



**Swaleh & 4 others (Suing for Themselves and for All the other Members of Tuamukeni Self Help Group) v Ali & 12 others (Environmental and Land Originating Summons 105 of 2016) [2024] KEELC 29 (KLR) (15 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 29 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 105 OF 2016**

**MAO ODENY, J**

**JANUARY 15, 2024**

**IN THE MATTER OF: LAND PARCEL NUMBER 284/III/MN & OTHERS.**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR DECLARATIONS THAT THE  
PLAINTIFFS HAVE OBTAINED OWNERSHIP OF 1590  
ACRES OF THE ABOVE LAND BY WAY OF ADVERSE**

**POSSESSION**

**BETWEEN**

**ALI MHALA SWALEH & 4 OTHERS ..... PLAINTIFF  
SUING FOR THEMSELVES AND FOR ALL THE OTHER MEMBERS OF  
TUAMUKENI SELF HELP GROUP**

**AND**

**MOHAMED M. SHEIKH ALI & 12 OTHERS ..... DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 16<sup>th</sup> December 2022 by the Applicant seeking the following orders;
  - a. Spent
  - b. That this Honourable court be pleased to join Mohamed Salim Shirazy as a defendant in this matter.
  - c. That costs of the application be provided for.



2. The application is based on the grounds set out on the face of the application and the Supporting Affidavit of Mohamed Salim Shirazy the Applicant who is also the intended 14<sup>th</sup> Defendant.

### **Applicant's Submissions**

3. It was the Applicant case that he is the registered owner of the following properties:
  - a. Subdivision No. 3725 Original No 284/178) Section 111 mainland North measuring approximately 2.861 Hectares;
  - b. Subdivision No. 3725 Original No 284/179) Section 111 mainland North measuring approximately 1.893 Hectares;
  - c. Subdivision No. 3725 Original No 284/180) Section 111 mainland North measuring approximately 1.893 Hectares;
  - d. Subdivision No. 3725 Original No 284/181) Section 111 mainland North measuring approximately 1.893 Hectares;
  - e. Subdivision No. 3725 Original No 284/182) Section 111 mainland North measuring approximately 0.5756 Hectares,;
4. Counsel submitted that the Applicant's land was originally part of plot LR NO.284/111//Mainland North which is the suit land and has been captured in the pleadings.
5. Counsel relied on the cases of *Laxmanbhai Construction Ltd V Kibingo Village (waridi Gardens) Ltd & 2 Others* [2012] eKLR, *Benson Mwangi Wangai v Ibrahim Ndwiiga & another* [2005] eKLR and submitted that the Applicant is a necessary party and has brought the application without delay. Counsel therefore urged the court to allow the application and prayed.

### **1<sup>st</sup> 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> Respondents' Submissions**

6. The Respondents opposed the application and relied on Order 1 rule 3 of the *Civil Procedure Rules* on joinder of Defendants to a suit. Counsel further cited the case of *Amon v. Raphael Tuck & Sons* [1956] 1 All ER 273 (CA) and submitted that every Plaintiff has a right to choose the person or persons he desires to sue' provided he claims some relief or remedy against such Defendants.
7. It was counsel's submission that in this case the Plaintiffs have made their claim and selected the Defendants against whom they are entitled to specific relief, under the doctrine of adverse possession. That they have not claimed that they are adversely occupying the Applicant's mentioned parcels of land, and the Applicant himself has not explained why the Plaintiffs may have, or are ignorant of a relief against him.
8. Mr. S M Kimani submitted that this is a representative suit the Applicant does not say that he has a cause of action jointly with the Plaintiffs against the Defendants herein, or jointly with the Defendants who are Plaintiffs in the case originated in Mombasa, against the Plaintiffs in the Malindi originating summons file. That further even if he had made such an averment, he cannot be joined either as a co-Plaintiff as he has not demonstrated that he was aware of any notice issued under Order 1 rule 8 of the *Civil Procedure Rules*.
9. Counsel therefore urged the court to dismiss the application with costs to the Respondents.



## Analysis And Determination

10. The issue for determination is whether the Applicant has met the threshold for joinder to this suit as a Defendant.

11. Order 1 Rule 10(2) of the *Civil Procedure Rules* states 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 or settle all questions involved in the suit, be added.”

12. In the case of *Kingori vs. Chege & 3 Others* [2002] 2 KLR 243 the court provided the following guiding principles for joinder of a party to a suit :

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

13. Similarly in the Supreme Court of Kenya in *Communications Commission of Kenya and 4 Others ... Vs... Royal Media Services Limited & 7 Others* [2014] eKLR relied on its earlier decision in the MUMO MATEMO case where the Court in defining who an Interested Party is, and held as follows:

“An interested party is 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. Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:

- a) What is the intended party’s state and relevance in the proceedings and
- b) Will the intended interested party suffer any prejudice if denied joinder.?”

14. The Applicant explained the interest that he has in the suit titles as the dispute touches parcels of land plot No. 284/111/MN situate at Kikambala within Kilifi County being one of them. The Applicant



also stated that is the registered owner 5 properties which the Plaintiffs claim ownership together with the subdivisions created from the mother title.

15. In the case of *Zephir Holdings Ltd vs. Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya* (2014) eKLR, the court held that :

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

16. I have considered the reasons advanced by the intended 14<sup>th</sup> Defendant and find that he is a proper party to this suit. This matter is yet to be heard and the issues raised will be determined upon hearing of the suit on merit. The application is therefore allowed as prayed. .

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF JANUARY 2024.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

