



**Ng'ang'a v Wamiti & another (Environment & Land Case
11 of 2020) [2023] KEELC 19177 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 11 OF 2020**

LN GACHERU, J

JULY 27, 2023

BETWEEN

JACINTA NJERI NG'ANG'A PLAINTIFF

AND

MIRIAM MUGURE WAMITI RESPONDENT

AND

SAMUEL NG'ANG'A PROPOSED APPLICANT

RULING

1. The Proposed Applicant Samuel Ng'ang'a filed a Chamber Summons Application* dated 7th February 2023, and sought for these Orders; -
 1. That this honourable Court be pleased to grant leave to the proposed Applicant herein Samuel Ng'ang'a to be joined in this originating summons as the 2nd Respondent;
 2. That this honourable Court be pleased to order that the draft Replying Affidavit annexed hereto be deemed as duly filed upon repayment of the requisite fees;
 3. That in furtherance to prayer 5 above, this honourable Court be pleased to reopen the Plaintiff's and Defendant's case to enable the proposed Applicant to cross-examine the Plaintiff and Defendant and also adduce evidence on his own behalf;
 4. That costs of this application be in the cause.
2. The said application is supported by various grounds and on the Supporting Affidavit of Samuel Ng'ang'a, the proposed Applicant dated 7th February 2023. The deponent averred that the Plaintiff/ Respondent while filing the Originating Summons dated 20th March 2020, failed to enjoin the proposed Applicant as a Respondent to the suit to safeguard the interests of the family of Jonathan



Kang'ang'a (deceased). The deponent further averred that Henry Wamiti Ng'ang'a (deceased), Samuel Ng'ang'a Warimwe (deceased) and Jonathan Kang'ang'a (deceased) were sibling and sons of Joseph Warimwe (deceased) and that that L.R. No. Loc.2/Gacharage/670 (the suit property), was registered in the name of Henry Wamiti (deceased), to hold it in trust for himself, Samuel Ng'ang'a (deceased) and Jonathan Kang'ang'a (deceased).

3. The deponent further averred that Milimani Succession Cause No. 1708 of 2005;- Estate of Henry Wamiti Ng'ang'a (deceased), has proceeded and was in the Confirmation of Grant stage, and the Petitioner therein Miriam Mugure Wamiti, who is the Respondent in the present case, proposed a means of distribution of the suit property among the 3 families of the sons of Joseph Warimwe (deceased). The Applicant further averred that in order to adjudicate over the suit property, the proposed 2nd Respondent was a necessary party to the suit to enable this Court to reach a just and conclusive determination.
4. Further, the proposed Respondent averred that he intends to file his response to the Originating Summons in opposition to the claim for adverse possession, a draft of which was attached. The Respondent/Applicant further stated that he had demonstrated an interest in the suit property, and therefore merit to be joined in this suit on behalf of the family of Jonathan Kang'ang'a (deceased).
5. The Plaintiff/Respondent opposed the application through the Replying Affidavit of Jacinta Njeri Ng'ang'a dated 23rd May 2023, which she averred that the present application was intended to frustrate her. She further averred that the Succession matter was filed way back in 2020, and was in the judgement stage nearing conclusion. Further that the proposed Applicant/Respondent delayed in making the present application since he had been present in Court during the proceedings and on occasion was pointed out as a possible witness in the suit, which failed to materialize. The Plaintiff/Respondent therefore averred that the application lacked merit and was an abuse of the Court process on the grounds that parties had given evidence and closed their respective cases and that the application was misconceived.
6. The Plaintiff/Respondent further averred that the present suit hinged on adverse possession/prescriptive rights and trust, which reliefs are personal claims intimate to the Plaintiff and Respondent herein.
7. Lastly, the Plaintiff/Respondent averred that this Court lacks jurisdiction to deal with matters of sub-division and the entitlement in the estate of a deceased person as sought to be introduced by the proposed Applicant.
8. The Proposed Applicant filed a Further Affidavit dated 8th June 2023, in which he denied the allegations made by the Plaintiff/Respondent in her Replying Affidavit dated 23rd May 2023.
9. Finally, an Affidavit in support sworn on 15th March 2023 by the Respondent Miriam Mugure Wamati, acknowledged that the proposed Applicant as a beneficiary of the Estate of Jonathan Kang'ang'a (deceased), by virtue of being his son. The deponent further averred that it was in the interest of justice that the proposed Applicant be joined in the suit to ventilate the interest of the family of Jonathan Kang'ang'a (deceased).
10. The Application was canvassed by way of written submissions. The proposed Applicant/Respondent through the Law Firm of Chege Kibathi & Co. Advocates LLP, filed their submissions in support of the application on 12th June 2023. The Applicant raised 3 issues for consideration.
11. On the issue of whether the proposed Applicant should be granted leave to be joined and be heard, he submitted that the Court has discretion to join any party to a suit at any stage of the suit, provided that



their presence is necessary to effectively determine a case with finality. The Applicant relied on Order 1 Rule 10 of the *Civil Procedure Rules* which states as follows:

- “(1) 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.
- (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.
- (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

12. To support their claim, the Applicant relied on the case of *Lucy Nungari Ngigi & Other v. National Bank of Kenya Ltd & Another & Charles Wambugu & 127 Others* HCCC No. 517 of 2014, where the Court held as follows:

“In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the *Civil Procedure Rule*. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But joinder of parties may be refused where such joinder: will lead into practical problems of the existing cause of action together with the one of the handling the existing Cause of action with the one of the party being enjoined is unnecessary, or will just occasion delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.”

13. The proposed Applicant further submitted that he had met the threshold for joinder to a suit having demonstrated his interest over the suit property.
14. On the issue whether the Court should grant leave to the proposed Applicant to adduce evidence and cross-examine, the Plaintiff/Respondent and the Respondent herein, the proposed Applicant



submitted that having met the threshold to be joined in the suit, the principles of natural justice required that he ought to be accorded the right to listen and to be heard. The proposed Applicant relied on the case of ELC Civil Suit No. 64 of 2007;- *William Ole Nabala v. Attorney General, Sammy Njuguna & 4 Others*, where the Court held as follows:

“The filing of the Application by the Applicant to be joined in the suit after the abatement of the suit, and the Application having been allowed could only have meant that the Applicant did not wish the suit to abate against her dead husband and by implied consent had the suit revived.”

15. On the final issue of whether the Originating Summons application dated 20th March 2020, can be deemed concluded, the Applicant submitted that the particular suit or Originating Summons is yet to be determined. The Applicant relied on Order 1 Rule 14 of the *Civil Procedure Rules* which states as follows:

“Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner.”

16. The Plaintiff/Respondent through the Law Firm of Kirubi, Mwangi Ben & Co. Advocates filed their written submissions dated 19th June 2023, opposing the application. It was submitted that the present application sought a myriad of orders including seeking to be heard, and substantive orders of stay and re-opening of the suit even before the proposed applicant is properly joined.

17. The Plaintiff/Respondent submitted that the parties present in the suit had obtained the requisite grants of representation in order to sue on behalf of the estate of their deceased husbands. She further submitted that the proposed Applicant did not have the legal capacity to represent the Estate of Jonathan Kang’ang’a (deceased).

18. The Plaintiff/Respondent relied on the case of *Gladys Nduku Nthuki v. Letsbego Kenya Ltd, Mueni Charles Maingi* (2022) eKLR, where the Court held as follows:

“Parties cannot be added so as to introduce quite new causes of action or to alter the nature (and character) of the suit. Necessary parties who ought to have been enjoined are parties who are necessary to the *Constitution* of the suit without whom no decree at all can be passed.”

19. The Plaintiff/Respondent placed further reliance on the case of *Florence Nafula Ayodi & Others v. John Tabalya Mukite & Another* (2021) eKLR, where the Court held as follows:

“Without going to the merits or otherwise of the prayer, this court needs first to determine whether or not the prayer is competently before it. This is because once the competency of a party to move the Court is established it gives the basis for the court to exercise the jurisdiction that both the *Constitution* and statute give it. It is upon that that the merits will be the next issue to go into. The prayer was made at the same time the proposed interested parties sought to be given leave to be enjoined in the suit. That is un-procedural. No legal cure, including Articles 40, 48 and 50 of the *Constitution* that the Applicants called to their aid, and 159 (2) (d) which parties often resort to when they gasp for breath in the weakness of their cases and arguments, or Sections 1A, 1B, 3A and 100 of the *Civil Procedure Act* can be of any avail. Praying for anything more than seeking leave to be enjoined is putting the



cart before the horse. Before leave is granted to a party to be enjoined, one has no more to say or pray to a court than that “I need leave”.”

20. To conclude, the Plaintiff/Respondent submitted that the application failed for the aforesaid reasons and the same ought to be dismissed so that the Court may render judgement held in abeyance as a result of the misconceived application.

21. The Respondent through the Law Firm of Osoro Mogikoyo & Co. Advocates, similarly filed written submissions dated 16th June 2023. It was submitted that the provisions governing enjoyment as a party to proceedings are provided under Order 1 Rule 10(2) of the Civil Procedure Rules which states as follows:

“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.”

22. The Respondent further submitted that it is only fair that the proposed Applicant be enjoined in this suit as he has demonstrated to the Court that he stands to be affected by the decision of the Court, as well as the interests of the family of Jonathan Kang’ang’a. The Respondent relied on the case of Francis Kariuki Muruatetu & Another v. R & 5 Others (2016) eKLR where the Court held as follows:

“The personal interest or stake that the party has in the matter must 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.

The prejudice to be suffered by the intended interested 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.

Lastly, a party must, in its application, set out the case and/or submissions 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.”

23. Lastly, the Respondent submitted that the Court has discretion to enjoin any applicant and once enjoined it is only reasonable to afford them a chance to submit their evidence. The Respondent relied on the case of Gladys Nduku Nthuki v. Letshego Kenya Ltd; Mueni Charles Maingi (Intended Plaintiff) (2022) eKLR as quoted in the case of Civicon Ltd v. Kivuwatt Ltd & 2 Others (2015) eKLR to buttress their claim. It states as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.. from the foregoing”from the foregoing, it may be concluded that being a discretionary order, the Court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10(2) bearing



in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

The Respondent prayed that the application be allowed.

24. Having read and considered the pleadings by the proposed Applicant, the Plaintiff/Respondent and Respondent, the submissions, authorities cited and the relevant provisions of law, this Court finds that the main issue for determination is:

Whether the orders sought for leave to enjoin the suit are merited?

25. The proposed Applicant herein seeks for leave to be joined in the present suit relating to an adverse possession claim between the Plaintiff/Respondent and Respondent herein over to the suit property. The proposed Applicant averred that land parcel no. Loc.2 Gacharage/670, (the suit property) was registered in the name of Henry Wamiti (deceased) to hold in trust for himself and his brothers Samuel Ng’ang’a Warimwe (deceased) and Jonathan Kang’ang’a (deceased). The Applicant further averred that he was the representative of the family of Jonathan Kang’ang’a (deceased) seeking to safeguard their interest in this suit by responding to the claim.
26. It is not in dispute that the suit property was registered in the name of Henry Wamiti Ng’ang’a (deceased) to hold in trust for himself and his two siblings. However, following the demise of Henry, Jonathan and Joseph, the issue or dispute relating to the ownership of the suit property changed to a succession cause in Milimani Succession Cause No. 1708 of 2005 – Matter of the Estate of Henry Wamiti Ng’ang’a (deceased). The said succession cause is on the Confirmation of Grant stage. However, that was put on hold pending the determination of this suit to determine whether the suit property forms part of the Estate of Henry Wamiti Ng’ang’a or whether the Plaintiff/Respondent has acquired ownership by way of adverse possession.
27. The Court has perused the file and found that the Plaintiff/Respondent was issued with letter of administration intestate on 7th October 1991, to represent the estate of her late husband Joseph Warimwe Ng’ang’a. Having been appointed the legal representative, the Plaintiff/Respondent herein could pursue the legal claim on behalf of her husband against the Estate of Henry Wamiti (deceased), who held the suit property in trust for himself and his siblings. Similarly, the widow to Henry Wamiti (deceased) was issued with letters of administration intestate on 16th August 2005.
28. These matter of representation in this case boils down to whether the proposed Applicant has the *locus standi* to sue and be sued on behalf of the Estate of Jonathan Kang’ang’a (deceased).
29. It is not in dispute that the suit property is subject to various suits wherein Henry Wamiti (deceased), is the registered owner and is represented by a duly appointed legal representative of the said estate of Henry Wamiti. It was claimed that Henry Wamiti (deceased), was holding the suit property in trust for Jonathan Kang’ang’a (deceased) and Ng’ang’a Warimwe (deceased). Despite the proposed Applicant herein claiming to represent the interest of the family of Jonathan Kang’ang’a (deceased), which is one of the grounds for this application, the proposed Applicant has failed to provide letters of representation to enable him represent the Estate of Jonathan Kang’ang’a (deceased).



30. Section 82(a) the Law of Succession Act provides as follows in relation to personal representatives:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.”

31. In Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term *locus standi* by stating:

“.....to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to.”

32. The Court of Appeal has reiterated the position on the issue of *locus standi* in case of Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730 where it was held that:

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone”

33. The issue on *locus standi* is a preliminary point of law almost similar to that of jurisdiction and since the proposed Applicant was not an administrator to the Estate of Jonathan Kang’ang’a (deceased), he lacked the capacity to sue on behalf of the deceased’s estate which renders the application incompetent.

34. Considering the above, this Court finds and holds that the proposed Applicant failed to approach the Court properly in a matter where he was representing the interests of a deceased party. The issue of *locus standi* being a primary point of law goes to the root of any suit. Its subsequent absence therefore renders the Application fatally defective.

35. Having found that the proposed Applicant lacks *locus standi*, the Court finds and holds that the Notice of Motion Application dated February 7, 2023, cannot stand and for the above reasons, the said Application is dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 27TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr Kirubi H/B for Mwangi Ben for the Plaintiff/Respondent

M/s Osoro for the Respondent

M/s Nyawira H/B for Juma for the Proposed Respondent/Applicant

Joel Njonjo – Court Assistant

