



Mucheru formerly Known as Gideon Magu Ngugi v Esbon & another; John (Interested Party) (Environment & Land Case E121 of 2023) [2023] KEELC 20924 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E121 OF 2023
EK WABWOTO, J
OCTOBER 12, 2023**

BETWEEN

**KEERU NGUGI MUCHERU FORMELY KNOWN AS GIDEON MAGU
NGUGI PLAINTIFF**

AND

PETER CHEGE ESBON 1ST DEFENDANT

NAIROBI CITY COUNTY 2ND DEFENDANT

AND

CHARLES MAINA CHUI JOHN INTERESTED PARTY

RULING

1. Charles Maina Chui John, the Interested Party herein moved this Court vide an application dated 30th May, 2023 seeking inter alia for injunctive orders against the Plaintiff in respect to Plot No. 209/7260/119 also referred to as Nairobi/block/50/823. The Interested party also sought for a declaration that he is the owner of the said property. The application further sought to set aside the earlier proceedings and orders issued by this Court on 29th March 2023.
2. The application was premised on the grounds that the suit property was allotted to him and he was issued with an allotment letter on 12th December, 2002 and since then, he has been exclusively owning it. He also averred that the property is currently leased to Mediheal Hospital, Eastleigh and the lease has been running from 1st August, 2021 to date.
3. The application was supported by the 2nd Respondent who filed a replying affidavit dated 25th July, 2023 stating that the suit land belongs to the Interested Party.



4. The Plaintiff opposed the application and filed a replying affidavit sworn by the Plaintiff on 15th July, 2023.
5. The application was canvassed by way of written submissions. The Interested Party filed written submissions dated 1st August, 2023 while the 2nd Defendant filed written submissions dated 4th September, 2023 and the Plaintiff filed written submissions dated 31st August, 2023.
6. The Interested party submitted on the following issues:
 - i. Who is the Plaintiff in this suit?
 - ii. Who between the Plaintiff and the Interested Party is the lawful owner of the suit property.
 - iii. Whether the Interested Party proved their case to warrant the orders sought.
 - iv. Who should bear costs.
7. It was submitted that in relation to the Plaintiff's Supporting Affidavit dated 14th March, 2023, he has attached a copy of gazette notice dated 25th March, 2022 which he claimed to have changed his name from Gideon Magu Ngugi to Keeru Ngugi Mucheru. The Interested Party had produced a copy of the original gazette notice dated 25th March 2022 and (Labelled and marked CMCJ-1) in his Supplementary Affidavit dated 30th June 2023 which confirms that this is fraud and lack of proper care to illegally lie to the court when indeed this change of name doesn't exist in the government records as claimed as per the 25th March 2022. The Plaintiff remains unknown and/or unidentified to the Honourable court.
8. It was further submitted that the particulars of fraud by the Plaintiff are; presenting false documents to the Honourable Court claiming to be the absolute proprietor of the suit property without any records in the Lands Registry showing that, deceiving the court into believing that he was actually the owner of the suit property while concealing material facts from the Land Registrar regarding the status of the suit property and believably corrupted to having issued with a fake certificate of lease whereas the relevant authority has never issued one, misrepresenting himself to court that he is the bonafide owner of the suit property, maliciously suing someone else who has no colour of right over the suit property, trying to deceive the court and procure orders fraudulently and unlawfully asserting rights of ownership of the suit property which did not belong to him. Reliance was placed in the Court of Appeal case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
9. It was also submitted that the *Constitution* of Kenya 2010 under Article 40 protects the right to own property and prohibits arbitrary and unlawful deprivation of this right. It was submitted that the issue of ownership was further settled by the letter from the County of Nairobi dated 3rd July 2023 and that there is no known evidence in the lands registries or county records to show that the Plaintiff purchased the property from anyone and consequently has never paid any rates for the subject property. Reliance



was further placed in the case of *Republic v City Council of Nairobi & 3 others* (2014) eKLR, Odunga, J had this to say about land that has already been allotted:

“once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment, since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

10. It was argued that the Interested Party is the lawful registered and rateable owner of the said property and that the Plaintiff has failed to proof ownership and even issued fake certificate of lease claiming to be for Nairobi area whereas the county has not issued such Certificates as the process is still ongoing. Therefore, he has to strictly proof where he acquired his Certificate of lease from.
11. The Interested party also cited the case of *Gitwany Investment Ltd v Tajmal Ltd & 3 Others*, Nairobi HCC No.1114 of 2002, where the Court relied in the words of the Court of Appeal in *Wreck Motors Enterprises v Commissioner of Land* CA No.71/1997 where it was held that-

“... like equity keeps teaching us, first in time prevails so that in the event such as this one, unlike by mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity”.
12. The Second Defendant in its submissions, submitted that the Interested Party had established a prima facie case to warrant the grant of the orders sought and reference was made to the cases of *Giella v. Classman Brown & Co. Ltd* [1973] EA 358, *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR and *Nguruman Limited v. Bad.. Nielson & 2 Others* [2014] eKLR .
13. The Plaintiff in his submissions submitted on the following issues:
 - i. Whether the Honourable Court can issue orders declaring the Interested Party as the absolute Proprietor of the suit property
 - ii. Whether the Applicant has established sufficient cause for grant of orders staying proceedings and setting aside orders issued on 29th March, 2023.
 - iii. Whether the Interested Party has attained the threshold for grant of orders of injunction.
 - iv. Who bears the costs of the suit?
14. It was submitted that in the case of *Trusted Society of Human Rights v. Mumo Matemo and 5 others* [2014] eKLR, with regard to who an interested party is, the Supreme Court of Kenya held thus:

“Consequently, an Interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab ignition. 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 or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”
15. The Plaintiff also made reference to the case of *Francis Karioko Muruatetu & another v Republic & 5 others* (2016) eKLR, and submitted that the interested party is raising a new issue of ownership of



the suit property which is beyond the scope of the issue raised by the primary parties herein. He has annexed an allotment letter dated 17th December 2002 purportedly issued to him as the original allottee by the 2nd Respondent herein. Further, he has also produced in evidence a sale agreement dated 17th December 2002 between him and one Margret Wamaitha Kimenye.

16. The said Sale Agreement clearly indicates that one Paul Kimenye (deceased) is the registered owner of the said land. From the sale agreement, it is evident that the Interested Party/Applicant purchased land from a representative of the estate of a deceased person. However, no evidence has been produced in terms of Grant of letters of administration to the said Margaret Wamaitha Kimenye, which would give her the legal right to sell immovable property owned by her deceased husband. Even if this court was to assume for once that the Interested Party bought the said property, he would acquire no legal rights over the same as the vendor would have acted in contravention of Section 46 of the Law of Succession Act which makes intermeddling an offence. Further still, the Interested Party has not produced any evidence to lead this Honourable court to a conclusion that the suit property was ever allotted to the said Paul Kimenye (deceased).
17. It was further submitted that a careful perusal of the allotment letter relied on by the Interested Party indicates that he was a transferee and at the same time a first allottee of the subject property which is practically impossible. Further, the Agreement for Sale and the letter of allotment produced by the Interested Party show that the same were issued on the same date which further casts more doubt on the credibility of the said documents which are only produced in court for purposes of satisfying the fiction that the Interested Party has tried to create and invite the court into believing
18. It was also submitted that the Court should take note of the fact that the Interested Party claims to be the original allottee of the suit property and at the same time there is an agreement to effect that he purchased the suit property from one Margaret Wamaitha Kimenye, a widow to one Paul Kimenye (deceased) the alleged original owner. He cannot be both the original allottee and purchaser for value from another person at the same time. It is worth noting that the main issue before court as raised by the primary parties revolves around the grant of orders of injunction against the 1st Defendant/Respondent restraining him, his agents, employees and/or any other persons claiming to act through him from in any way dealing with land parcel known as Nairobi/Block 50/823 for the reason that the Plaintiff/Applicant is the lawful registered owner of the said land.
19. The Plaintiff argued that he has demonstrated to this Honourable court that he is the registered proprietor of the suit property by producing a certificate of title issued by the Land Registrar on the 14 February 2023. The root of the Plaintiff/Respondent's title can be clearly traced to a letter of allotment dated 25th August 2005 issued in favour of the Plaintiff/Respondent by the 2nd Respondent herein. The Plaintiff/Respondent took immediate actual possession of the suit property and has been in possession since then.
20. Further, it was averred that the Plaintiff/Respondent has produced an official search certificate from the Land Registry dated 24th February 2023 which confirms that he is the registered proprietor of the suit land. Further to the foregoing, a letter from the 2nd Defendant/Respondent dated 14th June 2023 signed by one Patrick Analo Akivanga who is a registered Physical Planner and Acting County Secretary and Head of County Public Service confirms that the suit property herein which was part of Plot number 119 belongs to the Plaintiff/Respondent having been allocated to him by the 2nd Defendant/Respondent. From aforementioned letter and a copy of the survey map it is evident that Plot No 2009/7260/11 and Plot No. 209/7260/119 are not one and the same as alleged by the Interested Party/Applicant.



21. It was further submitted that the attempted retraction of the letters acknowledging ownership status of the Plaintiff by the 2nd Defendant vide its Memo dated 3rd July 2023 is baseless and an afterthought that should be ignored by this court for the reason that this position was arrived at without taking into account the views of the Plaintiff. Secondly, the Plaintiff has already demonstrated to court that he has a certificate of title over the suit property and in view of Section 26 (1) of the [Land Registration Act](#), a retraction letter by the 2nd Defendant herein cannot defeat the Plaintiff's title to the suit property. The title can only be challenged by court as provided for under Section 80 of the [Land Registration Act](#).
22. The Plaintiff argued that possession of a certificate of lease is conclusive proof that the holder in the indefeasible owner. This is anchored on Section 26 of the [Land Registration Act](#).
23. It was argued that the interested party purportedly lays claim over the suit property by dint of an allotment letter in the instant application. On the other hand, the Plaintiff/Respondent has demonstrated ownership to the suit property by producing a certificate of lease dated 14th February 2023 issued by the Registrar of Lands. An allotment letter or receipts evidencing payment of rates is not proof of title. The Interested Party/Applicant cannot therefore rely on them to defeat the Plaintiff/Respondent title over the suit property. In any case, a look at the said ground rent payment receipts produced by the Interested Party reveals that none of the alleged payments were made in respect of LR Nairobi/Block 50/823 which is owned by the Plaintiff/Respondent.
24. The Plaintiff relied on the case of *Lilian Waithera Gachuhi v David Shikuku Mzee* (2005) eKLR, while addressing the issue as to whether a letter of allotment could oust a registered certificate of title, the High Court held thus:

“I have considered the application and submissions of counsel for the applicant. I have no doubt that legally, a letter of allotment is an intention by the government to allocate land. It is not a title. Therefore, a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor of the land.”
25. The Plaintiff further submitted that the Interested Party/Applicant has alleged fraud on the part of the Plaintiff with respect to acquisition of the said title. He has also alleged that the plaintiff fraudulently changed his names and bribed his way into obtaining fake documents to defeat the Interested Party's rights. However, he has not specifically laid out the particulars of fraud alleged to assist this court get a clear picture of the suit. A casual assertion that the Plaintiff has committed fraud and forgery both which are criminal in nature without laying out particulars with specificity is prejudicial to the Plaintiff/Respondent and cannot stand in law.
26. The Plaintiff argued that this Honourable Court cannot grant the interested Party an order declaring him as the absolute owner of the suit property as doing so amounts to canvassing an issue not raised by the primary parties herein. The interested party has the option of filing his own suit as plaintiff instead of muddling the instant suit with this instant application. Reliance was made to the case of [Philomena Mwilu v Director of Public Prosecutions and 5 others](#) (Constitutional Petition No.295 of 2018) (Nairobi) where it was stated that:

“What emerges from the above decisions is that an interested party is a peripheral party and cannot introduce new issues for determination by court. Further, that in determining matters before it, the court will only consider the issues raised in the pleadings by the principal parties. This rule will be particularly unyielding when the matter before court is a private as opposed to a public interest claim. Notwithstanding that the interested Party before us was joined in the matter from the outset by the Petitioner, he is still only an



interested party within the meaning ascribed to the phrase by the law and judicial precedents which we have set out above. His joinder ab initio does not elevate his position in the matter. The court can only grant reliefs as sought by the petitioner or as it deems appropriate as provided under Article 23(3) of the *Constitution*."

27. The court was urged to decline the prayer seeking a declaration that the Interested Party is the absolute registered owner of the suit property.
28. It was also submitted that the Defendants were properly served with court process prior to the issuance of the orders of 29th March 2023 and that court was satisfied that proper service had been effected before granting the said orders. Secondly, the orders are not directed to the interested party thus this court should not set them aside.
29. In respect to the injunctive orders sought, it was argued that that the principles governing grant of injunctions were;
 - a. Prove a prima facie case with a likelihood of success.
 - b. Proof that failure to grant the injunction will subject the applicant to irreparable injury not capable of compensation by way of an award of damages.
 - c. Proof that the balance of convenience is in his favour.
30. It was argued that the Interested Party/Applicant has not proved a prima facie case with likelihood of success since he pegs his claim over the suit property on an allotment letter and receipts evidencing payment of rates to the 2nd Defendant/Respondent. He also claims ownership as a purchaser for value from a representative of a deceased person yet no grant of letters of Administration in favour of the said vendor has been furnished to court to show that the said vendor had legal authority to sale immovable property belonging to a deceased person and further, he is not in possession of the suit property either actual or constructive.
31. It was also submitted that the interested Party will not suffer any irreparable injury not capable of compensation by way of an award of damages the reason that firstly, he has no title capable of upsetting that held by the Plaintiff/Respondent. Secondly, the Interested party has a recourse against the 2 Respondent in a claim of damages and a refund for any sums paid in respect of the suit property.
32. On the third and final limb, the Plaintiff/Respondent submitted that the balance of convenience is not in favour of the Interested Party for the reasons that he has no legal title over the suit property.
33. I have considered the application, the rival affidavits and written submissions filed by the parties. The main issues for determination by this court is whether the Interested Party can be entitled to the nature of the orders sought herein and what are the appropriate orders to issue in respect to the application.
34. The Interested party herein has sought for inter alia for injunctive orders against the Plaintiff in respect to Plot No. 209/7260/119 also referred to as Nairobi/block/50/823. The Interested party also sought for a declaration that he is the owner of the said property. The application further sought to set aside the earlier proceedings and orders issued by this Court on 29th March 2023.
35. The Plaintiff was opposed to the grant of the said orders for the reasons that the interested party has raised new issues of ownership of the suit property which is beyond the scope of the issue raised by the primary parties herein.



36. In the case of *Francis Karioko Muruatetu & another v Republic & 5 others* (2016) eKLR, the Supreme Court held as follows:-

“Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the primary parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the court.”

37. In view of the foregoing, this court is bound by the said decision since it is now settled that in a suit a party seeking to be joined as an interested party cannot transform the suit into one in which he becomes the principal claimant and seeks substantive reliefs in the suit not initially sought by the primary parties. In the instant case, the issues raised by Interested party can be well ventilated if he would have sought to be joined either as a primary party in the matter or separately if he would have filed his own suit.

38. In view of the foregoing, I find that the application dated 30th May, 2023 is unmerited and the same is dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF OCTOBER, 2023

E. K. WABWOTO

JUDGE

In the presence of:

Mr. Gisore for the Interested Party/Applicant.

Mr. Mwangi Kangu for the Plaintiff/1st Respondent.

No appearance for the 1st and 2nd Defendants.

Caroline Nafuna: Court Assistant.

