



**Kinuthia v Gichobi & 2 others (Environment and Land Appeal
1 of 2020) [2022] KEELC 3971 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 1 OF 2020**

EC CHERONO, J

MAY 13, 2022

BETWEEN

HILLARY KINUTHIA APPELLANT

AND

HENRY CHOMBA GICHOMBI 1ST RESPONDENT

JAMES MUCHIRA GITARI 2ND RESPONDENT

GICHOBI KARIUKI 3RD RESPONDENT

*(Being an Appeal from the Judgment of Hon. Y.M. Barasa, S.R.M
delivered on 18th December 2019 in ELC Case No. 117/2019)*

JUDGMENT

1. This Appeal arises from the Ruling of Hon Y.M. Barasa, Senior Resident Magistrate delivered on 18th December, 2019. The gist of this appeal is that vide a Notice of Motion dated 30th September, 2019 had sought leave to be joined as an interested party. The Appellant had also sought a temporary injunction restraining the Respondents from obtaining any land board consent, transferring the title deed, taking possession or interfering with land parcel number Baragwe/Kariru/2492 pending the hearing of the said application. The Appellant further sought to have consent orders obtained by the respondents on 4th September, 2019 stayed and/or set aside pending the hearing and determination of that application.
2. The application was opposed by way of a Replying affidavit sworn by Henry Chomba on 14/10/2019. Several documents were annexed in opposition to the said application. The 3rd Respondent who was the defendant in the former suit also filed a replying affidavit in opposing the said application.
3. After hearing the parties and considering the said application, the trial magistrate rendered himself on 18/12/2019 by dismissing the application with costs. The Appellant was aggrieved with the ruling and preferred the current appeal on the following seven grounds of Appeal;-



1. The learned trial magistrate erred in law and fact when he dismissed the application of the appellant to be joined as an interested party to this suit because he failed to consider the appellant had lived and occupied the suit land for more than twenty years and none of the parties had challenged his possession for the said period. The appellant had annexed evidence by way of documents and photograph which clearly demonstrates all the developments on the said land. The appellant avers that the evidence entitled the Honourable court to be joined as a party and be given a chance to prove his interest in the said land.
2. The learned trial magistrate erred in law and fact when he dismissed the application of the appellant to be joined as an interested party to this suit because he failed to consider the averments by the appellant avers that the proposed suit and the consent order was a plot and a conspiracy of the respondents to defeat his interest in the suit land. It is the Appellant's contention that it was not disputed that the plaintiffs and the defendant were father, son and cousin and had brought this suit to defeat the interest of the Appellant in this suit. The order by the plaintiffs and the defendant was clearly an abuse of the court process.
3. The Appellant further contends that the learned trial magistrate erred in law and fact he disregarded the very said grounds that the Application, his supporting affidavit and in his submissions which included the following amongst others;- That he held a valid and unchallenged Title deed for the suit land Number Baragwe/Kariru/2492 which had never been cancelled by any legal Authority. The Appellant had made very clear submissions that one parcel of land had this valid legal Title deeds namely Baragwe/Kariru/2492 and Baragwe/Kariru/1971 and the court had to investigate and determine the reasons that led to the situation where the same parcel of land had two Title deeds. The Appellant contends that this failure caused serious miscarriage of justice.
4. The Honourable court also failed to consider salient facts that were raised by the Appellant which were that this matter of the subject matter of this suit that was pending at the High court namely ELC 180 OF 1983 that the parties did not disclose the land to the proposed interested party that they had transferred the land to him and that they did not involve him in the current suit. It is the Appellant's contention that failure to consider these facts was a serious error in law.
5. The learned trial magistrate erred in law and fact when he failed to consider the Appellant submissions that the suit land amongst others was subject matter of the ELC case number 180 of 1983 before Justice Mary Kasango. It was the Appellant's submission that if there were any issues they ought to have been detonated in the said suit. The plaintiffs and the defendant did not disclose that there were other proceedings in this suit which the court ought to have been made aware of. Failure to do so was not only illegal but failed a mandatory requirement of the civil procedure Rules, 2010.
6. The Appellant further submits that the learned trial magistrate erred in law and fact when he failed to consider the evidence adduced by the proposed interested party. He had annexed photographs evidence showing all the developments he had done on the suit land. This without doubt demonstrated that the Appellant had been on the suit land and ought to have been given a chance to establish his claim on the said land.
7. The learned trial magistrate erred in law and fact when he failed to grant the orders of injunction to conserve the suit property. Failure to do so will defeat his entire claim and interest in the property. It will also defeat his right of appeal and pursue justice in this matter because the suit property is likely to be sold to third party.



The Appellant's Submissions

4. The Appellant through the firm of Njiru Mbogo & Company Advocates submitted that he had demonstrated tangible interest in the subject matter of the suit and it was only fair and just to be given a chance to be heard. He urged that the refusal by the trial court to join him as a party shut all doors open to him in law to prove his case and get justice.
5. On the second ground, the Appellant submitted that ELC civil suit number 117 of 2019 was an abuse of the court process. He argued that it was a scheme to defeat the interest of the Appellant by three very close relatives. It cannot be denied that the orders set out made by all the three parties in this suit which were the orders by consent on 19th day of August 2019 and the orders of 13th September, 2019. These orders, he argued, adversely affected his interests and were seriously prejudicial to his interest in the suit land.
6. As regards the third ground, the Appellant did not submit anything. On ground no.4 & 5, the Appellant submitted that the former suit no. 117 of 2019 had a connection with High Court Case No.180 of 1983 (Nyeri) where he was a party and therefore an interested party. He argued that the trial magistrate ignored this fact which he had carefully pleaded and which would have gone a long way in the administration of justice. In the matter.
7. On the 6th and 7th grounds of appeal, the Appellant submitted that from the evidence on record, it was clear that he had an interest in the suit land and that it was wrong, unjust and unfair to shut him out.

The 1st & 2nd Respondents' Submissions

8. The 1st & 2nd Respondents through the firm of Maina Kagio & Company Advocates submitted as follows-;
 1. From the Appellant's application and the supporting affidavit which is the subject of this Appeal, the Appellant had averred to be the registered owner of land parcel number Baragwe/Kariru/2492. However, he did not annex a copy of the title deed or search certificate for the land to prove that he was indeed the owner.
 2. To the contrary, the 3rd respondent annexed a copy of the search certificate dated 19/06/2019 showing he was the owner of the land.
 3. That according to the replying affidavit by the 3rd Respondent filed in court on 17/10/2019, he indicated that there was a dispute at Nyeri HCCC NO.180 OF 1983 between the parties including the Appellant where the High court upon hearing the matter ordered that the land parcel no. Baragwe/Kariru/2492 be registered in his name and that that order is still valid since it has never been challenged. That as that order stands, it is clear that 3rd respondent is the owner of the suit land
 4. That though the Appellant attached photographic evidence, he did not set out his case well or disclose what interest he had on the land
 5. That the Appellant's allegation that he has been on the suit property for 20 years was denied by the 1st Respondent in his replying affidavit
 6. That there is no suit filed by the Appellant for adverse possession
 7. That the trial court was not seized of jurisdiction to make a determination on the claim of adverse possession.



8. That the High court in HCCC NO.180 OF 1983 (Nyeri) did not make any pronouncement as to the Appellant's interest over the suit property simply because he had none.

Legal Analysis and Decision

9. I have considered the record before the trial court and the proceeding in the High Court Civil case no. 180 of 1983 (Nyeri). The application before the trial court dated 30/09/2019 was a simple application for joinder of a party brought under Order 1 Rule 10 of the Civil Procedure Rules. The Appellant had also sought conservatory orders to preserve the subject matter of the appeal from being rendered nugatory. Order 1 Rule 10(2) *CPR* 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 to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

10. At paragraph 9(b) of his supporting Affidavit, the Appellant had deposed Gichobi Kariuki who was the defendant in the former suit did not disclose that he had sold and transferred the suit land to him and that he has been in possession of the suit land for the last twenty years. The Appellant annexed copies of photographic evidence showing the developments on the suit land. These averments given on oath were not controverted or challenged.
11. A party seeking to be joined as a party in a suit simply needs to demonstrate that he/she has a stake in the subject matter and that his application is not idle or tenuous but one that is arguable and raises a triable issue for determination by a tribunal or a court of law. Since the Appellant stated on oath that the Gichobi Kariuki, the defendant in the former suit had sold him the suit land which is the subject of this appeal and that he has been in possession of the same and has even done developments on the property, those averments under oath in my view were sufficient grounds to admit the appellant as an interested party in the former suit. I also find that It was prudent for the trial magistrate to issue conservatory orders to restrain the respondents from alienating the subject matter of the dispute pending hearing and determination of the suit.

Analysis and Decision

12. From the foregoing, I find the appeal merited and the same is hereby allowed on grounds number 1, 3, 4, 5, 6 and 7 of the Memorandum of Appeal dated 6th January, 2020.
13. In the circumstances, I make the following orders-;
 1. The Ruling by Honourable Y. M. Barasa given on 18/12/2019 dismissing the Appellant's Notice of Motion dated 30/09/2019 is hereby set aside and/or vacated and substituted with an order allowing the said application as follows-;
 - a. That Hillary Kinuthia be and is hereby joined as an interested party.
 - b. That an order of injunction do issue restraining the plaintiffs and the defendant from obtaining LCB, transferring the Title deed, taking possession or interfering with land parcel NO. Baragwe/Kariru/2492 pending the hearing of the suit.



- c. The interested party is granted leave to file and serve his response to the plaintiff's claim within fourteen days from today.
- d. Each party to bear their own costs of this appeal and the said application.
- e. This matter is remitted back to the Magistrate Court for hearing and determination.
- f. Mention before the Chief Magistrate, Kerugoya on 24/05/2022 for directions.

JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 13TH DAY OF MAY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Muturi holding brief for Njiru Mbogo for Appellant
2. Ms Wambui for 1st and 2nd Respondent
3. Mr. Macharia Wambui holding brief for Ngigi for 3rd Respondent
4. Appellant – present
5. 1st Respondent – present
6. 2nd Respondent – absent
7. 3rd Respondent – absent
8. Kabuta – Court clerk.

