



**Mueke & another v Co-operative Bank of Kenya Limited & another;
Mbuta & another (Intended Plaintiffs) (Environment & Land Case
370 of 2011) [2024] KEELC 3992 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3992 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 370 OF 2011**

**A NYUKURI, J
APRIL 29, 2024**

BETWEEN

JONAH MALIKA MUEKE 1ST PLAINTIFF

JOSEPH MUENDO MALIKA 2ND PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED 1ST DEFENDANT

GARAM INVESTMENTS COMPANY 2ND DEFENDANT

AND

EZRA DAVID MBUTA INTENDED PLAINTIFF

PUTITY MBULA MALIKA INTENDED PLAINTIFF

RULING

1. Before court is a chamber summons application dated 22nd May 2023 jointly filed by the plaintiffs seeking the following orders;
 - a. That Ezra David Ndolo and Purity Mbula Malika be added and/or joined as plaintiffs to the suit.
 - b. That this honorable court be pleased to grant leave to the plaintiffs/applicants to further amend the plaint appropriately.
 - c. That this honorable court be pleased to grant leave to the plaintiffs/applicants to file further list of documents and statements.
 - d. That costs of the application be provided for.



2. The application is supported by the affidavit of Joseph Muendo Malika, the 2nd plaintiff in this matter. He stated that the parties sought to be added are brother-in-law and sister to the applicant respectively. He stated that on 13th July 2009 the applicant purchased the suit property through public auction on behalf of the parties sought to be added. He further stated that he eventually transferred the suit property to the intended plaintiffs on 16th August 2016.
3. It was further his averment that his advocates now on record messrs A. M. Mbindyo & Company Advocates advised him to join the intended plaintiffs to the suit, since the previous advocates had not advised him on the necessity of joining the intended plaintiffs, hence the same was not prayed earlier as per the application dated 10th February 2020. He prayed to be allowed to file a further list of documents and statements, adding that the hearing of the suit had not commenced hence and that it was in the interest of justice that the intended plaintiffs be added to the suit. He also stated that mis-joinder or non-joinder of parties ought not to lead to dismissal of the suit as at the time of filing the suit, the property was registered in his name.
4. The application was opposed. In response to the application, the 1st defendant filed a replying affidavit through its counsel, Enoch Kamau Muriuki. They averred that the application is a delay tactic since it was not mentioned during an earlier application for amendment of the plaint and has been brought more than eleven years after the filing of the suit, and more than six years after the purported transfer to the intended plaintiffs. The deponent further stated that the intended plaintiffs were not privy to the contract between the plaintiff and the defendant as the plaintiff had not produced any duly registered power of attorney to the effect that they were acting on behalf of the intended plaintiffs. It was their averment that the joinder of the intended plaintiffs would introduce a new cause of action and thus cloud the real issues that ought to be settled between the parties. The deponent prayed that the application be dismissed with costs as it was a waste of judicial time and fatally defective.
5. The application was canvassed by way of written submissions.

Submissions by the applicant

6. Counsel for the applicants relied on provisions of sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 1 Rules 1, 9, 10 and 14, Orders 8 Rule 3 and 5 of the [Civil Procedure Rules](#) and submitted that this court has discretionary power to issue orders sought. It was submitted that both advocates who were previously on record did not timely advise the plaintiffs on the need to seek the joinder of the intended plaintiffs to the suit, yet the suit property had been transferred to them. It was further submitted that being the registered owners of the land, the intended plaintiffs would no doubt be affected by the decision reached by the court and thus necessary parties to the suit.
7. Counsel cited several cases in support of the application including; *King'ori v Chege & 3 others* [2002] eKLR, *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1EA 55 and [Civicon Ltd v Kivuwatt Ltd & 2 others](#) [2015] eKLR amongst others.

Submissions by the 1st respondent

8. Counsel for the 1st defendant filed submission in opposition to the application on 13th October 2013. Their main argument on opposing the application was that the prayer for joinder was not included in the application dated 10th February 2020 which sought to amend the plaint yet the intended plaintiffs had already been registered as plaintiffs of the suit property. They also submitted that the cause of action arose on 13th July 2009 through a sale by public auction by the chargee hence this being a commercial contract between the 1st defendant and the applicant, the intended plaintiffs are strangers to the contract and no benefits would flow to them from the outcome of the suit. They also relied on



the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules and submitted that the applicants had not demonstrated justifiable grounds for joining the intended plaintiffs.

9. Counsel relied on the case of Garley Enterprises Ltd v Agricultural Finance Corporation & Another [2018] eKLR and argued that the applicant's failure to annex a draft amended plaint made the application defective. They also argued that the application was not merited since the applicants had not demonstrated any justifiable ground for joining the plaintiffs, stating that any decree sought can be enforced without the presence of the proposed plaintiffs.
10. On whether the application was made in good faith and within a reasonable time, it was submitted that there had been undue delay and that the application was not brought in good faith and is meant to introduce a new cause of action as the applicant was aware from the onset of the facts that they now wish to introduce and that the parties are bound by their pleadings. On whether the proposed additional plaintiffs were necessary for the court to effectually and completely adjudicate upon the and settle all questions involved in the suit, counsel submitted that the intended plaintiffs had no contractual relationship with the 1st defendant and no reasonable cause of action disclosed against them and that the applicant did not file any power of attorney to demonstrate that he was acting on behalf of the proposed plaintiffs.
11. Counsel cited several cases in support of their case including Jeremiah Nyangwara Matoka v Independent Electoral and Boundaries Commission & 2 others, Meme v Republic [2004] 11 124 and Central Kenya Limited v Trust Bank Limited [2002] 2 EA amongst others. They concluded by placing reliance on the case of King'ori v Chege & 3 others [2002] 2 KLR 243 where the relevant test for determination on whether or not to join a party to proceedings were restated.

Analysis and determination

12. Having considered the application together with affidavits in support thereof, the response thereto, and the rival submissions by the parties; the court is of the view that the issue that arises for determination is whether the intended plaintiffs are necessary parties to the suit, and whether the plaint should be amended to include the intended plaintiffs.
13. The power of the court to join necessary parties to a suit is provided for in Order 1 rule 10 (2) of the Civil Procedure Rules 2010 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 and settle all questions involved in the suit, be added.
14. Order 8, rule 5 of the Civil Procedure Rules 2010 stipulates as follows:

For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
15. In the case of Kingori v Chege & 3 Others [2002] 2 KLR 243 the court stated that the guiding principles when an intending party is to be joined are as follows:
 - a. He must be a necessary party.



- b. He must be a proper party.
 - c. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
 - d. The ultimate order or decree cannot be enforced without his presence in the matter.
 - e. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.
16. Similarly, in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55, the court held thus;
- ...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 a 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.
17. In the instant matter, the applicants argue that the proposed parties will lead to a complete determination of the case and that the outcome of the suit will have an effect on them as they are the registered proprietors of the suit property. On the other hand, the respondents argue that the application is a delay tactic and there is no cause of action between the proposed parties and the respondents. In addition, that the applicants did not raise the issue of the intended plaintiffs being joined even when he sought to amend the plaint if 2020, when it is alleged that the suit property was purchased on their behalf and transferred to them in 2016.
18. For a party to be joined to any proceedings, they must be the necessary parties to the suit in that the determination of the issues would affect them. The issue between the plaintiffs herein and the defendants is whether there was a misrepresentation by the defendants in 2009 when they sold the suit property to the plaintiffs. The issue of the transfer having happened after this suit had been pending in court for 5 years and the allegation that the suit property was purchased on behalf of the intended defendants is a matter strictly between the plaintiffs herein and the intended plaintiffs and has nothing to do with the defendants or the matters is dispute in this case. In any event, no evidence was presented to show that the plaintiffs herein purchased the suit property on behalf of the intended plaintiffs. At any rate, the plaintiffs' own evidence filed on record does not support such position. The applicants have not explained the reasons why they did not seek to join the intended plaintiffs for the last eight years even when they filed application for amendment which was heard and ruling delivered on 9th November 2022. If this court were to join all the persons who are subsequently registered as proprietors of the suit property as parties to this suit, this suit may not be determined at all. For the above reasons, I find no merit in the application dated 22nd May 2023 and the same is hereby dismissed with costs.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:



Mr. Mbindyo for applicants
No appearance for respondents
Court assistant – Abdisalam

