Kayongo v Embakasi Ranching Co. Ltd; Munira & 2 others (Aggrieved Party) (Environment & Land Case 1125 of 2016) [2023] KEELC 16066 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16066 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1125 OF 2016

JO MBOYA, J

MARCH 2, 2023

BETWEEN

MONICA ATIENO KAYONGO ..... PLAINTIFF

AND

EMBAKASI RANCHING CO. LTD ..... DEFENDANT

AND

EGLAH WANGARI MUNIRA ..... AGGRIEVED PARTY

MARY WAIRIMU MWAI ..... AGGRIEVED PARTY

EVANSON KAMAU MWAI ..... AGGRIEVED PARTY

RULING

Introduction And Background

1. Vide Notice of Motion Application dated the 26th October 2022, the Aggrieved Parties/Applicants have sought for the following reliefs;

    i. That this Application be certified urgent and be heard Ex-Parte in the first instance.

    ii. That this Honourable Court's Ex-parte Decree given on 9th September 2021 by Hon. Lady Justice Kossy Bor and issued on 15TH October 2021 be stayed pending the hearing and determination of this Application.

    iii. That this Honourable Court's Ex-parte Decree given on 9TH September 2021, by Hon. Lady Justice Kossy Bor and issued on 15TH October 2021 be reviewed and set aside.

    iv. That the Aggrieved Parties be joined as Defendants in this matter.

    v. That the costs of this application be granted to the Aggrieved Parties/Applicants.

2. The instant application is premised and anchored on various albeit numerous grounds (12 grounds in total). Besides, the application is supported by three separate affidavits, each sworn by the Aggrieved Party/Applicants.

3. Upon being serve with the instant application and the attendant affidavit, the Plaintiff/Respondent responded thereto vide a Replying affidavit sworn on the 15th November 2022 and to which the Plaintiff/Respondent annexed six assorted documents, in support thereof.

4. Subsequently, the instant application came for hearing on the 22nd November 2022, when the advocates for the respective Parties agreed to canvass and dispose of the application by way of written submissions. In this regard, the court proceeded to and set timelines for the filing and exchange of written submissions.

5. Pursuant to and in line with the directions of the Honourable court, the Aggrieved Parties/Applicants proceeded to and filed Written Submissions dated the 19th January 2023, whilst the Plaintiff/Respondent filed written submissions dated the 12th February 2023.

6. For coherence and completeness of record, the two sets of written submissions form part of the record of the Honourable court and shall therefore be taken into account while crafting the instant Ruling.

Submissions By The Parties

a. Applicants' Submissions:

7. Learned counsel for the Aggrieved Parties/Applicants has raised, highlighted and amplified two salient issues for consideration by the Honourable court.

8. Firstly, learned counsel for the Applicants has submitted that the Applicants herein are the lawful and legitimate owners of the properties known as L.R No. Nairobi Block 105/4990, 4991, 4998 and 4999, respectively. In this regard, counsel has therefore contended that by virtue of being the registered owners and proprietors of the suit Properties, the Applicants were therefore entitled to be impleaded and/or joined in respect of the instant matter.

9. Nevertheless, learned counsel has further submitted that despite the fact that the Applicants here were the lawful owners of the suit property, the Plaintiff/Respondent herein proceeded to and indeed filed the instant suit, albeit without disclosing to the Honourable court that the Applicants had lawful and legitimate interests over the suit properties.

10. Furthermore, learned counsel for the Applicants has also submitted that the failure by the Plaintiff/Respondent to disclose and acknowledge the interests of the Applicants, was informed by a desire to steal a match on the Applicants. In this regard, counsel has contended that the Applicants herein ought to have been joined in the subject matter.

11. Be that as it may, learned counsel has submitted that having not been joined in the instant suit/proceedings, the Plaintiff/Respondent has ended up procuring and obtaining orders which are adverse to the interest of the Applicants.

12. Secondly, learned counsel for the Applicants has submitted that by virtue of the nature of interests that the Applicants have over and in respect of the suit properties, it is imperative and appropriate that the Applicants be joined into the proceedings as Defendants.

13. Owing to the foregoing, learned counsel has thus contended that the Honourable court ought to set aside the impugned Judgment and to direct the joinder of the Applicants as Defendants in the matter.

14. To surmise, learned counsel for the Applicants has therefore impressed upon the Honourable court to find and hold that the Applicants herein have met and satisfied the requisite threshold to warrant being joined in the subject matter as Defendants.

15. Consequently and in the premises, invited the Honourable court to grant the Application as prayed.

b. Respondent's Submissions

16. Learned counsel for the Plaintiff/Respondent has raised and highlighted three salient issues, for consideration and determination by the court.

17. First and foremost, learned counsel for the Respondent has submitted that the Applicants herein were never parties to the instant suit and hence same cannot purport to fall within the purview of the provisions of Section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya as read together with Order 45 Rule 1 of the *Civil Procedure Rules, 2010*.

18. Additionally, learned counsel has submitted that to the extent that the Applicants herein were not Parties to the suit, same cannot now purport to originate or mount an application for purposes of impeaching and or reviewing the Judgment emanating from the subject suit.

19. In any event, counsel has added that the Applicants herein have neither met nor satisfied the requisite grounds, known to law and envisaged under the provisions of Order 45 of the *Civil Procedure Rules, 2010*, to warrant the review sought.

20. Consequently and in the premises, learned counsel for the Respondent has contended that the Applicants herein are therefore strangers to the subject matter and hence devoid of the requisite Locus standi, to either commence or maintain the instant application.

21. To vindicate the foregoing submissions, learned counsel for the Plaintiff/Respondent has invited the Honourable court to take cognizance of inter-alia, the decision in the case of *Republic v Advocates Diciplinary Tribunal, Ex-parte Appollo Mboya* (2019)eKLR and *Tokeshi Mambili & Others v Simion Litsanga* (2004)eKLR.

22. Secondly, learned counsel for the Plaintiff/Respondent has also submitted that the Applicants herein can neither force nor compel the Respondents to implead or sue same, over and in respect of the subject matter, even when the Respondent has no claim or cause of action against same.

23. Furthermore, learned counsel has contended that it is incumbent upon the Plaintiff in each and every matter, (the matter herein not excepted) to discern whom same wants to sue or implead and once the Plaintiff determines the adverse party to be sued, it is not the business of the court to direct and/or guide a Plaintiff on whom to sue.

24. In this regard, learned counsel submitted that the Applicants herein can neither compel nor force the Honourable court to compel the Plaintiff/ Respondent to sue same over and in respect of the current matter.

25. Conversely, learned counsel for the Respondent has contended that if the Applicants herein are keen to implead the Plaintiff/Respondent, then same are at liberty to do so, albeit in a separate suit.

26. However, learned counsel has further added that it does not fall within the mandate and competence of the Applicants herein to demand to be sued by the Plaintiff and in any event, where the Plaintiff/ Respondent is not keen to sue same.

27. In this respect, learned counsel for the Respondent has cited and relied on the holding in the case of *Joseph Leboo & 2 Others v Director Kenya Forest Services & Another* (2013)eKLR, wherein Hon. Justice Sila Munyao, Judge underscored that the Honourable court cannot force a particular Party on a Plaintiff and in particular, where the Plaintiff has exercised his/her right to determine who to sue, in a particular matter.

28. Thirdly, learned counsel for the Respondent has submitted that the Honourable court has since entertained and adjudicated upon the claim pertaining to and concerning the suit properties. Furthermore, counsel has added that the court has since pronounced itself on ownership of the suit properties.

29. To the extent that the Honourable court has since pronounced itself on the question of ownership of the suit properties, learned counsel for the Plaintiff/Respondent has therefore submitted that this court is now Functus officio.

30. In view of the foregoing submissions, learned counsel has impressed upon the court to find and hold that the current application is therefore misconceived and legally untenable.

31. Consequently and in this regard, counsel has invited the court to dismiss the application in limine.

Issues For Determination

32. Having reviewed and evaluated the Application dated the 26th October 2022, together with the various supporting affidavits thereto; and having taken into account the Replying affidavit filed in opposition thereto and having considered the written submissions filed by the Parties, the following issues do arise and are thus worthy of determination;

    i. Whether the Applicants herein can mount the application without having sought for an order of Joinder in the first instance and prior to same being joined in the proceedings.

    ii. Whether the current application is Legally tenable.

    iii. Whether the Applicants herein can be joined as Defendants to and in respect of a matter which has since been concluded.

Analysis And Determination

Issue Number 1 & 2 Whether the Applicants herein can mount the Application without having sought for an order of Joinder in the first instance and prior to same being joined in the proceedings & Whether the current Application is Legally tenable.

33. The current Application has been originated and mounted by persons who have described themselves as Aggrieved Parties/Applicants.

34. Having described themselves as Aggrieved Party/Applicants, the Applicants have thereafter proceeded to and invited the Honourable court to review and set aside the Judgment, which was issued in respect of the subject matter.

35. It is common ground, that after describing themselves as Aggrieved Party/Applicants, the Applicants herein has not sought for any order to be joined in the instant proceedings, either as Interested Party or necessary party, as a precursor to applying to set aside, review or invalidate the Judgment and the consequential decree that was issued in respect of the instant matter.

36. From the foregoing position, what becomes clear and apparent is that the Applicants herein, without seeking to have some color of right within the suit, have sought to challenge and impugn the proceedings before the court.

37. To my mind, the current situation is tantamount to a person who has neither sought for permission to enter into the proceedings and yet, even though such a party has not been permitted to enter into the proceedings for purposes of seeking any relief therein, same has nevertheless sought to partake of and participate in the impugned proceedings and by extension, to procure substantive Orders.

38. In my humble view, it behooves the Applicants herein, in whatever capacity, to first and foremost apply to be made or constituted as parties in respect of the instant matter, prior to and or before venturing to make a substantive prayer, inter-alia, reviewing and setting aside the impugned Judgment.

39. Additionally, it is my further observation that without having been joined as Interested Parties or necessary Parties, in any manner provided for under the law, the Applicants herein remain strangers to the current suit and same cannot now be heard to invite the court to impugned and set aside the Judgment, which concerns parties other than themselves (read Applicants).

40. Furthermore, it is also imperative to state and underscore that for the Applicants to seek to and procure to invalidate the impugned Judgment and the resultant decree vide the provisions of Order 45 of the *Civil Procedure Rules*, it was incumbent upon the Applicants to plead and thereafter prove any of the three known grounds upon which a decree or order of the court can be reviewed. See Order 45 Rule 1 of the *Civil Procedure Rules*.

41. Notwithstanding the foregoing, it is also not lost on this Honourable court that prior to and or before endeavoring to prove either of the named grounds of review, as envisaged under the law, it behooves the Applicants to first and foremost plead the identified ground or ground(s) in the pleadings before the Honourable court.

42. Essentially, the Applicants herein were obliged to and should therefore have impleaded whatever ground(s) in the application beforehand. However, it is worth noting that no ground(s) was ever pleaded or alluded to in the body of the Application.

43. To this end, it is imperative to adopt, restate and reiterate the holding in the case of *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR, where the Honourable court had an occasion to deal with and adjudicate upon a near similar situation, where the Applicant had neither pleaded nor disclosed the requisite grounds upon which review was being sought.

44. For coherence, the Honourable Court stated and observed as hereunder;

> I am alive to the fact that the discretion donated to the court under Section 80 of the *Civil Procedure Act* is unfettered, but for the discretion to be exercise in favour of the applicant, the application for review must be based on the grounds specified under Oder 45 or on any sufficient reason but in either case the application must be made within a reasonable time.

45. Consequently, the question that then arises is whether the Applicants herein can seek to persuade the Honourable court to grant an orders of review, yet no grounds to anchor such an application have been pleaded, demonstrated and/or established.

46. In my humble view, it is incumbent upon every Applicant, the Applicants herein not excepted, to craft their pleadings (read application) in an appropriate manner and therefore include the requisite ingredients, that would enable same to propagate the cause of action/claim, upon which the decision of the Honourable court is sought.

47. Short of the foregoing, the Applicants herein cannot be at liberty to travel far and yonder and seek to throw on the face of the Honourable court the provision of Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 and thereafter call upon the court to grope in darkness, hopefully, with a view to finding something that would be (sic) of assistance to the Applicants case.

48. Unfortunately, the Rules of procedure were crafted in such a manner that parties who are approaching the Honourable court must endeavor to comply with and adhere to such rules and hence endeavor to and assist the Honourable court to administer justice to all the Parties, without undue prejudice or detriment.

49. In this respect, it suffices to reiterate the succinct observation by the Supreme Court of Kenya in the case of *Moses Mwicigi & Others v IEBC & Others* (2017)eKLR, where the court had an occasion to speak to and underscore the significance of compliance with Rules of procedure.

50. For convenience, the Supreme Court stated and observed as hereunder;

> (65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

51. Suffice it to say, that in respect of the subject matter, the Applicants herein have applied to set aside the impugned Judgment and the consequential decree, yet same have neither sought nor obtained an order for their inclusion into the proceedings in whatsoever capacity and/or manner.

52. Clearly, a stranger to the proceedings cannot be heard to seek a precipitate order with a view to impugning the Judgment and consequential decree of the court. Certainly, not until same accrues some interests in the proceedings, by way of inclusion, in line with the provisions of Order 1 Rule 10 of the *Civil Procedure Rules, 2010*.

53. In addition, even assuming that a stranger who has not been joined into the proceedings (in whatsoever capacity), could seek to impugn the proceedings and the consequential Judgment, then such a person must ordinarily establish on what basis/grounds, same seeks to impeach the Judgment and resultant decree.

54. In my humble view, the Aggrieved Parties/Applicants herein have neither met nor established any basis, known to law or otherwise, to warrant the impeachment, review and or rescission of the impugned Judgment and consequential decree issued on the 9th September 2021.

Issue Number 3 Whether the Applicants herein can be Joined as Defendants to and in respect of a matter which has since been concluded.

55. Having hitherto sought for the review and setting aside of the Judgment and consequential decree, prior to and before being joined as (sic) Parties in the matter, the Applicants have thereafter sought to be joined as Defendants in the matter.

56. Be that as it may, it is worthy to recall and reiterate that this court has since addressed the issue of whether or not the impugned Judgment and consequential decree of the court, can be set aside and or rescinded at the instance of strangers to the suit.

57. Furthermore, it is also not lost on this court that the court, whilst calibrating on the 1st and 2nd issues (which were dealt with in terms of the preceding paragraphs) has since pronounced himself that the Judgment in question is not amenable to being set aside and reviewed in the manner sought.

58. From the foregoing, what becomes crystal clear and apparent is that the Honourable court has declined the invitation to review and set aside the impugned Judgment and decree.

59. In the premises, the question that now arises and which is worthy of consideration and indeed determination; is whether the Applicants herein can be joined/admitted into the subject matter as Defendants.

60. Before venturing to address and resolve the question herein, it is imperative to state and underscore that an application by a party to be joined into the proceedings, in whatsoever capacity (read interested party, necessary party or as a Defendant) can only be mounted and sustained at any stage of the proceedings albeit before Judgment.

61. Furthermore, it is my humble view that the moment a Judgment is rendered and delivered in a particular matter, like in the instant case, the dispute beforehand (which fell for determination before the court), would have been determined and hence there would be nothing outstanding and pending hearing and determination, whatsoever.

62. In addition, it is worthy to recall that the joinder of a party, in whatsoever capacity, is intended to enable the joined party to participate in the proceedings and thereby assist the Honourable court in adjudicating upon the issues in dispute/controversy, effectually and effectively, once and for all.

63. Consequently and in this regard, can a party therefore be joined into proceedings, which have already been concluded and determined vide Judgment and if so, what shall be the purpose of such joinder.

64. Without belaboring the point, it is my finding and holding that the Applicants herein who are seeking to be joined in the subject matter, long after Judgment has been entered and delivered, are actually endeavoring to close the staple long after the Horse has bolted.

65. In my humble view, such an effort would be futile and an exercise in vanity.

66. Without belaboring the point, it is appropriate to adopt, reiterate and underscore the holding of the Court of Appeal in the case of *JMK v MWM & another* [2015] eKLR, where the Court, citing its earlier decision in *Central Kenya Ltd. V. Trust Bank & 4 Others*, CA No. 222 OF 1998, held thus:

> " All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs...We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our *Civil Procedure Rules*, in Tang Gas Distributors Ltd V. Said & Others [2014] Ea 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding

has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage."(Emphasis, mine)

67. Furthermore, the question as to whether a Party can be joined into proceedings which have already been concluded was also canvassed and deliberated upon in the case of *Mayfair Holdings Ltd v Municipal Council of Kisumu; Paulin Mauwa Akwacha (Interested Party/Applicant)* (2020)eKLR, where the Honourable Court stated and observed as hereunder;

> " The provisions of Order 1 Rule 10(2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in *Black's Law Dictionary* Ninth Edition at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment".
>
> A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising...Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the *Civil Procedure Rules* is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage."

68. Recently, a similar holding was also arrived at in the case of *Lilian Wairimu Ngotho & Another v Moki Saving Co-Operative Society Ltd & Another* (2014) eKLR, Nyamweya J, (as she then was) held as follows:-

> " The provision of Order 1 Rule 10(2) states that joinder of a party can be made at any state of the proceedings. Proceedings are defined in *Blacks Law Dictionary* Ninth Edition at page 1324 as 'the regular and orderly progression of a law suit including all acts and events between the time of commencement and the entry of judgment.' A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court to effectively and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its finding on the issue arising."

69. Furthermore, the necessity for a joinder of a Party in whatsoever capacity during the pendency of litigation was also underscored in the case of *Civicon Ltd v Kivuwat Ltd & 2 Others* (2015)eKLR (Civil Appeal No. 45 of 2014), where the court of appeal sitting at Mombasa stated and held as hereunder;

> " Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined."

70. My understanding of the totality of the decisions, (which I have endeavored to reproduce herein before), denote the position that the joinder of a party, the Applicants not excepted (in whatever capacity) can only be undertaken during the pendency of the litigation or not otherwise.

71. Consequently, the clear position that is discernable, is to the effect that immediately a Judgment is rendered in a particular matter (like in the instant one), then no joinder can be made in respect of such a matter.

72. Guided by the foregoing observations, it is therefore my finding and holding that the current application by the Aggrieved Parties/Applicants, who are seeking to be joined as Defendants, (in a matter that is already concluded), is not only misconceived but legally untenable.

Final Disposition

73. Having duly considered and analyzed the perspectives that were evident and apparent in respect of the subject matter, I have come to the conclusion that the Applicants herein have neither established nor demonstrated the requisite basis to warrant the impeachment and/or invalidation of the Judgment and consequential decree of the Honourable Court.

74. Furthermore, upon the refusal of the court to review, vary and/or rescind the impugned judgment (which was the subject of the current application), it then means that the Honourable cannot venture to admit and/or join the Applicants herein as Defendants in the matter, either as sought or otherwise.

75. For coherence and good measure, a Party can only be joined in respect of a pending proceedings, but not one that has been concluded/determined.

76. Consequently and in the premises, the Application dated the 26th October 2022, is not meritorious. In this regard, same be and is hereby Dismissed with costs to the Plaintiff/Respondent.

77. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH 2023.

OGUTTU MBOYA,

JUDGE .

In the Presence of:

Benson - Court Assistant.

Ms. Nzilani h/b for Mr. Ng'ang'a for the Aggrieved Party/Applicants

Mr. Juma for the Plaintiff/Respondent

N/A for the Defendant/Respondent