



REPUBLIC OF KENYA



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**Chepkemoi v Chebiego & another (Environment and Land Appeal
E014 of 2023) [2024] KEELC 6759 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E014 OF 2023
JM ONYANGO, J
OCTOBER 9, 2024**

BETWEEN

IRENE CHEPKEMOI APPELLANT

AND

MARIA T CHEBIEGO 1ST RESPONDENT

KIMUTAI KANGOGO SAWE 2ND RESPONDENT

RULING

1. The Application for consideration is the Notice of Motion dated 15th January, 2024 seeking the following orders:-
 - a. Spent
 - b. That pending inter-partes hearing the Honourable court be pleased to stay execution of the Decree dated 27th January, 2022 in Eldoret CMCC No 382 of 1997 and thereafter pending hearing and determination of this appeal.
 - c. That the Honourable Court be pleased to stay further proceedings in Eldoret CMCC No 382 of 1997 pending hearing and determination of this Appeal.
 - d. That costs of the Application to abide by the outcome of the Appeal.
2. The application is premised on the grounds stated on the face of the application and the supporting affidavit sworn on 15th January, 2024 by the Applicant herein, Irene Chepkemoi, who is the legal representative of Susana Changwony Rono (Deceased). She deponed that the deceased was the registered owner of a parcel of land known as Cheptiret/cheplaskei Block 4(Mosop 'B')/1, which, among other parcels, the 1st Respondent sought to have resurveyed. The 1st Respondent allegedly did not include the deceased as a party to the proceedings despite being the registered owner and a necessary party to the suit.



3. She deponed that the trial court dismissed her application for joinder and setting aside of the decree and consequential orders hence this appeal. She claimed that she has an arguable appeal. She deponed that the 1st Respondent sought to adopt a surveyor's report which contradicts an earlier report of 27th February, 2014. The appeal shall therefore be rendered nugatory unless the orders are granted, and the applicant shall as a consequence suffer irreparably. She deponed that the application was made without undue delay, in utmost good faith and in the interest of justice.
4. The 1st Respondent opposed the application via a Replying Affidavit sworn on 18th June, 2024. She deponed that during the pendency of the suit in the subordinate court, the Land Registrar, pursuant to powers conferred on him by Section 21 of the Registered Land Act (RLA) CAP 300 (repealed), visited the site and prepared a report for the dispute. That all parties including the deceased were served with Notices by the Chief, and were heard in line with Section 21(5) of the said repealed Act. She deponed that a second Land Registrar, one H.C. Mutai, under the auspices of the same powers, also visited the land and prepared a report. That the deceased was present when the Registrar was fixing boundaries and was duly heard. She alleged that the deceased was not prejudiced at all because the Land Registrar H.C. Mutai heard her and all the parties before making his recommendations, which the trial court adopted verbatim. The 1st Respondent added that the findings of the trial court were upheld by this court, though differently constituted.
5. Further, that pursuant to orders of this court, the County Land Registrar visited the parcels of land, during which visit the Deceased was present. The Land Registrar then prepared a report. That the two courts made no other orders beyond directing the Land Registrar to fix the boundaries, thus the deceased was not at all prejudiced. She deponed that the power to fix boundaries is vested in the Registrar, and once he exercises it, a party can only file a fresh suit but not seek a reversal of the order that prompted the Registrar to act. She also deponed that the Applicant had not satisfied all the conditions for grant of a stay of execution which are set out under Order 42 Rule 6. That the Applicant had not demonstrated that the Appeal has a high likelihood of success. On the other hand, that execution of the decree has already been delayed to the prejudice of the Respondent who has complied with all procedures and court orders. She asked that the application be dismissed.
6. On 24th June, 2024 the Respondent also filed an undated Replying Affidavit adding that the Deceased was aware of the dispute, and was also aware of the earlier survey meant to resolve it. She indicated that she is now elderly and wishes to have the dispute resolved amicably.
7. The Applicant then responded vide a Supplementary Affidavit sworn on 25th June, 2024. She annexed the Surveyor's Report dated 5th April, 2023 deposing that the parcel named therein as Cheptiret/ cheplaskai/Block 4(Mosop 'B')/90 which is claimed by the 1st Respondent does not exist on the ground. Further that the report, which is sought to be adopted, indicates that the ground area of the deceased's parcel, being the suit property, as well as that of other parcels is larger than what is contained in the title. She thus alleged that the Surveyor had hived off 0.33Ha or 0.82 Acres of the deceased's property to create a new parcel being Cheptiret/cheplaskai/block 4(Mosop 'B')/90, to the detriment of the deceased's estate. She pointed out that the 1st Respondent is seeking to adopt a surveyor's report adversely touching on properties whose owners are not parties to the proceedings, and insisted that her Appeal has high chances of success.

Applicant's Submissions

8. The court directed that the parties file their submissions. The submissions in support of the Applicant's application are dated 25th June, 2024. Counsel for the Applicant submitted that in ELD. CMCC 382 of 1997, the 1st Respondent sought a demarcation of parcels known as Cheptiret/



cheplaskai Block 4 (mosop B)3, 90, 91 and 92 as seen in the decree. However, the County Surveyor included in the survey exercise parcels that were not part of the proceedings, being; Cheptiret/ cheplaskai Block 4 (mosop B)/1,2 and 4-9, among them the deceased's property. Counsel submitted that the surveyor ignored complaints and concerns raised over the same. Counsel explained that the 1st Respondent had vide an application dated 29th November, 2023 sought to have the Surveyor's report dated 5th April, 2024 adopted.

9. Counsel further submitted that the deceased was never a party to the lower court proceedings and had no notice of the suit. Further, that her application for joinder, which the 1st Respondent opposed, was dismissed. Counsel faulted the impugned report for hiving off land from 3rd parties to create the 1st Respondent's parcel, and argued that implementing it will amount to condemning the Applicant unheard, which is an affront to their constitutional right to be heard. That if the impugned report is implemented, the Applicant shall suffer substantial loss and it will be a contravention of the rules of natural justice. Counsel cited Eldoret High Court Civil Case No 213 of 1997; *Komen Ego & 3 others v District Surveyor, Uasin Gishu District & 2 others* (2007) eKLR to bolster his arguments. That the Applicant lodged her application on time and it is in the interest of justice to preserve the substratum of the Appeal. Further, that the Applicant has demonstrated that she has an arguable appeal with high chances of success. Counsel urged that the application is merited and ought to succeed.

Respondent's Submissions

10. On the other hand, in the 1st Respondent's Submissions dated 1st July, 2024 it was submitted that the Applicant has not met the test for grant of stay of execution as provided under Order 42 Rule 6 of the *Civil Procedure Rules*. That she had not demonstrated any substantial loss as required, her claims being speculative and without concrete evidence. He relied on the case of *Machira t/a Machira & co. Advocates v East African Standard (No 2)* (2002) eKLR. In addition, she submitted that granting the stay would unduly prejudice the Respondent by delaying the enforcement of a lawful judgment. He relied on the case of *Kenya Shell Ltd v Kibiru* (1986) KLR 410. It was her further contention, that the appeal and the intended application was only meant to delay the hearing of the instant case. Counsel submitted that the application is a delaying tactic, meant to forestall the enforcement of the judgment and delay justice relied on the case of *Butt v Rent Restrictions Tribunal* (1979) eKLR.
11. Counsel submitted that the Applicant had not offered any security for the performance of the decree, and had also failed to demonstrate that the Appeal has high likelihood of success. On the failure to join the Applicant in the subordinate court, Counsel reiterated that the court merely upheld the jurisdiction of the Land Registrar who made his recommendations after hearing the Applicant. He asserted that even if the Applicant was heard, the same decision would have been arrived at because the primary jurisdiction to resolve disputes lies with the Land Registrar and the claim of non-joinder was thus superfluous. Counsel argued that the application for adoption of the award has not been decided and this court has no jurisdiction to determine a matter that was not decided by the lower court as it can only intervene by exercising its appellate jurisdiction. Counsel asked this court to dismiss the application with costs.

Analysis and Determination

12. I have carefully considered the instant application, the responses filed against it and the rival submissions by the parties. This is essentially an application for both stay of execution pending appeal and for stay of proceedings in Eldoret CMCC No 382 of 1997. I note, however, from my reading of the pleadings herein that there is another issue that runs through the narrative of this application and indeed the entire Appeal, which the court must as of necessity deal with before embarking on



whether the application is merited. This question relates to the Applicant's locus standi in bringing this application, the Appeal in its entirety and whether, if at all, she had the requisite locus standi in the lower court. The issue arises out of the fact that the Applicant was not a party in the original claim, and it is not clear to this court whether she gained entry into the suit regularly.

13. The Applicant is clear that the deceased was not a party to the proceedings in the lower court. In fact, the Applicant annexed the Plaint as proof of her assertion. The question therefore is whether she has the locus standi to bring the instant application that gave rise to the Appeal herein. It is thus imperative to first deal with the issue of whether the Applicant has the requisite standing bearing in mind that locus standi touches on the jurisdiction of the court. A determination on that question will have far-reaching implications on not only the instant Application, but also the determination of the appeal herein.
14. The issues therefore are that:-
 - i. Whether the Applicant is a proper party with locus standi to bring the instant application
 - ii. Whether the Applicant has met the conditions for grant of an order of stay of execution;
 - iii. Whether the court should stay the proceedings in the lower court as prayed;
 - iv. Who shall bear the costs?

i. Whether the Applicant is a proper party with the appropriate locus standi to bring the instant application;

15. Locus standi is defined in Black's Law Dictionary, 9th Edition at page 1026 as:-

“The right to bring an action or to be heard in a given forum”.

16. Hancox JA in Alfred Njau, Aluchio Liboi, Joseph Muya Mukabi, Peter Inyangala, Akhonya Analo and Jacob Gichigo v City Council of Nairobi [1983] KECA 56 (KLR) expounded on the term locus standi as follows:-

“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding. Therefore the effect of the judge's finding here, which was made after hearing the evidence, and not treated as an isolated issue, the latter course being disapproved in the particular circumstances of that case by the House of Lords in *IRC v National Federation of Self Employed and Small Businesses Ltd* (supra), was that the appellant had no right to bring or to appear in this suit against the Council.”

17. It is trite therefore that without locus standi, a party lacks the necessary legal standing to engage approach the court for a remedy. In the case of Julian Adoyo & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR, Mrima J. discussed locus standi as follows;

“A party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the



matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

18. I have perused the proceedings and entire record of the lower court file, being Eldoret CMCC No 382 of 1997 which was later renamed ELC No 362 of 2017. The suit in the lower court was initially instituted against Kimutai Kangogo Sawe as the sole Defendant. I note that there was an application dated 2nd May, 2007 for joinder of 18 individuals, who sought to be included in the suit as interested parties and/or Co-Defendants in the suit and their application was allowed on 13th August, 2007. Neither Susana Changwony Rono (the deceased), nor the Applicant herein were among these 18 individuals. There is no application in the entire lower court file that sought to have the said Susana Changwony Rono joined as a party to the suit.
19. The Applicant joined the proceedings when she filed the application dated 28th March, 2023 through which the Applicant alleged she sought to be joined to the lower court suit. That application is annexed to the instant Application together with the Ruling delivered thereon by the lower court. In the said application, the Applicant asked for an order of say of implementation and execution of the decree and for orders of review or setting aside of the decree. The Applicant did not include a prayer for joinder in the said application, and consequently, in the ruling delivered on 5th September, 2023 the Trial Magistrate did not address the issue regarding the joinder of the Applicant.
20. I am alive to the fact that the [Civil Procedure Rules](#) allow the court to admit an interested party to a suit, *suo moto*, to enable it completely adjudicate over the issues before it. Owing to that, I have also gone through the proceedings of the lower court and have seen no order by the Trial Magistrate joining either the Deceased or the Applicant herein in her stead as parties to the suit/trial proceedings of his own motion. It follows therefore that the application in the lower court was incompetent ab initio for having been brought by a person who was not party to the suit/proceedings.
21. The trial court must therefore be faulted for entertaining an application brought by a party who was a stranger to the proceedings. The participation of the Applicant herein and in the proceedings in the subordinate court is contrary to the provisions of the [Civil Procedure Rules](#), 2010. In addition, since it is clear that the issue of joinder was never raised or dealt with by the trial court, this court, sitting in its appellate jurisdiction, cannot entertain it. In [Daykio Plantations Limited v National Bank of Kenya Limited & 2 others](#) [2019] eKLR, it was held that:-

“It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit.”
22. I am further guided by the decision of the Supreme Court in [Kaluma v NGO Co-ordination Board & 5 others](#) (Application E011 of 2023) [2023] KESC 72 (KLR), where while dealing with an application for review by a third party, it held that:-

“29. In the instant application, the applicant contends that an application for review can be invoked by any person who would appeal the matter but is yet to do so. We disagree. This court derives its jurisdiction from article 163 of the [Constitution](#) and subsequently from legislation, to wit, the [Supreme Court Act](#) and Rules. It is therefore bound by its rules and procedure. Thus, a party



moving the court under article 163 must be competent to do so in the first place.

30. Section 21A of the Supreme Court Act provides for the circumstances pursuant to which this court may review its own decision on an application filed by “a party”. The court cannot entertain an application for review of its judgment filed by an applicant who was not a party to the proceedings as this goes to the root of the matter and sanctity of the already determined suit which was contested by the parties. Consequently, we find that the applicant is not competent to seek a review of the judgment under reference.”
23. The Applicant therefore has no right to or interest in the reliefs sought in the instant Application. It goes without saying that this decision will have an impact on the entire Appeal filed herein since the lack of locus standi is a point of law that touches on jurisdiction of the Court. By virtue of the fact that the Applicant was not a party to that suit and thus had no locus standi, the Trial court had no jurisdiction to entertain an application by an outsider to the suit. The proceedings with regards to the Applicant’s Application in the trial court were as a result null ab initio. They ought not have been conducted before the Applicant regularised her position or at all. The Ruling subject matter of this Appeal is equally a nullity. Consequently, this Appeal has no legs on which it can stand.
24. That being the case, it follows that this court equally has no jurisdiction to entertain the instant application or the Appeal in its entirety as the same is rendered moot by the Applicant’s lack of capacity. Any continued entertainment of the Appeal will have no significance, rendering any action by this court thereon purely academic and in vain. Time and again, it has been expressed that a court should not knowingly act in vain. But even if this court were of the mind to maintain this Appeal, the fact that the Applicant never had capacity to lodge the Application in the lower court that gave rise to the Ruling subject matter of this Appeal will not change. Arising from that finding, the Applicant had no capacity to file an Appeal against that ruling because it was a nullity, therefore as already expressed, the Appeal thus has no legs to stand on.
25. It should be noted that the finding that the Applicant has no locus standi does not mean that she has no cause of action as the two terms mean two different things. Whereas locus standi is the right to sue or to be heard, cause of action refers to the set fact giving rise to a party’s right to sue. Therefore, while the Applicant cannot be heard in this suit for lack of standing, she is at liberty to seek redress for any perceived wrongs regarding her parcel of land, perhaps through a separate suit. It is clear however, that such redress cannot be found in this suit. To compound this, the matter was indeed heard on Appeal and the judgment of the Trial Court upheld. That judgment has not been appealed against, reviewed or set aside.
26. As a result, this court finds that not having been a party in the lower court, and further, not having regularly been joined to this suit, the Applicant has no capacity to sustain the instant Application dated January 15, 2024 as well as the Appeal. Both are therefore struck out. Having been denied audience before this court, the court will not condemn the Applicant to pay costs.

DATED SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF OCTOBER 2024.

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J.M ONYANGO
JUDGE

In the presence of;



1. Ms. Kipseii for the 2nd -19th Respondents
 2. No appearance for the Appellants/Applicant
- Court Assistant: Brian

