



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 134 OF 2014

KATHENDU KARERI.....1ST PLAINTIFF

PAUL NGUKU NGARI.....2ND PLAINTIFF

VERSUS

ITA KIBORIO.....1ST DEFENDANT

CHARLES NTHIGA GITUMO.....2ND DEFENDANT

RULING

1. This ruling is on a post-judgement application – a notice of motion dated 23/2/2021 – filed on 24/2/2021 by a person – **PIUS NYAGA NTHIGA** – who was not a party in the suit but now wants to join as an interested party. **PIUS NYAGA NTHIGA** is therefore the applicant in the application and has brought the application under Order 1 Rules 1, 3, and 10, Order 51 Rule 1 and 15 of Civil Procedure Rules and all other enabling law.

2. The application came with seven (7) prayers but prayers 1, 2 and 4 are moot now as they were for consideration at an earlier stage. The prayers for consideration therefore are four (4) – prayers 3, 5, 6, and 7 – and they are as follows:

Prayer 3: This honourable court do review and set aside the judgement delivered on 27/2/2020 and all consequential orders.

Prayer 5: This honourable court do stay the implementation of the decree issued by this honourable court on 27/2/2020 and all consequential orders

Prayer 6: That the interested party applicant be granted leave to be joined as a party to this suit.

Prayer 7: That costs of this application be provided for.

3. The grounds upon which the application is anchored include, inter alia, that the applicant is seeking joinder in his capacity as the administrator of the estate of his late father – **CHARLES NTHIGA GITUMO** – who in turn was the administrator of the estate of **MUGO GITUMO**. Mugo Gitumo was the father of the applicant's late father and therefore a grandfather to the applicant. Initially, the applicant's father – **CHARLES GITUMO** – was second defendant in the suit but he ceased to be so on 11/10/2017 when a consent entered into between himself and the plaintiffs led to withdrawal of the suit against him.

4. The application as filed is against three (3) people – **KATHENDU KARERI**, the 1st respondent now and the plaintiff in the suit, **PAUL NGUKU NGARI**, the 2nd respondent now and 2nd plaintiff in the suit, and **MUNYI NGAI**, the 3rd respondent now and the interested party in the suit. The dispute revolves around the ownership of Land parcels Nos. EMBU/GANGARA 27, 31, 32, 37, 82, 371, 431, 830, 923, 924, 1038, 1041, 1641, 2086, 2822, 2823, 2824, and 2825. ("Suit properties" hereafter.)

5. The defendant in the suit, also, indicated to be a respondent in the application, is **ITA KIBORIO** and he is a registered owner of the suit properties. The plaintiffs however claimed that the suit properties were held in their trust as members of Miugu House of the Gakera clan. The defendant denied this. The court found for the plaintiffs and the interested party – all of whom are respondents now in the application under consideration – in a judgement delivered on 27/2/2020.

6. It happens that the late father of the applicant is also a registered owner of the suit properties. As pointed out elsewhere, he was the 2nd defendant in the suit but he consented with the respondents that he be out of the suit. The applicant is saying that his late father was not

heard yet the orders issued affect him or his estate. He wants to defend the interest of his father or, more correctly perhaps, the interest of his grandfather which his late father represented. All this is clear not only in the grounds on which the application is anchored, but also in the supporting affidavit that came with the application.

7. The 2nd respondent filed a response vide a replying affidavit dated 11/3/2021. He deposed, inter alia, that the late father of the applicant was a party in the suit but the matter was withdrawn against him. HE stated that the applicant's late father had not filed a counter-claim or made any claim against the plaintiffs before his death. According to the 2nd respondent the applicant can not make an application for joinder in an already concluded suit. This is more so considering that the applicant's late father was not a party at the time the judgement was delivered, and had not even filed a counter-claim when he was a party. The application was said to be an after-thought, having been filed after the death of the applicant's late father and about one year after judgement.

8. It was also that no good reason has been proffered for setting aside the judgement and the alleged illness of the applicants late father was not demonstrated. The 2nd respondent averred that the father was of sound mind when he entered into the aforesaid consent with them. The delay in filing the application was also said to be inordinate as it was filed about one year after delivery of the judgement. This court was asked to dismiss the application.

9. The interested party in the suit also filed a response vide a replying affidavit dated 16/4/2021. He deposed, inter alia, that judgement was rendered in his favour and he was awarded 30 acres from the suit properties. According to him, the application is meant to deny him the fruits of his judgment. He deposed that no good reason has been given to review or set aside the judgement and that the allegation that the applicant's late father was unwell was insufficient.

10. The applicant filed a supplementary affidavit to counter the responses. According to him, the pleadings should have been amended to reflect that his late father was no longer a party. According to him also, some material evidence was left out because of his father not participating in the suit. He wants to make this evidence available. He asked the court to allow this to happen as the respondents will not be prejudiced at all given that they will still be heard.

11. The application was canvassed by way of written submissions. The applicant's submissions were filed on 15/5/2021. He relied on the averments in his application. He also sought reliance on order 45 of the Civil Procedure Rules to urge that he has sufficient reason to have the judgement reviewed. He emphasized that the estate of the late Mugo Gitumo did not participate in the proceedings yet the judgement rendered was adverse to them.

12. Further, he submitted that the court proceedings were not fair. In this regard, he cited the case of **Wachira Karani Vs Bildan Wachira [2016] eKLR** as cited in the case of **Richard Nchapai Leiyapo Vs IEBC and 2 others** where the court emphasized that it would be unjust to deny a party who desires to be heard the opportunity of presenting his case. According to the applicant, the plaintiffs in this suit are not members of the Miugu family and that evidence is material to the suit. It was further submitted that since the plaintiffs are not members of the Miugu family, then they lacked capacity to institute the suit.

13. The court was told that it has discretion to set aside ex parte orders. The applicant cited order 1 rule 3, for this averment. He placed further reliance on order 1 rule 10(3) of Civil Procedure Rules. He pointed out that his late father – Charles Nthiga – was the administrator of the estate of the late Mugo Gitumo who was a joint registered owner of the suit parcels. He therefore needed to be heard as a defendant in the matter. Noting that there has been an allegation that the application is coming late in the day, he said that he was not aware of the proceedings and only got to know of them at the time of the implementation of the judgement.

14. The respondents submissions were filed on 4/6/2021. The history of the suit was given. They also relied on the responses to the application. According to them, the application is not premised on any provision of law that would empower the court to review or set aside the judgement. For this reason, the application, according to them, should be dismissed. They further submitted that there was inordinate delay in filing the application and that delay has not been explained.

15. As regards the law relied upon to justify joinder, the submission is that it applies to on-going cases, not concluded ones like this one. They faulted the applicant's late father for not claiming the suit properties or seeking to re-join the case if he felt that there was his interest at stake in the matter. In the suit, the first two respondents see a collusion between the 1st defendant (who is also named as a respondent) to defeat justice. The court was asked not to allow the application.

16. The interested party in the suit also filed submissions. In the submissions, he made reference to the substance of the judgement. He also mentioned several applications pending before the court. According to him, all are aimed at defeating justice. Referring to the application at hand, he submitted that no good reason or ground has been advanced to warrant review or setting aside the judgement. He further associated himself with the submissions of the first two respondents (the plaintiffs in the suit) and asked that the application be dismissed.

17. I have had a look at the court record generally. I have also considered the application, the various responses, and rival submissions. The issues for determination commend themselves to me to be as follows:

- 1) *Whether the applicant ought to be enjoined in the suit.*
- 2) *Whether the court ought to review or set aside the judgment.*
- 3) *Whether orders for stay of implementation of the judgment should be granted.*
- 4) *Which way for costs?*

18. It is appropriate now to address the issues.

Issue I: **Whether the applicant ought to be enjoined in the suit.**

Joinder of a party is covered under Order 1 Rule 10(2) of the Civil Procedure Rules which provides thus:

“The court may at any stage in 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 to adjudicate upon and settle all questions involved in the suit, be added.”

19. In **Lilian Wairimu Ngatho & Another Vs Moki savings Co-operative Society Limited & Another [2014] eKLR, Nyamweya J** (as she then was) had the following to say about joinder as envisaged under Order 10 rule 10(2) of the Civil Procedure Rules

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment.” A party can only therefore be joined to a suit at any time during pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.”

20. I realize that the applicant seeks to be joined as an interested party. He has filed this application as the legal representative of the estate of his late father – Charles Nthiga Gitumo. He submits that the estate was not represented in the suit. The respondents have contested the averment on the grounds that the applicant's father had been a party but he consented to his non-inclusion in the suit. The applicant however counters this by saying that his father was unwell at the time he agreed to have the suit withdrawn.

21. The position in law is that he who alleges must prove. The applicant needs to make available medical evidence showing that his late father was unwell as he alleges. In particular, this court would need to be persuaded that the father was of unsound mind when he entered into the consent. I agree with the respondents that this allegation has not been proved.

22. It is crucial too to appreciate the role of an interested party in a suit. The **Black’s Law Dictionary, 11th Edition at page 1351 define an interested party as “a party who has a recognizable state (and therefore standing) in a matter”**. In **Joseph Leboo Vs Director, Kenya Forest Service & Others: ELC No. 273 of 2013, Eldoret**, the court observed as follows:

“It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any right over it ...”

The court continued:

“It follows therefore that applicants seeking to join proceedings as interested parties ought to be handled with caution so that a person does not come to a suit, disguised as an interested party, while all along he/she wishes to agitate rights of his/her own over the subject matter of the suit.”

23. It appears clear from the above that an interested party is never a very central party in the proceedings. Such a party is a peripheral party. In the suit herein, the applicant's late father was not an interested party. He was a defendant. In his capacity as defendant, he could urge before court any interest that needed the attention of the court. The applicant wants to urge the same interest before the court as an interested party. He cannot do so. He has misunderstood or mistaken the role of an interested party. As such a party, he is not entitled to cause dismissal or striking out the suit. Yet that is what he precisely wants.

24. I think the applicant also needs to reveal and/or make available all the material and evidence which he thinks can make a difference in the final outcome of the suit. In **Francis Kariuki Muruatetu & Another V Republic and 5 others (2016) eKLR**, the court held, inter alia **“that the applicant must demonstrate the personal interest that she has in the matter by laying sufficient grounds before the court; the prejudice she would suffer if she is not enjoined as interested party; set out the case that she intends to make before the court and demonstrate the relevance of the evidence being proffered to the court in determining the issue in controversy.”**

In my view the applicant has fallen short of demonstrating the requirements needed for joinder as an interested party.

25. I now turn to issue 2 namely:

Whether the court should set aside or review the judgement

It's clear that the applicant wants to make available to court that which his late father would or ought to have made available had he remained a party to the end. Nobody forced his father to consent to withdrawal of the suit against him. He knew, or should be deemed to have known, that the suit that remained even after his withdrawal related to the properties of which he was a registered owner. It was obvious that the ultimate decision to be made by the court would relate to the properties. Yet he chose not to become part of the suit of his own volition.

He had time to think through the issue. The suit was withdrawn in the year 2017 and he died in 2019.

26. Now the applicant wants to adduce evidence long after judgement was delivered. His father had ample time to seek to rejoin the suit and agitate his interest. He didn't do so. In **Republic Vs Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019] eKLR the court held**, inter alia, that

“For material to qualify to be new and important evidence or matter, it must be of such a nature that it couldn't have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court.”

It is not shown by the applicant that the evidence he has is new or was not available to be given to court at the time it made its decision.

27. This court is not therefore persuaded that it should allow the review or setting aside. The applicant's late father opted out of the case knowing well it relate to properties in which he had an interest. The applicant, who is his son, now belatedly seeks to join the case to give what his late father should have given. I am not persuaded that I should allow this and I decline to allow it.

28. The third issue (issue 3) is **whether stay of implementation of judgement should be granted**. Having taken the position that the applicant can not be allowed to join the suit, and having further found that review and setting aside are not justifiable in the circumstances of this case, it is clear that the applicant remains a stranger. Stay of implementation of the judgement can only be considered in his favour or otherwise if his joinder has been accepted. A stranger cannot be allowed to seek stay of implementation of a judgment in a case he is not a party to. Stay of implementation can not therefore be granted and is hereby declined.

29. Finally, **there is the issue of costs**. The applicant, a stranger in the suit, has made the other parties incur costs. Costs follow the event unless the court, for good reason, orders otherwise. I don't see any good reason to depart from the position that costs follow the event. The applicant should therefore pay costs.

30. The upshot, in light of the foregoing, is that the application herein is dismissed with costs to the respondents.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **25TH DAY** of **OCTOBER 2021**.

In the presence of Kariuki for Muthoni Ndeke for applicant/intended interested party, Kathungu for Ithiga Njeru for plaintiff/respondent and M/s Njenga for Njiru Mbogo for the interested party.

Court assistant: Leadys

A.K. KANIARU

JUDGE

25.10.2021