

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC CASE NO. E009 OF 2021

ROBERT KIOKO MUTHIANI
.....**PLAINTIFF**
-VERSUS-
MUMBUA TITUS KIMINZA**1ST**
DEFENDANT
DAVID WAMBUA**2ND DEFENDANT**
WAMBUA MUTEI**3RD DEFENDANT**
MWANZIA KISINI**4TH DEFENDANT/APPLICANT**
MARY KATUNGE ONESMUS**5TH DEFENDANT**
-AND-
NORMAN KYALO MUKITI**INTENDED 6TH DEFENDANT**

RULING

1. Before this Court for determination is the Notice of Motion dated 18th March, 2025 brought under the provisions of Section 3A of the Civil Procedure Act addition to Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010.
2. The 4th Defendant/Applicant seeks the following orders: -
 - 1) **THAT this Honourable Court be pleased to join NORMAN KYALO MUKITI as the 6th Defendant to the main suit.**
 - 2) **THAT costs of this application be in the cause.**
3. The application is premised on the grounds appearing on its face together with the supporting affidavit of Christopher Kisini Muindi sworn on even date.
4. The Applicant averred that he is the 4th Defendant and that he bought a portion of the suit property from Norman Kyalo Mukiti who is a nephew to the Plaintiff and also the grandson of the late Muthiani Musomba. He added that Norman Kyalo Mukiti is a beneficiary of the estate of the late Muthiani Musomba. The Applicant contended that for the effective determination of the issues in this

suit, it is necessary that Norman Kyalo Mukiti be joined to the suit adding that the Plaintiff will not suffer any prejudice.

5. Opposing the application, the 2nd Defendant filed grounds of opposition on 11th June, 2025. He contended that the orders being sought by the Applicant are not tenable since a defendant cannot enjoin another defendant in an ongoing suit. That the Applicant can only include the intended defendant as a party by filing a counterclaim in his defence. It was further contended that the intended defendant is listed as witness for the 2nd Defendant and will therefore be participating in the proceedings. He urged the court to strike out the application with costs.
6. The Plaintiff asserted that he was not opposed the application.
7. The application was canvassed by way of written submissions.
8. In the 4th Defendant/Applicant's submissions dated 7th October, 2025, Counsel reiterated that the proposed 6th Defendant is a beneficiary of the estate of the late Muthiani Musomba. Citing the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules, Counsel submitted that if a party's presence is necessary to enable the court to effectively settle all the questions in the suit, then joinder may be ordered upon the application of either party or even *suo moto* by the court. It was further submitted that the 2nd Defendant had not stated how he would be prejudiced and that it is not sufficient that the proposed 6th Defendant is a witness for the 2nd Defendant.
9. In the 2nd Defendant's submissions dated 3rd October, 2025, Counsel identified two issues for determination namely: -
 - a) *Whether the 4th Defendant can enjoin another Defendant in an ongoing suit; and*
 - b) *Whether Norman's participation as a witness addresses the 4th Defendant's concerns.*

10. Citing the case of **Civicon Limited v Kivuwatt Limited & 2 others (2015) eKLR**, Counsel submitted that a plaintiff holds the prerogative on who to sue and that a defendant wishing to introduce another party can only do so by filing a counterclaim against that party. Counsel contended that the 4th Defendant's attempt at joining Norman Kyalo Mukiti as a defendant is procedurally irregular and legally untenable.

11. Submitting on the second issue, Counsel contended that the proposed defendant's evidence will be presented before the court and therefore his joinder is unnecessary. Counsel submitted that the application is devoid of merit and that it should be dismissed with costs.

12. After perusal of the application, the replying affidavit and the rival submissions, the sole issue for determination arising is as follows: -

a) Whether the intended 6th defendant should be joined as a party in the suit?

13. Joinder of parties to proceedings is governed by Order 1 of the Civil Procedure Rules. In respect of joinder of defendants to a suit, Order 1 Rule 3 of the Civil Procedure Rules 2010 outlines as follows: -

'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.'

14. Order 1 Rule 10 (2) makes provision for the addition of either a plaintiff or a defendant to an already filed suit. It outlines as follows:-

'(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 in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.’

15. In the case of Nyalwanga (Suing as the Administrator of the Estate of Joan Atieno Mango - Deceased) & 2 others v Owuor & another [2025] KEELC 6910 (KLR), the court outlined as follows: -

“Order 1 Rule 3 of the Civil Procedure Rules provides for persons who may be joined as defendants in a suit, and Order 1 Rule 10 of the Civil Procedure Rules empowers the court to substitute and add parties to an existing suit, as in the present case. In my view, under Order 1 rule 10(2) of the Civil Procedure Rules, the court can only join a person as defendant to an existing suit in two instances, first, where such person ought to have been joined as a defendant under Order 1 rule 3 of the Civil Procedure Rules aforesaid and was not so joined and secondly, where the presence of such person before the court may be necessary to enable the court to adjudicate and settle all questions involved in the suit. The court will, at the hearing of the joinder application, determine if the person sought to be joined as a defendant in this suit should have been joined as a party to the suit when the suit was filed or whether his/her presence before the court is necessary to enable the court to adjudicate and settle all questions involved in the suit.”

16. In the present application, the 4th Defendant has sought the joinder of Norman Kyalo Mukiti to the suit as a defendant on the grounds that he was the one who sold a portion of the suit property to him vide a sale agreement dated 17th January, 2021 and that his joinder as a party to the suit will effectively

determine the issues raised. The 4th Defendant further alleged that he purchased the suit property from the proposed 6th Defendant, the latter being a beneficiary of the Estate of Muthiani Musomba.

17. The Plaintiff did not oppose the issues of fact raised in the application. He also did not oppose the joinder of Norman Kyalo Mukiti.

18. The 2nd Defendant opposed the application arguing that the 4th Defendant cannot dictate who should be sued as a co-defendant as that prerogative rests with the Plaintiff. He further argued that the proposed 6th Defendant is one of the witnesses listed in defence to the Plaintiff's claim against him.

19. In the case of **Civicon Limited v Kivuwatt Limited & 2 others [2015] eKLR**, which was cited by the 2nd Defendant, the Court of Appeal aptly observed as follows: -

“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 the 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.”

20. The Court of Appeal went on further to hold as follows: -

“The question is whether the right of a person may be affected if he is not added as a party. Generally in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided... From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 rule 10 (2) bearing in mind the unique circumstances of

each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

21. In the *Civicon case (supra)*, the Court of Appeal made reference to the Supreme Court of Uganda case of Deported Asians Property Custodian Board vs Jaffer Brothers Limited (1999) I EA 55 (SCU) in which it was held that: -

“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 a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) 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.” [emphasis added]

22. On the basis of the foregoing, it is manifestly clear that the 4th Defendant wishes to mount a defence to the Plaintiff’s case on the strength of a contract that was executed between himself and Norman Kyalo Mukiti. Having derived a legal claim to the portion of the suit property allegedly from the proposed 6th Defendant, the 4th Defendant cannot effectually plead his opposing claim to the

land in the absence of Norman Mukiti who is a necessary party to the proceedings.

23. The interest of justice supersedes the 2nd Defendant's objection since the presence of the proposed 6th Defendant will help the court to effectually and completely adjudicate on all the issues concerning the suit property.

24. In the circumstances, the proposed 6th Defendant ought to be added as a Defendant in the suit in accordance with the provisions of Section 3A of the Civil Procedure Act and Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010. The final orders commending themselves are as follows: -

- 1) **An order is hereby issued for the joinder of NORMAN KYALO MUKITI as the 6th Defendant to the main suit.**
- 2) **An order is hereby issued granting leave to the Plaintiff to further amend his Amended Plaint dated 19/2/2024 accordingly and serve upon the Defendants within fourteen (14) days of the order herein.**
- 3) **An order is hereby granted for summons to enter appearance to issue against NORMAN KYALO MUKITI which summons shall be effected by the Plaintiff.**
- 4) **An order is hereby granted for leave to the Defendants to respectively amend their pleadings within fourteen (14) days of service of the further amended plaint in order no. (2) above.**
- 5) **THAT costs of this application be in the cause.**

.....

HON. E. OBAGA

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
THIS 13TH DAY OF NOVEMBER, 2025.**

IN THE PRESENCE OF:

Mr. Kasyoka for Plaintiff/Respondent

Ms. Kyalo for 2nd Defendant.

Mr. Osoro for 4th and 5th Defendants.

Court assistant – Steve Musyoki

ORIGINAL