



Kiroiro na Enye Community Based Organisation v Khosla & 3 others (Environment & Land Case 4 of 2023) [2024] KEELC 5966 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5966 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 4 OF 2023

FM NJOROGE, J

SEPTEMBER 19, 2024

IN THE MATTER OF LAND PARCEL PLOT NO. MN/IV/86

AND

**IN THE MATTER OF AN APPLICATION FOR DECLARATION
THAT THE PLAINTIFFS HAVE OBTAINED OWNERSHIP OF THE
ABOVE SAID PARCEL OF LAND BY WAY OF ADVERSE POSSESSION**

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

BETWEEN

KIRIRO NA ENYE COMMUNITY BASED ORGANISATION PLAINTIFF

AND

SHAMSHUDIN KHOSLA 1ST DEFENDANT

THE LAND REGISTRAR MOMBASA 2ND DEFENDANT

THE DIRECTOR OF SURVEY MOMBASA COUNTY 3RD DEFENDANT

THE OCS MTWAPA POLICE STATION 4TH DEFENDANT

RULING

1. The notice of motion for determination is dated 27/2/2024 brought under Section 1A, 1B & 3A of the [Civil Procedure Act](#), Order 1 Rule 10 (2), Order 2 Rule 15 and Order 51 Rule 1 of the [Civil Procedure Rules](#). The Orders sought were tailored as follows: -
 - a. That the honourable court be pleased to order that the 1st Defendant is not a necessary party in this suit;



- b. That the 1st Defendant's name be struck out from the plaint and all other pleadings in relation to the matter herein and the 1st Defendant be fully discharged from the proceedings herein;
 - c. That costs of this application be awarded to the 1st Defendant.
2. The basis of the application is to be found among the grounds set out in the motion and in the supporting affidavit sworn by the 1st Defendant on an even date. According to the 1st Defendant, he has been wrongly sued since he is not the registered owner of the land in dispute, Plot No. MN/IV/86 (the suit property). He exhibited a copy of official search dated 30/11/2023 showing that the suit property is registered in the name of one Abdulla Bin Omari.
 3. The 2nd-4th Defendants opted to not oppose the motion. The Plaintiff on the other hand failed to file any response or attend court for the same. The application was canvassed by way of written submissions. The 1st Defendant relied on the submissions dated 26/4/2024 wherein he reiterated and relied on the contents of the aforementioned supporting affidavit.

Analysis and Determination

4. Having considered the Notice of Motion and the submissions by the 1st Defendant, the sole issue for determination is whether the 1st Defendant/Applicant should be struck out as party in this suit for being wrongly joined in the suit.
5. With regard to joinder of parties, Order 1 rule 9 of the [Civil Procedure Rules](#) states that no suit shall be defeated for misjoinder or non-joinder of parties. That provision of the law requires that the court deals with the matter in controversy in so far as the rights and interests of the parties actually before it are concerned. Further, Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) also provides that: -

“The court may at any stage of the proceedings, either upon or without the application of either part, 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 defendants, 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.”
6. The question that falls for determination therefore is whether the 1st Defendant is a necessary party to this suit and if so, whether any cause of action is disclosed against it. It is also trite that the power to strike out a party from a suit should be approached with caution. The power to strike out a party from a suit is obviously the same as the power to strike out a suit in so far as that party is concerned. Madan. J.A in the case of [DT Dobie and Company \(K\) Ltd v Joseph Mbaria Muchina & Another](#) (1982) KLR 1 referring to the power to strike out a suit stated that: -

“The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”
7. In this case, the 1st Defendant contests that he is not the registered owner of the suit property and is therefore not a necessary party to this suit. He produced a copy of certificate of postal search dated 30/11/2023 indicating that the registered owner of the suit property is one “Abdulla Bin Omari on behalf of himself and as a trustee of the heirs”. On its part, the Plaintiff instituted this suit relying on



a certificate of postal search dated 25/7/2023 where the owner of the suit property is identified as the 1st Defendant.

8. I have perused the certificates of postal search and in the absence of any evidence to the contrary, I must rely on the most recent certificate to make my determination at this point with regard to current ownership. As already established, the most recent search presented before me shows that the 1st Defendant does not currently own the land. However, as the earlier certificate of search shows that he was previously the owner and that consequently there was a good reason for his joinder at the inception of the suit, and it is evident that how the transfer occurred may become an issue at the hearing, this court's opinion leans heavily on the side of disallowing the present application. In this court's view it can not be fully determined at the present stage whether the presence of the applicant can be fully dispensed with. In any event an award of costs would be the panacea in the end perchance the court rules in his favour. In the circumstances, I find that the application dated 27/2/2024 is not merited and it is hereby dismissed. The costs of the application shall abide the outcome of the suit.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 19TH DAY OF SEPTEMBER 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

