



Ojwang v Ghelani & 5 others; Chaju Builders Limited (Interested Party); Agola (Applicant) (Environment and Land Case Civil Suit 232 of 2013) [2025] KEELC 405 (KLR) (3 February 2025) (Ruling)

Neutral citation: [2025] KEELC 405 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 232 OF 2013
SO OKONG'O, J
FEBRUARY 3, 2025**

BETWEEN

JACOB NYAKWAKA OJWANG PLAINTIFF

AND

NATHWALAL NARISHIDAS GHELANI 1ST DEFENDANT

JOSHUA OMARI T/A SEDIME AGENCIES 2ND DEFENDANT

SAMWEL OGWENO OKECH 3RD DEFENDANT

MATHEWS OWINYO ODERA 4TH DEFENDANT

JOSHUA ONGWEN WAGUDE 5TH DEFENDANT

THE DISTRICT LAND REGISTRAR KISUMU 6TH DEFENDANT

AND

CHAJU BUILDERS LIMITED INTERESTED PARTY

AND

DANIEL OTIENO AGOLA APPLICANT

RULING

1. The Plaintiff brought this suit against the Defendants on 17th September 2013. The Plaintiff averred that at all material times, the parcel of land known as Kisumu/Kanyakwar “B”/396 (hereinafter referred to as “the suit property”) was registered in the name of his deceased father, Augustinus Ojwang Okut (hereinafter referred to as “the deceased”). The Plaintiff averred that the deceased sold to the 1st Defendant a portion of the suit property measuring 8 acres. The Plaintiff averred that the transaction



between the deceased and the 1st Defendant took place before land adjudication exercise in Kisumu/ Kanyakwar “B” Registration Section.

2. The Plaintiff averred that during the land adjudication, the whole of the suit property which measured 12 acres was recorded and subsequently registered in the name of the 1st Defendant as the first registered owner thereof on 23rd February 1983 although only a portion thereof measuring 8 acres had been sold to the 1st Defendant. The Plaintiff averred that the suit property was subsequently transferred and registered in the names of the 2nd Defendant and, the 3rd and 4th Defendants on 21st January 1999 and 23rd March 2011. The Plaintiff averred that the sale of the suit property by the 1st Defendant to the 2nd Defendant and the subsequent sale of the property by the 2nd Defendant to the 3rd and 4th Defendants were fraudulent and unlawful. The Plaintiff averred that the Defendants colluded to fraudulently and illegally deprive the Plaintiff of his deceased father’s share in the suit property.
3. The Plaintiff sought judgment against the Defendants jointly and severally for;
 1. A declaration that the 1st Defendant was only entitled to a portion of the suit property measuring 8 acres.
 2. An order that the suit property be surveyed, subdivided and a portion thereof measuring 8 acres be registered in the name of the 1st Defendant and the remaining portion measuring 4 acres be registered in the name of the Plaintiff.
 3. A declaration that dealings with the suit property by the 2nd, 3rd, 4th and 5th Defendants were fraudulent, void and should be cancelled.
4. The 1st and 5th Defendants filed separate statements of admission of the Plaintiff’s claim on 11th December 2013. The 2nd, 3rd, 4th and 6th Defendants were said to have been served but failed to enter appearance. The suit was heard as a formal proof and judgment entered for the Plaintiff against the Defendants on 18th May 2016. The court ordered that all entries in the register of the suit property save for those in favour of the 1st Defendant were illegal and fraudulent, and cancelled the same. The court ordered further that the Plaintiff as the administrator of the estate of his deceased father, Augustinus Ojwang Okut was entitled to a portion of the suit property measuring 4 acres (approximately 1.6 Ha.) while the 1st Defendant was entitled to a portion of the suit property measuring 8 acres (approximately 3.2Ha.) and that the suit property be subdivided and apportioned between the Plaintiff and the 1st Defendant in that manner. The 2nd, 3rd and 4th Defendants were condemned to pay the costs of the suit.
5. On 22nd September 2016, the 3rd and 4th Defendants filed an application dated 20th September 2016 seeking an order to set aside the judgment that was entered against them on 18th May 2016 together with all the consequential proceedings and orders arising therefrom on the ground that they were not served with Summons to Enter Appearance. On 26th October 2016, the court issued an order preserving and/or conserving the suit property together with the resultant titles pending the delivery of a ruling on the 3rd and 4th Defendant’s application.
6. In a ruling delivered on 15th February 2017 (wrongly dated 15th February 2016), the court found that the 3rd and 4th Defendants were not served, set aside the interlocutory and final judgment that was entered against them on 30th January 2014 and 18th May 2016 respectively and granted the 3rd and 4th Defendants leave to defend the suit.
7. The 3rd and 4th Defendants filed a joint statement of defence and the suit was heard afresh. In a judgment delivered on 7th December 2021, the court found that the Plaintiff’s deceased father had no interest in the suit property and that in any event, the Plaintiff’s claim against the 1st Defendant was time-barred



having been brought 33 years after the 1st Defendant was registered as the owner of the suit property. The court found further that the Plaintiff failed to prove that his deceased father was defrauded of the suit property. The court held that the 3rd and 4th Defendants were bona fide purchasers of the suit property for value from the 2nd Defendant without notice of the alleged fraud. The court noted that the 3rd and 4th Defendants who were the trustees of Afya Sacco Co-operative Society Limited Kisumu Branch had already subdivided the suit property and allocated the subdivisions thereof to their members who were already in possession. The 3rd and 4th Defendants produced in evidence copies of title deeds (73 in total) in the names of their members. The court dismissed the Plaintiff's suit with costs.

8. On 17th October 2024, the 3rd and 4th Defendants moved the court by a Notice of Motion application dated 16th October 2024 seeking; an order to join Chaju Builders Limited to the suit for the purposes of the application, a declaration that the order issued by the court on 15th February 2017 setting aside the ex parte judgment that had been entered against the 3rd and 4th Defendants on 18th May 2016 also overturned the execution of the said judgment and rendered any transactions over the suit property, Kisumu/Kanyakwar "B"/396 null and void and restored the status quo prior to the said judgment which was that the suit property had been subdivided into Kisumu/Kanyakwar "B"/1689-1770, a declaration that the subdivision of the suit property into Kisumu/Kanyakwar "B"/2732(further subdivided into subplots 2745, 2746,2747 and 2748), 2733 and 2734 by the Plaintiff and subsequent transfer of the subdivisions to the names of the Plaintiff and Chaju Builders Limited was null and void by reason of the ruling and orders made by the court on 15th February 2017, and an order revoking, rescinding and/or cancelling the purported subdivision of the suit property as aforesaid and the rectification of the register of the suit property so as to restore the land parcels Kisumu/Kanyakwar "B"/1689-1770 in the names of the registered owners thereof.
9. The 3rd and 4th Defendants averred that in September 2024, the Plaintiff and the agents of Chaju Builders Limited (hereinafter referred to only as "Chaju") entered the suit property and commenced excavation of murrum on the portions thereof. The 3rd and 4th Defendants averred that the Plaintiff also leased out portions of the suit property without the permission of the 3rd and 4th Defendants. The 3rd and 4th Defendants averred that upon making inquiries from the 5th Defendant on the status of the suit property, they discovered that the Plaintiff had proceeded to execute the judgment of the court delivered on 18th May 2016 which was set aside on 15th February 2017. The 3rd and 4th Defendants averred that the purported subdivision and sale of the portions of the suit property by the Plaintiff and Chaju were null and void as the same were based on a judgment that had been set aside.
10. The Plaintiff and Chaju have responded to the application which is pending hearing and determination before this court.
11. What is now before me is the Notice of Motion application dated 14th November 2024 by Daniel Otieno Agola (hereinafter referred to as the "Applicant"). The Applicant is not a party to the main suit that has been heard and determined. The Applicant is also not a party to the pending application by the 3rd and 4th Defendants. In the application the Applicant sought the following orders; that the Applicant be joined in this suit as an interested party, the judgment entered in this suit be set aside and the suit be heard a fresh, and that the suit be stayed pending the hearing and determination of ELCC No. E006 of 2024. The Applicant averred that the suit property, Kisumu/Kanyakwar "B"/396 was owned by his deceased father, Gordon Mark Agola Hongo. The Applicant averred that this suit was filed and heard without notice to him as the administrator of the estate of his father. The Applicant averred that it was necessary that the judgment be set aside so that he could join the suit for the purposes of a fresh hearing. In his affidavit in support of the application, the Applicant reiterated that he was the administrator of



the estate of his deceased father who was the registered owner of the suit property which was originally known as Kisumu/Kanyakwar “B”/385. The Applicant averred that it was necessary that he be joined in the suit so that he could be heard. The Applicant averred that the suit once reopened for hearing a fresh should be stayed pending the hearing of another suit namely, ELCC No. E006 of 2023.

12. The Applicant’s application was opposed by the 3rd and 4th Defendants through a replying affidavit filed on 16th December 2024. The 3rd and 4th Defendants averred that the Applicant had not established sufficient grounds to warrant his joinder to the suit and the setting aside of the judgment entered herein on 7th December 2021.
13. The Applicant’s application was heard on 2nd December 2024. I have considered the Applicant’s application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the 3rd and 4th Defendants in opposition to the application. The Applicant’s application has two limbs. The first limb seeks the joinder of the Applicant to the suit as an interested party while the second limb seeks the setting aside of the judgment entered herein on 7th December 2021 and stay of proceedings. I will consider the issue of joinder first. The application was brought under Orders 1 and 12 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*. Joinder of additional parties to a suit either as a plaintiff or a defendant is provided for under Order 1 rules 1, 3 and 10 of the Civil Procedure Rules. There is no express rule providing for the joinder of a party to a suit as an interested party. However, the court has an inherent power to join a person to a suit as an interested party for the ends of justice to be met.
14. The Civil Procedure Rules have no definition of an interested party. I will borrow the definition of an interested party provided in Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which I believe would also apply in civil suits. In the Rule, an interested party is defined as:

a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”.
15. The court’s power to join a party to a suit as an interested party is discretionary and as such must be exercised judiciously. That means that an applicant seeking to be joined in a suit as an interested party must satisfy the court that he has a stake or an interest in the subject matter of the suit.
16. In *Francis Kariuki Muruatetu & another v. Republic & 5 others*, Petition No. 15 as consolidated with No. 16 of 2013 [2016] eKLR, the Supreme Court set out the guiding principles on applications for joinder of interested parties to petitions which I believe would apply also to normal suits as follows:
 - (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 application, 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.”



17. I am not satisfied from the affidavit in support of the Applicant's application that the Applicant has a stake in this suit and that he stands to suffer prejudice if he is not joined to the suit. The Applicant who claims to be the administrator of the estate of his deceased father Gordon Mark Agola Hongo has not placed any evidence of his appointment as such before the court. The Applicant who has claimed that his deceased father was registered as the owner of the suit property has also not furnished the court with any evidence in proof of that allegation. The Applicant has also not told the court how and when he got to know of this suit and why he could not seek joinder before the suit was heard and determined. In the absence of any evidence that the Applicant is the administrator of the estate of his deceased father Gordon Mark Agola Hongo and that the deceased has any interest in the suit property, I am unable to see what prejudice or injustice his estate will suffer if the Applicant is not joined in this suit. The application for joinder must fail in the circumstances.
18. Having held that the Applicant has failed to establish that the estate of his deceased father has an interest in the suit property to warrant the Applicant's joinder to the suit, the Applicant's prayer for the setting aside of the judgment entered herein on 7th December 2021 and stay of further proceedings has become superfluous. It is not necessary to consider that limb of the application. I wish to add that the Applicant did not place before the court the pleadings in ELCC No. E006 of 2024 from which the court would have appreciated the connection between that suit and the present one.
19. For the foregoing reasons, I find no merit in the Notice of Motion application dated 14th November 2024. The same is dismissed with costs to the 3rd and 4th Defendants.

DATED AND DELIVERED AT KISUMU ON THIS 3RD DAY OF FEBRUARY 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Indimuli for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Mr. Otieno for the 3rd and 4th Defendants

N/A for the 6th Defendant

Mr. Ogonda for Chaju Builders

N/A for the Applicant

Ms. J. Omondi-Court Assistant

