



**Bazo v Ali (Environment and Land Appeal E003 of 2023)
[2024] KEELC 6115 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL E003 OF 2023
AE DENA, J
SEPTEMBER 26, 2024**

BETWEEN

MGAYI BAZO APPELLANT

AND

HEMEDI ALI RESPONDENT

RULING

Introduction And Background

1. To enable a better understanding of this appeal it is important to lay a background to the same. The Plaintiff commenced proceedings before the Magistrates court in Msambweni Msambweni ELC No E001 of 2022 Mgayi Bazo v Hemedi Ali by a plaint dated 31/01/22. Together with the Plaintiff was filed an application dated 31/01/22 seeking inter alia orders of temporary injunction against the defendant and or his agents restraining them trespassing and constructing in the suit property herein being a portion of land situated at Mwena Village being part of Title Number Mwereni/Group Ranch/14. The application was opposed by the Defendant who stated in his replying affidavit that he was a mere supervisor for the construction which belonged to the son of his deceased brother one Said Ali Mwangwadu. That he was wrongly sued and the sons of the deceased were the proper persons to answer to the application/suit.
2. The learned Hon. Sandra Ogot (SRM) delivered a ruling dated 14/2/22 dismissing the application dated 31/01/22 noting that indeed the Defendant had been wrongly sued and even if an injunction was issued it would only stop the supervision of the construction and not the construction. That the Plaintiff if he deemed it necessarily needed to identify the proper parties to sue as defendants.
3. Following the above ruling the Plaintiff amended the Plaintiff by adding three parties as 2nd 3rd and 4th defendants and filed an application dated 13/10/22 seeking among others orders of temporary injunction against the all the Defendants and leave to amend the Plaintiff as per the attached draft which he attached. The application also sought that the same be deemed as duly filed upon payment of the



requisite fees. The application was opposed by the Defendant by a preliminary objection contending inter alia that there was breach of procedure for amendment of pleadings as leave of the court was not sought to amend the plaint. The learned Hon. Sandra Ogot (SRM) delivered a ruling dated 17/2/23 agreeing with the Defendant dismissing the application on the basis that the omnibus application filed by the Plaintiff was unprocedural and that the orders sought ought to have been sought under two separate applications.

4. Aggrieved by the above the Plaintiff filed the present appeal against the said ruling date 17/2/23. A memorandum of Appeal was filed on 1/03/2023 raising the following verbatim grounds; -
 1. That the learned Trial Magistrate erred in Law and fact in not appreciating that the Application before her was served upon all parties including the intended defendants so as to respond whether the Defendant was indeed employed, working and or constructing under the instructions of the intended defendants whom the leave of the court was being sought for them to be made parties to the suit so that the court can have the opportunity to justify its ruling delivered on the 14th day of September, 2022 that dismissed the plaintiff's Application dated 31 January, 2022 on grounds that the defendant is an employee of the intended defendants without evidence before the court in support of that fact.
 2. That the learned Trial Magistrate erred in law and fact in finding that the court on its own motion can order an amendment of pleading so as to determine the real issue in controversy so as to arrive to a fair and just decision or determination but proceeded to dismiss the application for want of form of the application upon which the appellant was not seeking to amend but rather the plaint attached to it and further that the trial magistrate admitted that her position is not supported by express provisions of the law.
 3. That the learned Trial Magistrate erred in law and fact in taking sides in these proceedings by acting for the Respondent specifically on a ruling issued on 31 January, 2022 where the Respondent upon confronted on relying on the wrong provisions of the law Learned Trial Magistrate quickly used the provisions of Section 1A, 3A, 3 of the *Civil Procedure Act* to protect the Respondent but refused to apply the same provisions of the law and/or Article 159 of the *Constitution* despite being cited by the Appellant's Application and proceeded to dismiss the same on unfounded technicality.
 4. That the learned Trial Magistrate erred in law and fact by forming part of an elaborate astigmatic process of dispossessing the Appellant of the suit property by vacating interim Orders of Preservatory of the suit property and ordering the Appellant to file an Application for amending the Plaint and mischievously dismissing the same so as to put the Respondent in actual physical occupation, constructing and or wasting the Appellant portion of land.
 5. That the learned Trial Magistrate erred in law and fact in failing to consider the submissions raised by the parties in determining the issues raised in the Preliminary Objection and the Application before her.
 6. That the learned Trial Magistrate erred in law and fact in failing to recognize that the suit property was being wasted, constructed on, excavated and being sold hence appropriate Orders for maintenance of status quo were necessary to preserve the suit property pending hearing and determination of the suit.
 7. That the learned Trial Magistrate erred in law and fact in not allowing the amendment for the Court to determine the real question in controversy so as to give a fair and just decision that is void of unfounded legal technicalities in law over this matter.



8. That the Trial learned Magistrate erred in law and fact in finding out that there is no express provision-that disallows the Application before her and proceeded to dismiss the same.
 9. That learned Trial Magistrate erred in law and fact by arriving to the position that the procedure in filing the Application was wrong while admitting that her assertions not supported by clear provisions of the law and by further failing to invoke the provisions of Section IA,3,3A of the *Civil Procedure Act* as cited in the Application and proceeded to Dismiss the Application on unjustified technicalities not supported by the law.
 10. That the learned Trial Magistrate failed in law and fact in issuing a Ruling that is not supported by the law.
 11. That the Trial Magistrate erred in law and fact in realizing that the issue of amendment was conversed in her Ruling dated 31'March 2022 and Amendment was necessary to assist the court in arriving at a just and fair decision but proceeded to dismiss the same.
 12. That the Trial Magistrate erred in law and fact by finding that an omnibus Application is fatal while allowing an omnibus Application filed by the Respondent in these proceedings despite being brought under the wrong provisions of the law.
 13. That the learned Trial Magistrate erred in law and fact by exhibiting open biasness in handling these proceedings and in a manner and style of participating as that of not an baiter in law but representing and conducting the proceedings as the representative of the Respondent in this case
- 5 The Appeal was canvassed by way of written submissions which parties filed and exchanged. The Appellants submissions are dated 8/4/24 and the Respondents are dated 14/5/23.

The Appellants Submissions

6. It is submitted on behalf of the Appellant that the preliminary objection did not raise any pure point of law and ought not to have been upheld reliance is placed in *Peter Mungi v. Joseph Ngamba Kuria & Ano*. ELC Thika MSC. Application No.8 of 2021}}. That the court was biased in dismissing the application on procedural technicality as to omni bus applications when at the same time allowing the Defendants omnibus application by curing it under the provisions of section 1A, 3 and 3B of the *Civil Procedure Act*. The court is urged to order that the trial be conducted by another trial court.
7. That the court contravened the law by disallowing the application for amendment of the pleadings as amendment of pleadings including the correction of a party or addition/substitution of a cause of action ought to be allowed at any stage of the proceedings subject to conditions or as may be just and for purpose of determining the real issue in controversy. Reliance is placed on the principles of amending pleadings as laid out in ELC Case No. 195 of 2019 Mombasa Limited v. Trustee of Mombasa Simba Sports Club & Others. Further that the court without any evidence made a finding that the Defendant was not the owner of the construction. That by locking out the intended Defendants dealt the Plaintiffs suit an injustice and fell short of the requirements of article 159 of the *Constitution* as to procedural technicalities. That the amendments were intimated by the court in the previous ruling and there was no need of an application to the court to allow them as the court had jurisdiction to allow the same suo motto. The court is urged to allow the appeal.



Respondents Submissions

8. Reiterating the events that led to the filing of the present appeal it was submitted on behalf of the Respondent that the applicants did not adhere to the procedure laid out in Order 8 of the [Civil Procedure Rules 2010](#) for amending the application by adding three defendants without prior leave of the court. That the applicant ought to have filed an application to seek leave to amend and once granted then proceed to seek the orders of injunction against all the Defendants. The court is referred to [Joseph S. Wafula v. Elena Chepkurgat Arap Kogo](#) (2019) eKLR to buttress this position. That to allow the application dismissed by the trial court will be to enshrine illegality since equity will not allow a remedy that is contrary to the law.
9. Citing [Kenya Electricity Transmission Company Ltd v. Kibotu Limited](#) (2019) eKLR it is submitted that equity acts in personam and this court cannot issue orders against person who are not parties in the trial suit. The Court is invited to dismiss the appeal. The Respondent prays costs of this appeal. Reference is made to the provisions of section 27 of the [Civil Procedure Act](#) and the objectives of compensating the successful party for the trouble of defending the suit.

Analysis and Determination

10. Having considered the foregoing including the grounds of appeal, opposition thereof, the submissions of the parties and the impugned ruling delivered on 17th February 2023 for me the main issues for determination are
 1. Whether the Hon Trial Magistrate erred in law and fact by finding that an omnibus Application is fatal.
 2. Whether the Appellant is entitled to the orders sought
11. Before I delve into a discussion of the above issues I have noted that Counsel for the Plaintiff spent quite a considerable amount of time discussing that the Preliminary objection was not properly raised as it did not raise a pure point of law. But having perused the grounds of appeal this has not been raised as one of the grounds of appeal. I will therefore not spend time on it.

Whether the Trial Magistrate erred in law and fact by finding that an omnibus Application is fatal.

12. The learned trial court captured the gist of the objection thus; -

‘To be clear, the Plaintiff has filed an application seeking to amend the plaint to include three other defendants in his suit and in the same application he is seeking injunctive orders against the defendant and those 3 would be defendants at thought (sic) the court had already agreed to them being added on as defendants.’
13. My understanding of the objection raised by the Respondents is that it faults the applicants for filing an application seeking different substantive orders under what I will call the same roof. According to the Respondents an application to amend the pleadings ought to have been filed first giving an opportunity to the Defendant to respond and after leave was granted, the pleadings would be amended accordingly by adding the additional defendants. That thereafter this would pave way for an application to be filed seeking the conservatory orders.



14. Is there any law that bars the seeking of various substantive orders regulated under different provisions of the Civil Procedure under one application? The learned Hon. Magistrate observed thus; -

‘This position of omnibus application by the applicant is procedurally wrong. It may not have been expressly stated so in law, but the fact that each of this orders he is seeking is provided for separately under the rules, means that this omnibus application is wrong..... Application for each order should be brought separately to allow the parties ventilate on that issue before it moves to the next application dealing with a separate issue. This provides for clarity and removes chaos in in the Practice of Civil Procedure.’

15. But how have courts treated such applications? In the persuasive case of *Denis Abairwe v Standard Chartered Bank (U) Ltd* High Court of Uganda at Kampala Commercial Div. Miscellaneous Application No. 1851 of 2023 Arising from Civil Suit No. 757 of 2018 faced with an omnibus application seeking to set aside a judgement and stay of execution had this to say in its ruling delivered on 19/12/23; -

‘it is trite that an omnibus application may be brought where applications are of the same nature, have effect of mitigating a multiplicity of suits, one is a consequence of the other or where no injustice would be occasioned by handling both applications.....

As long as the omnibus application is brought before a court with jurisdiction to grant both reliefs, and in a procedure that can accommodate both applications, then the same is proper and should be entertained. Where however the court is not empowered to grant all the remedies sought or the procedure cannot accommodate all the applications then the court should entertain and dispose the portion of omnibus application that is rightly before it and decline to grant the rest of the application/reliefs, referring it to the appropriate court or procedure.’

16. In *Murithi Wanjao (T/A Wanjao & Wanjau Advocates) v. Samuel Mundati Gatabaki & Ano* (2015) eKLR the court referred to a decision of Ringera J as he then was where the said learned judge held that omnibus applications are for striking out, F. Gikonyo J chose to determine the application on merit.

17. I agree and I’m persuaded by the above dictum. I respectfully agree with the position that there is no legal provision that expressly states that an applicant shall not seek more than one substantive order in one application. For me as long as the court is seized of jurisdiction to grant the reliefs sought then it would not matter that the reliefs sought are regulated under different provisions of the Rules. Clearly the trial court had jurisdiction to grant both orders. If there is no specific bar in law then the rest becomes a procedural issue and a matter of sequencing. The court will decide depending with the circumstances of the case and the nature of the orders sought.

18. In the present case it was necessary to amend the pleadings to ensure the correct parties are enjoined following the filing of a replying affidavit by the Defendant in the previous application that a wrong party has been sued. The trial court in its ruling dated 14/9/22 left it to Counsel for the Plaintiff to choose whether or not to amend the pleadings. The trial court stated thus; -

It is my opinion that the plaintiff needs to ascertain who the proper parties are as defendants moving forward. If he decides he does not want to, that is equally his prerogative. However, he needs to be alive to the fact court orders cannot issue in vain.

19. The Applicant subsequently filed the Notice of Motion application dated 13th October 2022. The application was brought among others, Order 8 Rule 3 of the *Civil Procedure Rules* which order is on



amendment of pleadings with leave of the court and which I do not find necessary to reproduce here. Prayer No.4 reads as follows; -

That leave be granted to the Plaintiff to amend the plaint in the manner and style shown in the draft plaint annexed to the plaintiffs supporting affidavit and upon payment of the requisite filing fees the amended plaint be deemed as duly filed.

20. Ground No. 4 of the application explains what necessitated the amendment being the deposition that the defendant was a mere supervisor. Guided by the authorities cited the trial court clearly was seized of jurisdiction to grant such leave and grant prayer No. 4 above. The trial court faulted counsel for listing the parties in the Notice of Motion as if leave had already been granted. For me this was unnecessary. Maybe the words 'Proposed 2nd – 3rd Defendants' should have been inserted next to the added parties. However, it is noteworthy from the above that the applicant indeed provided for a cure by further praying that the amended pleading be deemed as duly filed upon payment of the requisite fees.
21. The trial court being seized of jurisdiction ought to have considered the application for amendment on merit rather than dismissing it summarily on the basis of the procedure deployed. It is this courts finding that the trial court erred in law by finding that an omnibus application is fatal.

Whether the Applicant is entitled to the orders sought.

22. The Appellant prays as follows; -
 - a. That the ruling delivered on 17th February 2023 by the learned trial Magistrate be set aside and in its place the orders for amendment of Plaintiff in terms of the Draft Amended Plaintiff annexed on the Appellants Application dated 13th October 2022 be allowed.
 - b. That Preservatory (sic) be issued restraining the parties from dealing with the suit land pending hearing and determination of the suit.
 - c. Costs of this appeal.
23. I think from my analysis and finding above and to avoid repetition prayer a) above should be granted. I will further add that the learned Magistrate appreciated and rightly so that such orders for amendment could be granted on an oral application and even suo motto and to enable effective determination of the real question in controversy.
24. I will now consider the invitation to grant the preservatory orders restraining the parties from dealing with the suit property pending hearing and determination of this suit. The Respondents contend that preservatory orders cannot issue against persons who are not parties to the suit. The trial court agreed with this proposition thus

‘Injunctive orders as provided under Order 40 are normally issued to parties already in a suit. In the present case, the applicant seeks to injunct people who are not even parties to the suit yet. Those orders would be unsubstantiated and a court never issues orders in vain’
25. Clearly the application for injunction was not heard on merit. This court having made a finding that the court erred by making the finding that an omnibus application is wrong, it is inevitable that a ruling in respect to the amendment of the Plaintiff is overturned and joinder of the additional defendants is allowed. It would follow that the application for injunction should be heard on merit and this can only be done upon the new parties filing a Defence and their response to the application first.



26. The upshot of the foregoing is that this appeal partly succeeds to the extent that the trial court erred in law by determining that an omnibus application is fatal. The following orders therefore issue
1. That the ruling delivered on 17th February 2023 by the learned trial Magistrate be set aside and in its place the orders for amendment of Plaintiff in terms of the Draft Amended Plaintiff annexed on the Appellants Application dated 13th October 2022 be allowed.
 2. That the Draft Amended Plaintiff above be deemed as duly filed upon payment of the requisite court fees.
 3. That the Notice of Motion application dated 13th October 2022 is referred back for hearing and determination by the trial court on prayers 2 and 3 thereof.
 4. That the costs of this appeal shall abide the outcome of the main suit herein.
 5. That the orders staying the proceedings in Msambweni ELC No. E001 of 2022 are hereby discharged.

Orders accordingly

RULING DATED SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2024.

HON LADY JUSTICE A.E

JUDGE

Mr. Mangaro for the Applicant /Appellant

Mr. Kamau ^{for} Respondent

Mr. Daniel Disii – Court Assistant

