



**Muchanga Investments Limited v Habenga Holdings Limited & 9 others;
Barclays Bank of Kenya Limited (Interested Party) (Environment and Land Case
Civil Suit 1180 of 2014) [2025] KEELC 409 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 409 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1180 OF 2014
OA ANGOTE, J
FEBRUARY 6, 2025**

BETWEEN

MUCHANGA INVESTMENTS LIMITED PLAINTIFF

AND

HABENGA HOLDINGS LIMITED 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 (FOR THE ESTATE OF CARMELINA
NGAMI MBURU) 9TH DEFENDANT**

AND

CATHERINE NJERI NGANGA PROPOSED DEFENDANT

AND

BARCLAYS BANK OF KENYA LIMITED INTERESTED PARTY



RULING

1. The Proposed 10th Respondent Defendant/Applicant has filed a Notice of Motion application dated 8th July 2024 pursuant to Order 51 Rule 1, Order 1 Rule 10(2), Order 8 Rule 3 of the Civil Procedure Rules, and Sections 1A, 1B and 3A of the Civil Procedure Act. The Applicant has sought for the following orders:
 - a. That Catherine Njeri Nganga be joined in this case as the proposed 10th Defendant in the original action and the proposed Plaintiff in the counterclaim.
 - b. That this Honourable Court be pleased to order that the 10th Defendant do file such defence and counterclaim and such other pleadings, affidavits and documents in the matter.
 - c. That the costs of this application be in the cause.
2. This application is supported by the Affidavit sworn by Catherine Njeri Ng'ang'a, the Applicant, who deposed that she has a claim to the suit land LR No. 3586/3 grounded on the doctrine of proprietary estoppel and constructive trust. This, she asserts, is as a consequence of the common intention between herself and the late Carmelina Ngami Mburu, even though the Power of Attorney had come to an end by virtue of the death of the donor, Carmelina Ngami Mburu.
3. The Applicant deposed that Carmelina Ngami Mburu allowed and let her incur expenss on the faith that she was pursuing, litigating and protecting the suit property and the estate of Carmelina Ngami Mburu cannot be allowed to turn around and say otherwise. She asserted that the doctrines of proprietary estoppel and constructive trust are applicable and come in to protect her claim and interest over the suit property.
4. She argued that the fair inference to be drawn from the conduct of Carmelina Ngami Mburu and her estate is that she consented to the arrangement to which she might have properly objected.
5. The Plaintiff opposed the application vide a Replying Affidavit dated 22nd July 2024 and sworn by the Plaintiff's General Manager, Dimitri Da Gama Rose. He averred that the Applicant was initially joined as the 9th Defendant in this suit in her personal capacity as the holder of a Power of Attorney donated to her by Carmelina Mburu, and was therefore protecting the interests of Carmelina Mburu, who claimed that the suit property was part of the estate of her late husband.
6. He deposed that the Applicant filed several pleadings as the Attorney for Carmelina Mburu, including a Statement of Defence and Counterclaim, in which the Applicant claimed the suit property belonged to Carmelina Mburu; that the Applicant also participated in the proceedings and cross-examined witnesses, and that upon the demise of Carmelina Mburu, the Applicant was discharged from the proceedings since the Power of Attorney lapsed upon the death of the donor.
7. It was deposed by the Plaintiff's Director that on 27th February 2019, the Applicant presented to this court a Limited Grant ad Litem for the Estate of Carmelina Mburu and was re-admitted to the suit as the Administrator of the Estate of the deceased, and that the Applicant was allowed to re-call and cross-examine witnesses who had testified during the time she was locked out of the proceedings.
8. He stated that on 22nd November 2021, Joseph Kang'ethe Wanyoike filed an application seeking to substitute the Applicant herein as the executor of the Estate of Carmelina Mburu on the ground that he had been appointed Executor of the Estate of Carmelina Mburu and that the Limited Grant issued to the Applicant had been revoked by the probate court.



9. It was deposed by the Plaintiff's Director that the Applicant opposed the application of Mr. Wanyoike, and did not raise the issue that she had a proprietary right or interest over the suit property; that this court granted Mr. Wanyoike's application and substituted the 9th Defendant as the Administrator of the Estate of Carmelina Mburu and that the Applicant then lodged an appeal in the Court of Appeal against the ruling of the probate court that revoked her limited grant and moved this court to stay proceedings pending the hearing of the appeal, which invitation this court declined.
10. Mr. Dmitri averred that at no point in the proceedings did the Applicant raise the claim of proprietary estoppel or constructive trust and raising the issue now amounts to a deliberate attempt to derail the proceedings. He argued that it has taken the Applicant two years, between 9th June 2022 to 8th July 2024, to bring this application, and that having sat on her rights, the doctrine of laches is against her being re-admitted in the proceedings.
11. He further contended that the doctrine of proprietary estoppel cannot form the basis of the Applicant's claim of ownership of the suit property as one of the principles of estoppel is that it is a shield which can be used as a defense to an action and not a sword and that the doctrine of constructive trust cannot be used to maintain a claim against a deceased person.
12. The Applicant filed a Further Affidavit in which she deposed that the Plaintiff has misunderstood her claim, which is one of proprietary estoppel and constructive trust as against the Estate of the late Carmelina Ngami Mburu and that the 9th Defendant held the suit property in trust for her.
13. She asserted that hers is an independent claim and has nothing to do with the Power of Attorney or the subsequent Limited Grant ad Litem to the Estate of Carmeline Ngami Mburu.
14. She deposed that there is no limitation period to the claim based on trust as stipulated under Section 20 of the *Limitation of Actions Act* and that it is a matter of justice and fair play that she be heard in her claim against the Estate of Carmelina Ngami Mburu. She stated that the Plaintiff will suffer no prejudice if she is admitted into the case and heard as a last litigant at the end of the case.
15. She argued that a constructive trust is imposed by the law wherever justice and good conscience required it; that the doctrines of proprietary estoppel and constructive trust are applicable in cases as a cause of action or as a defence to a cause of action; that she has no appeal pending before the Court of Appeal on the issue of revocation of the limited grant arising out of the Power of Attorney and that her application for stay was dismissed.
16. This application was canvassed through written submissions which this court has considered.

Analysis and Determination

17. The sole issue for the determination by this court is whether this court should allow the Applicant/ Proposed 10th Defendant to be joined in this suit. Under Order 1 Rule 10 (2) of the Civil Procedure Rules, a court may allow joinder of a party at any stage of the proceedings. It states 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.”



18. The power of a court to order joinder is based on discretion, which must be exercised judiciously and in accordance with the parameters set out in Order 1 Rule 10(2) of the Civil Procedure Rules. As stated in *Civicon Limited vs Kivuwatt Limited and 2 Others* [2015] eKLR:

“Again the power given under the Rules is discretionary which discretion must be exercised judiciously. 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.”

19. The guiding principles in considering whether to allow joinder of a party to a suit are set out in *Joseph Njau Kingori vs Robert Maina Chege & 3 Others* [2002] eKLR as follows:

- “1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.”

20. The definition of a necessary party is set out in the Ugandan case of *Departed Asians Property Custodian Board vs Jaffer Brothers Ltd* [1999] 1 EA 55 as quoted with approval by the Court of Appeal in *Civicon Limited vs Kivuwatt Limited & 2 others* [2015] eKLR 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 involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve 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 a 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.”

21. The Court of Appeal also quoted its earlier decision in *Meme vs Republic* (2004) KLR637 wherein it held that joinder will be permissible:
 - i. Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings;
 - ii. Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
 - iii. Where the joinder will prevent a likely course of proliferated litigation.”
22. The background to this application is that the Plaintiff instituted this suit through a Plaint dated 1st September 2014. The Plaintiff, the 3rd Defendant and the 9th Defendant (the estate of the late Carmelina Mburu) are all claiming ownership of the suit property, LR No. 3586/3.
23. The Applicant is not stranger in this matter. Between 2014 and June 2022, the Applicant, Catherine Njeri Ng’ang’a, acted as a representative of the estate of the late Carmelina Ngami Mburu, first as a holder of a Power of Attorney donated to her by Carmelina Ngami Mburu on March 13, 2014, and upon the demise of Ms. Mburu on October 24, 2017, vide a Limited Grant which allowed her to represent the estate of the deceased. This Limited Grant was later revoked by the High Court in Succession cause No 1130 of 2018 on the grounds that it had been illegally procured.
24. The Applicant has now sought to be joined to the suit in her personal capacity, on the ground that she has an interest in the suit property, on the basis of the doctrine of proprietary estoppel and constructive trust. She contends that the late Carmelina Ngami Mburu allowed and let her incur expenses on the basis that she was pursuing, litigating and protecting the suit property.
25. This is a new and novel application. This suit has been pending before this court for ten years and the hearing is at an advanced stage. The Applicant was substituted in July 2022 by Joseph Kangethe Wanyoike as executor of the Estate of the late Carmelina Mburu. Before the said substitution, the Applicant had participated in the proceedings as an Attorney of Catherine, and later on as her legal representative.
26. The applicant now wants to join the proceedings as a substantive party under the doctrines of constructive trust and proprietary estoppel. A constructive trust was defined by the Court of Appeal in the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR as follows:

“a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.”



27. In *William Kipsoi Sigei vs Kipkoech Arusei & Another* [2019] eKLR the Court of Appeal stated as follows;
- “We agree with the English decision *Yaxley v Gotts & Another*, (2000) Ch 162, where it was held that an oral agreement for sale of property, created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. This was also the approach taken in *Macharia Mwangi Maina* decision where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege.”
28. In *Willy Kimutai Kitilit vs Michael Kibet* [2018] KECA 573 (KLR) the Court of Appeal authoritatively opined that the doctrine of proprietary estoppel overlap with that of constructive trust, and both are concerned with equity’s intervention to provide relief against unconscionable conduct.
29. The doctrine of proprietary estoppel and constructive trust applies where a voidable contract subsists between two parties, to prevent a proprietor from acting to the detriment of the party that has relied on the said agreement. In this case, beyond the Power of Attorney donated to her by the late Carmelina Mburu, the Applicant does not plead any further grounds or facts upon which the claimed constructive trust and proprietary estoppel has arisen.
30. The Applicant has not alleged or shown any oral agreement or any conduct by Carmelina Mburu on which she has relied on to her detriment. She has also materially failed to adduce any written agreement between herself and the late Ms. Carmelina Mburu.
31. As the holder of a Power of Attorney, the Applicant held a fiduciary duty to the donor, Ms. Carmelina Mburu. This included a duty to act in good faith, in the donor’s best interest and a duty to avoid conflict of interest. The 11th Edition of the Black’s Law Dictionary defines a ‘fiduciary duty’ as follows: -
- “.. a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent’s principal or the beneficiaries of the trust;... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person-....Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest.”
32. The Applicant has moreover failed to annex a copy of the Power of Attorney issued in her favor. It is not possible for this court to discern the terms upon which the said Power of Attorney was donated to the Applicant, and if such conditions included payment of valuable consideration pegged on the outcome of the suit. In the absence of such a clause, the Applicant’s claim runs contrary to her fiduciary duty to Ms. Carmelina Mburu.
33. This court is minded that a Power of Attorney is extinguished upon the death of a donor by operation of law. Any claim that the Applicant has against Carmelina Mburu with respect to the duty she undertook on behalf of Ms. Mburu and any losses she incurred in that capacity ought to be pursued against the estate of the late Carmelina Mburu, and not as a claim in this suit.
34. In conclusion, the Applicant has not established that she is a necessary and proper party to this suit, as her claim is pursuant to the Power of Attorney donated to her by Carmelina Ngami Mburu, which in any event was extinguished upon the death of the donor.



35. Further, the Applicant has failed to establish a nexus to the suit property by way of an express term in the Power of Attorney, or an oral agreement or any conduct by Ms. Mburu against which this court could conclude that a claim of constructive trust or promissory estoppel has arisen.

36. For those reasons, the application dated 8th July 2024 is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Wena for Plaintiff

Mr. Kimutei holding brief for Kago for 3rd Defendant

Ms Athman holding brief for Odari for interested Party

Mr. Allan Kamau for 4th – 7th Defendant

Mr. Arusei for proposed 10th Defendant/Applicant

Ms Maganda for Owuor for 9th Defendant

Court Assistant: Tracy

