



**Nyasimi (Suing as the legal representative of the Estate of Isaac Okioro Nyasimi (Deceased)) v China Henan International Corporation Group & another (Civil Suit 3 of 2023) [2024] KEELC 913 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 913 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
CIVIL SUIT 3 OF 2023  
M SILA, J  
FEBRUARY 22, 2024**

**BETWEEN**

**MORARA NYASIMI ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ISAAC  
OKIORO NYASIMI (DECEASED)**

**AND**

**CHINA HENAN INTERNATIONAL CORPORATION GROUP .... 1<sup>ST</sup>  
DEFENDANT**

**MA HIU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

(Preliminary objection raised that the amended plaint does not conform to directions given in a ruling of the court; court finding that indeed the amended plaint does not comply with the ruling; such pleading incompetent and struck out; plaintiff given 14 days to regularize the pleadings or else the suit be struck out)

1. When this matter came up for directions on 9 November 2023, Mr. Nyamurongi, learned counsel for the defendant, submitted that he has a preliminary objection to raise on the veracity of the amended plaint herein filed on 21 November 2023. The objection was to the effect that the amended plaint, as filed, fails to comply with the ruling of 27 July 2023. Mr. Morara’s reaction was that he was not aware of such ruling and I gave him some time to verify the position and respond on 28 November 2023. On that day, Mr. Morara simply submitted that his understanding of the ruling was that the parties were joined by the order of the court and that he has no claim against them. I thus need to give my opinion on the preliminary objection hence this ruling. A bit of background to understand the genesis of the preliminary objection is certainly necessary.



2. This suit was commenced through a plaint which was filed on 24 October 2019 in the Chief Magistrates' Court at Kisii. Through an order made on 22 February 2023 the suit was transferred to this court as the subject matter exceeded the pecuniary jurisdiction of the Magistrates' Court. The ruling referred to in the preliminary objection was a ruling made when the matter was still before the Magistrate's Court.
3. The plaint, as originally filed, was against two persons, that is, China Henan International Corporation as 1<sup>st</sup> defendant and Ma Hiu, the 2<sup>nd</sup> defendant, with the 2<sup>nd</sup> defendant said to be an employee of the 1<sup>st</sup> defendant. Though it is not apparent in the title of the plaint, in the body of the plaint, the plaintiff averred that he is the appointed administrator of the estate of his deceased father, and it would appear that he is filing suit on behalf of the said estate. He averred that between October 2018 and April 2019, the defendants trespassed into the land parcels Wanjare/Bokeire/2181 and 2182 (the suit properties) and excavated stones and building materials thus intermeddling with the estate. In the suit, he asked for an order of permanent injunction against the defendants, an order for compensation for damages caused by their activities, a fine or imprisonment or both for intermeddling, costs and any other relief deemed fit to grant.
4. The defendants appointed counsel and filed a joint statement of defence. They denied wrongfully entering the suit properties and excavating materials. Without prejudice they averred that on the strength of representations made by one Erick Nyasimi and Zipporah Masese, they agreed to lease the suit properties for purposes of excavating gravel for road construction. They also raised issue that the plaintiff only holds a limited grant ad litem through the suit Kisii CM Ad Litem Cause No. 127 of 2019 and cannot on the basis of the limited grant mount the suit, and further, that the proceedings culminating into issuance of the grant were defective as the consent of the other beneficiaries was not granted. They pleaded that at an opportune time they would apply for orders to have Erick Nyasimi and Zipporah Masese joined as co-defendants in the case.
5. On 3 March 2021, the defendants filed an application dated 2 March 2021 seeking orders that :
  - a. Erick Nyasimi and Zipporah Masese be joined as defendants.
  - b. Consequent upon (a) above the plaintiff do accordingly amend the plaint herein.
  - c. Costs of this application be provided for.
6. The application was based on the reasons that the defendants excavated murrum on the suit properties pursuant to an agreement dated 17 September 2018 with the said Erick Nyasimi and Zipporah Masese who were described as brother and mother of the plaintiff respectively. It was averred that the said Erick Nyasimi and Zipporah Masese represented that the defendants have the blessings of the family to enter into suit properties and excavate murrum. It was added that following the agreement the family members were paid Kshs. 120,000/= for lease of the land for two years. They stated that it is now claimed that they are intermeddling with the estate of Isaac Okioro Nyasimi (deceased) and there is no plausible reason why the plaintiff did not join both Erick and Zipporah to the suit yet he was aware that they are the ones who invited the defendants to undertake the excavation. This application was opposed by the plaintiff culminating in the ruling delivered on 28 July 2021 by Hon. N.S Lutta, Chief Magistrate. I must say that the ruling is a difficult read, but there can be no question about its final determination, which was that the application is allowed. It means that the plaintiff was to proceed to amend his plaint and join Erick and Zipporah as co-defendants.
7. I have not seen any amended plaint filed pursuant to the orders above. Though no time frame was given, you would expect that any amended pleading be filed within 14 days of the order given, which is



the general period given under Order 8 Rule 6 of the *Civil Procedure Rules*, 2010. It follows that there was complete non-compliance with the order to join Erick and Zipporah as co-defendants.

8. What transpired thereafter was that the plaintiff, through a motion dated 27 June 2022, filed as Kisii ELC Miscellaneous Application No. E007 of 2022, applied to transfer the suit to this court because the claim would exceed the pecuniary jurisdiction of the Magistrates' Court. What prompted the application was that the plaintiff received a valuation report which quantified the loss suffered by the alleged activities of the defendants at Kshs. 75, 685,204/= meaning that the claim exceeded the pecuniary jurisdiction of the Magistrates' Court which is currently capped at Kshs. 20,000,000/=. I heard the application and allowed it in a ruling delivered on 22 February 2023. Within that ruling, I did raise issue that it was necessary to plead the specific amount claimed as damages, which had not been done in the original plaint.
9. On 13 June 2023, after the suit had been transferred to this court, I did grant the plaintiff leave to amend the plaint which culminated in the impugned amended plaint filed on 21 November 2023. The amended plaint now amends the title of the plaint to provide that the plaintiff sues as the legal representative of the estate of Isaac Okioro Nyasimi (deceased). In the body of the plaint there is elaboration on the manner of trespass and in the prayers the actual loss is quantified and figures provided. What is significant in our instance is that the amended plaint did not include Erick and/or Zipporah as co-defendants. In response to the Amended Plaint, the defendants filed an amended statement of defence "under protest" and within it, they averred that they would raise a preliminary objection to the propriety of the amended plaint for failing to comply with the order to amend that was made on 28 July 2021.
10. I have already elaborated how the order of 28 July 2021 was reached. There was indeed an order to amend the plaint so as to include Erick and Zipporah, and it is not in my place to question the order, for there was no appeal against it, nor has any application for review been lodged before me after the suit was transferred to this court. If the plaintiff was so aggrieved by that order to amend the plaint and include Erick and Zipporah as co-defendants, the avenue was to appeal that order, or seek a review (assuming that review was applicable), but not to ignore it as if the order was never issued. I would not wish to set a precedent where a person is at liberty to ignore court orders because they are not happy with the same, or feel that the order made, ought not to have been made. There are avenues for redress where one is not satisfied with a court order, but ignoring it, as if it was never made, is not one of the acceptable avenues. However bad the ruling may have been, the avenue to ignore it is not acceptable.
11. Having not exercised his right of appeal or review, and having failed to comply with the order to amend, I am afraid that this court cannot be sympathetic to the plaintiff. When the matter came up on 9 November 2023, I did not hear Mr. Morara, learned counsel for the plaintiff, say that he needed time to comply with the order, or needed time to appeal or file a review on it. What he said was that he was not aware of the order, and later, that there was ambiguity in it. I gave counsel time to regard the position of the plaintiff given the said ruling and directed the case to be mentioned again on 28 November 2023. On that day, Mr. Morara's response was that the parties (meaning Erick and Zipporah) were joined by the order and he also said that his client has no claim against them. Yet again, counsel did not say that he needs time to comply to amend the plaint, nor did he file any application for review, or in any other manner apply that the order be set aside. If he thought the order was ambiguous, he ought to have applied for clarification but no such application was filed. I repeat that the avenue to ignore the order was not available to the plaintiff.
12. The point I am making is that there is no room for non-compliance with court orders, whether one agrees with the same or not. I have already elaborated the trajectory that one needs to take when they are aggrieved by an order. If a party feels that an order is ambiguous, there is liberty to apply for clarification



if the path for appeal or review are not taken. I will repeat, and I have no problem repeating this a million times, that there is no avenue for ignoring a court order.

13. It is apparent that in the ruling of 27 July 2021, the court was of opinion that the suit cannot proceed without the presence of Erick and Zipporah as they were necessary parties to the case. They have not been made parties despite them being considered as necessary co-defendants before the case can proceed. There is purpose why court orders are made and in our case the court was of opinion that it cannot hear such suit without the presence of those two persons. Without the two persons ordered to be joined having been made parties, as directed by the Court, I do not see how the suit can be allowed to proceed. I do not see how one can wish to proceed with a suit where he has already been told he cannot proceed without some parties being present in the case.
14. For the above reasons, I uphold the preliminary objection. The amended plaint does not comply with the ruling of the court of 27 July 2021. The plaintiff chose to ignore that ruling as if it was never made. The only medicine that his amended plaint deserves is for it to be struck out with costs, which order I hereby make. Ordinarily I ought to strike out the suit but I will bend over backwards to accommodate the plaintiff. I direct that he files and serves a proper amended plaint in compliance with the ruling of court within the next fourteen (14) days. If nothing is filed then this suit will stand struck out with costs.
15. Orders accordingly.

**DATED AND DELIVERED THIS 22 DAY OF FEBRUARY 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

**Ruling Delivered in the Presence of :**

Mr. Mwangi Munga h/b for Mr. Morara instructed by M/s Morara Omoke & Company Advocates, for the plaintiff;

Ms. Kebungo, instructed by M/s Nyamurongi & Company Advocates for the defendants;

Court Assistant – Lawrence Chomba.

