



REPUBLIC OF KENYA



KENYA LAW
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**Khasiani & another v Grove Development Limited (Environment & Land
Case 254 of 2022) [2024] KEELC 216 (KLR) (29 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 254 OF 2022**

AE DENA, J

JANUARY 29, 2024

BETWEEN

ANDREW KHASIANI PLAINTIFF

AND

PENTECOASTAL ASSEMBLIES OF GOD [PAG] PROPOSED PLAINTIFF

AND

GROVE DEVELOPMENT LIMITED DEFENDANT

RULING

1. The application subject of this ruling has been brought pursuant to the provisions of sections 3A of the *Civil Procedure Act* and 13 of the *Environment and Land Court Act*, Order 1 of the Civil Procedure Rules and lastly Article 159 of *the Constitution*. The Plaintiff seeks the following prayers;
 1. That the intended 2nd Plaintiff herein be joined in this claim as the 2nd Plaintiff henceforth.
 2. That this court be pleased to issue leave for the Plaintiffs to amend their pleadings
 3. That costs be in the cause
2. The application is premised on the grounds that the claim herein involves the intended 2nd Plaintiff whose residence is also on the contested suit parcel Kwale/Diani Beach Block/20. That the 2nd intended Plaintiff which is a registered society has been residing on the southern part of the suit parcel since 1977 and operating a church. That the court would be better informed of the issues surrounding the property if the grievances of the intended party are brought forth through the proposed joinder. Further that the joinder will reduce multiplicity of suits and save the courts time and no prejudice will be occasioned to the Defendants.



3. The application is supported by an affidavit sworn by the 1st Plaintiff Andrew Khasiani. It is deponed that the 2nd Intended Plaintiff joined the plaintiff on the suit property since the year 1977 when a church was built by the daughter of one Mrs Grant and which is before the sale of the suit property. That he oversaw the extension of this church located to the south end of the suit property. That he has been in charge of the entire land to ensure there are no encroachers. According to him both he and the 2nd intended Plaintiff have enjoyed quiet and peaceful stay on the property. That no one has claimed the land until on 3/3/2023 when during the court site visit the intended party became aware of these proceedings. Citing the case of *King'ori v Chege and 3 Others* [2002] 2 eKLR 243 it is dated that said intended party meets the threshold of being enjoined as a Plaintiff. That this being a court of equity it must protect the interest of all parties who appear before it.
4. Also filed on the 23/5/25 alongside the above is an affidavit by Nicholas Kamina who describes himself as the Head Pastor of Pentecostal Assemblies of God (PAG). This affidavit reiterates the depositions made by the Plaintiff foregoing. Additionally it is deponed that he has never met the Defendants. That the church will be affected by the decision of the court and it is in the interest of justice the church is joined.
5. The application is opposed by an affidavit sworn by Minesh Ramesh Chandra Pandya, a director of the Defendant company. It is averred that the 2nd proposed Plaintiff is not an individual nor a company under the *Companies Act* nor a limited liability partnership and hence cannot be sued or sue. That the same is a registered society under the *Societies Act* which can only be sued and sue through its registered officials. This is reiterated in the Defendants grounds of opposition filed before court on 26/6/2023. Further that the Defendant has no dispute with the registered officials of the Pentecostal Church and no issues have arisen between the parties as the presence of the church and the occupation of the same on the suit property has the approval of the Defendant company. Referring to Sale Agreement dated 28/10/1994 it is deponed that the sale was conditional upon the buyer setting apart an acre for the church and transfer the portion to the church.
6. Referring to the site visit report of the suit property dated 6/3/23 it is further averred that the church is located at the far end of the part of the suit property marked B and which the Plaintiff is not in occupation. That the court has allowed the Defendant to secure the same since the Plaintiff is not in occupation. That there is no relationship between the Plaintiffs occupation and the church's presence in the property to warrant the grant of the orders sought. It is stated that the Plaintiff do not hold any crucial information that might assist allow in the suit as the court. That the church through its registered officials has not lodged any claim for adverse possession or indicated that it is interested in such a claim.
7. It is further averred that the application is made in bad faith as it is made with the misplaced hope that the joinder will somehow increase his chances in succeeding in his claim. The Defendant prays the application should therefore be dismissed with costs.
8. On 23/8/23 the Plaintiff/Applicant filed another affidavit in support of the application herein sworn by Patrick Musungu Lihanda. It is deponed the same is in response to the replying affidavit by the Defendant. He avers that he is General Superintendent of the intended 2nd Defendant based at the headquarters and in charge of all local assemblies and the registered trustee serving on the board of trustees and hence competent to swear the affidavit on behalf of the church. According to the deponent, the intended 2nd Defendant was established by a missionary one Mrs Emily Grant in the year 1970 who is deceased. The said missionary was the owner of the suit property. The church was built on the suit property herein. That the church recognises the 1st Plaintiff as the caretaker of the said Mrs Emily Grant and that the 1st Plaintiff took part in the construction of the church.



9. It is averred that the 2nd intended Plaintiff took possession of the suit property since its inception at Ukunda and construction of the church premises. That being the first church to be constructed in Ukunda, it was exempted from being registered as a society as evidenced by the certificate of exemption. That the Defendants have recently carried out subdivisions of the suit property and failed to list the church as a beneficiary of the same. Having been in occupation and control of the suit property for over 50 years, the 1st Plaintiff who the church has always known as an employee of Mrs Grant and who assisted on the construction/expansion of the church and the 2nd intended Plaintiff are entitled to a share of the suit property and hence the suit and instant application. That it is therefore important to have the intended Plaintiff included in the suit.

Submissions

10. On 17/7/2023 This court ordered that the application be canvassed by way of written submissions. The Defendant filed submissions on 13/9/23 and the Plaintiff on 23/08/23. The court has read the submissions and authorities cited and has considered the same in its ruling.
11. The gist of the dispute subject of this ruling is the enjoining into these proceedings the intended 2nd Plaintiff who is the Pentecostal Assemblies of God [PAG].
12. First and foremost I find it necessary to deal with some preliminary issues that have been raised in response to the application. It is submitted on behalf of the Defendant that the affidavit of Patrick Musungu Lihanda and produced as an annexure marked 'PAG-1 to the affidavit of Nicholas Kamina sworn on 22/08/23 and filed on 23/08/23 has no probative value. According to counsel for the Defendant an affidavit cannot be an annexure to another affidavit. To buttress this point the court has been referred to two court decisions *Republic v Ministry of Health & 3 Others ex parte Kennedy Amdany & 27 Others* [2018] eKLR and *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR.
13. I have perused the application and how the impugned 'PAG 1' has been introduced into the proceedings of the present application? The court notes that there are two affidavits sworn by Nicholas Kamina one filed on 23/5/24 and the other on 23/8/23. It is the later that is being impugned and was sworn on 22/8/23. At paragraph 3 therein it is stated that the church superintendent is willing to act as trustee in the suit together with the deponent Nicholas Kamina who is the local pastor and annexes 'PAG 1'. PAG 1 is an affidavit sworn by the Patrick Musungu Lihanda 'Affidavit In Support Of Chamber Summons Dated 19th May 2023'. The court notes that PAG 1 bears a court stamp of 23/8/23. Actually it is the same affidavit which is already referred to at paragraph 8 of this ruling. Therefore it has been first filed as a standalone affidavit in support of the Chambers summons filed by the Plaintiff Andrew Khasiani and secondly as an annexure in Mr. Kamina's affidavit. The court is invited to consider the annexures introduced in PAG1 being The Deed of Trust, Church Constitution, Authority to plead and Certificate of exemption from registration as all hearsay.
14. I have read the brief ruling of the Supreme court cited above. I note that the apex court pointed the probative value of such an affidavit introduced as evidence in proceedings was unusual if not strange and that their probative value come into question. The apex court with due respect to counsel did not term this an anomaly as stated in the submissions herein. In any case the court did not conclude on the fate of the annexed affidavits. For me at this stage the court is not dealing with the merits of the case before it but whether the criteria for joinder has been met. Any evidence can be adduced once leave is granted and the intended 2nd Plaintiff has become a party.



15. Should the intended 2nd Plaintiff be joined as party to the suit? The provisions of law guiding the enjoining of a party to a suit or removal therefrom is Order 1 Rule 10 of the Civil Procedure Rules, which provides verbatim as follows: -

10. Substitution and addition of parties [Order 1, rule 10.]

- (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
- (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.
- (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.
- (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

16. But what is the law as to who may be joined as plaintiffs. Order 1 Rule 1 provides as follows;-

“All persons may be joined in one suit as Plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where such persons brought separate suits, any common question of law of fact would arise.

17. From the foregoing it clear the power to add a party to proceedings is discretionary but the provisions above have also given a criteria and or what should guide the court in exercising its discretion. Further in making a determination on whether or not to enjoin a party in proceedings, the court mainly seeks to identify the said party’s stake in the case given that they were initially not a party to the same at the time of commencing the suit. In this regard I’m persuaded by Lady Justice Mbugua J in Leonard Kimeu Mwanthi v Rukaria M’twerandu M’iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties) [2021] eKLR, where it was stated,

A party claiming to be enjoined in proceedings must have an interest in the pending litigation”

18. In the present suit, it is the Plaintiff/ Applicants case that the party intended to be enjoined in the suit is in actual physical possession of a portion of the suit property. The sentiments are also echoed by the Defendant who admits that the intended 2nd Plaintiff is in occupation of the suit property and which is supported by the report on the site visit undertaken by the court and that they have absolutely no issue with the said occupation. It is the Plaintiffs/Applicant’s occupation and claim for ownership of the suit parcel by way of adverse possession that is contested. My attention has however been drawn to the affidavit in support of the application as sworn by Patrick Musungu Lihanda who claims to be the



general superintendent of the intended plaintiff. He states that despite claiming to have no issue with the intended Plaintiffs occupation of the suit property, the Defendant has sub divided the suit property without any specific allocation to the intended Plaintiff. From this statement it can be gathered that the intended Plaintiff has apprehension of being rendered landless by the Defendant's actions. The same has in my opinion necessitated their intention to be enjoined in this suit.

19. Having perused the pleadings for and against the application, it is my opinion that an identifiable stake has been singled out by the intended Plaintiff and which the Defendant has confirmed. The intended Plaintiff is in occupation and use of part of the suit property, and any decision made in this suit is bound to affect its interest. Additionally to me the second intended Plaintiff ought to have been joined to these proceedings abinitio since I note from the Originating Summons the Plaintiff/applicant is claiming the entire suit property and not the portion he alleges to occupy. It is a necessary party in my view. Each case is decided on its facts and merit. I do not see how I would sever the two claims herein as I can see common issues of law and facts are likely to emerge. Why then create a multiplicity of suits. It is prudent that all the issues are resolved within this suit. The court also finds support in the case of *Zephir Holdings Ltd v Mimosa Plantations Ltd & 2 Others* [2014] eKLR.
20. But having made the above finding, the Defendant doubts the capacity of the 2nd proposed Plaintiff to sue or be sued in its name that is Pentecostal Assemblies of God. It has been alleged that the intended Plaintiff has not been registered as a society and furthermore it is the officials of the same that should be sued and sue in their capacity as the officials. The court has been referred to a several authorities in this regard and some of which I have referred to. The Applicant has stated that it was exempted from registration as a society as evidenced by a copy of the certificate of exemption. It is still considered a society since it was lawfully exempted. It is trite that a society can only institute legal proceedings or defend the same through its representatives. This position was stated by the court in *Trustees Kenya Redeemed Church & Anor v Samuel M'Obiya & 5 others* [2011] eKLR where it was held thus:

“It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.”
21. In *African Orthodox Church of Kenya v Charles Omuroka & another* [2014] eKLR court held; -

“There is no doubt therefore, that both the Plaintiff and the 2nd Defendant as societies or Associations registered under the *Societies Act* are not legal entities capable of suing and being sued in their own names. They have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings. They can only sue through Trustees, if they have one or in the names of their officials in a representative capacity”
22. It is clear that the intended party has no capacity to sue on its own. The application to be enjoined should have been through its trustees. I will reiterate that at this point of the application the intended party is not yet added as a party until the orders are given. Revisiting the provisions of Order 1 Rule 10 of the *Civil Procedure Rules*, it is evident that the court can suo moto order for a party to be enjoined in the proceedings to aid in dispensation of justice from a point of having the rightful information over the course of action. The court can therefore still invoke its inherent jurisdiction to order that the joinder be in the correct name.
23. The upshot of the foregoing is that I allow the chamber summons dated 19/5/2023 with the rider that the party to be joined should be the Registered Trustees and or the registered officials of the Pentecostal Assemblies of God.



24. Following the above OS herein shall be amended within 14 days of the date of this ruling and served upon the Defendants. The Defendant/Respondent shall respond appropriately within 14 days from the date of service.

25. Let each party bear its own costs.

It is so ordered.

RULING DATED SIGNED AND DELIVERED THIS 29TH DAY OF JANUARY 2024.

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A.E DENA

JUDGE

Mr. Chege holding brief Mr. Matende for Plaintiffs

Mr. Kagu for the Defendant

Hanningtone Kessy – Court Assistant

