



**Ondiege (Suing as a Personal Representative of the Estate of Cornel Ondiege Ogola) v Commissioner of Lands & 76 others; Ogutu (Suing as a Personal Representative of the Estate of Raymond Oguta Dhier Deceased) (Interested Party) (Environment and Land Case Civil Suit 823 of 2016) [2023] KEELC 16873 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16873 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 823 OF 2016**

**SO OKONG'O, J**

**APRIL 20, 2023**

**BETWEEN**

**JACOB OGOLA ONDIEGE (SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF CORNEL ONDIEGE OGOLA) ..... PLAINTIFF**

**AND**

**COMMISSIONER OF LANDS & 76 OTHERS ..... DEFENDANT**

**AND**

**STANLEY OTIENO OGUTU (SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF RAYMOND OGUTA DHIER DECEASED) ..... INTERESTED PARTY**

**RULING**

1. The Plaintiff brought this suit in 2008 through a plaint dated May 18, 2008. The plaint was amended, further amended and further further amended on March 25, 2011, April 18, 2017 and February 26, 2020 respectively. In his further further amended plaint dated February 26, 2020, the Plaintiff sought judgment against the defendants for;
  - a. A declaration that the title registered as LR No 18040 and all parcels of land arising from its subdivision in the name of the 2<sup>nd</sup> Defendant and its successors thereafter namely, the 3<sup>rd</sup> Defendant and all those deriving titles therefrom including the 4<sup>th</sup> to 76<sup>th</sup> Defendants were irregular, void hence a nullity.
  - b. A declaration that the acquisition of the suit land by the Government through Gazette Notice No 3400 of 6<sup>th</sup> November 1976 was unconstitutional.



- c. A declaration that a constructive trust in favour of the estate of the late Cornel Ondiege Ogola over all the subdivided parcels of land registered in the names of the 4<sup>th</sup> to 76<sup>th</sup> Defendants was created from the subdivision of the suit parcel of land.
  - d. A declaration that the estate of the late Cornel Ondiege Ogola is the original owner of the suit land and hence the said estate's interest should be registered.
  - e. A permanent injunction restraining the 4<sup>th</sup> to 76<sup>th</sup> Defendants by themselves and/or through their agents and/or servants and/or any one claiming title under them from trespassing on and continuing to occupy the suit land in contravention of the law.
  - f. An order compelling the 4<sup>th</sup> to 76<sup>th</sup> Defendants to execute transfers in respect of the suit land in favour of the Plaintiff as the administrator of the estate of the late Cornel Ondiege Ogola within such time as shall be prescribed by the court in default of which the Deputy Registrar do execute the same on their behalf.
  - g. Costs and interest at court rates.
2. In the said further further amended plaint, the Plaintiff averred that the late Cornel Ondiege Ogola, deceased (hereinafter referred to only as "the deceased") acquired all that parcel of land that was ultimately registered as LR No 18040 (hereinafter referred to as "the suit property") from his deceased father, one, Ogola Obonyo in 1948 and occupied the same until sometime in the 1990s. The plaintiff averred that through a Gazette Notice dated November 6, 1976, the suit property was set apart for use by the Government of Kenya for housing and industrial development. The Plaintiff averred that on or about December 15, 1976, the deceased lodged an application for compensation for the suit property and on July 6, 1978, the deceased received a cheque for Kshs 2,149/- for the developments that he had done on the suit property. The Plaintiff averred that the deceased was not compensated for the land on which he had carried out the said developments.
  3. The Plaintiff averred that the deceased pursued compensation for the suit property from the 1<sup>st</sup> Defendant between 1976 and 1990 but his efforts bore no fruit. The Plaintiff averred that on April 14, 1993, the 1<sup>st</sup> Defendant without due regard to the interest of the deceased on the suit property unlawfully and fraudulently registered the suit property under the *Registration of Titles Act*, Chapter 281 Laws of Kenya (now repealed) in the name of the 2<sup>nd</sup> Defendant. The Plaintiff averred that the 1<sup>st</sup> Defendant while undertaking the said registration did not take into account the Gazette Notice No 3400 of November 6, 1976, the provisions of the *Land Acquisition Act* and the *Constitution of Kenya* that was in force then.
  4. The Plaintiff averred that the 2<sup>nd</sup> Defendant transferred the suit property to the 3<sup>rd</sup> Defendant on May 14, 2000 and the 3<sup>rd</sup> Defendant subsequently subdivided the property into several portions that it sold to the 4<sup>th</sup> to 76<sup>th</sup> Defendants.
  5. The Plaintiff averred that since the 1<sup>st</sup> Defendant never acquired any interest in the suit property, it had no interest that it could transfer to the 2<sup>nd</sup> Defendant. Similarly, the 2<sup>nd</sup> to 76<sup>th</sup> Defendants who derive their titles from the purported title that was held by the 1<sup>st</sup> Defendant did not acquire any valid interest in the suit property and the portions thereof. The Plaintiff submitted in the alternative that, the 4<sup>th</sup> to 76<sup>th</sup> Defendants hold the titles for the portions of the suit properties in their names in trust for the estate of the deceased.
  6. I have not seen on record any defence filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 77<sup>th</sup> Defendants in response to the further further amended plaint. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants filed a joint further amended statement of



defence on November 5, 2020 in which they denied the Plaintiff's claim in its entirety. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants averred that the Plaintiff's suit is time barred and on that ground alone, the same should be dismissed. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants denied that the 1<sup>st</sup> Defendant did not acquire an interest in the suit property. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants averred that the deceased was adequately compensated for the suit property by the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants denied that they held the titles to the portions of the suit property registered in their names in trust for the estate of the deceased.

7. What is now before me is a Notice of Motion application dated October 17, 2022 brought by the Interested Party, Stanley Otieno Ogutu (hereinafter referred to only as "the Applicant") under Order 21 Rule 8, Order 22 Rule 18, Order 40 Rules 1, 2 and 3 and Order 51 Rule 15 of the Civil Procedure Rules and section 63 of the Civil Procedure Act. In the application, the Applicant has sought the following orders;
  - a. That the court be pleased to grant leave to the Applicant to be joined in the suit as an interested party.
  - b. That pending the hearing and determination of the application, the court be pleased to issue an injunction restraining the Defendants from interfering with the Applicant's portion of the suit property.
  - c. That the court be pleased to order the county surveyor to visit the suit property to determine the exact size of the Applicant's portion thereof so as to protect the interest of the family of Raymond Oguta Dhier (deceased) (hereinafter referred to only as "Oguta") in the property.
  - d. That the costs of the application be provided for.
8. The application was brought on several grounds set out on the face thereof and on the supporting affidavit of the applicant sworn on October 17, 2022. The Applicant averred that he was the grandson and the administrator of the estate of Oguta who died in 1960 and was followed by his wife Benter Osore who died on February 8, 1968. He averred that Oguta owned a portion of the suit property on which his said wife and he were buried. The Applicant averred that he was seeking to join the suit so that he could protect the interest of Oguta. The Applicant averred that he would suffer irreparable loss if he was not joined in the suit and that he had established a *prima facie* case with high chances of success. The Applicant averred that as the grandson of Oguta, he was entitled to claim his properties. The Applicant averred that the Plaintiff failed to inform the court that Oguta owned a portion of the suit property. The Applicant averred that it was necessary for him to be joined in the suit so that he could claim Oguta's share of the suit property.
9. The application was opposed by the Plaintiff and the 3<sup>rd</sup> to 76<sup>th</sup> defendants. The Plaintiff opposed the application through a replying affidavit sworn on February 2, 2023. The Applicant averred that Oguta was his paternal grandfather and that he was buried on the suit property in 1960 before the property was compulsorily acquired in 1976. The Plaintiff averred that at the time of the compulsory acquisition of the suit property in 1976, it was the sons of Oguta who included the Plaintiff's father, Cornel Ondiege Ogola and the Applicant's father, Francis Ogutu Oguta who were in possession of the suit property. The Plaintiff averred that in 1978, the other sons of Oguta who included the Applicant's father, Francis Ogutu Oguta received compensation for the portions of the suit property which they had occupied and in 1979 they all relocated with their families to Simboi in West Kajulu Location where they established new homes.
10. The Plaintiff averred that sometime in 2019 after the court visited the suit property and recorded its observations, he saw the Applicant entering the suit property and putting up a semi-permanent house next to the Plaintiff and the Applicant's grand-parents' graves. The Plaintiff averred that when



he inquired why the Applicant had entered the suit property and put up the said structure, the Applicant told him that he did so with the permission of the 3<sup>rd</sup> Defendant. The Plaintiff averred that the Applicant was not on the suit property when the court visited the same on September 19, 2013. The Plaintiff averred that the Applicant's recent entry into the suit property and subsequent application for letters of administration ad litem in respect of the estate of the Applicant and the Plaintiff's grandfather, Raymond Oguta Dhier (Oguta) were solely meant to facilitate the Applicant's fraudulent attempt to insert himself as a claimant in this suit when he knew that his father was lawfully compensated for his portion of the suit property that was compulsorily acquired and had no claim over the portion of land that belonged to his brother, the Plaintiff's father Cornel Ondiege Ogola (the deceased).

11. The Plaintiff averred that the Applicant had no claim over the Plaintiff's father's estate which was the only legitimate claimant in this suit. The Plaintiff averred that the Applicant's application was an abuse of the process of the court and should be dismissed as it was delaying the hearing of the suit.
12. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants opposed the application through a replying affidavit sworn by Monica Ogada on January 25, 2023. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants averred that the suit property had never been owned by the Applicant or any of his relatives. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants averred that the suit property was compulsorily acquired and those who were in occupation were duly compensated. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants averred that there was no evidence that Oguta owned the suit property or that he had any interest in the same. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants averred that the Applicant's application had been brought late in the day in that the suit was filed in 2008 and the Plaintiff had already closed his case. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants averred that although the Applicant was aware of the existence of this suit, he sat back and took no action for 15 years. The 3<sup>rd</sup> to 76<sup>th</sup> Defendants urged the court to dismiss the application.
13. When the Applicant's application came up for hearing on February 6, 2023, the parties relied on their affidavits in support of and in opposition to the application and left the matter to court for determination.
14. I have considered the Applicant's application together with the affidavit filed in support thereof. I have also considered the replying affidavits filed by the Plaintiff and the 3<sup>rd</sup> to 76<sup>th</sup> Defendants in opposition to the application. The Applicant's application has two limbs. The first limb seeks the joinder of the Applicant to the suit as an interested party while the second limb seeks an order for the County Surveyor to visit the suit property to determine the size of Oguta's portion thereof. I will consider the issue of the joinder first. I have not found the rules of the Civil Procedure cited by the Applicant relevant to his prayer for a joinder. Joinder of parties to a suit either as a plaintiff or as a defendant is provided for under Order 1 rules 1, 3 and 10 of the *Civil Procedure Rules*. There is no express rule providing for the joinder of a party to a suit as an interested party. The court however has an inherent power to join a person to a suit as an interested party for the ends of justice to be met.
15. The *Civil Procedure Rules* have no definition of an interested party. Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, defines an interested party as:

“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”.
16. The court's power to join a party to a suit as an interested party is discretionary and as such must be exercised judiciously. That means that an applicant seeking to be joined in a suit as an interested party



must satisfy the court that he has a stake or an interest in the subject matter of the suit. I am not satisfied that the Applicant has demonstrated that the estate of Oguta had an interest in the suit property in 1976 when the same was compulsorily acquired by the Government. The Applicant has not refuted the Plaintiff's contention that in 1976, the people who were residing on the suit property were the sons of Oguta; Oguta having died 16 years earlier in 1960. These sons included the Applicant's father and the Plaintiff's father. Since Oguta was not in occupation of the suit property in 1976, it was his said sons who were entitled to compensation for the land and any improvements that they had made on the suit property. I find some truth in the Plaintiff's contention that the Applicant's father was compensated for the portion of the suit property that he was occupying and that he moved out of the suit property with his family. That explains why the Applicant chose to lodge a claim on behalf of Oguta who died in 1960 rather than on behalf of his own father who was alive and was in occupation of the suit property in 1976 when it was compulsorily acquired by the Government. The Applicant has not contested the averment by the Plaintiff that his father was compensated, moved out of the suit property and settled elsewhere. In the absence of any evidence that Oguta has any interest in the suit property, I am unable to see what prejudice or injustice his estate will suffer if it is not joined in this suit.

17. I am also in agreement with the 3<sup>rd</sup> to 76<sup>th</sup> Defendants that the application has been brought late in the day. The Applicant has not denied that he has been aware of the existence of this suit all along. The Applicant has not explained why it took him 15 years from the time the suit was instituted to seek leave to be joined in the suit. The order sought is discretionary. The court cannot exercise its discretion in favour of an indolent party. For that reason, also, the application must fail.
18. Having held that the Applicant has failed to establish that the estate of Oguta has an interest in the suit property to warrant the Applicant's joinder to the suit, the Applicant's prayer for the County Surveyor to visit the suit property to determine the size of the portion thereof that belongs to the estate of Oguta has become superfluous. It is not necessary to consider that limb of the application.
19. For the foregoing reasons, I find no merit in the Notice of Motion application dated October 17, 2022. The same is dismissed with costs to the Plaintiff and the 3<sup>rd</sup> to 76<sup>th</sup> Defendants.

**DATED AND DELIVERED AT KISUMU ON THIS 20<sup>TH</sup> DAY OF APRIL 2023**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Okero for the Plaintiff

Mr. P.D. Onyango for the 3<sup>rd</sup> to 76<sup>th</sup> Defendants

The Applicant in person

Mr. Kevin-Court Assistant

