



REPUBLIC OF KENYA



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**Gitonga v Marangu (Suing as Administratrix of the Estate of Jonah M’Muthuri) & another
(Civil Appeal E072 of 2021) [2023] KEHC 2419 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E072 OF 2021
EM MURIITHI, J
MARCH 23, 2023**

BETWEEN

SYLVIA NTUE GITONGA APPELLANT

AND

**JOYCE KINYA MARANGU (SUING AS ADMINISTRATRIX OF THE ESTATE
OF JONAH M’MUTHURI) 1ST RESPONDENT**

DAVID MURITHI 2ND RESPONDENT

*(An appeal from the Ruling of Hon. S. N Abuya (C.M.) in Meru
CM Succession Cause No. 48 of 1986 delivered on 9/6/2021)*

JUDGMENT

1. The appellant herein, the petitioner in the trial court, filed an originating summons on November 10, 2020 seeking inter alia joinder as an interested party and leave to participate in the proceedings; and declaration of the decree issued on June 20, 1994 to be time barred.
2. The 1st respondent herein, the 1st objector in the trial court, filed a replying affidavit in opposition to the originating summons.
3. The trial court *vide* its impugned ruling of June 9, 2021 found that:

“A party is enjoined in a suit if his presence may be necessary in order to enable a court effectively & completely adjudicate upon & settle all questions involved in the suit. I find the applicant failed to prove this condition since this case has already been heard & determined. The applicant can pursue his claim in the ELC court against the said Jennifer Naitore Mworira who sold to her land parcel No Abogeta/l-kiringa/480 which is a subdivision from LR Abogeta/L-Kiringa/377 which in turn is a subdivision from LR Abogeta/L-Kiringa/6 in violation of the judgment of the court dated January 24, 1994 where land parcel No



LR Abogeta/Lower-Kiringa/6 was given to the objector/1st respondent (Jonah). Further the judgment issued on January 24, 1994 was not appealed against and remains in force. I therefore find the applicant is not entitled to prayer 3 to be enjoined in this case. I will not deal with issues 2 since I have declined to enjoin the applicant in this case as an interested party. Accordingly, I find the application by applicant's (slvia Ntue Gitonga) dated November 9, 2020 to be without merit and its hereby dismissed with costs to the 1st respondent/objector. The applicant can pursue his claim in the ELC court against the Jennifer Naitore MworioA who sold to her the said land in violation of the said judgment of the court dated January 24, 1994 which is not been appealed against and is still in force.”

The Appeal

4. On appeal, the appellant filed her memorandum of appeal on June 14, 2021 listing 6 grounds as follows:
 1. The learned trial magistrate erred in law and fact in holding that the appellant could not be joined to the suit as an interested party since the matter was concluded yet the applicant sought joinder to challenge execution being undertaken by the 1st respondent at the time the application was made.
 2. The learned trial magistrate erred in law and fact in failing to appreciate that the appellant had an undeniable interest to the execution proceedings since her title over property title No Abogeta/L-Kiringa/480 was to be cancelled in 2020 pursuant to a time barred decree issued by the court on May 30, 1994.
 3. The learned magistrate erred in law and fact in failing to appreciate that a challenge to execution can only be determined by the court that issued the decree and cannot be contested in a different cause or court.
 4. The learned magistrate erred by failing to determine the germane issue raised in the application being whether the decree sought to be enforced was time barred.
 5. The learned magistrate erred in abstaining from making findings on the merit of application while at the same time directing the applicant to present her case to the Environment and Land Court effectively dismissing merits of the application without analysing the law and evidence presented.
 6. The learned magistrate misapprehended the issues arising from the application and thus rendering a ruling at odds with the facts and relevant applicable law.

Submissions

5. The appellant urges that her interest in the suit and the importance of her participation were too plain to belabour as her title was going to be cancelled and she was entitled to make a case why it ought not be cancelled. She faults the trial court for turning its face away from the proverbial elephant in the room by failing to address the issue whether the decree sought to be enforced was time barred, and cites *Malakwen Arap Maswai v Paul Kosgei* (2004) eKLR, *M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'mbijiwe* (2007) eKLR and *Republic v Land Registrar, Machakos & another; Raphael F.K. Kilonzo (Interested Party) Ex parte Fredrick Nzyoki Makau & another* (2021) eKLR. She urges that it is settled law that rights acquired pursuant to a judgment are extinguished within 12 years of delivery of the judgment by operation of law, and the trial court should have had no difficulty pronouncing itself



likewise, and cites *John Mwaura Mwaniki v John Ndonyo Njuguna* (2018) eKLR. She urges that the 1st respondent acquiesced to her ownership of Abogeta/L-Kiringa/480 and was estopped from making any claim on the same, and cites *Rajnikantkhetshi Shah v Habib Bank A.G Zurich* (2016) eKLR. She urges that the trial court misapprehended the issues arising from the application thus rendering a ruling at odds with the facts and the relevant applicable law.

6. The 1st respondent urges that the prayer for nullification of the decree was only sought by the appellant in her submissions, and a court can only grant what is prayed for, and relies on *Erastus Kihara Mureithi v Josphat Njoro Ragi & 2 others* (2011) eKLR and *Alex Gichira Mwatha v Joshua M Maina* (2016) eKLR. She implores the court to find that the dispute at hand delved into the estate of the deceased and hence the conclusion of the succession cause was a fundamental issue for consideration in determination of the application to be enjoined in the proceedings. She urges that since the appellant claimed to have purchased the land from a third party and not the deceased, her claim could not be heard in this succession cause, as observed in *Re Estate of Sirimani Blasio Matara (Deceased)* (2018) eKLR. She urges that the transactions that led to the creation of Abogeta/L-Kiringa/480 were null and void and the appellant did not acquire any title from the transferor as she had nothing to transfer. She applauds the trial court for finding that the appellant could only file a suit against the person who sold the land to her in the ELC Court. She urges that even if the trial court had addressed itself to the issue of time bar, it lacked jurisdiction to review the decision of October 24, 2017 by Lady Justice Anne Ong'ino, and cites *Kenya Hotel Properties Limited v Attorney General & 5 others* (2018) eKLR. She urges that the effect of the decree was to nullify Abogeta/L-Kiringa/377 and 378 and restore it to Abogeta/L-Kiringa/6 so that it could eventually be transferred to the objector. She urges that as at June 16, 2005 when the subdivisions of Abogeta/L-Kiringa/377 into 477, 478, 479 and 480 were effected, the decree of the court was still valid and capable of execution. She urges that the said subdivisions were illegal, null and void ab initio since they took place when there was a valid judgment and decree of the court requiring its restoration to Abogeta/L-Kiringa/6. Since the transactions leading to the creation of Abogeta/L-Kiringa/480 were tainted with illegality, the issue of limitation is immaterial. She urges that once the court allowed the 1st respondent to be enjoined in the proceedings and thereafter ordered cancellation of titles of the subdivisions of the suit land, the question of the decree being time barred was brought to rest, and cites *Mwangi M'Abanga v Festus Muriungi* (1994) eKLR. She urges the court to dismiss the appeal as allowing it would be tantamount to sitting on appeal on its own decision. She urges that the application was incurably defective since it sought to nullify a decree dated June 30, 1994, which was non-existent.

Analysis and Determination

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co & others* [1968] EA 123).
8. On October 17, 1986, David Murithi told the court that he sold the whole of Abogeta/L-Kiringa/6 measuring 5.6 Hectares (henceforth called the suit property) to Elias Kaburu and Julius Mworja. Jonah M'Muthuri stated that he bought the suit property from the deceased herein.
9. The court ordered that the issue of the alleged sale of the suit property to Jonah M'Muthuri by the deceased and the validity of the said sale be referred to the elders, and an award be filed in court.
10. The said award was subsequently filed in court but it did not resolve any of the disputed issues, and the court appointed David Murithi to be the administrator of the deceased estate. On March 11, 1988, the court proceeded to confirm that grant and distributed the suit property jointly to Elias Kaburu and Julius Mworja.



11. On February 16, 1990, the court referred the matter to D.O South Imenti to determine whether the objector, Jonah M’Muthuri had purchased 14 acres of the suit property from the deceased.
12. On January 24, 1994, the court set aside orders of December 21, 1990 and January 28, 1993 and awarded 14 acres of the suit property to the objector, Jonah M’Muthuri as had been concluded by the elders who arbitrated upon the matter.
13. The objector sought to have the executive officer of the court empowered to sign the necessary documents to effect transfer of the suit property to him, which application was allowed on August 24, 1995.
14. After the objector passed on, Joyce Kinya Marangu was on April 4, 2017 successfully appointed as his legal representative, by Lady Justice A. Ong’ino in order to execute the judgment of the court.
15. The objector filed an application dated July 14, 2017 seeking cancellation of certain subdivisions of the suit property so that the same could be registered in the name of the objector. On October 24, 2017, the court (A. Ong’ino J) ruled that:

“The order annexed is dated May 30, 1994. It was to the effect that parcel No LR Abogeta/L. Kiringa/6 measuring 5.6 Ha. be restored to the objector. Mr Kioga advocate was acting for the petitioner as at the time this order was made and there is no evidence that appeal was lodged. In the circumstances and in consideration of the age of the cause, application dated July 14, 2017 is allowed with costs.”

16. It is factual that the decree sought to be executed was issued on May 30, 1994, which the appellant terms as time barred, by dint of the provisions of section 4(4) of the [Limitation of Actions Act](#), which provides that:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

17. The purpose of the above section is to eradicate stale claims and stop the vexing of litigants. Where a judgment creditor elects to sleep on a decree, he is estopped from waking up from his slumber after 12 years have lapsed to claim his right. The law bars such claims. (See [Isaac Olang Solongo v Gladys Nanjekho Makokha \(Being the administrator of the Estate Antonina Makokha \(Deceased\) & another](#) [2021] eKLR).
18. Did the 1st respondent, who is the decree holder go into slumber after she was issued with the decree of May 30, 1994? Of course not. The decree could not be executed as the initial objector, Jonah M’Muthuri died and he had to be substituted. After the said substitution, the 1st Respondent realized that the suit property had since been subdivided into resultant parcels rendering the implementation of the decree impossible. This court finds that the 1st respondent all along intended to execute the decree of May 30, 1994 before the expiry of the limitation period of 12 years, but she faced hurdles which were not of her own making, and it would be considerably unfair to punish her for them.
19. Sections 26 and 27 of the Law of [Limitation of Actions Act](#) provide for extension of time in case of fraud or mistake, ignorance of material facts in actions for negligence, etc.



20. The court respectfully notes the decision of *Skov Estate Limited & 5 others v Agricultural Development Corporation & another* [2015] eKLR, where the court (Munyao Sila J) set out the pre-requisites to be fulfilled before a party can be joined to proceedings as follows:

“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. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to join a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.”

21. The Court of Appeal in *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR set the benchmarks for joinder of a party with binding authority as follows:

“[T]he power given under the rules is discretionary which discretion must of necessity be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.

In the same vein, a party seeking joinder who fails to establish any right over or interest in the subject matter cannot be enjoined.”

22. In this case, that the decree of May 30, 1995 was still valid and capable of execution, and the appellant’s quest to be joined into this succession cause was clearly unfounded, as she had no direct interest in the suit property, by virtue of an alleged purchase of a portion of the suit property from a third party, an alleged seller named Jennifer Naitore Mworia who was not a party to the proceedings, which were as properly noted by the trial court were already at an end. There being no pending litigation, the principles for the joinder of a party set out in the authorities could not be applied.
23. This court finds the trial court’s refusal to join the appellant into a succession cause, which had already been determined, was justified and well founded. Any determination as to the alleged sale of the suit property to the appellant by a third party who was not a party to the succession cause could only be made in proceedings in that behalf before appropriate forum. This court also finds that the trial court



addressed its mind to all the issues raised by the appellant in her application of November 10, 2020, and there is nothing on the principles for appellate interference with the discretion of a trial court (see *Mbogo v Shab* (1968) EA 93) as would justify the grant of the reliefs sought in this appeal.

ORDERS

24. Accordingly, for the reasons set out above, the court finds that the appellant's appeal is without merit and it is dismissed with costs to the respondent.

Order accordingly.

DATED AND DELIVERED ON THIS 23RD DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Oundo Muriuki & Co. Advocates for the Appellant.

M/S Murango Mwenda & Co. for 1st Respondent

M/S M.M. Kioga & Co. Advocates for the 2nd Respondent.

