



REPUBLIC OF KENYA



Gitau v Muhoro & 3 others; Mui (Intended Interested Party) (Environment & Land Case E010 of 2021) [2022] KEELC 15539 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E010 OF 2021
LN GACHERU, J
DECEMBER 20, 2022**

BETWEEN

RICHARD MAKARA GITAU PLAINTIFF

AND

SHADRACK MAINA MUHORO 1ST DEFENDANT

ESTHER VICTORIA WANJIKU 2ND DEFENDANT

NYASANI EVANSON NYAMARONGE 3RD DEFENDANT

WAWIRA N MUGANE 4TH DEFENDANT

AND

ALICE NJOKI MUI INTENDED INTERESTED PARTY

RULING

1 *Vide* a notice of motion application dated June 22, 2022, the Interested party/applicant, sought for the following orders against the plaintiff/respondent;

1. That the court be pleased to grant the Applicant, Alice Njoki Mui leave to be joined in this suit as a Plaintiff and an Interested Party in the proceedings and claim as before Court
2. That the Honourable Court do grant a further Order for the amendment of the Plaint to accommodate the joined Co Plaintiff/Applicant.
3. That the Honourable Court be pleased to issue an order for preservation and protection of the of the following properties by way of a Court inhibitory order pending final orders in this matter
 - a. Land Title Number Mitubiri /Wempa/Block 2/3663



b. Juja/Kalimoni Block 10/92

4. That the Costs of this Application be provided for.
- 2 The Application is premised on Nine (9) grounds set out on the face of it and the Supporting Affidavit of the Applicant herein, Alice Njoki Mui , sworn on 22nd June 2022 . It is the Applicant's averment that she is the 2nd widow of Joseph Mahuro Maina(deceased , and she is also a Co-administratrix of his estate jointly with the Plaintiff and the 2nd Defendant herein. That she brings the instant application to secure her interests and also represent the 3rd and 4th widows of the deceased namely Peris Wangari and Jemimah Waguama respectively. That the instant matter was filed by the Plaintiff in the first instance without any participation from her, yet she is Co administrator. That the deceased was polygamous and the Respondents herein have been attempting to conceal the estate assets while still attempting to steal and transfer some properties to themselves.
- 3 Further that Juja/Kalimoni Block 10/92, is a residential block with a rental income of about Kshs. 300,000/= per month and was fraudulently and illegally transferred to the 1st Defendant on or about 4/11/2020. That the manner in which the Respondents dealt with Mitubiri /Wempa/Block 2/3663, is evidence of fraud and criminal connivance. That the transfer of the two properties was done after the death of Joseph Mahuro Maina (deceased) and succession had not been done at the time. That in addition to this, the necessary documents for transfer like consents were not obtained.
- 4 The Application is opposed by the Plaintiff, Richard Makara Gitau via a Replying Affidavit sworn on 25th July 2022 . It is the Plaintiff's averment that the instant application is bad in law, logically incompetent and should be dismissed with costs to the Plaintiff. That the instant suit was instituted by the Plaintiff mainly for the protection of the estate of Joseph Mahuro Maina (deceased). That there is an ongoing Succession Cause being Murang'a Chief Magistrates Court Succession Cause No. 519 Of 2020 which shall protect the interests of the beneficiaries of the deceased. That the instant application is misconceived and will only work to cloud the issues in this matter. That the Interested Party should wait for the issues to be determined so that they can claim their share in the succession cause. That the Interested Party has not attached any evidence to proof that she is a wife to the deceased.
- 5 The 1st, 2nd, 3rd, and 4th Defendants also opposed the instant Application via a Replying Affidavit sworn by Esther Victoria Wanjiku on 18th October 2022 . It is their averment that the instant application is baseless, unmerited and bad in law . That the applicant is Co Administrator in the estate of the deceased and that means that the suit lands cannot be disposed off without her knowledge. That as a result, the inhibition orders would be redundant as there was no impending danger on the estate. That the Applicant is not a beneficiary of the estate, since the relationship between her and the deceased is non existent and it remains in question to be dealt with at the full hearing. That the applicant has failed to adduce any evidence in support of her allegations of fraud and/or conniving . That the suit lands were transferred to the 1st and 2nd Defendants during the lifetime of the deceased. That the Respondents have not in any way interfered, disposed and /or intermeddled with the estate of the deceased and in any case no evidence has been adduced to that fact by the Applicant. That an inhibition Order will only further delay the Succession Cause and interfere with the duties of the Respondents. That the Application lacks merit and the same should be dismissed with costs.
- 6 On 30th June 2022 , the Court directed that the instant Application be canvassed by way of written submissions. The Applicant filed her submission dated 25th July 2022 , through the Law Firm of Kirubi Mwangi Ben & Co Advocates. The Applicant reiterated her averments in her Supporting Affidavit and submitted that she is a necessary party in the matter, as she is an administratrix of the estate of the deceased Joseph Mahuro Maina . That the inhibitory order is sought to preserve and protect the



estate of the deceased from wastage especially Land Title Number Mitubiri /Wempa/block 2/3663 and Juja/Kalimoni Block 10/92 . That the Applicant has a right to be heard and should not be dismissed unheard.

7 The Plaintiff herein filed his submissions dated 22nd September 2022 in person and reiterated his averments as contained in his pleadings. He relied on a litany of cases and urged this Court to dismiss the instant Application with costs for being a waste of the Courts time.

8 Lastly, the 1st, 2nd 3rd and 4th Respondents jointly filed their written submissions dated 18th October 2022, through the Law Firm of Nyasani E. O & Co Advocates . It is the Respondents contention that the instant application is devoid of merit and undeserving of the orders sought. That the Applicant had failed to prove fraud and as such is not deserving of preservatory orders. That the suit lands were transferred to the 1st and 2nd Defendants during the life time of the deceased. Further that the Applicant had failed to establish the principles for grant od preservatory orders enumerated in the case of *Japhet Kaimenyi M'ndatbo vs. M'ndatbo M'mbwira* (2012) eKLR and *In the Estate of Paulo Kiplagat Boiwo* (2012) eKLR. Lastly, he reiterated that there was no relationship between the Applicant and the deceased and the Applicant is not a dependant as provided for in Section 29 of the Laws of Succession Act

9 The Court has considered the pleadings in general, the rival written submissions and the relevant provisions of law and finds the main issue for determination is whether the Application dated 22/6/2022 is merited.

10 The application is essentially based upon order 1 rule 10(2) of the Rules which stipulates as follows:

(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.”

11 It is trite that court has discretion to allow joinder of a party to a suit where it is deemed that such party is a necessary party to the suit and whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. See the case of *Meme... Vs...Republic* (2004) 1EA 124 , where the Court held that:-

A party could be joined in a matter for the reasons that:-

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings.
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law.
- iii. Joinder to prevent a likely course of proliferated litigation.

12 The guiding principles for joinder were also reproduced in the case of *Peter Irungu Wainaina vs. Chege Njibia & others* [2018] eKLR, where the Court while quoting Havelock Jin the case of *Technomatic Limited T/A Promopack Company Vs. Kenta Wine Agencies Limited & Another* (2014)eKLR, held that for joining a party thus;- He must be a necessary party, he must be a proper party, in the case of a defendant, there must be a relief flowing from that defendant to the Plaintiff, the ultimate order or



decree cannot be enforced without his presence in the matter and his presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

13 Though the court has discretion to issue an order for joinder of a necessary party, it may also refuse such joinder where such joinder would lead to difficulties in handling the existing cause of action and the party being sought to be enjoined is unnecessary party.

14 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 it was held 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." (Emphasis by underline)

15 In *Civicon Limited v Kivuwatt Limited and 2 others* [2015] eKLR, the Court of Appeal on the interpretation of order 1 of the Rules 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."

16 In the instant case, the Applicant seeks to be joined as a Plaintiff on the grounds that she is a Co-administratrix of the estate of the late Joseph Mahuro Mwangi, and that the suit property formed part of the estate of the said Joseph. In support of her case, the Applicant attached Grant of letter of Administration intestate issued on 8th June 2022 .



- 17 It is settled law that the estate of the deceased person is vested in the legal representative; see *Kothari-vs-Quaresb* (1967)EA 364, and *Trouistik Union International and another-s- Jane Mbeyu and another* (1993)eKLR. Under Section 3 of the *Law of Succession Act* (supra), the term “personal representative” means the executor or administrator as the case may be, of a deceased person. Section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, also defines the term “legal representative”. As such, the Applicant being a co administrator of the estate of Joseph Mahuro (Deceased) is a necessary party to the instant suit. The said Applicant has a statutory duty to protect and preserve the property of the deceased person before the same is administered and therefore their importance as a party in the instant suit cannot be wished away.
- 18 The upshot of the above is that the Applicant has been able to establish a case for joinder as a Plaintiff in the instant suit.
- 19 On the issuance of an inhibitory order , the Applicant seeks that the same be issued for purposes of preserving and protecting the suit land. It is her contention that the suit land herein has already been fraudulently transferred by the 1st and 2nd Respondents and an inhibitory order is necessary to stop any further dealing in the suit lands. The Respondent on the other hand contend that that the application is an abuse of the Court process as the same is not founded on any evidence. That the suit properties were transferred to the 1st and 2nd Respondents during the lifetime of the deceased and the same was done lawfully and without the commission of any fraud.
- 20 Section 68 of the *Land Registration Act* of 2012 provides as follows in section 68:
- (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
 - (2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.
 - (3) An inhibition shall not bind or affect the land, lease or charge until it has been registered. when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period.
- 21 In *Mwambeja Ranching Company Limited& another v Kenya National Capital Corporation Limited (Kenyac) & 6 others* [2015] eKLR the Court held the view that orders of inhibition envisaged under section 68 of the Registration of *Land Act* are in the nature of prohibitory injunction and act to preserve the suit property just as an interlocutory injunction would do. He stated;
- Of great significance on the request for an order of inhibition is Section 68(1) of the *Land Registration Act* which reads as follows; The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge. The case of *Japhet Kaimenyi M'ndatbo v M'ndatbo M'mbwiria* [2012] eKLR dealt with the threshold for granting orders of inhibition in a pointed manner as follows; “In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions:-
- a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless Preservatory orders of inhibition are issued.



- b. That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
- c. That the applicant has arguable case."

I am content to refer to the decision by Okwengu, J (as she then was) in the case of Philip Mwangi Githinji v Grace Wakarima Githinji (2004) eKLR when she rendered herself inter alia; "An order of inhibition issued under section 128 of the Registered Land Act is akin to an order of prohibitory injunction for it restricts the registered owner and any other person from having their transaction regarding the land in question registered against the title. Before the court can issue such an order it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition, such grounds would normally be in the form of a sustainable claim over the suit land."

22 Based on the forgoing, the Court in determining whether to grant an inhibitory order shall consider the following principles ;

- a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless Preservatory orders of inhibition are issued.
- b. That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
- c. That the applicant has arguable case."

24 It is not in doubt that the suit land in the instant suits have already been transferred and are currently registered in the names of the 1st and 2nd Defendant. While the Plaintiff alleges that the said transfer was procured fraudulently, the 1st and 2nd Defendant/Respondents allege that the suit property was transferred prior to the death of the late Joseph Mahuro . For the grant of inhibitory orders, the three principles outlined above must exist together in a specific case and the existence of one without the others is not enough for the grant of inhibitory orders. In addition to these the grant of inhibitory orders is based on evidence and not mere unsubstantiated allegations.

25 Based on the forgoing and the analysis of the Applicant's case and evidence produced, the Court finds and holds that the Applicant failed on a balance of probabilities to establish a case for the grant of inhibitory orders over the suit properties. While the Applicant has alleged fraud and conniving by the Respondents in transferring the suit land, she did not produce any evidence in support of her claim including but not limited to official searches for the 2 suit lands, copy of death certificate of the deceased and proof that the suit lands were transferred after the death of the deceased. It follows therefore that the prayer for an inhibitory order must fail as the same has not been proven to the required standard.

26 Having now carefully analyzed the law and the facts in the instant Application dated June 22, 2022 , this Court finds and holds that the same shall partially succeed in terms of prayers No. 2 and 3 and 5 . Prayer 4 on the other hand is declined for lack of sufficient evidence to sustain it.

27 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 20TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE



Delivered virtually;

In the presence of

Absent - Plaintiff/Respondent

Absent - 1st – 4th Defendant/Respondent

Absent - Interested Party/Applicant

Joel Njonjo – Court Assistant

