



**Tala alias Asina Mama Chai Tala & another v Bungoma County Government & 18 others  
(Environment & Land Case 129 of 2001) [2024] KEELC 1630 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1630 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 129 OF 2001**

**EC CHERONO, J  
MARCH 14, 2024**

**BETWEEN**

**ASINA TALA ALIAS ASINA MAMA CHAI TALA ..... 1<sup>ST</sup> PLAINTIFF**

**BENJAMIN BARASA WAFULA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BUNGOMA COUNTY GOVERNMENT & 18 OTHERS ..... DEFENDANT**

**RULING**

1. What is before me is the Notice of Motion application dated 24<sup>th</sup> January, 2023 seeking the following orders;
  1. This Application be dispensed with in the first instance for enabling the former plaintiffs to re-organise their houses for good ends of justice.
  2. This Honourable Court be pleased and grant orders for changing the capacity of 2<sup>nd</sup> plaintiff/Applicant herein and allow him to rally behind the 1<sup>st</sup> up to 19<sup>th</sup> Defendants as the 20<sup>th</sup> Defendant; due to the 1<sup>st</sup> Plaintiff/Respondent herein failing to comply with the consent reached on the 17<sup>th</sup> day of March, 2016 and compromising the County Land Registrar and County Surveyor to hide the site Report investigated on the 10<sup>th</sup> day of November, 2020.
  3. This Hon. Court be pleased and grant vesting orders directing the OCS Webuye Police Division to arraign the 1<sup>st</sup> Plaintiff/Respondent hereinafter named Asina Tala Alias Azina Mama Chai Tala in this Court; if at all she blocks the Road of Access opened by the Bungoma County Land Registrar, the Government Surveyor and the Chief Webuye Location.
  4. That, this Hon. Court be pleased and grant Orders pursuant to order 38; Rules 1 & 2 of the Civil Procedure Act CAP 21; so that we select the counterclaim dated 24<sup>th</sup> of January, 2022



to proceed as a test suit for determining the dispute affecting the 1<sup>st</sup> Respondent's and the claimant's ancestral LR No. Ndivisi/Muchi/1234 and 1235;

5. That, this Hon. Court be pleased and grant orders pursuant to order 38; Rules 1 & 2 of the Civil Procedure Act CAP 21; so that we select the counterclaim dated 24<sup>th</sup> of January, 2022 to proceed as a test suit for determining the dispute affecting the Respondent's two acres subdivided as LR No. Ndivisi/Muchi/4209, 4210, 4211, 4212, 4215, 4216, 4217, 4221, 4222, 4223, 4224 as well as part-portions of 4221 and 4228; against the 1<sup>st</sup> up to 8<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 17<sup>th</sup> up to 19 Respondents herein.
  6. That, this Hon. Court be pleased and grant orders pursuant to order 38; Rule 1 & 2 of the Civil Procedure Act CAP 21; so that we select the counterclaim dated 24<sup>th</sup> of January, 2022 to proceed as a test suit for determining the dispute affecting the claimant's two acres subdivided as LR No. Ndivisi/Muchi/4201 up to 4208 and 4213, 4218, 4219, 4220 as well as part-portions of 4221 and 4228; against the 1<sup>st</sup> up to 8<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 17<sup>th</sup> up to 19<sup>th</sup> Respondents herein.
  7. Costs of this application be paid to the 2<sup>nd</sup> plaintiff/applicant herein.
2. The application is supported by the affidavit of the applicant sworn on 24<sup>th</sup> January, 2022 as well as grounds apparent on the face of the said application.

#### **1<sup>st</sup> Plaintiff's/applicant's Statement of Facts**

3. According to the applicant, he wants to change his capacity from the 2<sup>nd</sup> plaintiff and added as the 20<sup>th</sup> Defendant. The reasons given by the applicant for seeking to change his capacity from a plaintiff to being one of the defendants is that the 1<sup>st</sup> plaintiff failed to comply with a consent reached on the 17<sup>th</sup> March, 2016 and compromising the County Land Registrar and County Surveyor to hide the site Report investigated on 10<sup>th</sup> November, 2020. The Applicant also seeks five others substantive prayers as shown in the application. In his supporting affidavit, the applicant deposed that he knows of his knowledge that the 1<sup>st</sup> Plaintiff who is also his co-plaintiff namely Asina Chai alias Azina Mama Chai Tala defaced their common boundary then grabbed part-portions of his ancestral LR. No. Ndivisi/Muchi/1234 and added to her ancestral LR No. Ndivisi/Muchi/1235. The applicant further stated that he knows of his knowledge that the 1<sup>st</sup> up to 3<sup>rd</sup>, 11, 15, 17<sup>th</sup>, and 18<sup>th</sup> Defendants registered part-portions grabbed from him being LR No. Ndivis/Muchi/1234 into new numbers as LR No. Ndivisi/muchi/2114, 2112, 2252, 3851, 4213, 4218, 4220, 4221, 4227 and 4228.

#### **1<sup>st</sup> Plaintiff/respondent's Statement of Facts**

4. The 1<sup>st</sup> plaintiff Azina Mamachai Tala filed a replying affidavit in opposition to the said application and deposed that the primary reason advanced by the applicant for seeking to change his capacity from 2<sup>nd</sup> plaintiff to 20<sup>th</sup> Defendant is on grounds that she (1<sup>st</sup> plaintiff) reneged from a consent reached on the 17<sup>th</sup> March 2016. She stated that the alleged consent has not been annexed to the application. She further deposed that the reasons advanced for the orders sought borders on malice particularly prayer NO. 2 where the applicant is seeking an order that the OCS Webuye Police Division to arraign her (1<sup>st</sup> plaintiff) before this Honourable Court to ascertain the blockage of access Road. She stated that that prayer is inconceivable as she has not been cited for contempt of any court order.
5. She averred that the relief being sought in prayer No. 3 of the application has no bearing with the issues at hand and clearly pre-empts the suit in its entirety and that the allegations of her blocking access road is an issue which has not been adjudicated upon and no court order has been annexed to support those allegations.



## Legal Analysis and Decision

6. I have considered the application dated 24/1/2022, the grounds apparent on the face thereof, the supporting affidavit as well as the replying affidavit in opposition thereto. Order 1 Rule 10(1 & 2) under which this application is brought provides as follows;

“(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) 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.....”

7. The 2<sup>nd</sup> plaintiff/applicant herein seeks to change his capacity as the 2<sup>nd</sup> plaintiff to being one of the defendants. The reasons given by the applicant for seeking to change his capacity from being one of the plaintiffs to being one of the defendants is that the 1<sup>st</sup> plaintiff who is his co-plaintiff failed to comply with a consent order reached on the 17/03/2016 and also for compromising the County Land Registrar and County Surveyor to hide the site Report investigated on the 10/11/2020. However, the applicant did not annex a copy of the alleged consent order or investigated Report on 10/11/2020.

8. If indeed the 1<sup>st</sup> plaintiff failed to comply with a consent order reached on 17/03/2016, the applicant is at liberty to move the court to enforce such an order. As regards the allegations that the 1<sup>st</sup> plaintiff compromised the County Land Registrar and the County Surveyor, there is no Occurrence Book (O.B) showing that the applicant made a complaint to the investigative agencies. The second prayer that the OCS Webuye Police Division to arraign the 1<sup>st</sup> plaintiff to ascertain the blockage of access road is inconceivable and untenable as the 1<sup>st</sup> plaintiff has not been cited for contempt.

9. As regards prayer NO. 4 & 5, the applicant has cited Order 38 Rules 1 & 2 of the [Civil Procedure Rules](#) which provides as follows;

“1. Where two or more persons have instituted suit against the same defendant and such persons under Rule 1 of order 1 could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suit until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.

2. The law contemplates that where a plaintiff has instituted two or more suits against several defendants who could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are



precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have been determined or shall have failed, to be a real trial of the issues."

10. The import and purport of the Civil Procedure under the above order and rule contemplates a scenario where two existing separate suits have been instituted against similar person(s) as defendant(s) and the issues to be tried in each suit are precisely similar. In this case, there is no other existing case where the same defendants have been sued which would demand this Court to apply the test suit principle as contemplated under Order 38 *CPR*. The proposal by the 2<sup>nd</sup> plaintiff to file a counterclaim against his co-plaintiff who is also the 1<sup>st</sup> plaintiff herein if the orders sought in the present application are granted cannot give rise to a test suit. In any event, the law and in particular the *Civil Procedure Act* and the *Rules* set out thereunder does not contemplate a situation where a plaintiff can change capacity from a plaintiff to a defendant. A plaintiff who is no longer interested in pursuing a claim against those he/she has dragged to court has the option to withdraw his/her claim subject to costs.
11. The upshot of all the aforesaid is that the Notice of Motion application dated 24<sup>th</sup> January, 2022 is devoid of merit and the same is hereby dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

**DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 14<sup>TH</sup> DAY OF MARCH, 2024**

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. M/S Murunga for 1<sup>st</sup> & 2<sup>nd</sup> defendants
2. Benjamin Wafula Barasa—2<sup>nd</sup> plaintiff
3. Fredrick Kadi Thomas—14<sup>th</sup> defendant-present
4. Bett C/A

