



**Alduchira Company Limited & another v Michira & 2 others (Environment & Land Case 158 of 2017) [2023] KEELC 21399 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21399 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 158 OF 2017**

**M SILA, J**

**NOVEMBER 8, 2023**

**BETWEEN**

**ALDUCHIRA COMPANY LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**DUNCAN MOGAKA MICHIRA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ALFRED MOFFARD OMUNDI MICHIRA ..... 1<sup>ST</sup> DEFENDANT**

**MARY KWAMBOKA OMUNDI ..... 2<sup>ND</sup> DEFENDANT**

**JANE GESARE AMINGA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

(Application to amend the plaint to join new parties; plaintiffs having filed suit contending that the defendants have interfered with various properties owned by the 1<sup>st</sup> plaintiff company; matter referred to arbitration pursuant to an arbitration clause in the Articles of Association as original defendants were members of the company; application now made to join parties who are said to have purchased the properties of the company wrongfully; application to amend allowed; with the application allowed, the order referring the matter to arbitration reviewed as the new parties are not members of the company and thus not bound by the arbitration clause)

1. The application before me is that dated 7 March 2023 filed by the plaintiffs. The plaintiffs seek orders for leave to amend the plaint. The application is opposed by the 1<sup>st</sup> defendant.
2. To put matters into context, this suit was commenced through a plaint filed on 1 February 2016. The 1<sup>st</sup> plaintiff is a limited liability company which is said to be family owned. The 2<sup>nd</sup> plaintiff and 1<sup>st</sup> defendant each hold 250 shares, whereas the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, said to be wives of the 1<sup>st</sup> defendant, each hold 100 shares. It is pleaded that the 1<sup>st</sup> plaintiff company owned several assets including the land parcels Kisii Municipality/Block II/194, Nyaribari Chache/B/B/Boburia/3370, Wanjare/



Bogiakumu/2636, Plot No. 10 Section A/7 Kisii Municipality, and Plot No. D6 Daraja Mbili, within Kisii Municipality. It is contended that over time, the 1<sup>st</sup> defendant has taken advantage of the absence of the other directors of the company and in connivance with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, fraudulently disposed and appropriated to himself the proceeds of sale of some of the above properties, specifically, the land parcel Wanjare/Bogiakumu/2636 and portions of the land parcel Nyaribari Chache/B/B/Boburia/3370 which it is averred was illegally subdivided. On the land parcel Kisii Municipality/Block II/194, it is averred that the 1<sup>st</sup> defendant collects the rent from the shops thereon and has failed to give a true statement of accounts. In the suit, the plaintiffs seek orders inter alia for the nullification of the transfer of the land parcels Wanjare/Bogiakumu/2636, which was transferred to one Isaac Moracha Ongwacho, and to nullify the subdivisions of the land parcel Nyaribari Chache/B/B/Boburia/3370 so that the same reverts to the proprietorship of the 1<sup>st</sup> plaintiff company.

3. The defendants entered appearance and filed an application to have the suit referred to arbitration on the basis that the Articles of Association of the Company provides for disputes to be settled through arbitration. The application was heard, and allowed, through a ruling dated 7 October 2016, with orders issued that this suit be stayed and the matter referred to arbitration. Since then, the matter has been mentioned to confirm the progress on arbitration, but nothing concrete has so far come out of that process.
4. I have already mentioned that the application herein seeks to amend the plaint. The supporting affidavit is sworn by the 2<sup>nd</sup> plaintiff. He deposes that the amendment seeks to include other parties as defendants in the suit as they stand to be affected by orders that may issue in this case. He has annexed a draft amended plaint which I have gone through. It seeks to introduce as parties the following persons: Isaac Moracha Ongwacho, Moracha Mwangi Josephat, Rose Kemunto Moracha, Oyuru Itira Nyamari and the Kisii County Land Registrar. It is stated that the proposed 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants, got registered as proprietors of the land parcel Wanjare/Bogiakumu/2363 and Nyaribari Chache/B/B/Boburia/8412 and that the proposed 8<sup>th</sup> defendant oversaw the change of ownership of the properties.
5. The application is opposed by the replying affidavit of the 1<sup>st</sup> defendant. He has deposed inter alia that the 1<sup>st</sup> plaintiff has not held any meeting to pass a resolution to authorize the present application; that the proposed 4<sup>th</sup> – 6<sup>th</sup> defendants are deceased; and that the matter in issue is a family dispute falling within the arbitration clause in the Memorandum and Articles of Association of the company.
6. The 2<sup>nd</sup> plaintiff filed a supplementary affidavit where he inter alia deposed that the defendants have made no effort to facilitate arbitration; that he proposed an arbitrator and the defendants failed to confirm him; that the amendment is intended to bring in parties whose properties stand to be affected by the orders of court; that no evidence has been tendered to show that the 4<sup>th</sup> – 6<sup>th</sup> intended defendants are deceased; that the amendments are aimed at meeting the ends of justice.
7. I invited counsel to file written submissions towards the application, and I have seen the submissions of Mr. Begi, learned counsel for the plaintiffs, and those of Mr. Nyatundo, learned counsel for the 1<sup>st</sup> defendant. Nothing was filed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants towards the application. I have given the submissions due consideration before arriving at my decision.
8. What is before me is an application to amend plaint and generally courts are fairly liberal when it comes to such applications. The intention, as outlined in Order 8 Rule 5, of the *Civil Procedure Rules*, 2010, is so as to allow the determination of the real question in controversy.
9. I have considered the reasons why the 1<sup>st</sup> defendant opposes the motion. First, it is said that no company resolution has been passed authorizing the amendment. I need not go deeply into that because this suit is also filed by the 2<sup>nd</sup> plaintiff, who is an individual in his own right, and thus capable of sustaining such



an application without going through the company. The presence or absence of a company resolution is therefore immaterial. The second objection is that the proposed 4<sup>th</sup> – 6<sup>th</sup> defendants are deceased. As rightfully pointed out in the supplementary affidavit, there is no material before this court to suggest that the proposed 4<sup>th</sup> – 6<sup>th</sup> defendants are deceased, and unless and until demonstrated otherwise, I can only assume that they are alive. In any event, if they are indeed deceased, the suit against them will be null and void and the existing defendants stand to suffer no prejudice whatsoever.

10. The last limb of the objection is that the matter was referred to arbitration. That is indeed the position. As I outlined earlier, there was an application filed by the existing defendants to have the matter referred to arbitration and an order to that effect was made on 7 October 2016. In my opinion, the revelation that the properties in dispute have been transferred to other parties, who are not members of the company, and who are thus not bound by the arbitration clause in the company’s Memorandum of Association, changes the dynamics of the case. It is trite that an arbitration clause only binds the persons who ascribed to it, therefore, it cannot bind a person who is not party to the contract that contains such arbitration clause. As far as I can see, the amendment seeks to introduce the persons who benefited from the transfer of the suit properties and it has not been suggested that they are members of the company. The arbitration clause is in the Articles of Association of the company and thus binds the company and its members. It cannot bind a third party purchaser who is not a member thereof.
11. Such issue has been subject of discussion in other proceedings. In the case of *Eunice Soko Mlagui v Suresh Parmar & 4 Others*, Court of Appeal at Nairobi, Civil Appeal No. 276 of 2014, (2017) eKLR the Court Appeal stated as follows :

“The arbitration clause in the Articles of Association of the company stipulated as follows:

“Arbitration-Differences to be Referred Whenever any differences arise between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand touching on the true intent or construction or the incidents or consequences of these Articles, or the statutes, or touching on anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching any breach, or alleged breach, or otherwise relating to the premises, or to these Articles or to any statute affecting the company, or to any of the affairs of the company, every such difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.”

The above clause applies in the event of disputes between members and the company and between members inter se. It does not apply to disputes with employees like the 4<sup>th</sup> and 5<sup>th</sup> respondents, who were external auditors of the company. To that extent therefore, and as contemplated by section 6(1)(b) of the *Arbitration Act*, there was no dispute between the appellant and the 4<sup>th</sup> and 5<sup>th</sup> respondents, which the parties had agreed to be referred to arbitration.

While it is true that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not object to the dispute between them and the appellant being referred to arbitration, the 4<sup>th</sup> and 5<sup>th</sup> respondents were vehemently opposed to such arbitration. The appellant, having willingly and consciously joined the 4<sup>th</sup> and 5<sup>th</sup> respondents to the proceedings, could not ask the court to sever the dispute so that one part is heard by an arbitrator and another by the court. As this Court



stated in *Niazons (K) Ltd v. China Road & Bridge Corporation Kenya* (supra), the policy of the law disapproves concurrent or parallel proceedings before two or more distinct forums.”

12. In the case of *David Kibet Tonui v Epainitus Galo Anzeze & 6 Others*, High Court at Nairobi, Milimani Commercial & Tax Division, (2019) eKLR the court pronounced as follows:
  46. Further, as stated herein, the 3rd Applicant is not a party to the agreement dated 11th May 2004 and cannot rely on it. Similarly, the articles of association of the 7th Respondent/company show that, there are only 2 subscribers, the 1st Defendant and one Grace Anzeze. The 3rd Applicant’s name is not reflected. The argument that, the 3rd Applicant can rely on the arbitral clause by mere fact that he is a party herein is not sufficient under the law. A party cannot suffer or gain a benefit under a contract to which he is not a party.
  47. Indeed, the allegations against the 3rd Applicant are pleaded under paragraph 12, 16 and 17 of the plaint and are basically alleged to be fraudulent actions of diversion of business from the 7th Respondent to the 4th Respondent. The 3rd Applicant is described as the company secretary of both the 4th and the 7th Respondents. There is no evidence that he is a member, an executor, an administrator or assigns of the company.
13. The authorities are all on fours, that if there is a dispute with a party who is not privy to the arbitration agreement, he is not bound to have the dispute referred to arbitration. It thus follows that if I am to allow a joinder of the new persons, then I must automatically review the order referring the matter to arbitration, since the new parties, as I have taken some trouble to explain, cannot be bound by the arbitration clause.
14. So, have the plaintiffs demonstrated that the amendment is necessary in order to determine the real question in controversy ? Absolutely. The proposed additional defendants are necessary parties, since, if the plaintiff’s suit succeeds, the end result will be a nullification of their titles. In fact, these persons ought to have been made parties in the first instance when this suit was filed and it baffles me as to why they were not joined as defendants when the suit was commenced. There is no way that such a suit would have proceeded without the registered proprietors of the titles sought to be nullified being made parties. Proceeding in absence of such persons would be to deny them an opportunity to be heard before potentially adverse orders can be made against them.
15. Unfortunately, the plaintiffs have not been very clear on the proposed amendment. I appreciate that the amendments are intended to join the persons who benefited from the transfer of the land parcel Wanjare/Bogiakumu/2636 and those who benefited from subdivision and transfer of the land parcel Nyaribari Chache/B/B/Boburia/3370. On the parcel Wanjare/Bogiakumu/2636, the plaintiffs annexed an extract of the Green Card which shows that the said property was transferred from the 1<sup>st</sup> plaintiff to Isaac Moracha Ongwacho on 16 July 2007, then to Morara Mwangi Josphat who is the current registered proprietor. I see that the property is charged though the Green Card annexed was not complete so as to show who the chargee may be. The proposed amendment seeks to join Isaac Moracha Ongwacho and Morara Mwangi Josphat, which is fine, but I see no intention to join the chargee, which to me, is critical. In respect of the parcel Wanjare/Bogiakumu/2636, I will allow joinder of Isaac Moracha Ongwacho and Morara Mwangi Josphat but also order the plaintiffs to join the chargee, whoever that may be, in the suit. If this court was to nullify the title, it follows that the charge therein must also be nullified, and it is only fair that the chargee be allowed a chance to be heard or at least be aware that such suit exists.
16. On the property Nyaribari Chache/B/B/Boburia/3370, there is nothing annexed to demonstrate how many parcels of land emanated from its subdivision. I cannot therefore tell with precision what parcels



of land have arisen out of partition of this land. If the plaintiffs wish to have orders for reversion of this title back to the original parcel No. 3370, then all persons who are registered as proprietors of the subdivisions need to be joined as parties, or else they must abandon this prayer. I will thus order the plaintiffs to join all persons who are registered as proprietors of any subdivision of the land parcel No. 3370 to this suit.

17. The amendment of the plaint be effected within the next 30 days and the new parties be served in the usual manner with the pleadings. The pleadings must be clear on which party is being sued, and why, which I have found to be very thin in the draft amended plaint. The plaintiffs must do better.
18. As I stated earlier, if I am moved to allow the amendment, then I must review the order referring the matter to arbitration, and I gave the reasons why. I have allowed amendment of the plaint in order to join other persons who are not members of the 1<sup>st</sup> plaintiff company and who are therefore not bound by the arbitration clause in the Articles of Association. That being the case, I proceed to review and set aside the order dated 7 October 2016 referring the dispute herein to arbitration. It follows that the matter will proceed in court to its logical conclusion.
19. The last issue is costs. The plaintiff had opportunity to properly plead his case in the first instance, and though I have allowed the application to amend, I am unable to grant the plaintiffs the costs thereof. I thus proceed to make no orders as to the costs of the application.
20. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 8 DAY OF NOVEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

**In the presence of: -**

Mr. Nyatundo for the 1<sup>st</sup> defendant/respondent

Mr. Begi for plaintiffs/applicants – Absent

Mr. J.O Soire for the 2<sup>nd</sup> & 3<sup>rd</sup> defendants/respondents – Absent

Court Assistant – Mr. Lawrence Chomba

