



REPUBLIC OF KENYA



Ondieki v Robert Asati Ouko t/a Ndege View Resort & 3 others (Environment & Land Case E046 of 2023) [2024] KEELC 4037 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4037 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E046 OF 2023**

MD MWANGI, J

MAY 16, 2024

BETWEEN

HENRY MASI ONDIEKI PLAINTIFF

AND

ROBERT ASATI OUKO T/A NDEGE VIEW RESORT 1ST DEFENDANT

PAUL OWINO OBUONG T/A WARRETS BAR AND

RESTAURANT 2ND DEFENDANT

AND

EMBAKASI RANCHING CO. LTD. 1ST PROPOSED DEFENDANT

**KENYA INSTITUTE OF SURVEYING AND MAPPING 2ND PROPOSED
DEFENDANT**

RULING

(In respect of the 2nd Defendant's application dated 12th March, 2024 seeking to join the proposed 3rd and 4th Defendants as parties in this suit)

Background

1. The application for determination is the 2nd Defendant's Notice of Motion dated 12th March, 2024 seeking the following orders:
 - a. That the Proposed 3rd and 4th Defendants be joined in this suit as the 3rd and 4th Defendants respectively.
 - b. That the costs of the instant application to abide the outcome of the subject application.
 - c. Such further orders and/or other orders be made as the Court may deem fit and expedient.



2. The application is premised on the grounds on the face of it and the Supporting Affidavit of Paul Owino Obuong deponed on the 12th March, 2024. The Applicant asserts that the Proposed 3rd and 4th Defendants have previously had dealings on the suit property. The Proposed 3rd Defendant was the initial land owner and had the master title of the whole land before it subdivided it and sold it to the Plaintiff amongst others. The Applicant accuses the Proposed 3rd Defendant of providing confusing maps prior to the subdivisions.
3. The Applicant argues that prior to the constructions; there was a road in between the 1st Defendant's property and the Plaintiff's property accessible to the Community members in the area. However, it was later established that the road was not properly demarcated. The initial Survey had indicated that the road was in between the two properties.
4. Subsequently, the Proposed 4th Defendant conducted a re-survey that demarcated boundaries. The 1st Defendant was then issued with a Title to his parcel. The beacons were re-established to rectify the previous errors.
5. It is therefore only fair and just that the proposed Defendants be joined in the proceedings for them to respond to the dispute herein.

Plaintiff's Replying Affidavit

6. The application is opposed by the Plaintiff. The Plaintiff contends that the application is an abuse of the court process aimed at delaying the hearing and determination of the suit. He argues that the Applicant has not attached the Witness Statements of the proposed 3rd and 4th Defendants to demonstrate the value they will be adding to the adjudication of the dispute herein.
7. The Plaintiff states that the issue of boundaries was determined by the Registrar of Titles who further submitted a report to that effect in ELCC E062 of 2022. He argues that the issue then is *Res Judicata*. That was the reason why the Plaintiff demolished his building that had encroached into his neighbour's property.
8. He further states that as a registered proprietor he enjoys an indefeasible title to his parcel and that the Green Card is sufficient evidence of his ownership. He avers that the Certificates of Lease were issued in 1988 and there is no value that the Proposed 3rd and 4th Defendants will add to the proceedings herein as they are *functus officio*.
9. The Plaintiff deposes that the Report by the Land Registrar on the four (4) Blocks: 4349, 4321, 4322 and 4348 is conclusive that the coordinates for the said plots are settled. Therefore, the 1st and 2nd Defendants have deliberately encroached onto his parcel, Block No. 4348 by 2.7 Meters as shown on the Sketch Maps.
10. The Plaintiff further deposes that 2nd Defendant is a lay person and cannot question the expert Report of the Surveyor which is final. In any event, the 2nd Defendant cannot acquire rights through a Lease Agreement as the rights are easements attached to the titles for the Blocks.
11. As for the proposed 4th Defendant, the Plaintiff contends that it is *functus officio* having processed and delivered titles. The Plaintiff contends that the necessary Party to this proceeding should be Nairobi City County for it to identify the public road and take possession of it.
12. He argues that the application is incompetent, bad in law and should therefore be dismissed with costs.



1st Defendant's Replying Affidavit

13. The 1st Defendant, Robert A. Ouko filed a Replying deponed on the 30th March, 2024 largely supporting the joinder of the Proposed 3rd Defendant. The 1st Defendant avers that it is legally sound for the Proposed 3rd Defendant to be joined in the proceedings having been the Original proprietor of the suit property before the subdivisions. He states that the boundaries were initially demarcated by the Proposed 3rd Defendant and beacons fixed thus the Allottees only fenced their respective parcels subject to the proposed 3rd Defendant's Surveyor's advice.
14. The 1st Defendant further explains how he acquired his subject property and avers that the beacons and service roads had already been done as there was a service road between his property and the Plaintiff's property. It is therefore necessary to join the Proposed 3rd Defendant in the proceedings herein. He denies the assertion that he and the 2nd Defendant (who is his Tenant) have encroached on the Plaintiff's plot.

Court's direction

15. The court directed that the application be disposed of by way of written submissions. The parties complied and the court has held the opportunity to peruse the same together with the cited authorities.

Issues for Determination

16. Having read and considered all the pleadings filed herein, the written submissions and the cited authorities, the only issues for determination are:
 - a. Whether the Proposed 3rd and 4th Defendants are necessary parties who should be joined into these proceedings.
 - b. Who should bear the costs of the application

Analysis and Determination

a. Whether the Proposed 3rd and 4th Defendants are necessary parties who should be joined into these proceedings.

17. Order 1 rule 10 provides that:

“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.”

18. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the issues in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings.
19. However, joinder of parties may be refused where it will lead into practical problems of handling the existing cause of action together with the one of the parties being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will



be declined where the cause of action being proposed or the relief sought is incompatible with or totally different from the existing cause of action. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.

20. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori v Chege & 3 Others* [2002] 2 KLR 243 where the learned Judge 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.
21. In *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 it was held as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...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.”

22. In *Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient



interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

23. In the instant case, the Proposed 3rd Defendant was the original owner of the Master Title before subdivision and transfer of the resulting titles to the allottees. The 1st and 2nd Defendants assert that the boundaries were demarcated and beacons placed on the respective properties before the acquisition by the 1st Defendant. I have perused the Plaint herein; I note that the Plaintiff’s complaint against the Defendant is of trespass and encroachment on his property. It is therefore only fair and just that original owner is joined into the proceedings, to shed light on how and where beacons were placed after sub divisions.
24. As for the Proposed 4th Defendant, it is evident that the suit properties were re-surveyed and new boundaries demarcated. To effectively determine the location of the boundaries, it is only the Proposed 4th Defendant, who supposedly undertook the re-survey and as a professional who can adduce evidence to that effect.

Conclusion

25. Accordingly, to enable the court determine the real issues in dispute among all the parties, the intended Defendants must be joined in the suit. I direct as follows:
 - a. Embakasi Ranching Co. Ltd. and The Institute of surveying and Mapping be joined as 3rd and 4th Defendants respectively.
 - b. Costs of the application shall be in the cause.

It is so ordered

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MAY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mosei h/b for Mr. Gitanda for the 1st Defendant

Mr. Ayiecha h/b for Mr. Barongo for the 2nd Defendant

Mr. Ondieki for the Plaintiff

Yvette: Court Assistant

M.D. MWANGI

JUDGE

