Kiarie & another v Matiba (Being sued as the executrix to the Estate of Hellen Wamere Dadet); Dadet (Proposed Interested Party) (Environment & Land Case E155 of 2023) [2023] KEELC 21074 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21074 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E155 OF 2023

JO MBOYA, J

OCTOBER 23, 2023

BETWEEN

DAVID MWANGI KIARIE .... 1ST PLAINTIFF

LORNA WANJIRU MWANGI .... 2ND PLAINTIFF

AND

EDITH MATIBA (BEING SUED AS THE EXECUTRIX TO THE ESTATE OF HELLEN WAMERE DADET) .... DEFENDANT

AND

EUGINIE MUTHONI DADET .... PROPOSED INTERESTED PARTY

RULING

Introduction and Background

1. The instant suit was filed by and on behalf of the Plaintiffs/Respondents', who contended to have entered into and executed a lawful Sale Agreement with the Defendant/Respondent pertaining to and in respect of L.R No. 1160/724 (also known as Nairobi/Block 148/1234); situate within Karen Area, in the City of Nairobi.

2. Furthermore, the Plaintiffs'/Respondents' contended that despite being willing to perform the terms of the Sale Agreement, the Defendant/Respondent herein threatened to breach and/.or violate the terms of the contract; and thus same filed the instant suit as a precursor to having the dispute referred to arbitration, in pursuance of the Provisions of Clause 11 of the Sale Agreement.

3. Contemporaneously with the filing of the suit, the Plaintiffs'/Respondents' also took out and filed an Application dated the 5th May 2023; whose import and tenor was to procure and obtain interim

protection pending reference to arbitration between the Parties. For good measure, the Application by the Plaintiffs was heard and disposed of vide Ruling rendered on the 14th June 2023.

4. Despite the foregoing, the proposed Interested Party/Applicant herein contends that same is one of the lawful beneficiaries of the Estate of Hellen Wamere Dadet, now deceased; and that by virtue of being one of the beneficiaries, same has a stake and/or interest over and in respect of the suit beforehand.

5. Consequently and in the premises, the proposed Interested Party Applicant has filed the Application dated the 18th September 2023; and in respect of which same has sought for the following reliefs;

   i. ....Spent.

   ii. The Applicant be joined in the matter as an Interested Party and to participate in the proceedings on behalf of the beneficiaries.

   iii. This court be pleased to lift, discharge and/or set aside the Injunction imposed upon parcel of Land known as L.R No. 1160/724 in Karen; along Kwarara.

   iv. The Application dated the 5th May 2023; be dismissed for lack of merit.

   v. Costs of the Application be provided for.

6. The instant Application is premised and anchored on the various Grounds which have been enumerated in the body thereof. Furthermore, the Application is further supported by the affidavit of the proposed Interested Applicant; sworn on the 18th September 2023; and a Further affidavit sworn on the 11th October 2023.

7. Upon being served with the Application under reference, the Plaintiff/Respondents filed a Replying affidavit sworn by one, Muturi Kamande, Advocate, on the 17th October 2023; and wherein, the Deponent has contended, inter-alia, that the Applicant herein was neither privy nor party to the sale agreement and hence same has no capacity to seek joinder in respect of the instant matter.

8. Moreover, the instant Application came up for hearing on the 23rd October 2023; when same was heard and canvassed vide oral submissions ventilated on behalf of the respective Parties. However, it is appropriate to state that Learned counsel for the Plaintiffs/Respondents was absent during the hearing.

Parties' Submissions:

a.Applicant's Submissions:

9. The Applicant herein adopted the grounds at the foot of the Application and also reiterated the contents of the supporting affidavit, as well as the Further affidavit, respectively. Furthermore, Learned counsel for the Applicant thereafter highlighted and canvassed three salient issues for consideration by the Honourable court.

10. Firstly, Learned counsel for the Applicant submitted that the Applicant herein is one of the beneficiaries of the Estate of Hellen Wamwere Dadet, Deceased, whose Estate owns the suit property, which is the subject of the court proceedings.

11. Further and in addition, Learned counsel for the Applicant has submitted that by virtue of being one of the beneficiaries of the Estate of the deceased, the Applicant herein is thus seized of the requisite capacity/ Locus standi to be joined in the proceedings, with a view to protecting of the interests of the rest of the beneficiaries of the Estate of the deceased.

12. Furthermore, Learned counsel for the Applicant has submitted that even though the Estate of the deceased has a duly appointed Executrix, namely, the Defendant/Respondent, the Applicant herein has the capacity to be joined. In this regard, Learned counsel invited the court to take cognizance of the provisions of order 31 rule 1 of the *Civil Procedure Rules*.

13. Additionally, Learned counsel for the Applicant has also cited and relied on the holding in the case of T*oyo Moyo Co Ltd versus Abdul Kassam* (2016)eKLR, in which counsel contended that the import and tenor of the Provisions of Order 31 Rule 1 of the Civil Procedure Rules; was elaborated upon.

14. Secondly, Learned counsel for the Applicant has submitted that the Applicant herein has a stake and/or interests in the suit property and thus same is bound to be effected by the current proceedings as well as the orders, if any, granted by the court.

15. On the other hand, Learned counsel for the Applicant has contended that to the extent that the proceedings herein touched on and concerned the suit property, which belonged to the Estate of the deceased, the proposed joinder shall therefore enable the Honourable court to effectively and effectually deal with the issues in controversy.

16. To vindicate the submissions that the Applicant herein has satisfied the threshold to be joined as an Interested Party, Learned counsel has cited and relied on the case of *Parmet Ole Kiseet vs Silvia Moi & 3 Others; Ndegwa Kabogo* (2021)eKLR.

17. Thirdly, Learned counsel for the Applicant has submitted that despite the fact that the dispute beforehand has been referred to arbitration, this court still has the requisite Jurisdiction to entertain and/or adjudicate upon the subject application.

18. Additionally, Learned counsel for the Applicant has submitted that even though the sale agreement between the Plaintiffs; on one hand and the Defendant on the other hand, contains an arbitration clause, the court herein can still entertain the dispute, if it is shown that the arbitration clause would occasion grave injustice to the Parties; or is contrary to public policy.

19. Further and at any rate, Learned counsel for the Applicant, has contended that the reference to arbitration, shall portend difficulty to the Applicant and the rest of the beneficiaries of the Estate of the deceased.

20. In support of the submissions that the Honourable court has Jurisdiction to intervene in the matter despite the existence of the arbitration clause, Learned counsel for the Applicant has cited and relied on the holding in the case of *Euromec International Ltd versus Shandong Taikai Power Engineering Ltd* (2021)eKLR.

21. Based on the foregoing, Learned counsel for the Applicant has thus implored the Honourable court to find and hold that the Application beforehand is meritorious and thus ought to be allowed.

b.Defendant's Submissions:

22. The Defendant herein did not file any Response, either Grounds of opposition nor replying affidavit.

23. On the other hand, during the hearing of the Application, Learned counsel for the Defendant intimated to the court that same was not opposed to the Application. Consequently and in this regard, counsel did not make any further submission.

Issues for Determination:

24. Having reviewed the Application dated the 18th September 2023; as well as the Response thereto; and upon consideration of the oral submissions canvassed on behalf of the Applicant, the following issues do arise and are thus worthy of determination;

    i. Whether there exists a suit before the court in respect of which the Applicant can be joined and/or made a Party to.

    ii. Whether the Honourable court is seized of Jurisdiction to grant any precipitate orders on the face of the Doctrine of Party Autonomy

    iii. Whether, in any event the Applicant has the requisite Locus Standi to mount the current Application or otherwise.

Analysis and Determination:

Issue Number 1 and 2. Whether there exists a suit before the court in respect of which the applicant can be joined and/or made a party to. Whether the court is seized of jurisdiction to grant any precipitate order on the face of the doctrine of party autonomy

25. As pointed out elsewhere herein before, the instant suit was filed by and on behalf of the Plaintiffs/Respondents, whereby same sought a basis and/or anchorage upon which to mount the Application for interim protection in accordance with the provisions of section 7 of the *Arbitration Act*, 1995.

26. Additionally, it is common ground that upon the filing of the instant suit, the Plaintiffs/Respondents proceeded to and also filed an Application for interim protection pending arbitration in accordance with clause 11 of the Sale Agreement, wherein the Parties had agreed that any Dispute between same shall be referred to Arbitration.

27. Instructively, upon consideration of the Application dated the 5th May 2023, this court was duly persuaded that there was basis to grant interim protection to and in favor of the Plaintiffs/Respondents, pending the hearing and determination of the arbitral proceedings.

28. Suffice it to point out that with the grant of interim protection, the dispute between the plaintiffs/respondents and the Defendant herein stood referred to arbitration and hence there is no more suit before this court, upon which the court can engage with the parties or otherwise.

29. Notably, where the Parties to a contract have agreed to have the dispute, if any, between them sorted out by way of arbitration, it behooves the court to respect the will of the Parties; and in particular, to give deference the Doctrine of Party Autonomy; which essentially underscores that the Parties have a right to determine for themselves the forum to have their dispute adjudicated upon.

30. True to the word, this court respected the wishes of the Parties and directed that the dispute be sorted out before the arbitrator, to be appointed in accordance with the terms of the sale agreement.

31. Having granted the interim intervention and the matter having been referred to arbitration, in pursuance of the provisions of clause 11 of the sale agreement in question, the issue that the court must grapple with is whether there is a suit in respect of which the Applicant herein can be joined.

32. Be that as it may, the answer to the question alluded to in the preceding paragraph is to be found in the provisions of order 46 rule 3(2) of the *Civil Procedure Rules,* which provides as hereunder;

    Form of order [order 46, rule 3.]

(1) The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the court shall not, save in the manner and to the extent provided in this Order, deal with such matter in the suit.

33. My understanding of the foregoing provisions, which bind arbitration proceedings, is to the effect that once a matter stands referred to arbitration, the Honourable court is divested of further Jurisdiction to entertain and engage with the matter until, inter-alia, the order of reference is set aside and/or vacated.

34. Secondly, there is also the question as to the Jurisdiction of a court to determine whether or not the arbitration clause shall occasion difficulty to the Parties and by extension interested Parties or better still; whether the arbitration clause will work injustice.

35. Whereas Learned counsel for the Applicant has invited the court to find and hold that the arbitral clause will occasion grave injustice to the Applicant; as well as the beneficiaries of the Estate of the deceased, it is important to underscore that the said issues are substantive in nature and same can only be adverted to and raised before the arbitrator.

36. Additionally, once such issues are raised before the arbitrator, the arbitrator shall thereafter be seized of the requisite Jurisdiction to entertain and thereafter adjudicate upon such issues. However, it is my considered view that the said substantive issues, do not fall within the mandate of this court, either as propagated or at all.

37. Perhaps and at this juncture, it is appropriate to take cognizance of the ratio decidendi in the case of Safaricom *Safaricom Ltd versus Ocean View Resort* (2010)eKLR, where the court stated and observed thus;

> " In the circumstances of the matter before the Court, it is quite clear that the superior court has stepped out of its jurisdiction and unless such a step is stopped, this Court's process is likely to be bogged down with matters which ought not to have come to it in the first place under any of this Court's rules.
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> We therefore have a responsibility to make declarations on nullities either sue moto or as and when moved by an aggrieved party as in this case. In my view, the High Court should have confined itself to the issue of either granting the interim measure or refusing to grant it without delving into the merits. The usurpation of the arbitrator's jurisdiction by the superior court also contravened section 17 of the *Arbitration Act* and for these reasons, this Court cannot in our view, condone this state of affairs as the final Court in the land because it we did not do so, who would? Moreover, the superior court's plainly illegal decision was likely in turn lead to the filing of unmerited appeals to this Court thereby resulting in abuse of this Court's process because I have in this ruling also stated that, in arbitration matters all courts including this Court's intervention is restricted to a facilitative role as specifically provided under the Act. Any other intervention outside the provisions of the Act is, with respect, unnecessary baggage on this Court as well and for this reason, this Court has the inherent power to reject the extra baggage and re-order things as provided in the applicable law. This explains why I must not fail to invoke this power to strike out the application and to set aside the superior court ruling and in its place give the interim measure of protection in terms of section 7 of the *Arbitration Act* and at the same time direct the parties to have recourse to the Arbitral process within a reasonable time as contemplated in sections 7

and 17 of the *Arbitration Act*. By dealing with the matter contrary to sections 7 and 17 of the *Arbitration Act* the superior court clearly lacked jurisdiction and therefore its decision constituted a nullity.

38. Lastly, it is also my finding and holding that the Doctrine of Party Autonomy divest this Honorable court of the requisite Jurisdiction to entertain and adjudicate upon this particular matter. Consequently, the court is bereft of Jurisdiction and mandate to make any precipitate order, in a matter where the disputants chose for themselves the forum to address their grievances, if any.

39. To this end, it is appropriate to cite and adopt the dictum of the Supreme Court in the case of *Bia Tosha Distributors Limited versus Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR) (Constitutional and Judicial Review) (17 February 2023) (Judgment), where the court held as hereunder;

> 103. Why do we say so? In granting the conservatory orders, the High Court retained control over the dispute as it was seized of the case and all parties were before it without any recourse to arbitration. In total contrast, the Court of Appeal, in overturning the conservatory orders and issuing further interim relief while referring the matter to the arbitrator, thereby divested itself of control over the case as the parties were deprived the liberty to proceed with the litigation. No further recourse by the parties on the interim orders was available to them before the High Court as it is equally bound by the decision of the Court of Appeal. And the Court of Appeal had on its part ceded its potential intervention in the matter to the arbitrator.
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> 104. The jurisdiction of the arbitrator is limited by the appointing document and largely operates with the consent, cooperation and participation of the parties before it. This is commonly referred t0 as "party autonomy".

40. My understanding of the ratio decidendi highlighted by the Supreme Court is to the effect that where Parties exercise their autonomy to have the dispute, if any, to be adjudicated by the arbitrator, then the honorable court is divested of Jurisdiction.

41. Consequently and in this respect, the Parties having by dint of clause 11 of the sale agreement agreed to have any dispute to be referred to arbitration, no further proceedings can be taken and no precipitate order can be made in respect of the instant matter by this Honourable Court, either in the manner sought or otherwise.

Issue Number 3. Whether, in any event the applicant has the requisite locus standi to mount the current application or otherwise.

42. There is no gainsaying that the Estate of Hellen Wamere Dadet, now Deceased, has a duly constituted Executrix, who is the Defendant/Respondent herein. Further and in addition, it is the said Executrix who entered into and executed the Sale Agreement, which informs the subject dispute.

43. By virtue of being the duly appointed and constituted Executrix, the Defendant herein is bestowed with the requisite mandate and/or authority to transact for and on behalf of the Estate of the deceased; and to represent the said Estate, in any proceedings, touching on and/or concerning the Estate.

44. For good measure, the mandate and/or authority of the Executrix is deemed to exists and subsists for as long as the Grant of probate has neither been revoked nor annulled in terms of the provisions of section 76 of the *Law of Succession Act*, chapter 160 Laws of Kenya.

45. In respect of the instant matter, what I hear the Applicant to be saying is that though the Defendant remains the duly appointed and constituted Executrix, same is now too old and unable to appropriately represent the interests of the Estate of the deceased.

46. Additionally, the Applicant seems to contend that the Executrix, who is the Defendant herein, appears to be acting contrary to and without due regard to the interests of the beneficiaries of the Estate of the deceased.

47. Consequently and arising from the foregoing, the Applicant herein now contends that same ought to be joined in the instant proceedings so as to protect and vindicate the rights of the other beneficiaries as well as his rights, to and in respect of the Estate of the Deceased.

48. Be that as it may, the question that does arise is whether a beneficiary, no matter how close same was/is to the deceased, has the requisite legal capacity to commence any proceedings, including an application touching on the Estate of the deceased.

49. The other incidental question that does arise relates to whether such a beneficiary can purport to supersede the mandate of the Executor/Executrix, whose Grant of probate has not been revoked.

50. To my mind, the mandate and/or authority to act for and on behalf of the Estate of a deceased is granted to a Legal administrator/administratix; Executor/Executrix and for as long as the Grant has not been revoked, it is only such persons who have the right to bring proceedings on behalf of the Estate of the deceased. See section 82 of the *Law of Succession Act*, chapter 160 Laws of Kenya.

51. On the contrary, no beneficiary has the mandate and/or capacity to bring and/or mount any Civil proceedings, whether an Application or otherwise; and to purport (sic) to act for and on behalf of the Estate of the Deceased.

52. To this end, it is appropriate to recall and reiterate the holding of the Court of Appeal in the case of *Rajesh Pranjivan Chudasama versus Sailesh Pranjivan Chudasama* [2014] eKLR, where the court stated and held thus;

> " As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled.
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> A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court differently constituted rendered itself thus:
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> "... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."

53. To my mind, the Applicant herein is divested of the requisite Locus standi to mount and/or maintain the instant application and in the absence of the requisite Locus standi/ Legal Capacity to sue; I am afraid that the Applicant herein has neither met the threshold nor satisfied the basis to warrant joinder as an Interested Party or otherwise.

54. Notably, before one can be joined as an Interested party, same must demonstrate the existence of the requisite Locus standi which denotes sufficiency of interest in the suit and/or suit Property under reference.

55. As concerns the significance of Locus Standi in any court proceedings, whether for joinder as Interested Party or otherwise, it is appropriate to take cognizance of the holding in the case of *Alfred Njau & 5 others versus City Council of Nairobi*[1983] eKLR, where the court stated thus;

> " Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ..."
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> The court proceeded to state:
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> "To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

56. Even though the Applicant herein has contended that same is a beneficiary of the Estate of the deceased, whose property is the subject of the instant proceedings, I am afraid that the mere fact of being (sic) a beneficiary does not ipso facto confer the Applicant with the requisite legal interests to warrant joinder into the subject proceedings, either as Interested Party or otherwise.

57. At any rate, it is also imperative to underscore that joinder of a Party into civil proceedings is not premised on moral sympathy and/or empathy. Instructively, joinder is informed by legal standing, which must be appraised on the basis of law and not otherwise.

58. Before departing from the issue herein, it is also appropriate to point out that the provisions of order 1 rule 10(2) of the *Civil Procedure Rules*, 2010; which underpin Joinder of parties, inter-alia, joinder of Interested Parties, has established a basis upon which joinder can be decreed.

59. For good measure, the provisions of order 1 rule 10(2) of the *Civil Procedure Rules*, 2010; underscore that joinder can only be undertaken where the presence of the person sought to be joined shall enable the Honourable court to effectively and effectually determine the issues in controversy.

60. To this extent, it suffices to adopt and reiterate the holding of the Court of Appeal in the Case of *Civicon Limited versus Kivuwatt Limited & 2 others* [2015] eKLR, where the court held and observed as hereunder;

> " The question is whether the right of a person may be affected if he is not added as a party. Generally in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided.
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> Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings."

61. Conversely, it must be noted that Joinder of a party is not to be undertaken for the sake of it and/or for cosmetic purposes. Furthermore, the Court must also be wary of situations, where the addition/ Joinder of Parties, in whatever capacity, will only serve to convolute the issues in controversy.

62. In a nutshell, I come to the conclusion that the Applicant herein has similarly not satisfied the legal threshold to warrant joinder into the subject proceedings, either as sought or at all.

63. Further and in any event, the joinder if at all, would bring into conflict the mandate donated to the Executrix vis a vis the beneficiaries; which situation would be contrary to the provisions of the *Law of Succession Act*, chapter 160 Laws of Kenya.

Final Disposition:

64. Having reviewed and analyzed the issues itemized hereinbefore, it is evident and apparent; that the Application by and on behalf of the Applicant, is not only pre-mature and misconceived; but same is legally untenable.

65. Consequently and in the premises, I find and hold that the Application is devoid/ bereft of merits. In a nutshell, same be and is hereby dismissed.

66. Nevertheless, I direct that each Party shall bear own costs of the Application, taking into account the proximate relationship between the Parties; and coupled with the fact that the Plaintiffs herein made no submissions in the matter.

67. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF OCTOBER 2023.

OGUTTU MBOYA

JUDGE