



**Gitau v Kanyua; Koigi (Interested Party) (Originating Summons E017 of 2022) [2025] KEHC 6607 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6607 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
ORIGINATING SUMMONS E017 OF 2022**

**A MSHILA, J**

**MAY 16, 2025**

**BETWEEN**

**CHARLES KANYUA GITAU ..... PLAINTIFF**

**AND**

**NANCY NJERI KANYUA ..... DEFENDANT**

**AND**

**KAREN WANJIRU KAHURIA KOIGI ..... INTERESTED PARTY**

**RULING**

1. Before court is an application by way of Notice of Motion dated on 20<sup>th</sup> June, 2023 and brought under Section 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, Rules 17 of the *Marriage (Matrimonial Proceedings) Rules-2020*, Order 40 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rules*, Article 50 of the *Constitution* of Kenya-2010 and all other enabling provisions of law). The Interested Party/Applicant sought for orders:-
  - a. Spent
  - b. That pending the hearing and determination of the application herein, the court be pleased to grant an Injunctive Order against the Respondents, their agents, representatives or any other person acting under their instructions, restraining the alienation, transfer, interference, sale, disposing off, laying to waste and/or in any other way trespassing onto the 0.5 acres of LR No. 1X4/90 (now LR. NO. 1X4/1X6), Kentmere Gardens- (hereinafter, the contested property) vested to the Defendant vide the Consent Judgment adopted by thjis Honourable Court on 25<sup>th</sup> October, 2022.
  - c. That the Interested Party be joined to this suit and admitted as an Interested Party.



- d. That the Consent Judgment adopted by this Honourable Court on 25<sup>th</sup> October, 2023 with regard to LR. No. 1X4/1X6-0.5 acres and/or all consequential actions taken resulting from the Court's Judgment with regard to the above portion of land be and is hereby reviewed and/or set aside.
  - e. That the distribution including and not limited to, sale alienation, transfer, or interference of the Contested Property LR. No. 1X4/1X6-0.5 acres by and/or on behalf of any of the Respondents, their representatives, agents or any other person claiming under them be suspended to await the conclusion and determination of *Limuru CMELC Case No. E008 OF 2023*.
  - f. That in the alternative to prayer e above, this court stays further proceedings in *Limuru CMELC Case No. E008 OF 2023* and determines the rights of the Interested Party by declaring that the Contested Property LR. No. 1X4/1X6-0.5 acres do vest to the Interested Party in terms of the Sale agreement entered between the Plaintiff and Interested Party.
  - g. That in the further alternative to prayers e and f above, *Limuru CMELC Case No. E008 OF 2023* be transferred to this court for determination of the rights of the Interested Party.
2. The application is premised on the grounds that the plaintiff and the defendant entered into a consent which was adopted as an order of the court on 25/10/2022 where the contested property was vested to the defendant. That the plaintiff had sold the property to the Interested Party but failed to transfer the said property as such he should have disclosed the same to the court instead of listing the property as matrimonial.
  3. Karen Wanjiru Kahuria Koigi, the applicant herein swore the supporting affidavit herein. She deponed that the plaintiff sought to distribute matrimonial properties between himself and the defendant which aggrieved her as the plaintiff had sold to her the contested property for Kshs. 5,000,000/= vide the sale agreement dated 19/9/2016. That she has so far paid Kshs. 4,580,000/= and the remaining Kshs. 420,000/= was to be paid once the completion documents have been availed. That, despite the plaintiff obtaining the consent from the Land Control Board, he never availed the other completion documents. The applicant avers that she learnt of this Court's Order where the consent dated 9/9/2022 between the plaintiff and the defendant was adopted by this court on 25/10/2022 where the contested property was vested to the defendant and the plaintiff never disclosed to the court that the said property had been sold to her and/or enjoin her as an interested party. She argued that the plaintiff should not have listed the property as part of his matrimonial property as this amounts to defrauding her of her money as such she has a right to be enjoined in this suit so as to be heard so as to avert prejudice and irreparable damage.
  4. Charles Kanyua Gitau the 1<sup>st</sup> respondent herein in his replying affidavit filed on 1/11/2023 averred that during the subsistence of his marriage to the 2<sup>nd</sup> respondent they purchased LR NO. 1X4/1X6. That all the resultant plots thereof are classified as matrimonial properties which information was disclosed to this court. That during the subsistence of the marriage the applicant's father was sold 1 acre. He also contended that after the dissolution of the marriage he had to sell land to enable him get funds so as to move out of the matrimonial home. The applicant was said to reside on the 1 acre plot purchased by her father. The sale agreement between the plaintiff and the applicant was said to be unenforceable as the applicant failed to pay the purchase price within ninety days and no spousal consent was issued. The court was urged to dismiss the application for failure to satisfy the principles for grant of an injunction and /or grounds for setting aside a consent judgment.



5. Wendy Karira Waweru the defendant's appointed attorney vide a power of attorney registered on 6/4/2016 filed her replying affidavit dated 6<sup>th</sup> October, 2023. She deposed that the applicant's application is misconceived as no leave has been sought for the applicant to be enjoined as an interested party. That the Respondents were husband and wife and they both acquired LR NO. 1X4/26 which was sub divided to give rise to various properties among them the contested property as such regarded as a matrimonial property. That the properties were divided upon the dissolution of marriage and that the suit property was not available for sale without the 2<sup>nd</sup> respondent's approval as the 1<sup>st</sup> respondent lacked the capacity to sell. That the applicant has the remedy of refund as provided in the sale agreement.
6. In her Supplementary affidavit dated 17<sup>th</sup> November, 2023 in reply to the defendant, Karen Wanjiru Kahuria Koigi stated that leave to be enjoined in this suit had been sought and that she has met the principles warranting grant of the injunctive orders as well as the principles set out for setting aside a consent order. She averred that by 25/4/2017 the entire property had been subdivided. She averred that on 17/8/2017, consent from the Land Control Board authorizing the transfer was issued. That no evidence has been produced to confirm that the suit properties was indeed matrimonial property. In any case, the plaintiff sold land to her father excised from the original property before she entered into a sale agreement with the plaintiff as such the plaintiff and the defendant are estopped from defrauding her of her proprietary rights.
7. Further, in her supplementary affidavit dated 17/11/2023 in reply to the plaintiff, the applicant stated that there is no evidence that the land was jointly acquired and registered in the names of the plaintiff and the defendant to constitute matrimonial properties. That in any case the sale was between the plaintiff and herself as such there was no presentation that the same was matrimonial. That the plaintiff failed was to transfer the land before the completion date which he failed to do and has not denied that he received the money. The plaintiff was said to be using this suit to re-write the agreement. This court was said to have jurisdiction as the consent was reached in a matrimonial cause. The plaintiff was said to be asking this court to back his conduct of unjustly benefitting himself. That the last installment having been made on 7/11/2017, the cause of action was said to be still alive.
8. The application was canvassed by way of written submissions

### **Applicant's Submissions.**

9. The applicant submits that she has a stake in the suit property having entered into a sale agreement with the plaintiff who duplicitously caused the said property to be considered matrimonial property in this cause. Reliance was placed in the case of *AAMM v IMN* (2019) eKLR. It was submitted that the applicant will suffer prejudice as she has been disposed of her property without being heard. Reliance was placed in the case of *Alton Homes Limited & another v Davis Nathan Chelogoi & 5 others* (2020) eKLR. The case herein was said to be of utmost urgency as such leave was not sought as there was risk of the property being disposed hence prayer for injunction and to be enjoined were sought contemporaneously. Reliance was placed in the case of *HOPF v Director of Survey & 2 others; Sakaja & 2 others (Interested Party)* (Environment & Land Case 4 of 2021) (2022) KEELC 6 (KLR). The court was urged not to sanction the actions of the plaintiff having approached this court with unclean hands. The court herein was said to be clothed with the requisite jurisdiction. The applicant relied on the case of *LMP v TMM & another; Demsa Travel Solutions Ltd (Interested Parties)* (2021) eKLR. Further, it was submitted that no evidence was presented to show that the property was jointly purchased as there is evidence that shows that the suit property was solely owned by the plaintiff. The applicant submits that the plaintiff having entered into an agreement for sale and obtained the consent then the applicant was allowed to assume that the plaintiff had obtained a spousal consent if need be as such the plaintiff



cannot claim that the property formed matrimonial property so as to dupe an innocent purchaser for value. The plaintiff was said to have failed to inform the court that he had sold the land to the applicant as such the court adopted the consent without having sufficient material and without the involvement of the applicant as such the same should be set aside. Reliance was placed in the case of *Wachira Karani v Bildad Wachira* (2016) eKLR. The applicant submits that she has met the threshold to warrant grant of injunctive orders as she has demonstrated that she entered into a sale agreement with the plaintiff. That she would suffer irreparable harm as she has been deprived off her right to enjoy her property by the plaintiff causing the suit property to be declared matrimonial property. The balance of convenience was said to tilt in favour of the applicant. In regard to stay of proceedings in Limuru CMELC E001 OF 2023, it was submitted that this court already conferred to the defendant the suit property as such the lower court cannot determine on the same issue as such the said proceedings should be stayed and /or transfer the said proceedings to this court reliance was placed in the case of *Protus Hamisi Wambada & another v Eldoret Hospital* (2020) eKLR. The matter was said not to be statute barred as full payment was pegged on completion which the plaintiff failed to do. Finally the court was urged to find the applicant's application meritorious.

### **Respondent's Submissions.**

10. The respondent submits that the suit land is matrimonial property as it was purchased during the subsistence of the marriage and the applicant has not produced any evidence that the suit land is not matrimonial property. It was submitted that a matrimonial property cannot be alienated without the consent of both spouses in a monogamous marriage. Reliance was placed in the case of *Mugo Muiru Investments Limited v E W B & 2 others* (2017) eKLR. The applicant was said to have breached the sale as she was supposed to pay the entire purchase price within ninety days being on or before 19<sup>th</sup> December, 2016 as such the agreement is unenforceable. The applicant was said to be undeserving of the orders sought having failed to pay the balance of Kshs. 420,000/= seven years later. Reliance was placed in the case of *Chogi's Garage Limited v Peers Oasis Park Holdings Limited & 2 others* (2021) eKLR. The 1<sup>st</sup> respondent submits that specific performance should not be granted as it is an equitable relief, and the applicant failed to pursue the same before approaching this court. Reliance was placed in the case of *Reliable Electrical Engineers Limited v Mantrac Kenya Limited* (2006) eKLR. In any case the applicant was said to have failed to pay the balance of the purchase price. Further that the applicant delayed in seeking the redress as the agreement lapsed on 19/12/2016. Reliance was placed in the case of *Lazard Brothers & Co. Ltd v Fairfield Properties Co. (Mayfair) Ltd* (1977) 121 SJ 793. The applicant was said to be indolent as such she does not deserve the remedy of specific performance. It was also submitted that the applicant has not adduced any evidence that would warrant setting aside of the consent judgment. The impugned agreement was said to be invalid as such the same cannot be the basis of setting aside a consent judgment. Lastly the court was urged to dismiss the applicant's application for admitting to have breached the sale agreement.

### **Issues For Determination**

11. Having considered the application by the applicants, the respondent's replying affidavit and the rival submissions, the main issue arising for determination is whether the Applicant should be enjoined in these proceedings?

### **Analysis**

12. The applicant herein sought to be enjoined to this suit and be admitted as an Interested Party. She claims that the plaintiff had sold to her the contested property for Kshs. 5,000,000/= vide the sale agreement dated 19/9/2016. That she has so far paid Kshs. 4,580,000/= and the remaining Kshs.



- 420,000/= was to be paid once the completion documents have been availed. That in a turn of events, she learnt of a Court Order where the consent dated 9/9/2022 between the plaintiff and the defendant was adopted by this court on 25/10/2022 where the contested property was vested to the defendant and the plaintiff never disclosed to the court that the said property had been sold to the applicant.
13. The 1<sup>st</sup> respondent the contested property was purchased during the subsistence of the marriage with the 2<sup>nd</sup> respondent as such the land is matrimonial property. The applicant was said to have breached the said sale agreement by failing to pay the full purchase price within 90 days. The sale was also said to be invalid for failure to obtain spousal consent from the 2<sup>nd</sup> respondent being that the property is matrimonial property.
14. Black's law Dictionary tenth edition defines an interested party as:
- A party who has a recognisable stake (and therefore standing) in a matter.
15. The guiding principles that are applicable in joinder of parties is as was stated by the Court of Appeal in the case of *JMK v MWM & Another* (2015) eKLR (Msa Civil Appeal No.15 of 2015) that:-
- “We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sarkar's code, (Supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10 (2) of our *Civil Procedure Rules*, in *Tang Gas Distributors Ltd V. Said & Others* (2014) EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”
16. Also, in the case of (2020) eKLR, Limo, J considered an application for joinder and stated:
- “Similarly in *SKOV Estate Ltd & 5 others v Agricultural Development Corporation and another* Hon Justice Sila Munyao held similar views this:-
- ‘18. In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation...’”
17. This Court is satisfied that the applicant has a stake in the contested property having produced the sale agreement between herself and the 1<sup>st</sup> respondent. The said transaction has not been denied by the 1<sup>st</sup> respondent. What is in contention is the issue of completion and spousal consent.
18. This Court also notes that the court in adopting the consent dated 9/9/2022 as an order of the court on 25/10/2022 was not privy to all these allegations by the parties herein.
19. In the circumstances, therefore, this court finds that the applicant has an interest in the contested property as such should be given an opportunity to be heard by participating in these proceedings.



**Findings And Determination.**

20. In light of the forgoing this court makes the following findings and determinations;

- i. The Application is found to have merit and it is hereby allowed.
- ii. The court hereby grants leave to **Karen Wanjiru Kahuria Koigi** to be enjoined to these proceedings as an Interested Party.
- iii. The Applicant to bear her own costs of the Application.
- iv. Matter be mentioned on 28/07/2025 for directions.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 16<sup>TH</sup> DAY OF MAY, 2025.**

**A. MSHILA**

**JUDGE**

