



**Githinji v Hared & 2 others (Environment & Land Case
E222 of 2023) [2024] KEELC 5807 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5807 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E222 OF 2023**

**JO MBOYA, J
JULY 29, 2024**

BETWEEN

JAMES MURIMI GITHINJI PLAINTIFF

AND

MOHAMED ALI HARED 1ST DEFENDANT

JOSEPH KARANJA 2ND DEFENDANT

KIAMBU DANDORA FARMERS COMPANY LIMITED 3RD DEFENDANT

RULING

1. The proposed 2nd and 3rd Defendants [Applicants] herein have approached the court vide chamber summons dated the 13th May 2024; and in respect of which same have sought for the following reliefs;
 - i. That the Applicant be admitted in the above Suit dated above Suit dated 21st April 2022 and filed in court on 26th April 2022 as the 2nd and 3rd defendants.
 - ii. That Leave be granted to the applicants to file and respond to the Suit dated 21st April 2022 and filed in court on 26th April 2022 within 30 days.
 - iii. That the costs of this Application be in the cause.
2. The instant application is premised on various grounds which have been highlighted at the foot thereof. Furthermore, the application is said to be supported by the affidavit of Abdilahi Muigai Muiruri. However, it is instructive to point out that there is no such affidavit which was attached to the application, either in the manner adverted to or at all.
3. To the contrary, the supporting affidavit which has been filed, has been sworn by one, namely, Joseph Mwangi Karanja and same is sworn on the 13th May 2024. Be that as it may, the said supporting



affidavit has not been adverted to at the foot of the application and hence there is no discernable nexus and/or affinity to the application before the court.

4. Be that as it may, upon being served with the application beforehand, the Plaintiff/Respondent herein filed a Replying affidavit and in respect of which same [Plaintiff/Respondent] has contended that the suit property being disputed at the foot of the suit has no nexus to and/or connection with the plot that is adverted to at the foot of the application, namely, Plot No. 493 Zone 11 Sossian or at all.
5. Additionally, the Plaintiff/Respondent has also contended that same has no claim as against the intended Defendants and thus the endeavour by the intended Defendants to join the suit is a deliberate scheme to convolute the issues in dispute and thus foster the continued occupation and trespass on the suit property by the 1st Defendant.
6. Suffice it to point out that the application beforehand came up for hearing on the 12th June 2024; whereupon the court gave directions pertaining to the manner in which the application was to be ventilated. For good measure, the court directed that the application be canvassed by way of written submissions, to be filed and exchanged, within set timelines,
7. Pursuant to the directions of the court, the intended Defendants/Applicants filed written submissions dated the 20th June 2024 whereas the Respondent filed written submissions dated the 24th July 2024.
8. For coherence, both sets of submissions form part of the record of the court.

Parties's Submissions:

Applicant's Submissions:

9. The Applicants filed written submissions dated the 20th June 2024 and in respect of which same [Intended Defendants] adopted and reiterated the grounds highlighted in the body of the application and thereafter canvassed one salient issue for consideration by the court.
10. Suffice it to point out that the Applicant contended that the suit property which is claimed by the Plaintiff herein forms and/or falls within the larger parcel of land known as L.R No. 11379/3, which is said to be registered in the name of Kiambu Dandora Farmers Company Ltd.
11. Besides, it has been contended that the suit property underpinning the subject proceedings shares the same geo-space/ground with plot number 493/Zone 11 Sossian, which plot arose from a sub division of L.R No. 11379/3 and therefore the intended Defendants are persons who ought to be joined in respect of the instant matter.
12. At any rate, learned counsel for the intended Defendants has ventured forward and submitted that to the extent that the Defendant's plot was sold to the Defendant by the intended 2nd Defendant, who obtained the plot from the intended 3rd Defendant, the said proposed Defendants are therefore necessary parties and whose presence would enable the court to effectively and effectually determine the dispute beforehand.
13. Simply put, learned counsel for the intended Defendants have thus contended that the intended Defendants are therefore necessary parties. In this regard, counsel has highlighted the provisions of Order 1 Rule 10[2] of the Civil Procedure Rules 2010, which underpins the jurisdiction/discretion of the court to join a party, at any stage of the proceedings, provided that such joinder shall be in the interests of justice.
14. On the other hand, learned counsel for the intended Defendants has also cited and referenced various decisions inter-alia Zephir Holdings Ltd vs Mimosa Plantations Ltd; Jeremiah Matagaro and



Ezekiel Misango Mutisya [2014]eKLR, Kingóri v Chege & 3 Others [2002]KLR 243 and Tang Gas Distributors Ltd v Said & Others [2014] EA 448, respectively, to underscore the scope of the jurisdiction of the court to join a necessary/interested party in a subsisting matter.

15. Flowing from the foregoing, learned counsel for the intended Defendant/Applicants has therefore implored the court to find and hold that the application beforehand is meritorious and thus ought to be allowed.

Plaintiff/respondent Submissions:

16. The Plaintiff/Respondent filed written submissions dated the 1st July 2024 and in respect of which same has highlighted inter-alia the gist/gravamen of the suit that has been filed before the court. In particular, the Plaintiff/Respondent has posited that the suit property is known as L.R No. 15400/470 [I.R No 162475] or better still plot number 298, which is indicated to be duly registered in the name of the Plaintiff/Respondent.
17. Furthermore, the Plaintiff/REspondent has contended that it is the suit property which has been encroached upon by the Defendants herein and thus the filing of the instant suit, whose purport is to recover vacant possession from the offender, namely, Defendant herein.
18. At any Rate, the Plaintiff/REspondent has posited that the intended joinder by the Applicants herein is a deliberate scheme, calculated to convolute the issues in dispute and thus delay, obstruct and/or defeat the expeditious hearing and determination of the dispute beforehand.
19. Other than the foregoing, learned counsel for the Plaintiff/Respondent has also submitted that the intended Applicants have not demonstrated any cogent or plausible basis and/or prejudice that same shall be disposed to suffer, if the intended joinder is not granted.
20. In a nutshell, the counsel for the Plaintiff/Respondent has submitted that the Intended Defendants/Applicants have neither demonstrated nor satisfied the legal threshold to warrant joinder in the suit as Defendants or at all. In this regard, it has been contended that the application is therefore misconceived and bad in law and thus ought not to be countenanced by the court.

Issues For Determination

21. Having reviewed the Application beforehand; the response thereto and the written submissions filed on behalf of the respective parties [whose details has been highlighted herein before], the following issues crystalize and are thus worthy of determination;
 - i. Whether the subject Application is competent and legally tenable or otherwise.
 - ii. Whether the intended Defendants have established the requisite basis to warrant joinder as [sic] Defendants in the suit or at all.

Analysis And Determination:

Issue Number 1 Whether the subject Application is competent and legally tenable or otherwise.

22. The Application beforehand relates to the intended joinder of the Proposed Defendants, namely, Joseph Karanja And Kiambu Dandora Farmers Co.ltd, respectively, who contend that same [Proposed Defendants] have a stake and/or interest in the suit as well as the suit property, which is the subject of the instant proceedings.



23. Given the nature of the application beforehand, there is no gainsaying that it was incumbent upon the proposed Defendants/Applicants to place before the court cogent and credible evidence [material] vide affidavit to demonstrate the nature of their interest in the instant suit and by extension the suit property.
24. Pertinently, it is evident that the intended Defendants/Applicants truly appreciated the need and/or necessity to provide an affidavit evidence to underpin the basis of their intended joinder. Indeed, and to this end, the application beforehand is said to be supported by the affidavit of one Abdilahi Muigai Muiruri.
25. Having highlighted and indicated at the foot of the application that same [application] is supported by the affidavit of Abdilahi Muigai Muiruri, it was incumbent upon the intended Defendants/Applicants and their legal counsel to ensure that the named affidavit is indeed attached to the application and filed alongside same.
26. Nevertheless, it is imperative to point out and underscore that despite the application adverted to the affidavit of Abdilahi Muigai Muiruri, no such affidavit has been tendered and/or adduced before the court. For good measure, an endeavour to discern the existence of such affidavit was in vain.
27. On the contrary, the supporting affidavit which has been filed and which is obtainable on record is the affidavit of one Joseph Mwangi Karanja sworn on the 13th May 2024. Nevertheless, even though the said affidavit has been filed, there is no nexus and/or affinity to the subject application.
28. Owing to the fact that the affidavit by Joseph Mwangi Karanja sworn on the 13th May 2024 has not been adverted to and/or referenced in the chamber summons application dated the 13th May 2024, it is my finding and holding that the said supporting affidavit has no affinity, nexus and/or connection to the application.
29. Furthermore, the said affidavit which has not been adverted to and/or highlighted by the application under reference, can also not be utilized and/or deployed for purposes of discerning whether any basis, prejudice or otherwise has been established to warrant the intended joinder of the proposed Defendants before the court.
30. Premised on the foregoing, it is my finding and holding that the chamber summons application dated the 13th May 2024 and which seeks joinder of the Proposed Defendants as primary parties to the suit, is devoid of evidential basis and/or anchorage. Simply put, the application has been mounted in vacuum.
31. Additionally, it is my finding and holding that there being no evidential anchorage and foundation upon which the application is premised, the court is deprived and divested of a basis upon which to exercise judicial discretion. Instructively, judicial discretion is to be exercised on the basis of credible evidence, explanation and/or justification; but not whimsically, capriciously or on the basis of sympathy.
32. In a nutshell, my answer to issue number one [1] is that the chamber summons application which is not anchored on any disclosed affidavit, is fatally deficient and thus legally incompetent. To this end, the application is still borne and thus merits being struck off.

Issue Number 2: Whether the intended Defendants have established the requisite basis to warrant joinder as [sic] Defendants in the suit or at all.

33. Notwithstanding the findings, which have been adverted to in the preceding paragraphs, and for the sake of completeness, I find it appropriate and/or apposite to venture forward and consider the merits of the application beforehand.



34. To start with, it is imperative to highlight that the Applicants herein are before the court seeking to be joined into the matter as co-Defendants. For clarity, the application highlights the Defendants as Proposed 2nd and 3rd Defendants.
35. To the extent that the Applicants are seeking to be joined as Co-Defendants, the capacity in which same [Applicants] are seeking to be joined must not be confused with any other capacity. For good measure, it was incumbent upon the Applicants to discern whether same [Applicants] are seeking to be joined as Defendants, interested parties or necessary parties.
36. Be that as it may, in respect of the instant matter, the Applicants have clearly pointed out and highlighted that same [Applicants] are seeking to be joined as Co-Defendants. However, in the body of the written submissions filed, the Applicants keeps oscillating between being joined as Co-Defendants; necessary parties or interested parties.
37. Suffice it to point out that it was incumbent upon the Applicants to discern capacity for the intended joinder and once the capacity is discerned, then the Applicants are obligated to place before the court sufficient material to underpin joinder in the designated capacity chosen.
38. Pertinently and in any event, it is not lost on the court that parties, the Applicants herein not excepted, are bound by their pleadings and cannot in the course of arguing their case go outside the pleaded case. [See Order 2 Rule 6 of the Civil Procedure Rules, 2010].
39. Additionally and in this respect, it suffices to take cognizance of the holding of the Supreme Court of Kenya [the Apex Court] in the case of Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR) (Civ) (28 January 2016) (Ruling), where the court held thus;
 60. Ordinarily, this Court will not enjoin a party in proceedings in a capacity different from that which they had sought. A party seeking to be enjoined as an interested party has to demonstrate having met the prerequisites of Rule 25 of the Supreme Court Rules, failing which they are not to be enjoined whether as interested parties or amicus curiae.

Likewise, a party that applies to be enjoined as amicus curiae has to prove that they have complied with the requisite conditions set out in Mumo Matemu. An applicant should seek to be enjoined in a capacity that is suitable for him/her. It is in view of the unique, and public- interest nature of this matter, that we are inclined to enjoin those parties that sought enjoyment as interveners, in the capacity of amici curiae; it is not as a matter of course.

Orders

40. Furthermore, it is important to underscore that a party who desires to be joined as a Defendant must implead a factual basis which is different from that to be demonstrated by a necessary or interested party. For coherence, for one to be joined as a Defendant it must be demonstrated that there is some semblance of reliefs flowing from that Defendant to the Plaintiff and not otherwise.
41. To this end, it is instructive to highlight and reiterate the holding of the court in the case of Joseph Njau Kingori v Robert Maina Chege & 3 others [2002] eKLR, where the court stated and held thus;

When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party



2. He must be a proper party.
 3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.
 4. The ultimate order or decree cannot be enforced without his presence in the matter.
 5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.
42. On the other hand, it is also important to point out that the joinder of a Defendant, who was not anticipated by the Plaintiff, should not be undertaken lightly insofar as such a joinder, may obscure, convolute and/or camouflage the issues in dispute; and by extension, occasion a delay in the hearing and determination of the matter.
43. At any rate, I hold the view that the joinder of a party as a Defendant takes a different trajectory from that of a party who seeks to be joined as a necessary party or interested party. In this regard, I am duly guided by the decision in the case of *Departed Asians Property Custodian Board vs Jaffer Brothers Ltd* [1999] 1 EA 55 it was held that:
- “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 involved 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 involved in the cause or matter...”
44. Having taken into account the ratio decidendi flowing from the decision [supra], it is now appropriate to venture forward and discern whether the proposed Defendants/Applicants herein merit joinder to the instant suit or better still, whether there is any relief flowing from the Intended Defendants to the Plaintiff.
45. First and foremost, the position taken by the proposed Defendants is to the effect that the plot being referenced as plot 493 Zone 11 Sossian, hitherto formed part of L.R No. 11379/3 [sic] belonging to the Proposed 3rd Defendant.
46. First forward, it is indicated that the alleged plot was allocated to and in favour of the proposed 2nd Defendant who thereafter is reported to have sold and transferred the said plot to the Defendant herein.
47. Assuming that the position highlighted in the proceeding paragraph is correct; then what is discernable is to the effect that both the proposed 2nd and 3rd Defendants divested themselves of all the rights and interests over the property and thus same have no interests to be canvassed and/ or protected vide joinder.
48. On the contrary, the only person who may have sought for joinder on the basis of a third-party notice would have been the Defendant herein, with a view to partaking of and/or pursuing indemnity and/ or contribution. [See Order 1 Rule 15 of the Civil Procedure Rules, 2010].
49. Arising from the foregoing analysis, I am unable to discern and/or decipher any lawful and/or legitimate basis upon which the proposed 2nd and 3rd Defendants would want to be joined to the subject suit as Defendants, when it is evident and crystal clear that the Plaintiff is not staking any claim as against same [proposed Defendants].



50. Barring repetition, I beg to highlight and underscore that it would have been different if the Applicants herein had sought joinder as interested or necessary party or better still as a party whose presence would have enabled the court to reach an effective and effectual determination. For good measure, the consideration for joinder as a necessary or interested party is different from that for joinder as a Defendant. [See the decision in the court of appeal in the case of Pravin Bowry v John Ward [2015]eKLR].
51. Finally, I beg to agree with the submissions by learned counsel for the Plaintiff that the intended joinder by the proposed Defendants was/is a scheme calculated to convolute and/or obscure the issues in dispute and thus to defeat the expeditious disposal of the matter beforehand.
52. Consequently and in the premises, my answer to issue number two [2] is to the effect that the proposed Defendants herein, have neither established nor laid a basis to warrant joinder in the manner sought or at all.

Final Disposition

53. Flowing from the analysis herein before highlighted, I come to the conclusion that the application beforehand is not only premature and misconceived taking into account that same is not anchored on any evidential foundation; but same is also devoid of merits.
54. In a nutshell, I come to the conclusion that the chamber summons application dated the 13th May 2024; courts dismissal and hence same be and is hereby dismissed with costs to the Plaintiff/ Respondent.
55. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF JULY 2024

OGUTTU MBOYA

JUDGE.

IN THE PRESENCE OF:

Benson – Court Assistant

Mr. Njuguna h/b for Mr. Kimamo for the Plaintiff/Respondent.

Mr. Abdiwakil Adhan h/b for Mr. Hussein for the Defendant/Respondent.

Mr. Murunga for the Proposed Defendants/Applicants.

