



REPUBLIC OF KENYA



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**Osoro v Madzayo (Civil Appeal (Application) E008 of 2023)
[2024] KECA 636 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KECA 636 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E008 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JUNE 7, 2024**

BETWEEN

JOHN NYAGAKA OSORO APPLICANT

AND

JILANI MONGO MADZAYO RESPONDENT

*(Being a reference against the Ruling and Orders of the Court of
Appeal of Kenya at Malindi (J. Lesit, JA.) dated 7th July 202)*

RULING

1. The respondent, Jilani Mongo Madzayo, sued the applicant by way of a plaint dated 11th April 2017 filed in Malindi ELC Case No. 85 of 2017 seeking vacant possession of plot No. 885/III/MN situate at Mtwapa within Kilifi County (the suit property) by demolishing any wall or structures built by the applicant on the suit property; a permanent injunction to restrain him from dealing in the suit property in any manner; and costs of the suit and interest at court rates.
2. In his defence dated 24th April 2017, the applicant denied the respondent's claim and averred that the respondent's suit disclosed no cause of action; that the respondent had no capacity to sue; that his suit was statute barred; and that it was
3. In its judgment and decree dated 15th September 2021, the ELC (J. O. Olola, J.) entered judgment against the applicant as prayed. In addition, the learned Judge gave the applicant forty- five (45) days to hand over vacant possession of the suit property to the respondent, remove the structures erected and being thereon, failing which he was to be evicted.
4. Aggrieved by the impugned judgment and decree, the applicant lodged a notice of appeal on 28th September 2021. Thereafter, he filed a record of appeal dated 21st February 2023, which was served on an undisclosed date on the parties therein named. It is noteworthy that neither the notice of appeal nor the record aforesaid have been placed before us in this Reference.



5. By a Notice of Motion dated 17th April 2023 supported by his annexed affidavit sworn on even date, the applicant prayed for orders that:
- “ 1. Leave of Court is granted to amend memorandum of appeal to include the names of the officials of Mtwapa Jumba Self Help Group, a party already served with a notice of appeal as a second respondent in this appeal.
 2. The amended memorandum of appeal is admitted as part of a supplementary record of appeal.
 3. The costs of this application are in the appeal.”
6. The grounds on which the applicant’s Motion was anchored were, inter alia, that:
- “The respondent who was the plaintiff in the superior court did not include the officials of Mtwapa Jumba Self Help Group as defendants, yet they reportedly allocated land to both the appellant and the respondent. Their input into the matter through their records would have gone a long way into determining whose equity had priority; the appellant served his notice of appeal on the officials of the proposed respondent; inadvertently, the name of the officials and the self-help group was omitted in the memorandum of appeal; and it is paramount for the officials of Mtwapa Jumba Self Help Group participate on appeal as they were served with the notice of appeal and being the suit land allocating group, they will be affected by any decree or order on appeal.”
7. The respondent successfully opposed the application, which was dismissed on 7th July 2023 with costs to the respondent. In her ruling, L. Lesiit, JA. observed:
- “ 23. It does not fit well to the appeal to have them enjoined as respondent. The fact they were witnesses for the appellant, it does not look neat to have the same party who called them in his support enjoining them as respondents. I think it will cause a measure of embarrassment to the enjoined parties, and will cause prejudice to the respondent. It will change the nature of the case. The record will be confusing, having to refer to parties that were witnesses as respondents.”
8. Dissatisfied with the ruling of Lesiit, JA., the applicant comes on reference to a full bench pursuant to Rule 57 of the Court of Appeal Rules, 2022. In support of the Reference, learned counsel for the applicant, M/s. Stephen Macharia Kimani AKA Suleiman, filed written submissions dated 7th February 2024 citing no judicial authorities, but submitting that there would be no confusion if the 2nd respondent’s name, as set out in the notice of appeal, is introduced in the face of the record and memorandum of appeal; and that the 2nd respondent was already named as a party to the appeal and had been included on the notice of appeal and served as such party. He urged us to allow the Reference with costs in the appeal.
9. In response, learned counsel for the respondent, M/s. J. K. Mwarandu & Company, filed their written submissions dated 21st February 2024. Counsel cited no judicial authorities, but submitted that the amendment sought had the effect of adding parties who had been called as witnesses for the applicant in the primary suit to be the 2nd respondent in the appeal; that the mere fact that Mtwapa Jumba Self-Help Group had been named in the notice of appeal as a party was not enough; that it was incumbent upon the applicant to show that the self-help group would be affected by the appeal one way or the



other; and that no basis was given to warrant this Court's interference with the learned Judge's decision. They urged us to dismiss the Reference.

10. The main question before us is, do the circumstances of this case justify interference with the impugned decision of Lesiit, JA? We do not think so. The applicant's submission that the intended joinder of parties who were witnesses to his claim in the trial court would not result in confusion does not hold. Neither has the applicant disclosed what stake, if any, the intended respondent comprised of the self-help group and its officials has in the outcome of the appeal. In any event, if they had, it would be up to them to seek such joinder in view of the fact that the applicant has no proven locus standi to champion their course, if any.

11. The immutable principle laid down by this Court in the words of Sir Charles Newbold, P. in *Mbogo and Another vs. Shah* [1968] EA at p.95 blazed the trail from which we must not stray. In its wisdom, the Court held:

“... a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice”

12. We also take to mind the ratio decidendi in *Kenya Co- Operative Creameries Ltd vs. Fims Ltd* [2006] eKLR where this Court, pronouncing itself on the discretionary powers of a single Judge in determining an application under rule 4 of the Court's Rules, held:

“... the single Judge exercises unfettered discretionary powers which in law must be exercised upon reason and not capriciously. Once the single Judge has so exercised the same discretion, and made a decision on the matter, the full bench will be very slow in interfering with the same exercise of discretion by a single Judge unless it is demonstrated that the single Judge, in the exercise of the same discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice (see the case of *MBOGO VS. SHAH* (1968) EA 93 at page 96).” [Emphasis added]

13. We find nothing on the record as put to us to suggest that the learned Judge misdirected herself in any of the matters falling to be considered; or that she arrived at a wrong decision; or that she was wrong in exercise of her unfettered discretion. In our considered view, the learned Judge correctly exercised her discretion, and her decision was by no means a misjustice.

14. In *Simeon Okingo & 4 others vs. Benta Juma Nyakako* [2021] eKLR, this Court set out the considerations to be made by the full bench in the following words:

“12. ... the single Judge is exercising unfettered discretion, on behalf of the whole Court; such discretion ought to be exercised based on proper principles of law. Therefore, the full bench would only interfere with the exercise of such discretion if it is apparent that the single Judge took into account an irrelevant matter which he/she ought not to have taken into account or failed to take into account a relevant matter which he/she ought to have taken into account or that he/she misapprehended the law applicable and evidence before him or that his decision was plainly wrong.” [Emphasis ours]



15. Finally, we need to point out that alleged mistake of counsel, however junior, in omitting the name(s) of the respondent(s) sought to be joined, does not of itself cure the litigant's inaction in identifying the parties against whom he intended to sue in the first place. Moreover, it is a litigant's case and not that of his counsel. The primary responsibility to identify the persons against whom a litigant has a viable course of action rests heavily on the litigant's shoulders (see *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* [2015] eKLR).
16. Having carefully considered the applicant's reference, the rival written and oral submissions of learned counsel for the parties, the cited authorities in the backdrop of this Court's Rules, we reach the inescapable conclusion that the applicant's reference fails and is hereby dismissed. Accordingly, the ruling of Lesiit, JA. dated 7th July 2023 is hereby upheld. The costs of this reference shall be borne by the applicant. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

