



Mulinge & 2 others v Nthiwa & 3 others; Muthama (Intended Interested Party) (Environment & Land Case 256 of 2017) [2024] KEELC 7374 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7374 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 256 OF 2017
TW MURIGI, J
NOVEMBER 6, 2024**

BETWEEN

**ELIZABETH WAYUA MULINGE 1ST PLAINTIFF
BOSCO MWISYA 2ND PLAINTIFF
SADIQUE MAKEWA 3RD PLAINTIFF**

AND

**PATRICK NTHIWA 1ST DEFENDANT
SOPHIA MASOA 2ND DEFENDANT
WAMBUA MUTHAMA 3RD DEFENDANT
LOISE NDUKU 4TH DEFENDANT**

AND

DUNCAN MULI MUTHAMA INTENDED INTERESTED PARTY

RULING

1. Before me for determination are two applications- the first is a Notice of Motion dated 19th October 2023 brought under Sections 3A & 3B of the Civil Procedure Rules, in which the Applicant seeks the following orders:-
 1. Spent.
 2. That the firm of Mulandi Kisabit & Associates be granted leave to come on record for the Intended Interested Party.
 3. That pending the delivery of the judgment slated for 6th December 2023, the Honourable Court be pleased to order that the name of Loise Nduku was irregularly and unprocedurally



added as she is not a direct beneficiary as per the laws of succession and the same should be removed.

4. That in the alternative, the Honourable Court be pleased to order that the Title Number in the late Lucas Muthama be registered in the names of the two beneficiaries in trust awaiting the succession cause to be completed.
 5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Duncan Muli Muthama sworn on even date.

The Applicant's Case

3. The Applicant averred that he is the son of the late Lukas Muthama Kanyau who died sometimes in the year 1987 and left behind three wives namely Esther Mulee Muthama (deceased), Teresiah Kaveke Muthama and Agnes Ngemu Muthama (deceased). He further averred that his late father had been sued in the proceedings herein together with the two defendants and upon his demise, the family appointed Benard Wambua Muthama to defend their late father's interest.
4. That they later learnt that the 4th Defendant was irregularly substituted in the place of their later father without their consent and without obtaining the requisite letters of administration.
5. According to the Applicant, the 4th Defendant who is his step sister in law, misrepresented to the court that all the wives of late Luka Muthama Kanyau were deceased adding that under the law of succession, she cannot take precedence over the other beneficiaries.
6. He lamented that the 4th Defendant was demanding Kshs 1,500,000/= from each family or else, she would sell the land to recover her money.

The 4th Defendant's Case

7. The 4th Defendant filed a replying affidavit on 20/11/2023 in opposition to the application.
8. She deposed that she applied and obtained letters of administration ad litem for purpose of being joined in the suit herein and that the beneficiaries executed a consent in support thereof.
9. She further averred that the 3rd Defendant did not participate in the proceedings because he had executed the consent authorizing her to be issued with the limited grant for purposes of representing the estate of the late Luka Muthama Kanyau.
10. She asserted that the application dated 14/6/20019 clearly shows that she is a representative of the estate of Luka Muthama Kanyau and added that she has always briefed the family on the progress in the matter herein.
11. She went on to state that she used her own money to hire legal Counsel to represent the estate of the deceased. That prior to being joined in the suit herein, she informed the other beneficiaries that they would refund to her the expenses that she had incurred from the estate of the deceased and denied having demanded Kshs 1,500,000/= as she had not quantified the amount due.
12. According to her the issues raised in the application are family issues which should not affect the interests on the other parties to the proceedings herein. She urged the court to dismiss the application with costs.



The Plaintiff's Case

13. The Plaintiffs filed a replying affidavit of Elizabeth Wayua Mulinge sworn on 14/02/2024 in opposition to the application. She denied the allegations that Luka Muthama Kanyau deceased was a Defendant in the suit herein or the registered owner of the suit property. According to the Deponent, the 4th Defendant was made a party to the proceedings vide the Notice of Motion dated 14/6/2019 in order to represent the estate of the deceased and not to replace him as the Defendant though she was thereafter made a Defendant.
14. She argued that the Applicant ought to have made his application earlier as he was aware of the proceedings herein. According to the Plaintiffs, the other parties to the suit herein should not be involved in the application since it is motivated by personal disagreements between the family of the Applicant and the 4th Defendant. The deponent argued that the Applicant cannot air his grievances related to the distribution of the estate of Luka Muthama Kanyau in the suit herein since it is not a succession cause. She urged the court to dismiss the application.
15. The application was canvassed by way of written submissions.

The Intended Interested Party's Submissions

16. The Intended Interested Party filed his submissions dated 22nd May 2024.
17. On his behalf, Counsel identified the following issues for the court's determination:-
 - i. Whether the name of Loise Nduku was irregularly and unprocedurally added as she was not a direct beneficiary as per the law of succession.
 - ii. Whether the court should order the title number in the late Luka Muthama in the name of two beneficiaries or in trust.
 - iii. Who should pay the costs.
18. On the first issue, Counsel submitted that the 3rd Defendant who is a son to the late Lukas Muthama and the registered owner of parcel No. Makueni/Kinyambu/293 was sued on behalf of the family. Counsel submitted that the letters of administration ad litem granted to the 4th Defendant is null and void ab initio as the same was obtained through fraud and misrepresentation of facts.
19. Counsel further submitted that the Intended Interested Party never consented to the 4th Defendant to represent the estate of his late father. Counsel argued that the trial magistrate erred in law and in fact in failing to detect the anomalies in the documents filed in support of the application for the letters of administration ad litem.
20. Counsel further submitted that the name of Lukas Muthama Kanyau who is the registered proprietor of title No. Makueni/Kinyambu/293, was not part of the proceeding from the time the Plaintiff instituted this suit and that no application was made by the Plaintiffs to include the name of the deceased or the administrator of his estate.
21. Counsel contended that the application for the grant ad litem ought to have been made by the three wives of the deceased or by any of his several children and not by the 4th Defendant. Counsel submitted that the 4th Defendant was irregularly enjoined in the proceedings with intent to defraud the other beneficiaries. Counsel went on to submit that the forgeries committed by the 4th Defendant were reported to the police who are yet to arrest and prosecute her.



22. With regards to the second issue, Counsel submitted that that title No Makueni/Kinyambu/293 should be registered in the name of the beneficiaries in trust for others. On costs counsel submitted that costs should await the outcome of the main suit.

The Plaintiffs Submissions

23. The Plaintiffs' filed their submissions dated 18th April 2024.
24. On their behalf, Counsel submitted that the only issue for determination is whether the 4th Defendant is properly on record for the estate of Luka Muthama Kanyau deceased. Counsel submitted that the 4th Defendant is properly on record for the estate of Luka Muthama Kanyau having acquired the letters of administration ad litem on 13/6/2019. Counsel further submitted that the Plaintiffs had sued the 3rd Defendant a brother to the Applicant but the suit against him was withdrawn since he does not participate in the proceedings.
25. Counsel relied on the provisions of Section 54 of the Law of Succession Act and Section 4 of the 5th schedule to submit that the prayers sought by the Applicant can only be granted in a succession court and not by the present court. To buttress his submissions Counsel relied on the case of Gabriel Macharia Njoroge v ABSA Bank(2021) eKLR.

The 4th Defendants Submissions

26. The 4th Defendant's submissions were filed on 15th May 2024.
27. On her behalf, Counsel submitted that the application is mischievous, bad in law and an abuse of the court process in that the 4th Defendant was regularly joined in the proceedings to represent the estate of Luka Muthama Kanyau, the registered owner of land parcel No. Makueni/Kinyambu/293.
28. Counsel further submitted that the Applicant has no locus standi to be joined in the proceedings as an Interested Party as he has not been appointed to represent the estate of the deceased. With regards to prayer No 4 of the application, Counsel submitted that the court cannot issue orders in favour of strangers who have not been determined as administrators or beneficiaries by the court. Counsel argued that the Interested Party and all the beneficiaries will not be prejudiced if the orders sought are not granted. He urged the court to dismiss the application.
29. The second application is dated 6th May 2024 brought under Order 50 Rule 1 of the Civil Procedure Rules, Sections 3A and 63(e) of the Civil Procedure Rules in which the Applicant seeks the following orders:-
1. Spent.
 2. There be a stay of proceedings herein pending the hearing and determination of Succession Cause No. 100 of 2019.
 3. That failure to stay the proceedings would result in the miscarriage of justice and bound to cause irreparable loss to the 1st, 2nd, 3rd Defendants and Interested party herein. THAT the costs of this application be provided for.
30. The application is premised on the grounds appearing on its face together with the supporting affidavit of Duncan Muthama sworn on even date.



The Applicant's Case

31. The Applicant averred that the 4th Defendant obtained letters of administration of the estate of Luka Muthama irregularly after presenting a forged consent in support of the application. He argued that the 4th Defendant is the daughter in law and not a beneficiary to the estate.
32. He complained that the 4th Defendant has been blackmailing the children of the deceased to pay Kshs. 1,500,000/= towards expenses incurred in representing them in the proceedings herein. He informed the court that he has filed an application seeking to revoke the grant issued to the 4th Respondent and that if the suit proceeds to judgment the Plaintiffs will be at liberty to enforce the judgment which will render the application herein an academic exercise. He contended that it is in the interest of justice that the proceedings herein be stayed pending the outcome of Succession Cause No 100 of 2019.

The Plaintiffs Case

33. The Plaintiffs relied on the replying affidavit dated 14/2/2024 in opposition of the application to the application dated 19/10/2023.

The 1st Defendant's Case

34. The 1st Defendant filed a replying affidavit in opposition to the application. He averred that the application is incompetent and an abuse of the court process. He further averred that the Applicant who is a relative to the 4th Defendant has all along been aware of this case and has never missed any hearing. That he is equally aware of the proceedings in Succession Cause No 100 of 2019 where the 4th Defendant was issued with a limited grant that made her a party to the proceedings herein. According to him the Applicant has no locus standi to bring the present application as he has not obtained a grant to clothe him with the requisite jurisdiction.
35. He argued that the 4th Defendant obtained a grant to defend the suit and ventilate the counter claim on behalf of the estate of Luka Muthama Kanyau. He further argued that the Applicant cannot raise the issues of distribution of the estate Luka Muthama Kanyau in the present suit as it is not a succession cause.

The 4th Defendant's Case

36. The 4th Defendant filed a replying affidavit sworn on 15/05/2024 in opposition to the application.
37. She deposed that she was regularly enjoined in the proceedings herein to represent the interest of the estate of Luka Muthama Kanyau the registered owner of the suit property. She further averred that she was issued with a grant ad litem on 13/06/2019 and was thereafter enjoined to the suit herein. That before she petitioned for the grant, she sought and obtained consent from all the beneficiaries including the Intended Interested Party. She argued that the application is an afterthought as the Applicant has not explained the delay of 5 years in bringing the present application. She asserted that she is a beneficiary of the estate as she is the daughter in law the late Luka Muthama. She argued that the Intended Interested Party will not be prejudiced if the orders sought are not granted since he will benefit from the suit property.
38. The application was canvassed by way of written submissions.

The 4th Defendant's Submissions

39. The 4th Defendant filed her submissions dated 29/07/2024.



40. In urging the court to dismiss the suit with costs, Counsel adopted the submissions in respect of the application dated 19/10/2023.

Analysis And Determination

41. Having considered both applications, the respective affidavits and the rival submissions the issue that arises for determination is whether the intended Interested Party/Interested Party is properly before the court and whether he is entitled to the orders sought.
42. It is not in dispute that the Applicant filed both applications when the matter was pending for judgment. I will first consider whether the Applicant is properly before this court. The Respondents contended that the Applicant has no locus standi as he has not been appointed as the legal representative of the estate of Luka Muthama Kanyau. In the application dated 19/10/2023, the Applicant has moved the court as the Intended Interested Party while in the application dated 6/05/2024, the Applicant has moved the court as the Interested Party. At this juncture the court is called upon to determine whether the Applicant has properly been joined in the proceedings herein.
43. The law governing the joinder of parties is grounded on Order 1 Rule 10(2) of the Civil Procedure Rules which provides 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 to effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”
44. It is clear from the above provision that a party can join or be joined in the proceedings at any stage with leave of court. The court must be convinced that the party has a recognizable stake in the proceedings.
45. The Black’s Law Dictionary (8th Edition) page 3548 defines an Interested Party as follows;
- “a party who has a recognizable stake and therefore a standing in the matter.”
46. In the case of *Trusted Society of Human Rights Alliance Vs Mumo Matemo & 5 Others* (2015) eKLR the Court held that;
- “An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made either way. Such a person feels that his interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.”
47. The Supreme Court of Kenya in the case of *Francis Karoki Muruatetu & Another Vs Republic & 5 Others* (2010) eKLR set out the key elements for consideration in an application for joinder of an Interested Party as follows:-
- a. 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.



- b. 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.
 - c. Lastly, a party must, in its participation, 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.”
48. Going by the above decisions, an Interested Party must therefore demonstrate that it is necessary that he/she be joined in the suit so that the Court may settle all the questions involved. The intended Interested Party must make a good case to be joined in the suit. The intended Interested Party must demonstrate that it has an identifiable stake in the proceedings.
49. These are persuasive decisions that state the legal position with regard to joinder of Interested Parties.
50. In the matter at hand, the record shows that the Applicant did not seek leave to be joined in this suit as an Interested Party. Both applications do not have a prayer for joinder of the Interested Party as a party to the suit. The Applicant ought to have sought leave to be enjoined in the proceedings herein. Once leave is granted, the Applicant can be joined in the suit and participate in the proceedings.
51. As was held in the Supreme Court case of County Assembly of Mandera County v Governor Mandera County & another(202) eKLR, a party yet to be joined in a suit lacks capacity to seek substantive orders.
52. In the matter at hand, the Applicant has not been joined in the proceedings herein. The Applicant is therefore a stranger to the proceedings and therefore lacks jurisdiction to seek the substantive orders.
53. In the end, I find that both applications are devoid of merit and are hereby dismissed with costs to the Respondents.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF NOVEMBER, 2024.

In the presence of:

Asiyo holding brief for Nzavi for the 4th Defendant.

Kingóo for the 1st Defendant.

Ms Kioko holding brief for Mutinda for the Plaintiffs.

