Chai v Kagula & others (Environment & Land Case 163 of 2014)
[2024] KEELC 14040 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14040 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 163 OF 2014

FM NJOROGE, J

DECEMBER 16, 2024

BETWEEN

HARUSI KENGA CHAI ..... PLAINTIFF

AND

ABDALLA KAGULA & OTHERS ..... DEFENDANT

RULING

The Application.

1. An application dated 10/7/2023 has been filed in this case seeking joinder of a proposed interested party, Bakari Swaleh Mwahutu alias Bakari Swaleh Mwarumbo. the application also sought temporary stay of execution of judgment, and the setting aside of the judgment and decree and all consequential orders and that the matter be heard de novo on the merits.

2. The grounds relied on are that the suit land is owned by neither the plaintiff nor the defendants but by the proposed interested party who was allegedly allocated the land in 1993 and who being a seafarer appointed the 2nd defendant caretaker thereon. It is said his name appears on the list of allottees held by the Kilifi County Government and he has been paying rates in respect thereof. He allegedly learnt of the suit on 8/5/2024 upon being furnished with a judgment of this court. Judgment is being executed against him yet he was not a party to the suit and the court was at the hearing oblivious to the fact of his being the registered allottee as well as payer of land rates. The application is supported by the sworn affidavit of the applicant that reiterates the afore going grounds.

The Responses.

3. The application is supported by the plaintiff and opposed by the defendants.

4. They have filed their grounds of opposition and replying affidavit respectively. I have considered the said grounds and replying affidavit as well as the submissions filed on behalf of the parties.

5. Ombachi Moriasi Nyachiro & Co Advocates state that they appear for both defendants in the application though the same grounds they filed indicate the 2nd defendant is deceased and has not been substituted. The defendants' grounds for opposing the application are that the court is now functus officio; that the seafarer applicant abandoned his claim to and possession of the land for 31 years; that he appeared only after the 2nd defendant died and can not defend himself in death; that the applicant is in collusion with the plaintiff to delay execution of the judgment.

6. The plaintiff's grounds for supporting the application are that the judgment was given on the basis of misinformation and that the proposed interested party has a constitutional right to be heard; that the records of the 2nd defendant require to be scrutinized in view of the many parties claiming the suit land and the respondents can not be prejudiced by the setting aside and fact finding mission in a manner that can not be compensated by way of costs.

Submissions.

7. The applicant, the plaintiff and the defendants filed their submissions on the application.

8. The applicant submitted that he was not made a party to the suit and was not aware of the same. that he has been paying rates to the county government of Kilifi; that the fact that he was invited for ADR alongside the other parties in this suit shows that the county officer recognize his claim. He stated that he has supplied a list that shows his name and that the fact that the list dates back to 1994 shows he was the allottee then. He relied on the county government of trans Nzoia vs Manaseh Distributors & Wholesalers Ltd Civil Appeal No 10 Of 2018 and submitted that he raises a triable issue through his documents and he ought to be heard on it before a verdict is given. Citing May Beach Ltd Vs Attorney General & 18 Others, 2018, he stated that it was in the interests of justice that he be joined to the suit as the judgment of this court affects his rights under Article 40 of *the constitution*. He cited Article 50 of *the constitution* and the tenets of natural justice as having been infringed by his failure to be heard.

9. On the issue of whether the applicant should be joined to the suit the plaintiff submitted that since he (the plaintiff) has established that he has proprietary interest over the suit property and the applicant also claims to exercise ownership on the ground, the latter ought to be joined; citing May Beach Ltd Vs Attorney General & 18 Others, 2018 eKLR and Elton Homes V Davis And Others 2019 eKLR, he submitted that this court has discretion to grant the orders sought post judgment since the applicant faces eviction. regarding whether the suit ought to be heard de novo, he submitted that to enable the applicant participate in the proceedings the suit ought to be heard de novo. He cited Jeremiah Mghanga V Millicent Zighe Mwachala & 3 Others 2021 eKLR and Josphat Muthui Muliu Inductrial Cause No 1224 Of 2012 (2014) eKLR for that proposition. He cited Trust Bank Vs Amalo Company Ltd 2003 EA at 350, whose effect he averred were that in the administration of justice disputes should be heard on their merits in the absence of any good reason for not doing so.

10. The defendants submitted that the suit was heard and determined 4 years ago, that this court pronounced itself and hence lacks jurisdiction to entertain any further proceedings. Citing Nicholas Stephen Okaka & Another V Alfred Waga Wesonga 2022 eKLR they submitted that the application does not meet the criteria for a stay of execution application. that the allotment letter and deed plan were produced in evidence alongside the area register; that the applicant stands to lose nothing since he has never stayed on the suit premises or constructed anything thereon; that no draft statement of claim or defence has been annexed to the application for the court to consider alongside the application to see if the proposed setting aside is merited. He questioned why the applicant had to wait for 31 years before agitating his claim. He averred that the 1st and 2nd defendants are already deceased and faulted the applicant for not disclosing that the 1st defendant who he claims to have been his caretaker,

was also deceased. Any claim against the 2 deceased persons would therefore require grants lf letters of administration which are lengthy procedures.

11. Regarding hearing of the case de novo the defendants' counsel submitted that such a scenario would offend the overriding objective in Section 1A and 1B of the CPR and would be prejudicial to the 1st and 2nd defendants who are deceased; that the court is inclined to favour the vigilant and not the indolent, and the four-year delay since the judgment was delivered has not been explained.

Determination.

12. I have considered the application alongside their grounds of opposition and replying affidavit and the submissions filed in this case during the preparation of this ruling.

13. The issues for determination are as follows:

    a. Has the applicant followed the proper procedure while approaching this court for orders of joinder as an interested party and if not, is that omission fatal to the application?

    b. Should the applicant be joined to the suit and the same be heard de novo?

    c. Who should bear the costs of the application?

14. Regarding the first issue it is noteworthy that before this court can even consider whether the applicant qualifies as an interested party within the definition given to that term in numerous court decisions, it is necessary to establish whether he has approached this court in the right manner.

1. In the *Civil Procedure Act* and Rules there is no specific procedure prescribed for joinder of an interested party to a suit commenced by plaint. The only parties provided for are plaintiffs and defendants as per Order 10 Rule 2 CPR which provides as follows:

> " The court may at any stage of the proceedings, either upon, or without the application of either party, 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 Defendant 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 or settle all questions involved in the suit, be added."

15. It has been the holding in earlier court decisions that there being no specific procedure provided for under the CPR, Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is applicable to civil suits as well where joinder of an interested party is sought. Rule 7 provides as follows:

> " 7. Interested party
>
> 1. A person, with leave of the Court, may make an oral or written application to be joined as an interested party."

16. It is then the case that if Rule 7 is followed, where an application is to be made by any person to be joined as an interested party to a suit that person needs to first make an application either written or oral for leave to apply to be made an interested party so that the court may sift through the material that he presents to establish whether he should be allowed to make such an application. That aspect of application for leave therefore applied in the present case, but I have not seen any record of oral or written application for leave by the applicant. The applicant is therefore seeking substantive prayers

for setting aside of judgment while he has neither secured leave nor been made a party to the suit in any capacity and that can not be allowed.

17. Should the application before me fail on the ground that no leave to file it was sought under the applicable provisions of the rules? I have had occasion to rule on the same issue in Malindi ELCC NO. 43 OF 2023 Roseline Aquino Joseph Pucheok Chuen & 8 Ors Vs Kikambala Housing Estate Limited and after examining several cases I held as follows:

> " The alternative to a joinder by application in Rule 7(a) is in Rule 7(b) and it is joinder by court suo moto. In that case the court considers a party's interest in absentia by way of perusal of existing documents before it, which may not even include the absent party's papers, and determines whether or not they ought to be joined to a suit despite no application having been made before it, and if it orders they are so joined. The question arising is: how just would it be to decline a joinder application on the basis of lack of a prior application for leave while this same court can order joinder to a suit of any party it considers suitable suo moto?

18. In this court's view there would be no just reason why a person who, as the applicant herein, has given a detailed narrative justifying why they should be joined in this matter, should fail to secure joinder by application while a person who never applied can be joined suo moto by court. The reasoning behind the foregoing holding is that first, Order 1 Rule 10(2) into which Rule 7 is sought to be extrapolated demands no prior application for leave. Secondly, while Article 50 of *the Constitution* provides for the inalienable right of every person having a dispute that can be settled by application of law to be heard before an impartial court or tribunal or other body, *the Constitution* at Article 159(2) (d) provides that, to paraphrase, substantive justice shall not be hindered by technicalities. Article 50, in my view, focused on substantive disputes to determine rights in rem and rights in persona and not inter-party disputes regarding technicalities....

19. In the current constitutional dispensation that promotes substantive justice above procedure, I would be amiss to ignore the material the applicant has presented to attempt to justify joinder as in the final analysis even if I reverse his progress to the making of an application for leave, it will be still that material that matters; hence the procedural omission of securing of leave should not bar the court from assessing the merits of the proposed joinder. I hereby dismiss the objection based on the claim that the applicant lacks leave."

20. That holding applies in this case. I reject the argument that leave has not been sought as being sufficient for the dismissal of the present application.

21. Notwithstanding the above finding as to procedure, prospects of the applicant's application are also quite dim. I state this because firstly, the definition of an interested party, derived from Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is as follows:

> " interested party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.""

22. I must marry the provisions of Rule 2 of the Mutunga Rules with Order 1 Rule 10 (2) which for ease of reference I restate as follows: -

> " Rule 10 (2) The court may at any stage of the proceedings, either upon or without the application of either party, 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 defendant, 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."

23. Since the CPA is the proper statute that governs civil proceedings I agree with the court in Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others [2014] eKLR when it states that in applications for joinder emphasis should be placed on the words "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit..." and when it observes that the interested party is neither a plaintiff or a defendant and that he should not be let into the house only to agitate his own rights despite not being a substantive party. Indeed, interested parties can not seek substantive orders in a suit and for anyone who needs such, the remedy is to use the obvious provisions of the CPR which allow such joinder of substantive parties. In the present case the applicant does not obviously fit into the shoes of an interested party within the above set parameters as he has not concealed his intention to claim the suit land for himself. Even if the rule were to be elasticized to an absurd extent to accommodate him, I find that the garment of "interested party" would not fit him well. The application ought to fail on that ground.

24. Secondly, the applicant has come too late in the day, long after the 1st respondent has been issued with a letter of allotment dated 27/9/1998. He has also come long after an alternative dispute resolution process was applied as per the minutes of the resident's committee and District Officer held on 26/3/2003. The applicant can not credibly claim that he spent was his whole life at sea in that period to the extent that he was not aware of all happenings in relation to the settlement where the plot he claims is. He has nothing on the ground and the structure and the unused building materials thereon can only be credited to the efforts of either the plaintiff or the defendants. I have had occasion to peruse the minutes of the resident's committee in detail and I have come across a section that seems to suggest that a "Bakar Swaleh Mwarumbo had been allocated (plot no 329) but declined to move due to his nature of work" (see page 2) and I am of the view that the said "Bakar" is the same as the applicant herein. There is all probability that that piece of information is correct as the delay in the applicant's lodging of any claim over the plot either in court or with the residents' committee or the Kilifi County Government has not been explained at all in his affidavit evidence. There is also great uncertainty as to which plot his documents refer to since, save for the December 1994 version of the area list (marked "Exh BSM2") in which his name appears in respect of plot no 329, no other document shows plot no 329 which is the subject matter of his application and of this suit. It is the case that while comparing that area list with the July 1995 version attached to the "Exhibit AK7" in the 1st defendant's undated affidavit filed on 30/10/2014 in the present suit, it is evident that other names had also somehow dropped out and had been replaced with others in the 1995 version. The absence of the specific sub-plot number (329) on his rates payments receipts is not explained whereas by 1995 plot numbers were already known to all and sundry within the settlement and were being used in documents and lists. The receipts do not convince this court that he was paying for plot no 329. The inclusion only of the mother parcel Title Number 5054 /1145 would not help him at all, whether in the capacity of an interested party, plaintiff or defendant.

25. For the foregoing reasons I find that the application dated 10/7/2023 lacks merit and the same is hereby dismissed with costs to the defendants only. The plaintiff is excluded from costs as she was supporting the application.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 16TH DAY OF DECEMBER 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI