



**Geoffrey Wanjala Lyambila & 3 others v Agnes Nakhumicha Lyambila & 9 others  
(Environment & Land Case E008 of 2021) [2022] KEELC 12718 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 12718 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E008 OF 2021**

**BN OLAO, J**

**JULY 6, 2022**

**BETWEEN**

**GEOFFREY WANJALA LYAMBILA ..... 1<sup>ST</sup> APPLICANT  
SAMUEL WAFULA LYAMBIA ..... 2<sup>ND</sup> APPLICANT  
PATRICK WANYAMA LYAMBILA ..... 3<sup>RD</sup> APPLICANT  
OLIVER BAHATI LYAMBILA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**AGNES NAKHUMICHA LYAMBILA ..... 1<sup>ST</sup> RESPONDENT  
DENNIS MAJIMBO ..... 2<sup>ND</sup> RESPONDENT  
ROBERT MASINDE ..... 3<sup>RD</sup> RESPONDENT  
ELIZABETH SIMIYU ..... 4<sup>TH</sup> RESPONDENT  
LINA KHAOYA ..... 5<sup>TH</sup> RESPONDENT  
LEONARD JUMA ..... 6<sup>TH</sup> RESPONDENT  
EMMANUEL WEKESA ..... 7<sup>TH</sup> RESPONDENT  
LEVI KISONGOCHI WASIKE ..... 8<sup>TH</sup> RESPONDENT  
DAVIS WAFULA ..... 9<sup>TH</sup> RESPONDENT  
JUSTUS NYONGESA ..... 10<sup>TH</sup> RESPONDENT**

**RULING**

- 1 Agnes Nakhumicha Lyambila(the plaintiff herein) moved to this Court vide her plaint dated June 12, 2021 and filed on July 7, 2021 seeking against Dennis Majimbo, Robert Masinde, Justus Nyongesa



Murunga, Elizabeth Simiyu, Levi Kisongochi Wasike, Lina Khaoya, Leonard Juma, Emmanuel Wekesa, and Davis Wafula (the 1<sup>st</sup> to 9<sup>th</sup> defendants respectively) the following orders with regard to the land parcel No Bungoma/Kamakoiywa/4224 (the suit land): -

- a. A permanent injunction against the defendants, their agents and servants or any other person acting through their instructions from trespassing and or making use of the land parcel No Bungoma/ Kamakoiywa/4224.
  - b. An eviction to remove the demarcations made by the defendants, sugar cane planted on the suit land, building materials and to demolish any structures or houses built on land parcel No Bungoma/ Kamakoiywa/4224 by the defendants.
  - c. Costs of the suit.
- 2 The basis of the plaintiff's claim is that she is the registered proprietor of the suit land which the defendants, without any colour of right, have invaded and commenced the building of a permanent house claiming to have purchased a portion thereof which is not correct. The 3<sup>rd</sup> and 4<sup>th</sup> defendants also claim which is not true, that they have leased a portion of the suit land from the plaintiff hence this suit.
- 3 The defendants filed two defences, the first being a joint defence by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants dated February 21, 2022 and the second being the 9<sup>th</sup> defendant's defence dated March 15, 2022. As at the time of drafting this ruling, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants appear not to have entered any appearances nor filed their defences.
- 4 What runs through the defences is that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants acknowledge the fact that the plaintiff is the registered proprietor of the suit land. They plead, however, that the plaintiff infact holds the suit land in trust on behalf of her sons Geoffrey Wanjala Lyambila, Samuel Wafula Lyambila, Patrick Wanyama Lyambila and Oliver Bahati Lyambila (the 1<sup>st</sup> – 4<sup>th</sup> Applicants respectively) who have proceeded to sell and/or lease their portions of the suit land to some of the defendants herein. For purposes of this ruling, I need not delve fully into the said defences. What is important for purposes of this ruling is that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants have pleaded that the Applicants herein have infact filed Bungoma Elc Case No 3 of 2021 against the plaintiff herein seeking orders that she holds the suit land in trust for them.
- 5 This suit had infact been listed for formal proof on March 23, 2022. That was however put on hold following the Notice of Motion dated March 21, 2022 and filed by the Applicants and which is the subject of this ruling.
- 6 By the Notice of Motion filed on March 21, 2022, the Applicants seek the following orders: -
1. Spent
  2. That this Court be pleased to enjoin the Applicants in this suit as Interested Parties.
  3. Spent.
  4. Upon grant of prayer (2) above, the Applicants be granted leave to file their joint defence.
  5. That upon grant of prayer (4) above, the annexed defence herein be deemed as having been duly filed and served upon the plaintiff.
  6. That costs be provided for.
- 7 The application is premised on the grounds set out therein and supported by the affidavit of Geoffrey Wanjala Lyambila the 1<sup>st</sup> Applicant herein and also sworn on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants.



- 8 The gist of the application is that the plaintiff is the mother to the Applicants and the Administratrix of her late husband's Estate one Benard Lyambila Nduruchi who died in 1987. That the plaintiff holds the suit land in trust for them with each being entitled to 4 acres although it is registered in her names. However, the plaintiff has refused to transfer to the Applicants their respective shares of the suit land and that has caused them to file Bungoma Elc Case No 3 of 2021 (OS) seeking various declaratory orders against her. That the defendants are bona fide purchasers of various portions of the suit land from them and it is therefore prudent for the Applicants to be enjoined in this suit as Interested parties.
- 9 Annexed to the supporting affidavit are the following documents: -
1. Copy of Certificate of Confirmation of Grant issued to Agnes Nakhumicha Lyambilain respect to the Estate of Benard Lyambila Nduruchi In Nbi H. C. *Succession Cause No 23 of 1998*.
  2. Copy of Certificate of Official Search in respect of land parcel No Bungoma/Kamakoiywa/4225 in the name of Mwanzo Kag Church.
  3. Copy of the Certificate of Official Search in respect of the land parcel No Bungoma/Kamakoiywa/4225 in the name of the plaintiff.
  4. Copies of land purchase agreements between the Applicants and the defendants for portions of the suit land (some are not very legible).
  5. Copy of the Originating Summons (OS) in Bungoma Elc Case No 3 of 2021 between the Applicant against the plaintiff (as Respondent) seeking declaratory orders with respect to the suit land.
- 10 When the Notice of Motion was placed before me on March 22, 2022, I did not certify it as urgent but directed that the plaintiff (and defendants if they wish) file their responses thereto within 21 days and that the same be canvassed by way of written submissions.
- 11 The plaintiff filed a replying affidavit dated April 22, 2022 in which she deponed, inter alia, that this application has no merit and that the Applicants can only be witnesses and not parties to this suit. That the issues in Bungoma Elc Case No 3 of 2021 are different from the issues in this suit and if the Applicants have any claim against the plaintiff, it can only be determined in a different suit. She therefore sought that this application be dismissed with costs.
- 12 The 7<sup>th</sup> defendant Leonard Juma on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants filed a replying affidavit dated April 4, 2022 supporting the Applicant's application.
- 13 Submissions were thereafter filed both by the firm of Emmanuel Wanyonyi Advocates for the Applicants and by the firm of RE Nyamu & Company Advocates for the plaintiff.
- 14 I have considered the application, the rival affidavits and annexures as well as the submissions filed. Although the application is premised upon the provisions of Article 10 and 47 of the [Constitution](#) and Sections 1, 1A and 3 of the [Civil Procedure Act](#), the relevant provision is Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) which provides that: -

“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 the name of any person who ought to have been joined, either as plaintiff or defendant or whose



presence before the 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 In Petition No 15 of 2015 as consolidated with Petition No 16 of 2015 *Francis Kariuki Muruatetu & another V R & others* 2016 eKLR, the Supreme Court, citing Black’s Law Dictionary 9<sup>th</sup> Edition, defined an Interested Party as: -

“A party who has a recognizable stake (and therefore standing) in a matter.”

16 It went on to state that a party seeking to be enjoined in proceedings must move the Court by way of a formal application, that “enjoinment is not a right but is at the discretion of the Court and therefore there must be “sufficient grounds laid before the Court.” The Court then identified the following elements that must be proved before an application for enjoinment is allowed: -

1: “The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be approximate enough to stand apart from anything that is merely peripheral.”

11 “The prejudice to be suffered by the intended interested party in a case of non – joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.”

111 “Lastly, a party must, in it’s application, set out the case and/or submissions it intends to make before the Court and demonstrate the relevance of those submission. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

17 The court went on to add: -

“..... we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected but the primary impact is on the parties that first moved the Court.” Emphasis mine.

18 I may also add that the enjoinment of an Interested Party in any proceedings should also only be allowed if it is the most efficacious way in which his interest in the proceedings can be ventilated. If there is another forum in which the intended interested party’s stake in the matter in dispute can be litigated without prejudicing such party’s interest in the subject of the dispute, the Court should be slow in allowing third parties in those proceedings especially if their enjoinment will only result in muddying the issues and delaying the expeditious disposal of the dispute between the main protagonists.

19 Having said so, I am not persuaded that this is a proper case to allow the enjoinment of the Applicants herein as Interested Parties for the following reasons. Firstly, the Applicants have confirmed that they have already filed their own suit against the plaintiff being Bungoma ELC Case No 3 of 2021 in which they are seeking declaratory orders with regard to the suit land. That suit is still pending and whereas it is true that they have an interest in the suit land, a refusal to enjoin them in these proceedings will not cause them any prejudice. Their interest in the suit land will best be ventilated in Bungoma ELC Case No 3 of 2021.



20 Secondly, it is clear from the 1<sup>st</sup> Applicant's supporting affidavit that their main interest in joining these proceedings is to support the defendant's case against the plaintiff. This is mainly because the Applicants have already sold or leased portions of their share in the suit land to the defendants. In paragraphs 20 and 21 of the said affidavit, the 1<sup>st</sup> Applicant has deponed as follows: -

20: "That we were justified to sell and lease part of our shares to the defendants and the plaintiff has no colour of right to seek for the reliefs against them as sought in the plaint."

21: "That the defendants are bonafide purchasers for value and they are justified to utilize their respective portion of land they bought/leased from us."

21 The Applicants' intentions are therefore clear. They are piqued by the fact that the plaintiff seeks to injunct the defendants from utilizing the suit land which they (Applicants) believe the defendants are entitled to as bona fide purchasers. In that regard, I agree with the replying affidavit of the plaintiff where she has deponed in paragraphs 4 and 5 as follows: -

4: "That the Applicants can only come to this case as witnesses but not as parties to this suit."

5: "That if the Applicants have any claim against the plaintiff, the same can only be determined in different proceedings other than this suit."

22 It is obvious that the Applicants want to be joined in these proceedings only to support the defendant's case. Nothing stops them from doing so as witnesses.

23 Finally, as is clear from the 4<sup>th</sup> prayer sought in their application, the Applicants are seeking leave to be enjoined as defendants. That would mean that if this Court allows that application, it will be imposing the Applicants upon the plaintiff as defendants in this case. Yet, the law is that a plaintiff in any suit is usually the *Dominus Litis* ie, the party who makes the decision in law – see *Black's Law Dictionary* 10<sup>th</sup> Edition. He cannot be compelled to sue any party against his wish – *Santana Fernandes v Kara Arjan* 1961 EA 693. In *Civicon Ltd v Kivuwatt Ltd & 2 others* 2015 eKLR, the Court of Appeal addressed the issue as follows: -

"O'Hare & Hills Civil Litigation 7<sup>th</sup> Edition 1996 at page 101 opines that one cannot be added as a plaintiff unless one gives one's consent in writing. In contrast, anyone can be joined as a defendant even against his wishes. However, no person can be a defendant unless the plaintiff claims some relief, even if only a declaration, against him. The general rule of practice is that the plaintiff is 'dominus litis.' This means that he is entitled to choose the defendants against whom he wishes to pursue his claim for the relief or remedy he seeks, and that he cannot be compelled to proceed against other persons whom he has no desire to sue. The doctrine of 'dominus litis' does not however extend to the joinder (or impleading) of parties. This is because the Court has a duty and power to add a person who is not a party to the action as originally constituted as a defendant even against the will of the plaintiff whether on the application of the defendant or of the non – party in order for the real matter in dispute to be determined. The non – party (or intervener) must show that he has interest in the matter in dispute to be determined in the suit." Emphasis mine.

24 It must also be remembered that Order 1 Rule 10 (2) of the *Civil Procedure Rules* says "the Court may ..... Order the name of any party ..... either as plaintiff or defendant ..... be added." That means that the Court has the discretion to decide which party to be added or struck out from the proceedings.



The overriding consideration being always whether the party to be joined has any interest in the subject of the dispute and his right may be affected if he is not added.

- 25 In the circumstances of this case, it is clear that the plaintiff has no claim against the Applicants. And although the 1<sup>st</sup> Applicant in his supporting affidavit averred at paragraph 22 that a copy of their draft defence was annexed, I did not see any such draft defence. What was annexed is the copy of the Originating Summons in Bungoma ELC Case No 3 of 2021. In any event, what defence could they possibly have against a claim that does not implead them? Most importantly, the plaintiff's claim is simply to evict and injunct the defendants from the suit land which will not affect the Applicants interest therein. And as I have already stated above, the Applicants claim against the plaintiff with respect to the suit land will be fully canvassed in Bungoma ELC Case No 3 of 2021 which is still pending.
- 26 Given all the above, the application is devoid of merit and is not for allowing.
- 27 With regard to costs, the main protagonists in the Notice of Motion are a mother (plaintiff) and her sons (Applicants). Being family, the order that commends itself to make is that each party meets their own costs.
- 28 The up shot of the above is that having considered the Notice of Motion dated March 21, 2022, I make the following disposal orders: -
1. The Notice of Motion is dismissed.
  2. Each party to meet their own costs.

**BOAZ N. OLAO.**

**J U D G E**

**6<sup>TH</sup> JULY 2022.**

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA BY WAY OF ELECTRONIC MAIL THIS 6<sup>TH</sup> DAY OF JULY 2022.**

**BOAZ N. OLAO.**

**J U D G E**

**6<sup>TH</sup> JULY, 2022.**

