



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngugi & 7 others v Fikah Acres Limited & 2 others (Civil Appeal
87 of 2018) [2024] KECA 1239 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1239 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 87 OF 2018
W KARANJA, J MOHAMMED & LK KIMARU, JJA
SEPTEMBER 20, 2024**

BETWEEN

**DAVID NJEHIAH NGUGI 1ST APPELLANT
NYONYO FARM LIMITED 2ND APPELLANT
LILIAN WANGARI MUIGA 3RD APPELLANT
PATRICK MURIUKI NJOGU 4TH APPELLANT
MARY WANGARI MURIITHI 5TH APPELLANT
JOSHUA MBUGUA NJUGUNA 6TH APPELLANT
MOSES GITHINJI MWANGI 7TH APPELLANT
SALOME WANGECHI WACHIRA 8TH APPELLANT**

AND

**FIKAH ACRES LIMITED 1ST RESPONDENT
KENYA PLANTERS CO-OPERATIVE UNION LIMITED 2ND RESPONDENT
KENYA COMMERCIAL BANK LIMITED HARVEN GADHOE, DANIEL
MUTISYA NDONYE ROBERT KINUTHIA MUNGAI T/A KAHONOKI
ESTATE 3RD RESPONDENT**

*(Being an appeal from the ruling of the Environment and Land Court
of Kenya at Milimani (E.O. Obaga, J.) dated 22nd January, 2018 in
ELC No. 1469 of 2016 Consolidated with NRB ELC No. 779 of 2009)*



JUDGMENT

1. This is an appeal against the ruling of the Environment and Land Court (ELC) at Milimani (E.O. Obaga, J.), delivered on 22nd January, 2018, whereby the ELC dismissed the appellants' application dated 5th August, 2016. In the application, the appellants sought a raft of orders, the main one being:
 - i. That the Intended Interested parties be joined as parties to this case.The other orders were dependent on the first order being granted, and were basically injunctive orders as against the 3rd respondent herein (Fika Acres Limited) in respect of several parcels of land the appellants had bought from the 3rd respondent. The said parcels were subdivisions from the main title, parcel No. L.R Number 1363/2. (the suit property).
2. The suit property has been the subject of long protracted litigation between several parties going way back to the 1990s to date. It is important, therefore, for us to give a brief history of the matter in order to place this appeal in proper perspective.
3. A perusal of the record reveals that at all material times Robert Kinuthia Mungai (Robert), the 2nd respondent herein was the registered owner of all that parcel of land commonly referred to as Kahonoki Estate being L.R Number 1363/2. (the suit property).
4. Robert secured Kshs.10,000,000.00 from Kenya Planters Cooperative Union Ltd (KPCU), the 1st respondent, through a mortgage dated 28th November 1984 secured by the suit property. KPCU registered the mortgage over the said property whose redemption date was 5th December 1984.
5. As at 1998, the unpaid mortgage was said to have stood at Kshs.73 million and KPCU sought to enforce its rights under the mortgage by selling the property. Robert moved to court to, inter alia, stop the sale of his property vide Nairobi HCCC 542 of 1990 and Nairobi HCCC 1484 of 1992 contesting enforcement of KPCU's rights under the said mortgage.
6. As the matters were still pending in court, the parties came to an out of court settlement and the suits were compromised. Pursuant to an agreement dated 23rd November 1998, Robert had mutually agreed with KPCU on the repayment of the money he owed it. Part of the agreement was that the 2nd respondent would subdivide the suit property into thirty subdivisions part of which were discharged and released to him and the remainder thereof assigned to KPCU in repayment of Robert's outstanding debt. The value of the plots was to be determined through valuation to be done by M/S. Thiga Survey Consortium.
7. As part of the compromise agreement dated 23rd November 1998, KPCU further executed partial re-assignments of all the other sub divisions in favour of Robert thereby discharging him from the mortgage with the effect that Robert was now free to deal with his parcels in any manner without any encumbrance or further reference to KPCU.
8. Following this agreement, Robert proceeded to dispose some of the properties which had been discharged by KPCU to some third parties.
9. On the other hand, KPCU had ran into financial problems and was disposing off some of its properties in a bid to facilitate payment of some of its debts. To that end it advertised for sale the plots which had been transferred to it following the agreement we have referred to above.



10. Fikah Acres Limited (the 3rd respondent) bought the said parcels of land, more particularly described as L.R Numbers 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28 and 1363/33 located in the Gatanga Area of Muranga County.
11. Pursuant to the sale agreements, Fikah Acres Limited paid KPCU the entire consideration for the purchase of the said properties whereupon, KPCU executed conveyances in their favour transferring the title thereto to Fikah. The said conveyances were registered on 21st August 2014, thereby making Fikah Acres Limited the registered proprietor thereof.
12. Upon being registered as the proprietor, Fikah Acres Limited sought to take vacant possession but the same was frustrated by the fact that the appellants had trespassed onto the land at the behest of Robert and Fikah Acres Limited was constrained to take out an action in recovery thereof being Thika CMCC No. 41 of 2015, Fikah Acres Ltd –vs- Robert Kinuthia Mungai in which the court issued interim orders restraining Robert from interfering with the suit premises in the interim pending the hearing of the said application.
13. In total disregard of those orders, Robert on various dates between 2010 and 2014 proceeded to enter into various sale agreements with the appellants and others over some of the properties already registered to Fikah Acres Limited being:-Agreement for sale dated 9th July 2010 between Robert Kinuthia;Mungai (vendor) and Nyonyo Farm Limited(purchaser) over LR. No. 1363/10 (Original No. 1363/2/2) for Kshs.2,496,328;Agreement for sale dated 9th July 2010 between Robert Kinuthia Mungai (vendor) and Nyonyo Farm Limited(purchaser) over LR. No. 1363/11 (Original No. 1363/2/2) for Kshs 2,522,891;Agreement for sale dated 24th February 2014 between Robert Kinuthia Mungai (vendor) and Joshua Mbugua Njuguna(purchaser) over Part of LR. No.1363/12 and 1363/13(Amalgamated & Resurveyed) for Kshs 900,000;Agreement for sale dated 20th June 2014 between Robert Kinuthia Mungai (vendor) and Lilian Wangari Muigai(purchaser) over LR. No. 1363/14 (Original No. 1363/2/12) for Kshs.10,000,000;Agreement for sale dated 6th June 2012 between Robert Kinuthia Muigai (vendor) and Lilian Wangari Muigai(purchaser) over LR. No. 1363/24 for Kshs.5,125,000;Agreement for sale dated 26th March 2012 between Robert Kinuthia Mungai (vendor) and Lilian Wangari Muigai(purchaser) over LR. No. 1363/25 for Kshs.4,900,000;Agreement for sale dated 22nd March 2012 between Robert Kinuthia Mungai (vendor) and Lilian Wangari Muigai(purchaser) over LR. No. 1363/26 for Kshs.5,215,000;Agreement for sale dated 28th July 2011 between Robert Kinuthia Mungai (vendor) and David Njehiah Ngugi(purchaser) over LR. No. 1363/27 for Kshs.2,700,000;Agreement for sale dated 28th July 2011 between Robert Kinuthia Mungai (vendor) and David Njehiah Ngugi(purchaser) over LR. No. 1363/28 for Kshs.2,700,000;Agreement for sale dated 27th February 2012 between Robert Kinuthia Mungai (vendor) and Salome Wangechi Wachira and Gladys Wairimu Wachira(purchasers) over LR. NO. 1363/15 (Original No. 1363/2/13) for Kshs.4,160,000;Agreement for sale dated 22nd March 2012 between Robert Kinuthia Mungai (vendor) and Mary Wangari Muriithi (purchaser) over LR. No. 1363/16;Agreement for sale dated 22nd March 2012 between Robert Kinuthia Mungai (vendor) and Mary Wangari Muriithi (purchaser)over LR. No. 1363/16 for Kshs.5,205,000;Agreement for sale dated 16th May 2012 between Robert Kinuthia Mungai (vendor) and Lucy Wanjiru Kinyanjui. Antony Jonah Mbatia Muitungu, Patrick Muriuki Njogu, Peter Mwangi Waimiri and Jane Wamuchene (purchasers) over LR. No. 1363/22 for Kshs.5,395,000;Agreement for sale dated 4th January 2013 between Robert Kinuthia Mungai (vendor) and Catherine Wangechi Wilmot and Moses Githinji Mwangi (purchasers) over LR. No. 1363/23 for 9,180,000;



14. In the course of all the confusion, KPCU which had by now been placed under receivership filed a suit, against, Robert Kinuthia Mungai t/a Kahonoki Estate. Fika Acres Limited was to be joined later as an interested party vide a court order dated 18th December, 2014.
15. There were several other suits filed in respect of the suit property but we will not concern ourselves with them for purposes of this appeal. It suffices to say, however that ELC case No. 1469 of 2016 was consolidated with Nairobi ELC No. 799 of 2009.
16. As these matters were still pending in court the appellants herein by an application dated 5th August, 2016 moved the court seeking, inter alia, to be joined as interested parties in the consolidated suit. That application was the subject of the ruling that has been challenged before us in this appeal.
17. It was the appellants' assertion that they learnt that Milimani Commercial Court Civil Case No. 779 of 2009 had been pending before court between the 1st respondent and the 2nd respondent; that the appellants also learnt that there was another case Nairobi HCCC 542 of 1991; Robert Kinuthia Mungai-vs-Kenya Planters Coop. Union Limited over the mortgage issue between the 1st respondent and the 2nd respondent in which an order was issued on 28th February 1991 restraining the 1st respondent from interfering with Land Parcel LR. 1363/2 the mother title of the suit properties.
18. That the appellants had further learnt that while the dispute over the mortgage between the 1st respondent and the 2nd respondent had been pending determination before court, the 1st respondent had transferred the suit property to its name in August 2014 and subsequently transferred it to the 3rd respondent; Further that the appellants have entered into sale agreements with the 2nd respondent and taken possession of their respective portions of the suit property in the belief that the 2nd respondent was at all material times the registered owner of the suit property; and that the appellants have belatedly come to learn of the transfer of the suit property to the 3rd respondent while they have been in possession and occupation of their land and have been taken by surprise to learn of the institution of a case by the 3rd respondent in Thika CMCC No. 41 of 2015 in which the 3rd respondent alleged to be in occupation of the suit property yet the appellants have been in occupation and are using their respective land parcels all the time since they purchased their property from the 2nd respondent.
19. Further, that the appellants came to learn of the proceedings in Environment & Land Case No. 1469 of 2016 sometime in July 2016 when one of the appellants was found in her land by strangers who claimed to be on a mission on behalf of the 1st and the 3rd respondents to scout for buyers of the property occupied by the appellants; and finally that neither of the parties to the suit involved the appellants in the proceedings before the court and the failure to join them in the proceedings and procuring orders adverse to the interest of the appellants was material non-disclosure and fraudulent misrepresentation of facts intended to mislead the court and deprive the appellants of their right to be heard and a fair determination of their interests in the suit property.
20. The appellant's application was opposed. The 3rd respondent, vide his replying affidavit dated 17th August 2016, deponed that the application was res judicata and, therefore, untenable for reasons that the issues raised therein had already been determined by the trial court in its ruling made on 2nd February, 2016. The court had specifically resolved the question of whether or not the suit properties belonged to the 2nd respondent following execution of the settlement agreement dated 23rd November, 1998 between him and KPCU.
21. That the court has already found that having benefited from that agreement by way of discharge of certain parcels of land and which he has already sold, the 2nd respondent could not then preclude the 1st respondent from a benefit accruing from the same agreement. Accordingly, the suit properties were not



- the property of the 2nd respondent as at the time of the purported purchase thereof by the appellants and were, therefore, not available for sale.
22. Further, that the application was res judicata for the reason that the question of whether the 2nd respondent had any proprietary interest in the properties subject of that application, was determined in the said ruling where the court found that the 2nd respondent had pursuant to the agreement dated 23rd November, 1998 already recovered part of the parcels which were mortgaged to the 1st respondent and which he had already disposed. And finally, that to the extent that the appellants' claim was based on an agreement of sale for properties which the court has already found were not owned by the 1st respondent, then the application seeking a determination of issues which were similar to and/or were substantially in issue in the ruling made by the court on the 2nd August 2016 was res judicata.
23. The 1st respondent filed grounds of opposition raising grounds that; the primary suit was a commercial dispute between a mortgagee, the 1st respondent, and the mortgagor, the 2nd respondent, and not a dispute over title, use and/or occupation to land and that the cause of action sought to be introduced by the appellants cannot be tried or disposed of together with the primary suit and to do so would contravene Order 3 Rule 8 of the Civil Procedure Rules; that the foundation of the appellants' application was an alleged contract between them and the 1st respondent and their recourse thus lies in a separate action in the ELC; and that the 1st respondent was not privy to the contract that forms the basis of the appellants' application.
24. The application was argued before the learned Judge (E.O. Obaga, J.) who in a ruling delivered on 22nd January, 2018 determined that the appellants' claim was based on an alleged sale between them and the 2nd respondent and that some properties which they were seeking are the same properties which have already been sold to the 3rd respondent who is now the registered owner. That it was clear that the appellants cannot be joined in the suit as their presence is not necessary for the court to effectually and completely adjudicate on the dispute. That whatever decision the court will make arising out of the reliefs sought by the 1st respondent will not assist in resolving the dispute between them and the 3rd respondent or the 1st respondent who sold them those parcels and that the appellants were aware of the futility of seeking to join the suit and that was why one of the prayers was for leave to bring a substantive suit in respect of the disputed property and that the appellants did not require leave to bring any action they wish.
25. It is this decision of the learned trial Judge that provoked the instant appeal. The appellant proffered nine (9) grounds of appeal challenging the said decision. In a nutshell, the appellant faulted the learned Judge for, inter alia; failing to appreciate and properly interpret and apply the law applicable to the subject matter of the application before the court thus arrived at a bad decision; in holding that the appellants' presence is not necessary for the court to effectually and completely adjudicate on the dispute while the plaintiff/respondent and Interested Party/respondent had illegally and fraudulently registered transfer of the suit property to themselves without any notice or knowledge of the appellants under the guise of realizing a mortgage while the appellants had possession and occupation of the dispute property in total violation of the law of the land; in making the decision that the decision the court will make arising out of the reliefs sought by the 4th defendant will not assist in resolving the dispute between them and the interested party or the 4th defendant who sold them the land in dispute in total disregard of the right of the 4th defendant to redeem a mortgage and the rights of the applicants in law to redeem the mortgage by virtue of being in possession and occupation of the mortgaged land; the decision offended the rules of natural justice and the trial judge conducted himself in a biased manner that was prejudicial to the applicants; in failing to exercise his discretion in making an order for preservation of the suit land pending the hearing and determination of the suit; and in



holding that the appellants were aware of the futility of seeking to join the suit and that was why one of the prayers in their application is leave to bring a substantive suit in respect of the disputed property imputing that they did not have a genuine and arguable case.

26. The appeal was canvassed by way of written submissions. Counsel for the appellant, Ms. Chege submitted that under Order 1 of the Civil Procedure Act, a party who has an interest in a matter pending before court is at liberty to apply to be joined in the suit and the court has wide discretion to make orders to join a party to a suit pending before court whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. It was submitted that the appellants are seeking to be joined to the suit to ventilate their claim of rights vested upon them by virtue of occupation of the land.
27. It was submitted that the trial court in its ruling stated that the appellants' claim is based on alleged sale between them and the 2nd respondent, which properties have been sold to the 3rd respondent. Counsel submitted that this was not the correct position because the appellants' claim is a claim pursuant to their right of occupation not just the said sale agreements and that by the reason of occupation, they have rights protected even against a mortgagor the likes of the 1st respondent, who intends to realize a security in form of land, which is in occupation of a third party.
28. Further, it was submitted that notwithstanding that the appellants are in occupation of the disputed property, no notice was given to them of the sale of the charged property and that they have a right to exercise the option of redeeming the mortgage over the land in issue to safeguard their interests. They were denied that right by the 1st respondent not having complied with the mandatory provisions of law in exercising its power of sale.
29. It was submitted that the appellants have a beneficial interest in the land that they purchased from the 2nd respondent; and which land they have occupied and developed. Their existence and interests had not been disclosed to the court; and it is their contention that the determination of the matters pending between the 1st respondent and the 2nd respondent affect their interests. In essence, the appellants are saying that, their claim over the occupation and ownership of the properties they occupy can and ought to be determined within the consolidated suit which they seek to join.
30. The respondents did not put in any written submissions in this appeal. Mr. Muturi Njoroge, learned counsel who appeared for Robert (the 2nd respondent) and Mr. Njenga for the 3rd respondent informed the Court that they were supporting the appeal.
31. This being a first appeal, our duty was well stated in *Abok James Odera T/a A.J. Odera & Associates -vs- John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where this Court held:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
32. Guided by the foregoing principles, the record of appeal as well as the appellants' submissions, we are called upon to determine whether the learned Judge properly exercised his discretion in dismissing the appellants' application seeking to be joined to the proceedings. The circumstances in which an



appellate court can interfere with the exercise of judicial discretion are settled. In *Mbogo & Another -vs- Shah* [1968] E.A., the Court observed thus:

“...a Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...”

33. Did the learned Judge take into consideration the principles that should guide a court when considering whether a party should be joined as a party to a suit or not?
34. These principles were clearly elucidated by the Supreme Court, in *Communications Commission of Kenya & 3 Others v. Royal Media Services Limited & 7 Others* [2014] eKLR as follows. A party can be joined to a suit;
 - “i) because his presence will result in the complete settlement of all the questions involved in the proceedings;
 - i. to provide protection for the rights of a party who would otherwise be adversely affected in law;
 - ii. to prevent a likely course of proliferated litigation.” (Emphasis added).
35. We have outlined in detail the history of the matter from 1984 to date. The relationship between KPCU and Robert Kinuthia Mungai is not in dispute. The history of the mortgage and the indebtedness was not disputed either. The settlement of their dispute before the trial court and the final payment and discharge of the suit property and the sub division of the same is not disputed either. All this happened before the appellants’ cause of action came into existence or was brought to the fore. In their submissions, the appellants have made heavy weather of the 1st respondent’s exercise of its statutory power of sale saying that the law was not complied with. We note that these are fresh issues which were not raised in the consolidated suit and which cannot be introduced in that suit at this stage, the plaintiff having withdrawn its suit.
36. We also note, from the impugned ruling that the learned Judge observed, and rightly so, that the plaintiff in the suit (KPCU) withdrew its suit as against Robert, and only Robert’s counterclaim, which mainly seeks declaratory orders remains unsettled. In our view, the learned Judge considered all the relevant material on record before dismissing the appellant’s application.
37. There is nothing on record to even remotely suggest that the learned Judge considered any irrelevant materials or failed to consider relevant material that was before to arrive at his ruling. We find that the learned Judge exercised his discretion properly in declining joinder of the appellants to the suit in question. We hold that the question of whether the statutory power of sale was properly exercised or not would create a fresh cause of action as it was never pleaded in either the plaint or in the counterclaim. In any event, this issue was long settled when the 1st and 2nd respondents compromised the initial suit by consent. This would only resurrect, cloud and confuse issues which have already been laid to rest.
38. Whether the appellants are in occupation of the property or not and whether they have any beneficial claim over it are not issues that can be canvassed in the counterclaim that is the only claim pending determination before the ELC. The grievance the appellants have is principally against the person who



purportedly sold them the properties in question and that is the party they should pursue through a separate distinct suit.

39. In the end, we find this appeal devoid of merit and dismiss it with orders that each party bears its own costs as the respondents who participated in the appeal supported it. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the Original.

Signed

DEPUTY REGISTRAR

