



REPUBLIC OF KENYA



Guyo v Maisha Bora Limited & 5 others (Environment & Land Case 149 of 2018) [2024] KEELC 5717 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 149 OF 2018**

EK MAKORI, J

JULY 24, 2024

BETWEEN

HAJILA BAJILA GUYO PLAINTIFF

AND

MAISHA BORA LIMITED 1ST DEFENDANT

WESTERN SUNSHINE COMPANY 2ND DEFENDANT

THE LAND REGISTRAR, KILIFI COUNTY 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

MICHAEL K. KATANA 5TH DEFENDANT

AND

DR. JOSEPHINE WANJIRU KAMAU PROPOSED DEFENDANT

RULING

1. The application dated 17 July 2023 seeks orders as hereunder:
 - a. That the applicant be admitted as a party in the suit dated 13 July 2018 and filed in Court on 17 July 2018 as the 6th Defendant.
 - b. That leave be granted to the 6th Defendant to be joined and to file and respond to the suit dated 13 July 2018, filed in Court on 17 July 2018, within 30 days.
 - c. That the costs of this Application be in the cause.
2. Save for the first defendant/respondent, the other parties in these proceedings did not oppose the application for joinder.



3. The proposed 6th defendant/applicant states that she learnt of the instant suit on June 6, 2023, upon being served with the replying affidavit by Hajila Bajila Guyo, the first Interested party in ELC Judicial Review No. 2 of 2022 Ex parte applicant Dr. Josephine Wanjiru Kamau v Hajila Bajila Guyo and others, wherein she was the applicant.
4. Upon learning of the suit mentioned above, the proposed 6th defendant/applicant promptly filed the instant application on July 17, 2023, in which she sought to be joined as a party to this suit and specifically as the 6th defendant.
5. The proposed 6th defendant/applicant further states that she had filed a complaint before the National Land Commission, which conducted public hearings on the allocation and ownership of LR Chembe Kibabamshe/397 within Kilifi Kilifi County from September 7 to 17, 2015, and February 1 to 4, 2016 at the Red Cross Hall in Malindi.
6. The Proposed 6th defendant/applicant further avers that all the parties herein, including the 1st defendant/respondent, appeared before the National Land Commission, which eventually decided that the suit property subject of the current litigation should be registered in her favour. The NLC found that the suit land belonged to her and that the subsequent titles issued to the parties in this suit should be cancelled, and she is registered as the absolute owner. The NLC decision was communicated to all the parties in the instant suit, and significantly, the findings were published in the Kenya Gazette.
7. As such, the proposed 6th defendant/applicant was astounded when she learnt that the plaintiff in the instant suit had filed this suit before this Court instead of preferring an appeal against the findings and eventual determination of the NLC.
8. The 1st defendant/respondent opposed the application vide a Preliminary Objection dated 16 February 2024 and a replying affidavit dated 29 February 2024. The proposed 6th defendant/ applicant filed a supplementary affidavit dated April 30, 2024.
9. The 1st defendant, through its Director, avers that the suit filed does not mention the 6th intended defendant/applicant, and no orders are sought against her in the original plaint dated 8 June 2018 and in the later amended plaint dated 6 February 2024.
10. The 1st defendant further states that the intended 6th defendant /applicant claims to have been allotted the suit land in 1977; she does not say that she obtained a title document to the suit property. She filed ELC Judicial Review No. 2 of 2022 - Ex parte applicant Dr. Josephine Wanjiru *Kamau v Hajila Bajila Guyo and others*, which this Court later dismissed. The Land Register testified that the Allotment Letter issued to the applicant was later cancelled. She does not have the land and has never set foot on it since 1977. The Judicial Review matter alluded to above disposed of her claim, which now stands res judicata. In any event, she must bring a fresh suit against the current registered owners and not be joined as a defendant.
11. The 1st defendant further alleges that the claim by the 1st defendant is statute-barred; it is a stale demand. Besides, if the applicant can join as a defendant, this matter will be convoluted further as a new cause of action will be introduced.
12. Parties were directed to file written submissions. They complied.
13. Before I frame the issues for this Court's determination, it will be observed that since this suit was filed in 2018, no progress has been made toward hearing it on its merits. This is thanks to many interlocutory applications, which I need not restate here.



14. Having realized the preceding, this Court, in its ruling, delivered on 24th January 2024, gave the following directions:

“Having looked at the entire proceedings and the responses, this Court is of the view that the Preliminary Objection raised, albeit targeting the application for amendment, addresses issues that have not been placed before this Court. That is, the PO would have been raised well after amendments and addressed when the parties to be joined would have been in a position to respond. What we have is putting the cart before the horse.

I can see an amendment to the defence by the first defendant. I don't know if it was allowed with the leave of the Court. If it had been allowed, the other parties had a right to respond. I have also seen an application for joinder. It also has to be addressed before we take the preliminary issues.

At this point, and in the spirit of active case management, I will first address the issue of amendment to the plaint.”

15. It follows that the single dominant issue I have to address in this ruling is whether to admit the applicant as a party or 6th defendant in these proceedings. The applicant and the 1st defendant referred this Court to various judicial authorities on the issue of the joinder of parties in proceedings. The former cited the decisions in *Zephir Holdings Ltd v Mimoso Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya* [2014] eKLR, on who a necessary party is in proceedings, *Kingori v Chege & 3 others* [2002] 2 KLR 243, on the guiding principles when an intending party is to be joined, the latter relied on the same authorities on the issue of joinder. The Court will refer to those authorities when deciding on the issue if necessary.

16. Joinder of parties to proceedings is governed by Order 1 rule 10(2) of the *Civil Procedure Rules*, which 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.”

17. In *Gladys Nduku Nthuki v Letsbego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR, Odunga J. held as follows on the issue of joinder:

“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:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the 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 effectively and completely adjudicate upon and settle all questions involved in the suit.
56. 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 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 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 the 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.”

57. 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 or 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.”

18. Reckoning the above judicial precedents that it is the discretion of the Court to order for the joinder of parties in proceedings, the Court has to be cautious when asked to join a party as a defendant; see, for example, Munyao J. in *Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others* [2014] eKLR, where he declined to allow joinder of a defendant when he stated as follows:

“ 15 ... Caution must be exercised when a party wants to join proceedings as a defendant. This is because the court would not want to impose a party upon the plaintiff unless it will not be prudent to determine the matter without such party being defendant. For example, if in an action against a tortfeasor, an employer of such tortfeasor applies to be enjoined as defendant because the tortfeasor was acting under the command of the employer, there should be no problem with such application, for the plaintiff's claim against the chosen defendant is the same claim against the principal. But where the plaintiff has chosen to assert his rights against certain defendants and not others, the court should be slow in imposing other defendants upon him, for each person has a right to choose against whom to assert his claims against. The plaintiff could have his genuine reasons as to why he does not wish to proceed against other persons, and issues of costs will also be involved.

16. In this case, the plaintiffs have made a choice on whom to sue. They have chosen to sue the 20 persons named as defendants. They have sued them because they say that it is these 20 persons who are trespassers and who are an impediment to the sub-division of the Group Ranch. In their replying affidavit, they have said that the intended interested parties are strangers to them, and that they are persons who are not residents of the suit land, but reside elsewhere. It is apparent that they have avoided suing the applicants because they do not consider the applicants to have trespassed on the suit land. That is their view of the matter, and I think that view needs to be respected...

19. Even if I were to take this application as an application by persons who want to be enjoined as defendants with a counterclaim, I am unable to allow it, for the plaintiffs do not wish to proceed against them, and as I earlier said, such choice needs to be given paramount consideration. I am unable to bring myself to include the applicants as defendants when the plaintiffs clearly state that they have no claim against them. I think the proper way is for the applicants to proceed to file a suit of their own if they feel that they have certain rights over the suit land.

19. In this matter, the applicant seeks to be joined in the proceedings, claiming that she has an ownership right over the suit property as the initial allottee and that The NLC made a finding to that effect. She has a stake in the suit property, just like the plaintiff and the other defendants. Any decree from this Court will affect her alleged proprietary rights in the suit property. She will then qualify as a necessary party in these proceedings
20. In JR No.of 2022, the applicant had sought orders of mandamus to compel the Chief Land Registrar, either by himself, subordinates, agents, or whosoever compelling him to revoke allegedly the illegal and fraudulently acquired grants in respect of Grant Number LR Chembe Kibabamshe/397 held by Hajila



Guyo and to issue the applicant with a title over LR Chembe Kibabamshe/397 upon compliance with the set legal requirements. That the suit property Grant Number LR Chembe Kibabamshe/397 be solely vested and registered in the applicant's name.

21. This Court, in dismissing the JR, stated as follows:

“We have a dispute(s) at hand between different parties as to the ownership of the suit property significant - Malindi ELC Case No. 149 of 2018. Moreover, the public duty of the respondent will only crystallize upon the conclusion of the matter(s) and/or setting aside the orders issued by this Court. I have not been addressed at what stage of the trial the other action(s) lies. Further orders from this court will tend to the proliferation and convolution of suits. The recipe is chaos where different parties have different orders from different courts of equal status.

It follows, therefore, that the order of mandamus sought cannot be issued until the orders issued by this Court, which is superior to the fifth interested party, are set aside or the dispute between the parties is fully and finally resolved.

Whether judicial review is the proper mode for seeking redress for the issue herein. I think not. The issues raised, and disputations made against the decision of the 5th respondent are contentious matters which can only be redressed by way of a civil suit. It is trite law that Judicial Review is designed to resolve uncontested matters of fact through affidavit evidence. There is a plethora of facts posed by the evidence tendered by the parties herein, particularly on the root of the title in this matter, which seems to have passed many hands and can only be resolved through an ordinary suit by calling witnesses and oral evidence to determine ownership of the suit property.

In the case of *Republic v National Transport and Safety Authority & 10 others ex - parte James Maina Mugo* [2015], eKLR Court held:

“...judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that when an applicant brings judicial review proceedings with a view to determining contested matters of facts and, in effect, determine the merits of the dispute, the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the disputes in the ordinary civil suits.”

First, both the second Interested Party and the ex-parte applicant all claim to the property, which is the subject matter herein. This led to the fifth interested party reviewing the dispositions. It will be necessary to interrogate the validity of the said claims by oral evidence.”

22. To my mind, the applicant should have filed her suit against the current title holders of the suit property and not be joined as a defendant. What will she be defending? I thought the applicant in the JR was seeking cancellation of titles subsequently issued to parties in this suit.

23. I Cannot impose on the parties a defendant they do not intend to sue. Since I have found she is a necessary party, I will allow the applicant to join as an interested party, not as a sixth defendant. That is the extent to which the application will succeed.

24. The Applicant (intended 6th defendant) is therefore joined as an interested party—costs in the cause.



25. Having made those findings, the other pending issues can be resolved at the Pre-trials before the matter is set down for hearing.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 24TH DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Makambo and Mr. Makworo, for the Plaintiffs

Ms. Aoko, for the 1st Defendant

Happy: Court Assistant.

Mr. Munga, for the 3rd and 4th Defendants

In the absence of:

Mr. Murunga for the proposed 6th Defendant

