



Muthoga & 2 others v Mugereki; Kagotho (Proposed Interested Party) (Environment & Land Case 127 of 2015) [2024] KEELC 163 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 127 OF 2015
JO OLOLA, J
JANUARY 25, 2024
(FORMELY NYERI HCC NO. 130 OF 2009)**

BETWEEN

RUNGARE MUTHOGA 1ST PLAINTIFF

DANIEL MAINA KARIENYE 2ND PLAINTIFF

MONICA WANGECHI KARIENYE 3RD PLAINTIFF

AND

VERONICA WANGUI MUGEREKI DEFENDANT

AND

ERASTUS KINYUA KAGOTHO PROPOSED INTERESTED PARTY

RULING

1. By the Notice of Motion dated and filed herein on September 18, 2023, Erastus Kinyua Kagotho (the Applicant) prays for an order that he be enjoined in this suit as an Interested Party. The application is supported by an Affidavit sworn by the Applicant and is premised on the grounds *inter alia* that:-
 - (i) The Applicant is the legal representative of the Estate of Isaiah Kinyua Kagotho who had an interest in the suit property;
 - (ii) The Applicant will be highly prejudiced and will be deprived of his property rights if the suit proceeds and is concluded without his participation;
 - (iii) The Respondents will not suffer any prejudice if the orders sought are granted; and
 - (iv) The joinder of the Applicant will assist the court in fully and finally deciding the matter before it.



2. Rung'are Muthoga, Daniel Maina Karienyne and Monica Wangechi Karienyne (the Plaintiffs) are opposed to the application. By their Grounds of Opposition dated and filed herein on September 22, 2023, the Plaintiffs state that:-

- (1) The application is misconceived and incompetent;
- (2) The application is bad in law, a gross abuse of the process of court and untenable;
- (3) The application is fatally and incurably defective;
- (4) The application is frivolous and vexatious; and
- (5) The application is otherwise without merit and should be dismissed with costs.

3. I have carefully perused and considered both the application as well as the Grounds of Opposition filed herein by the Plaintiffs. I have similarly perused and considered the submissions and authorities placed before me by the Learned Counsel for the Applicant. I was unable to find any submissions filed on the part of the Plaintiffs.

4. By the application before me, the Applicant urges the court to grant an order enjoining him in this suit as an Interested Party. It is the Applicant's case that he is the son and personal representative of one Isaiah Kinyua Kagotho (deceased), who is said to have purchased some 2 acres of the suit land from the Defendant's father in the year 1960. The Applicant contends that the matter herein has been litigated in the past and that his father's interests were thereby acknowledged by the Defendants' mother. It is therefore his case that if the matter proceeds without his input, the estate stands to suffer prejudice.

5. Order 1 Rule 10(2) of the Civil Procedure Rules under which the application is brought provides 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 enjoined, 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.”

6. 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.

7. In Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55, it was held that:-

“A clear distinction is called for between joining a party who ought to have been enjoined as a defendant and one whose presence before the court is necessary in order to effectually



and completely adjudicate upon and settle all questions involved 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 involved 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 on 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 enjoined 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 desired to set up unless the order to be made is to bind that person.”

8. In the matter before me, the Applicant claims a direct interest in the suit land as the son and legal representative of one Isaiah Kinyua Kagotho who is said to have purchased some 2 acres of the suit land way back in 1960. He has exhibited a Sale Agreement executed on November 30, 1978 acknowledging the fact that his father bought a share of the parcel of land known as [particulars withheld] which is said to be measuring 5.1 acres.
9. The suit herein was filed way back in the year 2009 and the application before the court has been made extremely late in the day. It is the Applicant's case that he resides on 2 acres of the suit land and it is surprising that he was unaware of any ongoing litigation about the land all that time.
10. At it were, the Plaintiffs did not offer any explanation regarding the matter of whether or not the Applicant resides on the said 2 acres of the land they claim. Instead they chose to file a generalized Grounds of Opposition which in essence did not offer any insight into the matter herein. The Applicant asserts that in Nyeri SRM Succession Cause No. 115 of 1983, his father was awarded 1.2 acres of the suit land. He has also attached a copy of an affidavit sworn in the said succession cause wherein the family of the Defendants acknowledged that his father was entitled to 2 acres of the land.
11. Given that the Plaintiffs claim to be entitled to 4.5 acres of the suit land by way of adverse possession, it was evident that the Applicant is a necessary party for this court to effectually and completely adjudicate and settle all the questions involved herein. This is so because the suit property is said to measure 5.1 acres. If the court were to grant the Plaintiffs their claim of 4.5 acres, those orders would certainly affect the Applicant who is said to have been awarded at least 1.2 acres in the succession cause aforesaid.
12. Arising from the foregoing and in spite of the unexplained delay in bringing this application, I am persuaded that the same has merit. Accordingly I hereby allow the Motion dated September 18, 2023 and hereby direct that Erastus Kinyua Kagotho be enjoined as the 2nd Defendant in the suit herein. He will have 21 days within which to file any pleadings he may desire to file.
13. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 25TH DAY OF JANUARY, 2024.

J. O. OLOLA
JUDGE

