



**Kheri & 4 others v Land Registrar Kwale; Hathaway Limited (Interested Party) (Miscellaneous Civil Application E005 of 2022) [2023] KEELC 20035 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20035 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
MISCELLANEOUS CIVIL APPLICATION E005 OF 2022  
AE DENA, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**JUMA RAMA KHERI ..... 1<sup>ST</sup> APPLICANT  
JUMAA SELEMAN MWAKUHEZA ..... 2<sup>ND</sup> APPLICANT  
OMARI RASHID NYERE ..... 3<sup>RD</sup> APPLICANT  
JUMA OMAR NYERE ..... 4<sup>TH</sup> APPLICANT  
JUMA ALI CHIGUNIA ..... 5<sup>TH</sup> APPLICANT**

**AND**

**LAND REGISTRAR KWALE ..... RESPONDENT**

**AND**

**HATHAWAY LIMITED ..... INTERESTED PARTY**

**RULING**

1. The application the subject of this ruling is dated 12/4/2022. The applicants seek the following verbatim orders; -
  1. Spent
  2. That this court be pleased to order the Land Registrar Kwale to issue certificates of title in respect to parcels of land known as Kwale/Galu Kinondo 41, 42, 43, 44 and 45 and the titles of the same to vest in the names of the applicant Juma Rama Kheri and Jumaa Seleman Mwakuhenza, Omar Rashid Chanzu, Mohamed Rashid Nyere, Juma Omar Nyere and Salim Omari nyere and Juma Ali Chigunea and
  3. That the Land Registrar to register the titles as follows; -



- a. Kwale/Galu Kinondo 41 – Juma Rama Kheri and Jumaa Seleman Mwakuhenza.
  - b. Kwale/Galu Kinondo 42 – Omar Rashid Chirizu
  - c. Kwale/Galu Kinondo 43 – Mohamed Rashid Nyere
  - d. Kwale/Galu Kinondo 44 – Juma Omari Nyere and Salim Omari Nyere
  - e. Kwale/Galu Kinondo 45 – Juma Ali Chigunia
4. That the costs be provided for
2. The application is supported by the Affidavit sworn on 12/4/2022 by Juma Rama Kheri. The basis of the application is that the applicants are the legal and beneficiary owners of the foregoing properties which I will refer to as the suit properties. It is averred they were sued as 1-5<sup>th</sup> defendants in Kwale HCC 33 of 2021 (Formerly Civil Case No. 48 of 2012 Msa) which was concluded by way of dismissal for want of prosecution. It is deponed that following extraction of the decree which they annexed and presented to the Land Registrar Kwale to effect the titles, the registrar declined and required that the decree should specifically be endorsed with the names of the applicants. Consequently, they filed the present application for an order directing the registrar to issue them with titles to the suit properties. Further annexed to the application are the applications for Registration and the forwarding letter to the Land Registrar Kwale.
  3. The State Counsel on behalf of the Land Registrar filed grounds of opposition dated 10/5/2022 in response to the application. It was their view that the parcels are registered in favour of Hathaway Ltd and the orders sought could not be issued without their participation. The applicants were also guilty of material non- disclosure in this regard and were not entitled to the orders sought.
  4. In further reply filed on 20/5/2022 the applicants deponed that they held titles to the properties but the registrar reflected Hathaway Limited which is erroneous. That Hathaway had sued for rectification of the titles held by the applicants but failed to prosecute the case leading to the dismissal.
  5. It is noteworthy that before the present application was determined, the said Hathaway Ltd filed an application dated 23/9/2022 seeking to arrest the ruling on the applicants’ application herein which had been reserved by this court for 10/10/2022. Hathaway sought to be joined as Interested Party to the present proceedings. On 13/2/2022 I rendered a ruling on the application dated 23/9/2022 allowing the joinder.
  6. Following joinder, the Interested Party responded to the application dated 12/4/2022 through the Replying Affidavit of Hooman Ehsani its Director. It is averred that the Interested Party being the registered absolute proprietor to the said properties their titles are indefeasible by dint of section 24 of the [Land Registration Act](#) 2012. That further under section 26 of the said Act, their title can only be defeated on the grounds of fraud, misrepresentation, which according to them the applicants had not demonstrated to the court Party to warrant the orders being sought. The holding in [Teresia Wanjiku Koigi vs Lincoln Wariua Ngungu and 16 others \(2022\)](#) eKLR that a title document is prima facie evidence of ownership unless challenged on the said grounds was cited to buttress this position. Further that the searches produced confirm the Interested Party as the proprietor. Also attached was evidence of land rates remittance by the Interested Party on the suit properties.
  7. The Interested Party averred that the dismissal of the suit ELC NO. 33 of 2021 herein did not confer any proprietary interest of the properties to the applicants or any entitlement. Further that suit involved Kwale/Galu Kinondo/41, 42 and 45 yet in the present application the applicants were also claiming Kwale/Galu Kinondo/43 and 44 which didn’t form part of the contested parcels. That the orders



- sought by the applicant cannot issue as long as the Interested Party's titles have not been impeached by a court of competent jurisdiction.
8. Together with foregoing affidavit the Interested Party filed a Notice of Preliminary Objection dated 27/2/2023 arguing this court lacks jurisdiction to determine property rights hereto in light of the application herein since a Notice of Motion cannot originate a suit. Thus no proper proceedings were before court. On 14/3/2023 I directed that the application and the preliminary objection be canvassed simultaneously. Parties were then to file and exchange witness submissions.
  9. The applicants filed submissions dated 15/5/2023 in respect of the preliminary objection. Citing section 1A, 1B of the [Civil Procedure Act](#) it is urged that it is the duty of the court, litigants and advocates to ensure matters are concluded expeditiously without inexcusable delay. Further that the court had wide discretion to enforce its decree dated 2/12/2021 under section 3A of the said Act.
  10. It is argued that the applicants were not commencing a suit but were seeking to enforce the orders. That the same could not be filed under the dismissed suit because there is no judgment to be enforced. Citing *Joseph Kibowen Cheruyot vs William C. Kiseru (2013)* eKLR it was confirmed that since there is no 'action' being enforced or being tried. The court was not being asked to determine any rights of the parties. That since the Civil Procedure Rules do not specifically provide for the procedures to be followed in such instances it is permissible to file a miscellaneous application. It is stated that in any event order 51 Rule 1 provides for a Notice of Motion.
  11. On their application, the applicant identified three (3) issues for determination. On whether the decree herein is valid, it is argued that the court pronounced its orders on 2/12/2021. That the decree was never challenged by the respondents and Interested Party. It is stated the decree complied with the provisions of order 21 Rule 7 of the [Civil Procedure Rules](#). As to whether the Interested Party stayed the order, it is submitted that since the Interested Party did not take any step to oppose or stay the orders, the order should stand. That parties cannot be freely left to decide what court orders to obey and which ones to ignore. Reference is made to [Trusted Society of Human Rights Alliance vs Cabinet Secretary for Devolution and Planning and 33 others \(2017\)](#) eKLR. It is argued that it is incumbent that the respondent obey the orders and register the applicants.
  12. It is also submitted that that since the Interested Party has not appealed against the orders the same should be complied with. Further that the basis for dismissal of a suit for want of prosecution is article 159 (2) (b) of [the constitution](#) that justice shall not be delayed. It is urged that once orders are issued they must be enforced which the respondent was tasked to do. The court is urged to find merit in the application.
  13. The respondent filed submissions dated 15/3/2023. It is submitted that the decree sought to be registered did not order for registration of the applicants as owners of the suit properties. That the same simply dismissed the plaintiff's suit against the applicants. That the Land Registrar was right in declining to issue certificates on the basis of the decree issued in Kwale ELC NO. 3 of 2021. The court is urged to dismiss the application with costs.
  14. The interested party filed written submission dated 29/3/2023. On the preliminary objection dated 28/2/2023 it is submitted that the ELC is bound by the procedure laid down by the [Civil Procedure Act](#). That order 3 Rule 1 of the [Civil Procedure Rules](#) requires that every suit is instituted by presenting a plaint or in such other matter as may be prescribed. That the applicant seeks to adjudicate over their claimed interests in land and for opting to institute the present proceedings by a miscellaneous civil application was contrary to statute since the said procedure is unknown. Reference is made to [Peter Kwema Kachoro vs Benson Maina Gitbembuki \(2005\)](#) eKLR.



15. With regard to the application, the Interested Party reiterated the depositions in the replying affidavit of Hooman Ehsani and submitted that the rights to acquire and own property is guaranteed under article 40 of the Constitution. That the property cannot be arbitrarily deprived. It is submitted that based on Section 24 of the Land Registration Act, only the Interested Party can be the absolute owners of the suit properties and the applicants cannot claim to be the “Legal and Beneficial owners of the properties. That indefeasibly of title is a hallmark of any land registration system as held by the court of Appeal in Charles Karathe Kiarie and 2 others vs Administrators of the Estate of John Wakale Muthere (deceased) and 5 others (2013) eKLR. Further that on account of the improper institution of the present proceedings no findings can be made on fraud or misrepresentation.
16. It is contended that in the absence of a counterclaim in the said suit determined in the favour of the respondents, the present claim cannot stand. To buttress this point, the case of Winfred Juma Wasike and 11 others vs Ministry of Interior and coordination and Another (2022) eKLR is cited. The court is invited to dismiss the Notice of Motion with costs.

### **Determination**

17. I have considered the application, the preliminary objection, the responses in opposition thereto and the submissions filed by the parties. The issue that commend determination is whether the preliminary objection is merited and whether the applicant is entitled to the orders sought.
18. A preliminary objection has been raised by the Interested Party urging that the application should be struck out for being filed under proceedings that do not to comply with the provisions of Section 19 of the Civil Procedure Act read together with Section 2 of the said Act as to commencement of a suit by way of Plaintiff. According to the Interested Party the applicant seeks to adjudicate over their claimed ‘interests in land’ which is denied by the applicant who states that they are merely seeking to enforce a decree of the court by the Land registrar.
19. I have read and understood the gist of the application herein. It is trite that the matter could not be filed under the previous proceedings since the court is functus officio and in any event the suit stands dismissed. The applicant states in his grounds in support of the application that the suit having been concluded, it is only fair that the suit properties be registered in the names of the owners. At paragraph 5 of the Supporting Affidavit the applicant depones that they require the registrar to issue them with the title deeds in order to claim their rightful properties. This is supported by the orders sought and the provisions under which the application is brought. The orders being sought at paragraphs 2 and 3 of the Notice of Motion and which have already been referred to elsewhere in this ruling clearly are of a substantive nature.
20. The substantive law provisions which are the basis of this application is Section 50 of the Land Act No. 6/2012 and Section 13 of the Environment and Land Court Act. The said Section 50 provides for transmission on death of a sole proprietor or proprietor in common. It is not clear how the above provisions relate to the present application and since the same has not been explained in the grounds and supporting affidavit thereto I will not speculate. Section 13 (1) of the Environment and Land Court Act is on the jurisdiction of the Environment and Land Court and the orders or reliefs this court can grant in exercise of its jurisdiction as it may deem fit and just.
21. For the court to exercise its jurisdiction under the above section it must be moved and or invited to do so under proceedings commenced before it. The Civil Procedure Act is an Act of Parliament to make provision for procedure in civil suits. A suit is defined under section 2 of the said Act to mean all civil proceedings commenced in any manner prescribed.



22. Section 19 of the *Civil Procedure Act* is on institution of suits and provides that ‘Every suit shall be instituted in such manner as may be prescribed by rules.’ The Rules applicable are the Civil Procedure Rules 2010. Order 3 rule 1 further elaborates that ‘Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed. I’m aware that the other manner prescribed under the rules is by way of Originating Summons (see Order 37) and Applications for Judicial Review. There is a new emerging trend of Originating Motion which I will not delve into for now. I have already stated the nature of the reliefs being sought which I note are substantive and I do not see them as fitting to be litigated upon under a miscellaneous application.
23. Sections 3A of the *Civil Procedure Act* as well as articles 40 and 48 of *the Constitution* have been invoked. Section 3A is on saving the inherent powers of this court to make any orders as may be necessary for the ends of justice to be met. Article 40 is on the right to acquire and own property and protection from arbitrary deprivation of the same. Article 48 is on access to justice for all persons. The applicant has approached this court based on the inherent powers of the court which is supported in the applicants closing submission on the preliminary objection herein. I’m not persuaded that section 3A is available to this court to make substantive orders as envisaged by the applicants under these proceedings.
24. Assuming this court were wrong on the above conclusion, I will proceed to determine whether the plaintiff is entitled to the orders sought. The genesis of this application is the decree issued on 8/12/21 pursuant to the orders of the court sitting on 2/12/2021. The court issued orders that the suit is dismissed under the provisions of Order 12 Rule 3 of the *Civil Procedure Rules*. Armed with the decree as deponed vide a letter dated 3/2/22 addressed to the Land Registrar Kwale, a copy of which is produced, counsel for the applicants pursuant to the decree requested that the register for the suit properties be amended or rectified as were earlier registered. The letter outlines how the properties were registered for ease of reference and also encloses copies of the attendant green cards. I have also seen the attendant Applications for registration of the court order/decreed and which bear a received stamp by the District Land Registrar Kwale. The applications bear the following remarks endorsed thereon ‘Plaintiff & Defendants to be named to register’. It is further clarified in the applicants submissions that the Registrar refused to comply citing that no specific order was given in the decree decreeing the property to the applicants....’
25. Following the above endorsement, the applicant depones at paragraph 5 of the Supporting Affidavit sworn on 12/4/22 that they require an order directing the registrar herein to issue them with their title deeds in order to claim their rightful properties.
26. The decree is attached to the supporting affidavit. My reading of the decree shows that it sets out verbatim the 10 prayers sought by the Plaintiff (the Interested Party herein) in ELC Case No. 33 of 2021 (formerly Msa. ELCC 48 of 2012). The applicants were the defendants in the said suit. If further sets out the dates when the suit was set down for hearing on which dates the Plaintiff was absent. The decree then reads verbatim as hereunder; -

It Is Hereby Decreed:

- a. That the suit shall stand Dismissed under the provisions of Order 12 Rule 3 of the Civil Procedure Rules with costs to the Defendants who have participated in this suit.

Given under my hand and the Seal.....

27. Let me state from the outset that the decree as extracted and presented does not decree that the Land Register should be amended as requested in the letter dated 3/2/22 addressed to the Land Registrar Kwale. I agree with the registrar as explained by Counsel above. I also agree with the respondent herein who states in its submissions that the decree the applicant sought to register did not cancel the plaintiff



Interested Party title to the suit property neither did it order for the registration of the applicants as owners of the suit properties and direct the Land Registrar to issue the applicants with titles. This is self-explanatory and I need not say more. In this regard I do not find any wrongdoing on the part of the Land Registrar.

28. To set the record straight it is important to address the import of the order for dismissal of the plaintiffs claim in ELC Case No. 33 of 2021. From the order the suit was dismissed under the provisions of Order 12 Rule 3 and which provide as follows; -
1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed, except for good cause to be recorded by the court.
  2. If the defendant admits any part of the claim, the court, shall give judgement against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.
  3. If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.
29. As far as I'm aware having dealt with the proceedings in ELC Case No. 33 of 2021 there was no admission on the part of the defendants. The Applicants defendants did not file a counterclaim in the said proceedings either. Even assuming there was a counterclaim based on the above provisions the same would have to go through the motions of a hearing (formal proof) if it was not a liquidated claim. For a claim such as is envisaged in the present application the counter claimer would have to prove their case to the required standard of proof in a hearing.
30. There is therefore no room under the above provisions for the court to enter judgement for the applicant as envisaged under the present application.
31. I have noted the arguments advanced by the Interested Party touching on the indefeasibility of the titles held by Hathaway Limited pursuant to the provisions of sections 24 and 26 of the Land Registration Act 2012. While the interested party had to raise a response to the plaintiff's application for me I do not think the present application is the right forum to address the claims of ownership of the suit properties herein. The opportunity to do so on merit lay in ELC Case No. 33 of 2021 which stands dismissed and I need not say much on this. Let the parties weigh the options available to them in law and proceed appropriately.
32. The upshot of the foregoing is that the preliminary objection is merited. The court also finds no merit in the application dated 12<sup>th</sup> April 2022 and it is hereby dismissed. I make no orders as to costs.

**DELIVERED AND DATED AT KWALE THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023**

**A.E. DENA**

**JUDGE**

**Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:**

Ms Njuguna holding brief for Mr. Matheka for the Applicant

Mr. Matheka for the Applicant

Mr. Mungai for the Interested Party

No Appearance for the Respondent.



Mr. Daniel Disii- Court Assistant.

