



**Nova Holdings Limited v Waithera & 5 others (Environment & Land Case 83 of 2022) [2023] KEELC 22571 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22571 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 83 OF 2022**

**LL NAIKUNI, J  
OCTOBER 11, 2023**

**BETWEEN**

**NOVA HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**MARY WAITHERA ..... DEFENDANT**

**AND**

**REGISTRAR OF TITLES MOMBASA ..... 1<sup>ST</sup> INTENDED DEFENDANT**

**COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> INTENDED DEFENDANT**

**KENYA NATIONAL HIGHWAY AUTHORITY ... 3<sup>RD</sup> INTENDED DEFENDANT**

**NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> INTENDED DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> INTENDED DEFENDANT**

**RULING**

**I. Introduction**

1. Before the Honorable Court for its determination is the Notice of Motion application dated 9<sup>th</sup> December, 2022 brought to court by ‘Mary Waithera’, the 1<sup>st</sup> Defendant/Applicant herein. The application is under the dint of order 1 rule 10 (2) and order 40 of the [Civil Procedure Rules](#) 2010 and Sections 3A of the [Civil Procedure Act](#) Cap. 21.
2. Upon Service both the Plaintiff/Respondent and 2<sup>nd</sup> Intended Defendant in opposition of the applicant filed grounds of opposition dated 5<sup>th</sup> April, 2023, and 23<sup>rd</sup> February, 2023 respectively.



## II. The 1<sup>st</sup> Defendant/Applicant's Case

3. Through the said application the Defendant/Applicant sought for the following orders: -

i. That the Registrar of Titles Mombasa County Government of Mombasa, Kenya National Highways Authority (KeNHA), National Lands Commission (NLC) and the Attorney General (AG) be and hereby enjoined as the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants to this suit and that summons do issue immediately.

ii. The costs of this application be in the cause.

The same application is based on the grounds, testimonial facts and averments made out under the contents of the 28 Paragraphed Supporting Affidavit of Mary Waithera sworn and dated on 9<sup>th</sup> December, 2022 together with four (4) annexures marked as "MW - 1 to 4" annexed thereto. She averred as follows:-

a. She was a female adult of sound mind and understanding and the Defendant/Applicant herein.

b. She was the legal registered owner to that property known as Land Reference No. MN/I/2248, where she engaged the quiet possession and enjoyment from the year 1970 and she annexed a copy of the Certificate of title deed marked as "MW-1" (Herein after referred to as "The Suit Property") The Plaintiff/Respondent had never taken possession of the land and she was shocked he had title deed since the year 1996

c. Since the acquisition of the suit property she had undertaken development on it being three (3) mansionettes which she would rent out to tenants before she brought them down to put up a modern block of apartments.

d. She had recently embarked on re-developing the suit property and undertaken the necessary steps and acquired the requisite approach for a storey building.

e. At no time had she refused to obey and demands or orders concerning the properties in the suit Land Reference No. MN/I/2248 and Land Reference No. MN/I/9901. Indeed, when she was ordered to stop the construction activities by the Mombasa County Government Officials she obliged.

f. The claims of trespass were meant to colour her in bad light since she had always believed that there existed no property between her property boundary.

g. Between her property and Mombasa-Malindi road was the standard reserve meant for the expansion of the said road.

h. The claims that she had denied the Plaintiff/Respondent the right and Opportunity to the access and occupy property Land Reference No. MN/1/9901 were not true since she sought leave from the Mombasa Municipal Council to fence the whole property all the way towards the highway in order to keep off encroachers and squatters.

i. Her request to carry out the fencing off was due to her interest to avert a crisis due to the emergence of mushrooming of kiosks in the neighborhood. The open space between her property and Mombasa-Malindi road had at all time been reserved for future expansion of the road.



- j. As advised by her Advocates the proper body capable of giving accurate information on whether the Plaintiff's alleged land was on a road reserve was the intended 4<sup>th</sup> Defendant.
- k. The Title Deed for the Plaintiff/Respondent for Land Reference No. MN/1/9901 only came to light the year 2022 ostensibly having been procured way back in the year 1996.
- l. To her the Plaintiff/Respondent's title was acquired through fraudulent and illegal means and the access road never existed on the ground and the current map of the area still indicated the purported Plaintiff/Respondent's property as an open space. She further held that:-
  - i. The access road between the Plaintiff/Respondent and her property never existed.
  - ii. The location of the Plaintiff/Respondent's property offended all known planning regulations.
  - iii. The Plaintiff/Respondent's property blocked access to her property from the main Mombasa-Malindi Highway

To her the proper body to provide accurate information on these facts was the Intended 2<sup>nd</sup> Defendant – Registrar of Title Mombasa, 3<sup>rd</sup> Intended Defendant – the Intended 5<sup>th</sup> Defendant and the Intended 6<sup>th</sup> Defendant. She averred that it was necessary to join them to the suit as it would enable the Court effectively and conclusively adjudicate on the dispute herein and arrive at a just verdict. She prayed for the orders sought from the applications to be allowed.

### **III. The Grounds of Opposition by the Plaintiff/Respondent**

- 4. As indicated, on 5<sup>th</sup> April, 2023 the Plaintiff/Respondent filed a six (6) grounds of Opposition dated even date. It stated as follows:-
  - a. The Plaintiff/Respondent never had a complaint cause of action against the persons/entities sought to be added to the suit as Defendants.
  - b. A party could only be added to a case if the Plaintiff had a claim against the party which was not the case herein.
  - c. The Defendant/Applicant should follow the proper procedure to pursue her claim against the proposed Defendants without seeking to force them to be Defendants in the Plaintiff/Respondent's case.
  - d. The order as framed by the Defendant/Applicant could not be granted because of the following reasons.
  - e. The prayer to “enjoin” parties to the suit was unknown in law.
  - f. The prayer did not disclose whom the Defendant sought to be “enjoined” as it refers to 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants yet this case had only one Defendant.
  - g. The application never met the stipulated legal threshold.
  - h. The application was intended to cloud and clog this matter and delay its speeding hearing by introducing unnecessary parties.

Hence, the Plaintiff/Respondent prayed for the application to be dismissed with costs.



## VI. The Grounds of Opposition by the Intended 3<sup>rd</sup> Defendant

5. On 23<sup>rd</sup> February, 2023 the Intended 3<sup>rd</sup> Defendant filed a grounds of opposition as follows: -
  - a. The application was unnecessary and incompetent in law.
  - b. The Intended 3<sup>rd</sup> Defendant had no mandate under the law to issue titles to the public and therefore was not involved in the attainment of the title to the Plaintiff.
  - c. The Applicant had not proved why she applied for the Intended 3<sup>rd</sup> Defendant to be enjoined in this matter.
  - d. The mandate was upon the 2<sup>nd</sup> Intended Defendant to establish true ownership of the suit property being the subject matter of the application.

Thus the Intended 3<sup>rd</sup> Defendant sought for the application to be dismissed with costs.

## V. Submissions

6. On 27<sup>th</sup> February, 2023 while all the parties were in Court, they were directed to file their written submissions. By the time the court was penning down this Ruling only the 1<sup>st</sup> Defendant had filed her written submissions. By and large, the Honorable Court will proceed to make the Ruling on merit thereof.

### A. The written Submissions by the 1<sup>st</sup> Defendant/Applicant

7. The Learned Counsel for the 1<sup>st</sup> Defendant/Applicant – the Law firm of Messrs Kimani Kairie and Associates filed their written submissions dated 24<sup>th</sup> April, 2023. Mr. Munyeri Advocate, as a way of commencing his submissions provided a detailed expose, introduction and facts of this case. Primarily, he based his submissions on a single issue whether the application for joinder of the Intended Defendants was merited or not. He indicated to court the application was anchored on the provisions Section 3A of the *Civil Procedure Act* Cap 21 and Orders 1 Rule 10 (2) and 40 of *Civil Procedure Rules*, 2010.
8. To begin with, the Learned Counsel dealt with the ground on the issue of “enjoin” as raised by the Plaintiff/Respondent. In so doing, he relied on the case of *Bruk (of unsound mind suing through the next friend C.M.K.) v Samuel Maina Kungu & 4 Others* (2021 eKLR where court observed:-

“Before delving into the merits of the application, this Court appreciates the Ruling of the Court in *Re - Estate of Barasa Kanenje Many (Deceased)* Succession Cause 263 of 2022 (2010) KEHC 1 (KLR) 30<sup>th</sup> July, 2020 where Court drew a distinction between the terms “join” and “enjoin” which are often used interchangeably. It was held: -

“To “join” a party to a suit means to add that person to the suit. To “enjoin” in law means to injunct or to bar a party from doing something. “enjoinder” means a prohibition ordered by injunction.”
9. The Learned Counsel was of the view that since the title deed by the Plaintiff/Respondent had been acquired fraudulently the person with this information was the Intended 2<sup>nd</sup> Defendant – the Registrar of titled Mombasa and hence need for the joinder of that office to the suit.
10. Further, the Counsel was of the opinion there was need to join the Intended 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants to the matter to enable the Court effectively and completely adjudicate upon and settle



all questions involved in the suit. To buttress on this point the Counsel relied on the case of Eldoret High Court Civil No. 136 of 2000 – *Joseph Njau Kingori v Robert Maina Chege & 3 Others* (2002) eKLR where court held:-

“When the above principles are applied to the facts of this application it is clear that the guiding principles when an Intending party is to be joined are as follows:-

- a. He must be a necessary party.
- b. He must be a proper party.
- c. In the case of a Defendant there must be a relief flowing from that Defendant to the Plaintiff.
- d. The ultimate order or decree cannot be enforced without their presence in the matter.
- e. His presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.”

11. In Conclusion therefore the Learned Counsel urged court to allow the application as it was important that the Intended Defendants be joined to the suit.

## **VI. Analysis and Determination**

12. I have keenly considered all the issues raised from the application dated 9<sup>th</sup> December, 2022 by the 1<sup>st</sup> Defendant the pleadings, written submissions, the myriad of authorities cited herein, the relevant provisions of the *Constitution of Kenya* 2010 and statutes.
13. In order to arrive at an informed, just fair and reasonable decision the Honorable Court has framed the following three (3) issues for its determination. These are:-
  - a. Whether the Notice of Motion application dated 9<sup>th</sup> December, 2022 by the 1<sup>st</sup> Defendant/Applicant seeking to have parties joined in the suit has any merit.
  - b. Whether the parties herein are entitled to the reliefs sought
  - c. Who will bear the costs of the application?

### **Issue No. (a) Whether the Notice of Motion application dated 9<sup>th</sup> December, 2022 by the 1<sup>st</sup> Defendant/Applicant seeking to have parties joined in the suit has any merit.**

14. Under this sub-heading, the court holds that primarily the substratum of this application is on the joinder of parties. Legally, the joinder of parties are founded under the Provisions of Order 1 Rule 10(2) of the *Civil Procedure Rules* which provides 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.”



15. The joinder are designed to help place before the court all the relevant matters for purposes of determination of the real issue in dispute and controversy between the parties. However, joinder of parties may be refused where such joinder would lead into practical problems of handling the existing cause of action together with the one of the party being joined, is unnecessary or will just occasion unnecessary costs on the parties in the suits – or just being a nuisance on rocking the boat from the bottom. In other words, joinder of parties would be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in joinder of parties would be a common question of fact or law would arise between the existing and the intended parties. (See [\*Lucy Nangari Ngigi & 128 Others v National Bank of Kenya Limited & Another\*](#) (2015) eKLR.
16. In applying these legal principles to the instant application, the Honorable Court is not satisfied that there is any necessity to have these parties be joined in the matter at all. The court is not convinced that the joinder of these parties as there is no single relief flowing from that Defendant to the Plaintiff that will not be achievable if these parties were not joined.
17. To me the ultimate order or decree will be smoothly be enforceable without their presence in the matter. Besides, the Court will still be in a position to effectively and completely adjudicate upon and settle all questions involved in the suit even in their absence as parties. If anything, and as indicated these parties being all state bodies are only coming to the Court to clog and complicate the hearing and final determination of the matter. I reiterate, let them come to the case to provide relevant and necessary information on the matters within their domain merely as witnesses only but not as parties to the suit. For that reason, I find that the Notice of Motion application has no merit at all.

**Issue No. (b) Whether the parties herein are entitled to the reliefs sought**

18. Having arrived at the above conclusion to wit that these parties are not necessary nor proper to be joined as parties to the suit I hold this opinion, and fully concur with the Learned Counsel for Plaintiff/ Respondent there exists no cause of action against the said parties. Besides, I dare say, they will only come to crowd and clog the suit unnecessarily.
19. I discern that the easiest ways and means to have the information sought by the Defendant from these offices would not necessary be by joinder of parties whom I see no relief flowing from them nor the ultimate order or decree could not be enforced without their presence – but summon them as witnesses. All these parties are state organs and would be more than willing to appear in court to tender evidence and provide any information required under article 35(1) of [\*Constitution of Kenya\*](#) and provisions of The [\*Access to information Act\*](#) all for purposes of accessing to information from public bodies. For these reason, therefore, I hold that the Defendant/Applicant herein is not entitled to the relief sought from the said application. The application must fail.

**Issue No. (c). Who will bear the costs of the application?**

20. The Issue of costs is at the discretion of the court. Costs are the awards that a party is granted at the Conclusion of any legal action and/or proceedings in any litigation. The Proviso of Section 27 (1) of [\*Civil Procedure Act\*](#) Cap 21 holds that costs follow the events. By the events, it means the outcome or result of said legal action.
21. In the instant case, the Defendant’s application has not been successful. Hence the Plaintiff and the 3<sup>rd</sup> Intended Defendant who participated in the application are entitled to costs.



## VII. Conclusion and Findings

22. Consequently after causing an in-depth analysis of the framed issues, the court on preponderance of probabilities holds and specifically order as follows:-
- a. That the Notice of Motion application dated 9<sup>th</sup> December, 2022 be and is hereby found to lack merit and hence dismissed.
  - b. That for expediency sake the matter to be listed down for hearing on 8<sup>th</sup> May, 2024. There be a mention on 5<sup>th</sup> February, 2024 for holding a pre-trial conference under order 11 of the Civil Procedure Rules 2010 and further directions.
  - c. That costs of the application awarded to the Plaintiff and the Intended 3<sup>rd</sup> Defendant to be borne by the Defendant.

It is so ordered accordingly.

**RULING DELIVERED VIA MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023.**

.....  
**HON. JUSTICE MR. L. L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

**Ruling delivered in the presence of:**

- a. M/s. Yumna, Court Assistant.
- b. M/s. Machogu Advocate holding brief for Mr. Oluga Advocate for the Plaintiff.
- c. M/s. Julu Advocate holding brief for Mr. Gatheru Advocates for the 1<sup>st</sup> Defendant.
- d. Mr. Makuto Advocate for the 4<sup>th</sup> Intended Defendant
- e. No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> & 6<sup>th</sup> Intended Defendants.

