



**Mutia v Kinyumu & another; Mutemi (Interested Party) (Environment & Land Case E002 of 2021) [2022] KEELC 2726 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2726 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND CASE E002 OF 2021**

**LG KIMANI, J  
JUNE 21, 2022**

**BETWEEN**

**TEMI MUTEMI MUTIA ..... APPLICANT**

**AND**

**ESTHER MUNZAU SIMON KINYUMU ..... 1<sup>ST</sup> RESPONDENT**

**JEREMIAH MASAKU KINYUMU ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**TABITHA MUTEMI ..... INTERESTED PARTY**

**RULING**

1. The intended interested party's notice of motion application dated November 29, 2021 is brought under articles 3, 10, 20, 22, 23, 27, 40, 48, 50 (1) and 60 of the Constitution of Kenya 2010, section 1A, 1B and 3A of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules 2010, seeking for orders:
  1. Spent
  2. That this honourable court be and is hereby pleased to join the intended interested party to the present suit by ensuring the expeditious disposal of the joinder application filed herein.
  3. That this honourable court be pleased to order that the title currently being held by the respondents for all that property known as Mwingi/mwingi/298 be duly registered in the joint names of the plaintiff, Temi Mutemi Mutia and the intended interested party, Tabitha Mutemi.
  4. That pending the hearing and determination of this suit, the honourable court be pleased to grant a temporary injunction restraining the parties herein from any further dealings, sale, transfer and/or developments on the property known as Mwingi/mwingi/298.



5. That this honourable court be pleased to declare the sale agreement dated April 8, 2000 as invalid and bad in law, and consequently order that a new sale agreement be drawn in the Intended interested party's name.
  6. Any other order that this honourable court deems fit and just in the interest of justice.
2. The grounds relied upon are that the plaintiff is her estranged husband, having finalized their divorce sometime in the year 2014. She claims that they were married in 2000 and purchased from the Defendants all that property known as Mwingi/Mwingi/298 for a consideration of Ksh 150,000 and not Kshs 200,000 as stated by the Plaintiff. She averred that they never received completion documents that despite several restraining orders, the plaintiff started to develop the land from about the year 2019 with the intention to defraud the intended interested party. She alleged in her supporting affidavit that the defendants and the plaintiff colluded to draft a forged sale agreement dated April 8, 2000.
  3. The intended interested party confirmed that there is a pending matrimonial property cause before the High Court of Garissa HCCC 1 of 2019 (OS) which was later transferred to Kitui Law Courts. It is her averment that she contributed greatly to the purchase and maintenance of the suit property, hence has an identifiable stake and deserves to be joined in this suit.
  4. The main suit is a claim by the plaintiff that he bought the suit property from the defendants via an agreement for sale dated April 8, 2000, but they refused to effect transfer of the suit property to him and threatened to evict him despite him being in quiet possession of the same for more than 20 years since the year 2000. He therefore seeks an order compelling the defendants to sub-divide the suit property as per the terms of the agreement, a permanent injunction restraining the defendants from interfering with the suit property and compensation for loss and damage thereof.

**The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Replying Affidavit and submissions on the Intended Interested Party's Application**

5. The defendants filed a joint replying affidavit and agreed with the intended interested party that there is no agreement for the sale of Mwingi/Mwingi/298 at all and that the one exhibited is a forgery. They also averred that they did not sell the suit property to the plaintiff nor to the intended interested party at all.
6. In addition to the replying affidavit, the defendants also filed written submissions to the effect that they did not sell the suit property and that what actually happened is that on the April 8, 2000, the Intended interested party and the plaintiff came to their home and requested them to give them a place to start a temporary business after which they will leave the premises to them.
7. They also pointed out the discrepancies between the plaintiff's averment that the plaintiff bought the land for the sum of Ksh.200, 000 while the intended interested party states that it was bought for a sum of Ksh.150, 000. It is their submission that the agreement for Sale dated April 8, 2000 was a fraud and was written by the Plaintiff without their knowledge and they denied signing the said agreement. They therefore submit that the application is full of falsehood, fraud, hearsay and an afterthought and ought to be dismissed with costs.

**Notice of Preliminary Objection by the Plaintiff**

8. The plaintiff filed a notice of preliminary objection dated January 11, 2022 objecting to the intended interested party's notice of motion application on the following points:
  1. That this honourable court lacks proper and requisite jurisdiction to hear and determine the sub-stratum and gravamen of the intended interested party's application for the reason that the



same raises issues of matrimonial property, which issues can only be determined by the High Court, Family Division and not this Honourable Court whose special jurisdiction is limited to determining substantive land rights.

2. That the application seeks orders that the sale agreement dated April 8, 2000 between the plaintiff and the defendants be declared invalid and that the court do order a new sale agreement be drawn in the name of the intended interested party which prayers are invalid, unavailable and unknown in law and extend beyond the powers of the court for reason inter alia that the same contravene the trite principle of privity of contract.
  3. That the intended interested party lacks the locus standi to sue on the issue before court and more particularly, on the question of the transaction giving rise to the suit before court and accordingly, her grievances are premature and anticipatory.
  4. That the tenor and true effect of the application, were it to be granted, would be the amendment of the plaintiff's suit in its totality, which action has no basis or provision under any law and which would result in unwarranted convolution of the case.
  5. That the effect of the application would be a shift of the proceedings from issues of contract and substantive land rights to matrimonial causes resulting in the unnecessary delay of the hearing and determination of the plaintiff's case in contravention of the overriding objectives under section IA and 1B of the *Civil Procedure Act* cap 21, Laws of Kenya and article 159 2(b) that requires justice be done without delay.
9. The background to the Preliminary objection is that counsel for the intended interested party filed an application under certificate of urgency dated November 29, 2021 seeking for, among other orders to join the intended interested party to the suit and a temporary injunction.

#### **The Plaintiff's Submissions on the Preliminary Objection and the Interested Party's application dated 29/11/2021**

10. Regarding the first objection whether this court has proper and requisite jurisdiction to entertain the intended interested party's application and whether she lacks the locus standi to seek the said orders the plaintiff's counsel states that as a former wife the applicant's interests in the suit property can only be examined by the high court which is the court clothed with the jurisdiction to handle matrimonial property issues. It is their submission that *the Constitution* did not intend this honourable court to hear and determine issues and disputes outside the environment, use, occupation and title to land as per article 162(2) b and the *Environment and Land Court Act*, 2011.
11. On the issue of locus standi, the Plaintiff submitted that the intended interested party was not and has never been a party to the agreement for the sale of land giving rise to this suit and submitted on the doctrine of privity of contract while relying on the holding in *Savings & Loan (K) Limited vs Kaanyenje Karangaita Gakombe & another* (2015) eKLR as cited in *Kenya Women Finance Trust vs Bernard Oyugi Jaoko & 2 others* (2018) eKLR.
12. Secondly the plaintiff submitted that the intended interested party made a prayer to invalidate the sale agreement which she is not party to. He stated that the applicant's grounds do not constitute a vitiating factor to invalidate a sale agreement. They cited the case of *African Cotton Industries Limited vs Rural Development Services Limited* (2021) eKLR where the court held that vitiating factors in a contract are those factors that will cripple or invalidate a contract such as mistake, duress, misrepresentation, undue influence, illegality, unconscionable contracts, fraud, insanity, lack of capacity and void agreements.



13. Thirdly, the plaintiff submitted that there is no justifiable cause for the suit property to be registered in both names of the plaintiff and the intended interested party. This is because the issue of contribution which is not within the court's jurisdiction is yet to be determined in order for the alleged matrimonial property to be sub-divided. It is his submission that the prayers are anticipatory and the applicant is pre-empting this honourable court.
14. On the question of whether the intended interested party should be admitted as a party to this suit, the plaintiff cited the case of *Communication Commission of Kenya & 4 others vs Royal Media Services Limited & 7 others* (2014) eKLR where the Supreme Court quoted the Mumo Matemu Case where it was held that an interested party is one who has a stake in the proceedings even though he or she was not a party to the cause ab initio.
15. The plaintiff also cited the case of *Meme v. Republic* (2004) 1 EA 124 where the court held that a party could be joined in a matter for the reasons that his presence will result in the complete settlement of all the questions involved in the proceedings; to protect the rights of a party who would otherwise be adversely affected in law and to prevent a likely course of proliferated litigation. The plaintiff also quoted Mativo J's holding in the case of *Kenya Medical Laboratory Technicians and Technologists Board & 6 others vs Attorney General & 4 others* (2017) eKLR where it was stated that the test is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.
16. It is therefore the plaintiff's submission that the intended interested party was never a party or a witness to the agreement giving rise to this suit, neither does she have stake in the suit without having established her contribution in the right forum. That the joinder of the intended interested party will not result in the complete settlement of all the questions involved in the proceedings as she is not privy to the agreement giving rise to the suit and shall not be adversely affected by the orders of this court and therefore the intended interested party does not meet any of the conditions or threshold set to be admitted as a party.
17. Lastly, regarding whether the court should grant the temporary injunction sought for by the Intended interested party, the plaintiff submitted that the intended interested party does not have interest in the said suit to warrant the issuance of such orders and in any case, there are already interim orders barring the sale or transfer of the suit property pending the final determination of the suit.

#### **The Intended Interested Party's submissions**

18. The intended interested party filed submissions and addressed only one issue of whether the intended interested party has an identifiable stake or legal interest in the current court proceedings. She cited rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013 and rule 25 of the *Supreme Court Rules* 2012 which define an interested party as a party or entity that has an identifiable stake or legal interest or duty in the proceedings.
19. Counsel for the intended interested party cited the cases of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2015] eKLR and *Francis Karioko Muruatetu vs Republic* (2016) eKLR where the Supreme Court set forth the criteria for joinder of an interested party.
20. They stated that in such an application, the court must take note the personal interest that the party has to the case, the prejudice to be suffered by the party in case of non-joinder and the party must set out the case that it intends to make to the court.
21. It is their submission that the intended interested party clearly contributed to the purchase of the suit property Mwingi/mwingi/298 and shall therefore suffer great prejudice if not joined to the suit and the matter is concluded in their absence. They therefore pray for their application for joinder to be allowed.



## Analysis and Determination

22. I have considered the application dated November 29, 2021, the replying affidavit by the defendants, the preliminary objection raised by the plaintiff and the submissions filed by all the parties. The court directed that the preliminary objection be heard at the same time as the application dated November 29, 2021. In my opinion, the following issues arise for determination in both the intended interested party's application and the plaintiff's preliminary objection:
- A) Whether the preliminary objection raises pure points of law and whether the court has jurisdiction to determine the intended interested party's application.
  - B) Whether the applicant has locus standi to move this court on the issues before the court and whether the intended interested party should be joined as a party to this suit.
  - C) Should the court grant the other orders sought by the intended interested party?

### **A. Whether the preliminary objection raises pure points of law whether the Court has jurisdiction to determine the Intended Interested Party's Application?**

23. The preliminary objection raised by the plaintiff is on the ground that the court lacks jurisdiction to hear the intended interested party's application for the reason that the application raises issues of matrimonial property, which issues can only be determined by the high court, family division. He claims that this court's special jurisdiction is limited to determining substantive land rights.
24. The test of the true definition of a preliminary objection was well set out in the case of *Mukbisa Biscuit Manufacturing Co. Ltd. - v- West End Distributors Limited*, (1969) EA 696, defined a preliminary objection as follows;
- “.....a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”
25. The above position was confirmed and followed in the case of *Oraro vs. Mbaja* (2005) I KLR 141
26. The land subject matter of this suit is land parcel number Mwingi/Mwingi/298 which is registered in the name of Esther Munzao Simon Kinyumu and Jeremia Masaku Kinyumu the defendants herein. The plaintiff claims that by an agreement for sale dated April 8, 2000 which is attached to his application dated October 21, 2021, he purchased the suit land from the defendants. The intended interested party, however, claims that this agreement is a forgery. She further claims that they purchased the land from the defendants jointly with the plaintiff. The defendants on the other hand deny ever selling the land to either the plaintiff or the intended interested party individually or jointly. The question of ownership of the suit land is therefore highly contested. At this point in time the land cannot be said to be matrimonial property as claimed by the Plaintiff as the issue of ownership is pending determination. It is the court's determination that the issue of ownership of the suit land can only be determined after trial upon hearing evidence from all parties. I therefore find that the objection



raised on the ground of the court's jurisdiction is blurred with factual details that are contested and in any event, to be proved through the processes of adducing evidence. It is thus not purely a matter of law and fails the test of what constitutes a preliminary objection.

27. Further it is the courts view that the Jurisdiction of a court flows from either the Constitution or legislation or both. In the case of the Environment and Land Court its jurisdiction is set out in written law; the starting point is article 162(2)(b) of the Constitution of Kenya 2010, which provides that this court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this court as follows:

“(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 law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes—

- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) 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 interests in land; and
- (e) any other dispute relating to environment and land.”

28. I find that in so far as the dispute herein relates to purchase and/or sale of land owned by the defendants by the plaintiff either alone or jointly with the intended interested party the dispute falls within the jurisdiction of this court.

29. In addition if rights to matrimonial property are in dispute, section 17 of the Matrimonial Property Act of 2013 provides as follows:

“(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

- (a) shall be made in accordance with such procedure as may be prescribed;
- (b) may be made as part of a petition in a matrimonial cause; and
- (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

30. In the case of Jane Wambui Ngeru v Timothy Mwangi Ngeru [2015] eKLR the court held :-

“No particular court is identified by the Act, and can therefore be any court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under article 165(3).



The Marriage Act of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are resident magistrate's courts and within the limits provided under the law as to their jurisdiction.

It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this court. The only limitation applicable to this court is that it can only hear such disputes if they involve or relate to land."

31. Further while determining the jurisdiction of the ELC court to hear a suit relating to matrimonial property it was held in the case of *B W M v J M C* [2018] eKLR

"For avoidance of doubt, the Court notes that the *matrimonial Property Act* does not define the Court that disputes relating to the matrimonial property disputes should be referred for determination. It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this court. The only limitation applicable to this court is that it can only hear such disputes if they involve or relate to occupation use and title to land. I find nothing to oust the jurisdiction of this court and I proceed to determine the preliminary objection"

32. It is thus the legal position that the mere fact that the subject matter of the suit is matrimonial property does not oust the jurisdiction of this court

**B) Whether the Applicant has locus standi to sue on the issues before the court and whether she should be joined as a party to this suit.**

33. The rules governing joinder of a party are found in order 1(10) of the *Civil Procedure Rules* which Provides that;

"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."

34. The Black's Law Dictionary defines an "interested party" as "A party who has a recognizable stake (and therefore standing) in the matter." It also defines a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings." An interested party is someone who is identified as being directly affected by the case (in particular, the relief that may or may not be granted by the court depending on whether it finds for or against the claimant. (Mativo J. in *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR).

35. The courts have pronounced themselves extensively on joinder of parties to a suit. The Court of Appeal in *Civicon Limited v Kivu Watt Limited & 2 others* [2015] eKLR quoted as such:

"In the case of *Gurtner vs Circuit* (1968) 1 All ER 328 it was held that , a party may be enjoined if he can demonstrate that any order in the action would directly affect him either legally or financially. (Denning, M.R.) stated thus:



“...The bureau clearly had a commercial interest in resisting the declaration; but that is not enough. John Stephenson J accepted the analysis of the rule and the many previous decisions under it contained in the exhaustive judgment of Devlin, J., in *A Amon vs Raphael Tuck & Sons, Ltd.* (1956) 1 All ER 273 and took the view that the court had no jurisdiction to add a party against the will of the plaintiff unless the person seeking to be added was:

“...at least able to show that some legal right enforceable by him against one of the parties to the action or some legal duty enforceable against him by one of the parties to the action will be affected by the result of the action...”

...The only reason which makes it necessary to make a person a party to an action is so that he may be bound by the result of the action, and the question to be settled therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party...”

Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained.”

36. Having assessed the intended interested party’s claim that she was married to the plaintiff herein (which is evidenced by their marriage certificate) and that she made contributions to the purchase of the suit property and further considering that the suit herein is not between the applicant and the plaintiff but involves the defendants who are the alleged sellers of the land, I am of the opinion that the proposed interested party will be bound by the final decision of this court. The applicant has also stated that she is aware about the details of the purchase of the suit property and the consequent development thereof. This is in my opinion a party 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, according to order 1 rule 10 of the *Civil Procedure Rules* (2010).

37. In *Pravin Bowry v John Ward and another* [2015] eKLR the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The court referred to the Ugandan case of *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A. 55 (SCU) where the court stated as follows:

“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 joined 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.”

38. The supreme court has also made pronouncements on the qualifications for a party to be admitted as an interested party in a suit in the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR where the court stated-

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be



well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause”

39. I find that in line with the above findings of the Court of Appeal in the Pravin Bowry and the Supreme court of Kenya in Mumo Matemo case, the intended interested party has shown that she has a stake in these proceedings and will be affected by any outcome of the suit herein for the reason that if the suit is dismissed she will have lost a property she claims to have an interest in by way of purchase and development jointly with the plaintiff. In the event that the plaintiff wins and taking into consideration the prayers in the plaint the suit property will have been adjudged as owned by the plaintiff solely. I have further taken into consideration the parties varying statements on the validity of the agreement for sale of the suit land and find that that the presence of the intended interested party in the suit is necessary for effectual and complete settlement of all questions in the suit. I find that the applicant has shown that the orders which the plaintiff seeks in the suit, would legally affect her interests, and further that it is desirable, for avoidance of multiplicity of suits, to have the Applicant joined so that she is bound by the decision of the court in this suit. Further the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. It is therefore necessary to make the interested party a party to this suit even though she was not a party to the agreement for sale exhibited in court by the plaintiff.
40. The Plaintiff claims that the applicant has no locus standi to claim the suit land for the reason that she was not a party to the agreement of sale dated August 8, 2000 and that the doctrine of privity of contract applies. I have found elsewhere in this ruling and this is clearly stated by the applicant that she was not a party to the said sale agreement and that indeed she claims that the agreement was a fraud. This position has also been taken by the defendants. I have considered that the application before me is an interlocutory one and certain issues ought to remain for determination after the trial. One of the issues is whether there exists a legally binding agreement for sale of the suit land, the parties to the agreement, if any and their rights under the said agreement, if at all. I have further considered that in any event if the property is found to have been purchased by the plaintiff or the interested party either jointly or individually, the same will become the subject of consideration under the *Matrimonial Property Act* or the question of privity of contract will be an issue for consideration after the trial.

#### **B. Should the Court grant the other orders sought by the Intended Interested Party as prayed for?**

41. The other orders that the intended interested party has sought are in summary that the title currently being held by the respondents for the suit property Mwingi/mwingi/298 be duly registered in the joint names of the plaintiff and the intended interested party, an order for the court to grant a temporary injunction restraining the parties herein from any further dealings, sale, transfer and/or developments on the property known as Mwingi/mwingi/298 and that the court declare the sale agreement dated April 8, 2000 as invalid and bad in law, and consequently order that a new sale agreement be drawn in the intended interested party's name.
42. In my view, prayer number 3 is incapable of being granted at this point in time. The court cannot register the plaintiff and the interested party as the owners of the suit property without determining the question of sale, or lack thereof of the suit property. This issue can only be determined at the full hearing of the suit. Similarly, the court cannot make an order to have the intended interested party be registered as a joint owner of the suit property before a full trial is conducted establishing the rights of all the parties to the dispute.
43. Regarding prayer number 4 seeking an order for the court to grant a temporary injunction restraining the parties herein from any further dealings, sale, transfer and/or developments on the property known



as mwingi/mwingi/298, this issue has already been dealt with by the order of this court that status quo be maintained pending the hearing and the determination of the plaintiffs application dated October 21, 2021.

44. Regarding Prayer number 5 seeking a declaration that the sale agreement dated April 8, 2000 as invalid and bad in law, and consequently order that a new sale agreement be drawn in the intended interested party's name, the prayer is incapable of being granted first because the court is yet to make its final determination on the question of validity of the sale agreement, which question can only be determined after a full hearing of the suit. Secondly, the courts cannot order a new agreement for sale to be drawn up in the name of the Interested party as it is trite in law that court of law cannot rewrite a contract on behalf of parties. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503, (2011) eKLR the Court of Appeal stated as follows: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

45. In view of the above, I am of the view that the preliminary objection raised by the plaintiff fails the legal test of what constitutes a true preliminary objection since all grounds relied upon deal with factual aspects of the case calling for proof, or which would require adducing of evidence for authentication. I further find that this court has the requisite jurisdiction to hear and determine the application dated November 29, 2021 and the issues of ownership of the suit land as raised by all the parties including the intended interested party. I therefore find that the Notice of preliminary objection dated January 11, 2022 lacks merit and the same is hereby dismissed.
46. I further find that the Intended interested party's application dated November 29, 2021 succeeds only to the extent that she may be enjoined as an interested party but fails on all the other prayers.

#### **Final orders**

- A. The notice of preliminary objection dated January 11, 2022 lacks merit and is hereby dismissed.
- B. The application dated November 29, 2021 is disposed of as follows:
- i. The applicant Tabitha Mutemibe and is hereby joined to this suit as an Interested Party.
  - ii. Prayers 3, 4, 5 and 6 of the application are hereby dismissed.
  - iii. There will be no orders as to costs

**DELIVERED, DATED AND SIGNED AT KITUI THIS 21<sup>ST</sup> DAY OF JUNE 2022**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

**Ruling read in open court in the presence of-**

C. Nzioka Court Assistant

Odongo Advocate holding brief for Gichuhi for the Intended Interested Party/Applicant

Sichangi Advocate for the Plaintiff/Respondent

Jeremia Masaku Defendant in person

