



**Mungai v Chelimo & 4 others (Environment & Land Case
20 of 2015) [2024] KEELC 4283 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 20 OF 2015**

A OMBWAYO, J

MAY 21, 2024

BETWEEN

ELIUD MACHARIA MUNGAI PLAINTIFF

AND

CAPRICE CHELIMO 1ST DEFENDANT

PAUL BII 2ND DEFENDANT

JACOB ONYANGO 3RD DEFENDANT

NAKURU LAND REGISTRAR 4TH DEFENDANT

THE ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. On 28th January 2015, Eliud Macharia Mungai, (hereinafter referred to as the plaintiff) filed a suit against Caprice Chelimo and 4 others claiming that the defendants unlawfully employed the services of the CID officers to arrest his son and forced him to write a statement, to the effect that he was not going to enter the suit land, herein or sell sand from the land and that he had surrendered it to him. The plaintiff prayed for a declaration that the registration of suit property plot No. Nakuru/Municipality Block29/910 in the name of the 1st defendant is null and void and should be cancelled.
2. The plaintiff prayed that the court orders the 1st defendant do execute the necessary and relevant conveyance documents to effect registration in favour of plaintiff as the proprietor of parcel of land plot No. Nakuru/Municipality Block 29/910 and /or in alternative the Deputy Registrar Environment and land court do execute the necessary and relevant conveyance documents in case the 1st defendant declines to execute. The plaintiff claimed General damages.
3. The plaintiff further prayed for a permanent injunction restraining the defendants either by themselves, their agents, servants workmen and or relatives from trespassing, entering, using,



- occupying the suit land, restricting the applicant's use and occupation of parcel of land Plot No. Nakuru/Municipality Block 29/910 and/or interfering with the suit land in any matter whatsoever. Last but not least, the plaintiff prayed for Interest on (a) and (b) at court rate.
4. On the 1st October 2021, the plaint was amended and a new party was brought in in the name of Richard Chelimo Kaplich and another party in the names of Joseph Korir Langat was added. This amendment amounted to substitution of the 1st defendant. The prayers in the plaint remained the same against the 2nd defendant. The matter went on until judgment was delivered on 5th December 2022. The court granted orders that the registration of the suit property Plot No. Nakuru/Municipality/ Block 29/910 in the names of the 1st and 2nd defendants is null and void and was cancelled. The 5th defendant was to rectify the register of land parcel No. Nakuru/Municipality/ Block 29/910 by deleting the 1st and 2nd Defendants' names and registering the name of Eliud Macharia Mungai.
 5. Moreover, the court issued an order of eviction, and permanent injunction against the 1st, 2nd and 3rd Defendant restraining them either by themselves, their agents, servants, workmen and or relatives from trespassing, entering, using, occupying the suit land, restricting the plaintiffs use and occupation of parcel of land Plot No. Nakuru/Municipality/ Block 29/910 and or interfering with it any manner whatsoever.
 6. The suit against the 4th defendant was dismissed with no order as to costs. The eviction order was to take effect after the lapse of 90 days from the date of judgment. Lastly, the plaintiff was to have costs of the suit and interest thereon from date of filing till payment in full. The 1st and 2nd judgment debtors have filed two applications seeking to set aside the judgment. The 1st application was filed by the 2nd defendant on 15th February 2024. The 2nd defendant has contested that judgment was obtained against him despite the fact that he has never been served with any summons, court pleadings or any other documents pertaining to the suit. The 2nd defendant/applicant contends that he has a good defence. The applicant reiterates that his failure to enter appearance or file a defence was occasioned by the non-service of summons and pleadings.
 7. I have considered the applications and affidavits on record and do find that it has not been demonstrated properly that the applicants were served with summons to enter appearance after the filing of the amended plaint on 5th October 2021. It is not clear that the plaintiff obtained leave of the court under order 10 rule 1 of the *Civil Procedure Rules* 2010 to enjoin Richard Chelimo Kaplich and Joseph Korir Langat as a parties to the suit. The 1st applicant seeks for an order for leave to the firm of M/s Cheruiyot Collins & Associates to come on record. I do find that there are no good reasons for the court refuse to grant the prayer because it is within the rights of the applicant to be represented by an advocate of his choice. On the 2nd prayer I do find that the right to be heard in sacrosanct and therefore the applicant cannot be denied to reach the seat of justice in view of the procedural improprieties in this case such failure to serve summons and failure to obtain the courts leave to enjoin the 2nd defendant, who ideally should have been joined as the 6th defendant because the 1st – 5th defendants existed.
 8. On the 2nd application dated 21st February 2024, the applicant Kiplich Mathew Kibet seeks an order to be made a party and the entire proceedings be set aside and he be allowed to enter appearance and defend the suit. The applicant states that he learnt about this case on 18th January 2024 through Chief Kaptebwo location Nakuru.
 9. The applicant states that the original plaint was instituted against Caprice Chelimo and not Richard Chelimo Kiplich and therefore no summons to enter appearance were served in the original plaint to 1st defendant who was not a party.



10. In the replying affidavit, Eliud Machaira Mungai states that summons to enter appearance were served upon the 1st defendant on 14th February 2015 and that the 1st defendant entered appearance on 4th March 2015 through the firm of Geoffrey Otieno & Co advocates. The plaint was amended on 5th October 2021, 6 years thereafter where he misspelt the name of 1st defendant indicating him as Caprice Chelimo instead of Richard Chelimo Kaplich. He believes that this was not a joinder but an amendment to correct spellings. According to the respondent the application has been brought after an inordinate delay.
11. I have considered the applications and the affidavits and submissions on record and do find that there is a procedural impropriety in the proceedings as the plaintiff made a major amendment to the plaint and brought in new parties with complete new names in the place of the 1st defendant and 2nd defendant. This ought to have been by way of an application for leave to enjoin a party under Order I rule 10(1) of the *Civil Procedure Rules* 2010 which provides as follows:-

Substitution and addition of parties [Order 1, rule 10] (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.

12. I do find that this procedural impropriety denied the applicant an opportunity to defend themselves and therefore the applicants should be allowed to approach the seat of justice and defend the case. The right to be heard in sacrosanct and cannot be taken away unless it is shown that the applicants intend to delay the hearing of the case. In this case, I do find that the 1st and 2nd defendant were not given an opportunity to be heard because they were improperly enjoined and not served with the summons to enter appearance.
13. The affidavit of service by Boniface O Owuoché is not sufficient as it mentions the 1st defendant son but does not disclose the full name. Moreover, it confirms the 1st defendant was Caprice Chelimo and not otherwise. If indeed the 1st defendant was Richard Chelimo Kaplich then he must have served the wrong person. Moreover, he should have confirmed that the 1st defendant was not Caprice Chelimo but he did not. I do find both applications merited.

Application Dated 14th February 2024

14. I do grant leave to the firm of M/S Cheruiyot Collins & Associates Advocates to come on record for the Defendant. The judgment entered on 5th December 2022 against the Defendant and all other consequential orders is set aside and the Defendant is granted unconditional leave to defend this suit. Each party to bear own costs.



Application Dated 21st February 2024

15. This honorable court makes an order that the applicant herein, being the legal representative ad litem of the estate of the 1st Defendant Richard Chelimo Kaplich (Deceased); be and is hereby made a party to this case in the place of the said 1st Defendant who is deceased. This honorable court sets aside the entire proceedings in this case, its judgment made and delivered on the 5th day of December 2022, its Decree and order issued on the 1st day of March 2023 and or any subsequent proceedings taken and/or order made herein. The Applicant herein is granted leave to file his statement of Defence and or other documents out of time and further the matter to be heard de novo. Each party to bear own costs. Orders accordingly. The defendants to file and serve defence within 10 days from today. The plaintiff to reply within 10 days of service. Hearing on 25th and 26th September 2024 on priority basis.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF MAY 2024.

A O OMBWAYO

JUDGE

