



Chesire v Kipturgo; Kitilit & another (Proposed Defendant) (Environment & Land Case 36 of 2020) [2023] KEELC 121 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KEELC 121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 36 OF 2020
FM NJOROGE, J
JANUARY 20, 2023**

BETWEEN

JOSEPH K CHESIRE PLAINTIFF

AND

ALEX KIBET KIPTURGO DEFENDANT

AND

SOKOME MARIA KITILIT PROPOSED DEFENDANT

DOUGLAS CHERUTICH KITILIT PROPOSED DEFENDANT

RULING

1. This ruling is in respect of the defendant’s notice of motion application dated October 19, 2022. The application is said to be brought under order 1 rule 10(2) and order 51 of the [Civil Procedure Rules](#) and seeks the following orders:
 - a. That this honorable court be pleased to grant the defendant/applicant leave to enjoin Sokome Maria Kitilit and Douglas Cherutich Kitilit as co-defendants in this suit.
 - b. That upon granting prayer (a) above this honorable court be pleased to grant the enjoined parties 14 days leave to file their responses.
 - c. That the costs of this application be provided for.
2. The application was supported by the affidavit Alex Kibet Kipturgo sworn on October 19, 2022. The grounds on the face of the application and the supporting affidavit are that in 1997, he was allocated land parcel No Nakuru/Mariashoni Settlement Scheme/2436 measuring approximately 5 acres by the government of Kenya; that the plaintiff was allocated land parcel No Nakuru/Mariashoni Settlement Scheme/2434 while Reuben Kitilit the proposed 2nd defendant’s deceased husband was allocated land



parcel No. Nakuru/Mariashoni Settlement Scheme/2435; that when the 2nd proposed defendant's husband died he was mistakenly buried on his parcel of land; that after his burial ceremony it was resolved that he should swap his land with the family of the 2nd and 3rd proposed defendants rather than exhume the body of the deceased; that as a result he took possession of the 2nd and 3rd proposed defendant's parcel of land known as Nakuru/Mariashoni Settlement Scheme/2435 while they took possession of land parcel No Nakuru/Mariashoni Settlement Scheme/2436; that the parcels of land are still registered in their original names; that after taking possession of land parcel No. Nakuru/Mariashoni Settlement Scheme/2435, he realized that it measured 4 acres which was smaller than what was indicated in the Registry Index Map which provided that all the parcels of land should measure 5 acres each; that he lodged a complaint at the lands office and as a result he was summoned together with the plaintiff before the Deputy County Commissioner's office on 4th December; that at that meeting it was agreed that the area chief, assistant chief, elders and a competent surveyor would visit the site and fix the boundaries; that on November 1, 2021 the surveyors from the ministry of Lands visited the parcels of land, measured them and compared the same with the Registry Index Map; that their findings were that land parcel No. Nakuru/Mariashoni Settlement Scheme/2435 was 1.618 Ha which fell short of the 1.955 Ha obtained using the Registry Index Map; that the deficit in size necessitated another survey where a new boundary was marked in order to ensure that Nakuru/Mariashoni Settlement Scheme/2435 measured 5 acres; that the new boundary resulted in a portion of land measuring approximately 0.423 Ha being hived from the plaintiff's land and added to the acreage of his land now amounting to 5 acres; that as soon as he put up his fence on the new boundaries, the plaintiff working together with the 2nd and 3rd proposed defendants frustrated his efforts to enter the land and have completely dispossessed him of the same; that he reported their actions to the police; that he is advised by his advocates on record that it is of utmost importance that the court enjoins Sokome Maria Kitilit and Douglas Cherutich Kitilit as the plaintiff's claim against him cannot be resolved without the presence of the proposed 2nd and 3rd defendants; that he is further advised that any judgement delivered in this matter cannot be enforced as land parcel No. Nakuru/Mariashoni Settlement Scheme/2435 is still registered in the names of the proposed 2nd and 3rd defendants and will remain unenforceable without them being made a party to the suit and that the suit can only be conclusively determined when the proposed 2nd and 3rd defendants are joined as they are an integral part for the determination of the suit on merit.

3. In response to the application, the plaintiff filed a replying affidavit sworn on 2/12/2022 and filed on December 5, 2022. He deposed that the intended joinder has no relationship with his case since the defendant's interest and his interest are distinct and shall amount to misjoinder of causes of action; that he is not privy of the said exchange of parcels of land; that his parcel of land measures 4.04 ha; that the alleged survey was done with collusion between the defendant, surveyors and the then Deputy County Commissioner; that he has not encroached on anybody's piece of land and has enjoyed peaceful co-existence with the two proposed defendants until a stranger came in between and created non-existence claims; that if the defendant has a case with the proposed defendants, he should handle them separately; that he has no locus standi in this case as he is litigating on the title of someone else without authority or power of attorney and that the application should be denied as it shall amount to misjoinder of causes of action.
4. The defendant filed his submissions dated January 9, 2023 on December 10, 2022 while the plaintiff did not file any submissions.
5. The defendant in his submissions identified the following issues for determination; whether the applicant is entitled to the prayers sought in the application and whether costs should issue.



6. On the first issue, the defendant reiterated the contents of her supporting affidavit and relied on order 1 rule 1, 10(2), the cases of *Elishaba Muthoni Mbae v Nicholas Karani Gichobi & 2 others* [2014] eKLR and *Crescent Distribution Services Limited v Egnite Technologies Limited & another* [2013] eKLR. The defendant submitted that the proposed 2nd and 3rd defendants are the registered owners of Nakuru/Marioshoni Settlement Scheme/2435 while he is in actual possession. The defendant relied on other cases and submitted that no effectual or complete settlement of the suit can be made in the absence of the 2nd and 3rd proposed defendants and as such they should be added as defendants.
7. On the second issue, he submitted that the costs of the suit be awarded to him.

Analysis and Determination

8. After considering the application and the response thereto, it is my view that the only issue that arises for determination is whether the proposed 2nd and 3rd defendants should be joined to the suit.
9. Order 1 rule 10(2) of the *Civil Procedure Rules* 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 and settle all questions involved in the suit, be added.”
10. The Court of Appeal in the case of *Pravin Bowry v John Ward & another* [2015] eKLR while considering the principles to be considered in an application for joinder of parties to a suit cited with approval the case of *Departed Asians Property Custodian Board v Jaffer Brothers Limited* (1999) I EA 55 (SCU) where it was held as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter...

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”
11. The court in the case of *Meme v Republic* [2004] KLR 637 set out the principles to be considered for joinder of a party to the suit as follows:

“(i) Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings;



- (ii) Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
 - (iii) Where the joinder will prevent a likely course of proliferated litigation.”
12. In the present matter, the defendant is seeking that Sokome Maria Kitilit and Douglas Cherutich be joined in the suit as defendants on the grounds that they are the registered owners of the suit property that he is in occupation of and which property the plaintiff has sued him over. He alleged that he had been allocated land parcel No Nakuru/Mariashoni Settlement Scheme/2436 while the proposed 2nd and 3rd defendants had been allocated land parcel No Nakuru/Mariashoni Settlement Scheme/2435. That when the 2nd proposed defendant’s husband died, he was mistakenly buried on his parcel of land and so they agreed that they would swap the two parcels of land though they did not do it formally. That after they exchanged the properties, he realized that Nakuru/Mariashoni Settlement Scheme/2435 was smaller than it was indicated in the Registry Index Map and so he sought the services of the surveyors from the Ministry of lands who drew a new boundary which touched on the plaintiff’s parcel of land. That the plaintiff has sued him because of the said boundary and that the proposed defendants presence in the suit is necessary to these proceedings.
13. The plaintiff on the other hand argued that the intended joinder does not relate to his suit and that both his interest and the interest of the defendant are different and that it will amount to misjoinder of causes of action. That he is not privy to the alleged exchanges of the parcels of land that were not formalized.
14. The Court of Appeal in the case of *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR while considering the provisions of Order 1 Rule 10 (2) of the *Civil Procedure Rules* stated as follows:
- “ Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined. In the same vein, a party seeking joinder who fails to establish any right over or interest in the subject matter cannot be enjoined...
- From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”
15. It is in this court’s view that in the circumstances of this case, the proposed 2nd and 3rd defendants ought to be joined to the suit given the allegations by the defendant that the suit property that he is in occupation of is registered in their names and that they had earlier swapped their parcels of land. Their presence as defendants in the suit is necessary as it will enable the court to determine all the issues in controversy and therefore the defendant’s application dated October 19, 2022 id hereby allowed. The costs of the application shall be in the cause.



16. The plaintiff shall amend his plaint to join the two applicants as the 2nd and 3rd defendants in that order and in the light of disclosures made in the allowed application, plead against them as may be appropriate, and he shall serve the amended plaint, together with summons against the 2nd and 3rd defendants within 30 days of this order in default of which the suit will stand struck out for non-compliance with court orders. The suit shall be mentioned on March 28, 2023 to ascertain compliance and for issuance of further directions.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 20TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

