



**Odembo v Ajwang (Environmental and Land Originating Summons
E004 of 2023) [2024] KEELC 13248 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023
GMA ONGONDO, J
NOVEMBER 12, 2024**

BETWEEN

JARED OTIENO ODEMBO APPLICANT

AND

JOSEPH OOKO AJWANG RESPONDENT

RULING

1. By a Notice of motion application dated 24th May 2024 pursuant to, inter alia, Articles 50 and 159 of the Constitution of Kenya 2010 and sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, the applicants through LK Obwanda and Company Advocates, are seeking the following orders;
 - a. That the Honourable court do grant leave to the applicant to amend the originating summons as disclosed in the draft annexed amended originating summons marked 'MAA-1' herein.
 - b. That the amended originating summons be deemed to have been duly filed and served.
 - c. That the cost of this application be provided for.
2. The application is premised upon the applicant's affidavit of thirteen paragraphs and a survey report (JOA-1) annexed to the affidavit. Also, the application is based on the grounds on the face of it. Briefly, the applicant's complaint is that another party has been in occupation of the suit land reference number Kasgunga Kamreri/ 3783 for over 15 years as disclosed in 'JOA-1' annexed to the said affidavit. That therefore, the intended 2nd applicant, George Swago cannot be dispensed with herein hence, the application be allowed accordingly.
3. The respondent/plaintiff, through Quinter Adoyo and Company Advocates, opposed the application by way of a replying affidavit of 21 paragraphs sworn on 5th June 2024 and termed the same unmeritorious. That the applicant ought to have known the 3rd party, the intended 2nd applicant and



- he is bound by the pleadings in this suit. That the applicant has no authority from the intended 2nd applicant as there is no supporting affidavit thereto. That as such, the application is untenable and an abuse of the court process.
4. By a supplementary affidavit sworn on 13th September 2024, the applicant averred that he does not fully represent the intended 2nd applicant and that the court cannot close door to the said party who has an interest in this matter. That the court has the discretion to add the intended 2nd applicant in the dispensation of justice herein.
 5. Learned counsel for the applicant filed submissions dated 18th October 2024 stating brief facts of this case and that the intended 2nd applicant has an interest in the instant suit thus, there is merit in the application. To reinforce the submissions, counsel relied on *Eastern Bakery-vs-Castelino (1958) EA 401* and *Galaxy Paints Company Ltd-vs-Falcon Guards Ltd Civil Appeal No. 219 of 1998* on addition of a party to proceedings before hearing of the case unless it causes injustice.
 6. On the other hand, learned counsel for the respondent filed submissions dated 18th October 2024 making reference to this suit commenced by an originating summons dated 13th February 2023 for adverse possession and that survey report to establish grave of Antone Asuma Odamna (Deceased) was in the negative thereof. That the application has been brought with undue delay, the same is prejudicial, targets a new cause of action and unmerited hence, it be dismissed. To buttress the submissions, counsel cited Order 8 Rule 3 of the Civil Procedure Rules 2010, *Central Bank of Kenya Ltd-vs-Trust Bank Ltd & 5 others (2000) KLR* and *Kassain-vs-Bank of Baroda (2002) eKLR*.
 7. Notably, the present suit is partly heard as PW1, Caleb Otieno Onyango, a surveyor testified and produced his report dated 18th October 2023 (PEXhibit 1) herein.
 8. On 4th June 2024, the parties agreed to give a shot at Court Annexed Mediation (CAM) in consonant with Article 159 (2) (c) of *Constitution* of Kenya 2010 and CAM Rules 2022. So, the court referred this case to CAM and there is a partial mediation agreement dated 22nd July 2024 by court Annexed Mediator, Felix Amoke Okal to the effect that the court to confirm the real owner of the suit land and how title deed was acquired.
 9. In that regard, is the present application meritorious to entitle the applicant to the triple orders sought therein?
 10. Order 8 Rule 3 (supra) provides for amendment of pleadings with leave of the court. It is clear that by the leave sought to amend the originating summons, the intended 2nd applicant is to be included as a party herein.
 11. In Black's Law Dictionary 10th Edition at 965, the term 'Joinder' means;

The uniting of parties or claims in a single lawsuit.'
 12. The right of access to justice for all persons is enshrined in Article 48 of *Constitution* of Kenya 2010 (*Constitution*).
 13. Further, a fair opportunity to be heard is a fundamental principle of justice; see Halsbury's Laws of England 5th Edition 2010 Volume 61 paragraph 639.
 14. Moreover, the parties are entitled to unlimited right to fair hearing under Articles 50 (1) (supra) as read with Article 25 (c) of *Constitution*.
 15. It is established law that the right to be heard is fundamental and permeates the entire justice system; see *James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another (2016) eKLR*.



16. So, the applicant and the intended 2nd applicant are entitled to access to justice and unlimited right to fair hearing in this matter. Bearing in mind Central Kenya Ltd, Kassain, Eastern Bakery and Galaxy Paints cases (supra), no injustice or prejudice will be occasioned on the respondent by the amendment of the originating summons as sought in the application.
17. It is therefore, the considered view of this court that the intended 2nd applicant has an interest in the suit land as disclosed in the report-JOA-1 herein. His inclusion as a party herein would be in the interest of justice as stipulated in sections 1A, 1B and 3A (supra).
18. The upshot is that the application is merited and the same is hereby allowed in terms of prayers (1) and (2) in the application as set out in paragraph 1 (a) and (b) hereinabove.
19. Cost of the application be in the cause.
20. The suit is set for directions on 17th February 2025.
21. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 12TH DAY OF NOVEMBER 2024.

G M A ONGONDO

JUDGE

In the presence of;

1. Kimberly instructed by L K Obwanda learned counsel for the applicant/plaintiff
2. Quinter Adoyo Quinter learned counsel for the respondent/defendant
3. Mutiva, court assistant

