



REPUBLIC OF KENYA



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Kimani v Mbondo & 5 others; Munya & 2 others (Interested Parties) (Civil Appeal E014 of 2022) [2023] KEHC 24301 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E014 OF 2022
MW MUIGAI, J
OCTOBER 24, 2023**

BETWEEN

PAUL NJUNGE KIMANI APPELLANT

AND

MARICELINA WANJIKU MBONDO 1ST RESPONDENT

JOSHUA NTHENGE NYOLI 2ND RESPONDENT

JOHNSON NYIKA KATUUI 3RD RESPONDENT

LITHER NTHENYA KAKUVI 4TH RESPONDENT

MOSES MUTUKU MUNYA 5TH RESPONDENT

ELIZABETH MUENI 6TH RESPONDENT

AND

MOSES MUTUKU MUNYA INTERESTED PARTY

ELIZABETH MUENI INTERESTED PARTY

PAUL NJUNGE KIMANI INTERESTED PARTY

*(Being an appeal from the ruling and order of Honourable Martha
Opanga Senior Resident Magistrate delivered on the 18th day
of January 2022 in Kangundo Succession Cause No.149 of 2019)*



JUDGMENT

Notice of motion

1. On 7th June, 2021 the 3rd interested party/Applicant filed an application under certificate of urgency and sought the following orders: -
 - a. Spent
 - b. That the Applicant be granted leave to be enjoined in the suit as an interested party.
 - c. That there be a stay of proceedings herein pending hearing and determination of this application.
 - d. That the Court be pleased to issue any other or further relief that this Court may deem fit and just to grant.
 - e. That costs of this application be provided for.

Trial Court Ruling

2. On 18/01/2022 the Trial Court delivered a Ruling in respect of the Application dated 7th June, 2021 and gave the orders as follows:-
 - a. That the 3rd intended interested party's application is not merited.
 - b. That the same is dismissed with no orders as to costs.

Memorandum Of Appeal

3. Aggrieved by the Ruling of the Trial Court delivered 18/01/2021 the Appellant herein filed their Record of Appeal stating the following grounds; -
 - i. That the learned Trial Magistrate erred in law and in fact by failing to evaluate the evidence presented by the appellant allows the appellant to present his case and advance his interest in the property where he lives with his family the subject matter of the proceedings in the lower court.
 - ii. That the learned Trial Magistrate erred in law and in fact in dismissing the appellant.
 - iii. That the Trial Magistrate erred in law and in fact by failing to address herself on the Replying Affidavit filed by the appellants in opposition to the 3rd respondent's application.
 - iv. That the Trial Magistrate erred in law and in fact by addressing issues which were not presented before her for determination.
 - v. That the Trial Magistrate erred in law and in fact in failing to notice and uphold that the appellant has been in the property known as Nairobi/Block 118/1320 for over 22 years without any disruption from the respondents.
 - vi. That the Trial Magistrate erred in law and in law by dismissing the appellant's application for joinder as interested party against all the legal provisions provided to allow the appellant an opportunity to present his case in the matter.



- vii. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate the fact that the administrators have not objected to the 3rd interested party being joined in the proceedings herein.
- viii. The Learned Trial Magistrate misdirected herself by arguing the respondents case and failing to look at the evidence tendered by the applicant in his application for joinder as an interested party.
- ix. The Learned Trial Magistrate erred in law and in fact in proceeding to deliver the ruling and making orders whereas one party to the proceedings the 2nd interested party had died at the time of delivery of the ruling and making such further orders.
- x. The Trial Magistrate erred in law and in fact by allowing an application similar to the application she dismissed brought by the 4th interested party thereby exhibiting double standards.
- xi. The Trial Magistrate erred in law and in fact by denying a party whose property is the subject of the proceedings thus denying the party a hearing.
- xii. The Learned trial Magistrate erred in law and in fact by making a finding that the appellant entered into a contract with two beneficiaries of the deceased against the evidence tendered before court.

Submissions

Appellant's Submissions

4. It is submitted that the appellant's application to be enjoined as a purchaser for value in the deceased's succession cause has merit. Reliance was placed in the case of Civil Appeal No. 128 of 2008 – Eldoret between *Rubo Kipngetich Arap Cheruiyot & Peter Kiprop Rotich* [2013] eKLR the court stated thus:-

“- succession causes are for the purposes of determining and appointing the legal representatives of deceased persons and also ascertainment of the deceased's heirs and their respective shares”.
5. It was further submitted that the law on this subject was not clear. Some courts have held that a purchaser's claim should be litigated separate from the succession cause, whilst others have said it should be within the succession cause. The decision of the Court of Appeal in the case of *Rubo Kipngetich Arap Cheruiyot v Peter Kiprop Rotich* Civil appeal No. 128 of 2008 also invited diverse interpretation when it stated as follow:-

“Claims by third parties to deceased persons properties although sometimes lodged in the succession cause of the deceased person are better litigated in separate suits”. The Court of Appeal recognized these possibilities. Therefore, I take the view that there is no absolute prohibition of third-party claims being litigated in a succession cause except this should be decided on case-to-case basis depending on the circumstances of each case”
6. It was therefore submitted that the instant case meets the circumstances as held by the Court of Appeal No.128 of 2008 and Succession Cause No. 499 of 2010 and the ruling and order of the Magistrate's Court dated 18th January 2022 be set aside, the appeal be allowed and cost of the appeal be provided.



Respondent's Submissions

7. It is submitted that issues for determination were whether the record of appeal is defective, whether the appellant is either a creditor or a dependant for him to be joined in these proceedings, whether the appellant could successfully plead adverse possession, whether the appellant merited to be joined as a party to the proceedings at the trial court and who should bear the cost of the appeal.
8. On the issue of whether the record of appeal is defective, it was submitted that the appellant in his record of appeal has attached documents which were never part of the lower court record. Documents from page 37 to page 102 were never part of the proceedings in the lower court and the same should not form part of the record of appeal.
9. It was submitted that as an appellate court, it had a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis as captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first Appellate Court. Reliance was placed in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR. Based on the above, it was submitted that the court cannot evaluate, reassess and reanalyze what was not before the lower court.
10. On whether the appellant is either a creditor or a dependant for him to be joined in these proceedings, it was submitted that the facts of this matter are similar to the facts of the attached authority in *Re-Estate of Barasa Kanenje Manya(Deceased)* 2020 eKLR. The crux of the replying affidavit to the application by the appellant can be summarized in three general grounds: the application was defective in substance in that grant of the prayers sought will lead to absurdity, the applicant is neither a creditor nor a beneficiary of the deceased and the purported agreement between the applicant and the intended 3rd interested party flies in the face of section 45 of the *law of succession Act*, the same is null, void and of no legal effect.
11. It was contended that the applicant sought to be granted leave to be enjoined as an interested party. Reliance was placed in the case of *Barasa Kanenje(supra)*, on the use of the words “join” and “enjoin” where the High Court differentiated the two words. “join” a party to a suit means add that person to the suit. “enjoin” in law, means to injunct or to bar a party from doing something. It was therefore submitted that the prayers as framed by the appellant in the lower court were nonsensical and grant of the same would have led to absurdity.
12. On whether the applicant is a creditor or a beneficiary, the court was urged to be persuaded by the reasoning in the case of *Re Estate of Barasa Kanenje Manya*, it was submitted that the appellant claims to have purchased from the sons of the late Nyoli Kikuvi on 18th June 1998. The deceased whom these proceedings relate on the other hand died on 13th December 1983. The grant of letters of administration was also first made by the lower court on 26th June 2015 and confirmed on 11th August 2020. If indeed the property was sold to the appellant, the same was sold fraudulently and contrary statute and the same was null and void and of no legal effect. Section 45 of the *Law of Succession Act* was emphasized and reliance was placed in the case of *Benson Mutuma Muriungi v CEO Kenya Police Sacco & Another*[2016] eKLR in attempt to decipher the contents of Section 45 of the *Law of Succession Act*.
13. It was submitted that unlike a grant of probate that relates back to the date of death, the illegal activities of the appellant do not date back from the date of death of the deceased as was held in the case of *Re Estate of Barasa Kanenje Manya (deceased)* [2020] eKLR.
14. It is submitted that the alleged sale agreement did not happen during the deceased's lifetime but happened after his death between his two surviving sons' way before they obtained a grant of



representation of the Estate of the deceased. Under the provisions of Section 82 of the [Law of Succession Act](#), they had no capacity to enter into any binding contract with anybody over any property that formed the estate of the Deceased. It is submitted that the sale agreement is in contravention of Section 45 of the [Law of Succession Act](#) and therefore unenforceable. Consequently, the appellant could not be joined in the proceedings as he is neither a beneficiary nor creditor.

15. On the whether the Court erred by not deeming the claimant an adverse possessor, reliance was placed in the matter of [Peter Okoth v Ambrose Ochido Andajo & Benedict Odhiambo Oketch](#)[2021] eKLR. In this matter the appellant in this matter gained access to the suit property with the belief that he was a purchaser for value from two of the beneficiaries, who at the time did not have capacity to enter into that agreement to sell the property of the deceased person. By gaining possession based on his belief, he did not forcefully occupy the property and his title was not adverse to the owner's title. The agreement to purchase the property was void ab initio as it touches on the estate of the deceased person as letters of administration have never been taken out. The agreement is contra- statute. The beneficiaries of the estate of the deceased person had also not consented to the sale as they were not even aware of the alleged sale.
16. On whether the appellant merited to be joined as party to the proceedings at the trial court, it was submitted that it had been proved on a balance of probabilities the appellant intermeddled with the estate of the deceased person. Reliance was placed in the case of [re Estate of Kungu Waingi](#)(2020) eKLR which defined an interested party as a party who has a recognizable stake and therefore standing in a matter.
17. In the case of [Francis Kioko Muruatetu & Another v The Republic & 5 Others](#) (2016) eKLR, the court made a finding on the merits of the applicants to be enjoined as parties to a suit. It was submitted that the Trial Court made a sober finding after examination of the legal principles that the appellant did not merit to be joined as a party to the proceedings as the sale agreement he relies on in his application is void ab initio and is irredeemable.
18. On who should bear the cost of this appeal it is trite that cost should follow the suit as observed in the Halsbury's Laws of England in paragraph 16.
19. It was finally submitted that the appeal is not merited for breach of so many statutory provisions and urged the court to dismiss the appeal with costs to the respondents

Determination

20. The Court considered the Record of Appeal, the Trial Court record written submissions of parties and the issue for determination is;
 - a. Whether the Appellant ought to be joined in these proceedings.
21. Whether the Appellant ought to have been joined in the Trial Court proceedings: Order 1 rule 1 of the [Civil Procedure Rules](#) provides as hereunder: All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.
22. Order 1 Rule 10(2) of the said [Rules](#) provides that:

“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 to adjudicate upon and settle all questions involved in the suit, be added.”

23. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori v Chege & 3 Others* [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows: 1. He must be a necessary party. 2. He must be a proper party. 3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff. 4. The ultimate order or decree cannot be enforced without his presence in the matter. 5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

24. In *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 it was held as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

25. In *Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must 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...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

26. In this case, the Appellant seeks to be joined as a party to the proceedings as he claimed that he bought land known as Nairobi/Block 118/ 1320 from the beneficiaries and has since lived there. The Respondents allege that the deceased whom these proceedings relate to died on 13th December 1983.



The grant of letters of administration was also first made by the lower Court on 26th June 2015 and confirmed on 11th August 2020 and if indeed the property was sold to the Appellant, the same was sold fraudulently and contrary statute It is therefore clear that the intended party's presence in these proceedings is not only necessary in order to enable this court effectively and completely adjudicate upon and settle all the questions involve in this cause, but the orders that this Court may issue in this Cause are likely to affect the interest of the said intended party.

27. Further, taking into account the relationship between the parties herein as well as the intended interested party to the suit, I find that it is desirable, for avoidance of multiplicity of suits, to have the said person joined so that he can be bound by the decision of this Court. I rely on the case of *Martin Kirima Baithambu v Jeremiah Miriti* [2017] eKLR, where the court pronounced itself as hereunder:

“The pragmatic reality has been for courts to add parties in a suit based on guarantee if it is desirable to add such party so that the court can resolve all the matters in controversy effectually and completely. Aptly here would be to invoke the procedure provided under Order 1 Rule 15 of the *Civil Procedure Rules*. I say these things for the sake of jurisprudence.”

28. This is a Succession Cause which entails the application of the *Law of Succession Act* in administration and distribution of the deceased's estate; registered in his/her names at the point of demise.
29. It is during administration and/or distribution of deceased's estate that the Trial court shall determine on the basis of evidence from All parties whether there are Creditors to the estate with uncontested proprietary interest or if any irregular illegal and unlawful sale of land was conducted by Administrators/Beneficiaries and if there is a dispute on title, ownership, use of land should then be transferred to ELC Court for determination.
30. In light of these considerations and to meet the end of justice and to ensure fair hearing to All Parties , let the Purchaser be joined to the proceedings and the Trial Court after tendering of evidence determine the Way Forward or refer the dispute to ELC.

Disposition

31. Having considered the issues raised by the parties herein, I find this appeal merited and leave is hereby granted to the Appellant to join as the 3rd interested party to this suit.
32. The cost of this Appeal is awarded to the Appellant.

JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 24TH OCTOBER, 2023 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

