



**Chesiyna v Njeru & 3 others (Environment & Land Case  
544 of 2016) [2022] KEELC 2302 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2302 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 544 OF 2016**

**JM MUTUNGI, J**

**JUNE 30, 2022**

**BETWEEN**

**JEBET CHEBII CHESIYNA ..... PLAINTIFF**

**AND**

**DOMIZIANO KABURU NJERU ..... 1<sup>ST</sup> DEFENDANT**

**RUTTO CHEBII CHESIYNA ..... 2<sup>ND</sup> DEFENDANT**

**CHEPKWONY KAPTEN CHESIYNA ..... 3<sup>RD</sup> DEFENDANT**

**AMELIA JEPTOO CHESIYNA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me for determination is the proposed 2<sup>nd</sup> to 4<sup>th</sup> defendants/applicants Notice of Motion application dated October 6, 2021 filed in court on the same day and made under Articles 156 (4)(a) & (b) & (6), 159 (2)(d) and 162 (1), (2)(a), (3) of *the Constitution* of Kenya. The proposed 2<sup>nd</sup> to 4<sup>th</sup> defendants/applicants in the application sought the following orders:
  - (1) ...Spent
  - (2) That Rutto Chebii Chesiyna, Chepkwony Kaptan Chesiyna, Amelia Jeptoo Chesiyna be enjoined as a 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants respectively in the suit.
  - (3) ...Spent
  - (4) That this court be pleased to set aside/review the orders issued on November 25, 2020.
  - (5) Costs of this application be provided for.
2. The application was supported on the grounds set out in the body of the application and the supporting affidavit sworn by Rutto Chebii Chesiyna, Chepkwony Kaptan Chesiyna & Amelia Jeptoo



- Chesiyna. They averred that the suit touched on the management of the estate of Elisha Chebii Chesiyna (deceased) which matter came to an end with the consent order issued on November 25, 2020. They also averred that they are beneficiaries of the estate of Elisha Chebii Chesiyna (deceased) and that they had not authorized the plaintiff herein to take out letters of Administration Ad Litem to deal with this matter. They averred further that they are now seeking to set aside the consent order entered into on 25<sup>th</sup> November 2020 on the grounds of concealment of facts and also be enjoined in the suit.
3. They averred that the plaintiff herein was paid by the defendant Kshs 8,300,000/= which was not authorized by the estate of Elisha Chebii Chesiyna leaving a balance of Kshs.3,400,000/= out of Kshs 11,700,000/=. The 2<sup>nd</sup> to 4<sup>th</sup> proposed defendants averred that Elisha Chebii Chesiyna (deceased) bought 15 acres from the 1<sup>st</sup> defendant and sold the property to purchasers that include Diana Chesaro, Dominic Oganda among others who were not involved in the making of the consent entered into on November 25, 2020.
  4. The 1<sup>st</sup> Defendant Domiziano Kaburu Njeru filed a Replying Affidavit sworn on November 1, 2021. He deposed that he remitted the sum of Kshs 8,300,000/= to the plaintiff on December 28, 2020 and that there is no aspect of the judgment that is pending execution. He deposed further that the applicants ought to seek for the plaintiff to account for the funds that had been received. He deposed that the deceased had no capacity to sell the property as he had not paid the entire purchase price and therefore the 3<sup>rd</sup> parties ought to seek a refund of the purchase price they had paid from the estate of the deceased. He further deposed that the application had been brought after an inordinate delay of eleven months.
  5. The plaintiff/respondent filed a Replying Affidavit sworn on November 1, 2021. She deposed that she is the eldest child of the late Elisha Chebii Chesiyna (deceased) who was the initial plaintiff in this matter and had been granted Letters of Administration Ad Litem to continue with the suit after the demise of Elisha Chesiyna. She deposed further that the late Elisha Chebii Chesiyna had several properties and that there has been several succession proceedings commenced after his death by her step brothers, step sisters and step mothers. She deposed that the funds she obtained in this matter were used to pay for the funeral expenses of the deceased among other expenses. She deposed that the applicants have not established any basis for setting aside the consent entered on 25<sup>th</sup> November 2020.
  6. The Plaintiff also filed grounds of opposition dated 2<sup>nd</sup> November 2021 in addition to the replying affidavit as follows:
    1. That the application is hopelessly muddled and fatally defective.
    2. That the plaintiff has filed an application in Nakuru Succession Cause No. 26 of 2020 to have Kajiado Succession Cause No. 56 of 2020 consolidated in the Nakuru Succession Cause No. 26 of 2020 a matter which relates the Estate of Elisha Chebii Chesiyna and has been determined as the Petition to hear all matters in the Estate of Elisha Chebii Chesiyna.
    3. That, in any event, no basis has been put forth to warrant the re-opening of the suit which was settled by the order of court dated November 25, 2020 marking the matter closed removing the court's jurisdiction in the matter and the deponents of the affidavit in support of the proposed defendants' application dated October 6, 2021, only relief is in succession cause No 26 of 2020 this matter being an application anchored purely on the basis of the succession cause aforementioned herein.



4. THAT the proposed Defendant's present application is frivolous, vexatious, an abuse of the court process and an attempt to reopen a suit that has already been disposed of which the proposed Defendants are now notorious for.
5. That the application is a misplaced attempt to keep this matter alive for no apparent reason, other than to keep the said defendants under perpetual litigation, despite the escalating costs hence the application is otherwise untenable and should ipso facto be dismissed with costs.
7. The proposed 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed their submissions dated February 22, 2022 on the same date. On whether the proposed defendants should be joined in the suit, it was submitted that they have a stake in the suit property as the biological children of the late Elisha Chebii Chesiyana and no succession proceedings have been filed and no administrator has been appointed. They relied on the case of *Pravin Bowry v John Ward & Another* [2015] eKLR where the court cited with approval the case of *Deported Asians Property Custodian Board v Jaffer Brothers Ltd* [1991] 1 EA 55 (SCU) where the court stated as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter...

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be enjoined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.
8. They also relied on other cases and submitted that no authority was given to the plaintiff to enter into the consent and receive the sum of Kshs.8,300,000/= and therefore the court has the power to set aside the consent order if it is shown to have been based on an agreement induced by misrepresentation. They relied on the Court of Appeal of Tanzania's decision in the case of *Tang Gas Distributors Ltd v Said & others* [2014] EA 448 and submitted further that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings even after judgement where damages are yet to be assessed.
9. On whether the issue of irregular representation may invalidate a suit, the proposed defendants submitted that the plaintiff's advocates were not lawfully on record as they did not serve a notice of change of advocates on the advocates of the late Elisha Chebii Chesiyana and relied on Order 9 Rule 9 of the *Civil Procedure Rules 2010*. They submitted that the failure to comply with Order 9 Rule 9 makes the consent judgement before the court incompetent.
10. On whether the matter should be handled in the succession matter of the estate of Elisha Chebii Chesiyana, it was submitted that there are several succession matters filed for the administration of the estate of Elisha Chebii Chesiyana but there is no administrator in place and that since the family is still litigating, the property in issue is at risk of being wasted by the plaintiff. They concluded their



submissions and prayed that it is in the interest of justice to set aside the orders issued and hear the parties inter-parties.

11. The plaintiff in her submissions filed on March 10, 2022 submitted that she was granted Letters of administration Ad Litem and was therefore authorized to conduct matters on behalf of the estate of the deceased. She submitted further that the proposed defendants/applicants do not have the legal capacity to institute this proceeding. The plaintiff relied on Section 54 and 67 of the [Law of Succession Act](#) and submitted that this court does not have the jurisdiction to hear and determine the present application as there are succession matters pending in the High Court which is the proper forum for it. On whether the consent order dated November 25, 2020 should be set aside, the plaintiff relied on the case of *Broke Bond LieBig (T)Ltd v Mallya* [1975] EA 266 where the Court of Appeal set out the circumstances in which a judgement freely entered into by parties can be set aside:

“prima facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud, or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

12. The plaintiff went on to submit that the proposed defendants/applicants have not met all the elements in order for the consent order dated November 25, 2020 to be set aside.
13. The defendant filed his submissions dated February 14, 2022 on March 30, 2022 and submitted that no aspect of the judgement is pending execution and that the applicants should be seeking for the plaintiff to account for the funds remitted to her which is an issue which he should not be involved in. He concluded his submissions by stating that it would not serve the ends of justice to revive the matter as there are other remedies available that do not necessitate the setting aside of the judgement.

### **Analysis and Determination**

14. After considering the application, the affidavits filed, grounds of opposition and the submissions, the main issues for determination are whether the applicants herein should be joined as parties to the suit and whether the consent order entered into by the plaintiff and the defendant should be set aside.
15. I will first address the issue of whether the applicants should be joined as defendants in the suit. Order 1 Rule 3 of the Civil Procedure Rules provides as follows:

(3) All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

16. Order 1 Rule 10(2) of the Civil Procedure Rules 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.



17. The applicants in this matter seek to be joined in the suit as defendants and have the consent order that was entered into by the plaintiff and the defendant that settled the matter set aside.
18. The court in the case of *Jacinta Wanjiru Mwendwa v Samwel Theuri & 3 others* [2019] eKLR stated as follows:
  - “9. It will be seen from Order 1 Rule 3, that the court may order the joinder of a person as defendant if there is a claim against him arising out of the same act or transaction complained of or if a separate suit were brought against him it will bring common questions of law or fact as in the existing case. It should however be noted that the joinder of the person as defendant in this instance must be in relation to a claim made against him by the plaintiff, for if it were not the case, he would not be defendant. The very presence of a person as defendant implies that the plaintiff has a case against him.
  10. With regard to Order 1 Rule 10 (2), it will be noted that the court has discretion to order the name of a person to be removed from proceedings or to be added to the proceedings, either as plaintiff or defendant, or the joinder of a person whose presence the court feels is necessary for the determination of all questions in the suit. Now, the court will only enjoin a person as defendant if the court feels that the plaintiff has a claim against such person, and as I have explained above, you cannot be defendant if there is nothing that the plaintiff has against you. Before giving the order to enjoin a person as defendant, the court must thus be satisfied that the plaintiff has a claim against such person, for you would not wish for a situation where a person is enjoined as defendant, but there is really nothing that the plaintiff has against such person. It is the same thing where a person is enjoined as plaintiff. The court must be satisfied that such person has a claim similar to what the existing plaintiff has against the existing defendant.”
19. As noted before, the applicants want to be enjoined in this suit as defendants on the grounds that they are beneficiaries of the estate of Elisha Chebii Chesinya who was the initial plaintiff in the matter before he died. The applicants allege that they did not authorize Jebet Chesinya to take out letters of administration Ad Litem on behalf of the estate of Elisha Chebii Chesinya in respect to this suit which led to the consent order entered into on November 25, 2020.
20. The applicants further allege that the plaintiff in making the consent with the defendant prejudiced the estate of the late Elisha Chebii Chesinya and it is on this basis that they are seeking to be enjoined.
21. As was held in the case of *Jacinta Wanjiru Mwendwa -vs- Samwel Theuri & 3 others* (supra), parties can only be enjoined in a matter as defendants if there is a claim against them arising out of the same transaction. Therefore, a party can only be a defendant if the plaintiff has a cause of action against him or her and seeks some relief against such a person.
22. In this matter, it is quite clear that the plaintiff has no cause of action against the applicants who are siblings and children of the late Elisha Chebii Chesinya who was the initial plaintiff. The applicants have indicated that they have disputes amongst themselves which have led to the filing of various succession matters that include Nakuru Succession Cause No 26 of 2020, Kajiado Succession cause No. 56 of 2020 and Nairobi Succession Cause No. 1052 of 2020. It is thus evident that the dispute between the applicants and the plaintiff relates to administration of the deceased estate and hence the matters in dispute fall within the province of the succession court and not this court.



22. In the instant matter, following the approval and adoption by the court of the consent by the parties dated November 17, 2020, the present matter and Nakuru ELC Case No.21 of 2016 were fully compromised. The court files were ordered closed with the parties bearing their own costs of the cases. The plaintiff in the instant case as observed would have no claim and/or seek any relief against the applicants if they were to be joined as defendants in the case. A plaintiff cannot be saddled with a defendant against whom he has no claim and against whom he seeks no relief. The applicants appear to have had issues with the Ad litem grant issued to the plaintiff to represent the deceased estate in these proceedings. At the time the consent was made, the Ad litem grant issued to the plaintiff was valid and had not been revoked. The plaintiff was seized with the necessary and appropriate authority to represent the deceased estate. If the applicants had an issue with the Adlitem grant, that was an issue to be dealt with by the succession court and not this court.
23. In my view the applicant have not made out a case to warrant their joinder as parties in the instant suit and I accordingly disallow their application to be joined as defendants in the suit. As the applicants have failed to satisfy the court that they have a basis to be joined as parties to the suit, there is no basis for me to consider the other limb of their application seeking to have the court order granted on November 23, 2020 set aside and/or reviewed. The application is for dismissal and I order the same dismissed. The parties shall bear their own costs of the application.
24. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS DAY OF 30TH DAY OF JUNE 2022**

**J M MUTUNGI**

**JUDGE**

