



**Garrity v Kirigia & another (Environment and Land Appeal E014 of 2023)  
[2023] KEELC 21268 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21268 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E014 OF 2023  
CK NZILI, J  
NOVEMBER 1, 2023**

**BETWEEN**

**WILLIAM BRUCE GARRITY ..... APPELLANT**

**AND**

**JULIAH MUGURE KIRIGIA ..... 1<sup>ST</sup> RESPONDENT**

**ERASTUS MUTHUURI KIUGU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The genesis of this matter was by a plaint dated 20.7.2022. The appellant as the plaintiff at the lower court had sued the respondents as defendants. He averred that he was a retired Canadian civil servant looking for a residential home in Meru County, for his family as and when he visited Kenya. He averred that he met the 1<sup>st</sup> respondent in the course of his work as a volunteer for vulnerable children and developed a rapport with her, who introduced her to the 2<sup>nd</sup> respondent as offering L.R No. Nyaki/Kithoka/6108 for sale.
2. The appellant averred that after conducting due diligence he entered into an agreement with 2<sup>nd</sup> respondent to purchase the suit land at an agreed price of Kshs.2,700,000/= culminating into a sale agreement dated 17.7.2020. Further, the appellant averred that he was made to execute a supplementary agreement of sale dated 15.10.2020, whose recitals were different from the initial agreement and calculated to ensure that he missed out his entitlement.
3. The appellant averred that he proceeded to erect a permanent house on the land with the 1<sup>st</sup> respondent being in charge of logistics through whom she would send construction expenses sums to Kshs.3,500,000/=. Upon request for the transfer papers from the 2<sup>nd</sup> respondent, the appellant averred that he was informed that the same had been handed over to the 1<sup>st</sup> respondent who became skeptical.
4. Further, appellant averred that he conducted an inquiry at the Land Registry Meru on how he could effect the transfer only to realize that the respondents had illegally and fraudulently duped him into



- entering into a sale agreement as if he was a mere witness, for the purchaser being the 1<sup>st</sup> respondent, yet he was the one who paid for the land and was never a spouse to the 1<sup>st</sup> respondent.
5. The appellant averred that the acts of the respondents in refusing to hand the transfer documents to him, amending the sale agreement without his knowledge, depriving him of his hard-earned property, breaching the sale agreement, exposing him to mental torture or anguish, taking advantage of his being a foreigner and exposing him to loss were illegal.
  6. The appellant prayed for;
    - i. An order directing the 2<sup>nd</sup> respondent to obtain the requisite land control board consent and execute all transfer instruments to transfer the suit land to Mirrgar Company Ltd where he is a director.
    - ii. An order directing the executive officer to execute all the requisite transfer documents over the land in favour of Mirrgar Company Ltd if the 2<sup>nd</sup> respondent declined to do so.
    - iii. Permanent injunction restraining the respondents' servants or employees or agents from dealing in any way with or disposing or interfering with the property after it has been duly transferred as alluded above.
  7. The plaint was accompanied by witness statements and a list of documents dated 20.7.2022. Upon service with summons dated 29.7.2022, the 1<sup>st</sup> respondent filed a notice of preliminary objection dated 4.8.2022, based on Order 2 Rule 15 (1) (a) (b), (c), (d) of the Civil Procedure Rules that the suit be struck out and or dismissed for not disclosing any reasonable cause of action, as scandalous, frivolous, vexatious, out to embarrass the 1<sup>st</sup> respondent and an abuse of the court process.
  8. The 2<sup>nd</sup> respondent filed under a certificate of urgency an originating summons dated 2.8.2022, seeking to strike out the appellant's pleadings and the suit for not disclosing a reasonable cause of action or defence in law, an abuse of the court process and in the interest of justice. The originating summons was supported by an affidavit sworn by Erastus Muthuuri Kiugu, stating that he was no longer the owner of the suit land. He stated that he could not transfer the land to a company having sold it to the appellant and the 1<sup>st</sup> respondent who were actually living on the suit land.
  9. Further, the 2<sup>nd</sup> respondent averred that there was a marital dispute between man and wife, which he would not be a party to and was not interested in the suit land therefore the case against him should be struck out. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a list of documents and statements dated 4.8.2022 and a supplementary list of documents dated 19.10.2022.
  10. Through an application dated 24.10.2022 the appellant sought inhibition orders against LR No. Nyaki/Kithoka/6108 to preserve the title after establishing that the 1<sup>st</sup> respondent had already acquired a title deed for the same as per a copy of the search dated 17.10.2022. The trial court proceeded to grant the order on 25.10.2022 pending inter parties hearing on 7.11.2022. The 1<sup>st</sup> respondent opposed the application by an affidavit in reply sworn on 9.11.2022 on the basis that the appellant was a total stranger to the suit land and had no legal capacity to purchase land in Kenya, the court cannot rewrite a contract by parties to make him a stakeholder and that the property was not under any risk of disposal. Parties filed written submissions for the preliminary objection and the two applications dated 27.10.2022 and 9.11.2022.
  11. In a further affidavit sworn by Erastus Muthuuri Kiugu on 14.11.2022 to the application dated 2.8.2022, the 2<sup>nd</sup> respondent averred that the 1<sup>st</sup> respondents and the appellant while purchasing the land expressed themselves as husband and wife and upon purchase, he handed over the title deed and



- all transfer documents to transfer the land to them, who eventually proceeded to build a house on the land and continued living there in as his neighbours.
12. Further the 2<sup>nd</sup> respondent averred that the appellant appended his signatures to all the documents as being aware of the entire process including requesting him to access electricity from his land, while undertaking the construction.
  13. The 2<sup>nd</sup> respondent averred that the appellant was trying to arm-twist him to sign another agreement behind the back of the 1<sup>st</sup> respondent but he refused to engage in fraud. The 2<sup>nd</sup> respondent averred that he engaged in no fraud with the 1<sup>st</sup> respondent and on the contrary it was the appellant who had problems with his wife and which issues they should settle through mediation without involving him.
  14. In a ruling dated 16.1.2023, the trial court dismissed the preliminary objection dated 2.8.2022. As to the application dated 2.8.2022 by the 2<sup>nd</sup> respondent, the trial court allowed it and struck out the suit against the 2<sup>nd</sup> respondent with no order as to costs.
  15. Regarding the application dated 24.10.2022, the trial court dismissed the same and ordered that the suit be heard on priority basis.
  16. The appellant by a memorandum of appeal dated 21.2.2023, faults the trial court for striking out the suit against the 2<sup>nd</sup> respondent, yet he was the one who received the purchase price of the suit land from him but transferred the land to the 1<sup>st</sup> respondent, making him a necessary party to the suit.
  17. Secondly the appellant faults the trial court for misapprehending the principal of corporate personality and proprietary interest, when it held it would be surreal to transfer the suit land to Mirgarr Company Ltd because the appellant was only a director and not a shareholder.
  18. Thirdly, the appellant faults the trial court for failing to evaluate the issues raised in his application and the supporting affidavit.
  19. Lastly, the appellant faults the trial court for failing to exercise its discretion judiciously in order to protect the subject matter of the suit by way of an inhibition. The appeal herein was admitted for hearing on 13.6.2023 and directions were issued to file a record of appeal within 60 days.
  20. In compliance with these directives, the record of appeal was filed on 7.8.2023, after which directions were issued on 21.9.2023 for the appeal to be canvassed by way of written submissions to be filed by 21.10.2023.
  21. The appellant relied on written submissions dated 25.9.2023. None had been filed by the respondents at the time of this judgment.
  22. Be that as it may, in the court record there appears a 2<sup>nd</sup> respondent's reply to the memorandum of appeal dated 14.4.2023, filed by M/S Muriithi Kireria & Associates for the 2<sup>nd</sup> respondent, followed by a 2<sup>nd</sup> respondent's replying affidavit in opposition to a memorandum of appeal herein sworn on 14.4.2023 attaching annexures marked EMK (1)-EMK (7). The said documents were filed even before the appeal was admitted for hearing under Section 79(B) of the *Civil Procedure Act*.
  23. The law firm of Murithi Kireria and Associates who represent for the 2<sup>nd</sup> respondent are the ones who prepared the sale agreement dated 17.7.2020, the center of the suit. There is an apparent conflict of interest since the law firm acted for both the 2<sup>nd</sup> respondent as the vendor and the appellant and the respondent as the purchasers.
  24. The said law firm is a potential witness to give evidence before the trial court on the basis of and the capacity in which the appellant herein signed page 11 of the sale agreement.



25. The documents filed by the 2<sup>nd</sup> respondent did not part of the lower court record. An appeal to this court is governed by Order 42 Civil Procedure Rules. Apart from the record of appeal the lower court file, the law does not envisage any other strange documents except in instances where a party to the appeal requests to adduce additional evidence.
26. The documents alluded to were filed before were issued under Order 42 Rules 11 & 13 of the Civil Procedure Rules as read together with Sections 79 (B) of the *Civil Procedure Act*. The said documents are not envisaged under Order 42 Rule 13 of the Civil Procedure Rules. They are hereby expunged from the court record.
27. Having said that as an appellate court, my role is to re-hear, re-appraise and re-hearse the lower court record and come up with independent findings as to facts and law. To this end, what was before the trial court was a plaint dated 20.7.2022. Following the service of summons, the respondents had fifteen days to file a memorandum of appearance and put in any defence to the claim. Other than a notice of preliminary objection, 1<sup>st</sup> defendant's list of witnesses and documents dated 4.8.2022, there is no evidence that the 1<sup>st</sup> respondent complied with Order 6 Rules 1, 2, 3 & 6 and Order 7 Rules 1, 2, 3, 4, 5 of the Civil Procedure Rules.
28. As to the 2<sup>nd</sup> respondent other than a certificate of urgency, originating summons dated 2.8.2022, supplementary list of documents dated 19.10.2022 and a further affidavit sworn on 14.11.2022, there is no evidence of any filed entry of an appearance and or a statement of a defence filed in compliance with Orders 6 & 7 of the Civil Procedure Rules.
29. Whereas a party may file a notice of preliminary objection, the law is that a party who has been served with a plaint must respond to the plaint through a pleading known by law. Pleadings relate to facts of the claim, defence, counterclaim or a set-off. Parties do not plead evidence but facts. A preliminary objection under *Mukhisa Biscuits vs West End Manufacturers Distributors Limited (1969) E.A 696* consists of a pure point of law which has been pleaded or arises by a clear implication out of pleadings, and which if argued may dispose of a suit. It is grounded on the various pleadings before the court. It is argued on the presumption that all the facts pleaded by the other side are correct.
30. Courts have said that pleadings by parties are the basis and the beacons setting the parameters through which parties have to travel alongside the court. It is the pleadings that issues for determination are drawn from.
31. Before the trial court, the respondents had not even surmounted the first step of entering an appearance, let alone filing any pleadings known by law. The 2<sup>nd</sup> respondent had no known pleading from which the originating summons could stand. If it was a preliminary objection the law abhors a preliminary objection based on evidence or the exercise of discretion and which can only be sustained by looking at disputed facts.
32. Similarly, the originating summons was brought by a stranger, a law firm which had not entered an appearance on behalf of the 2<sup>nd</sup> respondent. The same case applied to the 1<sup>st</sup> respondent, who merely jumped into the fray and filed a preliminary objection, witness statements and documents which were not accompanied by any defence known in line with Order 7 of the Civil Procedure Rules.
33. The rules of procedure are the handmaids of substance. Though they are not the mistresses they must be adhered to. A party coming to court must play by the rules of the game. Such a party cannot introduce documents and evidence anyhow and anywhere. Substantive justice and rules of natural justice are the hallmarks of a civilized society guided by the rule of law and not the rule of men. See



- Law Society of Kenya vs Martin Day & 3 others (2015) eKLR and Giro Commercial Bank Ltd vs Ali Swaleh Mwangula (2016) eKLR.
34. Without the respondents entering an appearance, I find that the trial court erred in law in entertaining the respondent's preliminary objection and other documents filed by law firms improperly before the court.
  35. As to the substance of the preliminary objection and the originating summons, the trial court was right in dismissing the preliminary objection as it was not grounded in law. The same reason applies to the capacity of the 2<sup>nd</sup> respondent since there was no memorandum of appearance or notice of appointment as required under Orders 4 and 9 of the Civil Procedure Rules.
  36. In Kenya Building Construction Timber and Furniture Industries Employees Union vs M/S Newline Furniture Ltd (2017) eKLR, the court observed that an application filed by an advocate who had not yet lodged a notice of appointment was irregular and invalid. See *Abdirahman Mohamed Abdi vs Safi Petroleum Product Ltd & another* (2011) eKLR.
  37. In *Richard Leiyagu vs IEBC & 2 others* (2013) eKLR the court said the pendulum has swung and courts have shifted towards addressing substantive justice and no longer worshipped at the altar of technicalities. The essence of a memorandum of appearance cannot be said. See *Misnak International UK Limited vs 4MB Mining Ltd* (2019) eKLR. A party assumes an audience through a memorandum of appearance once served with a plaint. The originating summons delved into deeper issues as to whether the 2<sup>nd</sup> respondent was a necessary party to the suit. It was supported by documentary evidence. The appellant filed a replying affidavit to it. It was also supported by the 1<sup>st</sup> respondent. since the 2<sup>nd</sup> respondent was the vendor in the sale agreement.
  38. The striking out of a pleading is a drastic step that should only be applied in the clearest of cases as held in *DT Dobie & Company Limited vs John Muchina & another* (1982) eKLR. It speaks to driving out a party from the seat of justice without a fair hearing. It breaches the very essence of access to justice. See *Mary Kathure & another vs Uliks Hasanaj* (2019) eKLR.
  39. The appellant has submitted that by striking out his claim the trial court was unfair, yet the 2<sup>nd</sup> respondent was a necessary party to the proceedings. The appellant relying on *Gladys Jepkosgei Boss vs Star Publication Ltd* (2021) eKLR and *Simon Kirima Muraguri & another vs Equity Bank (K) Ltd and another* (2021) eKLR has submitted that his suit should have been sustained however implausible it was rather than striking it out.
  40. In *Gladys Nduku Nthuki vs Letshega (K) Ltd & another* (2022) eKLR the court cited with approval *Zephir Holdings Ltd vs Mimosa Plantations Ltd & another* (2014) eKLR that a proper party was one whose presence was necessary or relevant for the determination of the real matter in dispute or who would enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit. The court cited with approval *William Kiprono Towet & 159 others vs Farmland Aviation Ltd and others* (2016) eKLR and *Cooperative Merchant Bank Ltd vs George Fredrick Wekesa C. A No. 54 of 1999* that a court may only strike out pleadings, where they disclose no resemblance of a cause of action or are incurable by amendments or are hopeless and beyond redemption, as held in *Yaya Towers Ltd vs Trust Bank Ltd C.A No. 35 of 2000*.
  41. The court cited with approval *Nambuye J in Kingori vs Chege & others* (2002) 2 KLR 243, that for the necessary party to be a proper party, there must be a relief flowing from that defendant to the plaintiff; ultimate order or decree of the court would be enforced without his presence in the matter and that his presence would be necessary to adjudicate the matter.



42. In *Civicon Ltd vs Kivuwatt Ltd & others* (2015) eKLR the court observed that the facts to consider in bringing the persons who are parties to a dispute relating to the subject matter includes the convenience, removal of prejudice, sufficient interest and the avoidance of multiplicity of proceedings, especially where a party would be reasonably be affected by pending litigation.
43. Assessing the pivotal role that the 2<sup>nd</sup> respondent played in the sale leading to the dispute at hand, I think his presence in the suit would aid the cause of justice, more than if left out of the proceedings. I think there would be no embarrassment, abuse of the court process and or prejudice occasioned to him if joined as a party.
44. The 2<sup>nd</sup> respondent did not plead corporate responsibility, separate legal persona, and the nexus between the appellant and Mirrgar Company Ltd.
45. The trial court appears to have the respondents dwelt on issues not pleaded by. To that extent it went beyond the law on who was a necessary party to the proceedings, which ideally was what the originating summons was all about.
46. As to the preservation of the suit property pending the hearing of the suit an inhibition is in the nature of a prohibitory injunction as held in *Charter House Bank Ltd vs Central Bank of Kenya & others* (2007) eKLR. Section 68 of the *Land Registration Act* provides that the court may issue the same pending occurrence of an event or the expiry of a specific period of time. This court in *Grace Kinoru Mark vs Mark Muriungi Mark and 2 others* (2022) eKLR cited with approval *Bilha Mideva Buluku vs Everlyn Kanyere* (2016) eKLR on the justification for an order of inhibition guided by *Mrao Ltd vs First American Bank of Kenya Limited & 2 others* (2003) eKLR especially where the property was in any danger.
47. The 1<sup>st</sup> respondent denied that the suit land was not under any threat of disposal, given both the appellant and herself were in occupation. The 2<sup>nd</sup> respondent, who is a neighbour averred that the appellant had immensely contributed towards acquiring and developing the suit land. The beneficial interest of the appellant appears apparent. It must be balanced against that of the 1<sup>st</sup> respondent. I see no prejudice to be suffered if the title to the land is inhibited. The upshot is I allow the appeal and reinstate the suit against the 2<sup>nd</sup> respondent. An inhibition order is hereby issued stopping any transactions over the suit land pending hearing and determination of the suit.
48. Further, the appellant shall be granted unlimited access to the suit land by the 1<sup>st</sup> respondent until the matter is heard and determined. Costs of the appeal to be borne by the respondents.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 1<sup>ST</sup> DAY OF NOVEMBER 2023**

In presence of

Riungu for 1<sup>st</sup> respondent

Karanja for appellant

Mutuma for 2<sup>nd</sup> respondent

**HON. CK NZILI**

**ELC JUDGE**

