



**Kungu & another (As Administrators of the Estate of Damian Cosmas Kungu  
alias Damian Cosmas Kungu Muhinja (Deceased)) v Kibarage Slums Association  
(Environment & Land Case 64 of 2020) [2023] KEELC 5 (KLR) (12 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 5 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 64 OF 2020  
EK WABWOTO, J  
JANUARY 12, 2023**

**BETWEEN**

**MYRA WANJIRU ALIAS MONICA WANJIRU KUNGU ..... 1<sup>ST</sup> PLAINTIFF**

**JAMES NGANGA KUNGU ..... 2<sup>ND</sup> PLAINTIFF**

**AS ADMINISTRATORS OF THE ESTATE OF DAMIAN COSMAS KUNGU  
ALIAS DAMIAN COSMAS KUNGU MUHINJA (DECEASED)**

**AND**

**KIBARAGE SLUMS ASSOCIATION ..... RESPONDENT**

**RULING**

1. The Application for determination was filed vide Notion of Motion dated October 31, 2022 and accompanied by Supporting Affidavit sworn by John Mwangi Kamau on the even date. The Defendant/Applicant sought the following orders:
  - i. Spent.
  - ii. The Honourable Court be pleased to grant leave to the Applicant to adduce new, additional and important evidence contained in the bundle annexed to the affidavit of John Mwangi in support hereof;
  - iii. The Court be pleased to join the National Land Commission as an interested Party to these proceedings;
  - iv. Costs of this application be in the cause;



2. The suit came up for hearing where the Plaintiffs' first witness testified and an application for a site visit was sought and allowed. On September 20, 2022, the site visit was conducted and a further hearing set for January 26, 2023.
3. In submissions dated November 15, 2022, the Defendant submitted that the evidence speaks directly to the subject matter of the suit property. Relying on the cases of *Raindrops Limited v County Government of Kilifi* (2020) eKLR and *EO vs COO* (2020) eKLR it was further asserted that they could not have attained the said evidence in good time since the Defendant's association being laymen had been limited in action. The association is currently under new leadership who discovered that the documents were in possession of the National Land Commission and moreover the documents would have a great impact on the outcome of the case.
4. The application was opposed in the Plaintiffs' submissions dated November 21, 2022 where it was argued that the Applicant seeks to reproduce old evidence and should therefore be dismissed. Relying on the case of *Francis K. Muruatetu and Another v Republic & 5 Others* (2016)eKLR, it was argued that the Applicants failed to demonstrate NLC's personal interest and what prejudice to be suffered.
5. Having perused the written submissions, court proceedings and supporting documents, it is evident that the issues for determination before this Court are:
  - a. Whether the Applicant should be granted leave to adduce new evidence?
  - b. Whether the National Land Commission should be enjoined as an Interested Party?
  - c. Who should bear costs of the Application?
6. Order 18, Rule 1 of the *Civil Procedure Rules*, dictates that the Plaintiff shall have the right to begin unless the court otherwise orders. In this instance, the Plaintiffs' witness gave evidence and was cross-examined. I take note that the Plaintiff's case is yet to be closed.
7. In *Halsbury's Laws of England* Volume 13 on discovery, it is stated that:

“The function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to sit before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”[Emphasis Mine]
8. I align myself with the sentiments of the learned judge in *Pinnacle Projects Limited V Presbyterian Church of East Africa, Ngong Parish & Another* (2019) eKLR

“...There is no greater duty for the court than to deliver substantive justice as provided for under Article 159 2(d) at the end of it all. While the wording of Article 50 of the *Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence...”



9. This Court must exercise its discretionary powers to ensure parties are not prejudiced in their pursuit of justice. In the instant case, seeing that the Plaintiffs are yet to close their case, they would have the opportunity to assess the relevance of the evidence and consequently cross examine the Defendant's witness when called upon.
10. The principles for joinder are well outlined in Order 1 rule 10 (2) of the *Civil Procedure Rules* as well as in *Meme v Republic* [2004] 1 124, eKLR which are:
- d. Joinder of a person because his presence will result in the complete settlement of all questions involved in the proceedings;
  - e. Joinder to provide a protection of a party who would otherwise be adversely affected in law;
  - f. Joinder to prevent a likely course of proliferated litigation.
11. In the case of *Shirvling Supermarket Limited v Jimmy Ondicho Nyabuti & 2 others* [2018] eKLR, the court rendered itself as follows:
- “The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative, it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.” [Emphasis Mine]
12. For the proposed party to be enjoined in this suit, the applicant has to show that they have a stake in the proceedings and that their presence will help determine the issues at hand. In this instance, some of the documents in the propose bundle included correspondences to the National Land Commission and consequent findings based on site visits. In my opinion, inclusion of the National Land Commission would not only prevent protracted litigation but also offer clarity on the suit property's current position.
13. In the foregoing, the Court finds that the Application dated October 31, 2022 is merited and the same is allowed in the following terms: -
- a. The Defendant/Applicant is hereby granted leave to adduce new evidence strictly as contained in the bundle annexed to the affidavit of John Mwangi Kamau.
  - b. The Defendant/Applicant is hereby granted leave to enjoin the National Land Commission as an interested party.
  - c. The Defendant/Applicant is to file and serve the additional list of documents upon all parties within five (5) days of delivery of this ruling.
  - d. Each party to bear own costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED BY ELECTRONIC MAIL AT NAIROBI THIS 12<sup>TH</sup> DAY OF JANUARY 2023.**

**E. K. WABWOTO**

**JUDGE**



