



Kamuingi Housing Company Limited v Kinuthia & 30 others; Githere & 2 others (Intended Interested Party) (Commercial Case 235 of 2013) [2023] KEHC 24577 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 235 OF 2013
MN MWANGI, J
OCTOBER 13, 2023**

BETWEEN

KAMUINGI HOUSING COMPANY LIMITED PLAINTIFF

AND

WAMBUI KINUTHIA & 10 OTHERS 1ST INTERESTED PARTY

DUNCAN NDEGWA WARUI & 19 OTHERS & 29

OTHERS 2ND INTERESTED PARTY

AND

GEORGE KAMAU GITHERE, PETER KINYANJUI KAMAU & JOHN GOCHO KIMANI INTENDED INTERESTED PARTY

RULING

1. The application before this Court is a Chamber Summons dated 20th February, 2021, brought under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 1 Rules 3 and 10 of the *Civil Procedure Rules*, 2010. The intended 3rd interested parties seek the following orders –
 - i. Spent;
 - ii. That George Kamau Githere, Peter Kinyanjui Kamau & John Gocho Kimani be joined to the suit as the 3rd interested party; (sic);
 - iii. That the Honourable Court be pleased to grant any further directions as it may deem fit; and
 - iv. Costs be provided for.



2. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn on 20th February, 2021 and 29th October, 2021 by George Kamau Githere, one of the intended 3rd interested parties. In opposition thereto, Margaret Wanjiku, a member of the 1st group of interested parties filed a replying affidavit sworn on 11th June, 2021. The Registrar of Companies swore an affidavit on 22nd May, 2023 sworn by Zachariah Mwangi.
3. The application was canvassed by way of written submissions. The intended 3rd interested parties' submissions were filed on 18th November, 2021 by the law firm of Ndegwa Kiarie & Co. Advocates, whereas the 1st interested parties' submissions were filed by the law firm of Stanley Henry Advocates on 3rd July, 2023.
4. Mr. Ndegwa, learned Counsel for the intended 3rd interested parties relied on the Supreme Court case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commissions & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR and submitted that the intended 3rd interested parties have demonstrated interest in the resolution of this suit as they had purchased several parcels of land/shares from the original owners, who are shareholders of the plaintiff company thus any decision affecting the Register will directly affect them.
5. He further submitted that in this case, the Court is required to establish who the original shareholders of the plaintiff company are, the shareholders who were fully paid up thus entitled to a share in the two parcels of land purchased by the plaintiff company and those who purchased portions of the said land from the original shareholders or are entitled to a share/plot of land as beneficiaries in succession.
6. From the foregoing submissions, Mr. Ndegwa asserted that the question of who the rightful shareholders with lawful interest in the plaintiff company are, cannot be conclusively determined without the involvement of the intended 3rd interested parties who have a legitimate legal interest in the plaintiff company and with pending proceedings in that respect. He stated that the intended 3rd interested parties should be allowed to join these proceedings so as to enable the Court make a conclusive and informed determination on who between the original shareholders of the plaintiff, and the 1st, 2nd & 3rd group of interested parties have a lawful stake in the plaintiff company.
7. Mr. Gachuna, learned Counsel for the 1st group of interested parties submitted that the plaintiff company has not had any Board of Directors since 21st November, 2013, after Havelock J., (as he then was) ordered the Directors of the plaintiff company to cease from carrying out any official or other duties as Directors of the plaintiff company. He stated that for the said reason, no document can be tendered as having been signed by the company since 21st November, 2013. He further stated that vide an order dated 21st November, 2013, the Court directed the Registrar of Companies to organize and call for a special meeting of the bonafide shareholders of the plaintiff company.
8. He submitted that the Registrar of Companies reconstituted a list of members of the plaintiff company who held a meeting at Tom Mboya Hall on 21st February, 2014, and only those with original share certificates were admitted to the said meeting. It was stated by Counsel that the Registrar of Companies in its report recommended expansion of the list of members of the plaintiff company to include those in the 1982 Register, and that members would trace their root to that Register. He stated that in view of the Registrar's recommendation, the 1st group of interested parties filed a Notice of Motion application dated 21st December, 2018 seeking inter alia that the members who were vetted and admitted by the Registrar of Companies during the Tom Mboya Hall meeting of 21st February, 2014 and those in the Register filed by Nairobi City Commission in the Kenya Times Newspapers of 17th October, 1987 and 18th October, 1987, be considered as the shareholders of the plaintiff company.



9. Counsel stated that Hon. Lady Justice Kasango dismissed the application dated 21st December, 2018 and directed the Registrar of Companies to come up with a list of members/shareholders of the plaintiff company. That in compliance with the said order, on 22nd May, 2023, the Registrar of Companies filed a list of members of the plaintiff company thus what remains is for anyone having an issue with the said list, to raise any issues he may have. Mr. Gachuna stated that the Court has since through the Registrar of Companies constituted a list of shareholders of the plaintiff company and as such, the application herein has been overtaken by events.
10. He contended that the composition of the body of the plaintiff company would not deny the intended 3rd interested parties any right they have acquired through purchase transactions, since such rights would be enforceable through the persons from whom they may have acquired such parcels of land from in a Court that deals with land matters. He indicated that the issue raised in this Court was for reconstitution of the shareholders list and subsequent election of the Board of Directors and not who owns what plot.

Analysis and Determination.

11. On consideration of the instant application, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the 1st defendant and the affidavit by the Registrar of Companies, as well as the written submissions by Counsel for the parties, the issue that arises for determination is whether the intended 3rd interested parties should be joined to this suit.
12. In the affidavit filed by the intended 3rd interested parties sworn by George Kamau Githere, he deposed that the outcome of these proceedings affects them directly as they had purchased several plots excised from all that parcel of land known as L.R. No. 6824 Komarock from shareholders of the plaintiff company and that they have since commenced serious developments thereon.
13. He averred that the plaintiff company was incorporated in the year 1971 as a land buying company with seven (7) members initially. That subsequently, the number of shareholders increased with time to 166 as per the 1973 company returns. He further averred that there were two returns filed by the plaintiff company in the year 1982, with one having 288 members and the other one having 291 members. Further, that there is a list that was published by the Nairobi City Commission in the Kenya Times Newspapers dated 17th October, 1987 that has a list of 181 members.
14. He stated that the shareholders of the plaintiff company held a meeting on 7th November, 1987, whereupon a resolution was passed inter alia to the effect that the Directors had no knowledge of the list published in the Kenya Times Newspaper, and that some members' names had been left out. He stated that one Miss Veronica Ng'endo had allocated herself two (2) plots and Mr. Gichandi who was not a shareholder had been allotted 1 plot and his wife Wambui Gichandi, had been allocated 2 plots.
15. It was stated by Mr. Githere that there is also a list compiled by the plaintiff and filed with the Registrar of Companies on 4th February, 2021, that has a list of 73 members for the Mathare plots that is L.R. No. 36/V/1-Juja Road and a second list of 201 members for the Njiru plots that is L.R. No. 6824 Komarock. He also stated that pursuant to a Court order, the Registrar of Companies compiled a report dated 27th March, 2014, on the status of the company, which report was adopted by the Court.
16. Mr. Githere deposed that the intended 3rd interested parties have consulted experts who have exhaustively cross-referenced, populated and tabulated all the aforementioned lists and created a report with a view to finding a lasting solution to all the issues affecting their shareholding/plots, the general shareholding of the plaintiff and the final allocation or distribution of plots.



17. In the 1st interested parties' replying affidavit sworn by Margaret Wanjiku, she deposed that the issue of identification of the true shareholders of the company is res judicata having been decided by this Court in its ruling in respect to the 1st interested parties' application dated 21st December, 2018. She averred that the admission of the intended 3rd interested parties to these proceedings is meant to obfuscate the real issues before this Court, which is the filing of the Register of members of the plaintiff company by the Registrar of Companies.
18. She deposed that the intended 3rd interested parties will have an opportunity as shall any other person claiming interest through any shareholder, to prove their root of interest through the persons who shall be listed as the shareholders of the plaintiff company in the Register that the Court ordered the Registrar of Companies to prepare.
19. The 1st interested parties contended that the intended 3rd interested parties' offer of assisting the Court to come up with the Register of the plaintiff company's members is laden with suspicion and fraud and it is also a massive attempt at self-preservation. She contended that is informed by fact that they have so much knowledge of the affairs of the plaintiff company despite the fact that they were outsiders to the plaintiff company until the year 2013, when they allegedly bought plots from the company.
20. She deposed that the share certificate used by the intended 3rd interested parties to prove their interest in the plaintiff company was issued by Kamuingi House Company Limited and not the plaintiff company and it does not disclose how many shares were issued in favour of the intended 3rd interested parties. She also deposed that admission of the intended 3rd interested parties to these proceedings will most likely open floodgates for such applications which are not beneficial to the plaintiff company.
21. The intended 3rd interested parties in their further affidavit sworn by George Kamau Githere deposed that in as much as Margaret Wanjiku, the deponent of the 1st interested parties replying affidavit states that she has been authorized by members of the 1st group of interested parties to swear the said affidavit on their behalf, no such authority was annexed to the said replying affidavit, leading to the conclusion that she is the only party who opposes the application herein.
22. He averred that the application herein cannot be res judicata as the intended 3rd interested parties have never participated in these or any other proceedings before a Court of law touching on the matters in question. He further averred that the authors of the share certificate that the intended 3rd interested parties rely on in support of the application herein, have not come out to discredit them despite being aware of the instant application.
23. It was stated by Mr. Githere that the letter marked as annexure MW2 attached to the 1st interested parties' replying affidavit reveals that the plot referred to therein reverted to the plaintiff company and was reserved for public utility. That one Francis Gacheru Ikundu lodged a complaint with the Criminal Investigations Department but the allegations were dismissed after investigations were done. Mr. Githere asserted that his interest in this matter is purely as a bonafide purchaser for value.
24. The Registrar of Companies in the affidavit sworn by Zacharia Mwangi deposed that he had acquainted himself with a report dated 24th March, 2014 which was prepared by the Assistant Registrar of Companies and filed in Court on 28th March, 2014, recommending that the Register filed in the year 1982 be used as the reference point in identification of the true shareholders of the plaintiff company and that members should trace their root to the said Register.
25. He averred that he had embarked on the exercise and reviewed the list of members in the records as at the year 1982 while drawing a comparison from a list published by the Nairobi City Commission in



the Kenya Times Newspapers of 17th October, 1987 and from a comparative analysis, the names of 144 people appear on the list of members in the year 1982 as well as the Nairobi City Commission's list.

26. It was stated by Mr. Mwangi that on 4th February 2021, Mr. Macharia Nderitu Advocate also presented a list for consideration by the Registrar of Companies, which list has not been factored into consideration. He expressed the view that any other members laying claim to the plaintiff company should trace their origin through the above lists.

Whether the intended 3rd interested parties should be joined to this suit.

27. Order 1 Rule 10(2) of the *Civil Procedure Rules*, 2010, 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 to adjudicate upon and settle all questions involved in the suit, be added.”

28. The tests for determining an application for joinder of parties were set out by the Court in the case of *Kingori v Chege & 3 others* [2002] 2 KLR 243, where Nambuye J., (as she then was), stated that the guiding principles when a party intends to be joined to proceedings are -

- i. He must be a necessary party;
- ii. He must be a proper party;
- iii. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff;
- iv. The ultimate order or decree cannot be enforced without his presence in the matter; and
- v. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

29. In *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR, the Court when dealing with a similar application made the following observation -

“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.”



30. It is not in dispute that the issue to be determined by this Court is who the original shareholders of the plaintiff company are. The intended 3rd interested parties are however of the view that this Court ought to also determine those who purchased land bought by the plaintiff company from its original shareholders or those who are entitled to a share/plot of land as beneficiaries in succession. It is evident from the intended 3rd interested parties' affidavit in support of the application herein that the intended 3rd interested parties' application is grounded on the fact that they purchased several parcels of land/shares from the original owners, who are shareholders of the plaintiff company, thus any decision affecting the Register will directly affect them.
31. They submitted that the question of who the rightful shareholders are and who has lawful interest in the plaintiff company cannot be conclusively determined without their involvement since they have a legitimate legal interest in the plaintiff company.
32. The 1st interested parties' case is that on 22nd May, 2023, the Registrar of Companies filed a list of members of the plaintiff company thus what remains is for anyone having an issue with that list to raise the said issue. They averred that the composition of the body of the plaintiff company would not deny the intended 3rd interested parties any right they have acquired through purchase transactions since such rights would be enforceable through the persons from whom they may have acquired such parcels of land from in a Court that deals with land matters.
33. On perusal of the pleadings herein, I am inclined to agree with Counsel for the 1st interested parties that the issue before this Court is not who owns the property purchased by the plaintiff company, but who the original shareholders of the plaintiff company are. The intended 3rd interested parties' claim is founded on the fact that they purchased several parcels of land from the original owners who are shareholders of the plaintiff company. As correctly submitted by Counsel for the 1st interested parties, this means that their claim touches on issues of ownership, use and occupation of the said parcels of land which is the preserve of the Environment and Land Court.
34. I am not persuaded that the intended 3rd interested parties are necessary parties to these proceedings as they cannot assist this Court in establishing who the original shareholders of the plaintiff company are, since they allegedly bought several parcels of land from the original shareholders of the plaintiff company sometime in the year 2013, whereas the plaintiff company has been in existence since the year 1971 when it was first incorporated. In light of the foregoing, this Court finds that the presence of the intended 3rd interested parties is not necessary to enable this Court effectively and completely determine who the original shareholders of the plaintiff company are. The ultimate order or decree that shall be issued by this Court can be enforced without the presence of the intended 3rd interested parties in the matter.
35. The above finding however does not discredit the intended 3rd interested parties' claim but they have to pursue their claim in the right forum. It is only after the determination of who are the original and/or legitimate shareholders of the plaintiff company are, that the intended 3rd interested parties can be able to verify whether the people they bought the parcels of land from are legitimate shareholders of the plaintiff company and thereafter pursue and/or enforce their rights against the plaintiff company and/or the persons who sold the alleged parcels of land to them in the proper forum and in the manner provided for by the law.
36. In view of the fact that this Court has no jurisdiction over land matters, and more specifically on issues touching on ownership, use and occupation of land, and the fact that the intended 3rd interested parties are neither proper nor necessary parties to these proceedings, this Court finds that there are no logical reasons for the intended 3rd interested parties being joined to these proceedings



37. The upshot is that the application dated 20th February, 2021 is devoid of merit. It is hereby dismissed with costs to the 1st group of interested parties.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF OCTOBER, 2023.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Gachura for the 1st group of interested parties

Mr. Ndegwa for the intended interested parties

Mr. Okiri h/b for Mr. Kividyoo for the defendant

