Meli v Rop; Kirui (Interested Party) (Environment & Land Case 598 of 2012) [2025] KEELC 376 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELC 376 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 598 OF 2012

JM ONYANGO, J

FEBRUARY 5, 2025

FORMERLY HCCC NO. 33 OF 2010

BETWEEN

KIBET MELI ..... PLAINTIFF

AND

SUSAN ROP ..... DEFENDANT

AND

LAZARUS KIPKIRWA KIRUI ..... INTERESTED PARTY

RULING

1. The proposed Interested Party moved this court through a notice of motion dated 22nd October, 2024 seeking the following orders:-

    a. Spent

    b. That this Honourable Court be pleased to arrest the judgement scheduled to be delivered on 30th October, 2024.

    c. That the applicant be enjoined in this suit as an Interested Party and the case be reopened for purposes of hearing the Interest Party case.

    d. Those costs of this application be provided for.

2. The Application is premised on the grounds set out on the face of it and supported by the Interested Party's Affidavit of even date. The Interested Party deponed that he was formerly married to the Defendant herein during which time he purchased 9.2 Acres curved out of Nandi/Cheptil/105 from Kibet A. Mele (the Plaintiff herein). That he paid the purchase price in full and the land was subdivided into Nandi/Cheptil/479, 480, 481 and 482. He tasked his former spouse to follow up on the title and

she was eventually issued with a title over Plot No. 480 thereof (the suit property). The Interested Party deponed that he sued Kibet Arap Mele's brother in PMCC No. 400 of 2006 for illegally occupying the suit land and he obtained judgment in his favour. That the said Kibet Mele testified as his PW2 in that case, and confirmed that he sold the land to the Applicant.

3. The Interested Party deponed that Kibet Meli, the Plaintiff herein, has no locus standi to file this suit since the registered owner of Nandi/Cheptil/105 is Kibet A. Mele. He averred that he would be adversely affected by the outcome herein without participation since he and the Defendant are no longer together. That he craved to be joined to the suit to assist the court in resolving the issues in controversy. He deponed that he stands to suffer great loss and damage if this application is not allowed, and added that the court has jurisdiction to grant the orders sought. He deponed that the Application has been made promptly and in good faith, and that the Plaintiff will not be prejudiced if the orders are granted.

4. The Plaintiff responded through a Replying Affidavit sworn on 29th October, 2024. He termed the application an abuse of court because the Applicant has been aware of these proceedings since 2010, but he chose not to participate and there has been no explanation for the delay. The Plaintiff said that his name is often spelled as Kibet Arap Meli, Kibet Melly and Kibet A. Mele. He explained that he purchased Nandi/Cheptil/105 from Kipruto Arap Kogo in 1969. He deponed that he never transacted with the Interested Party over any land or received money from him. He deponed that the Interested Party transacted with an individual masquerading as Kibet A. Mele. He denied being a witness in Kapsabet PMCC No. 400 of 2006 and the judgment therein has no nexus to the suit land herein. He deponed that without prejudice, any agreement in existence has been caught up by limitation under Sections 4(1)(a) and 4(4)of the *Limitation of Actions Act*.

5. The Plaintiff averred that the Interested Party has severally confirmed that the Defendant owns the suit property and she even donated a Power of Attorney to him to deal with matters relating to the land, thus the claim that the land is owned by the Defendant is not truthful. He confirmed that the image used by the Defendant in the transfer was his. The Plaintiff accused the Interested Party of mischief for not telling the court how he learnt that judgment herein was slated for 30th October, 2024. He further deponed that the process through which the Defendant obtained title to the suit land was flagged as suspect by the Land Registrar, Nandi County. The Plaintiff stated that he would be greatly prejudiced by any further delay of this case which is more than 14 years old. He asked that the application be dismissed with costs.

6. The Interested Party filed a further Affidavit stating that the Plaintiff had admitted that he goes by the name Kibet A. Mele, and thus cannot deny having transacted with him, or that he testified against his brother in Kapsabet PMCC No. 400 of 2006. He accused the Plaintiff of never serving him any Court documents even though he held the Power of Attorney donated by his wife. The Interested Party claims that he and the Defendant are the complainants in Kapsabet Criminal Case No. 1824 & 2365 of 2016, where he has accused the Defendant of selling his trees on the land without his consent. He avers that the use of the Plaintiff's image in the transfer is proof that he was involved in the sale. He denied that his claim is barred by statutory limitation since he has been using the land courtesy of the Defendant's Power of Attorney. He urged that the interest of justice would be served if the suit is to proceed upon his inclusion.

7. The Defendant also responded to the application vide a Replying Affidavit sworn on her behalf by Kipkosgei Choge, the Defendant's Advocate on record, on 4th November, 2024. Mr. Choge pointed out that the Defendant had applied to have the Interested party joined to the suit. He reproduced the contents of the entire Affidavit sworn by the Defendant in support of her application for joinder. He deponed that the Defendant and the Interested Party parted ways hence the Defendant's reluctance to

prosecute her defence as she believes that the Interested Party should pursue his land at his own costs. He deponed that the Interested Party should be heard in respect of his claims and assertions.

Interested Party/Applicant's Submissions

8. The Application was canvassed by way of written submissions. The Interested Party filed his Submissions dated 18th November, 2024. In those submissions Counsel submitted that the court has jurisdiction under Order 1 Rule 10(2) to join a party to a suit at any stage. He relied on the case of JMK vs MWM & Another (2015) eKLR. Counsel submitted that the Interested Party has sufficient interest in this suit as evidenced by the documents annexed to his Affidavits herein, and thus deserves to be joined in the suit. Counsel argued that it is in the best interest of justice that the Interested Party be accorded a fair hearing as provided under Article 50 of *the Constitution* of Kenya. Counsel relied on Presbyterian Church of East Africa Pwani Presbytery & Another vs Juma Mboe & Another (2017) eKLR.

9. Counsel urged that it is only fair that the Interested Party be involved in the hearing and comment on the evidence before the court delivers its judgment. Counsel cited the cases of Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 Others and Skov Estate Limited & 5 Others vs Agricultural Development Corporation & Another (2015) eKLR. It was submitted that the Defendant is no longer interested in the suit land having appointed the Interested party vide a Power of Attorney thereof, and that his proprietary rights will be affected if he is not joined to the suit. He added that it is fair, just and equitable that the Application be allowed to enable the court effectively and completely adjudicate on the issues raised in the suit. Relying on Francis Karioki Muruatetu vs Republic & 5 Others, Petition No. 15 as Consolidated with No. 16 of 2013 (2016) eKLR, counsel urged that the Interested Party had met the threshold for grant of the orders sought. He asked that the application be allowed as prayed.

Plaintiff's Submissions

10. The Plaintiff filed submissions dated 2nd December, 2024 opposing the application. Counsel reiterated the averments in the Plaintiff's Affidavit, and submitted that the Interested Party knew of this suit since inception and there is no explanation for the delay in making this application. Counsel cited the case of Francis K. Muruatetu & Another vs Republic (Supra) and the Skov Estate Limited Case (Supra) on the elements considered in an application for joinder. He argued that the Interested Party had not annexed a draft of the pleading he wished the court to consider if he wants to be joined. Counsel also argued that the Interested Party had not controverted the assertion that his claim is time barred.

11. Counsel for the Plaintiff submitted that a party seeking joinder must show that the reliefs which will be granted will not be fully realized because he has an important element of fact which shall miss if he is not added to the proceedings. Counsel also submitted that joinder is refused where the cause of action being proposed or reliefs sought are incompatible or totally different from those in the existing suit. Counsel argued that the Interested Party's claim has been rendered null and void by operation of law. Therefore joining him would occasion unnecessary delay or costs on the parties, and it serves no purpose to join him only for his pleadings to be struck out. Counsel concluded that the Application ought to fail.

Analysis and Determination

12. I have perused the Application, the Affidavits filed in support of and in opposition thereof. The only issue for determination by this court is whether the notice of motion application dated 22nd October, 2024 is merited.

13. There is no doubt that this court has jurisdiction to enjoin a party to a suit at any stage of the proceedings. Order 1 Rule 10(2) of the Civil Procedure Rules is the authority for that proposition. It provides 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."

14. The decision whether to or not to reopen a case is a discretionary one, and this court retains a wide discretion to do so, as provided by law. However, judicial discretion has to be exercised judiciously. This was stated in the case of Shah vs Mbogo (1979) EA 116, where the court, although dealing with a matter of setting aside ex-parte judgment, had this to say about judicial discretion:-

> "...this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

15. For this Court to exercise its discretion in favour of the Interested Party, he ought to satisfy it that there is sufficient cause to do so. The phrase Sufficient Cause was defined by the Supreme Court of India in Parimal vs Veena, as cited with approval in the case of Wachira Karani vs Bildad Wachira (2016) eKLR. In the case, the said Supreme Court stated that:-

> "I again repeat the question what does the phrase "Sufficient cause" mean. The Supreme Court of India in the case of Parimal vs Veena observed that:-
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> > ... "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.
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> The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice... The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause

is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

16. This case was commenced by way of Plaint dated 25th February, 2010 and filed in the High Court on the same day as Eldoret HCCC No. 33 of 2010. It was then moved to the ELC as Eldoret ELC No. 598 of 2012. Simply put, the case is older than the ELC Court. As can be seen from the record, the Defendant's appearance in this suit, as well as that of her advocate has been wanting, for lack of a better word. On 25th July, 2023 her Advocate on record, Mr. Kipkosgei Choge even filed an application to cease from acting citing lack of instructions and the fact that he could not reach the Defendant. This Application was fixed for hearing on 13th December, 2023. On the said date, the Defendant's advocate failed to appear to prosecute his own application. The application was therefore dismissed for want of prosecution.

17. Further, before the application to cease from acting was heard, or dismissed as is the case here, on 4th October, 2023 the Defendant filed an Notice of Motion Application dated 28th September, 2023 seeking to have the said Interested Party herein joined to this suit. This Application was filed by the same advocate who had claimed he could not contact his client as she was not answering his calls, and therefore had no instructions on the suit. The application was fixed for hearing on 10th June, 2024 but the Defendant and/or her advocate once more failed to appear on the date fixed for hearing. This application too was dismissed for want of prosecution. From 10th June, 2024 when the Defendant's Application for joinder was dismissed, she and her advocate did not appear again in court in this matter, until 30th October, 2024 when the matter was coming up for delivery of judgment, and the court was to give directions on the instant application.

18. The Interested Party accused the Plaintiff of not serving him with any court documents even though his former spouse had donated a power of attorney to him over the suit property. I however agree with the Plaintiff that he was under no obligation to serve him with any court documents since he is a stranger to this suit. If the Defendant had intended for him to represent her in this suit, it was upon the Defendant and the Interested Party to inform the court. In any event, the Defendant has always been represented by Counsel in this matter, and service on said Counsel equates to service on the

Defendant or her attorney at law.

19. As to the alleged separation, this court has only seen a marriage certificate (annexure LKK-1). There is no proof that the Interested Party and the Defendant are indeed no longer married, in this case a divorce decree or an order of separation might have sufficed, but none was given. But assuming they indeed are separated, whatever that may mean in this case, if indeed the Interested Party was invested in the suit property so much as to require him to defend the suit, he had every opportunity to do so. By his own admission, he already knew of the existence of this suit, and has in fact known from the very beginning, back in time to when the suit was still in the High Court. He wrote a letter dated 20th January, 2011 to the court regarding this very suit with the subject "Re: High Court of Kenya at Eldoret Civic suit No. 33 of 2010". He even swore an Affidavit on 2nd December, 2016 in Support of an application of the same date for injunction. He deponed therein that he had been appointed by the Defendant to prosecute this case on her behalf.

20. In any event, the Defendant cannot be said to not have defended the suit herein on behalf of her former husband. She did in fact present one witness, one Judith Chepkoech Cherutich, who testified for the Defendant as DW1 and was cross-examined by the Plaintiff's advocate. I see no evidence in

the documents presented by the Interested Party that the Defendant herein could not present on his behalf. Furthermore, the Power of Attorney is dated 25th May, 2012, and was registered on 11th June, 2012. If indeed, as submitted by the Interested Party, the Defendant donated the Power of Attorney because she was no longer interested in the suit, then he ought to have known of the Defendant's lack of interest at the time the Power of Attorney was donated, over 12 years ago. The Interested Party ought to have sought to be joined to this suit way back in 2012 and not wait a further 13 years to file the instant motion.

21. I note that the Interested Party contends that his failure to participate in the suit or attend Court was because his former spouse failed take up the matter causing the Defence case to be closed without his knowledge. If indeed the Interested Party had as much interest as he claims to have on the suit property, and therefore the case herein, he ought to have kept tabs on the progress thereof. As it, the Interested Party did not come clean on how he came to find out that the matter was coming up for delivery of judgment, and just in time to file this Motion.

22. This brings me to the question of whether or not to re-open the case. It seems to me that the Interested Party has all along been aware of the progress of this suit. Instead of joining the case from earlier, the Interested Party waited until this late stage, presumably waiting for an opportune moment, to apply for joinder. I am guided by the case of Ng'ang'a & 3 others vs Maina; Daniel Kamau Maina & others t/a Cactus Self Help Group (2022) KEELC 3060 (KLR), where the court held that:-

> " An analysis of the Ugandan case of Simba Telecom Vs Karuhanga & Another (Supra) point to the following to be considered in allowing or disallowing and application to re-open a case:
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> a. The application to re-open a case is at the discretion of the court
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> b. That the discretion is to be exercised judiciously
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> c. That in exercising the discretion, the court should ensure that:
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> i. A re-opening of a case should not embarrass or prejudice the opposite party.
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> ii. A re-opening of a case should not be allowed where it is intended to fill gaps in evidence.
>
> iii. A prayer for re-opening of the case will be defeated by inordinate and unexplained delay."

23. The only reason I can see for this application is that the Defendant intends to fill in the gaps in her witnesses evidence/testimony, hence the application for joinder, knowing that if it is allowed, the Interested Party will be at liberty to file fresh documents and produce fresh evidence in the case. As this court has already commented, there has been no proof of the alleged separation between the Defendant and the Interested Party, and this has only come up in this application for joinder. I am therefore not entirely convinced that the Interested party is in possession of any special fact or piece of evidence, that the Defendant was not able present before this court during the trial.

24. The Interested Party/Applicant brought his Application under several statutory and constitutional provisions, and rightly so. Aside from Order 50 Rule 1 of the Civil Procedure Rules, there is Section 1A of the of *Civil Procedure Act* is on the overriding objectives of the court, being the facilitation of just, expeditious, proportionate and affordable resolution of disputes. Section 3 is on the special jurisdiction and powers of the court, while Section 3A is on the inherent powers of the Court to make any orders

as would be necessary to ensure the ends of justice are met and avoid abuse of its process. Article 159(2) of *the Constitution* of Kenya is an umbrella provision of all the above cited statutory provisions.

25. In addition to the above legal provisions, the court has to consider whether sufficient cause has been established reopening this 14 year old case, to allow a party who had all along been aware of its existence but chose indolence instead of pursuing his alleged rights. This court has a duty under Section 1A of the Act to dispense justice in a most efficient and timely manner. This court needs to consider whether its determination herein would serve the ends of justice not only for the proposed interested party but also for the Plaintiff who has been waiting for a determination on this case for over a decade.

26. Bearing all these provisions in mind, and applying them to the circumstances of this case, I am further, convinced that the justice of the case will be served by dismissing the Interested Party's application. Consequently, the Interested Party's Notice of Motion dated 22nd October, 2024, is hereby dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5TH DAY OF FEBRUARY 2025.

J. M ONYANGO

JUDGE

In the virtual presence of:

Mr Melilei for the Interested Party/ Applicant

Ms Isiaho for the Plaintiff / Respondent

Court Assistant: Hinga