



**Ngare (Suing as the Legal Representative of the Estate of Stephen
Ngare Ogama-Deceased) v Ogamba (Environment & Land Case
E001 of 2022) [2024] KEELC 6639 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E001 OF 2022**

**JM KAMAU, J
OCTOBER 9, 2024**

BETWEEN

**ESTHER NYABATE NGARE PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN
NGARE OGAMA-DECEASED**

AND

ARNOLD RASUGU OGAMBA DEFENDANT

RULING

1. This suit was commenced by way of a Plaint dated 1/4/2022 where the widow and Legal Representative of the Estate of Stephen Ngare Ogamba sued her brother-in- law, Arnold Rasunga Ogamba over the ownership of the parcel of land known as Matutu Settlement Scheme/641 measuring 24 Acres or thereabout. She sought for the following orders against the Defendant: -
 - a. A Declaration that the Defendant has no proprietary rights over the suit land, Matutu Settlement Scheme/641 or any portion thereof and has no right whatsoever to occupy and/or to interfere with the Plaintiff's quiet user and possession of the suit land.
 - b. A Declaration that Matutu Settlement Scheme/641 lawfully belongs to the deceased.
 - c. An order of injunction restraining the Defendant either by himself, his agents, servants or anyone claiming under him from entering upon, trespassing onto, taking possession of, destroying crops or in any other way, whatsoever interfering with the Plaintiff's rights over the suit land known as Matutu Settlement Scheme/641.
 - d. Costs of the Plaintiff be borne by the Defendant.



- e. The Honourable court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedite.
2. The Defendant, vide a Statement of Defence and Counter-claim dated 13/6/2022 and amended on 22/9/2022 denied the Plaintiff's claim saying that 8 Acres out of the suit land belonged to him as his inheritance from their late father, Japheth Ogamba. He further said that although there was an agreement to exchange his aforesaid land with his late brother's 2 parcels of land elsewhere i.e. West Mwakibagendi/1638 and Wanjare/Bogiakumu/1908 respectively, this agreement did not last for long and the original land Matutu Settlement Scheme/ Mwakibagendi/178 had already been sub-divided into 640 and 641, with the latter, measuring 24 Acres belonging to the Defendant and his late brother. Later on, the 2 agreed to go back to their positions before the Agreement. The Defendant therefore sought for the following orders in his Counter-claim; -
 - a. An order of permanent injunction restraining the Defendant by herself agent, servant and/or anybody claiming under him from in any way trespassing into, damaging, wasting, cultivating and/or dealing with the Counter-claimer's portion of land in Matutu Settlement Scheme/641.
 - b. A declaration that the Counter claimer is entitled to a share of 8 Acres in Matutu Settlement/ Scheme/641 by virtue of his quiet and uninterrupted possession of the portion within the suit land for a period of more than 12 years.
 - c. Any other relief and remedy that the court may deem fit to grant for the tenets of justice to be met.
 - d. Costs and interests of this suit.
 3. After Hearing the Parties herein, the Court found 8 Acres out of that Matutu Settlement Scheme/641 rightfully belonged to the Defendant and 16 Acres belonged to the Deceased. By now, Matutu Settlement Scheme/641 was in the name of the Deceased who had already secured a loan of Kshs. 2,000,000/= from the Intended Interested Party. This Court therefore ordered that; -
 1. The Plaintiff's suit and prayers engraved in the Complaint dated 1/4/2022 is hereby and wholly dismissed with costs to the Defendant.
 2. The Defendant's Amended Counter-claim dated 13/6/2022 is hereby allowed in terms of prayer number (a) and prayer number (b) the (a) being restricted to the 8 Acres he has been occupying.
 3. The Co-operative Bank of Kenya Limited is hereby ordered to discharge the entire parcel of land Matutu Settlement Scheme/641, to facilitate the same to be sub-divided into two in the ratio of 2:1 between the deceased Stephen Ngare Ogamba retaining 16 Acres and the Defendant Arnold Rasugu Ogamba taking 8 Acres.
 4. Immediately after the aforesaid sub-divisions the two portions shall be registered with the Deceased being registered the proprietor of the 16 Acres on the one side which has the permanent house and the Defendant being registered the absolute owner of 8 Acres thereof which shall be where he has built a mud house.
 5. The Co-operative Bank of Kenya Limited shall be at liberty to charge the Plaintiff's (Deceased's) portion and if it shall not be sufficient then she will look for other collaterals belonging to the Deceased.



6. For the avoidance of doubt, the Defendant shall have the costs of the suit and that of the Counter-claim.
4. By so doing, the court was safeguarding the interests of the Intended Interested Party.
5. Later, vide Application dated 11/3/2024 the Plaintiff /Judgment Debtor moved the court with the prayer of stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules. Before the same was determined on 9/4/2024 this Court, on its own motion, invited the Applicant's Branch Manager (Kisii) to appear in court on 30/4/2024 to shed light on the status of the loan account. The Bank was given an opportunity to explain how it intended to deal with the loan which at this time stood at Kshs. 4,007,572.01 as at 30/4/2024. The Business Manager, Mr. Joel Odhiambo explained that should the loan not be serviced and cleared, the Applicant intended to auction the collateral thereat – LR. NO. Matutu Settlement Scheme/641. What followed is the current Application dated 12/6/2024 wherein the Intended Interested Party the Co-Operative Bank of Kenya Ltd has sought orders from this Court for;-
 - a. The Honourable Court be pleased to enjoin the Applicant as an Interested Party in the matter herein.
 - b. Consequent to the grant of prayer 1 above, parties be allowed to amend their pleadings to reflect the joinder of the Applicant.
 - c. The Applicant be granted leave to file a statement of defence and counterclaim.
 - d. Costs of this Application be provided for.
6. The Application is supported by the Grounds that:
 - i. The Intended Interested Party has a financial interest or stake in the matter in question as Chargee; and that their interest is clearly identifiable and proximate enough and not merely peripheral.
 - ii. The intended party's presence would enable court to resolve all the matters in the dispute.
 - iii. The intended party would suffer prejudice in case of non-joinder.
 - iv. The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.
 - v. The suit land that is the subject matter of the instant suit was Charged to the Applicant herein by Stephen Ngare Ogamba (now deceased) vide Legal Charge registered on 4th October, 2004.
 - vi. The acts of the plaintiff and Defendant herein aimed at dispossessing the Applicant of its legally Charged property renders the Applicant competent to be enjoined as a party in this suit as an interested party.
 - vii. The Applicant is directly affected by any orders that emanate from the instant suit and therefore entitled to be heard as per the Provisions of *the Constitution* of Kenya (2010).
 - viii. The Applicant has a right of relief in this matter, and if brought in a separate suit, a common question of law and fact would arise.
 - ix. The parties herein will not be in any way prejudiced if the orders sought are granted.



- x. It will be in the interest of justice that this court grants orders as prayed herein to allow the Applicant to seek remedies alongside the Plaintiff and Defendant for the apparent infringement of their fundamental rights.
7. In her Affidavit in support of the said Application sworn on 12/6/2024, the Intended Interested Party through her legal officer, Jackson Oire, deponed that: The Bank was served with a letter from the Decree Holder's Advocates M/s Bonuke and company Advocates on 22/2/2024 attaching a copy of the Judgment in this case demanding the discharge of the collateral – suit land, Matutu Settlement Scheme/641. The Parties to the suit land already disclosed the interest of the Applicant over the suit property before the Judgment was delivered. The Applicant's right of relief comes out of the illegal acts of the Plaintiff. The adverse orders already in place would frustrate the Applicant's recovery process. The Joinder of the Applicant to the suit would enable the Court to adjudicate the suit wholesomely.
8. The Applicant demonstrated her interest in the matter by attaching the charge documents and her Draft Statement of Defence and Counter-claim.
9. It didn't catch this Court by surprise that the Judgment Debtor supported the Application.
10. On his part the Decree Holder, vide his Replying Affidavit sworn on 23/7/2024 and filed in court the following day, termed the Application scandalous, frivolous, vexatious and otherwise an abuse of the Court process. In a nutshell, he deponed that the Court had already secured the interests of the Applicant by ordering that after the sub-division of the suit property following the discharge over it there be a compulsory charge over the 16 Acres belonging to the Judgment Debtor whose value was far more than the outstanding loan, the value being Kshs. 24,000,000/= against the outstanding loan of slightly over Kshs. 4,000,000/=. He also said that it was misleading for the Applicant to suggest that the 16 Acres stand to be sub-divided and transferred to 3rd Parties. He added that this Court is *functus officio* and that the Applicant does not seek to set aside the Judgment through Review. The Decree Holder rightly deponed that having acknowledged to have received a Notification of this Judgment on 22/2/2024 the Applicant waited for 6 months in order to file the current Application and in fact only after the stay of execution Application had been heard and determined. And that the Applicant was free to challenge the Judgment herein in the Court of Appeal.
11. Having given the Applicant and the Parties herein an opportunity to be heard, I notice that the Court, having realized that the Applicant's interests were at risk, went out of its way suo moto to invite the Applicant to explain the status of the loan account whereupon Mr. Joel Odhiambo, her Business Manager, came to court and produced several documents to show that the loan stood at Kshs. 4,007,572.01. By then the Court, again without being moved by any of the Parties, had ordered that the 16 Acres to be carved out of Matutu Settlement Scheme/641 whose value is over 20,000,000/=:, far beyond the outstanding loan, be charged to the Applicant. What has become difficult in doing so? This is what the Applicant ought to have done first. Discharge Matutu Settlement Scheme/641. Subdivide the land and have 8 Acres registered in the Decree Holder's name. Then have 16 Acres therefrom registered in the Judgment Debtor's name and then register a charge against the same. Secondly, the Applicant took more than 6 months after it allegedly came to her attention that there was a case in Court that affected Matutu Settlement Scheme/641, the charged property. I highly doubt that this information was not all along within her knowledge. Even after being invited and appearing in court on 30/4/2024, the Applicant still waited for almost 2 months before moving the Court. But most importantly, the Applicant has all along not been keen on realizing the security or pursuing the defaulting chargor, who was actually a Director of the Bank, ever since the suit property was charged in 2013, more than 11 years ago save one time in 2006 but then went back to sleep.



12. This is a discretionally prayer and equity aids the vigilant and not the indolent. And besides, the Court has already taken the interests of the Applicant into consideration. Nowhere has the Applicant suggested to the Court that the wind of opportunity given to her would not be successful.
13. In any case, what is the interest of the Applicant rather than recovering the monies advanced to the Judgment Debtor's Estate which as observed above, she has had no interest pursuing. This leads to only one conclusion. The Applicant is acting at the behest of the Judgment Debtor which was very clear in the proceedings in that even though the loan was not serviced at all, the Applicant took no action. This of course explains why the Judgment Debtor is not opposed to the Motion. In fact the last correspondence from the Applicant to the chargor is dated 28/12/2006 demanding that the chargor do make payments. This was produced in Court by the Applicant's own Business Manager. Now that the court has condemned the Judgment Debtor to have the Decree Holder's parcel of land released from the entire charged parcel and the Decree Holder has demanded the discharge of the same, the Applicant has rushed to Court to have the process halted instead of pursuing the large portion which the Court has ordered that it be charged. The Judgment is very clear. If the same were to be sub-divided and/or transferred to 3rd Parties, it would only be because the Applicant has allowed it to happen. The Applicant has therefore not come to court with clean hands nor in good faith and I strongly believe that her Application dated 12/6/2024 belongs to the archives. The same is hereby dismissed with costs to the Defendant/Decree Holder.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 9TH DAY OF OCTOBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Plaintiff's Counsel: Mr. Ochoki

Defendants' Counsel: Mr. Bonuke

