



**Wanjohi v Githaiga & 3 others (Environment & Land Case
E031 of 2022) [2024] KEELC 676 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 676 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E031 OF 2022
JO OLOLA, J
FEBRUARY 15, 2024**

BETWEEN

ALLAN MWANGI WANJOHI APPELLANT

AND

DANIEL NGATIA GITHAIGA 1ST RESPONDENT

SAMUEL KARIUKI KIBERENGE 2ND RESPONDENT

WILLIAM MURAYA GITHAIGA 3RD RESPONDENT

NYERI COUNTY LAND REGISTRAR 4TH RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Ruling and Orders of the Honourable M. N. Munyendo, Principal Magistrate issued on 18th November, 2022 in Othaya PMELC Case No. E008 of 2021.
2. By a Complaint dated 1st September 2021, Daniel Ngatia Githaiga, suing on his own behalf and as a personal representative of Stanley Githaiga Wambugu (the 1st Respondent) had sought the following orders against the 2nd, 3rd and 4th Respondents herein:
 - (a) A declaration that the sub-division of the parcel of land L.R Othaya/Kiahagu/67 registered in the name of the deceased Githaiga s/o Wambugu was irregular, fraudulent, illegal, null and void;
 - (b) An order directing the 3rd Defendant to revoke and/or cancel the title deeds for L.R Othaya/Kiahagu/2330, 2331 and 2332 or any other title deeds that could have further emanated from the three titles;



- (c) An order directing the 3rd Defendant Nyeri Land Registrar to rectify the register and revert the suit land to its original registration number L.R Othaya/Kiahugu/67 and in the name of the registered proprietor Githaiga s/o Wambugu (now deceased);
 - (d) The costs of this suit; and
 - (c) Any other or further relief as this Court may deem just to grant.
3. Those prayers arose from the 1st Respondent's contention that the suit property originally belonged to his father the late Stanley Githaiga Wambugu alias Githaiga Wambugu. The 1st Respondent accused the 2nd, 3rd and 4th Respondents of fraudulently sub-dividing the suit property into three (3) portions and thereafter causing the sub-divisions to be registered in the names of the 2nd and 3rd Respondents as well as that of a stranger by the name Allan Mwangi Wanjohi (the Appellant herein).
 4. In their joint Statement of Defence, Samuel Kariuki Kiberenge and William Muraya Githaiga (the 2nd and 3rd Respondents herein) rejected the 1st respondent's claim. The two asserted that the 1st Respondent had failed to sue Allan Mwangi Wanjohi (the Appellant) and one Stanley Githaiga Kariuki both of whom possessed title deeds arising from the sub-divisions of the original parcel of land.
 5. The 2nd and 3rd Respondent further asserted that the 1st Respondent had exchanged his portion of the original parcel of land in the year 2006 with the Appellant herein where he was paid a sum of Kshs.180,000/- together with plot No. 150 situated in Waichakehiri Farmers Company Limited in Limuria in Laikipia.
 6. Having heard the dispute and in a Judgment delivered on 11th February 2022, the Honourable M. N. Munyendo, Principal Magistrate delivered Judgment in favour of the 1st Respondent as sought in the Plaint.
 7. Subsequently and by a Notice of Motion dated 6th September 2022, the Appellant sought an order to be enjoined as an interested Party to the suit. In addition, the Appellant sought an order to set aside the Judgment delivered on 11th February, 2022 as well as an order of permanent injunction restraining the 1st Respondent from selling, transferring and/or dealing in any manner with the parcel of land known as Othaya/Kiahugu/67.
 8. The Appellant's application was premised on the grounds that he had been in occupation of the suit property and that the orders made in the Judgment had affected his ownership rights over the property. The Appellant further asserted that he had lawfully acquired his portion of the land from the 1st Respondent who had now trespassed onto the land and stole Napier grass therefrom.
 9. By a Replying Affidavit sworn on 20th September 2022, the 1st Respondent asserted that the Appellant did not follow the required legal formalities in acquiring the land. He asserted further that the Appellant was intermeddling in his father's estate by purporting to have acquired a portion of the land when no succession proceedings had been conducted.
 10. Having heard the application and in the impugned Ruling delivered on 18th November 2022, the Learned Trial Magistrate found the application unmerited and proceeded to dismiss the same with no order as to costs.
 11. Aggrieved by he said determination, the Appellant lodged the Memorandum of Appeal herein dated 30th November, 2022 urging this Court to review and/or set aside the orders on the grounds:



1. That the Learned Trial Magistrate erred in both law and fact in failing to evaluate the evidence adduced in Court and came to a conclusion that the Appellant cannot be enjoined in Othaya MELC No. E008 of 2021; Daniel Ngatia Githaiga -vs- Samuel Kariuki Kiberenge & 3 Others;
 2. That the Learned Magistrate erred in law and in fact in failing to take into account that the intended interested party is in current occupation of the subject suit land and has a right under the law to be heard;
 3. That the Learned Magistrate erred in law and in fact in failing to consider that the 1st Respondent deliberately failed to disclose the facts of the sale and exchange of his portion of land with the Appellant in his pleadings in the main suit.
 4. That the Learned Magistrate erred in law and fact by failing to consider the draft defence as filed and that it raises triable issues;
 5. That the Learned Magistrate erred in law and in fact by failing to consider that the 4th Respondent is mandated under the (law) to issue Title documents and if any irregularities were committed they ought to be answerable;
 6. That the Learned Magistrate erred in law and in fact by failing to set aside the Judgment (and to) enjoin (the) Appellant and grant him an opportunity to canvass his case; and
 7. That the Learned Magistrate erred in law and in fact in failing to issue injunction orders thus exposing the Appellant to the danger of being evicted by the 1st Respondent.
12. This being a first appeal, this Court has the mandate to re-evaluate the evidence before the trial Court as well as the Ruling emanating therefrom and to arrive at its own independent judgment on whether or not to allow the Appeal.
 13. I have in this respect carefully considered the Record of Appeal as well as the impugned Ruling. I have similarly perused and considered the submissions and authorities placed before me by the respective Parties herein.
 14. By his application before the lower Court, the Appellant had sought an order to be enjoined as an interested party to the suit. In addition, the Appellant had sought an order to have the Judgment delivered on 11th February, 2022 in favour of the 1st Respondent set aside as well as a permanent injunction order restraining the 1st Respondent from dealing in any manner whatsoever with the suit property.
 15. The Appellant's application was premised on the grounds that he had acquired the suit property from the 1st Respondent and that he has been in occupation of the same for a number of years and further, that the orders made in the Judgment had affected his ownership rights over the property.
 16. Having heard the application and at Paragraph 18 of her Ruling, the Learned Trial Magistrate states as follows:
 - “ 18. I note that this matter was heard and determined and that the Applicant seeks to be joined in this suit post judgment. I will say without a doubt that my Judgment dated 11th February, 2022 directly affected the interest of the Applicant herein in (the) parcel known as Othaya/Kiahugu/233 (sic) whose title I cancelled. It is also a fact that he did not participate in the concluded trial. Ordinarily, if this matter would still be pending the Applicant would instantly



qualify to be jointed in this suit. However, since the matter is concluded, I find that at this stage the Applicant is directly be affected by the outcome (sic), I must then consider if the Applicant's intended defence warrants the re-opening of this case to secure his interest in the portion that he occupies."

17. Having stated so, the Learned Trial Magistrate proceeded to analyse the Appellant's claim including the contention that the 1st Respondent had sold the portion of the land he occupies to himself and that the Appellant had exchanged another parcel of land situated in Laikipia with the 1st Respondent in consideration and concluded at Paragraph 22 of her Ruling as follows:

"22. That said, I have carefully considered the claim by the claimant vis-à-vis the issues I canvassed in my judgment I can confidently state that even if I was to re-open the case so that the Applicant participates in the proceedings it would not change the outcome. The Applicant himself in his defence admits that there were irregularities as to how the original parcel Othaya/Kiahugu/67 was sold and new titles issued after the death of the Respondents father without first obtaining a grant through a succession. It is common ground that the process was illegal and I am afraid at this point nothing can change that whether the irregularities were done by the Applicant or (the) Respondent. I find that it would be an academic exercise to re-open the case, relitigate issues and come to the same conclusion."

18. As it were, Order 1 Rule 10(2) of the Civil Procedure Rules 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 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 in the suit, be added."

19. The relevant test for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of King'ori v Chege & 3 Others [2002] 2 KLR 243 where the Learned Judge observed that for one to be enjoined as a party:

- "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."

20. In *Departed Asians Property Custodian Board v Jaffer Brothers Limited* [1999] 1 EA 5 5, 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 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 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 interest 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."

21. In *Civicon Limited -vs- Kivuwatt Limited and 2 Others (2-15) 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 1 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."

22. In the matter before me, it was the 1st Respondent's case that he had come to discover in the year 2020 that the parcel of land known as Othaya/Kiahagu/67 which had been registered in the name of his father the late Stanley Githaiga Wambugu had been sub-divided in the year 2006 without his knowledge. It was the 1st Respondent's case that the land had been sub-divided into L.R No. Othaya/Kiahagu/2330, and 2331 which had been registered into the names of his brothers, the 2nd and 3rd Respondents herein while a third parcel being L.R No. Othaya/Kiahagu/2332 had been registered in the name of the Appellant whom he referred to in his pleadings as a stranger on account of the fact that the Appellant was not one of his siblings.

23. While he sued his two brothers in the proceedings before the trial Court, the 1st Respondent did not sue the Appellant in spite of the fact that the orders he sought included one for the revocation of the title held by the Appellant. In the Judgment delivered by the trial Court on 11th February 2022, the Court nullified the sub-division of the original parcel of land and ordered that the title held by the Appellant be revoked.

24. That was the reason why at Paragraph 18 of the impugned Ruling, the trial Court readily admitted that the Judgment delivered on 11th February, 2022 directly affected the interest of the Appellant. Having so found, it was clear to me that the Appellant's presence in those proceedings was not only necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the matter but that the orders issued by the Court would directly affect his rights.



25. As the Tanzanian Court of Appeal stated while dealing with a similar matter in *Tang Gas Distributors Limited v Said & Others* [2014] EA 448:

“... the power of the Court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

26. In regard to the contention that to set aside the proceedings would amount to an academic exercise in that the sale transaction was conducted before succession proceedings were conducted in regard to the estate of the 1st Respondent’s father, I was not persuaded that that was entirely the case in regard to the facts herein.

27. In the matter before the trial Court, the Appellant had presented evidence which strongly suggested that both the Appellant and the 1st Respondent had entered into a Sale Agreement for a distinct portion of land which the 1st Respondent knew to be his own even though the estate was yet to be distributed. The Appellant’s position was indeed supported by the 2nd and 3rd Respondents who are brothers to the 1st Respondent. If upon trial that position would be proved to be factual, then the 1st Respondent would be clearly estopped from renegeing on the promises made.

28. As Lord Denning MR stated in *Amalgamated Investment v Texas Commerce* [1982] QB 84:

“The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this Judgment. It has evolved during the last 150 years in a sequence of separate developments; proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims; estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Court will give the other such remedy as the equity of the case demands.”

29. Indeed as the Ugandan Court of Appeal stated while dealing with a similar situation in *Diana Kanzira v Herbert Natukunda Rwanchwende* (Civil Appeal No. 81 of 2020) [2023]UGCA 286:

“Where a family had decided to apportion and allot each member a part of the whole estate, it is envisaged that the beneficiary, aware of their rights and interest, may deal with the land as he or she wishes... .. The legal proposition for the above assertion is as laid down in volume 48, Halsbury’s Laws of England, 4th Edition, Butterworths, London, 1984, page 349-350 thus –

[Paragraph] 626: Power of alienation. A beneficiary under a trust possesses the same power of alienation or disposition with respect to his equitable estate or interest under the trust as



the legal owner has over his legal estate or interest in the property, and he can exercise it by similar instruments and with similar formalities.”

30. Arising from the foregoing, I was persuaded that the Learned Trial Magistrate erred in failing to set aside the Judgment and to enjoin the Appellant in the suit before the trial Court more so after making a finding that his rights were certainly going to be affected by the Judgment. It follows that this Appeal succeeds.
31. The Ruling and/or orders granted by the Trial Court on 18th November, 2022 are hereby set aside. In their place, an Order is hereby made allowing the Appellant’s application dated 6th September, 2022.
32. The costs of this Appeal shall be borne by the 1st Respondent.

Judgment dated, signed and delivered in open Court and virtually at Nyeri this 15th day of February, 2024.

In the presence of:

Ms. Chepkemboi for the Appellant

Mr. Daniel Ngatia Githaiga (the 1st Respondent) present in person

No appearance for the 2nd, 3rd and 4th Defendants

Court assistant - Kendi

.....

J. O. Olola

JUDGE

