



**Mulwa & 21 others v Munyae & 10 others & another (Environment & Land Case 158 of 2017) [2023] KEELC 648 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 648 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 158 OF 2017  
CA OCHIENG, J  
FEBRUARY 13, 2023**

**BETWEEN**

**MUATHE MULWA & 21 OTHERS ..... PLAINTIFF**

**AND**

**DAVID MUNYAE & 10 OTHERS ..... DEFENDANT**

**AND**

**JOSEPH NDAKA & 163 OTHERS ..... INTENDED DEFENDANT**

**RULING**

1. What is before Court for determination is the Applicants' Notice of Motion Application dated the September 16, 2022 where they seek the following orders:-
  1. That an order do issue joining the 1<sup>st</sup> to 164<sup>th</sup> Intended Defendants/Applicants herein as Defendants respectively and the Plaintiff do amend the Plaintiff to name them respectively.
  2. That upon the joinder, the 1<sup>st</sup> to 164<sup>th</sup> Intended Defendants/Applicants do file their Defence and Counter-claim as appropriate.
  3. Cost of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Wainaina Kanyiri who deposes that the Plaintiffs filed the instant suit seeking various prayers on the face of the Plaintiff. He explains that the intended Defendants/Applicants bought the suit land with some of them having done so, way back in 1960s. Further, that the intended Defendants/Applicants have been in peaceful occupation and settlement of the suit land for a very long time. He avers that the Applicants openly purchased the suit land for value and took possession in full glare of the Plaintiffs. He contends that when the Applicants were purchasing their respective portions from the registered owners, they were not aware that the Plaintiffs would raise issues as they have done in this suit. He insists that the



Applicants were innocent purchasers for value thus their rights will be violated if this case is heard and determined in their absence. He avers that they have legitimate expectation that their rights over the land as purchasers would be protected both in law and by the Plaintiffs. Further, that when the Plaintiffs filed this suit, they were aware that the Applicants were in occupation of the suit land and no prejudice will be suffered as they will have a chance to confront the evidence presented.

3. The Application is opposed by the Plaintiffs who filed a Replying Affidavit sworn by Muathe Mulwa where he deposes that there was a similar application dated the August 23, 2017 which was dismissed by the Court on January 25, 2019. He insists that the Intended Defendants/Applicants should forward their respective claims to the purported vendors/sellers since it is alleged that they purchased distinct portions from them. He contends that reliefs sought in the Plaint are specific to particular Defendants and therefore the Plaintiffs have no claim against the Applicants. He avers that the Plaintiffs have no doubt as to the persons from whom they are seeking reliefs as sought in the Plaint and therefore they do not need to amend their Plaint to include the Applicants. Further, that the suit herein has not been instituted against wrong persons so as to allow the Applicants and there is nothing in dispute between the Plaintiffs herein and them, which will require the Court's determination. He explains that the purported agreement dated the May 4, 1987 between Mr Muli Ndila and Nguvi Kilea the 3<sup>rd</sup> Defendant herein does not concern the Plaintiffs. Further, that none of the Applicants was the original 32 members of Ngunga farm. He states that Mr David Mutiso the 19<sup>th</sup> Plaintiff herein, informed him that he has no dispute with the purported purchaser one Mr Philip Kaloki who bought a portion of land from his late father Munyao Mwanja. Further, that Morris Mweu Muthike should seek redress from the 9<sup>th</sup> Defendant if any and not from the Plaintiffs herein. While Samson Kinai and Mr James Mutuku Makau should seek redress if any from the 7<sup>th</sup> Defendant and not from them. He insists that he has no dispute with Philip Muasa whom he sold a small portion of land and he does not need to be a Defendant in this suit. Further, that Mutua Muindi has no dispute with Mr Mutyambai Mwingi, Mr Muia Mutuangi and Mr Mailu Ndaka who had purchased some portion of land from the late father Muindi Nguvu, hence they do not need to be joined as Defendants in this suit. He reiterates that the Application is meant to delay and or obstruct the course of justice and is brought in bad faith taking into account that the matter was filed in the year 2017 whereas some of the Sale Agreements were made during the pendency of this suit.
4. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits and rivaling submissions, the following are the issues for determination: Whether this application is res judicata. Whether the Applicants should be joined in this suit as Defendants.

I will deal with the two issues jointly.

6. The Applicants in their submissions state that the instant Application is not res judicata. They argue that the same was dismissed by this Court through a Preliminary Objection without determining the core issues they had raised. Further, that the Court made a Ruling that the 87<sup>th</sup> Applicant, who had sworn the Affidavit in support of the Application, had not adduced any written authority from the other Applicants and thus the Application was in violation of Order 1 Rule 13(1) and (2) of the Civil Procedure Rules. They contend that they have hence filed this instant Application by presenting a written authority as required. Further, the fact the deponent did not have authority of the other persons to file and plead the suit on their behalf means that they cannot be deemed to have been parties of that initial Application. They insist that the former Application vis a vis the instant Application has different parties. They argue that they have satisfied the threshold for admission as Defendants as



they have an interest in the suit land which they purchased from some of the owners way back in the 1960s and have produced duly executed Sale Agreements to that effect. Further, that they have been residing on the suit land for a very long time and are bona fide purchasers without notice hence they have absolute unqualified and answerable defence against any claim of any prior equitable owner.

7. To buttress their averments, they relied on the following decisions: *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company Advocates & Another (Interested Parties) (2020) eKLR*; *Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & Another (2018) eKLR*; *Hezekia Kipkorir Maritim & 10 Others v Philip Kipkoech Tenai & 2 others (2016) eKLR*; *Civicon Limited v Kivuwatt Limited and 2 others (2015) eKLR*; *Jeremiah Wanyiri Wambugu v Geoffrey Wiagwa Wanjoya (2016) eKLR*; *Edward Muchiri (Suing as the Administrator to the Estate of Nelson Muchiri Gitthinji) v Christopher Njoroge Komu (being sued as the Administrator of the Estate of Komu Kiarie) (2021) eKLR*; *Falcon Global Logistics Co Limited v Management Committee of Eldama Ravine Boarding Primary School (2018) eKLR*; *Fletcher vs Peck 10 US 87 (1810)*; *Lawrence Mukiri v Attorney General & 4 Others (2013) eKLR*; *Celina Muthoni Kitthinji v Safiya Binti Swaleh & 8 Others (2018) eKLR*; *Francis Maina Njogu versus Nicolas Kiragu Ngacha and John Muchina Njogu Peter Muriuki Njogu Catherine Wanjiru Kerugoya ELC Case No 102 of 2014 eKLR* and *Departed Asians Property Custodian Board vs Jaffer Brokers Ltd (1999) 1 EA 55*.
8. The Plaintiffs in their submissions aver that this Application is res judicata because the Applicants filed a similar Chamber Summons Application dated August 23, 2017 where they had sought the same orders and Justice Angote vide his Ruling on January 25, 2019, dismissed the said Application. The argument by the Applicants that since the deponent did not have authority of the other persons to file and plead on their behalf means that they cannot be deemed to have been parties of that initial Application does not hold water as the Application in itself indicates that it was filed on their behalf. They insist that the 164 Applicants should not be enjoined as Defendants in this suit as they are not necessary parties. Further, the fulcrum of the dispute herein revolves around Land Parcel Number LR 1849 measuring 2,882 acres; declaration that the Defendants are not lawfully entitled to more than 80 acres of the suit land and that the original 32 members are tenants in common entitled to equal shares. They further seek a mandatory injunction directing the Defendants to excise their respective portions of land which are over and above the 80 acres of the suit land for distribution among the Plaintiffs. They reiterate that none of the Applicants was an original member of the aforementioned farm and have each not even specified from whom they allegedly acquired their respective properties from. Further, that the presence of the Applicants is not necessary to enable the court effectually and completely adjudicate this suit. To support their arguments, they relied on the following decisions: *Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR*; *Gladys Nduku Ntbuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR*; *Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] eKLR*; *ET v Attorney General & another [2012] eKLR*; *Gurbacham v Yowani Ekoru [1958] EA 450*; *Amir Ahmed & 2 others v Katana Chai & 55 others; Kadzuboni Primary School Board of Management–Kadzuboni Primary School (Intended Defendants) [2021] eKLR*; *Izera Enterprises Limited v Image Font Limited; Sagalla Ranchers Limited (Interested Party) (Environment & Land Case 113 of 2021) [2022] KEELC 12585 (KLR) (28 April 2022) (Ruling)* and *Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General (2017) eKLR*.
9. As to whether the instant Application is res judicata.
10. The doctrine of res judicata is set out in the *Civil Procedure Act* at Section 7 where it stipulates inter alia:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between



parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

11. In this instance, the Applicants had initially filed an Application dated the August 23, 2017 seeking joinder to this suit, which was dismissed by Justice Angote on January 25, 2019. I wish to reproduce an excerpt from the said Ruling:

In the absence of written authority by the 260 Interested Parties authorizing the 87<sup>th</sup> Applicant to appear, plead or act for them in this matter, the Application for joinder by the Applicants is unmeritorious. Indeed, the failure by the Applicants to sign such an authority or even have a separate document detailing their national identity card numbers leads the court to conclude that the 261 Applicants are busy bodies whose intention is to delay the finalization of this matter. For those reasons, I dismiss the Application dated August 23, 2017 with costs.'

12. The Applicants argue that this Application is not res judicata since they have now filed the written authority which was absent in the previous Application for joinder, which fact is disputed by the Plaintiffs who insist the instant Application is res judicata. It is trite that Section 7 of the Civil Procedure Act is also applicable to Applications and that the matter directly and substantially in issue in both Applications filed by the Applicants herein was on joinder of parties to the suit. In the case of *Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services* [2019] eKLR the Court of Appeal judges held as follows:-

Undeniably the doctrine of res judicata is founded on public policy, which is aimed at achieving two objectives, namely, that there must be a finality to litigation and that a party should not be vexed twice on account of the same litigation. In the present appeal, it is not in dispute that both the former and the latter suit had the same parties in common. Also not disputed in this appeal, is the finding by the learned Judge that the subject matter in the two matters was one and the same; namely the recovery of monies owed in respect of an outstanding loan. What the appellant has laboured to contest is the finding that the former suit was not heard and decided within the meaning of Section 7 aforesaid. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was res judicata and cannot stand. The 1<sup>st</sup> respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant this would be contrary to public policy that litigation must come to an end and the best the 1<sup>st</sup> respondent could do was to invoke the appellate process and not filling a fresh suit.'

See the case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR.

13. I have had a chance to peruse the previous Ruling and note that Justice Angote actually dealt with the issue of joinder of the parties before dismissing the Application. I opine that the Applicants cannot circumvent the law and use their failure to comply with Order 1 Rule 13(1) & (2) of the Civil Procedure Rules as an excuse to file a fresh Application. Based on the facts before me while relying on the legal provisions I have quoted and relying on the cited decisions, I find that the instant Application is indeed res judicata.



14. As to whether the Applicants should be joined in this suit as Defendants.
15. On joinder of parties, Order 1 Rule 10 of the Civil Procedure Rules stipulates thus:
  - (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
  - (2) 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.'
16. In the case of *Pravin Bowry v John Ward and Another [2015] eKLR* the Court of Appeal considered the principles to be considered in an Application for joinder of parties to a suit and referred to the Ugandan decision of *Deported Asians Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55 (SCU)* where it was held that:

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 interests 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 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.'
17. On perusal of the Complaint, Defence, instant Application, respective affidavits including annexures herein, I note the Applicants claim to have bought their respective portions of land from different parties who are not Plaintiffs herein. Further, the fulcrum of the dispute is different from the suit land. It is worth noting that some of the Applicants actually purchased their parcels of land during the pendency of this suit. Insofar as the Applicants claim to have been in occupation of their respective portions of land and should be deemed as purchasers for value, I opine that they would be safer seeking their remedies from the respective vendors and not against the Plaintiffs who only seek relief outlined above, against the Defendants. Based on the facts as presented while relying on the legal provisions I have cited as well as associating myself with the authorities quoted, I find that the Applicants do not meet the criteria set of a Defendant in this suit and their involvement in this suit will not be necessary to enable the court effectually as well as completely adjudicate upon it.
18. In the circumstances, I find the instant Notice of Motion Application unmerited and will dismiss it with costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13<sup>TH</sup> DAY OF  
FEBRUARY, 2023

CHRISTINE OCHIENG

JUDGE

