



**Ondieki (Suing as Heir and Legal Administrator of the Estate of
Kerubo Ondieki - Deceased) v Ndege (Environment and Land Appeal
E016 of 2022) [2023] KEELC 22152 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E016 OF 2022
JM KAMAU, J
NOVEMBER 30, 2023**

BETWEEN

ZEPHANIAH NYAKERIGA ONDIEKI APPELLANT

**SUING AS HEIR AND LEGAL ADMINISTRATOR OF THE ESTATE OF
KERUBO ONDIEKI - DECEASED**

AND

CHARLES ONDIEKI NDEGE RESPONDENT

*(Being an Appeal from the Ruling of the Magistrate's Court at Nyamira by Hon. W. K. Chepseba
– CM delivered on the 17th day of November, 2022 in Nyamira CMC ELC Case No. 43 of 2007)*

JUDGMENT

1. This is an Appeal from the Judgment of Nyamira CMCC ELC. No. 43 of 2007 delivered on 17/11/2022 by the Chief Magistrate Honourable William Chepseba. The facts of the case are as follows: -
2. The 1st Respondent sued the Appellant for:

An order of rectification of the Register in respect of Kisii/North Mugarngo/ Bokeira1/1065 and a permanent injunction restraining the Applicant from claiming ¼ share of the said parcel of land or interfering with the Respondent's peaceful enjoyment of the same.
3. The Respondent claimed that the late Kerubo Ondieki was one of the 4 registered co -proprietors of the said parcel of land together with the Applicant and 2 others.
4. He therefore fraudulently had himself solely registered the owner thereof to the exclusion of the said Kerubo Ondieki. He therefore asked the lower Court to rectify the register so that the interests of the Respondent as legal representative of the Estate of Kerubo Ondieki would also be reflected



thereon. The Applicant on the other hand failed to enter appearance and /or file Defence and the Respondent sought for interlocutory judgment on 3/7/2007 and the same was granted on 16/7/2007. On 29/11/2007 the Respondent adduced evidence in Court before Honourable S K Gacheru, Resident Magistrate. On 23/10/2008 the Court delivered Judgment and a Decree was drawn that reads as follows: -

1. That an order of rectification be and is hereby issued rectifying the Register in respect of LR. No. Kisii/North Mugirango 1/ 1065 showing that a ¼ share of it be and is owned by the Plaintiff (Respondent) herein.
2. A permanent injunction be and is hereby issued restraining the Defendant by himself, his agents, servants and /or assigns claiming a ¼ share of Kisii/North Mugirango1/1065 or interfering with the Plaintiff's (Respondent's) peaceful enjoyment and /or possession thereof.
5. The Decree thereof was issued on 18/11/2008 together with the Order that the Executive Officer of Nyamira CMCC do execute all documents to enable the Respondent Zephania Nyakeriga Ondieki get his ¼ share of parcel Number North Mugirango/Bokeira 1 /2679 such as forms for Application for Land Control Board, transfer of land and Mutation. This was on 18/10/2018. North Mugirango/Bokeira1/2679 is a sub division of North Mugirango/Bokeira /1065.
6. On 21/6/2021, the Respondent made an Application to have Jane Mokeira Osero, Imelda Bochaberi Onyanda, Peter Ogero Ogendi and Benson Omayo Minyira joined in the suit for purposes of hearing and determination of an Application for inhibition of any dealing, transacting and /or disposition relating to LR. No. North Mugirango/Bokeira1/2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687 and 2688.
7. He also sought that the sub-division of North Mugirango/Bokeira 1/1065 into the above sub-divisions by the Applicant during the pendency of the suit was null and void. The Respondent also prayed that such sub-divisions be revoked, rescinded and /or cancelled. The same was opposed by the Appellant on grounds that the Court was already functus officio and that the parcels of land to be inhibited belonged to people who were not parties to the suit. He also pleaded that this was tantamount to the re-opening of the suit which had already been concluded. Another Application dated 27/2/2022 was made that one Monica Omambia Nyaboke be joined as an Interested Party in the suit on the ground that the Appellant had further sold a portion of land to the intended Interested Party which land had now been registered as North Mugirango/Bokeira 1/2686 in the name of her Daughter in law Imeldah Bochaberi Onyando without her knowledge and /or consent.
8. On 15/12/2022 an Order was issued as follows: -
 1. A Declaration be and is hereby issued that the sub division of the LR. No. North Mugirango/Bokeira/1065 into LR Nos. North Mugirango/Bokeira/2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687 and 2688 by the Defendant/Respondent during the pendency of the instant suit was /is null and void.
 2. A Declaration be and is hereby issued that the sub division of the LR. No. North Mugirango/Bokeira/1065 into LR. Nos. North Mugirango/Bokeira 1/2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687 and 2688 by the Defendant/Respondent and thereafter the transfer of the subsequent sub divisions in the names of the Defendant/ Respondent. Jane Mokeira Osero, Imelda Bochaberi Onyanda, Peter Ogero Ogendi, Benson Omayo Minyira is hereby null and void.
 3. There be and is hereby granted an order revoking, rescinding and /or cancelling the Titles of the subsequent sub divisions namely LR Nos. North Mugirango/Bokeira/2679, 2680, 2681,



2682, 2683, 2684, 2685, 2686, 2687 and 2688 and restore and/or rectify the register in respect of the suit property, that is, LR. No. North Mugirango/Bokiera 1/1065 to reflect the names of Nyabuto Ondieki, Kemunto Ondieki, Kerubo Ondieki and Sigara Kibore all deceased.

4. The Executive Officer, Nyamira Law Court, be and is hereby directed, manded and/or authorized to execute the transfer instruments/Documents, touching on and /or concerning the suit property, that is LR. No. North Mugirango/Bokiera/1065, to facilitate the transfer in respect of the suit property in regard to ¼ share of the whole of the suit property being the share owned by the Plaintiff/Appellant as issued vide the Judgment/Decree of the Honourable Court.
 5. Leave be and is hereby granted to the intended Interested Party to be join this suit as an Interested Party.
 6. Costs of this Application and the main suit be borne by the Defendant/Respondent.
9. On 17/11/2022 the Court ordered that the intended Interested Party was granted leave to be joined in the suit as an Interested Party. It is this Ruling/Order that is the subject of this Appeal on the following grounds: -
1. That the learned Magistrate erred in law in reopening a matter that had been concluded and upon which there had been execution and file closed.
 2. That the learned Trial Magistrate erred in law and in fact in allowing into a closed case parties who were not originally in the matter and whose Titles were never the subject of the suit.
 3. That the Trial learned Magistrate decided and ruled the case against the weight of evidence on record.
10. The Question to be determined here is, can a party be allowed to be joined as party to a suit after Judgment has been delivered?
11. The Respondent had not made certain disclosures during the hearing of the suit to wit that he sold part of the suit property in the course of the Hearing of the suit.
12. Order 1 rule 10(2) of the said *Rules* provides that:
- " 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."
13. In the case of *Kingori vs. Chege & 3 Others* [2002] 2 KLR 243 the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:
1. He must be a necessary party.
 2. He must be a proper party.
 3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
 4. The ultimate order or decree cannot be enforced without his presence in the matter.



5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.
14. Justice G V Odunga in *Gladys Nduku Ntbuki v Letsbego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR in High Court of Kenya at Machakos Civil Case E007 of 2021 applies the *dicta* in the Court of Appeal in Tanzania in *Tang Gas Distributors Ltd vs. Said & Others* [2014] EA 448 to the effect that: -

“ the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

15. But I must caution that this is a principle that must be applied very cautiously. It is a discretion that can only be exercised with a lot of caution so that a pandoras box before is not opened. The Respondent ought to have been very vigilant when the case in the lower Court was ongoing. He ought to have ensured that his interests in the suit were protected as the suit was being heard. He ought to have been very vigilant since equity aids the vigilant and not the indolent. On the other hand, equity will not allow a wrongdoer to profit by a wrong and that Equity delights to do justice and not by heaves. But unfortunately, equity follows the law. Where the law is in black and white equity cannot do otherwise.
16. The law must be followed. Do I then conclude that my hands are tied since I cannot re open the case regardless of the fact that the Interested Parties had their rights trampled on?
17. My view is that after the Interested Parties were joined as parties to the suit post- Judgment they should not have automatically enjoyed the benefits of the Judgment. There was change in the matrix and what they ought to have done is to set aside the Judgment or even appeal. An aggrieved party may appeal from an order or judgment of the trial Court if his rights have been injuriously affected by the action of the court. As an alternative remedy, this is what the Interested parties ought to have done.
18. In the premises and in order to give justice to all the Parties herein, I order that all the parties joined as Interested Parties after Judgment were properly made so including the Order allowing Monica Omambia Nyaboke to be joined as an Interested Party in the suit. The Order therefore stands. Nevertheless, the Court should not have allowed the Interested Parties joined after Judgment to benefit from Judgment already delivered before they came on board. But since there is no wrong without a remedy, all the Interested Parties in Nyamira CMCC, No. 43 of 2002 are at liberty to apply to the Trial Court to set aside the Judgment of the said Court. Each party to bear its own costs.

JUDGMENT SIGNED AND DELIVERED AT NYAMIRA THIS 30TH DAY OF NOVEMBER 2023.

MUGO KAMAU

JUDGE

In the presence of: -

Court Assistant:

Mr. Masese for the Appellant

Ms. Ochwal for the 1st Respondent

Mr. Ondima for the 2nd Respondent

