



**Mecha v Mochere & another; Nyambongi (Suing through her Attorney Hellen Moraa Gekanana) & another (Applicant); Mamboleo (Interested Party) (Environment & Land Case 59 of 2016) [2022] KEELC 3154 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3154 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 59 OF 2016**

**JM ONYANGO, J**

**MAY 25, 2022**

**BETWEEN**

**ELMELDA KERUBO MECHA ..... PLAINTIFF**

**AND**

**CHARLES MORIRA MOCHERE ..... 1<sup>ST</sup> DEFENDANT**

**DORICA OSORO NYABICHA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**EVALINE KENYURI NYAMBONGI (SUING THROUGH HER ATTORNEY  
HELLEN MORAA GEKANANA) ..... APPLICANT**

**HELLEN MORAA GEKANANA ..... APPLICANT**

**AND**

**ANTONY MAMBOLEO ..... INTERESTED PARTY**

**RULING**

1. The Plaintiff herein filed suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claiming that they had trespassed upon her land parcel number West Kitutu/Bogusero/3894 and erected a fence thereon.
2. In his defence, 1<sup>st</sup> Defendant denied the Plaintiff's claim and stated that he owned plots number 18B and 35 which border the Plaintiff's land but they are separated by a road of access.
3. Since the dispute was essentially about the position of the Plaintiff's land vis a vis the Defendants' plots, the court directed the Kisii Land Registrar and County Surveyor to visit the disputed parcels of land and establish the boundaries thereof.



4. On July 6, 2017, the said officers visited the disputed parcels of land and filed their report dated July 17, 2017. According to the said report, land parcels No West Kitutu/Bogusero/3894 and West Kitutu/Bogusero/656 are separated by a 6 metre road from each other. Although the road exists on the map it had not been opened on the ground. Land parcel No 656 is registered in the name the Gusii County Council now known as Kisii County Government. The said plot is sub-divided into plots which have been allocated to individuals. The report made a finding that plots No 18B and 35 are within Mosoch Market and have been allocated to the Defendants. It was further established that land parcel no 3894 has been sub-divided into two parcels known as West Kitutu/Bogusero/9601 and 9603. The report concluded that the disputed portion of land is within parcel no West Kitutu/Bogusero/656 and not 3894 as alleged by the Plaintiff.
5. The court adopted the Land Registrar's report as the judgment of the court and dismissed the Plaintiff's case on March 9, 2018. The court also directed that the access road be opened. Following the dismissal of the case, the Defendants made arrangements to fence their plots No 18B and 35, but the Plaintiff resisted the fencing prompting the Defendants to apply for an injunction against the Plaintiff. The court granted a 90-day injunction to enable the Defendants fence their plot.
6. More than four years after the judgment and two years after execution of the said judgment, the Applicants filed a Notice of Motion dated February 7, 2022 seeking an injunction against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents or anyone acting under the authority of the 1<sup>st</sup> Defendant from entering, trespassing upon, occupying, fencing and/or committing acts of waste upon land parcels no. West Kitutu/Bogusero/9744 and 9745 pending the hearing of the application inter partes.
7. The Applicants are also seeking that the execution of the decree undertaken on land parcels No West Kitutu/Bogusero/9744 and 9745 be reviewed, vacated and/or set aside and finally that the judgment of this Honourable court and all consequential orders thereto be vacated so that the Applicants can be joined as Defendants in order to safeguard their interests over the aforesaid parcels of land.
8. The application is based on the numerous grounds stated on the face of the Notice of Motion and the affidavit of Hellen Moraa Gekanana, the Applicant herein. The long and short of it is that the Applicants allege that they have been affected by the implementation of the judgment in this matter as the boundary features of their land parcels no 9744 and 9745 have been destroyed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents in the course of executing the said judgment.
9. In her affidavit the 2<sup>nd</sup> Applicant has deponed that her daughter who resides in the United States of America is the registered owner of land parcel number West Kitutu/Bogusero/ 9745, while she is the registered owner of parcel 9744. The said parcels are sub-divisions of parcel number West Kitutu/Bogusero/9601 which is a sub-division of L R No West Kitutu/Bogusero/3894.
10. She depones that they were not privy to the proceedings herein and neither were they served with court process prior to alienation of their respective pieces of land and they have therefore been condemned unheard and denied their right to defend their interests in the said parcels of land.
11. It is her deposition that the execution of the decree herein did not contemplate a situation where land parcels Nos 9744 and 9745 would be annexed by the Respondents as there is a 6 metre road separating land parcel No 9601 where the two plots are hived from and Mosoch market plots.
12. She contends that at the time of filing the instant suit, the issues in dispute between the Plaintiff and the Defendants related to parcels 3894 and plots no 18A and 35 Mosoch Market. However, at the date of the report and subsequent entry of judgment, the Defendants had notice that parcel no 3894 had



- been sub-divided into parcels 9601 and 9603 and they ought to have involved the persons beneficially interested in the said plots including the Applicants herein.
13. She states that the Plaintiff has no interest in parcels 9744 and 9745 upon which the judgment has erroneously been implemented. She is of the view that the Respondents cannot suffer loss if the application is granted as they have benefited from the decree in an unintended manner.
  14. She depones that she only became aware that the actions undertaken by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents were in execution of a decree and orders of this court after filing Kisii CMCC No 123 of 2021. She adds that a site visit would confirm that the Respondents have annexed substantial portions of land parcels nos 9744 and 9745 in the guise of opening a road of access.
  15. The Application is opposed by the 1<sup>st</sup> Defendant/Respondent through his Replying Affidavit sworn on March 7, 2022 and the Notice of Preliminary Objection dated March 7, 2022.
  16. In the said Preliminary Objection, he raised the following grounds:
    - i. That the Applicants' Advocates are not properly on record based on Order 9 rule 9 of the Civil Procedure Rules, 2010 and Rule 23 of the Court of Appeal Rules, 2010.
    - ii. The Applicants before this court are strangers as they have no leave of the court to be enjoined (sic) in this suit contrary to rule 7 (1) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013.
    - iii. That there is a contravention of Order 1 Rules 15 to 22 of the Civil Procedure Rules, 2010 as regards 3<sup>rd</sup> Parties or Interested Parties.
    - iv. The Applicants' claim in their application before the court does not relate to the issues filed by the Plaintiff in this suit, hence they are introducing new issues before the court for determination.
    - v. The Applicants' application is scandalous, frivolous and vexatious and therefore an abuse of the process of the court.
  17. In his Replying Affidavit the 1<sup>st</sup> Defendant depones that the application has been instigated by the Plaintiff, yet the dispute he had with her regarding land parcel number 3894 and plots no 18B and 35 Mososcho Markert was resolved by the court through its judgment delivered on March 9, 2018 by adopting the Land Registrar's report dated July 17, 2017.
  18. It is his contention that the Plaintiff's parcel number 3894 which she sub-divided into parcels 9601, 9602 and 9603 and further sub-divided into parcels No 9744 and 9745 is separated from his plots no. 18B and 35 Mososcho Market by a 6 meter road of access.
  19. He depones that he has no interest in the Plaintiff's plot or its resultant sub-divisions including parcels 9744 and 9745 and he has fenced his plots No 18B and 35 which the Plaintiff has been claiming all along.
  20. The court directed that the Preliminary Objection be dealt with first and that the same be argued by way of written submissions and both parties filed their submissions which I have considered.

### **Respondents' Submissions**

21. It was submitted on behalf of the Respondents that the Applicant's advocates are not properly on record as they did not comply with Order 9 rule of the Civil Procedure Rules which requires that where there is a change of advocates after delivery of judgment, the advocate coming on record should either



enter into a consent with the outgoing advocate to allow the incoming advocate to come on record or the incoming advocate should seek leave of the court to take over from the previous advocate.

22. Secondly, it was submitted that the Plaintiff intends to revive this suit through the back door as the Applicants bought their plots from her and she failed to convince the court to rule in her favour.
23. Thirdly, it was contended that an Interested Party can only be joined to a suit during and not after delivery of judgment. It was also submitted that the Applicant's parcels of land are separate and distinct from the Plaintiff's parcel and the Applicant are therefore introducing new issues which were not the subject of the dispute between the Plaintiff and the Defendants.

### **Applicants' Submissions**

24. In response to the Preliminary Objection, it was submitted for the Applicants that since they were not parties to the suit at the time judgment was delivered, their advocate did not need to comply with Order 9 rule 9 of the Civil Procedure Rules.
25. On the question of leave to be joined to the suit. It was contended that Order 1 Rule 10 provided for joinder at any stage of the proceedings provided their presence was necessary to enable the court to effectually and completely adjudicate upon the questions involved in the suit. However, it was submitted that the Applicants had deliberately not applied for joinder as they were seeking a review of the judgment under Order 45 Rule 1 of the Civil Procedure Rules on the grounds that they were condemned unheard.

### **Analysis and Determination**

26. Having considered the Notice of Motion, rival affidavits and submissions by both parties, the issues for determination are:
  - i. Whether the firm of Nyamurongi & Co Advocates are properly on record.
  - ii. Whether the Applicants should have applied to be joined to the suit before seeking the orders of injunction and review or setting aside of the judgment.
27. The first point of contention is that the firm of Nyamurongi & Co Advocates is improperly on record as they came on record after delivery of judgment without complying with Order 9 Rule 9 of the Civil Procedure Rules, 2010. The said rule provides as follows:

“Order 9 Rule 9. When there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court;

  - a. Upon an application with notice to all the parties or;
  - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.
28. It is not in dispute that the original suit was between the Plaintiff and the Defendants and judgment in respect thereof was delivered on March 9, 2018. The Applicants were not parties to the original suit and the firm of Nyamurongi & Company Advocates which is on record for the Applicants is therefore not taking over from any of the advocates who were on record when the judgment was delivered. In order for Order 9 Rule 9 to come into play, the advocate must be taking over from another advocate who previously represented one of the parties at the time of judgment. That is not the case in the instant suit as the Applicants were not involved in the original suit.



29. The second point of contention is that the Applicants are strangers to the suit as they did not seek to be joined to the suit. Learned counsel for the Plaintiff/1<sup>st</sup> Respondent has contended that an Interested Party can only be joined to a suit during and not after delivery of judgment. On the other hand, learned counsel for the Applicants submitted that the Applicants deliberately applied for review as they were aggrieved by the judgment delivered on March 9, 2018.

30. The law on joinder of parties is set out under the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules which provides as follows:

“ 10(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.”

31. The court therefore has a discretion to add a party whose presence is necessary to assist the court in adjudicating all the questions involved in the suit even in the absence of an application by either of the parties. The emphasis here is whether that party will enable the court adjudicate all the issues in the suit. See *Pius Mbugua Ngugi & 2 others v Chief Land Registrar & 7 others* [2018] eKLR

32. In the case of *Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General* (2017) eKLR the court held as follows:

“ The elements to be satisfied where a party seeks to be enjoined in proceeding as an interested party are that:

- a. The intended interested party must have an identifiable stake
- b. Or legal interest
- c. Or duty in the proceedings

...A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally, that is by curtailing his legal rights. In determining whether or not an applicant has legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit”

33. In the case of *IMK v MWW & Another* (2015) eKLR the Court of Appeal held thus:



This Court adopted the same approach in *Central Kenya Ltd v Trust Bank & 4 Others*, CA No 222 OF 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

34. We would however agree with the Respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar’s Code, (*supra*) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our *Civil Procedure Rules*, in *Tang Gas Distributors Ltd v Said & Others [2014] E A 448*, stated 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.
35. What can be gleaned from the above cited authorities is that one can only be joined to a suit where proceedings are still pending. In the instant case judgment was delivered way back on March 9, 2018 and the said judgment has been executed. The Applicant disclosed in his affidavit that the implementation of the said judgment is what prompted her to file Kisii CMCC No 123 of 2021 against the Respondents. In the circumstances, it is clear that the Applicant’s application for review is being made rather late in the day.
36. Taking the circumstance of this case into consideration, I agree with counsel for the Respondent that it would not be legally tenable to join the Applicant to a concluded suit where execution has already taken place. It has also not been demonstrated that the Applicants have a stake in the claim between the Plaintiff and the Defendant as they appear to have a separate claim against the Plaintiff. Furthermore, the application for review has been made rather late in the day. The Applicants are trying to shut the stable door after the horse has bolted.
37. The upshot is that the Preliminary Objection has merit and I uphold it and struck out the application dated February 7, 2022 with costs to the 1<sup>st</sup> Defendant/Respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 25<sup>TH</sup> DAY OF MAY, 2022.**

**J M ONYANGO**

**JUDGE**

