



Terrazzo Enterprises Limited v Mbugua (Environment and Land Case Civil Suit 197 of 2017) [2024] KEELC 3476 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3476 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 197 OF 2017**

**JA MOGENI, J
APRIL 30, 2024**

BETWEEN

TERRAZZO ENTERPRISES LIMITED PLAINTIFF

AND

HELENA NJERI MBUGUA DEFENDANT

RULING

1. By a notice of motion dated 20/11/2023 the Plaintiff, Terrazzo Enterprises Limited, sought the following orders:
 - a. Spent
 - b. That this Honorable Court be pleased to join, Chief Land Registrar, the Director of Land Administration, the Attorney General and the Nairobi City County Government as defendants in this suit.
 - c. That this Honorable Court be pleased to grant leave to the applicant to amend the plaint herein.
 - d. That the draft amended plaint in the supporting affidavit filed herewith be deemed duly filed upon payment of the requisite fees.
 - e. That costs of this application be in the cause.
2. The said application was based upon the grounds set out on the face of the motion and supported by an affidavit sworn by the Plaintiff on 20/11/2023. It was contended that the intended defendants being the custodians of the land records should be joined to the suit so that they can assist the court in arriving at a just and effectual determination of the issues raised in the suit.



3. The plaintiff's case was that he is the rightful and ratable owner of the suit property holding suit title LR No 209/7260/61 situated next to Kenya Bus Station Pumwani. That the 1st defendant has fraudulently, wrongfully and unlawfully trespassed onto the suit property to the detriment of the proprietary rights of the plaintiff. It was, therefore, the Plaintiff's desire to have the land dispute determined conclusively in the presence of all concerned parties.
4. The Defendant filed a replying affidavit sworn on 26/01/2024 in opposition to the said application. It was contended that the said application was misconceived and an abuse of the court process. It was contended that the intended defendants should not be dragged into the proceedings since the plaintiff had an option of summoning them as witnesses but chose not to do so. Further the Chief Land Registrar was summoned by the Court suo motto on 20/09/2023 and produced documents relating to the suit property.
5. That the Chief Land Registrar produced a report in court which clearly stated that there were no records showing existence of grant number IR 101134 belonging to the plaintiff. That the defendant's title being IR Number 104590 was the one which was on record. Further that on 21/07/2022 both parties were summoned by the Chief Land Registrar and the revelation that there were not records showing the plaintiff's title documents was communicated to the parties at the said meeting.
6. The defendant averred that the plaintiff has known for over 12 years that the defendant has constructed and stayed on the suit property. That the defendant failed to summon any custodians of records and it was only the court which summoned the Chief Land Registrar Suo Motto. The defendant had an opportunity to even cross-examine the Chief Land Registrar and Director of Land Administration and each one of them confirmed that their records reflect that the owner of the suit property is the defendant. She therefore, asked the court to dismiss the said application with costs.
7. The defendant in her replying affidavit questioned the wisdom of the plaintiff's application coming when both parties had testified and closed their cases on 28/06/2022 and that the evidence of both the Chief Land Registrar and Director Land Administration has already been tested through cross-examination by the plaintiff's advocate. The plaintiff did not file any supplementary affidavit to rebut the averments contained in the replying affidavit.
8. The parties agreed on 20/11/2023 to canvass the application by way of written submissions and a ruling date was reserved. The Plaintiff/Applicant filed its written submissions on 23/04/2024 and the Defendant /Respondent filed her written submission on 26/04/2024.

Analysis and Determination

9. The court has considered the Plaintiff's said application, the Defendant's replying affidavit in opposition thereto as well as the respective submissions of the parties. The court is aware that an application for joinder or addition of parties is governed by the provisions of Order I Rules 3 and 10 of the [*Civil Procedure Rules, 2010*](#) (hereafter the Rules). The law does not only identify who may be a defendant but also delineate the process of substitution and addition of parties respectively. Order 1 Rule 3 provides as follows:

“All persons may be joined as defendants against 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 separate suits were brought against such persons any common question of law or fact would arise.”



10. Order 1 Rule 10 provides as follows:

- “(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.
- (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

11. The nature of the court’s discretion under Order 1 Rule 10 of the Rules was considered by the Court of Appeal in the case of *JMK v MWM & MFS* Mombasa Civil Appeal No 15 of 2015 [2015] eKLR and the court stated as follows: -

“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. *Sakar’s Code* (supra) quoting as authority, decisions of Indian courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal in Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our *Civil Procedure Rules* in *Tang Gas Distributors Ltd v Said & others* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgement where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

12. The issue for the court to consider in the present matter therefore would be:-

- i. Whether the proposed defendants ought to have been joined as defendants.
- ii. Whether the proposed defendants would be necessary parties to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

13. The issues for determination in a suit arise only out of the pleadings of the parties and other evidential material as may be presented to the court. In the instant suit the plaint filed by the plaintiff clearly seeks a determination that the plaintiff is the rightful owner of the suit property against the defendant. It seeks to have the court to issue a permanent injunction restraining the defendant from continuing occupancy of the suit property.

14. The reliefs that the plaintiff seeks are against the defendant and no relief is sought against the proposed defendants. The proposed defendants especially the Chief Land Registrar and the Director Land Administration have already presented their report and their evidence and been cross-examined in court on their evidence. It is difficult to appreciate how joining them as defendants will give rise to a different set of information from what is already presented and testified about on oath.



15. In my view the plaintiff has not established that there are compelling reasons to join as defendants to this suit the Attorney General, Chief Land Registrar and the Director Land Administration. The reliefs the plaintiff seeks in this suit are specific to the Defendant and the court is satisfied joinder of the three as defendants would not be appropriate.
16. As to whether the proposed Defendants are necessary parties to the suit to enable the court to effectually and completely adjudicate all questions involved in the suit, I answer in the negative. As stated above this suit involves the plaintiff and the defendant and the reliefs that the plaintiff seeks are directed against the Defendant solely.
17. My view is in that the plaintiff is seeking to litigate its suit in a piecemeal manner to fill up areas it was not able to do at trial by seeking to join the three parties as defendants. The plaintiff has had ample time where they should have invited the proposed defendants as witnesses but chose not to do so.

Disposal

18. This application has the hallmarks of a “Damascus” moment which will not pass in the circumstances. The proposed Defendants in my view are not a necessary party whose presence is necessarily to enable the court to make full adjudication of this suit. I hold that they are not a necessary party and I accordingly dismiss the proposed Plaintiff’s Notice of Motion dated 20/11/2023 with costs to the Defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF APRIL 2024.

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MOGENI J

JUDGE

In the virtual presence of:-

Mr. Kenneth Wilson for the Defendant/Respondent

Ms. Bundi holding brief for Mr. Gitonga for the Plaintiff/Applicant

Ms. Caroline Sagina: Court Assistant

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