



**Greenbelt Warehouse Limited v Munyaka Holdings Limited & 2 others (Environment & Land Case 212 of 2021) [2023] KEELC 20780 (KLR) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20780 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 212 OF 2021  
LL NAIKUNI, J  
OCTOBER 9, 2023**

**BETWEEN**

**GREENBELT WAREHOUSE LIMITED ..... PLAINTIFF**

**AND**

**MUNYAKA HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**HAMISI PETER MUMBA (IN HIS CAPACITY AS THE  
ADMINISTRATOR OF THE ESTATE OF KIDEMU CHAMBO  
KWAMWENGA) ..... INTENDED DEFENDANT**

**RULING**

**I. Introduction**

1. The Application for determination is the one dated 11<sup>th</sup> November 2022 brought by the intended 3<sup>rd</sup> Defendant/Applicant. It was under the provision of Article 159 of the *Constitution* of Kenya, 2010, Sections 1A, 3A of the *Civil Procedure Act*, Cap. 21 and Order 1 Rule 10 (2) and Order 10 Rule 11 of the *Civil Procedure Rules*.
2. Upon service of the application, the 1<sup>st</sup> Defendant/Respondent while in opposition of the said application, on 24<sup>th</sup> January, 2023 filed replies in form of a Replying Affidavit dated 23<sup>rd</sup> January, 2023. The Honourable Court will be dealing with it at a later stage herein.

**II. The Intended Proposed 3<sup>rd</sup> Defendant/Applicant**

3. The Intended Proposed 3<sup>rd</sup> Defendant/Applicant herein sought the following prayers:



- a. Spent.
  - b. Spent.
  - c. That the Court be pleased to join the Intended 3<sup>rd</sup> Defendant as the 3<sup>rd</sup> Defendant in this matter and upon grant of the said order, the 3<sup>rd</sup> Defendant be granted leave to file his statement of defence and compliance documents.
  - d. That the costs of this application be in the cause.
4. The application is premised on the grounds on the face of the application and further supported by the affidavit of Hamisi Peter Mumba, one of the duly appointed Legal Administrators of the Estate of Kidemu Chabo Kamwenga, the 3<sup>rd</sup> Intended Defendant (Hereinafter referred to as “The Deceased”). He deponed That:
- a. He was one of the duly appointed Legal Administrators of the Estate of the deceased and hence well conversant with the facts and circumstances of this case and as such competent to swear this affidavit.
  - b. The intended 3<sup>rd</sup> Defendant was the registered proprietor Land Parcel no. CR No. 25706/4 sub - division No. 22817/I/MN (original No. 2150/I/MN) (Hereinafter referred to as “The Suit Property”).
  - c. The intended 3<sup>rd</sup> Defendant sold the suit property to the Plaintiff.
  - d. That vide a letter dated 5<sup>th</sup> November 2022 the Plaintiff informed the Applicant of the existence of this suit.
  - e. Further, the Plaintiff threatened to institute proceedings against the Applicant with regard to the said sale of the suit property alleging That its peaceful occupation of the same had been threatened by the Defendants.
  - f. The Applicant had been in occupation of the suit property for over 30 years before he sold and transferred the same to the Plaintiff. Although he had already sold the property to the Plaintiff, it was necessary That the Applicant be joined in these proceedings so as to shade light on the status of the suit properties before the sale and transfer of the same to the Plaintiff herein and assist the Court to arrive at a fair determination.
  - g. The Plaintiff already instituted this suit with the exclusion of the Applicant and substantive steps had already been made in the matter.
  - h. The deponent informed Court That he was over thirty (30) years old having been born and raised on the suit property until when the property was sold and transferred to the Plaintiff and since then they had never had any claim from any person on the property.
  - i. He urged the Court to allow the application.

### **III. The 1<sup>st</sup> Defendant’s Responses**

5. The 1<sup>st</sup> Defendant responded to the application through filing of a 12 Replying Affidavit sworn and dated on 23<sup>rd</sup> January 2023 by one Charles Kang’ethe. He deponed That:
- a). He was a male adult of sound mind and understanding and a Director of the 1<sup>st</sup> Defendant herein through special resolution dated 16<sup>th</sup> June, 2022 to appear in the matter and hence fully conversant with the matter.



- b). The application lacked merit and had been filed with an intention of delaying the suit. There was no draft Statement of Defence attached to the application.
- c). Further to That it was claimed That the neither party had sought any orders or reliefs the Applicant would be seeking against any of the parties herein.
- d). The deponent argued That the court could pass an effective Judgement in the absence of the Applicant as he had no claim over the suit property and That, if the Plaintiff saw it fit he would be the one to join the Defendant or better still call the Applicant as a witness to his case.
- e). He informed the Court That it was the 1<sup>st</sup> Defendant who had been in occupation of the suit property and not the Applicant as alleged which was misleading information to the Court.
- f). The deponent maintained That the Applicant was not a necessary party to the suit and urged court to dismiss the suit with costs.

#### **IV. Submission**

- 6. On 15<sup>th</sup> November, 2022, while all the parties were present in Court, they were directed That the application dated 11<sup>th</sup> November, 2022 be disposed off by way of written submissions. Pursuant to That all parties concerned obliged. Thereafter, the Honourable Court reserved a day to deliver its Ruling on notice accordingly.

##### **A. The Written Submission by the Applicant**

- 7. On 14<sup>th</sup> February 2023 the Learned Counsel for the Applicant through the Law firm Messrs. Mutisya Mwanzia & Ondeng Advocates filed their submissions dated 2<sup>nd</sup> February 2023. Mr. Mwanzia Advocate commenced his submission by stating That the Applicant was the registered owner of the suit property and sold the same to the Plaintiff. The Plaintiff had since sued the 1<sup>st</sup> Defendant who claimed to also have title to the suit property.
- 8. He further informed Court That the Plaintiff had also threatened the Applicant That he would sue him, in the event this suit never succeeded. The Counsel submitted That the Applicant, as a previous owner of the suit property was a necessary party herein and best placed to explain to court the genesis of the root of the suit property. In his submission he relied on the provision of Order 1 Rule 2 of the Civil Procedure Rules, 2010 to argue That the presence of the Applicant in the suit was necessary to enable court effectually and completely to adjudicate and settle all questions involved in the suit. To buttress on this point, the Counsel cited the case of: “JMK – Versus - MWM and another (2015) eKLR where it was held:-

“.....the power of 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 trial; That it can be done even after Judgement where damages are yet to be assessed; That it is only when a suit or proceedings has been finally disposed of and there is nothing more to be done That the rule becomes inapplicable; and a party can even be added at the appellate stage.”

He urged the Court to allow the application as prayed.

- 9. The Honourable Court utilizing its unfettered discretion and in the interest of balancing the scale of Justice, feels it is a fair and reasonable thing to consider the averments made out from the filed Replying Affidavit by the 1<sup>st</sup> Respondent while opposing the application by the Applicant under Paragraphs



9 and 10. To me they were more in form of submissions That ordinary averments to be made in an Affidavit contrary to the requirements of the provision of Order 19 of the Civil procedure Rules, 2010.

10. The content of Paragraphs 9 and 10 held as follows:-

“That I am advised by my Advocates on record That the application before Court has not passed the two tests stated by Justice Ringera J (as he was then) in the case of “*Werrot & Company Limited & 3 Others – Versus – Andrew Douglas Gregory & 2 Other* (1998) eKLR who is a necessary party to a suit. “For determining the question who is necessary part there are two tests a). there must be a right to some relief against such party in respect of the matter involved in the proceedings in question and b). it should not be possible to pass an effective decree in the absence of the party.

I am further advised That the Applicant’s motion has not passed the test .....as set out in the case of “*Amon – Versus – Raphael Tuck & Sons Limited* (1956) 1 ALL ER 273” wherein Devlin, J stated That:

“The party to be joined must be someone whose presence before the Court is necessary as a party. What makes a person a necessary party?.....the only reason which makes a person a party to an action is so That he should be bound by the result of the action and the question to be settled, therefore, must be a question in action which cannot be effectively and completely settled unless he is a party. It is not enough That the intervener should be commercially or indirectly interested in the answer. The person is legally interested in the answer only if he can say That it may lead to a result That will affect him legally. That is by curtailing his legal rights. That will not be the case unless an order may be made in action which he is legally interested”

## V. Analysis and determination.

11. The Honourable Court has carefully read and considered the pleadings herein – the Notice of Motion application dated 11<sup>th</sup> November, 2022 by the Applicant, the responses by the 1<sup>st</sup> Defendant herein, the written submissions and the cited authorities made by the by the Learned Counsels and the relevant provisions of the Constitution of Kenya, 2010 and statures.
12. To arrive at a fair, reasonable and equitable decision, the two (2) issues for the Court to make its determination are:-
  - a. Whether the Notice of Motion application dated 11<sup>th</sup> November, 2022 meets the standards to warrant the joining of the Applicant as the 3<sup>rd</sup> Defendant.
  - b. Who will bear the costs of the application.

### **Whether the Notice of Motion application dated 11<sup>th</sup> November, 2022 meets the standards to warrant the joining of the Applicant as the 3<sup>rd</sup> Defendant.**

13. Under this Sub heading, the main issue in this application is one on joinder of parties. The power of court to join a party to the suit is provided for by Order 1, Rule 10 (2) of the Civil Procedure Rules, 2010 which provide as follows:

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order That the name



of any party improperly joined, whether as plaintiff or defendant, be struck out, and That the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

14. To start us off, the Plaintiff *vide* a Plaint dated 19<sup>th</sup> October 2021 instituted this suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant seeking *inter alia* a permanent injunction against the Defendants from interfering in any way with Land Parcel no. CR No. 25706/4 sub - division No. 22817/I/MN (original No. 2150/I/MN). In support of his case, the plaintiff has among other documents filed two agreements for sale both dated 12<sup>th</sup> December 2014. The first was between Kidemu Chabo Kamwenga, as the vendor and the Plaintiff as the purchase, for the purchase of LR No. 2147/I/MN measuring 0.2644ha at a consideration of a sum of Kenya Shillings Five Million (Kshs 5,000,000/=). The second is between Hussein Mohamed Abdi as the vendor and the plaintiff as the purchaser for the purchase of LR No. MN/I/2150 measuring 0.2035ha at a consideration of a sum of Kenya Shillings Five Million (Kshs 5,000,000/=). Further to That he has filed an earlier certificate of postal search dated 9<sup>th</sup> December 2014 indicating That Chabo Kidemu Kamwenga was the registered owner and a more recent one dated 13<sup>th</sup> October 2016 which shows That the plaintiff is the registered owner of the suit property.
15. The Defendants have mounted a defence and a counterclaim against the Plaintiff's claim. The 1<sup>st</sup> Defendant maintained That he is the registered owner of the suit property after purchasing it from Festus George Ndungu and Simon Ngugi in 1974. Soon after on 20<sup>th</sup> July 1974 a transfer No. 1868/1 was registered in favor of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant maintained That he was issued with a certificate of title CR. No. 57831 on 20<sup>th</sup> September 2012, and That the Plaintiff acquired his title fraudulently. He urged court to find the Plaintiff's sub - divisions and creation of certificates of title LR No. 75467 and 75468 to be illegal and the same be cancelled. The 2<sup>nd</sup> Defendant filed a defence on 2<sup>nd</sup> April 2022 denying the averments made by the plaintiff and claimed That there exists a similar suit "ELC No. 96 of 2019 Munyaka Holding Limited – Versus - Abdi Hussein Mohammed and 3 others over the same parcel of land. The 2<sup>nd</sup> defendant maintained That this suit herein is "Res Judicata to ELC 96 of 2019 and further this suit is time barred, making it defective and an abuse of the court process.
16. The suit was filed on 19<sup>th</sup> October 2021 and this application for amendment for joinder of the applicant has been brought on 11<sup>th</sup> November 2022. In my view there is neither delay in bringing the suit nor is the suit going to delay the hearing of the suit. If anything the court has the discretion to allow amendments at any stage of the proceedings before judgement, and in this case the hearing has not even began. The 1<sup>st</sup> defendant has argued That the applicant has not attached a draft statement of defence to the applicant hence the application is unmerited. However, the annexing of a statement of defence in an application for leave to be enjoined, it out of good practice as parties will give court a chance to examine their proposed case. This is rather an added advantage to an application for leave to be enjoined, its lack does not mean the application is automatically unmerited. Further to That the Defendants will not suffer any prejudice if the application for amendment is allowed. The delay That the 1<sup>st</sup> defendant has talked about of delaying the suit, can always be compensated by an award of damages. The mere delay of a suit is not a ground for denying an application for amendment, it is only prejudicial when the delay causes the other party a prejudice That cannot be compensated by an award of damages. Moreover, the Defendants will be allowed to file their responses to the applicant's defence and examine him during the hearing of the suit.
17. The claim sustained by the Plaintiff is anchored on his proprietary interest in the suit property, which he acquired upon purchasing it from the Applicant. It is therefore safe to say That the presence of



the applicant before this court is necessary to enable the court completely adjudicate and settle all the questions involved in the suit. The Applicant is a right party to be sued in these proceedings since he was the one who transferred his interests in the suit property to the Plaintiff. The presence of the Applicant will be beneficial to the court in ascertaining whether the Plaintiff is indeed a bonafide purchaser of value without notice of fraud or not.

18. Therefore, in my view any application for both joinder of the Applicant and amendment of the pleadings before the hearing of the suit should be freely allowed by court especially where there will be no injustice caused to the other side. The joinder and amendment sought is designed to help place before the court all the relevant matters for determination of the real issue in dispute between the parties. Hence, the application succeeds.

#### **Who will bear the costs of the application**

19. It is now well established That the issue of Costs is at the discretion of the Court. Costs mean the award That a party is awarded at the conclusion of any legal action or proceedings in a litigation. The Proviso of Section 27 (1) of the *Civil Procedure Rules*, 2010 hold That costs follow the event. By the event it means the result of the said legal action or proceedings.
20. In the instant case, although the Applicant has been successful in prosecuting his application but from the given circumstances of the case and one which is still proceeding on for full trial, its just fair and reasonable That each party bears their own costs accordingly.

#### **VI. Conclusion & Disposition**

21. In the long run and having caused an elaborate analysis to the framed issues in this application by the Applicant herein, the Honourable Court makes the following orders:-
  - a. That the Notice of Motion application dated 11<sup>th</sup> November 2022 found to be merited and hence be and is hereby allowed.
  - b. That the 3<sup>rd</sup> Defendant/Applicant to comply with the provisions of Order 6, 7 and 11 of the *Civil Procedure Rules*, 2010 by filing and serving his Statement of Defence, list of witnesses, witness statements and list of documents within the next 14 days from the date of the delivery of this ruling.
  - c. That the Plaintiff have leave of 14 days from the date of service of the Defence upon him to file and serve their Amended Plaint, and 7 days thereafter service by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein to file Reply to the Defence and Amended Defence and Counter Claim, if any filed.
  - d. That, the 1<sup>st</sup> & 2<sup>nd</sup> Defendants have leave of 14 days from the time of being served with an Amended Plaint to file an Amended Defence and Counter - Claim respectively if need be.
  - e. That for expediency sake, this matter to be set down for hearing on 25<sup>th</sup> April, 2024. There be a mention on 31<sup>st</sup> January, 2024 for ascertaining of compliance of these court orders and conducting a Pre – Trial session under Order 11 of the *Civil Procedure Rules*, 2010.
  - f. That each party to bear their own cost.

It is ordered accordingly

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 9<sup>TH</sup> DAY OF OCTOBER 2023**

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**HON. JUSTICE MR. LL. NAIKUNI**  
**JUDGE**

