



**EMN v NM; JWN (Applicant) (Civil Case 14 of 2013)
[2024] KEHC 2520 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL CASE 14 OF 2013
LM NJUGUNA, J
MARCH 13, 2024**

BETWEEN

EMN PLAINTIFF

AND

NM DEFENDANT

AND

JWN APPLICANT

RULING

1. The applicant filed a notice of motion dated 23rd November 2022, supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 - a. Spent;
 - b. Spent;
 - c. That the name of the Applicant, Jane Wangiri Njeru be added as an interested party to the proceedings in the High Court Civil Case No, 14 of 2013;
 - d. That the final judgment entered in High Court Civil Case No, 14 of 2013, and the decree dated 08th August 2018, together with all the subsequent proceedings, orders, rulings and/or directions be stayed, reviewed and/or set aside;
 - e. That the Honourable Court do thereafter order the re-hearing of the High Court Civil Case No, 14 of 2013 or make such order in regard to the re-hearing of the said suit as it thinks fit; and
 - f. That the costs of this application be in the cause.



2. It is the applicant's averment that during the hearing, it was never disclosed to the court that the defendant was a polygamous man. That the applicant should be allowed to participate in the proceedings in the interest of justice so that she can ventilate her case since she also has interest in the properties. That since her interests in the suit were not considered and the case proceeded without her knowledge, the suit should be re-tried to give her a chance to address the court on her arguments.
3. That during subsistence of her marriage to the defendant, they jointly purchased property title number Gatari/Githimu/1785 which has since been shared amongst the plaintiff and the defendant through the judgment, excluding her and her 4 children. That she also farms on properties numbers Gatari/Githimu/4416, Gatari/Githimu/4417 and Nthawa/Riandu/31 in order to provide for her family. That if the orders are not granted, she risks losing her share of the matrimonial property.
4. For context, the plaintiff and the defendant are husband and wife, married under Kikuyu Customary Law while the applicant is the defendant's second wife. In light of section 17 of the *Married Women's Property Act, 1882*, the plaintiff filed a plaint dated 22nd May 2013 seeking half of the defendant's land, which she claimed were acquired in the course of their marriage. The case went to full hearing and it was determined through the judgment delivered on 23rd May 2018 by the Hon. Lady Justice F. Muchemi. In the said judgment, the court found that the plaintiff was entitled to 45% of each of the properties while the defendant was entitled to 55%. A decree was issued to that effect on 08th August 2018.
5. Shortly after the judgment and decree, the defendant filed an application dated 18th September, seeking stay of execution pending his intended appeal. The application for stay was determined through the court's ruling delivered on 25th July 2019 where Hon. Lady Justice F. Muchemi gave orders for conditional stay as follows:
 - a. Pending the hearing and determination of the intended appeal, an order is hereby issued staying execution of this court's judgment delivered on 23rd May 2018 on condition that the applicant causes the appeal to be admitted and record of appeal filed and served within 3 months;
 - b. Pending hearing and determination of the intended appeal, the parties to maintain *status quo* on the properties listed in the judgment; and
 - c. Each party to meet their own costs.
6. Following lapse of the period set in that ruling, the plaintiff moved the court through an application dated 13th April 2021 seeking the intervention of the court for execution since the defendant had failed to comply with the conditions set by the court. The defendant was directed by the court to file a response to the said application but none was filed. The application has since not been prosecuted. Instead, the application herein was filed by the second wife of the defendant, seeking the orders listed in my first paragraph herein.
7. The plaintiff opposed the application through her replying affidavit dated 06th February 2023 in which she termed the application as vexatious as the same is targeted at aiding the defendant to circumvent court processes through the backdoor. That the applicant is feigning knowledge of the suit yet she has been married to the defendant since the year 2000 and the suit was filed in the year 2013. That all the suit properties were acquired before the applicant married to the defendant in 2000 and so she has no place in the proceedings and she cannot lay claim on any of the properties. That the applicant has failed to demonstrate that there is good cause for her to be enjoined in the proceedings and she urged the court to dismiss the application altogether.
8. The parties opted not to file any submissions.



9. The issues for determination are as follows:
- a. Whether the applicant should be enjoined in the suit as an interested party;
 - b. Whether the court can grant stay of execution orders; and
 - c. Whether the suit should be heard afresh, given the applicant's averments.
10. On the issue of joinder as interested party, rule 2 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) defines an interested party as:
- “a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”
11. Similarly, in the case of [Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others](#) [2015] eKLR it was held:
- “...Consequently, 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 or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”
12. In the case of [Francis Kariuki Muruatetu & another v Republic & 5 others](#) Petition 15 as consolidated with 16 of 2013 [2016] eKLR the court discussed the guiding principles of enjoining interested parties:
- “One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:
- (i) 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.
 - (ii) 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.
 - (iii) Lastly, a party must, in its application, 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.”
13. I have carefully perused the proceedings and judgment and have noted the sentiments of the Judge therein. She noted at paragraph 26 of the judgment that both parties to the suit stated that the suit properties were acquired during subsistence of the marriage of the plaintiff and the respondent and before the applicant herein got married to the defendant. She also held that the parties are still married and therefore the property is matrimonial property held by the defendant and the respondent as husband and wife. The suit was brought in light of section 17 of the [Married Women's Property Act 1882](#) which has since been repealed. I should note that for applications like this, this old law was still applicable until 2014 when the [Matrimonial Property Act](#) was enacted.



14. That being said, the plaintiff was held as the wife for purposes of the Married Women's Property Act 1882 and so her claim is valid. As to whether the applicant should be enjoined for purposes of ventilating her claim in the suit, in my view, the move may not do much to change the judgment of the court as she was factored into the reasoning of the Honourable Judge in her judgment. (See also the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR (*supra*))
15. Additionally, without involvement of the applicant, the court was able to fully settle the issues in the case while being aware that she was bound to be affected by the findings. In the case of *Shivrling Supermarket Limited v Jimmy Ondicho Nyabuti and 2 others* (2018) eKLR the court was faced with the issue of who should be enjoined as a party to a suit and opined as follows;

“The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Has the applicant demonstrated he has sufficient interest in the subject matter of the suit or that he is a necessary party whose presence is necessary to enable the court to effectually and completely adjudicate upon all the issues in the suit?”

16. On the related issue of whether the case should be re-opened for hearing of the applicant's case, the applicant seeks that this court reviews its findings and/or sets them aside and order a re-hearing. Having determined that the applicant cannot at this stage be enjoined as a party to the suit, it is impractical to subject the suit to a re-hearing. In the Indian case of *Ajit Kumar Rath v State of Orisa and others* on November 2, 1999 the court held thus:

“....A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilizing it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified there in.”

I surely find no good reason to order re-hearing of the case.

17. On the issue of stay of execution, having determined that the applicant will not be enjoined as a party to the suit, it will be superfluous to grant her orders for stay of execution. The case would have been different if the applicant had been enjoined as an interested party. In the present circumstances, she is not a party to the suit and therefore she cannot be granted any further orders by this court.
18. Be that as it may, I have considered the pleadings and the relevant laws and do find that the application lacks merit and the same is hereby dismissed in its entirety.
19. I make no order as to costs.
20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF MARCH, 2024.

L. NJUGUNA

JUDGE



.....for the Plaintiff
.....for the Defendant
.....for the Applicant

