



**Karanja v Kinuthia (Environment & Land Case 113 of 2016)
[2023] KEELC 49 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 49 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 113 OF 2016
FO NYAGAKA, J
JANUARY 19, 2023**

BETWEEN

PATRICK MBANYA KARANJA PLAINTIFF

AND

JAMES KINUTHIA DEFENDANT

RULING

1. The Notice of Motion Application dated 04/07/2022 and filed by the defendant on even date invokes section 3, 3A and 63 (e) of the [Civil Procedure Act](#) as well as Order 51 of the [Civil Procedure Rules](#). It seeks the following reliefs:
 1. ...spent.
 2. ...spent.
 3. That Joseph Kiptoo Arap Keter, Jonathan Ayodi, Manasseh Njenga, Gordon Otieno Opidi, the Director of Survey, the County Surveyor and the Attorney General be enjoined as Interested Parties in this suit and be served with pleadings in regard to this suit.
 4. The Defendant be granted leave to amend his Defence and introduce a Counterclaim and the Interested Parties as parties to this suit.
 5. That costs of the Application be provided for.
2. The Application is supported by the grounds on the face of the Motion and by an Affidavit of the Defendant. The main contention and basis of the Application is that the Defendant has discovered that there was an error committed by the Surveyor during demarcation of plots namely Kitale Municipality/ Block 7/58, 99, 100, 363, 475 and an unnumbered plot.



3. As a result, an erroneous Registry Index Map, which was annexed to the Supporting Affidavit and marked as JK1, which was generated, impacted the parties to the suit and the proposed Interested Parties. He continued that in that regard, there was need to resurvey and correct the Registry Index Map. He acknowledged that this could only be achieved with the participation of all affected parties hence the Application.
4. The Applicant accused the Respondent of failing to consider the genesis of the problem affecting the aforementioned parcels. He cited the Part Development Plan (PDP), annexed and marked as JK2, which created seven (7) plots. He contended that, however, the Surveyor, in spite of benefiting from sight of the PDP as annexed to the allotment letters, erroneously created six (6) plots in contravention of the PDP, hence the problem. He urged that it was in the interest of justice that the Application be allowed. He annexed a draft copy of his Amended Statement of Defence and Counterclaim marked JK3.

The Response

5. The Plaintiff opposed the Application. He deposed, vide his Replying Affidavit sworn on 30/08/2022, that the Application was unmeritorious for various reasons. Firstly, he observed that the names of the owners of the affected parcels of land had not been disclosed. Secondly, the Applicant was incapable of ascertaining errors on both the Registry Index Map and the dimensions on the PDP as that was a preserve of a qualified Surveyor. Thirdly, he raised no issue with the owners of the alleged plots hence found their enjoinderment gratuitous. Fourthly, the draft pleadings failed to describe the intended parties, the cause of action against them and the parcels they owned if at all. He contended that the Application was an abuse of the court process, speculative, failed to notify the Interested Parties and was thus for dismissal with costs.

Supplementary Affidavit

6. Pursuant to leave granted by this court, the Applicant, in brief rejoinder, deposed that the issues canvassed in the Respondent's Affidavit were best determined at the hearing. He clarified that the 1st - 4th Interested Parties were owners of the plots namely Kitale Municipality/Block 7/58, 99, 100, 363, 475 and one unnumbered plot. He added that the Surveyor is a proposed Interested Party. He emphasized that the participation of the Interested Parties is necessitated by the outcome of this suit.

Submissions

7. Parties canvassed the Application by way of written submissions. According to the Applicant in his submissions dated 10/10/2022 and filed on 12/10/2022, the enjoinderment of the aforementioned parties to the suit is inescapable and salient as it would assist this court to unmask the issue of ownership since there is need to resurvey and correct the Registry Index Map. In that regard, their participation in the matter is of utmost importance. He submitted that the Application was based on the principle of fairness hence merited.
8. The Respondent filed his submissions dated 07/11/2022 on 08/11/2022. He rehashed the contents of his response arguing that the Applicant was engaging in a fishy expedition with a view to obtaining further evidence. He submitted that the suit was premised on his ownership rights to the suit property on the strength of a title registered under his name. On the other hand, the Applicant claimed ownership on the strength of allotment letters. As such, the participation of the proposed Interested Parties in these proceedings was superfluous.



Analysis and disposition

9. I have considered the Application, the Affidavits and the annexures thereto. I have also given due consideration to the parties' rival written submissions and the relevant law. The Application seeks to enjoin several parties to the suit which enjoinder ultimately changes the character of the pleadings. Thus, his other prayer is for amendment of his statement Defence to include a Counterclaim.
10. The power to enjoin a party to a suit is governed by the provisions set out in Order 1, Rule 10 (2) of the *Civil Procedure Rules*. It provides that the court may on such terms as may appear just, order the addition of any party whose presence may be necessary to enable the court effectually and completely adjudicate upon all questions involved in the matter.
11. The Court of Appeal in *Pravin Bowry vs. John Ward and another* [2015] eKLR, citing with approval the Ugandan case of *Deported Asians Custodian Board vs. Jaffer Brothers Ltd* [1999] 1 E.A. 55 (SCU) considered the principles to be considered in an Application for joinder of parties to a suit 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 because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all 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 interest of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on the 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.”

12. The court also referred to its earlier decision in *Civicon Limited vs. Kivuwatt Limited and 2 others* [2015] eKLR interpreting the provision as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judiciously. 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.

... 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 1, 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 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.”



13. The Applicant contended that the enjoinder of the parties mentioned is premised on the fairness dogma. He argued that the 1st - 4th Proposed Interested Parties as proprietors of plots namely Kitale Municipality/Block 7/58, 99, 100, 363, 475 and an unnumbered plot, will be affected by an order of resurvey and correction of the Registry Index Map. He furthered that the resurvey was inexorable since the Surveyor erroneously created six (6) instead of seven (7) plots.
14. Looking at the generality of the pleadings, coupled with the arguments preferred by the Applicant, I find that the inclusion of the proposed parties to the suit is necessary to enable the court settle all the questions in controversy. I note that the order of resurvey will affect the suit land. The participation of the parties to be included will thus serve the purpose of facilitating expeditious disposal of the real issues in controversy avoiding a multiplicity of suits. I further note that the said order will not occasion any prejudice to the Respondent.
15. Regarding amendment of pleadings, its power is provided for under Order 8, Rule 3 and 5 of the Civil Procedure Rules. This court is called upon to determine the issue of amendment. Under the cited Rules, the power to amend may be allowed for the purpose of determining the real issue in controversy. Given the discretionary nature of the power, the order may be granted in such a manner as the court directs on such terms as to costs or otherwise as are just. I further take cue that the grant of an order for amendment is so compelling that it may be allowed notwithstanding that its effect will be to add or substitute a new cause of action arising out of the same facts whether substantially or otherwise.
16. Having established that the enjoinder of the proposed Interested Parties is indispensable, I observe that the same will change the character of the pleadings. In addition, the Applicant's draft Amended Statement of Defence includes a Counterclaim which will affect the parties by way of reliefs sought. I observe that the grounds espoused in the Replying Affidavit indicate that the proposed orders go to the kernel of the issues in dispute. As such, it affirms the necessity of the amendment order. I find that no prejudice will be occasioned upon the Respondent by order of amendment since not only can he be granted corresponding leave to amend his pleadings but is also entitled to be compensated on costs.
17. I hasten to add however that the enjoinder of the proposed parties will imperatively serve good cause if the parties are joined as Defendants rather than Interested Parties. I say so because the reliefs sought will directly and substantially impact them. I find this presupposition on account of the nature of the orders sought in the Counterclaim.
18. Their inclusion in the present suit does not qualify them as Interested Parties under the definition and meaning of the words but as Defendants. I therefore make orders that the description of the parties, their relation to the cause of action and the orders sought be expressly averred to give the parties proper footing when responding to the introduced paragraphs. In line with this, it is behooving that the novel paragraphs strictly comply with the wordings set out in Order 8, Rule 7 of the Civil Procedure Rules, 2010.
19. In light of the above analysis, I find that the Application dated 04/07/2022 is merited and is hereby allowed in the following terms:
 1. Joseph Kiptoo Arap Keter, Jonathan Ayodi, Manasseh Njenga, Gordon Otieno Opidi, the Director of Survey, the County Surveyor and the Attorney General be and are hereby enjoined as Defendants.
 2. The Plaintiff/Respondent shall amend and plead all issues and claims he may have against all Defendants, file and serve the Amended Plaintiff and summons to enter appearance, together with a copy of this Ruling, on all the parties added, within ten (10) days of this ruling, and also



the Defendant within the said period, and file an Affidavit of Service thereof within ten (10) days of service of the party served last.

3. The Defendant/Applicant be and is hereby granted leave to amend, file and serve his Defence and Counterclaim in compliance with paragraph eighteen (18) of this Ruling upon all the parties herein within seven (7) days of service of the Amended Plaint as ordered in (2) above, failing which the orders herein shall automatically lapse without any further reference to this court.
 4. The Defendant/Applicant shall pay thrown away costs in the sum of Kshs. 25,000.00 to the Plaintiff/Respondent within ten (10) days from the date of this order failing which the orders herein shall lapse automatically.
 5. All parties shall prepare and file and serve indexed and paginated trial bundles, as required by law, and issues for trial, within 21 days of the close of pleadings.
 6. The matter shall be mentioned for directions and confirmation of compliance with the above orders on 03/04/2023.
20. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 19TH DAY OF JANUARY 2023

HON. DR. IURFRED NYAGAKA
JUDGE, ELC KITALE

