



REPUBLIC OF KENYA



KENYA LAW
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Khavere v Kavuludi & 3 others; Kisia (Intended Interested Party) (Environment and Land Appeal 12 of 2022) [2023] KEELC 16783 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 12 OF 2022**

E ASATI, J

APRIL 13, 2023

BETWEEN

CAROLINE KHAVERE APPELLANT

AND

PETER KHENDI KAVULUDI 1ST RESPONDENT

EMILLY KHAVERE 2ND RESPONDENT

FLORENCE KHAVAI 3RD RESPONDENT

HELLEN KHADI 4TH RESPONDENT

AND

JAMIN MISIGO KISIA INTENDED INTERESTED PARTY

RULING

1. This ruling is in respect of two applications namely; the appellant's application dated December 6, 2022 and the intended Interested Party's application for joinder dated February 7, 2023.

Appellant's application

2. The appellant's application dated December 6, 2022 was brought pursuant to the provisions of section 3A of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules and section 10(3) of the Chief Magistrate's Courts Act and section 29 of the *Environment and Land Court Act*. The application seeks for orders that: -
 - a. The application be certified urgent
 - b. The honourable court be pleased to cite and punish the Respondents for contempt of court order dated November 16, 2022



- c. Costs be in the cause.
3. The applicant's case is that on November 16, 2022, the court issued an order staying the execution of the judgement and resultant decree and orders in Hamisi Pm EL CASE NO 025 OF 2021. That despite the Respondents having received the order through their Advocates, they failed and or neglected to respect the order hence the application. That the Respondents unlawfully demolished the property of the applicant and have issued threats against tenants staying in the applicant's rental premises. That court orders must be obeyed by all and sundry. That the interests of justice dictate that the orders sought be granted as court orders are not issued in vain.
 4. The application was opposed vide the grounds of opposition dated February 6, 2023. The Respondents contend that the application contravenes section 29 of the *Environment and Land Court Act* since there is no existing orders barring the Respondents from the acts they allegedly committed. That the orders issued on November 16, 2022 by the court are merely stay orders and not restraining orders. That the application is not only frivolous but also bad in law and a complete waste of the court's time.
 5. The sole issue presented to the court for determination is whether or not the Respondents are in contempt of court.
 6. Contempt of court in a civil case is the wilful breach or disobedience of a court judgement, decree or order direction or other process of a court or wilful breach of an undertaking given to the court. The Court of Appeal in *Michsel Sistu Mwaura Kamau vs Director of Public prosecutions & 4 others* [2018]eKLR said that it is trite law that to commit a person for contempt of court, the court must be satisfied that he has willingly and deliberately disobeyed a court order that he was aware of." The applicant has to prove that there has been wilful disobedience. In the case of *Johari School Limited vs Rosemary Wambugu t/a Johari School* [2021]eKLR. the ingredients of contempt of court were given as firstly the existence of a court order whose terms are clear, unambiguous and binding on the Respondent, secondly that the Respondent had knowledge or proper notice of the terms of the order, thirdly that the Respondent acted in breach of the terms of the order and fourthly the conduct of the Respondent was deliberate.
 7. On the existence of a court order whose terms were clear and unambiguous and binding upon the Respondents, the applicant submitted that on November 16, 2022 the court issued an order staying execution of the judgement delivered by the trial court in Hamisi Pm El Case No 025 OF 2021 on October 17, 2022. That the terms of the judgement whose execution was stayed were that:
 - a. The honourable court finds and declares that the parcel No Tiriki/Sedende/5 and Tiriki/Sedende/106 were ancestral and that the registration of the 1st Defendant Jamin Misigo Kisia as the proprietor was by trust for the Plaintiffs who were at all material times beneficiaries entitled to then same under the trust.
 - b. Court finds and declares that the subdivision of land parcel known as Tiriki/Senende/106 to create Tiriki/Senende/1110 and Tiriki/Senende/1112 and the subsequent transfer of the resulting parcels to the Defendants to the exclusion of the Plaintiffs was in violation of the existing customary trust and to that extent null and void for all purposes.
 - c. The subdivision of land parcel No Tiriki/Senende/106 and transfers of the resulting parcels to the Defendants having been found unlawful be cancelled and the new titles arising from the said original title be and is hereby revoked and that upon cancellation the new titles, the same revert to the original title in the names of the 1st Defendant.



d. That in the meantime an order of this honourable court be and is hereby directed to the Land Registrar to register a prohibition on the suit parcels Nos Tiriki/Senende/1110, 1111, 1112.

The Respondents submitted that even if the applicant proves that the Respondents demolished her house, still she could not have proved that they are in breach of the orders of the court

8. The court order dated November 16, 2022 was an interim order of stay of execution of the lower court judgement. The wordings of the order were:

“interim order of stay of execution of the judgement dated October 17, 2022 and any resultant orders is hereby granted.”

The court record shows that the order was granted at the initial stage *ex parte* when the application was presented under certificate of urgency pending hearing and determination of the application inter partes. The court order was therefore in existence at the time of the alleged breach and the terms of the order were clear and unambiguous and binding upon the Respondent’s as the beneficiaries of the judgement.

9. The second element is whether the Respondents had knowledge or sufficient notice of the existence of the order. The appellant has deposed in the Supporting Affidavit that the Respondents were served with the order. Annexed to the Supporting Affidavit and marked CK1 was a photostat copy of the order dated November 16, 2022 duly received at the firm of A B L Musiega & Co Advocates. Also, annexed to the supporting Affidavit was an Affidavit of Service sworn by one Habil Juma Wanyama on November 17, 2022 wherein the deponent explains how he served each of the Respondents with the court order on November 7, 2022. Service of the order is not contested by the Respondents. I find that the Respondents had knowledge of the court order dated November 16, 2022.

10. The third ingredient is whether the Respondents acted in breach of the terms of the order. The applicant states in the Supporting Affidavit that after receiving the court order, the Respondents went a head to demolish her property. That they destroyed the perimeter wall completely. That subsequently the Respondents and their workers who were demolishing the wall were arrested. The Respondents did not file any affidavits to controvert the applicant’s allegations of fact. They instead stated in their grounds of opposition that there were no orders barring them from the acts they allegedly committed. To the supporting Affidavit the applicant annexed photographs showing the demolished wall. She also annexed copy of the Police OB of the report she made to the police station of the destruction. On the basis of this evidence, I find that the Respondents either by themselves or through their agents demolished the perimeter wall but the said demolition was not in breach of the court order. The court simply stayed execution of the judgement on an interim basis. The judgement did not order demolition or eviction. The Respondents’ act of demolition of the applicant’s property in the circumstances though deliberate and unlawful was not in breach of the court order of November 16, 2022.

11. I find that contempt of court has not been proved. This does not however preclude the applicant from seeking appropriate remedies for the damage, including compensation in accordance with the valuation report at an appropriate forum.

Application by the intended Interested Party

12. The application by one Jamin Misigo Kisia (intended Interested Party) is dated February 7, 2023. It was brought pursuant to the provisions of article 159 of the *Constitution* of Kenya 2010, sections 1A, 1B, and 3A of the *Civil Procedure Act*, Orders 1 and 51 of the Civil Procedure Rules 2010. The substantive prayer sought is that the applicant be joined to the appeal as an interested party and be accorded an



- opportunity to participate in the appeal. The grounds upon which the application is made are that the applicant was a party in the lower court case from which the appeal arises. That he was the 1st Defendant while the appellant herein was the 2nd Defendant. That any decision made in the appeal will directly affect him since he was the original registered owner of the suit lands and the subject matter of the appeal. That the joinder will accord him the constitutional right to be heard and that the appellant shall not suffer any prejudice by reason of the joinder.
13. The applicant (intended Interested Party) submitted vide the written submissions dated March 6, 2023 that he is the original registered owner of the suit parcels of land and that he was a party in the suit. Relying on the case of *Stov Estate Limited & 5 others vs Agricultural Development Corporation and Another* [2015]eKLR the applicant submitted that an application of this nature must demonstrate that it is necessary that he/she be enjoined in the suit. That the applicant has demonstrated that it is necessary for him to be enjoined in the appeal. That the issues before the court cannot be effectively adjudicated if the applicant is not allowed to participate.
 14. The appellant opposed the application vide the grounds of opposition dated March 3, 2023. It was the appellant's case that the application was untenable in law, was an abuse of the court process and offends the provisions of sections 78 and 79 of the *Civil Procedure Act* Cap 21 Laws of Kenya. That a party to the appeal lodged in the High Court can only be either an appellant or a Respondent and there are no provisions for a party to be enjoined to the appeal as an interested party. That the applicant has not demonstrated whether he wants to be joined as an appellant or Respondent. That the applicant has only one choice, that is, to be an appellant of which he is now time barred by the provisions of section 79G of the *Civil procedure Act* Cap 21 Laws of Kenya. That the applicant was the 1st Defendant in the trial court and after the delivery of the judgement herein, he never preferred to appeal against it and there are no reasons given why he should now wish to ride on the present appeal that was lodged by the 2nd Defendant. That the applicant has not demonstrated his intention and/or interest in the instant appeal. That the applicant lacks *locus standi* to join the appeal and he cannot impose himself as a Respondent in the appeal. That having not demonstrated what value he may add to the appeal; the applicant should be treated as a busy body and be denied the orders sought.
 15. The Respondents in the appeal did not respond to the application.
 16. After the judgement was delivered each of the parties therein had a right of appeal as provided for in section 75 *Civil Procedure Act* and orders 42 and 43 of the *Civil Procedure Rules*. The applicant chose not to appeal. I have noted that the judgement ordered, inter alia , that the titles to the suit land be cancelled and the land reverts to the intended Interested Party. This makes the intended interested party a necessary party in the appeal. The applicant seeks to be enjoined as an Interested Party. Under 1 Rule 10 (2) of the *Civil Procedure Rules* the name of any person whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, can be added at any stage of the proceedings. in *Francis Karioko Muruatetu & another v Republic & 5 others* [2016] eKLR, (Supreme Court Petition No(s.) 15 & 16 of 2015 (Consolidated), held that a party who seeks to be joined in proceedings must demonstrate the personal interest or stake that the party has in the matter , the interest must be clearly identifiable and must be proximate enough. And secondly 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.



17. in *David Kiptugen v Commissioner of Lands, Nairobi & 4 others* [2016] eKLR the Court of Appeal allowing an applicant to be joined as a party in an appeal held

“We agree with Ms Kirui that whatever the outcome of the appeal, if the applicant is not joined in this appeal, he will be deprived of an opportunity to be heard on his claim to the ownership of the suit land. That will of course be unconstitutional and against the rules of natural justice.”

And in *Central Kenya Ltd v Trust Bank Limited & 5 others* (1998) eKLR, it was held that

“... We stress that power of the Court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying.”

Guided by the above cited authorities and law I find that the application for joinder has merit. I am satisfied that the applicant has demonstrated the grounds for joinder.

18. In conclusion, I make the following orders

- i. application dated December 6, 2022 is disallowed
- ii. The application dated February 7, 2023 is allowed. The applicant’s name to be added to the appeal as an interested party.
- iii. Each party to bear own costs.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 13TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E ASATI,

JUDGE.

In the presence of:

Neville- Court Assistant.

Alumasa-for the Appellant/Applicant

No appearance for the Respondents

Nalanda for the intended Interested Party/Applicant

