



**Gichana (Suing on behalf of Gladys Nyansarora Onukoh) v Kingoina;
Kingoina (Interested Party) (Environment and Land Case Civil Suit
177 of 2013) [2022] KEELC 3603 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND CASE CIVIL SUIT 177 OF 2013**

JM ONYANGO, J

MAY 11, 2022

BETWEEN

**DANIEL OGUOKA GICHANA (SUING ON BEHALF OF GLADYS
NYANSARORA ONUKOH) PLAINTIFF**

AND

HARUN ONYIMBO KINGOINA. RESPONDENT

AND

ARUSHA KINGOINA INTERESTED PARTY

RULING

Introduction

1. By a Chamber Summons application dated 5th January, 2022 the Interested Party/Applicant filed an application seeking leave to be joined to the suit, an order setting aside the consent order recorded between the Plaintiff/1st Respondent and the Defendant/2nd Respondent on 26th September, 2013 that was adopted as the judgment of this court and an order staying the execution the consent judgment.
2. In his Supporting Affidavit, the Applicant averred that the cause of action concerns land Parcels No. Nyaribari Chache/B/B Boburia/5070 and Nyaribari Chache/B/B Boburia/10187 (hereinafter referred to as the suit properties) which are adjacent to each other. The Interested Party further averred that the suit properties formed part of the land that was originally owned by one Jeremiah Kengoina who is the late father to both the Interested Party and the Defendant/1st Respondent. The Interested Party averred that he was allocated the portion forming part of parcel 5070 by his late father who died on 15th November, 2008 and that he occupies the said portion to date.



3. He deponed that his father's land was illegally subdivided without succession being carried out leading to the creation of the suit properties after the death of his father on 15th November, 2008. He further averred that this suit was quickly disposed of by way of a consent without giving a chance to any of the heirs of his late father's estate who were in actual occupation of the same to be heard. He deponed that the consent that was adopted by the court as its judgment was based on fraud, illegality and misrepresentation. The Applicant deponed that the Plaintiff/Respondent on the strength of the fraudulent consent and the subsequent judgment had commenced construction on his portion of the property with the protection of the Police Officers. The Applicant averred that it was in the interest of justice that the court allows the prayers sought.
4. In response to the application the Plaintiff/1st Respondent filed Grounds of Opposition dated 28th January, 2022. He argued that the Applicant had not demonstrated the interest that he has in parcel 5070, given that he did not annex any ownership documents. He argued that the matter had been marked by this court as settled by issuance of decrees and final orders and thus there was nothing to be decided. He further argued that the Applicant had not displayed any cause of action against any of the parties and that he had not met the parameters for setting aside a consent order. He expressed fears that should this court allow the application, he would lose the massive development he had commenced on the suit property.
5. The Defendant/2nd Respondent on his part filed a Replying Affidavit sworn on 28th January, 2022. He deponed that this matter was fully settled on 27th June, 2013 when the consent between the Plaintiff and the Defendant was adopted as the judgment of the Court and thus there was nothing to be heard any more. While acknowledging that the Interested Party was his brother, he averred that the parcel of land that was being claimed by the Plaintiff had already been sold and transferred by his late father to one Johnson Ongoto Mogese on 14th September, 1993 when he was still alive. He stated that Johnson later sold the said parcel of land.
6. In support of his claim, he produced a copy of his father's death certificate, a sale agreement and a transfer form as Annexure marked 'H.O.K- 1' 'H.O.K-2' and 'H.O.K-3'. He claimed that he had produced the said document to prove that none of the children of his late father including himself and the Interested Party were privy to the transactions over the suit property (5070) and thus a challenge on such processes would be an exercise in futility.
7. The court directed that this application be disposed of by way of written submissions and both parties filed their submissions which I have considered.

Issues for determination

8. The following issues arise for determination;
 - i. Whether the Interested Party/Applicant should be made a party to the suit.
 - ii. Whether the Applicant is entitled to an order setting aside and/or varying the consent judgement dated 27th June, 2013.
 - iii. Whether the execution of the Decree emanating from the consent judgment should be stayed.



Whether the Interested Party should be joined to the suit

9. I will first deal with the issue as to whether the Applicant can be joined in a matter that has already been determined. The Court of Appeal while dealing with a similar issue in the case of *JMK v MWM & Another* [2015] eKLR had this to say on the issue;

It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014.

The appellant however had not applied solely to be added as a party to the suit; he had also applied for review and setting aside of the judgment of the court to give him an opportunity to be heard. (emphasis mine) In other words, the appellant was effectively applying for review and setting aside of the judgment of the Industrial Court and an order for de novo hearing of the suit, which would afford him an opportunity to be heard. The learned judge properly found, in our view, that the Court had jurisdiction to review and set aside its judgment. However, he declined to do so on the grounds that the issues that the appellant was raising could only be raised in an appeal rather than in an application for review.

On our part, we entertain considerable doubt whether the appellant could have been able to appeal to this Court against the judgment of the Industrial Court when he was not a party to the suit whose judgment aggrieved him and had not otherwise participated in the proceedings. Both the Industrial Court Act, 2011 and the Industrial Court (Procedure) Rules made thereunder confer wide jurisdiction on the court to review and set aside its judgment. Section 16 of the Act provides as follows:

“The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.”

Rule 32 (1) of the Procedure Rules, on the other hand provides as follows:

“1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—

- (a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or
- (b) on account of some mistake or error apparent on the face of the record; or
- (c) on account of the award, judgment or ruling being in breach of any written law; or
- (d) if the award, the judgment or ruling requires clarification; or
- (e) for any other sufficient reasons.”

The rules do not define “aggrieved person” but it defines “party” to mean “a person, a trade union, an employer, employer’s organization or any corporate body directly involved or affected by an appeal, or claim to which the Court has taken cognizance or who is a party to a collective agreement referred to Court for registration. A person who is directly affected by an appeal, or claim to which the Court has taken cognizance is deemed by the rules to be a party, and we do not find any reason why such a



person cannot be an aggrieved party for purposes of applying for review of a decree or order of the court. (Emphasis added).

10. From the above decision of the Court of Appeal, an Applicant who applies to be joined to a concluded suit and also applies that the said judgment be reviewed or set aside cannot be shut out as long as he can demonstrate that he is directly affected by the said judgment.
11. Having established that the Interested Party can be added as party to this suit even though the same had already been disposed of by way of a consent recorded between the Respondents back in 2013, the next question would therefore be whether the Interested Party has established that he is directly affected by the consent judgment for him to be joined.
12. The law on joinder of Interested Parties to suits was settled by the Supreme Court of Kenya in the case of *Francis K. Muruatetu and another v. Republic & 5 others* (2016) eKLR, the court set out identifiable key elements for consideration in an application for joinder as an Interested Party. The elements are as follows: -
 - a. 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.
 - b. 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.
 - c. Lastly, a party must, in its application, set out the case and/or submission 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.”
13. The Applicant in his bid to establish that he is a necessary party to this suit has averred and which averment has been supported by the Defendant/1st Respondent that the suit properties were originally registered in the name of their late father. He has also averred that he is in occupation of parcel 5070 in respect of which the Plaintiff has since obtained eviction orders to evict him.
14. It is clear from the record that the Defendant/1st Respondent is not interested in the suit because on several occasions when the Plaintiff/2nd Respondent has filed applications seeking the enforcement of the decree which entailed evicting his family members from the parcel 5070, the Defendant has shown no interest at all because the decree does not affect him. This is because he has a separate and distinct parcel of land No. 10187. This explains why on 14th November, 2021 the Advocate for the Plaintiff/2nd Respondent told the court with confidence that he had called the Defendant/1st Respondent concerning the application filed by the 2nd Respondent seeking enforcement of the eviction order and the Defendant indicated he was not the one interfering with the enforcement of the eviction order.
15. The fact that the Plaintiff was seeking eviction orders against the Defendant and his family members shows the Plaintiff has never taken possession of the suit property since she bought it and the same is being occupied by a member of the Defendant’s family and is not the Defendant. The Plaintiff has not at all challenged the Applicant’s claim that he is one of the Defendant’s family members in occupation of parcel 5070 which is registered in her (the Plaintiff’s) name. The Plaintiff has not challenged the photos the Applicant has annexed to the Supporting Affidavit showing that there is an ongoing destruction of his property on the suit property (parcel 5070).



16. Since the Applicant has been able to establish that he has an interest in the suit property (parcel 5070) and that the enforcement of the decree will affect him if it is not set aside, it is in the interest of justice that he be added to this suit.

Whether the Applicant is entitled to an order setting aside and/or varying of the consent judgement dated 27th June, 2013.

17. In the case of *Brook Bond Le big Ltd vs Mallya* (1975) E.A 266 Law A.G President at page 269 stated inter alia:

“A court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between the parties.”

18. Similarly, in the case of *Flora Wasike v Destino Wamboko* (1988) the court observed that

“It is now settled law that a consent judgment or order has contractual effect and can only be set side on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *JM Mwakio v Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983. In *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

19. Learned counsel for the Applicant set out elaborate and informative arguments regarding the invalidity of the title deeds to the suit properties held by the Respondents. Counsel submitted that the title deeds were acquired through fraud since they were acquired through the subdivision of the Applicant’s father’s title long after he had died and that no succession had been carried out before the sub-divisions.
20. The Defendant in an effort to defend the Plaintiff that he acquired the suit property (5070) from a third party who had acquired the same during the lifetime of his father, has attached a sale agreement between one Johnson Ongoto Mogesa and the Plaintiff and a transfer document executed on 14th September, 1993. He claims that the transfer of the said parcel to Johnson Ongoto Mogesa was done during the lifetime of his father and therefore the interested party could not challenge any transaction carried out by his father during his lifetime.
21. A cursory glance at the said documents and specifically the Transfer Document marked ‘H.O.K-3’, shows that the Transfer Form is not a genuine document as it refers to parcel 5070 which is a sub-division of a bigger parcel of land that was being held by the Defendant’s father.
22. The documents attached to the Plaintiff’s affidavit particularly the search certificate and the title deed show that parcel 5070 was a sub-division of parcel 4738 which sub-division occurred on 3rd June, 2010. One would therefore wonder how a title number generated on 3rd June, 2010 would be the one appearing on a 1993 transfer form. It is equally baffling how the Plaintiff who was a subsequent purchaser after one Johnson Ongoto Mogesa would be the one who executed the transfer form on 14th September 1993.



23. The only inference that can be drawn is that the Applicant is right in his averment that the Plaintiff/2nd Respondent and the Defendant/1st Respondent could have acquired the suit properties through illegal subdivisions that occurred years after the death of original owner and without a succession process taking place.
24. Having made a finding that the title documents that the Respondents hold are not legal, it follows that the consent judgment was vitiated by illegality. The Respondents clearly did not acquire a good title over the suit property and it is in the interest of justice that it be set aside or vacated.

Whether the execution of the decree emanating from the consent judgment should be stayed

25. Having found that the consent judgment ought to be set aside, it goes without saying that the same cannot be executed and thus the execution is also stayed.

Conclusion

26. From the foregoing, I find that the application by the Interested Party is merited and therefore the same is allowed as prayed with costs to the Applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF MAY, 2022.

J.M ONYANGO

JUDGE

