



**Kessio v Birgen & another (Environment & Land Case
98 of 2021) [2022] KEELC 2887 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2887 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 98 OF 2021**

MN MWANYALE, J

MAY 26, 2022

BETWEEN

LEONIDA CHEPWAMBOK KESSIO PLAINTIFF

AND

ESTHER JEROTICH BIRGEN 1ST DEFENDANT

DAISY JESONDIN BIRGEN 2ND DEFENDANT

RULING

1. Before the court for determination is application by way of Notice of Motion dated February 21, 2022. The same is brought under article 50 (1), article 159 (2) (a) of the *Constitution* of Kenya 2010, section 1A, 1B and 3A of the *Civil Procedure Act*, section 19 of the *Environment and Land Court Act, 2022* Order 1 Rule 10 and Orders 51 rule 1 of the *Civil Procedure Rules 2010*. The applicant is seeking the following orders;
 - i) Spent
 - ii) That this honourable court be pleased to grant leave to Tamar Cheptoo Birgen, The applicant herein to be enjoined as interested party in this suit.
 - iii) That upon leave being granted as sought in prayer (b) herein Tamar Cheptoo Birgen be at liberty to file any necessary response and or document in this suit.
 - iv) That the cost of this application be provided for.
2. The grounds upon which the application is founded are set out on the face of the application.
3. The intended interested party has sworn a supporting affidavit in support of this application. In the affidavit, the applicant avers that;



- a) She is a co-wife to the defendants herein having been married to the late Col. Meshack Kiptoo Birgen who was the former registered owner of the suit property known as Nandi/Sarora/122 measuring 21 Ha.
 - b) The defendants are the current registered owners of the suit property pursuant to a Certificate of Confirmation of Grant issued on 20/3/1997.
 - c) The defendants hold the suit property in trust for the intended interested party and themselves.
 - d) The applicant has lodged objection proceedings and summons for revocation of the Certificate of Confirmation of Grant vide Kapsabet High Court P and A No. 23 of 2021 which is pending hearing and determination.
 - e) That being a widow of the deceased, she is entitled to the assets of her late husband.
 - f) That the applicant has never been enjoined to these proceedings yet she had immense interest and unless she is enjoined she may be denied the right to be heard.
 - g) The applicant has legal and proprietary interest in the suit property yet the parties herein are excluding her.
 - h) The parties herein are aware of the applicants claim on the suit property but took no action to enjoin her in the suit.
 - i) No prejudice will be suffered by the parties herein since then substantive suit is fresh and hearing not proceeded.
4. The plaintiff/respondent opposed the applications vide replying affidavit sworn by Leonida Chepwambok Kessio. Briefly, she deponed that:-
- a) The applicant failed to demonstrate any sufficient interest over the suit property to warrant the orders sought. The applicant has equally failed to demonstrate that her presence is necessary to enable the court adjudicate upon all issues effectively in the suit.
 - b) This suit was filed against the defendants for the sole reason that they are the joint proprietors of the suit parcel thus enjoining the intended interest party would confuse issues and delay the matter.
 - c) The issues raised in the instant application including whether the applicant was a wife to the deceased previous owner are a preserve of the successful court.
 - d) The Application has no merit and in the interest of justice be dismissed since the applicant has not demonstrated that she is a necessary party to be enjoined.
5. On March 17, 2022, this court issued directions to the effect that his application dated February 21, 2022 be disposed by way of written submissions. Parties were granted until May 16, 2022 to file their submissions. Upon perusal of the record, I have only come across the plaintiff/respondents submissions filed on her behalf by the firm of Ms. Cheruiyot Kirui and Company Advocates.
6. I have read and considered the application and the annexures thereto; response filed by plaintiff/respondent, the relevant provision of the law as well as submissions by the respondent and have taken all these into account in arriving at my decision.



ANALYSIS AND DETERMINATION:

7. I am of the considered opinion that the sole issue for determination arising there from is: -
 - i) Whether the applicant should be enjoined as an interest party in this proceeding.
8. The law providing for joinder of interested parties is Order 1 Rule 10 (2) of the *Civil Procedure Rules* which states that;-

“The court at any stage of the proceedings, wither upon, or without application of either party, and on such terms as my 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 or settle all questions involved in the suit, be added.”
9. Section 3A of the *Civil Procedure Act* gives this Court inherent power to make such orders as may be necessary for the ends of justice and to prevent abuse of the Court process, while sections 1A and 1B of the said Act, also known as the overriding objective of the *Civil Procedure Act* and Rules, provide the objectives, expected to be upheld by the Courts while dispensing justice. They include; facilitating the just, expeditious proportionate and affordable resolution of civil disputes with the participation of parties.
10. I am further guided by the decision of the Supreme Court in the case of *Francis Kariuki Miruatetu and another -vs- Republic and 5 others* (2016) eKLR where the apex court under paragraph 37 set out three requirements an Applicant must show to succeed in an application for joinder as an interested party. Applicant must show that;
 - “i) 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.
 - ii) The prejudice to be suffered by the intended interested party in case of no-joiner must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
 - iii) Lastly, a party must, in its application, set out the case and/or submissions in 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.”
11. It is against the backdrop of the provisions of the law cited herein and the binding decision of the Supreme Court that I need to determine whether the applicant has met the requirements above to warrant the orders sought.
12. First, does the applicant have a clearly identifiable, personal interest or stake in the proceedings? The applicant has stated in the supporting affidavit that she is the co-wife to the defendants herein having been married to the previous registered owner as that of husband and wife. The applicant has equally annexed a copy of summons for revocation of grant filed in Kapsabet High Court P&A No. 23 OF 2021 in the matter of the estate of Meshack K. Birgen. Upon perusal of this annexure TCB – 5, the applicant is seeking revocation of grant issued to the defendant’s herein for the sole reason that she is



- a widow and wife to the deceased previous owner. The applicant admits however that the Succession matter/revocation of grant is pending hearing and determination.
13. I agree with the plaintiff/respondent's submissions that this court is not clothed with jurisdiction to determine whether the applicant is a wife or not for purposes of succeeding her deceased husband's property. The proper court with the preserve to determine succession matters is the High Court Family Division. Indeed the applicant is well aware of this hence her proceeding to file objection proceedings and summons for Revocation of grant in the High Court vide Kapsabet High Court P & A No. 23 of 2021.
 14. As long as the Succession matter is pending determination, in my view the applicant has no identifiable stake in this proceeding. In the unlikely event that I allow and agree that the Applicant has interest in the matter at this stage then I will be performing the functions of a High Court Judge, Family Division.
 15. Regarding the requirement that an interested person ought to have personal interest or stake in the proceedings, I find that the applicant does not meet this requirement set out by the Supreme Court in the Muruatetu case cited herein.
 16. Secondly, the applicant has to demonstrate the prejudice they will suffer in case of no-joinder as interest party. In this case, the applicant has failed to demonstrate to the satisfaction of this court the prejudice she will suffer in the event of non-joinder. The mere mentioning that she has a legal and proprietary interest over the suit land, without any justification or an order from a succession court confirming that indeed she has legal interest in the suit property, does not suffice.
 17. The third and final requirement an applicant ought to meet to be enjoined as interested party is that she has to demonstrate that he case is not merely a replication of what the other parties will be making before court. The applicant herein claims to be a co-wife to the defendants herein. She has not demonstrated in the application that her case is not a replication of the other two co wives. The applicant has not also filed submissions to demonstrate the same. It is the court's view therefore that the Application has failed to meet the third requirement set out by the apex court in the Muruatetu case cited herein.
 18. It is the court's opinion and view that the intended interested party's application is premature as her interest over the suit property as per the material before me does not demonstrate or prove any stake or personal interest in the property. At best, the Applicant's claim in these proceedings is farfetched and therefore not a necessary party to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.
 19. Accordingly, I find no merit in the Notice of Motion application dated February 21, 2022 and order that the same be dismissed with costs to the plaintiff/ respondent.
 20. This suit have been referred to the court annexed mediation but was stayed pending hearing of the application. The same can now proceed with the mediation.
 21. It is so ordered.

DATED AND DELIVERED IN KAPSABET THIS 26TH DAY OF MAY, 2022.

HON. M. N. MWANYALE,

JUDGE

In the presence of:

Ms. Rop holding brief for Ms. Chesoo for the Applicant



Mr. Kirui for the Plaintiff/Respondent

Ms. Mitey for the Defendant/Respondent

