



**Emfil Limited v Attorney General & 423 others; Maluki & 6 others (Proposed Defendant)
(Environment & Land Case 113 of 2015) [2024] KEELC 1274 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 113 OF 2015
LL NAIKUNI, J
FEBRUARY 27, 2024**

BETWEEN

EMFIL LIMITED PLAINTIFF

AND

THE HONOURABLE ATTORNEY GENERAL & 423 OTHERS DEFENDANT

AND

ISAAC MUTUNGA MALUKI PROPOSED DEFENDANT

JENNIFER WANJIRA KAARIA PROPOSED DEFENDANT

NICHOLAS KIAMBI KAARIA PROPOSED DEFENDANT

LINDA MWENDE KAARIA PROPOSED DEFENDANT

TIMOTHY MUGWIMI KAARIA PROPOSED DEFENDANT

GUESTCARE IDEAL HOMES LIMITED PROPOSED DEFENDANT

ADONA – OCTIES LIMITED & OTHERS PROPOSED DEFENDANT

RULING

I. Introduction

1. The ruling by this Honourable Court regards the determination of three (3) Notice of Motion applications filed on 30th July, 2022, 9th September, 2022 and 20th July, 2022 brought under Certificates of Urgency. The said tripartite applications were moved by the Proposed Defendants herein Isaac Mutunga Maluki, Jennifer Wanjira Kaaria, Nicholas Kiambi Kaaria, Linda Mwendu Kaaria, Timothy Mugwimi Kaaria, Guestcare Ideal Homes Limited, Adona – Octies Limited and Others herein.



2. Upon service, the Plaintiffs and Defendants did not oppose the said applications. Nonetheless, the Court has proceeded to singularly assess and determine the said applications simultaneously on their merit whatsoever.

II. The Notice of Motion application dated 30th July, 2022

3. The application dated 30th July, 2022 was brought to Court pursuant to the provision of Order 1 Rule 10(2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21, Section 423 of the Insolvency Act, 2015 and Article 159(2) of the Constitution of Kenya, 2010.
4. The Applicants sought for the following orders: -
 - a. This Honourable Court be pleased to enjoin Isaac Mutunga Maluki forthwith in these proceedings as a Defendant.
 - b. Upon prayer 1 above being granted, the Plaintiff and the Defendants be compelled to serve their pleadings on the Proposed Defendant.
 - c. This Honourable Court be pleased to grant the Proposed Defendant leave to respond to the pleadings filed by the Plaintiff and the Defendant.
 - d. The Honourable Court be pleased to issue such further or other Orders as it may deem just and convenient.
 - e. The costs of this application be provided.
5. The application by the 1st Proposed Defendant/ Applicant herein was premised on the grounds, testimonial facts and averments made out under the 19th Paragraphed Supporting Affidavit of Issac Mutunga Maluki sworn and dated 30th July, 2022. The Applicant averred that:
 - a. The Proposed Defendant sought to be enjoined in the present proceedings as a Defendant as he had an identifiable stake, legal interest and/or duty in the proceedings before this Court but was not a party to the proceedings and/or involved in the litigation thereby necessitating the present application.
 - b. The proposed Defendant had a legitimate claim to the suit property by virtue of having purchased the property L.R Number Kwale/Ramisi Kinondo/Squatter S.S/84; being part of the suit property and measuring approximately 1.042 Ha from one Yusuf Mohammed Mwaranduni in the year 2016 and paying the full purchase price of a sum of Kenya Shillings Thirteen Million Two Hundred Thousand (Kshs.13,200,000/=). Annexed in the affidavit and marked as “IMM – 1” and “IMM – 2” were true copies of the Kenyan National Identity Card belonging to Yusuf Mohammed Mwaranduni and a Certificate of Title Deed in this regard.
 - c. Before purchasing the said property, due diligence was conducted by carrying out a Mohammed Mwaranduni as per records maintained at the Lands Office. Annexed in the affidavit and marked as “IMM – 3” and “IMM – 4” were true copies of the application for search and the Certificate of official search evidencing the same.
 - d. The said Yusuf Mohammed Mwaranduni proceeded to show him the beacons to the land and physically pointed out the suit land to him.
 - e. It was averments by the Proposed Defendant that due process was followed in acquiring approvals from the Land Control Board and in obtaining the rent and rates clearance



certificates and the completion documents, including the original title, released to the Proposed Defendant. What was remaining was payment of Stamp Duty and the Proposed Defendant was granted physical possession of the suit property.

- f. On account of having obtained money to pay for Stamp Duty, the Proposed Defendant caused a Search at the land registry on 18th May 2021 and established that there was a restriction placed on the larger parcel of the land including the Proposed Defendant's on account of the proceedings before this Honourable Court. Annexed in the affidavit and marked as "IMM – 9" was a true copy of the official search evidencing the same.
- g. This Court was being called upon to make certain findings or issue certain orders that will directly infringe on the Proposed Defendant's right to acquire and own property guaranteed under Article 40 of *the Constitution* and thereby adversely be affected in law if the matter was heard and determined in his absence. The Proposed Defendant stood to be infringed and he would likely be adversely affected in law if the matter was heard and determined in his absence.
- h. The joinder of the Proposed Defendant, as an antecedent would assist in just and fair resolution of the present case. The proposed Defendant had a legitimate and identifiable stake with sufficient grounds in law and fact to be joined to these proceedings
- i. It was a cardinal rule of procedural law that any party who stood to be directly affected by any orders that may be eventually issued and whose participation is necessary in a suit for effective adjudication of the matters in issue ought to be made a party in the suit.
- j. Given the foregoing, it was only fair and just that the Proposed Defendant be accorded the opportunity to champion his case and prove his stake in the suit property before this Honourable Court.
- k. The Proposed Defendant also had a duty to uphold *the Constitution* of Kenya and advance the rule of law and the administration of justice and assist the Court in matter to or ancillary or incidental to the law; hence the application for joinder.
- l. It would be unfair for the Court to make a determination of the issues raised based only on the parties that had entered appearance when there was a claim by the Proposed Defendant to the property L.R Number Kwale/Ramisi Kinondo/Squatter S.S/84.
- m. By enjoining the Proposed Defendant, the Court would avoid multiplicity of suits. The presence of the Proposed Defendant would ensure that the matter in controversy between the parties are completely and finally determined by this Honourable Court and forestall all multiplicities of legal proceedings relating to this matter before the Court.
- n. The Plaintiff and the other Defendants would not be prejudiced by this application since they would have the opportunity to respond to any claims made by the Proposed Defendant touching on the suit property.
- o. In the circumstances the Honourable Court's intervention was called for to prevent further injustice to the Proposed Defendant. It was mete and just that the prayers sought this Application be granted.

III. The Notices of Motion applications dated 9th September, 2022

- 6. The applications dated 9th September, 2022 was brought pursuant to the provisions of Sections 1A, 1B, 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 1 Rule 3; 10 (2) (4) of the Civil Procedure Rules 2010.



7. The Applicants sought for the following orders in both the applications: -
 - a. Spent.
 - b. That upon service and hearing of the Application on a date to be ordered by the Court, the Honourable Court be pleased to order that the Applicant be granted leave and be joined as a Defendant in this suit and be served with Plaint and Summons to enter appearance and be granted leave to unconditionally file and prosecute her defence to the Plaintiff's suit.
 - c. That any other further orders be made as the Court may deem just and fit to grant.
 - d. That the costs of this Application be provided for.
8. The application by the Proposed Defendants/ Applicants herein was premised on the grounds, testimonial facts and averments made out under the 12th Paragraphed Supporting Affidavit of the Applicants sworn and dated 9th September, 2022. The Applicants averred that:
 - i. The Applicants are the lawful registered freehold titles proprietor of land known as Kwale/ Ramisi Kinondo. The title deeds were annexed and marked in the supporting affidavits.
 - ii. The Plaintiff's suit herein claims, inter alia, the same subject land registered in favour of the Applicants and occupied and in use and possession by the Applicants.
 - iii. The Plaintiff's suit further sought for the cancellation and revocation of the Applicants' titles numbers Kwale/ Ramisi Kinondo.
 - iv. Upon the filing of this suit, the Plaintiff had not served with Plaint and Summons to Enter Appearance upon the Applicants although the Plaintiff now sought to evict the Applicants from the Suit land and was interfering with the lawful use and possession of the land by the Applicants registered proprietor.
 - v. The proceedings, hearing and Judgement and/or Orders given in this suit would directly affect the Applicants' lawful interest in the land guaranteed and protected by the law and *the Constitution*.
 - vi. It was necessary to join the Applicants in the suit as the Applicants' presence and participation in the suit is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit.

IV. The Notice of Motion application dated 20th July, 2023

9. The application dated 20th July, 2022 was brought pursuant to the provision Sections 1A, 1B, 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 1 Rule 3; 10 (2) (4) of the Civil Procedure Rules 2010.
10. The Applicant sought for the following orders in both the applications:
 - a. Spent.
 - b. That upon service and hearing of the Application on a date to be ordered by the Court, the Honourable Court be pleased to order that the Applicant be granted leave and be joined as a Defendant in this suit and be served with Plaint and Summons to enter appearance and be granted leave to unconditionally file and prosecute her defence to the Plaintiff's suit.
 - c. That any other further orders be made as the Court may deem just and fit to grant.



- d. That the costs of this Application be provided for.
11. The application by the Proposed Defendant/ Applicant herein was premised on the grounds, testimonial facts and averments made out under the 15th Paragraphed Supporting Affidavit of Peter Mutuku Musomba, the director of the Applicant company sworn and dated 20th July, 2023. The Applicants averred that:
- i. The Applicants were the lawful registered freehold titles proprietor of land known as Kwale/ Ramisi Kinondo. The title deeds were annexed and marked in the supporting affidavits.
 - ii. The Plaintiff's suit herein claims, inter alia, the same subject land registered in favour of the Applicants and occupied and in use and possession by the Applicants.
 - iii. The Plaintiff's suit further sought for the cancellation and revocation of the Applicants' titles numbers Kwale/ Ramisi Kinondo.
 - iv. Upon the filing of this suit, the Plaintiff had not served with the Plaint and Summons to Enter Appearance upon the Applicants although the Plaintiff now sought to evict the Applicants from the Suit land and was interfering with the lawful use and possession of the land by the Applicants registered proprietor.
 - v. The proceedings, hearing and judgement and/or Orders given in this suit would directly affect the Applicants' lawful interest in the land guaranteed and protected by the law and [the Constitution](#).
 - vi. It was necessary to join the Applicants in the suit as the Applicants' presence and participation in the suit was necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit.

V. Submissions

12. On 19th October, 2023 while all the parties were present in Court, they were directed to have the four notices of motion applications dated 30th July, 2022, 9th September, 2022 and 20th July, 2023 be disposed of by way of written submissions. By the time of penning down this Ruling none of the parties herein had complied. Pursuant to that a ruling date was reserved on Notice by Court on its merit accordingly

VI. Analysis & Determination.

13. I have carefully read and considered the pleadings herein by the Proposed Defendants herein the relevant provisions of [the Constitution](#) of Kenya, 2010 and statutes.
14. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
- a. Whether the proposed Defendants ought to be enjoined as a party in this instant suit
 - b. Who will bear the Costs of Notices of Motion applications 30th July, 2022, 9th September, 2022 and 20th July, 2023.

ISSUE No. a). Whether the proposed Defendants ought to be enjoined as a parties in this instant suit

15. Under this sub - title, the main substratum of the application is on joinder of parties. The Honourable Court opines that Joinder of parties is governed by Order 1 of the Civil Procedure Rules, 2010. In law,



joinder should be permitted of all parties in 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 such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rule, 2010. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties. This is the test I shall apply in this case.

16. Under the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 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.”

17. In saying so, I wish to refer to the case “Pravin Bowry – Versus - John Ward and Another [2015] eKLR” the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The court referred to the Ugandan case of “Deported Asians Custodian Board – Versus - Jaffer Brothers Ltd [1999] 1 E.A. 55 (SCU)” where the court stated as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter.....

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 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 by underline)



18. Additionally, the Court of Appeal in the case of:- “JMK – Versus - MWM & another [2015] eKLR” while speaking to the principle of joinder of a party in a proceeding noted as follows:

“This Court adopted the same approach in *Central Kenya Ltd - Versus - Trust Bank & 4 Others*, CA NO. 222 OF 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court...”

19. Further, the Court of Appeal in the case of “EG – Versus - Attorney General; David Kuria Mbote & 10 others (Interested Parties) [2021] eKLR” shedding more light on the application of this principle held as follows:

“(1) The core of the court’s power to join a party to any proceedings including at the appellate stage, as aptly discussed in *Hamisi Yawa & 36,000 others – Versus - Tsangwa Ngala Chome & 19 others* [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -

- a. The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.
- b. The intended party’s presence would enable court to resolve all the matters in the dispute.
- c. The intended party would suffer prejudice in case of non-joinder.
- d. The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.”

20. Similarly, in the case of “*Meme – Versus - 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.?"

21. The principles objectives for joinder are enunciated in the case of "Joseph Njau Kingori – Versus - Robert Maina Chege & 3 others [2002] eKLR" that;

"... that the guiding principles when an intending party is to be joined are as follows:

(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 to effectively and completely to adjudicate upon and settle all questions involved in the suit."

22. Although joinder as a party is not an automatic right, a party who is desirous to have a party enjoined in the suit can do so at any time in an ongoing proceeding through an application. The Court will then consider it and in its discretion decide on the suitability of such an addition. In making this determination the Court is accordingly guided by the principles set out in the cited authorities.

23. Applying the above legal principles to the instant case, the Applicants through their notices of motion applications seek to be enjoined as Defendants in the suit as they averred that at the time of filling of the suit they were registered proprietors of the suit property and that the proceedings, orders and the judgment entered in this suit will impact them. Despite the fact that the plots are numerous and perhaps of different sized or that they were sold to different persons they are all deduced from the suit property, and derived in the same transaction: they are based on the addendum between the Defendants, and all form part of the mortgaged property. Invariably, the determination of the real issues in controversy between the Plaintiff and the Proposed Defendants on the one hand, and the Honourable Court will need all concerned parties to be before the court. This course not only prevents duplication of efforts but also allows the court to determine the relief in the entire transaction and all common issues of fact and law which arise among the parties. Accordingly, to enable the court determine the real issues in dispute among all the parties, the intended Plaintiffs must be enjoined in the suit.

24. The Honourable Court agrees with the Proposed Defendants/ Applicant that enjoinder will assist this court being that the ownership of the suit property is being challenged and they have produced title deeds to parcel number LR. Number as under Kinondo/squatter Settlement Sceme (kwale/ Ramisi Kindondo S.S.) to that effect, the only way for the Honourable Court to get a clear picture to the dispute is to have the presence of the proposed Defendants in the suit. Therefore, I find merit in the prayer to enjoin the Proposed Defendants as Defendants in this suit.



ISSUE No. b). Who will bear the Costs of Notices of Motion applications 30th July, 2022, 9th September, 2022 and 20th July, 2023.

24. It is now well established that the issue of costs is at the Courts discretion. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

25. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

26. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event unless the court, for some good reasons, orders otherwise.

27. In this case, as this Honourable Court has opined above, and as the matter is still proceeding on, the Costs of these applications shall be in the cause.

VII. Conclusion & Disposition

28. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

- a. That the Notices of Motion applications dated 30th July, 2022, 9th September, 2022 and 20th July, 2023 be and are found to have merit and hence allowed in its entirety.
- b. That the proposed Defendants/Applicants is hereby enjoined as the Defendants in this suit.
- c. That the Plaintiff and the other Defendants be and are hereby compelled to serve their pleading on the Defendants/ Applicants herein within 14 days of this Ruling.
- d. That this Honourable Court be and is hereby pleased to grant the Defendants/ Applicants leave to respond to the pleadings filed by the Plaintiff and the earlier Defendants.
- e. That mention on 23rd May, 2024 to confirm compliance, hearing date and further directions being that this is a fairly only matter and should have been concluded by now. Hearing on 27th June, 2024



- f. That the cost of the Notices of Motion applications 30th July, 2022, 9th September, 2022 and 20th July, 2023 to abide the outcome of the main suit.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024.

**HON. JUSTICE MR. L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Wangari holding brief for M/s. Davys for the Plaintiffs/Applicants.
- c. Mr. Asige Advocate for some of the Applicants.
- d. Mr. Omulo Advocate for some of the Applicants.
- e. Mr. Kemei Advocate holding brief for M/s. Langat for 1st to 8th Defendants/Respondents.
- f. Mr. Birir Advocate for the 152 Defendant/Respondent.
- g. Mr. Apollo Mwendu Advocate for 12th, 142nd, 145th, 147th, 149th, 154th, 239th, 233rd, 241st, 306th, 308th and 318th.

