



**Kitaka v Ivati (Environment and Land Case Civil Suit  
E387 of 2022) [2023] KEELC 18622 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18622 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E387 OF 2022**

**JO MBOYA, J**

**JULY 3, 2023**

**BETWEEN**

**DOMINIC MAINGI KITAKA ..... APPLICANT**

**AND**

**ESTHER NZILANI IVATI ..... RESPONDENT**

**RULING**

1. Vide Notice of Motion Application dated the 19<sup>th</sup> May 2023; the Defendant/Applicant herein has approached the Honorable Court seeking for the following reliefs;
  - i. That Francis Kitumbi Maingi be “enjoined” in the suit in the capacity of the 2<sup>nd</sup> Defendant.
  - ii. That the Plaintiff to amend the Plaintiff and include the new Defendant once the Application is allowed.
  - iii. Costs of the Application be provided for.
2. The subject Application is premised and anchored on various grounds, which have been alluded to and enumerated at the foot of the Application. Further and in addition, the Application is supported by the affidavit of the Applicant sworn on the 19<sup>th</sup> May 2023; and in respect of which the Applicant has annexed two sets of documents in support thereof.
3. Be that as it may, upon being served with the instant Application, the Plaintiff/Respondent responded thereto vide an elaborate Replying affidavit sworn on the 31<sup>st</sup> May 2023; and in respect of which, the Plaintiff/Respondent has controverted and/or opposed the Application under reference.



4. Nevertheless, the instant Application came up on the 25<sup>th</sup> May 2023, whereupon the advocates for the respective Parties agreed and covenanted to canvass and dispose of the Application by way of written submissions.
5. Pursuant to and in line with the agreement by the advocates for the respective Parties, the Honourable court thereafter proceeded to and set the requisite timelines within which the written submissions were to be filed and exchanged by the Parties.
6. For good measure, the applicant proceeded to and filed written submissions dated the June 14, 2023, whereas the plaintiff/respondent filed written submissions dated the 16<sup>th</sup> June 2023. Instructively, the two sets of submissions forms part of the record of the Honourable court.

### **Submissions by the Parties:**

#### **A. Applicant's submissions:**

7. The Applicant herein filed written submissions dated the 14<sup>th</sup> June 2023; and in respect of which same has raised, highlighted and canvased two (2) issues for consideration by the Honourable court.
8. Firstly, Learned counsel for the Applicant has submitted that both the plaintiff/respondent and himself bought Plot No. 176B from Francis Kitumbi Maingi, who was hitherto the lawful owner and/or proprietor of the said property.
9. Further and in addition, the Defendant/Applicant has contended that upon purchase and acquisition of the suit property, same entered upon and took possession and in any event, the Applicant contends that same has been in occupation and possession of the suit property for more than 23 years.
10. Additionally, Learned counsel for the Applicant has submitted that by the time the Plaintiff herein was purchasing and/or buying the suit property, same was already in occupation of the suit property.
11. Based on the foregoing, Learned counsel for the Applicant has therefore submitted that the named Francis Kitumbi Maingi, who was the vendor, is therefore a critical and necessary Party to be joined to the current proceedings, so as to ventilate the true circumstances relative to the entry upon and occupation of the suit property by the Applicant.
12. Other than the foregoing, the Applicant herein also affirms that having been in occupation and possession of the suit property for more that 23 years, same has therefore acquired and accrued lawful and legitime rights thereto and in any event the extent and scope of such rights can only be determined once Francis Kitumbi Maingi has been joined as a Party.
13. Secondly, Learned counsel for the Applicant has submitted that the proposed Defendant/Co-Defendant, has a stake in the subject matter and his presence would assist and enable the Honourable court to fully, effectively and effectually determine and adjudicate upon the issues in controversy.
14. Premised on the foregoing, Learned counsel has therefore implored the Honourable court to find and hold that the instant Application is meritorious and thus deserving to be granted.
15. For good measure and in support of the foregoing submissions, Learned counsel for the Applicant has cited and quoted the decision of the court in *Meme versus Republic* (2004)1 EA at page 124, in vindication of the circumstances under which a Court of Law can decree and order Joinder of a Co-Defendant.



## **B. Respondent's Submissions:**

16. The Respondent herein filed written submissions dated the 16<sup>th</sup> June 2023; wherein same has raised, canvassed and amplified Three (3) issues for consideration and determination by the Honourable court.
17. First and foremost, Learned counsel for the Respondent has sought to distinguish the term joinder and enjoiner. In this respect, Learned counsel has contended that the Applicant herein has misconceived and misapprehended the meaning and import of the word enjoin.
18. According to Learned counsel for the Respondent, the correct terminology and phrase, which ought to have employed/deployed should have been to join the intended 2<sup>nd</sup> Defendant and not otherwise.
19. Having sought to distinguish the meaning and import of the two terminologies, Learned counsel for the Applicant has thereafter proceeded to and cited the decision in the case of *Re-Estate of Barasa Kanenje Manyu (Deceased)* (Succession Cause No. 263 of 2002) (2020)KEHC (KLR), wherein the Learned Judge of the High Court endeavored to and elaborated upon the distinction and the dichotomy between the two terminologies/phraseology.
20. Be that as it may, having made the elaborate submissions on the foregoing position, Learned counsel has nevertheless failed to juxtapose the import and implication of the usage of the terminology to enjoin and whether, the deployment of the said terminology negates or vitiates the Application before the Honourable court.
21. Secondly, Learned counsel for the Respondent has submitted that same bought and acquired the suit property from one Francis Kitumbi Maingi and thereafter paid the entire purchase price in accordance with the terms of the sale agreement.
22. Further and in addition, Learned counsel for the Respondent has submitted that upon the completion of the payments relating to the purchase of the suit property, the Respondent herein was entitled to enter upon and take possession of the suit property.
23. Nevertheless, Learned counsel has further contended that despite being the lawful purchaser of the suit property, the Defendant/Applicant has declined to vacate and hand over vacant possession of the suit property to and in favor of the Plaintiff/ Respondent.
24. In the premises, the Respondent herein contends that the Defendant/Applicant has no lawful claim to and in respect of the suit property save for the trespass, which continues unabated and which the Honourable Court, ought to attend to by hearing the subject matter, without further delay.
25. Lastly, Learned counsel for the Respondent has submitted that same has not made and/or mounted any claim as against Francis Kitumbi Maingi, in any manner whatsoever, to warrant his joinder into the current proceedings.
26. Further and in addition, Learned counsel has submitted that insofar as same has no claim and/or interests as against Francis Kitumbi Maingi, the intended joinder will be therefore an exercise in futility and thus operate to defeat the expeditious hearing and disposal of the suit.
27. In any event, Learned counsel has added that whatever issues that the Applicant herein would have as against Francis Kitumbi Maingi (the Proposed 2 Defendant), same can be addressed and/or dealt with by the Defendant on the basis of cross examination.



28. In view of the foregoing, Learned counsel for the Respondent has submitted that the Applicant herein has neither established nor demonstrated the need to join/ include the proposed 2<sup>nd</sup> Defendant into the matter or at all.
29. To buttress the foregoing submissions, Learned counsel for the Respondent has cited and relied on, inter-alia, the holding in the case of Joseph Njau King'ori versus Robert Maina Chege & 3 Others (2002)eKLR, to anchor the contention that the Application for Joinder is not only misconceived but legally untenable.

### **Issues for Determination**

30. Having reviewed the instant Application and the Response thereto and upon consideration of the written submissions filed by and on behalf of the respective Parties, the following issues do arise and are therefore worthy of determination;
  - i. Whether or not the deployment of the terminology “enjoin”, militates and vitiates the Instant Application.
  - ii. Whether the Proposed 2<sup>nd</sup> Defendant is a Necessary and Proper Party to be joined into the instant Proceedings.
  - iii. Whether the proposed Joinder shall prejudice the Rights and/or Interests of the Plaintiff/Respondent; or otherwise.

### **Analysis and Determination**

#### **Whether or not the deployment of the terminology “enjoin”, militate and vitiates the Instant Application.**

31. Learned counsel for the Respondent has indeed taken it upon herself to draw the distinction and dichotomy between the terminology/phraseology joined and enjoined, the latter terminology being the one that has been deployed by the Applicant at the foot of the current Application.
32. Furthermore, Learned counsel for the Respondent has thereafter cited and relied on a pertinent decision of the High Court in the case of *Re-Estate of Barasa Kanenje Manya (Deceased)* (Succession Cause No. 263 of 2002) (2020) KEHC 1 (KLR).
33. Notably, the terminology join, which culminates into the adjective joinder relates to the joining of a Party/Parties to an existing suit. For good measure, the terminology joinder has been employed and/or deployed in terms of Order 1 Rules 3, 10 of the Civil Procedure Rules, 2010, respectively.
34. Further and in addition, it is imperative to state and underscore that the correct terminology to be deployed relates to joinder of Parties and not enjoinder of Parties, the latter, which has a complete and distinct meaning and tenor.
35. Nevertheless, I beg to point out that the usage and deployment of the word enjoining the proposed 2<sup>nd</sup> Defendant into the instant proceedings, does not diminish, camouflage or obscure the clear intention of the Applicant at the foot of the current Application.
36. Clearly, one reading the instant Application and many other applications where the terminology enjoined shall have been used and employed; would appreciate that what is sought to be done is the inclusion or better still; the addition of another Party to the existing suit/proceedings.



37. Consequently and in any event, I beg to confess that it is not only the Applicant herein who has employed and deployed the word enjoin in the instant proceedings. For good measure, a number of decisions including decisions from the Court of Appeal and the Supreme Court, which is the Apex court, have variously deployed and used the word enjoined.
38. Be that as it may, it is not lost on this Honourable court that the practice of law is neither anchored nor premised on literature, English grammar and spelling mistakes. To the contrary, the practice of law and the interpretation and terminology is anchored on the need to Administer Justice to the Disputants, albeit without undue regard to procedural and technical matters, inter-alia fanciful distinctions, like the one which has occupied a substantial chunk of the Respondent's submissions.
39. For me, I understand the Applicant herein to be beseeching the Honourable court to grant Leave and/or liberty to include and add the proposed 2<sup>nd</sup> Defendant as a Party to the instant suit or proceedings; with a view to enabling all the issues in controversy to be heard and determined once and for all.
40. Without any hesitation, I am clear in mind that though the Applicant has used the terminology to "enjoin", which in grammatical sense denotes the import of an order restraining and compelling the doing of something; but loosely interpreted, would entail the desired inclusion/addition of a Party who was hitherto not in the suit.
41. Furthermore and for good measure, I must point out that despite the lengthy submissions which sought to draw the dichotomy between the two terminologies, Learned Counsel for the Respondent has not pointed out how the deployment of the term enjoined, has negated and/or vitiated the substance attendant to the current Application.
42. Consequently and in my humble view, I come to the conclusion that the dichotomy, nay, distinction, which has been emphasized and duly amplified, flies on the face of Article 159(2) (d) of *the Constitution* 2010; which inter-alia, frowns upon the reliance on undue procedural technicalities, in the determination of Legal Disputes.

**Whether the proposed 2<sup>nd</sup> Defendant is a Necessary and Proper Party to be Joined into the Instant Proceedings.**

43. The Applicant herein has contended and indeed argued that same had hitherto bought and purchased the suit property from Francis Kitumbi Maingi and thereafter same entered upon and took possession of the suit property.
44. Furthermore, the Applicant has proceeded to and stated that same has been in occupation and possession of the suit property for more than 23 years to date.
45. On the other hand, the Plaintiff/Respondent has contended that same bought and purchased the suit property from Francis Kitumbi Maingi in the year 2009 and thereafter paid the entire purchase price to the said vendor.
46. Nevertheless, the Plaintiff has further contended that despite having bought and acquired the suit property, the Defendant/Applicant herein has illegally and unlawfully remained in occupation of the suit property for more than 14 years and has therefore denied the Respondent of her legitimate rights to enter upon and occupy the suit property.
47. From the totality of the evidence placed before the Honourable court and particularly the contents of the Replying affidavit sworn by the Respondent, it is instructive to note that by the time the Plaintiff/Respondent bought the suit property, from the named Vendor; the Defendant/Applicant herein appears to have been in occupation and possession thereof.



48. Nevertheless, even though the Respondent contends that the Applicant had hitherto agreed to vacate the suit property, there appears to be some semblance of a claim that the Applicant is raising and/or staking in respect of the suit property.
49. Notably, if the Plaintiff/Respondent bought and acquired the suit property when the Defendant/Respondent was already in possession thereof, then there is a likelihood of claims arising from and relating to overriding interests, in terms of Section 28 of the [Land Registration Act](#), 2012; which may arise and/ or ensue.
50. Furthermore, if the person who sold to the Plaintiff herein, had hitherto sold the same land to the Defendant, then there arises a clear basis that would warrant the Joinder and/or inclusion of the named vendor.
51. Instructively, even though the Plaintiff argues and posits that same has no claim as against the vendor; there exists a likelihood that if it transpires that the vendor sold land which had hitherto been sold, then the Plaintiff may very well also come to terms with a likely situation of seeking Indemnity.
52. Be that as it may, even assuming that the Plaintiff/Respondent has no claim as against the proposed 2<sup>nd</sup> Defendant, there is no gainsaying that the Defendant/Applicant may be propagating his Joinder with a view to raising, inter-alia, a Counterclaim of some sorts.
53. To my mind and given the contention that the Plaintiff and the current Defendant may have bought the suit property from the same vendor, it is imperative that the said vendor, who is the proposed 2<sup>nd</sup> Defendant be joined. In any event, the joinder of the named vendor would enable the Honourable court to canvass and deal with all the issues and claims affecting both the Plaintiff and the current Defendant effectively and effectually.
54. Furthermore, if either of the Parties herein may choose to raise a claim against the proposed 2<sup>nd</sup> Defendant, then such a claim would be adequately responded to by the proposed 2<sup>nd</sup> Defendant and thereafter the Honourable court would effectively adjudicate upon the entire dispute.
55. In view of the foregoing analysis, I come to the conclusion that the proposed 2<sup>nd</sup> Defendant is indeed a proper Party to be joined into the instant proceedings, so as to enable the court to effectively and effectually adjudicate upon and determine the dispute.
56. At any rate, it is instructive to state and observe that the proposed joinder of the proposed 2<sup>nd</sup> Defendant, will also go along way in averting and abating the filing of a plethora of suits touching on and concerning the same dispute herein. In this regard, the current Joinder would thus play a critical role in helping the court to effectively deploy and utilize the scarce Judicial resources, including time.
57. Before departing from this particular issue, it is imperative to take cognizance of the requisite ingredients that underpin an Application for Joinder of a Party as a Co-Defendant. In this regard, it suffices to adopt, restate and reiterate the holding of the Court of Appeal in the case of [Civicon Ltd versus Kivuatt Airlines Ltd](#) (2015)eKLR, where the court stated and held thus;

“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.”

.....



From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

58. Additionally, the issues to be calibrated upon and illuminated by the court when confronted with an Application for Joinder; whether as an Interested Party, proper party or co-Defendant, were similarly highlighted in the case of *Pravin Bowry versus John Ward & another* [2015] eKLR, where the court held thus;

“The exercise of this discretion to add a party as a co-defendant is also in consonance with the provisions of Order 1 rule 3 of the Civil Procedure

Rules which provides that:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

59. Clearly, the Plaintiff/Respondent may not have a claim to raise and canvass against the Intended/proposed 2<sup>nd</sup> Defendant, but that does not mean that the current Defendant/Applicant is not seized of the mandate/ liberty to generate and propagate a claim of whatsoever nature, against the proposed 2<sup>nd</sup> Defendant.
60. In view of the foregoing, I am minded and disposed to decree that the proposed 2<sup>nd</sup> Defendant is clearly a proper Party in respect of the instant proceedings; and that his Joinder will go along way in enabling the Honourable court to determine all perspectives arising from and attendant to the subject Dispute.

**Whether the proposed Joinder shall prejudice the rights and/or interests of the Plaintiff/ Respondent.**

61. Other than the contention by the Respondent that same has no claim as against the proposed 2<sup>nd</sup> Defendant, the Respondent also contended that the intended joinder of the proposed 2<sup>nd</sup> Defendant will prejudice the expeditious hearing and disposal of the current suit.
62. On the other hand, the Respondent has also contended that the proposed joinder of the proposed 2<sup>nd</sup> Defendant is a calculated scheme by the Defendant herein to perpetuate his offensive occupation and use of the suit property, albeit without any lawful basis.
63. However and despite the apprehension canvassed and ventilated by the Respondent, there is no discernable prejudice/ injustice; that the Respondent shall be exposed to suffer if the proposed 2<sup>nd</sup> Defendant is joined as a party.
64. Unknowingly, the Joinder of the proposed 2<sup>nd</sup> Defendant may very well enable both the Plaintiff/ Respondent and the Applicant herein to ascertain the truth behind what appears to be double or duplicated sale and alienation of the suit property.



65. Further and in any event, the proposed joinder would be in the interests of not only the Defendant/Applicant but also the Plaintiff/Respondent in arriving at and unravelling the controversy at the foot of the current dispute.
66. Premised on the foregoing, I wish to point out that despite the globalized and omnibus allegations that the Plaintiff/Respondent shall be disposed to suffer prejudice; however none has been articulated and highlighted in the entire body of the Replying affidavit that was filed on behalf of the Plaintiff/Respondent.
67. Notwithstanding the foregoing, there is no gainsaying that if there be any prejudice or detriment, to be suffered by the Plaintiff/Respondent (which is not discernable), then such prejudice can easily be indemnified by way costs.
68. Nevertheless, it is my humble albeit considered view that the Plaintiff herein will neither suffer nor accrue any prejudice, that cannot be remedied by an award of costs. In any event, it is instructive to recall that the instant suit was only filed before the court on the 17<sup>th</sup> November 2022; and hence, same is a fairly new matter.
69. Finally, though the Plaintiff/Respondent now relies upon the number of years that same has (sic) been denied and deprived of the usage of the suit property; it is imperative to underscore that the Plaintiff/Respondent appears to have been at peace with the status quo ante, up to and including November 2022, when the instant suit, was filed.
70. In the circumstances, the Plaintiff/Respondent who has hitherto waited for the very many years, before filing and/or lodging the instant suit, can certainly afford just a little wait. For good measure, Justice shall soon knock at the doors of the Plaintiff/ Applicant, one way or the other.
71. In a nutshell, I surmise that there is no evident and or apparent prejudice that has been adverted to and/or highlighted by the Plaintiff/Respondent, to warrant declining the proposed joinder.

**Conclusion and Final Disposition:**

72. In my humble view, the Dispute beforehand appears to involve the Plaintiff, the Defendant and the proposed 2<sup>nd</sup> Defendant, respectively. Consequently and in this regard, any efforts to resolve the subject controversy cannot be undertaken without the Joinder of the proposed 2<sup>nd</sup> Defendant.
73. Consequently and informed by the holdings/findings alluded to in the preceding paragraphs and the analysis therein; I find and hold that the instant Application is meritorious.
74. In the premises, the Application dated the 19<sup>th</sup> May 2023; be and is hereby allowed on the following terms;
  - i. Francis Kitumbi Maingi be and is hereby Joined into the proceedings as the 2<sup>nd</sup> Defendant.
  - ii. Consequently and to give Life to the Joinder, the Plaintiff herein be and is hereby ordered and/or directed to Amend the Plaint and to reflect the decreed Joinder in accordance with the provisions of Order 1 Rule 10(4) of The Civil Procedure Rules 2010.
  - iii. The amended Plaint, (in terms of clause (ii) hereof), shall be filed and served on all the Parties within 14 days from the date hereof.



- iv. The Defendants herein (inclusive of the current Defendant), shall be at Liberty to file and serve their Statement of Defense, if any and same to be filed and served within 14 days from the date of service.
- v. The Plaintiff shall be at liberty to file and serve a Reply to the Statement of Defense, if any, and same to be filed and served within 7 days from the date of service of the Defendants.
- vi. The Parties herein (Plaintiff and Defendants) shall thereafter have Leave to file Further List and Bundle of Documents; List of witnesses and witness Statement, if any; and same to be filed and served within 14 days from close of pleadings.
- vii. The matter herein shall thereafter be set down for Directions to ascertain/confirm compliance with the directions of the Honourable court.
- viii. Costs of the Application be and are hereby awarded to and in favour of the Plaintiff/ Respondent.
- ix. For good measure, the Costs are hereby certified in the sum of Kshs.15,000 Only and same to be paid within 14 Days from the Date hereof.

75. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF JULY 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

**In the Presence of:**

*Benson - Court Assistant.*

*Mr. Mambiri for the Defendant/Applicant.*

*Ms. Mwanzia for the Plaintiff/Respondent.*

