



Hussein v Elema & 8 others (Environment and Land Appeal E029 of 2023) [2024] KEELC 7246 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7246 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E029 OF 2023
CK NZILI, J
OCTOBER 30, 2024**

BETWEEN

MOHAMED ALI HUSSEIN APPELLANT

AND

SUSAN ELEMA 1ST RESPONDENT

MOHAMED JIROMI GOLICHA 2ND RESPONDENT

JAMAL MOLU 3RD RESPONDENT

ABDI WAKO 4TH RESPONDENT

SALAD AUTANA 5TH RESPONDENT

ALI TUTANA 6TH RESPONDENT

MUGO WAHOME 7TH RESPONDENT

IBRAHIM HUKA BORU 8TH RESPONDENT

THE HON ATTORNEY GENERAL 9TH RESPONDENT

*(Being an appeal against the orders and ruling of Hon. R. Ongira,
SRM in ELC No. E006 of 2023 at Tigania, dated 4.9.2023)*

JUDGMENT

1. What is before the court is a memorandum of appeal dated 29.9.2023. The appellant, who was the plaintiff at the lower court, had sued the respondents as the defendants for trespass and forceful entry into and from his Parcel Nos. 15550 and 15647 Ngaremara/Gambela Adjudication Section, between 2018 and 2023, hence making him unable to access, utilize or occupy his land; a declaration that the land belongs to him and a permanent injunction stopping the respondents from entering,



- interfering, transferring or in any way interfering with his right to ownership of the suit parcels of land. Alongside the plaint, the appellant filed an application dated 25.1.2023. The 1st -8th respondents entered appearance through F.J Mugambi & Company Advocates on 13.2.2023.
2. Further, by an application dated 10.2.2023, the Hon. Attorney General sought to be joined as an interested party and stay of proceedings pending the conclusion of the adjudication process under Section 30 of the [Land Adjudication Act](#). Despite leave being granted on 6.3.2023, to put in responses to the applications dated 25.1.2023 and 10.2.2023, no responses were filed by the 1st - 8th respondents within 7 days as ordered or at all. Instead, on 6.3.2023, Mr. Muthomi told the trial court that he was not opposed to the application by the 9th respondent. Equally, no submissions were filed on their part by 3.4.2023, as ordered by the trial court to both the application and preliminary objection by the 9th respondent on 29.5.2023.
 3. The appellant opposed the application by a replying affidavit sworn on 28.2.2023 for lack of merits. He averred that his suit involved trespass and was not in respect to the adjudication process as alleged by the interested party.
 4. Similarly, he said that the joinder of the interested party was tantamount to altering the nature of the suit and introducing a new cause of action that was prejudicial to him.
 5. In a further affidavit sworn by Patrick Wachira Nguyo, Deputy Chief state counsel, it was averred that there were ongoing cases, such as Muthara Njuri Ncheke Council of Elders and another vs Committee of Ngaremara Gambela Adjudication Section and others (2019) eKLR, where the court held that the adjudication process should continue only in respect to the areas covered in the initial notice issued on 11.3.2016.
 6. The deponent denied the contents of a letter dated 4.1.2023 by the appellant, to the effect that the adjudication process had been completed, facts which only the District Land Adjudication and Settlement Officer (DLASO), in charge of Tigania could confirm. As to trespass, the deponent averred that trespass pre-empties ownership of the suit parcels of land and to handle the dispute, the court would be usurping the powers of the Land Adjudication Officer under Section 28 of the [Land Adjudication Act](#). The deponent averred that by joining the interested party to the suit, there would be no new cause of action or alteration of the cause of action other than in guiding the court. Similarly, it was averred that the court lacked jurisdiction to grant prayer number 1 of the plaint under the Act
 7. Further, the deponent averred that the Hon. Attorney General, as the principal legal advisor to the government and with leave of court, may appear at any stage in proceedings that were incidental to government functioning, the protection and upholding of the rule of law and defending public interest under Article 156 (6) of [the Constitution](#). In this case, it was averred that it was a matter of public interest because, upon completion of the adjudication of the Ngaremara/Gambela Adjudication Section, land titles will be delivered to the locals.
 8. Again, the deponent averred that for purposes of meeting the ends of justice, the Ministry of Land and Physical Planning should be given ample time to complete the adjudication process and produce the adjudication register as per Sections 24 & 25 of the [Land Adjudication Act](#).
 9. By a ruling dated 15.5.2023, the application for joinder of the interested party was allowed in terms of prayers (b) & (c). The trial court declined to stay the proceedings. Following this, the interested party filed a memorandum of appearance as the 9th defendant, a statement of defense and a counterclaim dated 24.5.2023.



10. In the statement of defense and counterclaim, the 9th defendant, herein the 9th respondent, denied the contents of the plaint and insisted that the court lacked jurisdiction to hear and determine the suit, by virtue of Section 30 of the *Land Adjudication Act*.
11. By way of a counterclaim, the 9th defendant, as the plaintiff, sued the appellant, averring that the ownership of Parcel Nos. 15550 and 15647 Ngaremara/Gambela Adjudication section had not been determined hence, the appellant could not claim ownership of the land or aver that he has interest in the land. The 9th respondent averred that it is only the adjudication officer who has the jurisdiction in all claims made relating to interests in land in the adjudication area and in this case, the defendant in the counterclaim had not exhausted the avenues set under the *Land Adjudication Act*.
12. Further, the 9th respondent averred that it was appropriate that the Ministry of Lands and Physical Planning to be given ample time to complete the adjudication process and consequently produce an adjudication register. The 9th respondent averred that the suit by the appellant should be dismissed and the appellant directed to seek redress before the adjudication committee. The counterclaim had no verifying affidavit.
13. The trial court issued directions on 29.5.2023 that parties canvass the preliminary objection by way of written submissions. The 1st -8th respondents had not filed any defence to both the main suit and the counterclaim. In a ruling delivered on 4.9.2023, the trial court upheld the preliminary objection and struck out the suit with costs which were assessed at Kshs.66,300/=, by a certificate of costs dated 25.3.2024, following a bill of costs dated 24.10.2023 by the 9th respondent, of Kshs.1,344,990/=.
14. The appellant has appealed to this court on the basis that:
 - i. He was denied a right to be heard and a fair administrative action.
 - ii. He was condemned unheard.
 - iii. The court failed to find that he had filed a replying affidavit sworn on 28.2.2023 and filed on 2.3.2023.
 - iv. The court had no jurisdiction to determine the matter, given that letters dated 4.1.2023, 28.4.2022, and 15.3.2022 had exempted him from acquiring a consent to file the suit.
 - v. For not finding that he had no claim against the government for his cause of action related to trespass.
 - vi. The ruling and orders were against the law and rules of procedure.
15. This appeal was canvassed by way of written submissions. The issues calling for my determination are:
 - i. If the 9th respondent could change the status in which it was allowed to join the proceedings and file a memorandum of appeal, statement of defense and counterclaim and a preliminary objection.
 - ii. If the trial court infringed on the rights of the appellant, to property and fair administrative action.
 - iii. If the court had jurisdiction to hear and determine the suit.
 - iv. If the appeal has merits.
16. Jurisdiction is everything and without it, a court of law must down its tools. The suit before the trial court was based on the trespass to land. Trespass refers to unjustified entry into the private property of



another and the commission of acts of destruction. Trespass may be instant, continuing, or permanent. The appellant, in support of this suit, attached copies of a letter dated 4.1.2023 confirming ownership of Parcels No.15550 and 15647, for orders of status quo and for maintenance of law and order, awaiting the fresh adjudication of the area as ordered by the Environment and Land Court at Meru. There was a letter attached from the County Government of Isiolo dated 28.4.2022, showing that the appellant was the owner of Plot No. 9 Chechelezi Nassie as per Laiform system dated 9.1. 2013, where he had been paying land rates and rents since 2013, as per a demand note dated 5.11.2012. From the record it appears that after service of summons, the firm of F.J Mugambi & Co. Advocates filed a notice of appointment on behalf of the 1st – 8th respondents, but filed no further pleadings or documents in the matter.

17. From the pleadings, it is clear that other than a statement of defense and counterclaim, which had no verifying affidavit, no list of witnesses, witness statements and documents were filed to sustain or verify the averments by the 9th respondent. Even if the 9th respondent could have been a 9th defendant, a witness statement and documents showing that the suit land was under adjudication process, the stage of the adjudication process and lastly, that a consent to sue was a condition precedent to filing the suit, were necessary.
18. It is trite law that parties are bound by pleadings, and issues flow from such pleadings. The ruling dated 15.5.2023 was clear that the Hon. Attorney General was joining the suit as an interested party. Instead, the 9th respondent, without leave of court, filed documents in a different capacity. The deponent of the application for leave had alluded to the role of the land registrar and the land adjudication officers. One would have expected the said officers to be the best suited to swear the verifying affidavit to the counterclaim or witness statements to confirm the ownership of the suit land or the status of the adjudication process as alleged by the appellant.
19. In *Francis Muruatetu vs Republic* (2017) eKLR, an interested party was described as a party who is neither a plaintiff nor defendant, but who has a stake in a suit, for he is likely to be affected by the outcome.
20. The court held that the issues for a court's determination remain those of the principal parties to a suit and an interested party cannot step in and dictate or change the suit or claim. Again, the court stated that access to justice includes the right to a fair trial and if the trial is unfair, one cannot be said to have accessed justice. In *Gladys Nduku Njoki vs Letshego (K) Ltd (2022) eKLR, the court cited Civicon Ltd vs Kivuwatt Ltd & others* (2015) eKLR, on the distinction between an interested party and the primary parties to a suit.
21. In this appeal, the trial court orders allowing the joining of the 9th respondent as the interested party were not set aside, varied, or vacated. The 9th respondent appears to have abused the court process and came in with the sole aim of interfering with the right to a fair hearing of the appellant and not to assist the court. I say so because, in the initial plaint, there was no pleading against the Hon. Attorney General. The said plaint was not amended to include the 9th respondent as a defendant, for it to file a defense and counterclaim. By allowing the joinder, the trial court did not order the filing of such pleadings by the 9th respondent as a 9th defendant.
22. Instead, the 9th respondent brought itself as a 9th defendant and proceeded to file a defense and counterclaim, answering issues that had not been pleaded against it. In *Bajaber Limited vs Kenya Revenue Authority* (2021) eKLR, the court held that a party cannot depart and file pleadings that are different from which leave had been granted. A party who was not a defendant cannot simply walk into proceedings by filing a statement of defense. See *Luka Kiplelei Kotut vs Joseph Chebii & Another* (2013) eKLR and *Marigat Group Ranch & 3 others vs Wesley Chepkoiment & 19 others* [2014] eKLR.



23. It is also not clear if the 9th respondent extracted and served a summons to enter an appearance as a plaintiff in the counterclaim against the defendant to the counterclaim. The counterclaim was not verified or accompanied by an affidavit duly signed by the Hon. Attorney General or the land adjudication officer, confirming that the suit land was under adjudication. The DLASO has already written a letter regarding the need or status quo orders.
24. There was also evidence that the suit land was a plot registered with the County Government of Isiolo, where the appellant had been paying land rates and land rents since 2012. Letters to that effect were on the court file. The supporting affidavit by the 9th respondent was sworn by Patrick Wachira Nguyo, a chief state counsel and not a land adjudication officer. There was no specific letter after 24.2.2016, confirming that the suit land was falling on a land adjudication section, hence falling under Section 30 of the *Land Adjudication Act*.
25. A preliminary objection is a pure point of law which is based on undisputed facts. It cannot be based on disputed facts or evidence where there would be a need to invoke the discretion of the court. See *Oraro vs Mbaja* 2005] eKLR. The 9th respondent did not plead to the issue of trespass at all and neither did it allude to any reports that showed that the issue of trespass had been determined or was capable of being handled under the *Land Adjudication Act*. Further, the 9th respondent did not produce a single letter to show that there was a need to seek consent to sue under Section 30 of the *Land Adjudication Act*.
26. The 9th respondent had not pleaded facts regarding the date of declaration of the Ngaremara/Gambela Adjudication Section, when it began and the status of the same.
27. The appellant had, in his affidavit sworn on 28.2.2021, attached the letters dated 4.1.2023, 28.4.2022, and 15.3.2022 and his averments that the adjudication process was complete regarding his parcel of land was finalized a long time ago as per the referenced letters. All these letters were not challenged by way of rival pleadings, documents and reports from either the 1st – 9th respondents or from the designated officers in charge of the adjudication section.
28. From the findings of the trial court, it is not clear on what basis the court found that the subject matter of the suit land had not been surveyed or adjudicated upon, yet there were numerous annexures. The trial court seems to have blamed the appellant for not filing a replying affidavit. A preliminary objection consists of a pure point of law that has been pleaded and or which arises by clear implication out of the pleadings. In *Oraro vs Mbaja* (supra), the court held that a preliminary objection must not be blurred with factual details, liable to be contested and or proved through evidence.
29. To my mind, the issue raised by the 9th respondent was not a pure point of law. The 9th respondent and its pleadings were improperly filed before the court, purporting to be a 9th defendant. The preliminary objection was equally one requiring evidence. It lacked merits. The pleading filed by the 9th defendant ought to have been struck out with costs. A nullity is a nullity. Any orders or costs granted to the 9th defendant were improperly granted. The upshot is that the appeal is allowed. The lower court order dismissing the suit is set aside and or vacated. The suit is reinstated for hearing by another judicial officer apart from Hon. R. Ongira (SRM).
30. Costs of the appeal to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 30TH DAY OF OCTOBER, 2024

HON. C K NZILI

JUDGE



In presence of

C.A Kananu

Ms. Wangechi for appellant

