



REPUBLIC OF KENYA



Githatu & 8 others v Kihara & 9 others; Njora & 19 others (Interested Parties) (Environment and Land Case Civil Suit 742 of 2017) [2022] KEELC 3539 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 742 OF 2017**

OA ANGOTE, J

JUNE 9, 2022

BETWEEN

**MATHINI GITHATU 1ST PLAINTIFF
FRANCIS ICHANGAI NGUGI 2ND PLAINTIFF
SHADRACK CHEGE MWANGI 3RD PLAINTIFF
DR. GANRIEL G. MBUGUA 4TH PLAINTIFF
PETER KIRIKA 5TH PLAINTIFF
STEPHEN NJENGA NGUGI 6TH PLAINTIFF
NANCY WAMAITHA KINUTHIA (SUING AS THE REPRESENTATIVE OF
ESTATE OF KINUTHIA NUNUA) 7TH PLAINTIFF
NGATHO KAIRO 8TH PLAINTIFF
ESTHER WAMBUI NDERI (SUING AS THE REPRESENTATIVE OF ESTATE OF
NDERI MBUTIRI) 9TH PLAINTIFF**

AND

**WAWERU KIHARA 1ST DEFENDANT
STEPHEN KARANI 2ND DEFENDANT
GABRIEL NJOROGE NGUGI 3RD DEFENDANT
MACHARIA MUCHINGI 4TH DEFENDANT
PETER GITHUKU MURAGURI 5TH DEFENDANT
MUNGAI MBUTIRI 6TH DEFENDANT
KENYA COMMERCIAL BANK 7TH DEFENDANT**



EQUITY BANK LIMITED 8TH DEFENDANT
NATIONAL BANK OF KENYA 9TH DEFENDANT
NATIONAL LAND COMMISSION 10TH DEFENDANT

AND

JAMES KIMANI NJORA INTERESTED PARTY
ZIPPORAH WAIRIMU WANJOHI INTERESTED PARTY
VIRGINIA WANGARE WAWERU INTERESTED PARTY
DAVID GITAU GACHIMU INTERESTED PARTY
VIRGINAI MUGURE MAINA INTERESTED PARTY
PATRICK WAGATU RWANDA INTERESTED PARTY
GABRIEL GATHINGU NDUNGU INTERESTED PARTY
CHARLES MUGAMBI GITHENYA INTERESTED PARTY
PETER KAMAU MAINA INTERESTED PARTY
ESTHER NJOKI WAITITU INTERESTED PARTY
GRACE NJERI GAKWA INTERESTED PARTY
VIRGIANIA MUGURE WAITITU INTERESTED PARTY
JAMES NJUGUNA GITAU INTERESTED PARTY
ROSEMARY GATHOG'O INTERESTED PARTY
ANDREW MAINA MWANGI INTERESTED PARTY
IBRAHIM NDUNGU MWANGI INTERESTED PARTY
LEAH GATHONI MWANGI INTERESTED PARTY
ALBERT MBUGUA MUGWIRA INTERESTED PARTY
JORAM WACHIRA THIONGO INTERESTED PARTY
GILBERT MWANGI MACHARIA INTERESTED PARTY

RULING

1. In the Notice of Motion dated August 4, 2021, the intended Interested Parties have sought for the following orders;
 - a. The Honourable court be pleased to enjoin Zipporah Wairimu Wanjohi, David Gitau Gachimu, Virginal Mugure Maina, Patrick Wagatu Rwanda, Gabriel Gathingu Ndungu, Charles Mugambi Githenya, Peter Kamau Maina, Esther Njoki Waititu, Grace Njeri Gakwa, Virgiana Mugure Waititu, James Njuguna Gitau, Rosemary Gathog'o, Andrew Maina Mwangi, Ibrahim Ndungu Mwangi, Leah Gathoni Mwangi, Joram Wachira Thiongo, Albert Mbugua Mugwira, Gilbert Mwangi Macharia, James Kimani Njora, Virginia Wangare Waweru Party as parties to this suit.



- b. Costs of the application be provided for.
2. The application is premised on the grounds that the intended Interested Parties are innocent purchasers for value of some plots which were hived from the subject property registered as Land Reference number 13166 I.R 27109 situated in Kahawa West which were sold to them by various individual beneficiaries.
 3. It is the case of the Intended Interested Parties that being purchasers of some of the plots comprising the suit property, they are necessary parties to this suit by virtue of that interest in the suit property and that no prejudice will be suffered by either party if they are allowed to join in the suit.
 4. In response to the application, the 9th plaintiff deponed that the subject matter of this suit is on the compensation money that was released by the Kenyan Urban Roads Authority through the National Land Commission after the Government acquired 2.0288 Ha of L. R. No. 13166, I. R. 27109, the suit property, for the construction of the Nairobi Northern by-pass project and that the intended Interested Parties were not affected by the said compulsory acquisition of the 2.0288 Ha of the suit property.
 5. The 9th plaintiff finally deponed that it is true that the intended Interested Parties purchased land from some of the owners of L.R. No. 13166 and that in that capacity, they are better placed as witnesses for the plaintiffs to show that the suit property was indeed sub-divided and sold.
 6. On his part, the 2nd defendant deponed that he has the authority to swear the affidavit on behalf of the 1st-6th defendants; that the proposed Interested Parties are misinformed on the nature of the dispute in question and that the subject matter in issue in this suit relates to the manner of distribution of compensation proceeds by the Kenya Urban Roads Authority through the National Land Commission.
 7. According to the defendants, from way back in 1973, L.R. No. 13166 IR 27109 has never been sub-divided nor titles issued to any person successfully and that the mother title to the suit property is yet to be re-allocated to the respective 21 original members.
 8. The 2nd defendant deponed that the whole parcel of land is currently held as tenants in common in equal shares by all the 21 original members and persons claiming under them and that the intended interested parties are complete strangers and have not demonstrated any legal ownership of the land that was compulsorily acquired, or any part of the L.R. No. 13166 IR 27109.
 9. The 2nd defendant finally deponed that the intended interested parties, are claiming under individual specific members who are either part of the 21 members or claiming under them and that they should hold their horses and await the sub-division of the land among the 21 original members who engaged them in the purported sale of the suit property.
 10. According to the defendants, it is puzzling how the intended interested parties can claim to have bought specific portions of the suit property which has been a subject of litigation since 1983 and whose distinct boundaries are yet to be established.
 11. The 2nd defendant finally deponed that there is an ongoing dispute in ELC case number 348 of 2009 where the entitlement and substantive rights relating to the suit property is the subject matter and that the intended interested parties should make an application to be joined in that suit.
 12. According to the 2nd defendant, the proposed 1st interested party purports to have been authorized by the other 19 interested parties but has not filed any letter of authorization from the same persons



contrary to Order 1 Rule 13 of the Civil Procedure Rules. The 8th to 10th Defendants did not oppose the application.

13. Both the plaintiffs and the 1st-6th defendants and the intended interested parties filed their respective submissions and authorities which I have considered.
14. This suit was commenced by way of a Plaint dated December 5, 2017. In the Plaint, the plaintiffs averred that they represent the 21 registered owners of L.R. No. 13166 IR 27109 measuring 40.46 hectares (100 acres) as tenants in common in equal shares; that the original 21 shareholders and their families together with one other adopted member settled on the suit property in 1974 and that in the year 2000, they resolved to sub-divide the suit property among the registered members in equal shares.
15. The plaintiffs averred in the Plaint that in the year 2007, they were appointed as the caretaker committee to oversee the sub-division of the suit property; that they subdivided the land after obtaining approvals from the Nairobi City Council and that in the year 2009, all the members participated in the balloting and allocation of the suit land, a process that was overseen by the District Commissioner.
16. It is the plaintiff's case that in the year 2012, the Government, through the Kenya Urban Roads Authority (KURA) acquired five acres from the suit land for the development of the Northern Bypass and undertook to compensate the registered owners upon valuation and that the registered owners of L.R. No. 13166 have not been able to agree on the mode of distribution of the money set aside for compensation.
17. In the Plaint, the main prayer is for a declaration that the proceeds of compensation be divided amongst the shareholders of the affected parcels of land as per the allocation details.
18. The intended interested parties have applied to be joined in the suit on the ground that they purchased a portion of the suit property from the registered owners. While the 9th plaintiff agrees that some of the intended interested parties purchased portions of the suit property, he maintains that the intended Interested Parties can only come in the suit as witnesses and not parties.
19. On the other hand, it is the defendants' case that the intended interested parties have no known right in the suit property considering that the suit property is still in the names of the 21 registered owners who are holding the land as tenants in common in equal shares.
20. Both the plaintiffs and the defendants hold the view that the applicants have not shown proof of being among the persons entitled to compensation from Kenya Urban Roads Authority (KURA) in respect to the compulsory acquisition of a portion of the suit property.
21. The issue of joinder of parties is governed by Order 1 Rule 10 (2) of the Civil Procedure Rules which provides as follows:

“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.”



22. The Supreme Court of Kenya pronounced itself on the issue of joinder in the case of *Francis Kariuki Muruatetu and another v Republic & 5 others* (2016) eKLR as follows:-

“The personal interest or stake that the party has in the matter must be clearly identifiable and must be proximate enough stand apart from anything that is merely peripheral. 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.”

23. In the case of *Trusted Society of Human rights Alliance v Mumo Matemu & 5 others* (2014) eKLR, the Supreme Court defined an interested party as follows:-

“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 appears in the proceedings and champions his or her cause.”

24. The Court of Appeal in *Pravin Bowry v John Ward and another* [2015] eKLR considered the principles to be considered in an application for joinder of parties to a suit. In so doing, the court placed reliance on the Ugandan case of *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 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 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.”

25. The Court of Appeal also referred to its earlier decision in *Civicon Limited v Kivuwatt Limited and 2 others* [2015] eKLR on the interpretation of Order 1 of the Rules where it had observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.

...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out



in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

26. The evidence before this court shows that although parcel of land known as L. R. No. 13166 is registered in favour of 21 individuals as tenants in common, the intended Interested Parties’ claim is that they purchased a portion of the suit property from the said owners or their beneficiaries.
27. To support their claims, the intended Interested Parties have annexed on their affidavit share certificates issued to them between the year 2009 – 2021 showing the plots that were sold to them. The said share certificates show that the portions that they purchased were sub-divisions of L. R. No. 13166.
28. The plaintiffs have also annexed several agreements in respect to the suit property, together with copies of receipts purportedly issued to them upon purchase of the sub-division of the suit land.
29. The plaintiffs in this case have admitted that indeed some of the sub-plots of the suit property have been sold to the plaintiffs and that the suit land was sub-divided with the approval of the Nairobi County Government.
30. That being the case and while the question of the validity of the share certificates and the sale agreements in possession of the applicants will be dealt with at trial, it follows that the issue of a portion of the suit property having been compulsorily acquired by the government may have a bearing on the Applicants’ interest in the portions of land that they claim they purchased.
31. In the circumstances, it is the finding of this court that the intended interested parties/applicants have shown by way of an affidavit and documents that they have a stake in the proceedings. In the event that the intended Interested Parties are found to have legally purchased portions of land that falls within the land that was compulsorily acquired by Kenya Urban Roads Authority, they will be affected by the decision of this court. That being the case, the intended Interested Parties should be joined in these proceedings to champion their cause.
32. For those reasons, the application dated August 4, 2021 is allowed as prayed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF JUNE, 2022.

O. A. Angote

Judge

In the presence of

Ms Muturi for 7th, 8th and 9th Plaintiffs

Mr. Mahinda for the 8th Defendant

Mr. Amuyunzu h/b for Waweru Kihara for 1st - 6th Defendants

Ms Bundi for Mulanya for Intended Interested Parties

