Kenya Co-operative Creameries v Mboga & 106 others; National Land Commission (Interested Party) (Enviromental and Land Originating Summons 329 of 2015 & Environment & Land Case 183 of 2015 (Consolidated)) [2022] KEELC 12828 (KLR) (3 October 2022) (Ruling)

Neutral citation: [2022] KEELC 12828 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 329 OF 2015
& ENVIRONMENT & LAND CASE 183 OF 2015 (CONSOLIDATED)

LL NAIKUNI, J

OCTOBER 3, 2022

BETWEEN

KENYA CO-OPERATIVE CREAMERIES ..... APPLICANT

AND

HASSAN ALI MBOGA & 106 OTHERS ..... RESPONDENT

AND

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

RULING

I. Introduction

1. The chamber summons application dated November 3, 2021 by the intended defendants/applicants herein has been placed before court for its determination. It's brought under the provisions of section 3A of the *Civil Procedure Act* cap 21, order 1 rule 10 (2) and (4) and order 1 rules 14 & 25 of the *Civil Procedure Rules 2010*.

II. The Intended Defendants/applicants Application

2. The intended defendants/applicants are seeking for the following orders:-
    a. Spent;
    b. That honorable court be pleased to add the following persons as defendants and/or interested parties to this suit:- Mariam Ali Mwalimu & 43 others; and
    c. That the cost of the application be provided for.

3. The said application is founded on the grounds, facts and averments of the supporting affidavit of Matano Tsui Ambarisworn and dated the November 3, 2021. He avers that he is a male adult of sound mind residing in all that parcel of land known as land reference No MN/VI/2860 Miritini (hereinafter referred as "the suit land") with full knowledge of the facts of this case and hence competent to swear this affidavit on behalf of all the other intended defendants/applicants herein.

   He held to be having been given the authority to swear this affidavit and the conduct of these proceedings on behalf of the 44 intended defendants/applicants herein.

4. The deponent provided it with the background in that the suit was instituted by the plaintiff against the defendants sometimes in the year 2015 whereby it was claiming ownership to the suit property and that the defendants had encroached onto it.

   He deponed that the applicants had been living on the suit land from as early as the years of 1960s. However, they had not been aware of the alleged transfer of the suit land of their properties to the plaintiff/respondent. Indeed they had all a long been of the impression that they were the rightful owners of the suit property.

5. He asserted that the applicants had been the owners of the suit property for several years now and were victims of historical injustice and attempted displacement from the only home they had ever known. He held that the notice of intention to sue and the actual suit had never been served upon them who were the actual persons living on the suit property and were unaware of the suit until recently. Thus, they had legitimate interest on the property.

6. The deponent held that the applicants were apprehensive that their rights as persons in current possession of the suit land would be violated without giving them a right to be heard.

   He urged court to grant the orders sought from this application.

III. The Replying Affidavit By The Plaintiff/Respondent

7. On February 18, 2021, while opposing the chamber summons application by the intended defendants/applicants, the plaintiffs filed a replying affidavit sworn by Irene Mbito. Unfortunately, a copy was missing from the court file.

IV. Supplementary Affidavit By The 44 Intended Applicants

8. On April 4, 2022 with leave of court the 44 intended defendants/applicants filed a ten (10) paragraphed supplementary affidavit dated even date and sworn by Matano Tsui Ambari.

   He was responding to the averments made by Irene Mbitoin her replying affidavit sworn on February 18, 2021 on behalf of the plaintiff herein. The deponent responding to the averments made under paragraphs 4, 5, 6 & 7 of the replying affidavit he pointed out the following issues:-

   a. The previous application dated September 24, 2018 mostly included persons who were already defendants in this case – thus, there was need to sort out the issue of representation;

   b. This court had ordered that the additional defendants who had made the application be joined in the matter;

   c. They were not aware of any order served through the newspaper as they never bought papers;

   d. The honorable court had made on September 28, 2021 for the defendants to regularize participation in the suit which order had not been appealed or set aside.

9. The deponent responded to the averments made under the contents of paragraphs 8, 9 & 10 of the replying affidavit as follows:-

   a. The alleged headcount as alleged by the plaintiff was inaccurate as non of the 1, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 27, 29, 30, 31, 32, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 46,49,52,53,54,55,60,62,63,64,65,66,68,71,73,74,75,77,78,81,82,85,88,89,91,93,96,98,101,104 &106 resided on the suit property.

   b. The alleged headcount was not mandated by court. It did not involve the 108th to 150th defendants who were already the suit property at the time the alleged audit was being conducted.

10. He reiterated that the defendants/applicants and other families resided on the suit property from as early as the years 1960s and hence there could be no issue of encroachment. Based on the contents of the replying affidavit he contended that there would be no ground for the dismissal of the application.

V. The Submissions

11. On March 15, 2022, apart from the 1st to 107th defendants/applicants who were absent, all the others were present. The honorable court directed that the chamber summons application dated November 3, 2022 be canvassed by way of written submissions.

    Subsequently upon the parties complying accordingly the honorable court reserved a date to deliver its ruling.

A. The Intended Defendants/applicants Written Submissions

12. On April 12, 2022 the learned counsel for the 44 intended defendants/applicants the law firm of Messrs Okello Kinyanjui & Co Advocates filed their written submissions dated April 7, 2022. Mr Okello advocate submitted that this application was made pursuant to the direction by this court, which orders had never been appealed against nor set aside. This had been done following the objections raised by the plaintiff on having the 105th to 150th defendants' suit.

    Besides, whether the orders existed or not the intended defendants/applicants had a right to be heard as founded under the provisions of article 48 of the *Constitution* of Kenya, 2010. He held that the applicants had a right to be heard and they could not have been aware of the suit as unfortunately they never got access to newspaper where an order of the existence of this court had been published on the essence of having the intended defendants/applicants to be joined in this suit, the learned relied on the famous cases of "*Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another* (2015) eKLR & *Rubina Ahmed & 3 others v Guardian Bank Ltd* (2019) eKLR and *JMK v MWM & another* (2015) eKLR.

    He reiterated that the applicants lived on the suit land and some all their lives- as long as from the years 1950 to date.

    He urged court to allow the application and grant the orders sought.

B. The Plaintiff's/respondent's Written Submissions

13. On May 26, 2022, the learned counsel for the plaintiff/respondent law firm of Messrs Mereka & Co Advocates filed their written submissions dated May 24, 2022. Mr Mereka advocate submitted that the chamber summons has been filed after the court allowed a similar application dated September 24, 2018 where it sought to add ninety eight (98) defendants and the court allowed it. He Submitted the

plaintiff did due diligence by informing the public of the said suit by advertising on June 29, 2020 the order in a newspaper of wide national circulation the Daily Nation Newspaper.

He now found it wrongful for the defendants to be filing yet another application to accommodate new encroachers.

He argued that the proposed defendants herein had already been given sufficient opportunity to be joined onto this suit but they never utilized it on times.

14. Hence, he urged court to find that the application was an abuse of court process and to buttress its argument relied on the Supreme Court case of "*Communication Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* (2014) eKLR where court held:-

> " The applicant has not demonstrated how the ends of justice would be better served by enjoining it in the appeal".
>
> "We cannot exercise our discretion to enjoin a party that disguises itself as an interested party, while in actual fact merely seeking to institute fresh suit".

He argued that mere residents by the applicants without any proof did not guarantee them the right to be joined in the suit; they had not proved their relationship to the suit property. Further, they had not shown how justice would be served better in the present suit once they were joined. His contention the applicants had not attained the threshold for joined as enshrined in the case of "*Francis Kariuki Muratetu & Anor v Republic & 5 others* (2016) eKLR for admission as an interested party.

It's for these reasons that the learned counsel urged court to dismiss the case herein with costs.

VI. Analysis & Determination

15. I have carefully assessed the pleadings filed in relation to the chamber summons application herein being the affidavits, replies, written submissions, cited authorities by all the parties, the relevant provisions of the *Constitution* of Kenya, 2010 and statutes.

In order to arrive at an informed, just, reasonable and fair decision, this honorable court has framed the following issues for its determination. These are:-

a. Whether the chamber summons application dated November 3, 2021 by the 44 defendants/ applicants meet the laid down threshold for them being joined as parties to the suit hereof.

b. Whether the parties are entitled to the relief sought.

c. Who will bear the costs of the application.

Issue No (a) Whether the chamber summons application dated 3{{^rd}} November, 2021 by the 44 defendants/applicants meet the laid down threshold for them being joined as parties to the suit hereof.

16. The legal preposition that governs the granting of orders for a party to be joined in a suit are founded under order 1 rules 1 to 15 of the *Civil Procedure Rules*. The instant application is essentially based on the provision of order 10 (2) of the *Civil Procedure Rules, 2010* which stipulates as follows:-

> " (2) The court may at any stage of the proceedings, either upon or without the application of either party, any 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 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".

In the case of "*Pravin Bowry v John Ward & another*" (2015) eKLR the Court of Appeal considered the principles to be taken into account in an application for joinder of parties to a suit. In doing so, the court referred to the Ugandan case of "*Deported Asians Custodians Board v Jaffer Brothers Limited* (1999) 1 EA 55 (SCU) where the court stated as follows:-

> " A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter .....For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies to be joined as a co – defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it or unless the order to be made is to bind that person"

17. This court is persuaded by the authority "*Francis Kariuki Muratetu & Anor v Republic & 5 others* (2016) eKLR (supra)" cited by the learned counsel for the plaintiff/respondent in the scope for admission as an interested party was delineated as hereunder:- "From the foregoing legal provisions and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party..... one must move court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court, hence sufficient grounds must be laid before the court on the following elements:-

    i. The personal interest or state that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral.

    ii. The prejudice to be suffered by the intended interested party in case of non- joinder must also be demonstrated to the satisfaction of the court. It must also be outlined and not something remote.

    Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court and demonstrate the relevance of those submissions it should also demonstrate that these submissions are not merely a replication of what the other parties will be making before court.

    The honorable court discerns that the power given under this rules is discretionary which discretion must be exercised judicially. The objective of these rules is to bring on record all the 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 joined in the suit.

Issue No (b) Whether the parties are entitled to the relief sought.

18. Under this sub-heading, having stated the law and the principles for joinder of parties, there is no doubt from the material on record and this honorable court is fully satisfied that the 44th defendants/

applicants who is stated have lived and born on the suit land from the years of 1950s todate. They have a personal interest or stake in matter. They have been clearly identifiable and have proximate enough cause to the matter. Therefore, the court holds that they will stand to suffer prejudice if the orders not to join them will not be granted.

The honorable court also takes cognizance and in order to fairly balance the scale of justice, the plaintiff/respondent will have all the ample opportunity to fully cross-examine the defendants individually on their proximity to the land during full trial. It's just, fair, natural justice and equity and this being a land matter with all its sensitivities that each party is accorded an opportunity to be heard in order to ventilate their case particularly on matters of land ownership as it is in this case. For these reasons, this honorable court that the 44 defendants/applicants are entitled to the orders sought.

Issue(c) Who will bear the costs of the application.

19. The issue of costs is at the discretion of the court. Costs means the award after the conclusion of any legal action, proceedings and litigation process. The proviso of section 27 (1) of the *Civil Procedure Act*, 21 provides that costs follow the event. The event means the result of the said any legal action, proceedings and litigation process.

20. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See the case of "*Hussein Janmohammed & Sons v Twentsche Overseas Trading Company Limited* (1967) EA 287. In the instant case, since the suit is yet to be heard and determined, the court is of the opinion that costs should be in the cause.

V. Conclusion & Determination

21. In the long run and as indicated above, upon conducting an intensive analysis to the issues framed hereof, this court proceeds to make the following orders:-

    a. That the chamber summons application dated November 3, 2021 be and is hereby allowed.

    b. That the plaintiff/respondent be and is hereby granted 14 days leave to amend, file and serve an amended plaint reflecting the made out from this ruling.

    c. That both the 44 applicants and the plaintiff/respondent be at liberty to file any affidavits or pleadings they shall deem fit and suitable within the next 14 days from this date.

    d. That for the sake of expediency, this suit should be heard and finally determined within the next one hundred and eighty (180) days from this date. There should be a hearing on February 28, 2023. In the meantime, each party is granted 30 days leave to file and exchange any further documents they may wish to rely on during the hearing.

    e. That the costs of this chamber summons application to be in the cause.

RULING DELIVERED, SIGNED, AT MOMBASA & DATED ON THIS 3RD DAY OF OCTOBER 2022.

HON. JUSTICE (MR) L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the Presence of:-

a. M/s. Yumnah & Mr. Omar Court Assistants.

b. Mr. Muchui Advocate holding brief for Mr. Mereka Advocate for the Plaintiff/Respondent;

c. Mr. Ousa Okello Advocate for the 108th to 150th Defendants/Applicants.