



Kalume & 16 others v Legal Representatives of Cassam Suleiman Sumar & Haji Dada Kumber (Executors of the Estate of Haji Suleiman Sumar Khamisa) & 3 others; Khamis & 2 others (Interested Parties); Hassan & another (Intended Plaintiffs) (Environment & Land Case 194 of 2010) [2024] KEELC 6920 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6920 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 194 OF 2010
SM KIBUNJA, J
OCTOBER 23, 2024**

BETWEEN

KAHINDI CHARO KALUME & 16 OTHERS & 16 OTHERS & 16 OTHERS & 16 OTHERS & 16 OTHERS PLAINTIFF

AND

THE LEGAL REPRESENTATIVES OF CASSAM SULEIMAN SUMAR & HAJI DADA KUMBER (EXECUTORS OF THE ESTATE OF HAJI SULEIMAN SUMAR KHAMISA) 1ST DEFENDANT

HAKIKA TRANSPORT SERVICES LIMITED 2ND DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA 3RD DEFENDANT

HARJI GOVIND RUDA 4TH DEFENDANT

AND

ABDULHAKIM ABEID KHAMIS INTERESTED PARTY

JAMAL ABEID KHAMIS INTERESTED PARTY

MOHAMED ABEID KHAMIS INTERESTED PARTY

AND

MOHAMED SALEH HASSAN INTENDED PLAINTIFF

MAHMOUD ABDALLA MAHMOUD INTENDED PLAINTIFF



RULING

(Notice of Motion Dated 11th October 2023 & 26th January 2023)

1. The intended plaintiffs have moved the court vide a notice of motion dated 11th October 2023 seeking for the following orders:
 1. ” Spent.
 2. That pending the hearing and determination of this suit the intended Plaintiffs/Applicants be granted leave to join these proceedings as Plaintiffs and the pleadings herein be amended to reflect as such.
 3. That upon being joined the Applicants/Plaintiffs be at liberty to file their pleadings within fourteen (14) days after date of joinder.
 4. That pending the hearing and determination of the Intended Defendant’s Application, the Judgment dated 30th October, 2014 and the resultant Decree on 14th November, 2013 be maintained.
 5. That the costs of this Application be provided for.”

The application is predicated on six (6) grounds on its face and supported by the affidavit of Mohamed Saleh Hassan, 1st intended plaintiff, sworn on the 11th October 2023, in which he inter alia deposed that the 2nd intended plaintiff and himself are the registered proprietors of L.R Mn/v/2799 [cr 72903], and that the intended defendant has never been in occupation of the suit property; that this court delivered a judgment dated 30th October 2014 and a decree was issued on 14th November 2014, directing the subdivision of L.R 387/V/mn, from which the above parcel was derived from; that the intended defendant case will negatively affect their rights to the said property and it is in the interests of justice that the application is allowed to safe guard their interests, and that the judgement and decree of the court should remain undisturbed.

2. Harji Govind Ruda, the intended defendant filed a replying affidavit sworn on 27th October 2023 in opposition to the application, inter alia deposing that the application is devoid of merit; that the intended plaintiffs have not demonstrated that they merit to be joined in the suit and there is no connection between L.R Mn/v/2799 (cr 72903) and the suit property herein.
3. The learned counsel for the intended plaintiffs and intended defendant filed their submissions dated 13th March 2024 and 11th December 2023, for and against the application dated 11th October 2023, which the court has considered. No other party filed any other reply or submission in respect of the said application.
4. The court has noted that there is another application dated 15th September 2022 and amended on 26th January 2023 by Harji Govind Ruda, intended defendant, seeking for inter alia:
 - a. “Spent.
 - b. Spent.
 - c. Spent.



- d. That pending the hearing and determination of this suit the intended defendant/applicant be granted leave to join these proceedings as a defendant and the pleadings herein be amended to reflect as such.
- e. That upon being joined the applicant/defendant be at liberty to file his pleadings within 14 days after date of joinder.
- f. That pending the hearing and determination of this suit the proceedings herein, the judgement dated 30th October 2014 and the resultant decree on 14th November 2014 be unconditionally reversed and/or set aside and the applicant be granted unconditional leave to defend this suit.
- g. That the hearing and determination of this suit this matter [sic] be consolidated with ELC 335 of 2017 Harji Govind Ruda vs Kenha & Others.
- h. That the costs of this application be provided for.”

The application is premised on the twelve (12) grounds on its face and supported by the affidavit of Harji Govind Ruda, intended defendant, sworn on 15th September 2022. It is the intended defendant’s case inter alia that he is the registered owner of Lr/mn/v/3790, Cr.27624, now registered as Mn/v/2618, that is in issue in this suit and in ELC No.335 of 2017, Harji Govind Ruda versus Kenha & others; that the plaintiffs and other parties in this proceedings are also parties in that other suit; that this suit proceeded without his participation, and a judgement was delivered on 14th November 2014, directing the subdivisions of Mn/v/387.

5. The application is opposed by the plaintiffs through their grounds of opposition dated 30th January 2023, inter alia stating that the applicant has not met the threshold of consolidation of suits, and the cause of action in this suit and the other one are completely different; that the judgement was delivered on 30th October 2014, the decree was issued and has been perfected, and the court is *functus officio* in this suit.
6. It is apparent the intended plaintiffs’ and intended defendant’s applications dated 11th October 2023 and 26th January 2023 respectively, seeks for prayers that are at variance, with the exemption of that for joinder. That with a view of fast tracking these applications that are pending in this suit, I have found it necessary to deal with the two applications in this ruling, though it was initially meant for the notice of motion dated 11th October 2023. This decisions will not place any party at a disadvantage or prejudicial position, but will instead ensure justice is done without undue delay.
7. The issues for determinations in the applications dated the 11th October 2023 and 26th January 2023 are as follows:
 - a. Whether the intended plaintiffs and defendant have met the threshold for joinder in the suit.
 - b. Whether the intended defendant has met the threshold for the setting aside of the judgment and decree.
 - c. Who pays the costs?
8. The court has carefully considered the grounds on the two applications, affidavit evidence, grounds of oppositions, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations:
 - a. The record confirms that this suit that was commenced *vide* the originating summons dated 14th November 2012, was determined through the judgement delivered on the 30th October 2014. The parties have confirmed that a decree was thereafter issued and



has been perfected/executed. From the said judgement, the subject matter in suit was 132 acres comprised in land title CR. 8813. That as this suit is therefore finalised, the court has to be conscientious in its duty to dispense justice and make an effectual and final determination.

- b. The two applications raises issues of joinder of parties. Order 1 Rules 1, 3, & 10 of the [Civil Procedure Rules](#) provides for who may be joined as plaintiff and defendant, and substitution and addition of parties, during the life of a suit. That while the application dated 11th October 2023 seeks inter alia for the court's judgement and resultant decree to be maintained, in addition to joinder of the intended plaintiffs, the application dated 26th January 2023 seeks for among others to have the judgement set aside, and that the applicant be at liberty to file his pleadings.
- c. While determining whether or not, to allow a joinder application, Order 1 Rule 10(2) of the [Civil Procedure Rules](#) obligates the court to consider whether the presence of the applicant may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. In this matter as it is, the suit is heard and determined, and there are no pending issues.
- d. There are instances where joinder applications may be considered even in finalised and determined suits. In the case of [Bellevue Development Company Limited versus Vinayak Builders Limited & another](#) [2014] KEHC 5507 (KLR) the court held that:

“Joinder of parties is possible after judgment. I will give some example where such joinder of parties is permitted; 1) in cases of representative suits; or 2) substitution of one or more parties, for instance, in case of death, or incapacity of a party or change of status of a party; or 3) in execution process. In the broader sense, it is deemed to be a kind of joinder of parties where a contemnor was not a party in the suit where judgment has already been entered and for which he is being cited for contempt of court. Equally, it is a joinder of parties where an objector raises objection to execution under Order 22 rule 51 of the [CPR](#). However, any joinder of parties post-judgment will have to surmount any possible constitutional objections on the front of rules of natural justice and the principle of finality of litigation.”

And, in the case of *J M K versus M W M & Another* [2015] eKLR, the Court of Appeal elaborated on the provision of Order 1 Rule 10 (2) of [Civil Procedure Rules](#) and stated that:

“We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings.”

Further, in the case of [Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another](#) [2014] eKLR the court held that:

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black's



Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”.

The court is aware of the doctrine of *stare decisis* and is bound by the precedents from the Court of Appeal like the *J M K versus M W M & Another* [supra].

- e. Having considered the facts presented through the two applications, and upon perusing the record generally, it becomes apparent that the intended plaintiffs’ application dated the 11th October 2023, was prompted by the intended defendant’s application dated 26th January 2023. While both seek applications for among others joinder to the suit, the former seeks to maintain the judgement undisturbed, while the latter seeks to have the judgement set aside. As already observed above, this suit is already determined through the judgement of 30th October 2014, that both applicants in the two applications have alluded to. It is the finding of the court that neither the intended plaintiffs nor the intended defendant has established before the court reasonable grounds for joinder in the already decided suit. It follows that the court does not need to pronounce itself on the merits or demerits of the other prayers in the two applications, as the applicants thereof are without locus standi.
- f. In section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, costs follow the events unless where otherwise for good reasons ordered. That as the applicants in the two applications have failed in their quest, they will pay the costs to the parties who defended the respective notices of motion.

9. From the foregoing determinations, the court finds and orders as follows on the two applications dated 11th October 2023 and 26th January 2023:
 - a. That the intended plaintiffs’ notice of motion dated 11th October 2023 is without merit and is dismissed with costs.
 - b. That the intended defendant’s amended notice of motion dated 26th January 2023 is also without merit and is dismissed with costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23RD DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

