



**Kitonga v Kalume & 2 others (Environment & Land Case
20 of 2017) [2024] KEELC 5611 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5611 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 20 OF 2017
NA MATHEKA, J
JULY 23, 2024**

BETWEEN

JOSEPH KITHUKUMUKI KITONGA PLAINTIFF

AND

DENA KALUME 1ST DEFENDANT

KADENGE KALUME 2ND DEFENDANT

AND

**SOFIA KALUME NURI & MARGARET KALUME NURI (BEING THE
LEGAL REPRESENTATIVES OF THE ESTATE OF MOHAMED KALUME
NURI) INTENDED DEFENDANT**

RULING

1. The application is dated 7th February 2020 and is brought under Section 1, 1A, 1B, 1C, 3, 34. 63(e), 100 of the *Civil Procedure Act*, Order 1 Rule 9 and order 8 rule 3 and 52 of the Civil Procedure Rules 2010 seeking the following orders;
 1. That the matter be certified as urgent and service be dispensed with in the first instance.
 2. That the honorable court be pleased to include the 3rd Defendants herein as a party to the suit.
 3. That this honorable court be pleased to grant the Defendants leave to amend the Defence to include a counter-claim.
 4. That the costs be provided for.
2. The application is grounded on facts and averments stated by Sofia Kalume one of the administrators of the estate of Mohamed Kalume Nuri who stated inter alia that the deceased was her husband who owned L.R No. 1043/III/156 and the suit property L.R No. 1043/III/155 and both properties are



neighbouring plots; that they have been occupying both plots from 1990 before the title deed was issued; that she always believed that the title deed for L.R 1043/III/156 was the entire property; that when this suit was lodged they had not acknowledged plot 155 as part of the deceased's property and thus denied having any interest in the same; that a surveyor informed the court that there were two plots and that they had encroached onto plot 155; that they challenged those findings by the said surveyor vide applications whose dates they did not provide and the same were dismissed; that they went through the deceased belongings and found documents showing how the deceased acquired the disputed land and that they therefore wish to amend the defence to include a counterclaim; that there will be no prejudice suffered by the plaintiff.

3. In reply the plaintiff filed replying affidavit sworn on 3rd March 2020 stated inter alia that a ruling was delivered on 26th June 2018 and no appeal had been filed hence the plaintiff executed the ruling by demolishing the structures built by the 1st and 2nd defendant; that the application lacks merit and is made in bad faith; that the 3rd defendants lack locus as the petition did not list the suit property as one of the assets by the deceased. Both counsel for the defendants and plaintiff filed their submissions on 24th May 2024 and 29th May 2024 which the court considered.
4. Having perused the application, the replying affidavit and the submissions thereto the issue for determination is whether the notice of motion application dated 7th February 2020 has merit or not and who will bear the costs?
5. The 3rd defendant has waited over 3 years to be joined into the suit and amend the defence to include a counterclaim. Joinder of parties to a suit is regulated under Order 1 rule 3 of the Civil Procedure Rules. In *Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another* [2015] eKLR the learned judge held as follows;

“In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rule.Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party 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 to or totally different from existing cause of action or the relief. 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.”

6. Counsel for the plaintiff argued against joinder as they believe the 3rd defendant would distort facts on which the court has already made a finding while the counsel for the plaintiff was adamant that the inclusion of the 3rd party is necessary as the suit property is subject to a succession pending in Mombasa Succession Cause No. 39 of 2018 and that the same are better placed to be in the suit as the 1st and 2nd defendant have been wrongly sued. Furthermore, counsel for the defendants argued that the outcome of this suit shall affect the intended party. Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows;

“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.”

7. The power of a court to order joinder is based on its discretion which must however be exercised judiciously and in accordance with the parameters set out in Order 1 Rule 10(2) of the Civil Procedure Rules. This was the position held by Angote J. in *Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR where he held 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.”

7. Also, in *Joseph Njau Kingori v Robert Maina Chege & 3 Others* [2002] eKLR distilled the guiding principles in considering whether to allow joinder of an intending party 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.”

8. The rulings dated 22nd May, 2018 by Learned Justice Komingoi did not have the effect of finality as claimed by the counsel for the plaintiff. It only granted a temporary injunction pending hearing of the suit. No fact had been resolved by the court as the ownership of the suit property is still in dispute. Although, the plaintiff claims that the 3rd defendant does not have locus, he attached petition documents showing that the 3rd defendant had petitioned the court for a full grant. Furthermore, the 3rd defendant attached a grant dated 27th May 2019. I therefore find that the 3rd defendant has fulfilled all the requirements in the *Joseph Njau Kingori* case supra.

9. On amendment of the defence, Order 8 of the Civil Procedure Rules states as follows;

- “(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings,



on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

- (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
- (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

10. The arguments raised by the counsel for the plaintiff that a new cause of action would be introduced if the Defence is amended by introducing the counterclaim is allowed has been defeated by Order 8 Rule 5. No prejudice has been demonstrated by the Plaintiff if the application is allowed. The proposed counterclaim has introduced facts not previously before this court and genuinely challenges the ownership of the suit property and the court can only properly determine the same if the amendment to include the counterclaim is allowed. I find the application is merited and I grant the following orders;

1. The 3rd Defendant herein be enjoined as a party to the suit.
2. That Defendants are granted leave to amend and file the Defence to include a counter-claim within the next 14 days.
3. The the costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

