



Mbui & another v Mbui; Ethan & another (Interested Parties) (Environment & Land Case 154 of 2017) [2023] KEELC 17184 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 154 OF 2017
JM MUTUNGI, J
APRIL 20, 2023**

BETWEEN

ALICE WARUGURU MBUI 1ST PLAINTIFF

MARY MUTHONI MBUI 2ND PLAINTIFF

AND

ELIJAH MITHAMO MBUI DEFENDANT

AND

NDUBAI RICHARD KARURI ETHAN INTERESTED PARTY

PHARIS MUNDIA WARUI INTERESTED PARTY

RULING

1. The Applicants *vide* a Notice of Motion application dated 6th September, 2022 pray for the following orders:-
 1. Spent.
 2. That Ndubai Richard Karuri Ethan and Pharis Mundia Warui, be enjoined in these proceedings as Interested Parties.
 3. That there be a stay of execution of the Judgment or decree given in this matter on 12/11/2021 pending the hearing and determination of this application.
 4. That upon granting prayer 2 above, the Honourable Court be pleased to set aside the Judgment entered in this matter on 12/11/2021 as far as it affects the parcels of land Title No. Kabare/Nyangati/8571, 8572, 8573, 8574, 8575, 8576, 8578, 8581 and 8585 registered in the names of the Interested Parties.



5. The Costs of this application be provided for.
2. The application is supported on the grounds set out on the body of the application and the affidavit sworn in support by Ndubai Richard Karuri Ethan. Principally the applicants seek to have the Judgment entered in this matter on 12th November, 2021 set aside and that they be joined as parties in the suit to enable them to ventilate their interest in the suit. They aver that they were not parties to the suit and that the Judgment that was rendered affected their interests as the registered proprietors of land parcels Kabare/Nyangati/8571, 8572, 8573, 8574, 8575, 8576, 8578, 8581 and 8585. They contend that the effect of the Judgment was to annul their titles without affording them an opportunity of being heard in defence of their titles. The Applicants contend they were innocent purchasers for value without any notice of any defect in the titles they acquired. They argue they were necessary parties in the suit to enable all issues in the matter to be finally and fully adjudicated. The Applicants assert that their titles are resultant subdivisions out of land parcel Title No. Kabare/Nyangati/440 which was the subject matter in the litigation.
3. The 1st Plaintiff/Respondent swore a Replying Affidavit in opposition to the applicant application. The 1st Plaintiff affirmed the suit revolved around title Number Kabare/Nyangati/440. She averred that the Applicants had not established any nexus between the titles they held and title number Kabare/Nyangati/440. She averred that the Applicants application was a ploy to delay justice to her as the successful litigant arguing that there has to be an end to litigation. The 1st Plaintiff contended that the Applicants, if at all they were prejudiced as a consequence of the Judgment, they have recourse to the persons who sold them the land for a claim in damages.
4. The Applicants filed a Supplementary Affidavit to respond to the 1st Plaintiffs Replying Affidavit. The 1st Applicant in the Supplementary Affidavit reiterated that the parcels now registered in the Applicants names resulted from the subdivision of land parcel Kabare/Nyangati/440. The Applicants stated land parcel Kabare/Nyangati/440 was initially subdivided into two (2) portions being land parcels Kabare/Nyangati/1061 and 1062. The Applicants averred that in 2010 land parcel No. 1061 was subdivided into Five (5) portions being parcels Kabare/Nyangati/5344 to 5348 and subsequently in 2017 land parcel Kabare/Nyangati/5344 measuring 3.41 Ha was further subdivided into Fifteen (15) subplots being title Nos. Kabare/Nyangati/8571 to 8585. The applicants annexed copies of Mutation Forms dated 31/5/10, 29/6/2010 and 7/7/2017 marked “NRK 3a, b and c” respectively evidencing the subdivisions.
5. The Applicants averred that they did not acquire their titles from the Defendant against whom the Judgment was made yet the Judgment if implemented would adversely affect their interest in the titles that they hold. They contended that they were bonafide innocent purchasers and had a right of being heard and prayed for the orders sought in the application to be granted.
6. The application by the Applicant was canvassed by way of written submissions. The Applicants filed their submissions dated 17th November, 2022 on 22nd November, 2022; the Plaintiff's filed their submissions dated 8th February, 2022 on 9th February 2022; and the Defendant filed his submissions dated 9th February, 2022 on the same date.
7. The Applicants application is premised on Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* that basically speak to administration of substantive justice in an expedient and cost effective manner. The application further invokes the provisions under Order 1 Rules 3, 5, and 10(2) of the *Civil Procedure Rules* that deal with joinder of parties to a suit. Primarily the applicants contend they were not parties to the present suit and a Judgment was made that directly affects their interest in properties that they are the registered proprietors. They assert they were not given an opportunity of being heard in defence



of their titles before the court made a Judgment that directly affected the proprietary rights and interest in the properties registered in their name.

8. The Applicants in support of the application placed reliance on the following cases:-
- i. *Moki Savings Co-op Society Ltd & another; Beatrice Njeri Gachukia & 19 Others (proposed Interested Parties/Applicants)* eKLR 2022 where Oguttu Mboya, J set aside a Judgment entered in 2010 on the basis that the Applicants were necessary parties who ought to have been joined in the suit and heard before a Judgment that was adverse to their interest was rendered.
 - ii. *Hemed & another v Karisa Mwangangi* (Interested Party) [2022] KEHC 464 KLR.
 - iii. *SKOV Estate Ltd & 5 Others v Agricultural Development Corporation & another* [2015] eKLR.
 - iv. *Republic v Director of Land Adjudication & Settlement Exparte Stephen Muchofonyori; Nancy Njoki Mburu (Intended Interested Party)* 2019 eKLR.
9. The Supreme Court in the Case of [*Francis Karioko Muruatetu & another v Republic & 5 Others*](#) [2016] eKLR set out the conditions/parameters that ought to be satisfied for a party to be joined in a suit as an Interested party as follows:-
- i. The personal interest or stake that the party has in the matter be set out in the application. The Interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
 - ii. The prejudice to be suffered by the Intended Party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
 - iii. Lastly, a party must, in its application set out the case and/or submission it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court. Munyao, J in the Case of *Skov Estate Limited & 5 Others v Agricultural Development Corporation & another (supra)*, relied upon by the Applicants, in considering what a party seeking joinder requires to satisfy stated inter alia as follows:-

“ ---A Judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one to be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the Judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not joined, the Court may not be fully equipped to settle the questions in the suit or maybe handicapped in one way or another. A joinder maybe allowed if the Intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claim of the incumbent Plaintiff and Defendant”.
10. In a somewhat similar matter as in the present matter in the Case of [*Lilian Wairimu Ngatbo & another v Moki Savings Co-op Society Ltd \(supra\)*](#) where third parties had purchased and had portions of the



land subject to the suit transferred to them but had not been joined in the suit, Oguttu Mboya, J in considering an application for the Third Parties to be joined as Interest Parties observed thus:-

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“60. It is my humble opinion that if the original title, which was the subject of the proceedings, have been subdivided and the resultant subdivision created and transferred in favour of 3rd parties, then it behooved the Plaintiffs/Respondent herein to have pursued the matter, including seeking amendment and joinder of the parties who were beneficiaries of the subdivisions”;

Further the Judge continued and stated as hereunder:-

“----- either the Plaintiffs/Respondents herein or the Defendants had an obligation to apply to join the purchaser of the portions of the suit property. To the extent that they were not joined, the proceedings were carried out and/or undertaken on the back of the said purchasers without them being afforded an opportunity to be heard”.

11. In the present suit, when the Plaintiff instituted the suit on 17th November, 2017, the suit property LR Kabare/Nyangati/440 in respect whereof they sought a declaration that it had been fraudulently and illegally registered in the Defendants name, the land already had been subdivided and new subtitles created and 3rd parties had acquired titles to some of the subdivisions. Indeed, the Defendant vide his Defence filed on 9th January, 2018 affirmed that the land had been subdivided in 2010 into two portions namely Kabare/Nyangati/1061 and 1062 and that land parcel Kabare/Nyangati/1061 had further been subdivided to create land parcels Kabare/Nyangati/5344 to 5348 which subdivisions had been transferred to 3rd parties. As at this point the Plaintiffs had notice that land parcel Kabare/Nyangati/440 did not exist and there were other persons who had acquired interest to portions of the land. The prudent thing that the Plaintiff could have done when this information was disclosed was to seek to amend the Plaint to bring on board all the persons who had acquired titles out of the original land parcel as by the plaint the Plaintiffs they were seeking to have all those titles annulled.
12. The Applicants subtitles resulted from the subdivision of land parcel Kabare/Nyangati/5344 which was itself a subdivision out of land parcel Kabare/Nyangati/1061. Land parcel Kabare/Nyangati/1061 was a subdivision out of land parcel Kabare/Nyangati/440 (original title). The Applicants upon being registered as proprietors of land parcels Kabare/Nyangati/8571, 8572, 8573, 8574, 8576, 8578, 8581 and 8585 they were vested in terms of Sections 24, 25 and 26 of the Land Registration Act, 2012 with absolute ownership rights and their titles were absolute and indefeasible and could only be challenged through due process as provided under the law. If their titles were to be annulled due process had to be followed.
13. Section 26(1)(a) and (b) of the *Land Registration Act* 2012 provides the limited grounds on which a registered proprietor's title could be challenged; either on grounds of fraud and misrepresentation to which the proprietor is proved or shown to be a party or if it is shown the title was unprocedurally or illegally acquired. The implication is that a title holder must be given an opportunity of being heard before his title can be cancelled and/or annulled.
14. By the Judgment entered by the Court on 12th November, 2021 the Court inter alia ordered as follows:-
 1. A declaration that the registration of Mbogo Mbui as the proprietor of land parcel No. Kabare/Nyangati/440 was fraudulent, illegal, null and void.
 2. A declaration that all subsequent dealings from 26/6/1972 were equally fraudulent, illegal, null and void and of no legal effect.



3. The Land Registrar, Kirinyaga County is hereby directed to rectify the register by reverting the suit land in the name of original proprietor Mbui Mbogo.
15. The effect of the Judgment was to annul the applicant's titles without giving them an opportunity of being heard in defence of their titles. The Applicants had a real and genuine interest in the subject matter of the suit before the Court. Any decision that was made was bound to affect their interest as they had acquired proprietary rights over the parcels of land in regard to which they held titles. Their rights could not be erased without them being afforded a chance of being heard in defence of the titles.
16. I am in the premises satisfied that the Applicants were indeed necessary and appropriate parties who needed to be joined in the suit to enable all issues and questions arising in the suit to be fully and finally adjudicated by the Court. I find the Applicants application dated 6th September, 2022 merited. The Judgment delivered on 12th November, 2021 cannot stand as to allow it to stand would amount to condemning the Applicants unheard which would be against the Rules of Natural Justice that no person ought to be condemned without being afforded an opportunity of being heard. It does not matter that the Court may still arrive at the same verdict even after hearing the parties. It is all about justice and no party should be driven away from the seat of justice on the basis that he does not have a plausible and/or good case. The Court ought to hear all those who have a stake in the proceedings and only after hearing all those who deserve to be heard should the Court render its decision. The Applicants in the present suit had a stake in the matter as they stood to be affected by the decision and deserved to be heard.
17. For all the above reasons I set aside the Judgment entered on 12th November, 2021 and order that the Applicants be joined as the 2nd and 3rd Defendants respectively.
18. The Plaintiffs are directed to amend the Plaintiff appropriately to include the Applicants as Defendants and to serve the amended Plaintiff on the Defendant and the added Defendants within the next 21 days from the date of this ruling.
19. The added Defendants to enter appearance and file their statement of defence together with the requisite compliance documents within 21 days of being served with the Amended Plaintiff.
20. The matter is fixed for mention for pre trial directions on 14/6/2023. The cost of the application to be in the cause.

RULING DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 20TH DAY OF APRIL 2023.

J. M. MUTUNGI

E.L.C.- JUDGE

