



REPUBLIC OF KENYA



KENYA LAW
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Lwangu v Ndoté; Kabui & 13 others (Interested Parties) (Environment & Land Case 79 of 2010) [2023] KEELC 52 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 52 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 79 OF 2010
FO NYAGAKA, J
JANUARY 19, 2023

BETWEEN

SOFIE FEIS CAROLINE LWANGU PLAINTIFF

AND

BENSON WAFULA NDOTE DEFENDANT

AND

SIMON KABOCHI KABUI INTERESTED PARTY

PATRICK NYUKURI INTERESTED PARTY

JOHN ACHOKI AKENGA INTERESTED PARTY

RESELINE ASENWA INTERESTED PARTY

ALICE KULUNDU NASIO INTERESTED PARTY

PAUL SINGOMBE MACHWARA INTERESTED PARTY

JOSEPHAT OBUNIA NYANGWESO INTERESTED PARTY

JUSTUS BUNDI MAKORI INTERESTED PARTY

BEATRICE MUSIMBI INTERESTED PARTY

EDWARD MBALIZWA MUHALIA INTERESTED PARTY

SIMON NJENGA MBUGUA INTERESTED PARTY

ROBERT ONZOMU INTERESTED PARTY

EVERLYNE K SIRIBA INTERESTED PARTY

PERMINUS MIGIRO SIRIBA INTERESTED PARTY



RULING

1. The Plaintiff, by Motion on Notice dated July 20, 2022 and filed on even date, moved this Court by dint of Section 3A and 100 of the Civil Procedure Act, Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules. He sought the following reliefs:
 1. ...spent
 2. That the Plaintiff/Applicant be granted leave to amend its further amended Plaintiff within a time frame to be stipulated by the court.
 3. That costs of this Application be in the cause.
2. In support, the Plaintiff enunciated a number of grounds on the face of the Motion and gave details of the grounds and facts in support thereof in an Affidavit which had an attached annexure, the draft Amended Plaintiff which he marked as Annexure A. The Applicant averred that the Defendant, in cahoots with the proposed 2nd Defendant, have deceitfully disposed of portions of the suit land to the proposed 5th - 16th Defendants. Additionally, the proposed 3rd, 4th and 17th - 24th Defendants have illegally occupied the suit land. She then deposed that the Defendant published an image of his family on her social media page, namely Facebook, which image formed part of the Plaintiff's evidence as attached to his List of Documents.
3. She justified her contention that the orders sought were necessary bereft of occasioning any prejudice on the other parties. She stated that the amendments were necessary to shed clarity and place all matters in controversy accurately and coherently before Court in order to further avoid a multiplicity of suits. She opined further that the proposed amendments shall give all parties an opportunity to ventilate their issues accordingly thus painting a clearer picture for the benefit of the trial Court.

Responses

4. The 1st (sic) - 12th Interested Parties filed Grounds of Opposition dated October 3, 2022 opposing the Application on even date. They stated that the Application lacked merit; it was filed to defeat their interests; was prejudicial; intended to delay the matter further and that it was frivolous, having been filed inordinately.
5. The 1st and 2nd Interested Parties filed Ground of Opposition dated November 8, 2022 on November 9, 2022. They opposed the Application, urging that it was misconceived, bad in law, an abuse of the process of the Court and an afterthought.

Submissions

6. Parties were directed to dispose of the Application by way of written submissions. However, as at the time of writing this Ruling, I had not been impressed with any parties' submissions. While I note that the 1st and 2nd Interested Parties attached joint submissions to their Grounds of Opposition, I note that they not only did not bear the court's stamp as an indication that they had been duly filed but also favor no evidence of payment of the requisite fees. For these reasons, I will not consider them as they are not properly on record. But be that as it may, that will not prejudice the determination of the Application on merits since submissions do not constitute facts and pleadings of parties but only a marketing language of parties trying to impress the Court on making a determination in their clients' favour. If a party fails to plead an issue or cause of action before the Court, his or her case will disclose



no cause of action. And if he fails to adduce evidence to support what he has pleaded, he will fail to discharge the burden of proof as required by the Rules of evidence. For this proposition reference is made to the Court of Appeal case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR. Thus, even where submissions have been filed, the Court can as well not consider them depending on their import: it does not have to comment on them either. Indeed, many decisions have been rendered by Courts without submissions being considered and they have been found lawful. For this, the holding of the Court of Appeal in the above case is clear when it stated that, “Indeed there are many cases decided without hearing submissions but based only on evidence presented.” For this reason, I now proceed to determine the instant Application.

Analysis and Disposition

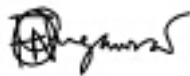
7. I have considered the Application, the annexure thereto as well as the responses in opposition. I have also given due consideration to the relevant law. The Application seeks to enjoin new parties and convert all existing interested parties all to Defendants in this suit. The enjoinder lays credence to their inclusion in the proposed capacities from the several averments as captured in the draft Amended Plaint. Ultimately, the Plaintiff seeks an order for amendment of the Plaint.
8. 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*. The provision gives a court discretionary power on such terms as may appear just to order the addition of any party whose presence may be necessary to enable the court effectually and completely adjudicate upon all questions involved.
9. Under Order 8, Rule 3 and 5 of the *Civil Procedure Rules*, the power to amend may be allowed for the purpose of determining the real issue in controversy. The order may be granted in such a manner as the court directs on such terms as to costs or otherwise as are just. An order for amendment is so inexorable 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 substantially or otherwise.
10. I must remind myself that given its discretionary nature, I must exercise the same judiciously, noting that each case is looked at circumstantially. The amendment of a pleading to enjoin a party to a suit is necessary to enable the court effectually and completely adjudicate and settle all questions involved in the suit, avoid a multiplicity of suits and give every party that will ultimately be affected by the court’s orders on the issues in dispute an opportunity to ventilate their respective positions. Where no prejudice is occasioned and where the same contingently delays the conclusion of the matter, the court will grant an order condemning the successful party to meet the costs of his/her adversaries present in the suit.
11. According to the Plaintiff, the Defendant, in cahoots with the proposed 2nd Defendant, have since disposed of portions of the suit land to the proposed 5th - 16th Defendants deceitfully. Additionally, the proposed 3rd, 4th and 17th - 24th Defendants have illegally occupied the suit land. She then stated that the Defendant published an image of his family on his social media page, namely Facebook, which image formed part of the Plaintiff’s evidence as attached to her list of documents.
12. I have looked at the draft Amended Plaint. I find that it elaborately demonstrates the reasons justifying the inclusion of the parties. They are satisfactorily explained. I further note that it seeks for reliefs against all parties introduced into the suit, which reliefs may not sufficiently directed at the persons named as interested parties if they remain in the same position or character in the suit as presently are. Thus, holistically, I find that the amendment will serve the ends of justice and is thus necessary for proper determination of the issues herein. I acknowledge that as indicated by its antagonists, the same ultimately delays the trial of this matter. However, this may be compensated by way of costs. Weighing



the prejudice that might be occasioned by not allowing the amendment vis-à-vis the delay to be in the matter, allowing the amendment would serve the better ends of justice. Thus, by virtue of this, and in balancing competing interests, the Plaintiff shall meet the costs of the Application. Consequently then, the Notice of Motion Application dated July 20, 2022 and filed on that day is successful in the following terms:

1. Leave be and is hereby granted to the Plaintiff to amend her Plaint as per the annexed draft Amended Plaint to her Application dated July 20, 2022, file and serve the same within seven (7) days from the date of this order failing which the orders herein shall automatically lapse without any further reference to this Court.
 2. The Plaintiff shall pay thrown away costs in the sum of Kshs 15,000.00 to the 1st and 2nd Interested Parties jointly and Kshs 75,000.00 to the 3rd - 12th Interested Parties jointly within fourteen (14) days from the date of this order failing which the filed and served Amended Plaint (if any by then) shall stand struck out of the record automatically.
 3. Evidence of payment of the throw away costs be transmitted in writing to both the Court and all other Defendants as soon as it is done.
 4. The service of the Amended Plaint and Summons to Enter Appearance shall be served on the parties enjoined as defendants only after the payment of throw away costs has been made, since the validity of the Amended Plaint on record is dependent on fulfillment of orders (1) and (2) above.
 5. The present parties who are Defendants in this suit so far shall file and serve their amended statements of Defence within three (3) days after receipt of transmission of evidence of payment as ordered in (3) above, or after the lapse of 14 days of this order whichever occurs earlier.
 6. The other parties enjoined shall comply with the timelines set out in the [Civil Procedure Rules](#) when entering appearances and filing their Defences.
 7. The witnesses who have already testified shall be recalled, if need be, only for purposes of cross-examination and re-examination by the parties.
 8. The matter is hereby fixed for directions and confirmation of compliance with the above orders on February 20, 2023.
13. Orders accordingly.

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



HON. DR. *JUR* FRED NYAGAKA



JUDGE, ELC KITALE

