



REPUBLIC OF KENYA



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**Impact Properties Limited v Owiti & 2 others; Nyabiage & another (Intended Interested Party)
(Environment & Land Case 24 of 2013) [2022] KEELC 14516 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 24 OF 2013
EK MAKORI, J
NOVEMBER 2, 2022**

BETWEEN

IMPACT PROPERTIES LIMITED PLAINTIFF

AND

LEO GOGO MTEPE 1ST DEFENDANT

LUCAS OWITI 2ND DEFENDANT

CLEOPHAS NYAMETA 3RD DEFENDANT

AND

LAWRENCE NYABIAGE INTENDED INTERESTED PARTY

THOMAS MAERA INTENDED INTERESTED PARTY

RULING

1. Application dated the 21st day of February 2022 seeks the following reliefs: -
 - a. That Lawrence Nyabiage and Thomas Maera be joined as Defendants or necessary parties in this cause.
 - b. Upon their joinder, parties make the necessary amendments to their pleadings to encompass the joinder.
 - c. Costs of the application be provided.
2. The application is based on the reasons stated in the body of the application as well as the affidavit of one Cleophas Bichanga Nyameta, deposed on February 21, 2022. The application has been challenged. The Plaintiff/Respondent has filed opposition grounds. The court ordered the parties to submit written arguments in the case.



Applicant's case

3. The Applicant/3rd Defendant claims that he acted as counsel in a land sale transaction for the 1st and 2nd Defendants, and on instructions from the two vendors, and his involvement was purely as an agent in the entire process.
4. Any money he authorized for release was subject to the instructions of the vendors and or their agents. And the intended interested parties were aware of it. The joining of the two parties will go a long way towards explaining how the vendors' accounts were run because the parties were in charge of it.
5. The amount subject to this suit was paid to the vendors as deposits and appropriated as directed by the said vendors' company. Any money paid by the vendors must have been approved by the intended interested parties, resulting in their inclusion as necessary parties in this suit.

Respondent's case

6. In the grounds in opposition dated June 3, 2022, the Respondent contends that the application is fatally flawed, misconceived, frivolous, bad in law, and gross abuse of the court process, and it should be dismissed with costs. The parties intended to be joined have no connection to this suit and, as a Plaintiff, he has no cause of action against them and cannot be forced to sue parties against whom he has no claim at all.

Issues for determination

7. What remains to be determined is whether the intended parties' joining will be apropos or it will result in the convolution of the real issues in the suit and result in the introduction of an outright new cause of action. What are the appropriate remedies, if any, in this situation, and who should bear the costs of the application?

Submissions by the Applicant

8. The Applicant submits that under Order 1 Rule 3,10(2) and 14 and Order 51 of the *Civil Procedure Rules* – a party or persons may be joined as a Defendant or an interested party against whom any right or relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in in the alternative, where if separate suits were brought against such persons any common question of law or fact could arise. It is also a rule that a person to be joined should be someone whose presence is necessary as a party.
9. The Applicant quotes the *Black's Law Dictionary* on who an interested party to a case is – It is a person who has a recognizable stake and therefore a standing in a matter.
10. Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.
11. The Applicant has further quoted several authorities on joinder – and the test applicable. Among the cases cited include, Francis Karoki Muruatetu and Another vs Republic and 5 others [2016] eKLR, *Trusted Society of Human Rights vs Mumo Matemu and 5 Others* [2014] eKLR, *Meme vs R* [2004]1 EA 124 and *Amon vs Raphael Tuck and Sons Ltd* [1956] 1 All E.R. The applicable test being that the joinder of the intended interested party may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter. The Applicant concludes that the two



intended interested parties will be necessary for this suit and therefore the application ought to be allowed.

Respondent's submissions

12. On the contrary, as stated in the grounds for opposition and written submissions, the Respondent believes otherwise. The Plaintiff/Respondent asserts that it will have no cause of action against the parties to be joined. The suit was originally filed in 2013, and the Plaintiff/Respondent in the plaint has sued the appropriate parties and cannot be forced to bring in additional parties who have no connection to the same. The position is stated clearly in paragraph 3 of the Plaint dated July 5, 2013. The 3rd Defendant wishes to impose the parties to be joined on the Plaintiff, which he alleges is an illegal action. If there is a cause of action, the 3rd Defendant may have one against the interested parties and may file a separate suit against them.
13. The Respondent has quoted the holdings in - *Carol Construction Engineers Ltd vs Naomi Chepkorir Langat* [2019] eKLR and *Good News Church of Africa vs Board of Management Eldoret Secondary School* [2020] eKLR, which articulates the position that parties cannot be forced to choose whom to litigate against in a suit where they claim certain reliefs arising from an act or a wrong allegedly committed against them.
14. The Respondent has also submitted that this application is an afterthought, brought late in the day, the pending suit having been initiated way back in 2013. It's an abuse of the court process.

Analysis and determination

15. I have set out the issues that the court ought to address in disposing of the pending application. The main issue to rule on is largely on the joinder of the two parties whether as Defendants or interested parties and what overall effect it will have in the proper and legal progression of the suit.
16. As correctly submitted by the Applicant, Order 1 Rule 3,10(2) and 14 and Order 51 of the *Civil Procedure Rules* sets out who can be joined as a Defendant or an interested party in a claim, the most significant provisions being Order 1 Rule 3 and 10(2) of the *Civil Procedure Rules* respectively which stipulates as follows: -
Order 1 Rule 3: -
“All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
Order 1 Rule 10(2): -
“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 the court may be necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
17. The Plaintiff/ Respondent took out summonses and filed a suit against the Defendants jointly and severally. Its claim against the Defendants is as pleaded in paragraphs 3,4,5,6,7,8,9,10,11,12,13 of the



plaint dated June 5, 2013, and in it, it has leveled allegations against each of the Defendants based on the sale of land transaction which is the subject matter in this suit. The 1st and 2nd Defendants allegedly carried themselves as Directors of or to be trading in the style and name of Vros Produce Limited while the 3rd Defendant ostensibly acted for them as their lawyer in the transaction. Necessary agreements were drawn. The terms of sale were spelled out. The agreements were duly signed and executed. Payment and deposits were done. The 3rd Defendant was allegedly the conduit in the receipt of the consideration and payment to the vendors acting as their lawyer. According to the Plaintiff/ Respondent, there was no completion of the sale transaction. It aborted. The 1st and 2nd Defendants disappeared - never to be traced to date to complete the sale or refund the deposits already paid. The Applicant/3rd Defendant did not assist in tracing the alleged vendors nor has he explained the due diligence he undertook in the entire sale process – hence this litigation which the Plaintiff/ Respondent thinks is appropriate in the circumstances as against all the named Defendants. The Plaintiff /Respondent believes it has no cause of action against the intended interested parties.

18. The Applicant/3rd Defendant argues that he was a mere agent acting in a fiduciary position for the intended interested parties who were agents of the 1st and 2nd Defendants and their joinder will go a long way in fully and finally disposing of this suit. The intended interested parties instructed him and therefore their joinder will be necessary.
19. The specifics of fraud against the Applicant/3rd Defendant stated in the plaint are such that he is a necessary party in the case to explain the identity, put a face on, and state the whereabouts of the 1st and 2nd Defendants and how the deposits were made, paid out. It will be up to him to explain his Advocate / Client relationship and disapprove of the Plaintiff/ Respondent's plea of fraud in the sale transaction.
20. I have considered the cases quoted by the Applicant on the issue of the joinder of the intended parties to this suit. The Applicant seeks that they are joined as Defendants and if not as interested parties. The authorities cited tend to suggest that its quite germane to join all parties and or persons who have applied to the court, as Defendants or interested parties if at the end of the day the joinder will lead to the resolution of the common question(s) that may arise in a pending suit (Order 1 Rule 3 *Civil Procedure Rules*).
21. The court in the exercise of its discretion can order at any stage the striking out or joinder of any party, to enable it effectually and completely adjudicate upon and settle all questions involved in the suit (Order 1 Rule 10 (2) *Civil Procedure Rules*).
22. The parties intended to be joined have not applied to be so joined in this suit. The Plaintiff/Respondent has no cause of action against them. They are total strangers to it. The Applicant/ 3rd Defendant describes them as necessary parties or Defendants, or agents of the 1st and 2nd Defendants who gave him instructions and are aware of the way the purchase monies were disbursed and they are the ones who ran the accounts used to pay. These are people only known to him. They are as stated strangers to Plaintiff. The court doesn't know the two nor can it remotely connect them to the suit as persons whose presence will be necessary towards resolving common question(s) that may arise in this suit nor will their joinder lead to the effectual and complete adjudication upon and settlement of questions involved in the suit. At least this is what I can decipher from the averments from the supporting affidavits and reasons stated for the joinder in the body of the application.



23. The Plaintiff/Respondent quoted the case of [*Good News Church of Africa Vs Board of Management Eldoret Secondary School*](#) [2020] eKLR where Justice Odeny faced a similar situation and held as follows: -

“In this case, the Applicant states that the party whom they intend to join was the original registered Trustee of the suit land but has not produced any documentation to ascertain the same. Plaintiff states that they do not have a claim against the proposed party.

From the pleadings and the supporting affidavit, these are parties that can be called as witnesses and not as parties to the suit. Including them in the suit will complicate the matter as they will not give evidence that is neutral but to support their position or the position of a party that has dragged them to court.

I agree with Judge Munyao in the case of [*Carol Construction Engineers Ltd v Naomi Chepkorir Langat*](#) [2019] eKLR where in dismissing the Defendant’s application to enjoin other persons as Co-Defendants stated that:

“It will be wrong for this court to impose upon the Plaintiff some persons as Defendants when in fact the Plaintiff has no issue with such persons.”

The Plaintiff is clear on this that he does not want other parties to be imposed on them. If the Applicant had established that the party to be enjoined is necessary, then the court could have considered it.

In the case of [*Rubina Ahmed & 3 others v Guardian Bank Ltd \(Sued in its capacity as a successor in Title to First National Finance Bank Ltd\)*](#) [2019] eKLR the Court of Appeal while dismissing an appeal relied on [*Halsbury’s Laws of England*](#),^{4thEd.} (re-issue), Vol. 36(1) at paragraph 76, which stated the following about amendments of pleadings: -

““The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose, the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its motion. The person applying for an amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if an analysis of it is intended for the first time thereby advancing a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side. [Emphasis added].”

24. The joinder of the two parties is at the behest of the Applicant, who requests that they be joined as Defendants/interested parties and that the parties amend their pleading to accommodate the joinder. In other words, the Applicant seeks to introduce new Defendants to the Plaintiff. That is not what Plaintiff desires. If the Applicant wanted to include those parties, he could have filed 3rd party proceedings. He is the only one who knows about their involvement in the sale transaction. Nothing has been presented to this court to show how those parties were involved. It’s just assertions in the supporting affidavits with no evidence. In this case, just like in the [*Good News Church of Africa*](#) (*supra*), I agree with Justice Odeny, the new intended parties to be joined in this suit will if admitted, further complicate it. They will be leaning as witnesses for the Applicant/ 3rd Defendant. I don’t think they are fit for joinder. They will further cloud this protracted trial. We will go to the drawing board and reopen pleadings for a fresh start. Too much time seems to have been consumed in addressing interlocutory applications since 2013 and the main suit remains docked – the sails have never been unfurled. It defeats expeditious disposal and active case management strategies and erodes the course of justice



25. The upshot and my holding are that the application dated 21st of February is hereby dismissed with costs to the Respondent in any event.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
2ND DAY OF NOVEMBER, 2022.**

E. K. MAKORI

Judge

In the Presence of:-

Mr. Kimani for the 3rd Defendants/Applicants

In the Absence of: -

Mr. Muturi for the Plaintiff/Respondents**

