Gikuno t/a Jayton Investments v Gachugo & 5 others (Civil Appeal E629 of 2022) [2024] KEHC 10537 (KLR) (Civ) (3 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10537 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E629 OF 2022

WM MUSYOKA, J

SEPTEMBER 3, 2024

BETWEEN

ANTONY KANJA GIKUNO T/A JAYTON INVESTMENTS ..... APPELLANT

AND

RICHARD KABUGI GACHUGO ..... 1ST RESPONDENT

SAMUEL ANTHONY NGUYAI ..... 2ND RESPONDENT

EDWARD GACHOGU MUIGAI ..... 3RD RESPONDENT

WAIS CAPITAL LIMITED ..... 4TH RESPONDENT

KIRIIYU MERCHANTS AUCTIONEERS ..... 5TH RESPONDENT

DAVID NJENGA SAMSON ..... 6TH RESPONDENT

(An appeal arising from orders in the ruling of Hon. AN Makau, Principal Magistrate, PM, delivered on 14th July 2022, in Milimani CMCCC No. E4068 of 2022)

JUDGMENT

1. The suit at the primary court was initiated by the 1st, 2nd and 3rd respondents, against the appellant, and the 4th, 5th and 6th respondents, for a permanent injunction to restrain the 4th and 5th respondents from disposing of Nairobi/Block 76/54 by public auction, private treaty or otherwise. The case, by the 1st, 2nd and 3rd respondents, was that the 3rd respondent was the registered owner of Nairobi/Block 76/54 , who had a history of memory lapses, and who had been induced or taken advantage of by the 6th respondent to guarantee a loan, in respect of which the 4th and 5th respondents had initiated recovery proceedings, by way of disposal of the property, Nairobi/Block 76/54, without issuing the appropriate

notices on the 3rd respondent. The 4th and 5th respondents filed a defence to the claim, where they denied all the facts averred in the plaint, and put the 1st, 2nd and 3rd respondents to strict proof.

2. The plaint, initiating the suit, was lodged simultaneously with a Motion, dated 9th August 2020, seeking a temporary injunction, along the same lines as those in the plaint for the order for permanent injunction. Part of the argument was that Nairobi/Block 76/54 was matrimonial property, in respect of which the 1st and 2nd respondents, being sons of the 3rd respondent, had an inherent and constitutional right. The 4th and 5th respondents reacted by stating that the property had already been sold at a public auction, the 1st and 2nd respondents had no locus standi to seek the injunction orders and the material pleaded in the supporting affidavit was all hearsay. That application was canvassed by way of written submissions, and was disposed of in a ruling delivered on 19th August 2021, granting the temporary injunctive orders.

3. The appeal herein does not arise from those orders, but from subsequent orders, made on 14th July 2022, on an application dated 4th February 2022. The latter application was by the appellant herein, seeking his joinder as a defendant in the suit, on grounds that he had paid the purchase price for Nairobi/Block 76/54, which was sold by public auction by 5th respondent herein, on instructions from the 4th respondent. He had argued that he had conducted a search, and established that there was no caveat. He asserted that he was an innocent purchaser without notice. He averred that the 1st, 2nd and 3rd respondents had concealed pertinent facts, and expressed that his joinder would assist the court to effectively and completely adjudicate the matter. To that application, a preliminary objection was raised, to the effect that the matter was res judicata, as the issue had been determined by the court in the earlier ruling, there was no cause of action between the 1st, 2nd and 3rd respondents and the appellant, the court had no jurisdiction to address the issue of registration of Nairobi/Block 76/54, and the application was untenable in law. The 1st respondent then swore an affidavit, on 16th March 2022, to expound on or argue the preliminary objection.

4. The application was canvassed by way of written submissions. In the ruling, delivered on 14th July 2022, the trial court dismissed the application for joinder, on grounds that the interest that the appellant sought to protect was acquired during the pendency of the suit, after he bought the subject property, and that the relationship between the appellant and the 1st, 2nd and 3rd respondents was unknown.

5. The appellant was aggrieved by that ruling, and filed the instant appeal. The grounds of appeal revolve around the trial court holding that no sufficient interest had been established for joinder of the appellant; failure to note and hold that having purchased the property established a sufficient interest; and the failure to consider that the appellant stood to suffer loss, on account of the non-joinder.

6. Directions were given, on 28th September 2023, for disposal of the appeal, by way of written submissions. I have only come across written submissions by the appellant, in the file of papers that was placed before me.

7. The appellant cites both Order 1 Rule 10(2) of the Civil Procedure Rules and *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. He has also cited the decisions in Prayash Ventures Limited & 2 others vs. NIC Bank PLC Formerly NIC Bank Limited & another: Beatrice Jeruto Kipketer (Interested Party) [2021] eKLR (HA Omondi, J), Communications Commission of Kenya & 4 others vs. Royal Media Services Limited & 7 others [2014] eKLR (Ojwang & Wanjala, SCJJ) and Mumo vs. Republic [2004] 1 EA 124, to support his case.

8. From the outset, let me clarify that *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, often referred to as the Mutunga Rules, do not apply here, for they are the subsidiary legislation for constitutional litigation on protection of fundamental rights

and freedoms. The litigation before the trial court was not on such issues. The suit was in respect of an ordinary civil dispute, over a loan and land. It fell squarely within the processes prescribed and regulated by the *Civil Procedure Act*, Cap 21, Laws of Kenya, and the Rules made under that Act, to wit the Civil Procedure Rules. I shall decide the instant appeal on the basis of the Civil Procedure Rules, and not *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules do not apply universally, to all litigation before the courts, it is specific to constitutional litigation, it can only be cited to help expound on the provisions of the Civil Procedure Rules, to the extent that the latter provisions, and those of the *Civil Procedure Act*, may allow. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules do not override the Civil Procedure Rules, given that the 2 sets of subsidiary legislation are designed to govern different processes.

9. Order 1 Rule 10(2) of the Civil Procedure Rules, on which the joinder application was premised, states 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 effectually and completely adjudicate upon and settle all questions involved in the suit, be added."

10. There are 2 objectives in Order 1 Rule 10(2) of the Civil Procedure Rules, the striking out or removal of parties from a suit, and joinder or addition of parties. Removal and striking out is for parties who have been improperly joined. The joinder or addition of parties is for parties who ought to have been joined to the suit. The application before the trial court was not seeking striking out of a party who had been improperly joined, but rather addition or joinder of a party whose presence would enable the trial court to effectually and completely adjudicate and settle the questions involved in the suit. There are 2 components to the joinder of parties. The first is about the party or "person who ought to have been joined," and the second is about a party who need not be joined, but whose presence in the suit is deemed necessary, nevertheless, to shed some light on some element of the matter. Let me deal with the 2 aspects here below.

11. The first aspect, of a party who ought to have been joined, relates to a party who is directly affected, and who ought to have been made a party to the suit, in view of the cause of action. It is essentially about a person who ought to be party to that suit, in view of the causation, for the orders to be made would directly affect them, in terms of liability, compliance and enforcement, and in respect of whom the proceedings ought not be conducted in their absence, for among other things, the issue of a right to a fair hearing, and to obviate the prospect of that person being condemned unheard. The matter of a primary party ought to come to mind. About a person to whom liability would attach, or against whom the orders would be enforced. For plaintiffs, it would be a person who would be privy to the events leading to the accrual of the cause of action, and who would benefit directly from the orders likely to be made by the court, should the suit prove successful. See King'ori vs. Chege [2002] 2 KLR (Nambuye, J) and Gladys Nduku Nthuki vs. Letshego Kenya Limited & another [2022] eKLR (Odunga, J).

12. The second aspect is about persons who could be described as secondary parties. That is persons who are not likely to be directly affected by the final orders likely to be made, but whose input in the dispute could assist the court in the determination of the dispute before the court. They would be persons against who no liability attaches, or against whom no orders are likely to be made. They could be

affected indirectly by the orders, and, therefore, they should have some interest in the matter, and more importantly, they should have information and knowledge, regarding the subject-matter, which would be essential or necessary for determination of the questions in dispute. The picture of a nominal party should come to mind.

13. The next question should be whether the appellant herein was a person who could be joined under the first component, or under the second. Whether his joinder was necessary in the first aspect would depend on whether he was a primary party to the matter in controversy, to require that he should have been made a party to the suit at inception, on grounds that liability would attach on him, or orders are likely to be made against him, or he would be required to comply with the orders that the trial court was ultimately likely to make.

14. Was the appellant such a person? I do not think so. I am not able to tell, directly, from the filings at the trial court, as to when the pleadings were lodged at the court registry, for they bear no court stamps. However, the plaint is dated 9th August 2020, and so is the certificate of urgency, filed simultaneously with it, and the Motion of even date. The handwritten notes in the trial court record indicates that the file was first acted upon by the court on 24th September 2020, and the matter was first placed before a judicial officer, AN Makau, PM, on 13th October 2020. The plaint that was lodged in court sought a permanent injunction, to restrain sale of Nairobi/Block 76/54, and the background was that a loan had been advanced to one of the plaintiffs, in a manner that suggested that he was taken advantage of, and there was an issue of failure to settle the loan, which led to certain steps being taken towards realisation of the property that had been offered as security. The appellant was not party to the loan arrangements, and the property had not been sold to him as at the time the suit was filed. As indicated above, the suit was filed in August/September 2020, and the sale happened in December 2020. As at the time the suit was filed, the appellant was not in the picture, and he did not get into that picture until 11th December 2020, some 3 to 4 months later. He was not privy to the issue that gave rise to the cause of action, he had no information or knowledge of the subject-matter surrounding the loaning and the charging of the property, no liability could accrue to him, and no adverse orders could be made requiring him to comply. He was not a "person who ought to have been joined" at the time the suit was filed, or at inception, and, therefore, he could not be joined or added to the suit on that account.

15. What about the second aspect, could he be joined on account of that? That is, on account of what he may have known about the subject-matter, which information or knowledge would assist the court in arriving at a fair and just decision, without attributing any liability to him, or making orders that would expect or call for compliance from him. As indicated above, as at the time the suit herein was being filed, the appellant had no interest in the subject-matter, Nairobi/Block 76/54. He was not privy to the loan arrangements where Nairobi/Block 76/54 was offered as security. He, therefore, had no input into the matter, in terms of availing or furnishing information to, or sharing knowledge with, the court, about the dispute that there was between the 1st, 2nd and 3rd respondents, on one part, and the 4th, 5th and 6th respondents, on the other. The 1st, 2nd and 3rd respondents had come to court to prevent sale of Nairobi/Block 76/54, by the 4th, 5th and 6th respondents. The application for interim injunction was first placed before the court on 13th October 2020, and no interim or temporary orders were granted until 19th March 2021. Although the Advocate for the 1st, 2nd and 3rd respondents, Mr. Mageto, and the court, did talk about interim orders being extended, on 22nd October 2020, there were no such interim orders, for none had been granted on 13th October 2020. The 4th, 5th and 6th respondents replied to the interlocutory injunction application, by an affidavit sworn on 15th December 2020, and to the plaint, by a defence of even date, and that was after the alleged sale had had happened on 11th December 2020. The payment was allegedly paid or received on 15th December 2020.

16. As can be seen from the above, the sale allegedly happened during the pendency of the suit. Can it be said that the said sale was carried out with a view to defeat the suit, and specifically the application for interim injunction? If the sale was conducted while the 4th, 5th and 6th respondents were aware of the suit and the application, it would be fair to conclude that the said sale was conducted mischievously, with an intention to steal a march over the 1st, 2nd and 3rd respondents, to defeat the said application. Had the summons to enter appearance, together with the application, been served on the 4th, 5th and 6th respondents, by 11th December 2020, when the alleged sale happened? I cannot tell that from the record. I have scrupulously perused and pored through the papers in the original trial record, and the bundle of papers, constituting the record of appeal, filed herein, and I have not come across an affidavit of service, which would have indicated when the plaint and the application were served on the 4th, 5th and 6th respondents. I have noted, from the record, that when the matter came up in court on 22nd October 2020, the Advocate who appeared in the matter for the 1st, 2nd and 3rd respondents, Mr. Mageto, in the absence of the 4th, 5th and 6th respondents, informed the court that the said the 4th, 5th and 6th respondents had not filed a response, and that he had been informed by the 1st, 2nd and 3rd respondents that the parties were negotiating. That implied that service had been effected on the 4th, 5th and 6th respondents, as at that date, but they had not filed their responses to the suit and the application. Should any implication be made on the statement by Mr. Mageto, that service had been effected, but the 4th, 5th and 6th respondents had failed to file responses? No. A court of law should not act on suppositions, or on statements made by Advocates at the Bar, but on concrete proof, that, indeed, service had been effected. As there was no proof, by way of an affidavit of service, then, that service had not been effected. No proof of service was subsequently availed, for no affidavit of service, to that effect, was filed prior to delivery of the ruling on 19th March 2021, nor that of 14th July 2022.

17. In view of the above, it was erroneous of the trial court, in the impugned ruling of 14th July 2022, to have concluded that the property was sold when there were pending issues, when that court did not have before it evidence that the 4th, 5th and 6th respondents were aware of the suit and the application. It could not be said, therefore, that the 4th, 5th and 6th respondents disposed of the matter maliciously to defeat the suit or the application, or while well aware that there were issues that were in court, and they should have held off the sale, even in the absence of the restraining orders.

18. So, what should be made of this? As indicated above, as at the time the suit was initiated, the appellant herein was not in the picture, for he was yet to purport to have bought the property at a public auction. He could not qualify, therefore, to be a "person who ought to have been joined." However, after the suit and application for interim injunction were filed, the papers were not served on the 4th, 5th and 6th respondents, for there is no proof of that service, and it would be safe to conclude that as at 11th December 2020, when the appellant placed his bid at the public auction, the said 4th, 5th and 6th respondents were unaware of the said suit. By the very act of bidding at that sale, and of making payment, for the suit property, the appellant acquired an interest that he was entitled to protect, and it entitled him to or justified his joinder as a defendant in the suit, for the same was about a property he had just paid for, and in respect of which he stood to lose, should the matter go on to hearing, and to finalisation, without his involvement. He became a "person who ought to have been joined" at that point.

19. I note that the purchase price money was paid on 15th December 2020, which is also when the defence, witness statement and replying affidavit were dated. Should much be read into this? The coincidence is worth raising eyebrows. However, beyond that it should not matter. The sale allegedly happened on 11th December 2020, and not on 15th December 2020. The obligation was on the 1st, 2nd and 3rd respondents, to demonstrate, that when the said sale was happening, service had already been effected,

and that the said sale was being done mischievously, to either defeat or subvert the course of justice, something which they failed to do. There could be suspicion that service had been effected long before 11th December 2020, but suspicion alone would not do, the 1st , 2nd and 3rd respondents should have proved service in the manner required by the relevant law.

20. In view of everything that I have discussed above, I come to the conclusion that the trial court erred, in concluding that the sale happened during the pendency of the suit, for that fact was irrelevant, for what mattered was whether, after the filing of the suit and the application, the 2 processes had been brought to the attention of the relevant defendants in the manner required by the law, and that the activities of 11th December 2020 happened with the information and knowledge that that suit and the application were pending. In the absence of proof of service, there was no basis for laying any blame on the appellant.

21. The trial court had also reasoned that the relationship between the appellant and the 1st, 2nd and 3rd respondents was unknown or unestablished, and, therefore, there was no possibility of demonstrating that a cause of action existed as between them. The short response to that argument lies with the decision in Andy Forwarders Services Limited & another vs. Price Waterhouse Coopers Limited & another [2012] eKLR (Musinga, J), where it was remarked that joinder need not have anything to do with a cause of action, but about the presence, of the person to be joined or added to the cause, being necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the matter. That would be the second aspect that I have discussed in paragraphs *15* and *16*, hereabove, and the conclusion here should be that, if the appellant did not qualify to be added under the first aspect, then his case fell under the second aspect, on the basis that he had information and knowledge, accumulated from the exercise that he participated in on 11th December 2020, which he could share with the court, and which justified his joinder as a defendant.

22. Consequently, I find merit in the appeal herein. I hereby allow it, with the consequence that the orders made in the ruling, delivered on 14th July 2022, are hereby set aside, and substituted with an order, allowing the application, dated 4th December 2021, to have the appellant joined to the suit as a defendant. To facilitate the filing of a defence by him, the 1st, 2nd and 3rd respondents shall, within 30 days, amend their plaint, accordingly, and serve it upon the appellant, and the 4th, 5th and 6th respondents, who shall have another 30 days to file and serve their respective responses. The Deputy Registrar shall cause the original trial court records to be returned to the trial court for compliance and further directions. Each party shall bear their own costs. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 3RD DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Maina, instructed by Maina Makome & Company, Advocates for the appellant.

Mr. Wanjohi, instructed by JW Wanjohi & Company, Advocates for the 4th and 5th respondents.