



REPUBLIC OF KENYA



Wakhome & another v Alunga & 4 others; Kisiangani (Third party) (Environment & Land Case 7 of 2020) [2023] KEELC 17702 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 17702 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 7 OF 2020
BN OLAO, J
FEBRUARY 23, 2023**

BETWEEN

SALOME WAKHOME 1ST PLAINTIFF

JULIANA WAKHOME 2ND PLAINTIFF

AND

TAFROZA MUHONJA ALUNGA 1ST DEFENDANT

WAMALWA WANYAMA CHIMBANGA 2ND DEFENDANT

PAUL MWELEZA 3RD DEFENDANT

ERASTUS BARASA 4TH DEFENDANT

MOSES ASICHELE 5TH DEFENDANT

AND

GILBERT KISIANGANI THIRD PARTY

RULING

1. The issue which this Court has been called upon to determine in this ruling is a disagreement between Co-Administratrixes who hold a confirmed Grant issued to them jointly in respect to one Estate. I therefore find it in order to commence this ruling by reminding Salome Wakhome and Juliana Naliaka Wakhome that since they hold one Confirmed Grant issued to them as Co-Administratrixes, there is however only one Administration and not two with regard to the Estate of their deceased husband Josephat Wakhome Nabiswa. Therefore, they have no choice but to act as one with regard to the management of the deceased's Estate. They are now obliged to act as a team scoring together in one goal and jointly defending their goal from the opposing team. None of them can act independently and the moment that happens, they will have failed in their responsibilities and the Estate will suffer,



at times, irrevocably. There is no doubt therefore that as Co-Administratrixes, the two have taken on an onerous obligation.

2. By a plaint filed herein on 19th February 2020, Salome Wakhome and Juliana Wakhome (the 1st and 2nd plaintiffs respectively), acting through the firm of Samba & Company Advocates, sought the main remedy that the defendants be evicted from the land parcel No Bungoma/Ndalu/41 (herein the suit land) or any resultant sub-divisions thereof. The basis of their claim is not necessary for purposes of this ruling. Suffice it to state that as at the time of this ruling, some of the defendants are yet to file their defences.

3. By a Notice of Motion dated 19th April 2022 and which is the subject of this ruling, the 1st plaintiff citing the provisions of sections 1, 1A, 3 and 3A of the Civil Procedure Act as well as orders 1 and 51 of the Civil Procedure Rules, seeks the following orders:

1. That the name of the 1st plaintiff be removed from this suit as a party.
2. That in the alternative, the suit herein be struck out for being frivolous, vexatious and fictitious.
3. That costs be borne by the 2nd Defendant/Respondent.
4. The application is premised on the grounds set out therein and is supported by the 1st plaintiff's affidavit dated 19th April 2022.
5. The gravamen of the application is that the suit was filed by the 2nd plaintiff without the 1st plaintiff's knowledge and that her signature in these pleadings was forged. That the 1st plaintiff's name was mischievously included in this plaint as the 1st plaintiff by the 2nd plaintiff who is her co-wife yet both have no claim against the defendants with regard to the suit land which has been fully transmitted to all the beneficiaries including the defendants following succession proceedings in Kitale P&A Cause NO 13 of 2014. That the defendants are therefore bona fide purchasers of part of the suit land.
6. Annexed to the application are the following documents:
 1. Confirmed Grant in respect to the Estate of Josephat Wakhome Nabiswa issued in the joint names of the plaintiffs in Kitale High Court Succession Cause No 13 of 2014.
 2. Certificate of Official Search in respect of the suit land.

The application is opposed and both the 2nd plaintiff and their counsel Mr Jeremiah Samba have filed replying affidavits dated 27th June 2022 in opposing the application.

7. In her affidavit, the 2nd plaintiff has averred, inter alia, that she and the 1st plaintiff are Co-Administratrixes of the Estate of the late Josephat Wakhome Nabiswa as per the Confirmed Grant issued in Kitale High Court Succession Cause No 13 of 2014. That the two of them therefore have a duty to diligently administer the said Estate. That on 13th April 2020 they both agreed at the offices of their advocate to file this suit to evict the defendants from the suit land. That the 1st plaintiff thumb printed the authority allowing the 2nd plaintiff to sign all documents herein. The 2nd plaintiff is therefore shocked that the 1st plaintiff is now derogating from her duty as an Administratrix and that she has clearly been compromised.

8. In his replying affidavit of even date, Jeremiah Onger Samba and who is counsel for the plaintiffs has confirmed that he acted for them in the Succession Cause in Kitale High Court where they were appointed as Administratrixes of the Estate of the deceased Josephat Wakhome Nabiswa. That on 13th January 2020, the 1st plaintiff authorised the 2nd plaintiff to sign pleadings in this case instructing



counsel to file the same. That until she is removed as an Administratrix following the confirmation of Grant in the Succession Cause, the 1st plaintiff cannot sanitize the conduct of the defendants, who were found to be intermeddling with the said Estate, without having been removed as an Administratrix. That the 1st plaintiff does not understand what is contained in her affidavit.

9. In a further affidavit dated 7th July 2022, the 1st plaintiff has reiterated, inter alia, that she did not instruct the firm of Samba & Company Advocates to file this suit against the defendants and neither did she authorise the 2nd plaintiff to sign any pleadings on her behalf. While admitting that she and 2nd plaintiff instructed the said firm to file succession proceedings, she however denied having agreed with the 1st plaintiff to file this suit. She added that at one point, Job Wanyonyi the son to the 2nd plaintiff took paper to her to sign purporting to be a sub-division of the land parcel No Bungoma/Ndalu/41 and she suspects that those must be the documents she signed in relation to this suit. That Jeremiah Samba is taking advantage of her illiteracy to file this suit against the defendants.
10. The application has been canvassed by way of written submissions filed by Mr Robert Wamalwa instructed by the firm of Robert Wamalwa & Company Advocates for the 1st plaintiff and by Mr Jeremiah Ongeru Samba instructed by the firm of Samba & Company Advocates.
11. I have considered the application, the rival affidavits and the submissions by counsel.
12. The 1st plaintiff seeks the following two substantive orders:
 1. That her name be struck out from this suit.
 2. In the alternative, the whole suit be struck out.
13. There is no doubt that this Court has the power and discretion to strike out or add the name of any party in proceedings. order 1 rule 10(2) of the [Civil Procedure Rules](#) provides that:

“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.”

The term “improper party” is defined in [Black’s Law Dictionary](#) 10th Edition as:

“A party whose involvement in a land suit is not permitted under a rule or statute or who has no connection with the subject matter or the suit.”

It is common ground that the 1st plaintiff is a Co-Administratrix to the Estate of her late husband. Further, that the suit land is a subject in these proceedings. It cannot therefore be correct to treat the 1st plaintiff as a party who has been “improperly joined” in these proceedings. In support of her application, the 1st plaintiff has deposed that she never gave instructions to the firm of Samba & Company Advocates to file this suit (paragraph 5), that she did not sign any pleadings (paragraph 6) and that she was shocked to learn about this suit (paragraph 7). In response to those averments, the 2nd plaintiff has deposed in her replying affidavit that on 13th April 2020, she and the 1st plaintiff went to the office of their counsel Mr Samba where they instructed him to file this suit and that the 1st plaintiff thumb – printed her authority allowing the 2nd plaintiff to sign all documents on the behalf (paragraphs 7 and 8). This has been corroborated by Mr Jeremiah Ongeru Samba in paragraph 5 of his replying affidavit and although the 2nd plaintiff refers to the date as 13th April 2020, Mr Samba states that the



date was 13th January 2020 and that is confirmed by the Authority to plead dated 13th January 2020 thumb-printed by the 1st plaintiff and which has been filed herein. The 1st plaintiff has not suggested why the 2nd plaintiff or even her own counsel, would want to allege that she authorized the filing of this suit when she did not. Mr Samba is in these proceedings only as counsel. There is no reason why he would want to entangle himself in the murky waters of this litigation and neither has it been suggested that he has any interest in the suit land. The 1st plaintiff goes further in her supporting affidavit to state that the defendants are entitled to the suit land and should not be evicted. This matter will go to full plenary hearing where she will have an opportunity to support the defendants' case if she so wishes. She also has the right to go back to the succession Court, apply for rectification of the Grant and remove herself from being a Co-Administratrix. That can also be done by the 2nd plaintiff. However, and as I stated at the beginning of this ruling, for as long as the plaintiffs remain Co-Administratrixes to the Estate of the deceased, they have no choice but to work as a team because the administration is one. Counsel for the 1st plaintiff has made the following submission in support of his client's claim that she could not have authorized the filing of this suit:

“The 1st plaintiff/Applicant is born 1934 she is a total illiterate old woman. She doesn't understand Kiswahili and English language. Now how did she instruct the 2nd plaintiff and have authority to plead recorded in English language? Do we have any authority recorded in Bukusu language (1st plaintiff is Bukusu) authorizing the 2nd plaintiff to file and prosecute the case? The answer is NO.”

Counsel goes on to add:

“Yes, the firm of Samba & Co Advocates had initially represented both plaintiffs herein in Kitale High Court Succession Cause No 13 of 2014. Does it mean that the instructions thereto extended to have the said firm file the present suit for and on behalf of the Applicant? The answer is No. The firm of Samba & Co Advocates cannot assume to have had instructions to file the present suit.”

Finally, Mr Wamalwa makes the following submissions:

“The 1st Plaintiff/Applicant has not retained advocate SAMBA to be handling her legal issues. Consequently, the firm of SAMBA was misled by the 2nd plaintiff to file present suit in joint names of the applicant and the 2nd plaintiff. There must be express instructions. Be it as it may, is there any evidence to show that 1st plaintiff paid any legal fee to Samba & Co. Advocates to file the case? The answer is No.”

Counsel then cited the case of *Mugote & Associates Advocates v Kiambu County Assembly Speaker* 2018 eKLR which, in my view, dealt with the issue whether there was an Advocate – client relationship to justify counsel taxing his Bill of Costs. That is not the position in this case and I think counsel is splitting hairs. The fact that a party is old and illiterate does not mean that he or she cannot give instruction, unless of course, he or she, is suffering from some other infirmity which is not the case herein. It is stated that the 1st plaintiff is a Bukusu but there is no suggestion that the 2nd plaintiff is not a Bukusu as well.

14. The 1st plaintiff concedes that she and the 2nd plaintiff instructed Mr Jeremiah Samba to file the succession cause in Kitale. She states in paragraphs 9 and 10 of her supporting affidavit as follows:

9: “That in 2014 together with the 2nd plaintiff filed succession cause in respect of the Estate of my deceased husband vide Kitale High Court P&A No 13 of 2014”



10: “That on 15/9/2016, the grant was confirmed and certificate of confirmation issued (Hereto annexed and marked SNW1 is a copy of certificate).”

It therefore defeats logic that now some 10 years later, Mr Jeremiah Samba has suddenly mutated into a dishonest counsel falsifying documents and purporting to act for the 1st plaintiff. The view I take of all this is that the 1st plaintiff is unfairly casting aspersions on the integrity of her counsel. The bottom line is that I am not persuaded that this suit was filed without the 1st plaintiff’s knowledge or consent. And as I have already stated in this ruling, she has the option of removing herself from being a Co-Administratrix to the Estate of the deceased but that will have to be done in another Court.

15. The prayer to remove herself from being a party in this suit does not meet the threshold set out in the law. It is hereby declined.

16. The alternative prayer is that this suit be struck out for being frivolous, vexatious and fictitious. Order 2 rule 15(1) of the [Civil Procedure Rules](#) provides that:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

- (a) it discloses no reasonable cause of action or defence in law; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

Striking out of a pleading is a draconian remedy to be resorted to sparingly. In the case of [D. T. Dobie v Joseph Mbaria Muchina & Another](#) C.a. Civil Appeal No 37 of 1978 Madan J.a. (as he then was) said:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

In [Kivanga Estate Ltd v National Bank of Kenya Ltd](#) C.a. Civil Appeal No 217 of 2015 [2017 eKLR] it was stated thus:

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.”

Here we have an interesting spectacle of a Co- plaintiff who wants to strike out her own case. And the suit seeks the eviction of the defendants from the suit land for being trespass thereon as the said land is the property of the deceased. The 1st 2nd and 4th defendants have field a defence denying that they



are trespassers and adding that they are bona fide purchasers for valuable consideration. I do not see how the plaintiffs' suit can be considered as being frivolous, vexatious or an abuse of the process of this Court. It is instructive to note that by an earlier ruling delivered by this Court on 1st July 2021, I dismissed the plaintiff's application seeking to strike out the 1st, 2nd and 4th defendants defence. There was no appeal against that ruling.

17. Prayer No 2 of this Notice of Motion dated 19th April 2022 is clearly mischievous. I think the only viable option left to the 1st plaintiff in this matter must be clear by now.
18. Ultimately therefore, the Notice of motion dated 19th April 2022 is devoid of merit. It is dismissed. And since the main protagonists are family, each shall meet their own costs thereof.

BOAZ N. OLAO

JUDGE

23RD FEBRUARY 2023

RULING DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF FEBRUARY 2023 AT BUSIA BY WAY OF ELECTRONIC MAIL WITH NOTICES TO THE PARTIES.

BOAZ N. OLAO

JUDGE

23RD FEBRUARY 2023

