



**Akello (Suing as Administrator of the Estate of Matayo Okello Oloo)
v Sundia; Oduma & 4 others (Applicant) (Environment & Land Case
44 of 2015) [2024] KEELC 169 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 44 OF 2015
BN OLAO, J
JANUARY 25, 2024**

BETWEEN

**FRANCIS TOBIAS AKELLO (SUING AS ADMINISTRATOR OF THE ESTATE
OF MATAYO OKELLO OLOO) PLAINTIFF**

AND

GABRIEL ONYACHI SUNDIA DEFENDANT

AND

FELISTER OUNDO ODUMA APPLICANT

MILLIS AJIAMBO ODUMA APPLICANT

PHILIS MAKOKHA SUNDIA APPLICANT

KELVIN OCHIENG ONYACHI APPLICANT

COLLINS OWINO ODUMA APPLICANT

RULING

1. Francis Tobias Okelo (the plaintiff herein and suing as the Administrator to the Estate of Matayo Akelo Oloo) instituted this suit vide his plaint dated 8th May 2015 in which he sought the following substantive orders against Gabriel Onyachi Sundia (the defendant):
 - i. An injunction restraining the defendant, his family members, servants, agents and those claiming through him from cultivating, developing or otherwise dealing with the land parcel No Samia/Luanda-Mudoma/3752.
 - ii. Order of demolition and eviction.
 - iii. Damages.



- iv. Costs.
2. The defendant filed a defence disputing the plaintiff's claim to the land parcel No Samia/Luanda-Mudoma/3752. He pleaded that the said parcel land was created following a fraudulent amalgamation of the land parcels No Samia/Luanda-Mudoma/1369 and 693. He therefore sought judgment against the plaintiff by way of a counter-claim as follows:
 1. Dismissal of the plaintiff's suit.
 2. A declaration that the consolidation of the land parcels No Samia/Luanda-Mudoma/1369 and 693 was illegal and should be revoked.
 3. Costs.
3. The suit was heard by Kaniaru J and in a judgment delivered on 20th February 2019, he dismissed the defendant's counter-claim and entered judgment for the plaintiff as per prayers (i), (ii) and (iv).
4. The defendant was aggrieved by that judgment and filed a Notice of Appeal. Meanwhile, the defendant filed an application dated 22nd February 2022 for stay of execution. That application was withdrawn on 21st March 2022. The defendant's application for leave to appeal out of time was also dismissed by the Court of Appeal vide Civil Application No 96 of 2019.
5. I now have for my determination a Notice of Motion dated 25th September 2023 and filed by Felister Oundo Oduma, Millis Ajiamba Oduma, Philis Makokha Sundia, Kelvin Ochieng Onyachi and Collins Owino Oduma (the 1st, 2nd, 3rd, 4th and 5th Applicants respectively) in which they seek the following orders:
 1. Spent.
 2. That leave be granted to the Applicants to be enjoined in this suit as interested parties.
 3. That there be a stay of eviction and execution of the decree herein pending the hearing and determination of this application interpartes.
 4. That the Applicants be allowed to file their responses to the claim herein.
 5. That this Honourable Court do recall the warrants of attachment and/or the eviction orders issued in respect of the matter.
6. The application is premised on the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Article 159(2) of the *Constitution* 2010. It is predicated on the grounds set out therein and supported by the joint affidavit of the Applicants also dated 26th September 2013.
7. The gravamen of the application is that although this court had vide its judgment issued an eviction order against the defendant in respect to the land parcel No Samia/Luanda-Mudoma/3752, that title was subsequently cancelled and no longer exists. However, the firm of Eshikhoni Auctioneers is in the process of evicting them from the said parcel of land whose title has been cancelled and it no longer exists. That the said title originated from the land parcel No Samia/Luanda-Mudoma/1369 in which Lucas Sundia, Oduma Muga and Okochi Muga had 1/3 share each and the plaintiff did not inform the court the true position. That the land parcel No Samia/Luanda-Mudoma/3752 originated from the amalgamation of the land parcels No Samia/Luanda-Mudoma/1369, 2203, 2204 and 2205 which have different owners. If the eviction order is executed, the Applicants will suffer great irreparable loss and the Applicants have a good defence and they should be heard before any execution. This application



has been brought timely and in good faith and the plaintiff used un-constitutional and illegal means to obtain the orders herein.

8. The Applicants annexed the following documents to their affidavit:
 1. Copy of Limited Grant of Letters of Administration *Ad Litem* issued to Felister Oundo Oduma and Millis Ajiambo Oduma in respect to the Estate of Peter Oduma Muga alias Oduma Muga.
 2. Copy of Limited Grant of Letters of Administration *Ad Litem* issued to Kelvin Ochieng Onyachi and Collins Owino Oduma in respect to the Estate of Okoth Muga Khadera alia Okochi Muga.
 3. Copy of Limited Grant of Letters of Administration *Ad Litem* issued to Philis Makokha Sundia in respect to the Estate of Lukas Sundia Muga alias Lukas Sundia Peter.
 4. Copy of Decree issued in ELC Busia Petition No 2 of 2019.
 5. Copy of letter dated 20th September 2023 from Land Registrar Busia addressed to the County Surveyor Busia in respect of Implementation of Decree in Petition No 2 of 2019 on revocation of title No Samia/Luanda-Mudoma/3752.
 6. Copy of letter dated 21st September 2023 from the County Surveyor Busia addressed to the Regional Surveyor Kakamega on revocation of title No Samia/Luanda-Mudoma/3752 and reinstatement of titles No Samia/Luanda-Mudoma/1369, 2203, 2204 and 2205.
 7. Copy of certificates of official search for land parcel No Samia/Luanda-Mudoma/1369 registered in the names of Lukas Sucndia, Oduma Muga and Okoth Muga on 23rd May 1979.
 8. Copy of Letter dated 31st August 2023 from the Chief Namboboto Location and addressed to the Deputy Registrar Busia High Court with regard to the beneficiaries of the land parcel No Samia/Luanda-Mudoma/1369.
 9. Copy of Adjudication Record issued on 1st August 1972 in respect to the land parcel No Samia/Luanda-Mudoma/1369.
 10. Implementation of the Minister's Decision dated 13th March 1987 in respect to the land parcel No Samia/Luanda-Mudoma/1369.
 11. Eviction order addressed to Eshikhoni Auctioneers to put back Francis Tobias Akello onto the land parcel No Samia/Luanda-Mudoma/3752.
 12. Copy of death certificate for;
 - a. Lucas Sundia Muga
 - b. Okoth Muga Khadera
 13. Copy of Identity Card No 2071858 for Philis Makokha Sundia.
9. The application is opposed and the plaintiff filed a replying affidavit dated 16th October 2023 in which he deposed, inter alia, that the application by the Applicants seeking to be enjoined in this suit has been over-taken by events as this dispute was heard and determined and an application for leave to appeal was dismissed by the Court of Appeal in Civil Application No 96 of 2019. That the issues being raised in the application were raised before Omollo J who, vide her ruling dated 26th January 2022, declared them to be re judicata. That some of the Applicants are the children of the defendant while



Philis Makokha Sundia (the 3rd Applicant) is the mother to the defendant and had filed her own case against the plaintiff in Busia ELC Case No 77 of 2019 which was struck out for being *res judicata*. This application is an afterthought and lacks merit as it has been filed following the striking out of Busia ELC Petition No 2 of 2022.

10. The record shows that although the Applicants were at some point represented by the firm of J. P. Makokha & Company Advocates, they filed this application in person.
11. When the application was placed before me on 26th September 2023, I directed that it be canvassed by way of written submissions to be filed on or before 26th October 2023. However, neither the Applicants nor Mr. J. V. Juma counsel for the plaintiff filed any submissions. The application will therefore be determined on the basis of the rival affidavits and annexures filed by the Applicants and plaintiff.
12. The Applicants seek the main order that they be enjoined in these proceedings as interested parties and be allowed to file their pleadings in response to the plaintiff's claim. The law on joinder of Interested Parties is set out in Order 1 Rule 10(2) of the [Civil Procedure Rules](#) as follows:

“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.”
Emphasis mine.

13. The Supreme Court of Kenya in the case of [Communications Commission of Kenya & 4 others v Royal Media Services Ltd & 7 others](#) Petition No 15 of 2014 [2014 eKLR], adopted its own decision in the case of [Mumo Matemu v Trusted Society Of Human Rights Alliance](#) 2014 eKLR and defined an Interested Party as;

“... one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.” Emphasis mine.

The same court in the case of [Francis K. Muruatetu & another v R](#) 2016 eKLR set out the following elements to be considered by the court in an application for joinder:

- a. 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 proximate enough to stand apart from anything that is merely peripheral
- b. 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 clearly outlined and not something remote.
- c. 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 those submissions are not merely a replication of what the other parties will be making before the Court.



14. The applicant's case for joinder in these proceedings is that the land parcel No Samia/Luanda-Mudoma/3572 No longer exists and that the land has reverted to the original land parcels No Samia/Luanda-Mudoma/1369, 2203, 2204 and 2205. Further that they occupy the said parcels of land and if the eviction orders are executed, they will suffer irreparable loss. The rejoinder by the plaintiff is that infact some of the Applicants are children of the defendant while the 3rd Applicant is the wife. Therefore this application is *res judicata* and was, in any event, determined by Omollo J vide a ruling delivered on 26th January 2022. If indeed the Applicants live on the land in dispute and the title No Samia/Luanda-Mudoma/3572 was cancelled, then they surely had an identifiable stake in these proceedings. And I am using the word "had" rather than "have" for reason which will soon become clear in this ruling.
15. The first hurdle that the remedy for joinder will have to surmount is that some of the Applicant (the Respondent did not say which ones, and it is not rebutted) are children of the defendant while the 3rd Applicant is his wife. That means that those Applicants who are the defendant's children are pursuing the same interests which the defendant was pursuing in this case vide his counter-claim which was dismissed by Kaniaru J in his judgment delivered on 20th February 2019. In that judgment, the plaintiff's prayers No 1 and 2 which were allowed were as follows as per paragraph 3 thereof
- 1) "Injunction restraining the defendant, his family members, servants and those claiming through him from cultivating, developing or otherwise dealing with land parcel No Samia/Luanda-Mudoma/3752"
 - 2) "Order of demolition and eviction."
16. The Applicants did not in their application set out clearly the case which they seek to prove if they are enjoined in these proceedings. However, by virtue of their relationship with the defendant, it seems clear to me that whatever they intend to pursue will be caught up with the doctrine of *res judicata*. The same is provided for in Section 7 of the [Civil Procedure Act](#) as follows:
- "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court." Emphasis mine.
- The rationale of the doctrine of *res judicata* is to bring litigation to an end. By virtue of their relationship with the defendant, the Applicants are essentially the "family members, servants, agents and those claiming through him" and who, by dint of the judgment by Kaniaru J, were not only restrained "from cultivating, developing or otherwise dealing with the land parcel No Samia/Luanda-Mudoma/3752" but they were also evicted therefrom. The Applicants wee affected by that judgment and if their application for joinder is allowed, they will basically be getting an opportunity to have a second biting at the claim by prosecuting again the claim which the defendant pursued through his counter-claim but lost. In my view, the Applicants cannot properly join these proceedings as Interested Parties because their interest in the land in dispute was prosecuted by the defendant. They may not have been parties ab initio but in terms of the doctrine of *res judicata*, it applies to parties and their privies. The Applicants were clearly the defendant's privies and indeed, the judgment by Kaniaru J applied to them. Clearly they cannot surmount the hurdle of *res judicata* in these proceedings.
17. Secondly, it is of course true that an Interested Party can be enjoined at any stage including even at appeal stage – [David Kiptugen v Commissioner of Lands](#) 2016 eKLR. In that case, the Court of



Appeal allowed an Applicant to be joined as an Interested Party at the appeal stage as disallowing the application would deny him the opportunity to be heard on his claim to the suit land. See also the case of *JMK v MWM & another* 2015 eKLR where the Court of Appeal adopted the reasoning of the Court of Appeal of Tanzania in the case of *Tang Gas Distributors Ltd v Said & others* 2014 EA 448 “that a party can even be added at the appellate stage”.

18. Those authorities, unfortunately, cannot aid the Applicants for the simple reason that there is already in these proceedings a final judgment by another Judge of concurrent jurisdiction over the subject matter herein. An application by the defendant seeking extension of time to file a Notice of Appeal against that judgment was dismissed by the Court of Appeal in Civil Application No 39 of 2021 (Kisumu) on 11th February 2022. Therefore, that final judgment has neither been reviewed nor set aside on appeal. In the circumstances, for this Court to allow the Applicants to be enjoined in these proceedings as Interested Parties will be tantamount to sitting on appeal over a final judgment of another judge of concurrent jurisdiction which is not permissible. In my view, the only route open to the Applicants would have been to be enjoined as Interested Parties in the appeal which, unfortunately, was closed on 11th February 2022 when Kiage JA declined their application to appeal out of time. And as was held in the case of *Tang Gas Distributors Ltd v Said & others (supra)*, a decision that has been followed in this country, this “suit or proceeding has been finally disposed of and there is nothing more to be done.” The remedy for joinder of the Applicants as Interested Parties in this suit under Order 1 Rule 10(2) of the *Civil Procedure Rules* is clearly not available to the Applicants.
19. Having declined to join the Applicants as Interested Parties in these proceedings for the reasons stated above, it follows that the remedies of stay of eviction, leave to file responses and the recalling of warrants of attachments cannot be granted.
20. Ultimately therefore and having considered all the evidence herein, I make the following disposal orders with respect to the application:
 1. The Notice of Motion dated 26th September 2023 is dismissed.
 2. The Applicants shall meet the costs thereof.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 25TH DAY OF JANUARY 2024.

Mr. Wanyama for Mr. J. V. Juma for Respondent present.

1st Applicant - Absent

2nd Applicant - Absent

3rd Applicant - Absent

4th Applicant - Absent

5th Applicant - Absent

BOAZ N. OLAO

JUDGE

25TH JANUARY 2024

