



Muchanga Investments Limited v Holdings & 8 others; Barclays Bank of Kenya Ltd (Interested Party); Waiganjo (Intended Interested Party); Ng'ang'a (Suing and being sued as Executor of the will of Carmelina Ngami Mburu) (Applicant) (Environment and Land Case Civil Suit 1180 of 2014) [2022] KEELC 14734 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14734 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1180 OF 2014
OA ANGOTE, J
NOVEMBER 10, 2022

BETWEEN

MUCHANGA INVESTMENTS LIMITED PLAINTIFF

AND

HABENGA HOLDINGS 1ST DEFENDANT

JINA ENTERPRISES LIMITED 2ND DEFENDANT

TELESOURCE COM LIMITED 3RD DEFENDANT

DIRECTOR OF SURVEYS 4TH DEFENDANT

DIRECTOR OF PHYSICAL PLANNING 5TH DEFENDANT

REGISTRAR OF TITLES 6TH DEFENDANT

CHIEF LAND REGISTRAR 7TH DEFENDANT

JOHN MUGO KAMAU 8TH DEFENDANT

JOSEPH KANGETHE WANYOIKE (SUED AS THE LEGAL REPRESENTATIVE OF CARMELINA NGAMI MBURU - DECEASED) 9TH DEFENDANT

AND

BARCLAYS BANK OF KENYA LTD INTERESTED PARTY

AND

SAMUEL W. WAIGANJO INTENDED INTERESTED PARTY

AND



CATHERINE NJERI NG'ANG'A (SUING AND BEING SUED AS EXECUTOR OF THE WILL OF CARMELINA NGAMI MBURU) APPLICANT

RULING

1. There are two applications before this court for determination. The first one is a Notice of Motion application dated May 6, 2022 in which the Intended Interested party/applicant, Samuel Waiganjo, has sought for the following orders:
 - a. That the applicant be enjoined as an interested party in the case.
 - b. That the plaintiff do serve the interested party herein with the suit papers.
 - c. That the court file be availed to the applicant for perusal.
 - d. That temporary orders be issued to the Plaintiff to allow the Interested Party to use access road L.R. 3586/3/2/1 to access his property L.R. 12243/2 until the determination of this suit.
1. This application is premised on the grounds on the face of the application as well as the supporting affidavit sworn by Samuel Waiganjo. According to the Intended interested party, the plaintiff closed the only access road L.R. No. 3586/3/2/1 to the Intended Interested Party's property being L.R. 12243/2 and later merged the access road with L.R. No. 3586/3 with the help of the 4th, 5th, 6th and 7th defendants who have not provided an alternative access road to serve the Intended interested party's property.
3. Mr. Waiganjo deponed that he filed ELC Petition No. 38 of 2017, in which the plaintiff was the 6th respondent; that the Petition was struck out on February 24, 2022 for being sub judice this matter, and that he is apprehensive that orders prejudicial to his interests could be made with regard to the access road without giving him a chance to present his case.
4. The plaintiff, in its replying affidavit, argued that the dispute in this suit is about ownership of Land Reference Number 3586/3, which the applicant is not claiming; that the applicant's claim is limited to the granting of an access road to his property which is adjacent to the suit property, and that the applicant should await the outcome of this suit and thereafter seek redress against the party whom this court declares to be the rightful owner of the suit land.
5. It was deponed by the plaintiff's representative that the applicant's claim is premature and cannot assist the court to determine the issue of ownership of the suit property; and that granting the interim orders which the applicant has sought would amount to vacating the already existing interim orders, which prevents any of the parties from interfering with the suit property until the suit is determined.
6. It was deponed that the applicant was aware of the existence of this suit since 2014 but took no steps to be enjoined to this suit and that no prejudice will be suffered by the applicant if he awaits determination of the issue of ownership of the suit land before he makes a claim for access against the party that will be declared the owner of the land.
7. The second application is a Notice of Motion filed by Catherine Njeri Ng'ang'a dated July 12, 2022, in which she has sought for the following orders:-
 - a. That there be a stay of execution and/or further execution of the ruling and order rendered by the honourable court on June 9, 2022 in this matter pending the hearing and determination of the appeal or the intended appeal and/or until further orders of the Honourable Court.



- b. That the honourable court be pleased to issue an order staying further proceedings in this case pending the hearing and determination of the appeal or the intended appeal against the orders issued on the 9th June 2022 and/or until further orders of the honourable court.
 - c. That the honourable court be pleased to make any other or further order as the honourable court deems it fit and just
 - d. That costs of this application be in the cause.
1. According to the 9th defendant, they have lodged and served the Notice of Appeal against the ruling and orders of this court rendered on June 9, 2022; that the impugned Ruling allowed her substitution with Joseph Wanyoike as executor of the Estate of Carmelina Ngami Mburu, and for all pleadings filed by the 9th Respondent after the death of Carmelina Ngami Mburu on October 24, 2017, to be expunged, among other orders.
9. It was the applicant's argument that the orders of Hon. Justice A.O. Muchelule of the Family Court revoking her grant in the High Court of Kenya at Nairobi Family Division Succession Cause No. 1130 of 2018 in the matter of the Estate of the Carmelina Ngami Mburu (deceased) has been challenged, and that the matter is before the Court of Appeal awaiting ruling for stay of orders issued on October 25, 2021.
 10. It was deponed that a greater hardship would be avoided by granting this application because if the Court of Appeal accepts her appeal, then the proceedings in this suit will have to be reversed and winded back, which would not advance the cause of justice.
 11. The plaintiff opposed the application and asserted that the applicant has no locus standi to file and prosecute this application because it is no longer a party in the proceedings; and that further, pendency of proceedings in the Court of Appeal against the decision of Muchelule J in Nairobi High Court Probate and Administration Case No. 1130 of 2018 is not a ground for staying proceedings in this suit as the causes of action and parties in the two suits are different.

Analysis and Determination

12. Having considered the applications, the pleadings filed by the parties and the submissions, the issues for determination before this court are:
 - a. Whether Samuel Waiganjo should be enjoined as an interested party to this suit.
 - b. Whether Samuel Waiganjo has satisfied the conditions for the grant of a temporary injunction.
 - c. Whether this court should grant orders of stay of execution and stay of proceedings pending determination of Catherin Njeri Ng'ang'a's Appeal
13. This suit concerns the ownership of the suit land, LR No. 3586/3 IR No. 37285 (Original No. 3586/2/3) situated in Karen, measuring approximately 54.39 Hectares. The plaintiff, the 3rd Defendant and the 9th defendant are all claiming ownership of the suit land.
14. Samuel Waiganjo has sought to be enjoined in the suit as an interested party. His case is that the plaintiff closed the only access road L.R. No. 3586/3/2/1 to his property being L.R. 12243/2 and later merged the access road with L.R. No. 3586/3 with the help of the 4th- 7th defendants who have not provided an alternative access road to serve his property.
15. Further he deponed that he had filed ELC Petition No. 38 of 2017, in which the Plaintiff was the 6th defendant but the same was struck out on February 24, 2022 for being sub judice to this matter.



16. In the second application, Catherine Njeri Nganga, has sought for a stay of execution of the decision of this court delivered on June 9, 2022 as well as stay of proceedings in this suit pending hearing and determination of her intended appeal.
17. In the Ruling of June 9, 2022, this court allowed the substitution of the 9th defendant with Joseph Wanyoike as executor of the Estate of Carmelina Ngami Mburu and expunged all pleadings and documents filed by the 9th defendant after the death of Carmelina Ngami Mburu on October 24, 2017, among other orders.
18. The 9th defendant has urged that she has an arguable appeal against the orders of this court and that unless the orders sought herein are granted, her appeal would be rendered nugatory, as this suit would have proceeded to the conclusion without her input, yet she has been litigating in this matter for about eight years.
19. While an interested party is not defined under the Civil Procedure Act or its Rules, they are defined under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as:

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation.”
20. An interested party is defined by the Black’s Law Dictionary, 9th Edition at page 1232 as:

“A party who has a recognizable stake (and therefore standing) in the matter”
21. The Supreme Court of Kenya in the case of Francis K. Muruatetu and another vs Republic & 5 others (2016) eKLR stated that enjoinderment of an interested party is at the discretion of the court and is subject to certain elements:

“Enjoinderment is not as a right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

 - i. 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.
 - ii. 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.
 - iii. Lastly, a party must, in its participation, set out the case and/or submissions 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.”
22. This court shall now consider whether the applicant has met the above conditions. It is not disputed that the subject matter of this suit is with respect to ownership of the suit land, L.R. 3586/3, with multiple parties claiming to be the lawful owners of the land. The Intended Interested Party has asserted that his interest in the suit land is with respect to an access road L.R. No. 3586/3/2/1, which he claims the Plaintiff closed and merged with the suit land.



23. The intended interested party had indeed filed ELC Petition No.38 of 2017, which the court dismissed, finding that due to the existence of the current suit, ELC 1180 of 2014, that suit was sub-judice because the Petition concerned the same subject matter, being L.R. No. 3568/3.
24. An access road is an easement, which is defined as a right annexed to the land either to use (positive easement) or to restrict the use of (negative easement) on the land of another (See *Esther Wanjiku Mwangi & 3 others vs Wambui Ngarachu (sued as the legal representative of the estate of Ngarachu Chege - Deceased)* [2019] eKLR).
25. The owner of land which is subject to an easement is bound by that legal arrangement. Considering that the central issue in this suit is ownership of the suit land, while the applicant's interest is in the nature of an easement and not ownership of the suit land, it is the finding of the court that the issues raised by the Intended Interested Party are distinct.
26. The interested party cannot raise any valid Defence, or claim in this matter against any party herein until the court determines the issue of ownership. His claim being distinct and specifically against the party the court will find to be the owner of the suit property, the court declines to enjoin him in these proceedings.
27. Having declined to enjoin the intended interested party in these proceedings, it will be moot to discuss the issue of whether the Intended Interested Party is entitled to an injunctive orders. In any event, this court has given directions on the maintenance of the suit property pending the hearing of the suit, it cannot revisit the issue of whether injunctive orders should issue or not.
28. This court will now consider the application by Catherine Njeri Ngang'a for stay of execution and stay of proceedings. It is true that the Catherine Njeri Ngang'a is no longer a party in these proceedings, and has lodged an appeal in the Court of Appeal against the decision of not only this court, but also the decision of the High Court, Family Division.
29. The mere fact of filing an appeal in itself cannot be reason to stay these proceedings. Indeed, if Catherine Njeri Ngang'a succeeds in the Court of Appeal, the court can order for a retrial. No prejudice would be suffered by Catherine Njeri Ngang'a in the event of such an eventuality.
30. That being the case, I decline to stay the execution of the Ruling of the court or to stay the current proceedings.
31. For those reasons, the court dismisses the applications dated May 6, 2021 and July 12, 2022 with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10TH DAY OF NOVEMBER, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Miller for Plaintiff

Ms Kiget for 9th Defendants

Mr. Waiganjo for Interested Party

Mr. Allan Kamau for 4th – 7th Defendants

Mr. Musyoka for 3rd Defendant



Mr. Muyunzu for 1st Interested Party

Court Assistant - June

