



Kinyanjui & 3 others (Suing as the officials of the Kianjata Welfare Association) v Mwangi & 4 others (Environment & Land Case E352 of 2021) [2022] KEELC 3837 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E352 OF 2021**

**JA MOGENI, J
MAY 18, 2022**

BETWEEN

**PETER KINYANJUI 1ST PLAINTIFF
GIBSON MEMIA KARUMBA 2ND PLAINTIFF
PAUL GATHUKIA NJOGU 3RD PLAINTIFF
RAHAB MUGURE 4TH PLAINTIFF
SUING AS THE OFFICIALS OF THE KIANJATA WELFARE ASSOCIATION**

AND

**JOHN MWERU MWANGI 1ST DEFENDANT
GITHURAI TINGANGA CO LTD 2ND DEFENDANT
COOPERATIVE BANK OF KENYA LIMITED 3RD DEFENDANT
REGISTRAR OF TITLES 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT**

RULING

1. This ruling is in respect of the application by way of a notice of motion dated November 29, 2021 and a Preliminary Objection by the 3rd defendant dated 3/12/2021. The application is seeking the following orders:
 - a) Spent
 - b) That this honorable court be pleased to include Elimonyaco Auctioneers as an interested party for purposes of hearing and determination of this application



- c) That this Honorable court be pleased to grant an order of injunction restraining the Defendants/Respondents by either themselves and/or their servants, agents, employees and/ or any other person claiming to act under their authority from alienating, selling, transferring, further charging, disposing of and/or in any other way dealing with land parcel number Nairobi/Block119/2977 pending the hearing and determination of this application.
 - d) That this Honorable Court be pleased to grant an order of injunction restraining the Defendants/Respondents by either themselves and /or their servants, agents, employees and/ or any other person claiming to act under their authority from alienating, selling, transferring, further charging, disposing of and/or in any other way dealing with land parcel number Nairobi/Block119/2977 pending the hearing and determination of this application.
 - e) That this Honorable Court be pleased to order the stay of the Notification of Sale issued by Elimonyaco Auctioneers dated September 20, 2021 for sale of Land Parcel Number Nairobi/Block119/2977 pending the hearing and determination of this application and/or suit and / or further orders as this Honorable Court may deem fit to grant.
 - f) That the costs of this application be provided for.
2. The application which is predicated on the provisions of Sections 1A, and 1B, the [Civil Procedure Act](#), Order 40 and Order 51 of the [Civil Procedure Rules](#) is premised on the grounds set out therein and is also supported by the Applicant's affidavit.
 3. The gravamen of the application is that the plaintiff/applicant is the legal owner of land parcel number Nairobi/Block 119/2977 and plaintiff has instituted proceedings against the 1st defendants/respondents herein who are claiming ownership of the same suit property. Further that there is already a notification of sale for parcel number Nairobi/Block 119/2977 which was issued on September 20, 2021 by the 3rd defendant through Elimonyaco Auctioneers which the plaintiff seeks to have stayed pending the determination of the instant application and or suit. The plaintiff also seeks to have Elimonyaco Auctioneers enjoined as interested party to the instant suit.
 4. From the suit the plaintiffs/applicants identify themselves as a self-help group with over 80 members and the legal owners of land parcel number Nairobi/Block 119/2977 having bought the suit property in 1979 from one Edward Mugi a shareholder of the 2nd defendant. According to the plaintiff the 2nd defendant is the custodian of all title documents of ownership of the parcels of land bought at Githurai 44 for all its members who are shareholders including the plaintiff since the suit property did not have a title deed. The plaintiffs aver that upon the purchase of the suit property the 2nd defendant had the responsibility to process title for all its shareholders including the plaintiff for the suit property.
 5. The plaintiffs' claim against the 1st and 2nd defendant is that they conspired to defraud the plaintiffs of the suit property and have it registered in the 1st defendant's name. The plaintiffs contend that after the 2nd defendant had the 1st defendant register the suit property in his name fraudulently he, 1st defendant then obtained a credit facility from the 3rd defendant who charged the title to the suit property without undertaking due diligence which the plaintiff states were negligent on the part of the 3rd defendant
 6. The 3rd, 4th and 5th defendants have opposed the application. The 3rd defendant went further and also filed a Preliminary Objection dated 3/12/2021 raising the following grounds:
 - a. That this court has no jurisdiction to preside over and or determine the issues raised in this suit as against the 3rd defendant by virtue of Section 4(2) of the [Limitations of Actions Act](#), Cap 22 Laws of Kenya



- b. That this suit is unmaintainable in law, it is a non-starter, incurably defective, a substantive and procedural monumental nullity and an unmitigated abuse of the abuse of the court process.
7. The 1st and 2nd defendants did not file any documents, neither did they enter any appearance. The 3rd defendant filed his grounds of opposition to the application denying the Plaintiff's claim. They averred that the only claim against them was that they were negligent in the registration of the Charge. They however contend that there was no dispute that the charge was registered way back in 2016 and the instant suit only commenced in 2021 which is three (3) years since the registration of the charge and therefore that is the reason they raised a preliminary objection.
8. The 4th and 5th defendants did not file a statement for or against the preliminary objection but they filed their defence to the plaint dated 8/03/2022 denying the plaintiff's claim of conspiracy with any defendant to deny the plaintiff of the suit property.
9. Before the suit could be set down for hearing, the plaintiff filed the application dated November 29, 2021 to which interim orders were issued in relation to the Notice for sale dated September 20, 2021 by the 3rd defendant through ELimonyaco Auctioneers and the Preliminary Objection which are the subject of this ruling.
10. Counsels agreed to canvas the application vide written submissions the firm of Karanja Kagiri & Co. Advocates for the plaintiffs/applicants and by the firm of Silas, Evans and Stevens Advocates LLP for the 3rd defendant. The 1st, 2nd, 4th and 5th defendants did not file responses to the application and the Preliminary Objection.
11. I shall first consider the Preliminary Objection because if I uphold it, then there will be no need to consider the application.

Issues for Determination

- 12 I have considered the application, the supporting affidavit, the Preliminary Objection as well as the submissions and the authorities cited by Counsels to me, the following arise for determination:
- I. Whether the Preliminary Objection raises pure points of law.
- II. Whether the Court has jurisdiction to hear and determine this suit.
- III. Whether the plaintiff's/applicants application for joinder of an interested party has merit
- IV. Whether the plaintiffs/applicants have met the threshold for grant of a temporary injunction pending the final disposal of the suit

Analysis and Determination

Whether the Preliminary Objection raises pure points of law.

13. The starting point is to define what a preliminary objection is.
14. A Preliminary Objection, as LAW J.A stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd.v. West End Distributors Ltd*1969 EA 699: -

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plead of limitation, or a



submission that the parties are bound by the contract giving rise to the suit to refer the same to arbitration.” Emphasis added.

15. In the same case, New BoldJ.A defined it as follows: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” Emphasis added.

16. In the instant suit the 3rd Defendant has based his Preliminary Objection on the ground that this court lacks jurisdiction to hear and determine the Plaintiff’s suit. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Plaintiff’s case as outlined are true or not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR held as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

17. Out of the items raised by the 3rd, defendant as the basis of the Preliminary Objection, the only point of law is that the court has no jurisdiction to preside over and or determine issues against the 3rd defendant because of Section 4(2) of the Limitations of Actions Act, Cap 22 Laws of Kenya.

18. The 3rd defendants argue that the cause of action accrued to the Plaintiff in 2016 when the land was registered in the name of the 1st defendant. This suit was filed on October 15, 2021. The 3rd defendant therefore argue that the suit is time barred both under Limitation Act and section 4(2) of the Limitation of the Actions Act Cap 22 Laws of Kenya.

19. Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya states as follows:-

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: provided that an action for libel or slander may not be brought after the end of twelve months from such date.”



20. The above quoted section provides for a time frame of 3 years within which an action for tort ought to be filed. Prima facie one would say that the Plaintiffs' suit is statute barred. This is so because if the cause of action accrued to the Plaintiffs in 2016 and the suit was filed on October 15, 2021 the suit would be out of time of the 3 years under the Act. However, it should be noted that the Plaintiffs are suing for ownership of title for a charge they contend was fraudulently put on their title.

Whether the Court has jurisdiction to hear and determine this suit.

21. The Environment and Land Court is anchored in the *Constitution*. Article 162 provides for the establishment of the ELC as one of the superior Courts in Kenya. It provides as follows:

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- (1) The superior courts are the supreme Court, the court of Appeal, the High Court and the Courts referred to in Clause (2)
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:-
 - a. Employment and labour relations; and
 - b. The environment and the use and occupation of, and title to, land.

22. Article 162 (2) (b) of the *Constitution* mandated parliament to create a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Parliament did create the ELC through the *Environment and Land Court Act*, No. 19 of 2011. Section 13 of the ELC Act provides for the jurisdiction of the court and states as follows:

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- (1) The court shall have original and appellate Jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162 (2)
 - (a) of the Constitution, the court shall have power to hear and determine disputes relating to Environment and Land, including disputes:-
 - b) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - c) Relating to compulsory acquisition of land;
 - d) Relating to land administration and management;
 - d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
 - e) Any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Article 42, 69 and 70 of the *Constitution*.



- (4) In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.
- (5) Deleted by Act No. 12 of 2012.
- (6) Deleted by Act No. 12 of 2012
- (7) The exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including:-
 - a) Interim or permanent preservation orders including injunctions;
 - b) Prerogative orders;
 - c) Award of damages;
 - d) Specific performance;
 - e) Restitution;
 - f) Declaration; or
 - g) Costs.

23. As can be noted from Section 13(1) above, the court has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution. Section 13(2) in very broad terms states that the court has jurisdiction to hear any other dispute relating to environment and land.
24. It will be seen from Section 13(2) (d) and (e) that the court has jurisdiction to hear a matter relating to public, private and community land contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land. It will therefore be appreciated that the jurisdiction of the court in so far as disputes involving environment or land is very wide and almost limitless. The remedies that the court can grant includes injunctions.
25. The dispute before this court relates to the charge over land parcel Title No. Nairobi/Block119/2977. The plaintiffs/applicants seek an injunction to restrain the defendants from attaching and selling the said land. It cannot be argued that the dispute is not over land. It is over land or interest in land. It was argued that this court cannot hear a money or commercial claim. The charge is a disposition relating to land. The current law on charges is in part C of the Land Registration Act and part VII of the Land Act and Section 101 of the Land Registration Act and Section 150 of the Land Act gives this court jurisdiction to hear and determine disputes, actions and proceedings concerning land under the two Acts.
26. From the foregoing, I find no merit in the argument that this court has no jurisdiction to hear and determine this suit. The upshot of the above is that I find no merit in the preliminary objection. It is hereby dismissed.

Whether the plaintiffs/applicants’ application for joinder of an interested party has merit

27. On the application for enjoining the Elimonyaco Auctioneers as an interested party for purposes of hearing and determination of this application, the plaintiffs/applicants brought this matter under certificate of urgency when the court granted interim orders of injunction pending the hearing of the application inter partes.



28. The 1st, 2nd, 4th and 5th defendants did not participate in the application. The matter was therefore between the 3rd defendant and the plaintiffs/applicants. The issue for determination is therefore whether the plaintiffs/applicants have met the threshold of joinder of parties.
29. The principles and rules governing proceedings on joinder and misjoinder are clearly explained under Order 1 Rule 8, 9 and 10 of the *Civil Procedure Rules*. The salient features of order 1 are that a party or claimant may be permitted as a plaintiff or defendant in the same proceedings from any claims the plaintiff has against the defendant. That upon application two or more persons may be allowed by the court to join the already filed suit by the plaintiff or the defendant where they assert that any claim to the relief as set out arises from the same transaction or occurrence.
30. Further a party seeking to be enjoined in a suit must prove that he/she has an identifiable stake or legal interest or duty in the proceedings. Rule 2 of The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 defines an interested party as follows:-
- “interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;”
31. Rule 7 (2) provides that a court may on its own motion join any interested party to the proceedings before it. The broad principles which should govern disposal of an application for enjoinder are that the court can, either on an application made by any interested party or on its own motion direct any person as party to be enjoined in the proceedings.
32. It is important to note that an applicant in joinder proceedings must demonstrate that his/her presence is necessary to enable the court to adjudicate effectively and completely the issues in the proceedings he/she seeks to join as an interested party.
33. The court’s power to exercise discretion on joinder of an interested party was enunciated in the Supreme Court of Kenya case of *Francis Kariuki Muruatetu Ltd & another V Republic & 5 others* in Petition No. 15/16 of 2016 eKLR where the court identified the following elements to be considered in granting the application to include the following:
- (1) 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.
 - (2) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
 - (3) Lastly, a party must, in its application, set out the case and/or submissions it 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.
34. In the present suit the proposed interested party is an auctioneer who had already put out a notice for the sale of the suit property. The 3rd defendant confirmed through the replying affidavit of December 30, 2021 that they were ready to exercise their statutory power of sale. Therefore the presence of the proposed interested party Elimonyaco Auctioneers who had been instructed by the 3rd defendant is necessary to explain what instructions were given to them and the level on implementation of the instructions.



35. Further in the case of *Mai Mabi Kijabe/Longonot Co. Ltd v Ayub Mugo Njoroge & 5 others* Civil Suit No. 1672 of 2001 eKLR laid down the following principle as regards joinder under order 1 Rule 8.:

“It is a cardinal rule procedural that any party who stands to be directly affected by any orders that may be in any such and whose participation is necessary in a suit for effective adjudication of the matters in issue ought to be made a party in the suit or at least be notified about the existence of the suit.”

36. The position that the Court of Appeal took in the case of *JMK v MWM & Another* (2015) eKLR where the Judges quoted with approval the decision by the Court of Appeal in Tanzania in *Tang Gas Distributors Limited vs. Said & others* (2014) EA 448, is 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 trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceedings have 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. It is important note however that the mere mention of the term “Interested Party” does not entitle them to be enjoined as parties to the proceedings.
37. The court notes that the none of the defendants have opposed this application for joinder of the interested party Elimonyaco Auctioneers. I find that the plaintiffs/applicants have established that Elimonyaco Auctioneers participation in the suit is relevant and there is an identifiable stake hence should be joined in this suit. That being the case, and without going into the merits of the case it is my findings that the Interested Party, *prima facie*, has an interest in the outcome of this suit and ought to be joined in this suit to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

Whether the plaintiffs/applicants have met the threshold for grant of a temporary injunction pending the final disposal of the suit

38. On the fourth issue as to whether the plaintiffs/applicants have met the threshold for grant of a temporary injunction pending the final disposal of the suit, counsel submitted that the applicant has demonstrated that the property that the 3rd defendant intends to sell is still in dispute in regards to the ownership. That from the pleadings before court, three different parties are claiming ownership of the said property and it is a matter that is within the knowledge of the 3rd defendant. Counsel therefore submitted that the applicant has meet all the conditions as set out in the *Giella v Cassman Brown & Company Ltd* 1973 EA 358 case which requires the applicant to show the following:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

39. The law on granting interlocutory injunction is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides: -

“Where in any suit it is proved by affidavit or otherwise—



- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

40. The applicant stated that the suit property has rental houses where the plaintiff draws rent from and the issue in this case is the determination of the ownership of the suit property. If the suit property is sold before the determination of the ownership, this will interfere with the substratum of the case. This in effect shows that the plaintiffs/applicants have a *prima facie* case with a probability of success. In the case of *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another*, (1990) eKLR the court held that:

“To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”

41. From the affidavits and the documents attached I find that the applicant has met that threshold of a *prima facie* case.

42. On the issue as to whether the applicant will suffer irreparable harm, from the record and the documents produced, it is evident that the applicant is likely to suffer irreparable harm if the injunction is not granted

43. On the issue on balance of convenience the court expressed itself in the case of *Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, as follows: -

“Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. ”

44. The applicant has demonstrated a *prima facie* case with a probability of success and that if the orders sought are not granted then it will suffer irreparable harm. This in effect calls for a status quo to be maintained which is to preserve the substratum of the case until the ownership dispute is determined. The balance of convenience in this case lies in favour of the applicant.

45. I therefore find that the application dated 29/11/2021 has merit.



Disposal Orders

1. The Preliminary Objection dated 3/12/2021 is unmerited and is therefore hereby dismissed.
2. The application dated November 29, 2021 has merit and is hereby allowed as prayed with regard to prayers b, c, d, and e. Leave is hereby granted to the Interested Party to be enjoined as defendants to this suit and file any response to the claim if need be within the next 14 days.
3. Parties to go for PTC before the DR in compliance with Order 11 of the [Civil Procedure Rules](#) on 6/06/2022.
4. Considering the circumstances of this case, I order that each party to bear own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY, 2022.

MOGENI J

JUDGE

In the Presence of:

Mr. Kangiri for the Plaintiff/Applicant

N/A for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the 4th Defendant

N/A for the 5th Defendant

Mr. Vincent Owuor.....Court Assistant

