



Atunga v Karingithe (Suing as the legal representative of the Estate of Karkise Ole Mosiro) & 4 others; Nyamemba (Interested Party) (Civil Application NAI 132 of 2020) [2023] KECA 618 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KECA 618 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION NAI 132 OF 2020
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
MAY 26, 2023**

BETWEEN

CHRISTINE MOCHECHE ATUNGA APPLICANT

AND

MARITUAI KARINGITHE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KARKISE OLE MOSIRO) 1ST RESPONDENT

BOMAN MOSIRO 2ND RESPONDENT

ELIJAH MOSIRO 3RD RESPONDENT

SIMON NDUNGU SUPEYO 4TH RESPONDENT

JOSEPH CRESPERS SUPEYO 5TH RESPONDENT

AND

PATRICK TUMBO NYAMEMBA INTERESTED PARTY

(Being an application by Christine Mocheche Atunga to be joined in these proceedings as an Interested Party)

RULING

1. Before this Court is a Notice of Motion dated September 14, 2020, which is brought by the applicant under the provisions of sections 3A & 3B of the *Appellate Jurisdiction Act* and rule 77(1) of the *Court of Appeal Rules, 2010*. The principal orders sought in the application are that: this application be heard on priority basis before the hearing of the respondents' application dated May 28, 2020; and that Christine Mocheche Atunga be joined in Civil Appeal No 132 of 2020 as an Interested Party.



2. The application dated May 28, 2020 referenced above was by the respondents seeking stay of execution of the trial court's judgment pending hearing of this appeal. At the hearing of the instant application, it was brought to the Court's attention that the application for stay of execution was argued on January 26, 2021 and a ruling reserved for March 19, 2021. However, vide orders issued on May 10, 2021, the Court deferred delivery of the ruling on the application for stay of execution pending the hearing and determination of the instant application. This position was confirmed by learned counsel Mr Rotich for the applicant, learned counsel Mr Saende on record for the 1st and 2nd respondents, and learned counsel Mr Angwenyi for the interested party, Dr Patrick Tumbo.
3. The background to this application relates to the ownership of a property known as LR No Ngong/Ngong/845 (hereinafter referred to as "the suit property." The dispute was subject to litigation at the Environment and Land Court (ELC) at Kajiado, ELC Case No 372 of 2017. The trial court delivered a judgment on December 9, 2019. The trial court also rendered a ruling on an application for stay of execution of the judgment on May 21, 2020.
4. Christine Mocheche Atunga contends that, on or about August 25, 2018, she purchased a parcel of land known as Ngong/Ngong/87565 from the registered owner thereof, one Charles Nyatundo Rasugu. The property was a sub-division of the suit property.
5. She further contends that a Certificate of Title was issued in her name on October 25, 2018, and that she proceeded to have the parcel of land charged to Hazina Co-operative Savings & Credit Society Limited for a loan facility of Kshs 5,000,000/=. She states that she utilized the said loan money to construct a residential house on the said parcel of land where she has resided with her family since October 1, 2019.
6. Her main contention in these proceedings is that she was not aware of and/or was never informed of the proceedings in Kajiado ELC Case No 372 of 2017 when negotiating for the purchase of the parcel of land and/or during the construction of her residential home; that she only came to learn of the proceedings and judgment when the 1st and 2nd respondents trespassed on her property and partially demolished her house purporting to enforce eviction orders issued by the trial court.
7. She contends in the application and in the affidavit in support thereof that as the registered proprietor of the parcel of land which she occupies, she has an indefeasible interest thereon and in any proceedings affecting the said parcel of land; that her rights will be adversely affected if the order sought is not granted; and that it is in the interest of justice that her application be allowed.
8. Save for the 1st and 2nd respondents who opposed this application, all the other parties were in support of the application as confirmed by their respective counsel during the hearing hereof.
9. In opposing the instant application, the 1st and 2nd respondents contend, inter alia, that the applicant did not acquire a good title from Charles Nyatundo Rasugu from whom she purchased her parcel of land; that the applicant's remedy lies against the said seller; that the mutation used to create the parcel of land alleged to belong to the applicant was a forgery, and that the applicant was an accessory to the said fraud; and that the instant application has not met the threshold for joinder, is an abuse of the court process, and should be disallowed.
10. We have carefully considered the application, the affidavit in support, and the law. The Supreme Court in *Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 others* [2014] eKLR held thus:

“ An interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when



it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

11. The applicant has annexed to her application various documents, including a Sale Agreement in respect of her parcel of land (Ngong/Ngong/87565) which was executed between her and Charles Nyatundo Rasugu on August 25, 2018, a copy of a title and an Official Search, which shows that the property was initially registered in the name of Charles Nyatundo Rasugu, an application to the area Land Control Board, Consent from the area Land Control Board, a copy of Certificate of Title which shows that the parcel of land was on October 25, 2018 registered in the name of the applicant, an Official Search dated November 12, 2018 showing that the said parcel of land had been registered in her name, a letter from her advocate dated November 21, 2018 instructing her bank to release the entire purchase price of Kshs 1,380,000/= to Charles Nyatundo Rasugu, and a payment voucher in favour of the said Charles Nyatundo Rasugu for the amount of Kshs 1,380,000/=.
12. The applicant has demonstrated to our satisfaction that she has a legitimate interest in the appeal pending for determination before this Court, either as a legitimate purchaser or an innocent purchaser for value of the parcel of land known as Ngong/Ngong/87565, which is a subdivision of the suit property. This interest would no doubt be affected and/or defeated if she is not joined as an interested party.
13. The denial of the orders sought in the application will, in our considered view, highly prejudice the applicant. Accordingly, we hereby allow the Notice of Motion dated September 14, 2020. We also order that the costs of this application be in the appeal. Since the outcome of this application has a direct bearing on the stay application which is pending delivery of ruling, we direct that the said application be mentioned before the bench that heard the earlier application for appropriate directions. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY MAY, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

