



Yawa & 35001 others v Chome (Suing as the administrator of the Estate of the Late Mumba Chome Ngala (Deceased) & 19 others (Civil Application 100 of 2018) [2018] KECA 35 (KLR) (6 December 2018) (Ruling)

Hamisi Yawa & 36,000 others v Tsangwa Ngala Chome & 19 others [2018] eKLR

Neutral citation: [2018] KECA 35 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 100 OF 2018
ARM VISRAM, W KARANJA & MK KOOME, JJA
DECEMBER 6, 2018**

BETWEEN

HAMISI YAWA 1ST APPLICANT

NAZUA KITI CHUMA & 35000 OTHERS 2ND APPLICANT

AND

TSANGWA NGALA CHOME (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MUMBA CHOME NGALA (DECEASED) 1ST RESPONDENT

TOWN COUNCIL OF MARIAKANI 2ND RESPONDENT

KETRACO COMPANY LIMITED 3RD RESPONDENT

MWABEJA, MWAMUMDU, MWAKAI CLANS 4TH RESPONDENT

KATEMBE NZEMBE LEWA 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

NATIONAL LAND COMMISSION & 13 OTHERS 7TH RESPONDENT

(An application for joinder of the applicants as interested parties in the appeal against the Judgment of the Environment and Land Court (Angote, J.) delivered on 19th July, 2018 in E.L.C CASE NO. 243 OF 2014)



RULING

1. The point of contention between the parties herein as we can gather from the record revolves around the entitlement and ownership of Kilifi/Madzimbani/Mitangoni/B/1 (suit parcel). More specifically, the 1st, 4th and 5th respondents claim that their entitlement to the exclusion of the other claimants from the fact that the suit parcel is ancestral land and that they have been in occupation of the same since time immemorial.
2. It seems the dispute over the suit parcel dates back to the 1970's when Mumba Chome Ngala (deceased) who happened to be the 1st respondent's father and the family of the Durumas disagreed on the ownership thereof. This culminated in the deceased filing a suit against Madzao Mangale who represented the Durumas in the then District Magistrate's Court at Kaloleni being DMCC No 26 of 1977 which was determined in his favour. Thereafter, following a notice of the 2nd respondent's intention to set apart 200 acres of the suit parcel in favour of the 3rd respondent for the construction of a sub-station for the transmission line in the Mariakani area, the 1st respondent as the administrator of the deceased's estate, filed suit against the 2nd and 3rd respondents in the Environment and Land Court (ELC) being E L C Case No 243 of 2014 (formely, Mombasa E L C No 95 of 2011) objecting to such setting apart.
3. On one hand, the 1st respondent's suit was based on the fact that the deceased was the owner of the suit parcel. On the other, the 2nd respondent maintained that it was the legal custodian of the suit parcel which was Trust land hence it could set apart a portion thereof in the manner it did. Be that as it may, a consent was recorded on May 11, 2012 by the 1st, 2nd and 3rd respondents to the effect that the deceased's clan was recognized as the rightful owner of the suit parcel subject to 200 acres which was to be set apart in favour of the 3rd respondent. As is required by law, the 3rd respondent also deposited Kshs 26,000,000 with the District Commissioner for purposes of compensating persons affected by the setting apart of the said portion of the suit parcel.
4. It is at this juncture that the 4th to the 7th respondents joined the suit. As per the 4th respondent, they were not only the first to occupy the suit parcel but had also permitted the 1st respondent family to take possession of portions thereof. Conversely, the 5th respondent's case was that it was the first to occupy the suit parcel and was later joined by other clans and together they co-existed in peace until the 3rd respondent took a portion thereof.
5. Whilst the hearing of the suit was ongoing another consent was entered, this time around between 1st, 3rd and 5th respondents, in the following terms:
 - 1) The Plaintiff confirms and recognizes that the 2nd Defendant's (3rd respondent herein) Title No C R No 60592 being L R No 29836 registered on October 11, 2013 was properly issued pursuant to the consent order recorded in court on May 11, 2012 and setting apart from the unsurveyed and unregistered land now registered as Kilifi/Madzimbani/Mitangoni/B/1 issued on August 26, 2014 in the name of the Plaintiff.
 - 2) The Plaintiff confirms that at the time the Plaintiff procured its title for Kilifi/ Madzimbani/ Mitangoni/B/1 issued on August 26, 2014 for approximately 2,861 hectares or thereabout, the Plaintiff failed to consider the existence of the 2nd Defendant's Title No C R 60592 being L R No 29836 which was already in existence and issued after setting apart as a result of the



consent order registered in court as aforesaid and as a result the Plaintiff's title was issued over the said Title No C R 60592 being L R No 29836 of the said 2nd Defendant.

- 3) That the Plaintiff shall return its title for correction to the Land Registrar, Kilifi County so that the 2nd Defendant's Title No C R 60592 being L R No 29836 whose acreage is 80.03 hectares or approximately 200 acres is excluded from the Plaintiff's title which correction shall bring to an end the dispute between the Plaintiff and the 2nd Defendant.
 - 4) That the Plaintiff confirms having collected and received the sum of Kshs 26,000,000 deposited with the District Commissioner, Kaloleni (later Deputy County Commissioner) which sum was deposited in with a view to compensate any person affected by the setting apart of the 200 acres for and on behalf of the 2nd Defendant and which is now comprised in the Title No C R No 60592 being L R No 29836.
 - 5) The Plaintiff confirms that they shall indemnify the 2nd Defendant in respect of any claim by any party claiming to be entitled to the said sum of Kshs 26,000,000 and/or the 200 acres contained in the Title No C R 60592 being L R No 29836 and it is hereby agreed that any such claim shall be the sole responsibility of the Plaintiff and shall be defended for and on behalf of the Plaintiff.
 - 6) That the 2nd Defendant in recognition of the above withdraws the Defence and Counter claim dated June 22, 2015 and filed in court on June 23, 2015 which withdrawal shall be a confirmation that the dispute between the Plaintiff and the Defendant is settled as the Plaintiff also withdraws simultaneously his claim against the 2nd Defendant contained in the Plaintiff dated September 6, 2012 and filed in court on September 7, 2012.
 - 7) That the office of the Attorney General does withdraw wholly its Defence and Counter-claim dated April 28, 2016.
 - 8) That upon signing and filing of this consent order, the Plaintiff shall be and is at liberty to settle the remaining dispute with the 1st Defendant (2nd respondent herein) and the Interested Parties in any manner which may be agreeable to the Plaintiff, 1st Defendant and the said Interested Parties.
 - 9) Each party shall bear its own costs.”
6. Based on the foregoing, the trial court was only left with the determination of the 4th and 5th respondents' entitlement and/or rights, if any, over the suit parcel. In doing so, the learned Judge (Angote, J.) took into account that a complaint which had been lodged by the 4th respondent with the 7th respondent in respect of ownership of the suit parcel and the suit at the subordinate court were determined in the 1st respondent's favour. Ultimately, the learned Judge in a judgment delivered on July 19, 2018 rendered himself in the following manner:

“The totality of the evidence before me shows that the suit land has always been owned by the clan of Mumba Chome, and being Trust land, was held by the County Government (1st Defendant) on behalf of that family. Consequently, I find that the Plaintiff has proved his case on a balance of probability. I therefore allow the Plaintiff dated 14th April, 2011 in the following terms:

- a. A declaration be and is hereby issued that parcel of land known as Kilifi/Madzimbani/Mitangoni/B/1 measuring 2,861 Hectares is owned by the clan of Mumba Chome Ngala, represented by the Plaintiff.



- b. The Title Deed issued to Plaintiff on August 26, 2014 to be surrendered to the Chief Land Registrar for issuance of another Title Deed to the Plaintiff, on behalf of the clan of Mumba Chome, and after reducing the acreage of the land by 200 acres which was set apart for the 2nd Defendant.
 - c. The National Land Commission to resettle the parties who have been living on the suit land for many years, either on the same land, with the consent of the clan of Mumba Chome, or on another parcel of land, in line with Section 134 of the Land Act.
 - d. The land on which public institutions have been constructed to be acquired by the National Land Commission pursuant to the provisions of the law relating to the compulsory acquisition of land.
 - e. Each party to bear his/its own costs.”
7. It is this decision that the applicants, who were not parties in the ELC suit, wish to challenge in an appeal filed in this Court. For that reason, they have approached us seeking to be joined as interested parties in the appeal and for leave to file the necessary pleadings. Their application is premised on the grounds that they were in occupation of portions of the suit parcel for a long period of time and were not aware or privy to the ELC suit. As such, the orders therein which adversely affected their rights over the said parcel were issued without them being given an opportunity to be heard. Moreover, they had gotten wind of the fact that the 1st respondent had entered into a consent with the 3rd and 4th respondents to hive off 1000 acres from the suit parcel for the said respondents’ resettlement. It follows therefore, that unless the orders sought are granted the applicants will suffer irreparable damage since they will be evicted from the suit parcel and rendered homeless.
8. Opposing the application, the 1st respondent was sceptical that the alleged 35002 applicants were in actual possession of the suit parcel. Instead he believed they were conduits being used by unscrupulous persons to obtain interest thereon. He deposed that his suspicion was bolstered by the fact that not all the applicants had given their authority to Hamisi Yawa and Nazua Kiti Chuma to seek their joinder as evident from the authority annexed to the application. Furthermore, the dispute over the suit parcel had been in the public domain for a very long period and the applicants could not feign ignorance of the same. Besides, the trial court had granted ample opportunity to any interested parties to join the suit. All in all, the applicants had not put forth sufficient reasons to warrant their joinder.
9. In his address, Mr Waithira, learned counsel for the applicants, reiterated the grounds in support of the application. He added that the applicants wished to adduce evidence connecting them to the suit parcel. Mr Kiarie, Ms Abeid and Mr Muga appearing for the 3rd, 5th and 6th respondents respectively also supported the application.
10. On his part, Mr Shamalla, learned counsel for the 4th respondent, also holding brief for Mr. Kadima for the 1st respondent, opposed the application. He began by stating that there are two appeals in this Court from the impugned judgment, that is, Civil Appeal No 95 & 18 of 2018. Going by the application it was not clear which of the two the applicants sought to join as interested parties. According to counsel, the applicants’ interest had been represented in the ELC suit by the clans therein thus we should reject any attempt by the said applicants to participate as individuals in the appeal. Moreover, the ELC in the impugned judgment had not left any party homeless but had directed their resettlement.



11. We have considered the application, submissions made on behalf of the parties and the law. The rationale behind the joinder of any party to proceedings is to have on board a necessary party for purposes of determining the real issues in dispute. Perhaps, this is reason behind the general guiding principle that joinder of a party like amendment of pleadings, should be freely allowed and at any stage of the proceedings, provided that it will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. See this Court's decision in *Nderitu Wachira Reciever & Reciever & Manager of Bulleys Tanneries Ltd. (Under Receivership) & 4 others vs. Siraji Enterprises Ltd & another* [2016] eKLR.
12. In as much as an application by a party to be joined to any proceedings should not be restricted, there are criteria to be met by the party intending to be joined. The criteria which are in no way exhaustive include:
- 1) The applicant must demonstrate that it would be desirable for him/her to be added as a new party and that his/her presence would enable court to resolve all the matters in the dispute.
 - 2) The joinder will not prejudice the other parties
 - 3) The joinder will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.

See this Court's decision in the case of *Attorney General vs Kenya Bureau of Standards & another* [2018] eKLR.

13. Applying the above principles to the application at hand, we find that the applicants have made out a case to warrant their joinder in the appeal against the impugned judgment. We say so, because as we set out in the opening paragraph of this ruling, at the heart of the dispute between the parties is the determination of the ownership and entitlement of the suit parcel. Accordingly, the participation of the applicants who claim to be in occupation and entitled to the suit parcel is integral in the conclusive determining the aforementioned issue.
14. In any event, courts all over have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. This much was appreciated by this Court in *Mbaki & Others vs Macharia & Another* [2005] 2 EA 206, at page 210, as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

It goes without saying that like the impugned judgment any decision in an appeal to this Court would affect the said applicants.

15. We are also convinced that declining the orders sought would deprive the applicants the opportunity to be heard on their claim over the suit parcel which is contrary to the rules of natural justice and unconstitutional. See this Court's decision in *David Kiptugen vs. Commissioner of Lands, Nairobi & 4 others* [2016] eKLR.
16. It is not lost to us, that not all the applicants executed the authority annexed to the application as correctly observed by the 1st respondent. We also take judicial notice of a concept peculiar to this jurisdiction, of people loosely referred to as ‘professional squatters’. These are people whose names will appear in claims for adverse possession even when they have never resided on the properties in question and their sole aim is to unjustly enrich themselves from other people's hard-earned properties. With



that in mind, joinder and leave sought to file pleadings can only apply to those who have indicated their consent by appending their signatures or thumb prints on the authority in question. Similarly, we cannot help but note that the applicants did not specify which appeal they wanted to join as interested parties. Nevertheless, bearing in mind that both Civil Appeal Nos. 126 & 127 of 2018 touch on the impugned judgment we deem that it would be in the interest of justice for the applicants who we have identified herein above to be joined in either of the appeals.

17. The upshot of the foregoing is that the application dated September 28, 2018 is allowed to the extent set out in this ruling. For avoidance of doubt, we issue orders joining the following applicants as interested parties in Civil Appeal Nos 126 & 127 of 2018:

1. Hamisi Yawa ID No 22xxxx
2. Nazua Kiti Chuma ID No 05xxxx
3. Chizi Kazungu Mwachiteme ID No 50xxxx
4. Nyamvula Kazungu Mwachitembe ID No 11xxxx
5. Mwangolo Chimbugwa Tsuma ID No 46xxxx
6. Jumwa Makazi Bindo ID No 28xxxx
7. Kadzele Malewa Jimbale ID No 94xxxx
8. Rashid Makanga Tsuma ID No 13xxxx
9. Omar Mangale Kombo ID No 28xxxx
10. Jira Mangale Kombo ID No 29xxxx
11. Kionga Mangale Kombo ID No 28xxxx
12. Yawa Tsuma Munda ID No 26xxxx
13. Hassan Nyamawi Njoloji ID No 13xxxx
14. Jameson Kombo Tsuma ID No 27xxxx
15. Idd Tsuma Munda ID No 26xxxx
16. Tsuma Makali Tsuma ID No 38xxxx
17. Mganga Tsuma Ruwa ID No 91xxxx
18. Chizi Ruwa Berudi ID No 21xxxx
19. Mbeyu Mganga Tsuma ID No 13xxxx
20. Mwalewa Jefa Mwanga ID No 26xxxx
21. Kwekwe Tsuma Chiti ID No 96xxxx
22. Nadzuwa Kalume Peho ID No 13xxxx
23. Nzole Mitsololo Mwango ID No 37xxxx
24. Kalume Kombo Mshenga ID No 29xxxx
25. Simon Mwero Munga ID No 34xxxx



26. Mupa Mugandi Chai ID No 50xxxx
27. Chizi Tsuma Jira ID No 13xxxx
28. Buruwa Mugunda Mazoo ID No 49xxxx
29. Munga Mwango Chibogo ID No 31xxxx
30. Kwekwe Mdoya Mao ID No 49xxxx
31. Bibi Charo Kazungu ID No 20xxxx
32. Umanzi Munga Mwango ID No 26xxxx
33. Myanzi Zuma Hamisi ID No 50xxxx
34. Kalume Peho Mshenga ID No 31xxxx
35. Saidi Jumaa ID No 22xxxx

The said applicants are also granted leave to file any necessary pleadings in the said appeals. Costs of this application shall abide by the outcome of the aforementioned appeals.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF DECEMBER, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

