



Diocese of Meru Registered Trustee v Kenya Tea Development Agency Limited & 7 others; County Government of Meru & another (Interested Parties) (Environment & Land Petition E003 of 2020) [2024] KEELC 741 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELC 741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E003 OF 2020
CK NZILI, J
FEBRUARY 14, 2024**

BETWEEN

THE DIOCESE OF MERU REGISTERED TRUSTEE APPELLANT

AND

**KENYA TEA DEVELOPMENT AGENCY LIMITED 1ST RESPONDENT
KIOGORA MUTAI 2ND RESPONDENT
HONESTY KANYUA MANYARA 3RD RESPONDENT
ERASTUS MITITI ERASTO 4TH RESPONDENT
FESTUS K. KATHENDU 5TH RESPONDENT
JAPHET MBURUGU 6TH RESPONDENT
JOSEPHINE KAGWIRIA 7TH RESPONDENT
THE LAND REGISTRAR – IMENTI SOUTH & CENTRAL
DISTRICT 8TH RESPONDENT**

AND

**COUNTY GOVERNMENT OF MERU INTERESTED PARTY
NATIONAL LAND COMMISSION INTERESTED PARTY**

RULING

1. Following the judgment and decree of this court dated 6.7.2022 and 9.12.2022, respectively, several applications were filed herein. The 1st application is dated 11.5.2023 by Erastus Miriti Erasto and Mwamba Magana. They seek;-



- a. The respondents be barred from evicting, selling, advertising, charging, offering for sale and or interfering with L.R No. Nkuene/Mitunguu/1968 and 1969 and
 - b. Leave to cross-examine the process server alleged to have effected service upon them of the petition.
 - c. For setting aside the judgment and decree.
2. The reasons are contained on the face of the application and an affidavit of Erastus Miriti Erasto dated 5.5.2023. Briefly it was averred that the applicants are the sons of the 8th respondent in the petition, who passed on long before the petition was filed; they state there was non-disclosure of material facts; are ready to defend the petition; they have been in occupation of the land since 2000; the land was validly allocated to them as per the minutes of the town clerk attached as E.M.E. "1", the deceased held a good title and therefore the estate as condemned unheard. The applicants attached a copy of the minutes, limited grant ad litem, and the draft replying affidavit.
 3. On 23.5.2023, a notice of appointment of advocates was filed by the firm of Kiautha Arithi & Co. Advocates on behalf of the liquidator Abogeta Farmers Cooperative Society Ltd, described as a 3rd interested party, who was not a party by the time judgment was delivered in this petition. The firm of Namachanja Wambulwa & Co. Advocates filed a notice of appointment to act for the 4th and 8th respondents. The firm, without leave, amended the 1st application. In the amended notice of motion, they sought two extra prayers that Johnson Kirimi Mwamba be allowed to proceed in this petition as the legal representative of the late Mwamba Magana and the 7th respondent be substituted with the 2nd applicant.
 4. The 2nd application, dated 11.7.2023, was brought by the firm of Kuria Karatu & Co. Advocates. It sought the following prayers:
 - a. Stay of execution of the decree pending hearing of this application.
 - b. Setting aside the judgment and decree.
 - c. Joinder of East African Pentecostal Church Ntitune through its registered trustees as interested parties to these proceedings.
 - d. An injunction restraining the respondents from dealing with L.R No. Nkuene/Mitunguu/1973.
 - e. Leave to file pleadings in the form of a replying affidavit as per the attached draft to defend the suit.
 5. The grounds were set on the face of the application and a supporting affidavit of Henry Kinyua sworn on 11.7.2023. Briefly, it was averred that the applicant church was allocated the land measuring 1.19 ha in 2003, after taking possession in 2000 and proceeded to put up Ntitune Primary School as per the attached photographs and was not aware of the petition filed on 25.9.2020. The original land has been reinstated as per a copy of the green card attached as P.C "3". That they would be exposed to hardship in relinquishing the title held by them; there were extensive developments on the Suitland, and unless a stay were granted, they would suffer irreparable damage despite a formidable defence.
 6. The 3rd application, dated 11.7.2023, was filed by the liquidator above, alluded to as the 3rd interested party. It sought for the joinder of the liquidator as a 3rd interested party in the petition and for leave to respond to the 1st application. The application was based on grounds on its face and a supporting affidavit by Charles Muchui Mugwika. Briefly, it was averred that the decree had already been effected,



- and the land reverted to L.R Mitunguu/Nkuene/190 as per entry number 3 dated 15.12.2022 in the copy of the green card. It was further averred that the liquidator of the defunct Abogeta Farmers Cooperative Society Ltd was appointed on 1.3.2023 and has since taken legal custody of the suit land and commenced the liquidation process; otherwise, the liquidator was a necessary party to this petition. The liquidator attached the appointment letter dated 1.3.2023 and Gazette Notice No. 5867 of 15.10.1999, a copy of the register, and a draft replying affidavit as annexures marked C.M.M “1-4”.
7. From the court record, the firm of Wambugu and Muriuki Advocates came on record for the 1st interested party by a notice of appointment dated 26.6.2023.
 8. The court directed that all the pending applications be served upon all the parties, who were at liberty to put in written submissions before inter parties hearing. When the matter came up on 25.9.2023, Mr. Kimaita, learned counsel for the 1st interested party, told the court that he had not been served with any of the applications. The court directed all three applications to be served upon all the parties to the decree. Leave was also granted to the parties to file responses and written submissions for the three applications within 30 and 45 days, respectively. A mention date for 16.11.2023 was set to fix a ruling date.
 9. A 4th application dated 28.11.2023 was filed by the 1st interested party seeking stay, variation, and arrest of the delivery of ruling scheduled for 14.2.2014 for the applications dated 30.5.2023 and the two dated 11.7.2023 and for leave to file responses and submissions. The grounds, as set out on the face of the application and supporting affidavit of Earnest Kimaita advocate, were that after directions given on 16.11.2023 due to non-service with the applications the 1st interested party was unable to comply with the directives until the lapse of the timelines to file a response.
 10. By an order dated 29.1.2024, the application was allowed for the filing of a response and written submissions by the 1st interested party within three days. The rest of the applicants were at liberty to file any further responses restricted to new issues by 6.2.2024, as would be raised by the 1st interested party.
 11. As if this was not enough 5th application dated 25.1.2024 was filed by Ngunjiri Michael and Co. Advocates seeking to cease acting for the petitioner decree holder for lack of instructions. The same was allowed on 29.1.2024, and the coming law firm represented by Mr. Mutua Advocate was ordered to regularize their appearance of the petitioner decree holder.
 12. Despite earlier directions, the only reply made is the one by Charles Muchui Mugwika filed on 23.11.2023 with respect to the application dated 11.7.2023, which perhaps has a bearing against all the applications seeking for stay, applications seeking for setting aside and leave to join, re-open and defend the petition. The liquidator avers the society was dissolved by Gazette No.5867 of 15.10.1999, when it was the owner of L.R No. Nkuene/Mitunguu/190 measuring approximately 100 acres. As the current liquidator appointed on 1.3.2023, he avers that he has taken custody of the suit properly following the appointment and has commenced the liquidation process. It was further averred that the land registrar had effected the decree, and the land had reverted to its original status as per a copy of the record, including the resultant subdivisions L.R No. 1973.
 13. Similarly, the liquidator averred the applicants were misleading the court since the liquidation process had commenced, which included serving a notice of eviction for illegal occupation on the land excised unconstitutionally and in breach of Sections 63 and 65 of the Cooperative *Societies Act* by not involving the consent or approval of the liquidator in the meeting of 6.9.2002.
 14. Further the liquidator averred that any transactions over the suit land were null, void, and illegal, for they were done without involving him, and therefore, the applicants cannot claim to have acquired a good title for the same.



15. The 1st interested party relies on replying affidavits sworn by James Mutia on 1.1.2024 to the applications dated 11.5.2023 and 11.7.2023. On the application dated 11.5.2023, it is averred there was no nexus between Abogeta Societies and Abogeta Farmers Cooperative Society Ltd, and thus, the liquidator cannot purport to have any interest in the instant matter in whichever way. He termed the application as a non-starter lacking merits and which should be dismissed.
16. On the application dated 11.7.2023, the 1st interested party averred the application was overtaken by events since L.R No. Nkuene/Mitunguu/1973 stood canceled and has reverted to the mother title, as per the current official search certificate. Further, the 1st interested party averred that the two applications were filed out of time without any explanation as to the inordinate delay. Additionally, the 1st interested party averred no draft replying affidavit had been attached by Henry Kinyua to demonstrate his interest or prejudice for the court's consideration, since the applicant was not a society or related to it, who had reserved the land. The 1st interested party termed the application as lacking merits, which should not be allowed in the public interest.
17. As regards the petitioner, it relied on an application dated 29.1.2024, hereinafter the 6th application seeking for review of the judgment dated 6.7.2022, that vested the suit property and its resultant subdivisions into the hands of the liquidator Abogeta Farmers Cooperative Society Ltd. The grounds were set on the face of the application and supporting affidavit by Sister P Kanja, sworn on 29.1.2024. Briefly, the petitioner avers there was an error apparent on the face of the record in paragraphs 17, 18, 19, 24, 32, and 104 of the judgment when the court equated Abogeta Societies to Abogeta Farmers Cooperative Society Ltd and mistakenly vested the suit land to the liquidator.
18. The 4th and 8th respondents relied on written submissions dated 28.11.2023. On substitution of the 8th respondent, it was submitted under Order 24 Rule 4 of the Civil Procedure Rules after the death of a party, the court can allow for substitution and that there was a misrepresentation of facts that service was effected on the 8th respondent in 2020, yet he had died on 12.12.2006. Therefore, the estate was condemned unheard contrary to Articles 47 and 50 of *the Constitution* as read together with the Fair Administrative Actions Act. Reliance was placed on *Ridge vs Baldwin* (1964) A.C. 40.
19. On setting aside the 4th and 8th respondents submitted under Order 51 Rule 15 of the Civil Procedure Rules, *ex parte* orders or judgment may be set aside such as this one. Reliance was placed on *Sifuna & Sifuna Advocates vs. Patrick Simiyu Khaemba* (2021) eKLR, *Patel vs East Africa Lodge* (1974) E. A 7, *David Kiptanui Yego & others vs Benjamin Rono & others* (2021) eKLR and *Rayat Trading Co. Ltd vs Bank of Baroda & Tetezi House Ltd* (2021) eKLR.
20. On stay of execution, it was submitted that the court had powers under Order 42 Rule 6 (2) of the Civil Procedure Rules. Reliance was placed on *Stephen Okaka & another vs. Alfred Wesonga* (2022) eKLR, *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR.
21. On injunction, it was submitted that the court should issue the orders. Reliance was placed on *Giella vs Cassman Brown* (1973) E. A 358 *Nguruman Ltd vs Jan Bonde Nielsen & others* (2014) eKLR, *Mrao vs. First American Bank of Kenya* (2003) and *Hezron Kamau Githu vs Kianjogu Enterprises Ltd & another* (2022) eKLR, *Robert Mugo wa Karanja vs Eco Bank (K) Ltd and another* (2019) eKLR.
22. The 4th and 8th applicants submitted as owners of L.R No. Nkuene/Mitunguu 1968 and 1969, they were likely to suffer more inconvenience if no injunction was granted.
23. On the application dated 11.7.2022, Mr. Karatu advocate relied on the written submission dated 15.11.2023. Relying on *Mandeep Chauhan vs Kenya National Hospital & others* (2013) eKLR, the applicant submitted they were condemned unheard contrary to rules of natural justice. Reliance was



- also placed on *Msagha Mbogholi vs The Hon. Chief Justice & others* (2006) 2 KLR 553 *Onyango Oloo vs AG* (1986-1989) E. A 456, *Sifuna & Sifuna advocates vs. Patrick Simiyu Khaemba* (2021) eKLR, *David Kiptanui Yego & 134 others vs Benjamin Rono & others* (supra), *James Kanyitta Nderitu & another vs Marios Philotas Ghikas & another* (2016) eKLR.
24. On stay of execution, the applicant submitted they had met the requirements under Order 42 Rule 6 of the civil procedure Rules. Reliance was placed on *Stephen Okaka & another vs. Alfred Waga Wesonga* (2022) eKLR, *James Wangalwa & another vs Agnes Naliaka Cheseto* (supra)
 25. On the joinder of parties, the applicant submitted under Order 1 Rule (10) Civil Procedure Rules and Rule 2 Constitution of Kenya (Protection of Fundamental Practice and Procedure Rules, 2013 (Mutunga Rules) the court could allow a joinder at any stage of the proceedings, and in this case, since they were allottees of L.R No. 1973. Reliance was placed on *Parment Ole Kiseet vs. Sylvia Moi and others Ndegwa Kabogo (I.P.)* (2021) eKLR, *Francis K. Muruatetu & Another vs Republic & others* (2016) eKLR.
 26. On temporary injunction, the applicant submitted they had met the ingredients in *Giella vs Cassman Brown* (supra) E.A 358, *Nguruma Ltd vs Jan Bonde Nielsen & others* (2014) eKLR, *Hezron Kamau Gichuru vs Kianjogu Enterprises Ltd & another* (supra) eKLR. *Mrao Ltd vs. First American Bank of (K) Ltd* (supra), *Pius Kipchirchir Kogo vs Frank Kimeli Tena* (2018) eKLR, *Amir Suleiman vs Ambrose Resort Ltd* (2004) eKLR, *Robert Mugo wa Karanja vs Ecobank (K) Ltd & another* (supra).
 27. The issues calling for my determination are the following:
 - i. If the court should set aside, review or vacate the judgment and decree herein.
 - ii. If the interested parties or respondents should be allowed to join, defend and participate in a fresh hearing of the petition.
 - iii. If there should be a stay of execution or interim orders of injunction over any dealing regarding L.R. No. Nkuene/Mitunguu/1968, 1969, & 1973.
 - iv. If the liquidator should be joined and granted leave to respond to the application by the intended respondents and interested parties.
 - v. If there was an error apparent on the face of the judgment requiring its review.
 28. What was before the court was the petition dated 25.9.2020, brought against the respondents and two interested parties. The 1st respondent filed a response dated 19.11.2020. By an affidavit of service dated 18.1.2021 sworn by Kellen Kendi, the court was satisfied that the 1st, 2nd, 3rd, 5th, 9th, and 10th respondents were duly served with the petition as well as the 2nd interested party.
 29. Consequently, the 2nd and 3rd respondents filed a replying affidavit dated 27.1.2020. Out of the abundance of caution, the court, by an order dated 2.4.2021, directed that the 4th, 6th, 7th, and 8th respondents be served by 24.4.2021. The County Government of Meru, as the 1st interested party, filed a notice of appointment dated 30.4.2021 through Caroline Kinga, a legal counsel.
 30. By an affidavit sworn on 25.5.2021, Kellen Kendi confirmed service of the petition upon the 4th, 6th, 7th, and 8th respondents on 24.4.2021 at Mugeru village Timau, Kwa Bwankware village and Gankondi village, respectively. The court proceeded to issue inhibition orders on 5.8.2021 against L.R No. Nkuene/Mitunguu/1967 – 1975, until the determination of the petition.
 31. By a replying affidavit dated 26.10.2021, Catherine Makau, on behalf of the 9th and 10th respondents, opposed the petition. In paragraph 3, she averred that L.R No. Nkuene/Mitunguu/190 was initially



- leased to the Abogeta Farmer's Cooperative Society Ltd, by the predecessor to the 1st interested party, which was placed on liquidation on 5.10.1999.
32. Further, the 9th and 10th respondents gave the history of the resettlement of the seven families affected by the Giumpu Disaster in Abogeta location, by an allocation of 4 acres by the 1st interested party out of the initial 100 acres of land initially leased to Abogeta Farmers Cooperative Society Ltd.
 33. The 9th and 10th respondents averred the 1st interested party subdivided parcel L.R No. 190 into parcel L.R No's 1967 – 1975 on 28.11.2002 and made transfers on parcel no. 1967 to Lucy Karimi, then to the 1st respondent, and later to the 2nd and the 3rd respondents, while L.R No. 1968 went to Erastus Miriti Erasto.
 34. The 9th and the 10th respondents further stated L.R No. 1970, 1971, 1972, 1973, 1974, and 1975, were transferred on 24.12.2008, 1.10.2015, 2.8.2018, 5.12.2002, 9.6.2009 and 18.6.2015 respectively, as per the copies of liquidation order, minutes, mutation forms, land transfer forms and green card attached as annexures C.M.M. "1" - "5" respectively.
 35. The petitioner filed a supplementary affidavit dated 9.12.2021 through Josephine Gakii Mwitari. She did not dispute the affidavit by the custodian of land records for the respective titles that the land had been reserved for Abogeta Farmers Cooperative Societies Ltd as per the liquidation order attached & searches attached.
 36. Further, in the written submissions dated 13.4.2022, the petitioner did not list the issue as a disputed fact in paragraph 12. In paragraphs 28 and 42 of the written submissions, the petitioner referred to Abogeta Farmers Cooperative Society Ltd and its liquidation order to say that if that was a fact, then the suit parcels of land should have gone to the membership of the societies.
 37. The petitioner, therefore, is estopped in law from denying pleaded facts as per the response and to turn around and say it is the court that erroneously equated Abogeta Societies with Abogeta Farmers Cooperative Society Ltd.
 38. Coming to the issue of setting aside, following the decree issued, a notice of appeal dated 15.7.2022 was filed by the firm of Gichunge Muthuri & Co. Advocates on behalf of the 2nd and 3rd respondents.
 39. The effect of the decree issued on 9.12.2022 was that the land revert to its original status before the 1st interested party affected the reservations on the strength of a mutation form registered on 28.11.2002 by the 9th respondent. From the responses by Charles Mugwika, entry number 2 creating subdivisions, L.R No's 1967 – 1975 was reversed by entry number 3 on 15.12.2022, over the title register for L.R No. Nkuene/Mitunguu/190, following the decree of this court.
 40. Henry Kinyua, the applicant in the application dated 11.7.2022 for the E.A.P.C, has, in paragraph 9 of his affidavit, confirmed that the reversal was affected as per an attached copy of the green card marked P.C. "3". Additionally, in the replying affidavit by Charles Muchui Mugwika sworn on 23.11.2023, he confirmed he was now a liquidator for the Society duly gazetted, and had taken custody of the suit property for purposes of liquidation under Sections 63 and 65 of the Cooperative [Societies Act](#).
 41. The 4th and 8th respondents have sought the setting aside of the judgment, stay of the decree, and leave to defend the petition on account of non-service. Strangely, one, Johnson K. Mwamba, swore an affidavit dated 17.5.2022 to oppose the petition. He confirmed in paragraphs 7, 8, and 13 thereof that the land belonged to Abogeta Societies. The deponent even said he was the one who had paid survey fees for his extended family to acquire the land which was allocated to his relatives Ephantus Kaaria Mwamba, Sebastian Mugambi and Lucy Gakiiru, who sold their portion to Honesty K. Manyara.



42. The said Johnston K. Mwamba attached a copy of the death certificate, minutes and chief's letter as annexures J.M. "4 (a) & (b)", respectively. On the amended notice of motion dated 30.5.2023, one of the grounds is that Johnston Kirimi Mwamba be allowed to represent the late Mwamba Magana, the 8th respondent as a legal representative.
43. The applicant blames the petitioner for not disclosing that the 8th respondent had passed on. Further, he avers that he was condemned unheard and was never aware of or served with the petition. That is far from the truth, going by the affidavits of Johnson K. Mwamba filed by Gichunge & Muthuri & Co. Advocates sworn on 17.5.2022, on behalf of his family and, in particular, the 4th respondent.
44. In my considered view, therefore, the 4th and 8th respondents application amended on 30.5.2023 lacks merits. The same is dismissed with costs.
45. On the application dated 11.7.2023, the execution of the decree was effected on 15.12.2022. The application was filed over seven months after the decree was executed. There is nothing to stay or issue an injunction against regarding the execution of the decree. No notice of eviction from the land has been served upon the applicant to vacate the land. L.R No. Nkuene/Mitunguu/1973 does not exist in the land registry. The intended applicant avers that it was allocated the portion by the 1st interested party in 2000. No copy of the title deed has been attached to show that the intended party was lawfully allocated the land and has lawfully developed it with the requisite approvals permits, and plans from the 1st interested party.
46. A prima face case with a probability of success or irreparable damage and balance of convenience has not been met for the grant of orders of injunction as held in *Mrao Ltd & Nguruman vs Jan Bonde Nielsen* caselaw. It is not enough to allege substantial loss or damage without cogent evidence, as held in *James Wangalwa vs Agnes Naliaka Cheseto* (supra).
47. On the aspect of the notice of appointment by Wambugu & Muriuki Advocates dated 26.6.2023, the said notice is incompetent in view of an earlier notice by Caroline Kinya, advocate for County Attorney dated 30.4.2021. Leave to come on record after entry of judgment was not sought and obtained. Consequently, any response filed by James Mutia on behalf of the 1st interested party is incompetent.
48. Further and given the affidavit by Catherine Makau, the land registrar, the 1st interested party through James Mutia, is incompetent to contradict the custodian of land records and purport to state that there was no nexus between Abogeta Societies and Abogeta Farmers Cooperative Society Ltd.
49. Similarly, the said James Mutia lacks the legal capacity to challenge the ownership of the suit and the power of a gazetted liquidator. Additionally, if the applicants and the interested parties are doubting or challenging the powers and the suit land as being part of the properties of the defunct Abogeta Farmers Cooperatives Society Ltd, the jurisdiction to do so lies elsewhere.
50. As to whether the liquidator and the interested parties should be allowed to join this petition, it is not in dispute that there is already a notice of appeal by the 1st, 2nd, and 3rd respondents. Further, the decree of this court has already been effected. The suit land lies with the liquidator and the head lessor, the 1st interested party, to be dealt with in accordance with the liquidation process. A liquidation order was made on 5.10.1999, and a liquidator was appointed with effect from 1.3.2023. None of the intended or interested parties have contested the said order or appointment of the liquidator. It is the liquidator under Section 66 of the Cooperatives *Societies Act* who has the mandate to institute and defend suits and other legal proceedings by or on behalf of the society in liquidation. No action can commence against the society or liquidator under Section 64 thereof without leave of the court.



51. If the intended parties have any claims over the suit properties of a Society under liquidation, they must subject themselves to the law since the suit property now vests with the liquidator. Once appointed, the liquidator takes over the day-to-day running of the Society under liquidation, which includes the capacity to deal with creditors, sell property, and prepare assets distribution schedule for members under Section 66 thereof.
52. Any person aggrieved by the decision of the liquidator has to approach the Cooperative tribunal for reprieve.
53. In this petition, the court canceled the entries to L.R. No. 190 on 6.7.2022. After the decree, a liquidator was appointed on 1.3.2023. The liquidation period was extended for another one year.
54. Under Section 12 of the Cooperatives *Societies Act*, the liquidator holds and the suit property vests in him. See *Kenton Kijabe Cooperative Society & another vs. Liquidator Kenton Kijabe Cooperative Society* (2018) eKLR and *Rapid P. (K) Ltd vs Nitunze Saving & Credit Cooperative Society Limited (in Liquidation) & others* (2019) eKLR. The court is functus officio.
55. This court, therefore, finds no merits in the applications before it. The same are dismissed with no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 14TH DAY OF FEBRUARY 2024

In presence of

C.A Kananu

Miss Mwai for 1st Respondent

Obiria for Karatu for the intended interested party and holding brief for Wambulwa for 4th & 8th respondents

Miss Kerubo for the liquidator

Miss Maina for the 9th respondent

Mutua for the Petitioner

Mr. Wambua holding brief for Mr. Kimaita for the 1st interested party

HON. CK NZILI

JUDGE

