



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ORIGINATING SUMMONS NO. 101 OF 2016

IN MATTER OF L.R. NYAKI/MUNITHU/1480 AND 1482

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

PAUL MWENDA M'INOTI (Suing in his capacity as Administrator ad Litem of the Estate of

HELLEN KARAMBU M'INOTI (Deceased)**PLAINTIFF**

VERSUS

PETER KIRIMI IMATHIU.....**DEFENDANT**

CATHRINE MWENDWA**INTERESTED PARTY**

RULING

1. By an application dated **18.5.2021 Susan Mwari Breachley** acting as the legal representative of the estate of **David Lee Breachley** now deceased describing herself as applicant/intended 2nd interested party seeks under **Section 1A, 1B and 63 (e) of the Civil Procedure Act, Order 1 Rules 3, 5 and 10 (2)** and **Order 51 Rules 1, 3 and 4 of the Civil Procedure Rules** to be added or enjoined and be allowed to file her pleadings in this matter.
2. Secondly she seeks this suit be consolidated with **Meru CMCC E&L Case No. 8 of 2020 Susan Mwari Breachley –vs- Peter Kirimi Imathiu**.
3. The grounds upon which the application is made are that her deceased husband had bought land through the defendant while the plaintiff was the caretaker of the aforesaid property and the 1st interested party a daughter of the said caretaker. In short she states she has a legitimate interest in this case as the “land” allegedly belonged to her late husband. The intended interested applicant is represented by the firm of **M/s Carl Peters Mbaabu & Co. Advocates** who came on record on 18/5/2021.
4. The application is opposed by the plaintiff by a replying affidavit by **Catherine Mwendwa** sworn on **19.7.2021** on the grounds that there is no common question of fact or law disclosed; that there is no identifiable stake or legal interest and lastly no prejudice has been demonstrated which she would suffer.
5. Secondly, the plaintiff maintains his occupation and possession of the suit land has never been interrupted by the intended interested party since 1993.
6. Fourthly it is submitted the intended party’s presence would not in any way be necessary or offer any assistance to court on the issues between the plaintiff and the defendant.
7. Fifthly the plaintiff avers the suit was filed on 18.7.2016 while the intended interested party knowingly sued the defendant in the lower court in 2020 hence the issues in the two files are not related. Furthermore she has a right to have the lower court file stayed.
8. Lastly the plaintiff submits by consolidating two different suits in two different courts, he will highly be prejudiced for it will complicate

and further delay this matter.

9. The court has gone through the entire file. The history of this matter indicates it was commenced by originating summons dated 18/7/2016 seeking for the following questions:-

- a) *Did the deceased occupy property title No. NYAKI/MUNITHU/1480 & 1481 for more than 12 years?*
- b) *Was the deceased occupation open, unhindered, exclusive, undisturbed, uninterrupted and adverse to the defendant's use of the property for more than 12 years?*
- c) *Was the deceased in occupation of the Suit Land since 1993?*
- d) *Did the deceased make significant improvement on the suit land signifying actual possession.*
- e) *Has the estate of the deceased acquired beneficial interest and hence ownership and became entitled to be registered as owner of the suit land by way of adverse possession?*
- f) *Has the defendant ever occupied the suit and in the last 12 years?*

10. Alongside the originating summons came an application dated **18.7.2016** for temporary injunction for stopping any intended eviction or inference with the plaintiffs rights over **Parcel No. Nyaki/Munithu/1480 & 1481** then registered in the name of the defendant. By a ruling delivered on 27.7.2016 the court declined to issue temporary orders of injunction but granted inhibition orders and parties were directed to comply with Order 11 in 60 days' time.

11. By a motion dated **21/7/2017**, **Catherine Mwendwa** sought to be enjoined as a plaintiff claiming her late mother **Hellen Karambu** she was living on the suit land since **1993** and upon death in **2010** was buried therein. The application was allowed vide a ruling made on **17.12.2018** then represented by the firm of **David John Mbaya & Co. Advocates**. Later on she replaced her lawyers with **Maita Rimita & Co. Advocates** on **2/10/2018**.

12. Since the plaintiff and the defendant could not be traced, Catherine Mwendwa now a party sought and was allowed to effect service through substituted service by orders issued on **6.3.2020** and **5.10.2020** respectively. This was done on **Daily Nation Thursday December 17, 2020** and a return of service filed on **18.10.2021**.

13. On **17.2.2021** the Catherine Mwendwa filed a notice of motion dated **16.2.2021** seeking for injunction orders over the suit land against the plaintiff (yet she had never filed a replying affidavit to the originating summons). The application was served upon parties and a replying affidavit sworn by the defendant on **1.3.2021** was filed. At the same time the defendant filed his defendant's list and bundle of documents on **3.3.2021**.

14. On **5.7.2021** **Mbaabu M'Inoti & Co. Advocates** filed a notice of motion dated **5.7.2021** seeking to withdraw from acting for the plaintiff. The firm of **Maitai Rimita & Co. Advocates** came on record for the plaintiff through a notice of appointment of advocates instead of a notice of change of advocates, notwithstanding they were also on record for Catherine Mwendwa. The court gave directions that the application dated **16.2.2021** be disposed of by way of written submissions.

15. Catherine Mwendwa filed written submissions dated **31.5.2021** maintaining she had met the threshold for grant of temporary injunction as per **Order 40 rule 2**, relied on **Kangethe Kabinga & 2 Others -vs- Kenya Women Microfinance Bank PLC (2021) eKLR, Giella -vs- Casmann Brown & Co. Ltd (1973) E.A358, Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others (2014) eKLR, Mrao -vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR, Philip Mwangi Githinji -vs- Grace Makarima Githinji (2004) eKLR, Hannah Wangui Mthenge & 2 Others -vs- Rose Muthoni Mathenge (2017) eKLR, Panari Enterprises Ltd. -vs- Lijoodi & 2 Others (2014) eKLR and Dorcas Muthoni & 2 Others -vs- Michael Ileri Ngari (2016) eKLR.**

16. The defendant represented by **Albert Kamunde & Co. Advocates** though no indication as to when they came on record for the defendant filed written submissions dated **12.7.2021** stating the interested party (Catherine Mwendwa) had not met the criteria for grant of temporary orders for lack of proprietary interests. Reliance was placed on **Mrao Ltd, Giella & Nguruman cases (supra), Section 107 of the Evidence Act** and **Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai (2018) eKLR.**

17. It appears the interested party (Catherine Mwendwa) extracted and was issued an order on **20.8.2021** by the Deputy Registrar which had been granted **22.2.2021**, by the court.

18. On **3.9.2021** Susan Mwari Branchley without leave filed a supplementary affidavit sworn on 3.9.2021 at Meru before **David Thangicia Advocates** yet she alleged she is a resident of **Kennewick, Washington, USA**, contrary to **Oaths and Statutory Declarations Act, Cap 15**.

19. As if that was not enough in this file, on **28.9.2021** the Catherine Mwendwa through **M/s Maitai Rimita & Co. Advocates** filed a notice of motion seeking to have the defendant cited for contempt of court of the order issued on **20.8.2021** for acts committed in May 2021.

20. Other than the plethora of applications herein, the court record shows parties have on a number of occasions been ordered to comply with Order 11 and fast-track this matter for full hearing. All these directions appear to have fallen on deaf ears.

21. Given the above context it is obvious there has been deliberate delay and inertia on all the parties contrary to the overriding objectives

provided under **Section 1A & B of the Civil Procedure Act** in assisting the court to deliver justice in an expeditious manner.

22. Coming to the application dated **21.2.2021** it is clear from the court record that Catherine Mwendwa has, though allowed to be joined in these proceedings did not file any pleadings for or against the originating summons.

23. Secondly her advocates on record are also the current lawyers on record for the plaintiff posing a clear and apparent conflict of interest.

24. Thirdly and more importantly after **Catherine Mwendwa** joined, she did not file either a replying affidavit, defence and counterclaim or supporting affidavit to the originating summons herein. In absence of defining and filing her claim/stake with clear details, my considered view that her application dated **21.2.2021** is built on quick sand, lacks merit and is hereby dismissed with costs.

25. As regards the supplementary affidavit filed by the intended 2nd interested party **Susan Mwari Brechley**, she had no capacity before being allowed to the suit to file a supplementary affidavit to the motion dated **21.2.2021**. The same is hereby expunged from the court's record.

26. Coming to the application dated **18.5.2021** the same is supported by an affidavit sworn in **Meru Kenya on 18.5.2021** by **Susan Mwari Brechley** a resident based in **Kennewick Washington**, though as stated above commissioned in Meru, Kenya.

27. It is unfortunate the **Commissioner of Oaths** made such a grave mistake to purport to commission an affidavit. Be that as it may, and looking at the wider interest of justice to the parties, a party seeking to be joined as a party must show clearly the basis, upon which his or her stake or interest arises.

28. In **Communication Commission of Kenya and 4 Others –vs- Royal Media Services Ltd. & 7 Others (2014) eKLR** it was held:-

“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court’s decision in Mumo Mutemu case where it held

“An interested party is one who has stake in the proceeding, though he or she was not a 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. Similarly in Meme –vs- Republic (2004) I E A 124 the High Court held that a party could be enjoined in a matter for the reasons that:

a) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings:

b) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law.

c) Joinder prevents a likely course of proliferated litigation.

We ask ourselves the following questions:

a) What is the intended party’s state and relevance in the proceedings and (b) Will the intended interested party suffer any prejudice if denied joinder.”

29. In my considered view the intended interested party’s claim if any, is against the defendant and has no relationship whatsoever with the rest of the parties in this matter. Secondly the intended interested party chose to sue the defendant in the lowest court and not in the High Court. Third her suit was later filed after the instant suit. If at all she thought it necessary to be a party in this suit, she had no reason to file the case at a lower court instead of simply seeking to be enjoined, herein. Fourth there is no request for the transfer of the lower court suit herein.

30. A party cannot simply seek for consolidation alone before requesting for a file in the lower court to be transferred. The pleadings in the lower court have also not been attached for this court to establish if there is a common fact or point of law in both matters.

31. Fifth and more importantly, the intended interested party has not demonstrated her stake and or legal interest in this suit.

32. For the foregoing reasons I find the application without merit and dismiss it with costs.

33. As regards the application dated 24.9.2021 for contempt of court, given my finding on the application dated 21.2.2021 that the interested party has no demonstrable stake, and there being no affidavit of service of the order in **May 2021** when the order is alleged to have been violated, the same is dismissed with costs. Parties herein to comply with earlier orders on **Order 11** within 45 days failure of which the originating summons stand dismissed for non-compliance.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 27TH DAY OF OCTOBER, 2021

In presence of:

C.P. Mbaabu for applicant

WAMBUA FOR PLAINTIFF/INTERESTED PARTY

MUGANE FOR KAMUNDE FOR DEFENDANT

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE