



REPUBLIC OF KENYA



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**Njoroge v Inshwill Buidar Engineering Ltd; Githakwa & 38 others (Proposed Interested Party)
(Environment & Land Case E018 of 2023) [2024] KEELC 3326 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E018 OF 2023**

LN GACHERU, J

APRIL 24, 2024

BETWEEN

MARGARET MURIMA NJOROGE PLAINTIFF

AND

INSHWILL BUIDER ENGINEERING LTD DEFENDANT

AND

**BENSON KIRIKO GITHAKWA & 38 OTHERS PROPOSED INTERESTED
PARTY**

RULING

1. The matter for determination is the Notice of Motion Application dated 15th January 2024, brought under Article 40(1), (2), (3), Article 259 (1) and (2) of *the Constitution* of Kenya, Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*, and Order 1 Rules 10(1) and Order 51 Rules 1 and 10 of the Civil Procedure Rules, wherein the Proposed Interested Parties have sought for the following orders; -
 - i. That the Honourable Court be pleased to grant leave to the Proposed Interested Parties to be joined as Interested parties to the suit.
 - ii. That upon grant of prayer (b) above, the Honourable Court be pleased to grant leave to the Proposed Interested Parties to put in its documents and pleadings.
 - iii. That the costs of this Application be borne by the Respondent.
2. The Application is premised on the grounds set out on its face and on the Supporting Affidavit of Benson Kiriko Githakwa, sworn on 15th January 2024.
3. The suit property, being land parcel No. Kakuzi/kirimiri Block/7/249, is a subdivision of land parcel no. Kakuzi/kirimiri Block/7/37, which is the subject parcel of land in ELC Case No. 67 of 2018. The



- said parcel of land was the subject of the decision of the Court dated 29th September 2022, in ELC Case No. 67 of 2018, wherein, the Court dismissed the Plaintiff's suit which had sought, inter alia, the revocation of the title deed to the suit property held by the Defendant herein.
4. The said suit was dismissed because the Plaintiff failed to adduce sufficient evidence in support of allegations of fraud by the Defendant thereon, regarding the acquisition of title over the suit land. The Court found and held that the Defendant's title was lawful and not impeachable pursuant to the provisions of Section 26 of the [Land Registration Act](#).
 5. The suit property has been the subject of protracted litigation as noted by the Court in page 38J of the said Judgment delivered on 29th September 2022. In the instant suit, the Plaintiff contests the Defendant's ownership rights over the suit land, while the Proposed Interested Parties/Applicants herein claim to have purchased portions of the suit property from the Plaintiff, without notice of any imperfections in regard to the Plaintiff's title.
 6. The Applicants/Proposed Interested Parties, have contended that they are bonafide purchasers for value of ninety-seven (97) parcels of land of different sizes, which were to be carved out of land parcel number KAKUZI/KIRIMIRI/BLOCK 7/249, (having purchased the same from the Plaintiff herein in year 2013. The Applicants annexed sale agreements marked BKG-1 and BKG-2, executed by the Plaintiff and the Applicants.
 7. They further claimed that the Plaintiff, upon receipt of various payments from the Applicants in respect of the aforesaid 97 subdivisions of the suit land, issued receipts to them annexed by the Proposed Interested Parties as BKG-3.
 8. The Applicants' further contended that they acquired a legal interest in the portions of the suit land purchased from the Plaintiff, and they have settled on their respective parcels of land since 2013, where they carry out diverse agricultural activities thereon.
 9. The Applicants also contended that should the hearing of the present suit proceed in their absence, they stand to suffer irreparable loss and injustice.
 10. The Plaintiff did not oppose to the instant Application.
 11. However, the Defendant/ Respondent resisted the said Notice of Motion Application through Grounds of Opposition and the Replying Affidavit sworn on its behalf by PATRICK GUKURA MURAYA, dated 8th February 2023. The Deponent averred that the present Application is frivolous, is without merit and is meant to derail the hearing of the main suit scheduled for 13th February, 2024.
 12. The Defendant/Respondent, in its Replying Affidavit averred that the Applicants/Proposed Interested Parties have conspired with the registered owner of the suit property namely, Mugumoini Farmers Company Ltd, to defeat its legal right of ownership over the suit land.
 13. Further, the Defendant/Respondent contended that it is not a party to any agreements for sale of the suit property involving the Plaintiff and the Applicants/Proposed Interested Parties, and further, the Applicants are strangers to it.
 14. The Defendant/ Respondents averred that it executed a sale agreement with the Plaintiff in respect of the suit land on 17th September 2013. Further, the Defendant/Respondent claimed that an anomalous situation arises in the instant Application in that the 2nd, 9th, 12th, 29th and 39th Applicants herein have annexed sale agreements executed between themselves and the Plaintiff, which pre-date 17th September, 2013.



15. Furthermore, the Defendant/Respondent averred that the 3rd, 4th, 5th, 7th, 8th, 10th, 11th, 13th, 15th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 26th, 28th, 30th, 31st, 32nd, 34th, 36th, and 38th Applicants herein, have not annexed any sale agreements in support of their respective claims of purchase of their alleged portions of the suit property.
16. It was its further allegations that two (2) of the sale agreements annexed by the Applicants namely, the one executed by Ann Muthoni Karanu, and the Plaintiff and the other one between the Plaintiff and Macharia William Maina jointly with Margaret Macharia, were filed before this Court whereas the said Ann Muthoni Karanu, Macharia William Maina and Margaret Macharia, are not named among the Applicants in the instant Notice of Motion Application.
17. Further, the Defendant/Respondent refuted the Applicants' claim that any of them is in occupation of the suit property or engages in agricultural activity thereon, and asserted that the Applicants have failed to demonstrate to the Court that any agricultural activities are being undertaken on the suit land by themselves.
18. The Respondent also argued that because the key issue in the main suit relates to breach of the contract dated 17th September, 2013, by the Plaintiff, the Applicants, whose claim is directed solely against the Plaintiff, have no recourse, but to wait and abide the outcome of the main suit and, thereafter, commence their own suit against the Plaintiff if necessary, depending on the outcome of the main suit.
19. The Defendant/ Respondent annexed a Replying Affidavit sworn by Patrick Gukura Muraya on 8th February 2023, a Judgment of this court delivered on 29th September 2022, in ELC Case no. 67 of 2018, which suit involved Mugumoini Farmers Company Ltd as the Plaintiff, the Defendant herein in the role of Defendant and Ephraim Waithaka Ruitha and Charles Wang'ondu Samson as first and second Interested Parties respectively.
20. The Proposed Interested Parties/Applicants responded to the Defendant's Grounds of Opposition dated 8th February 2024, by filing a Further Affidavit on 21st February, sworn by Benson Kiriko Githakwa on 20th February 2023.
21. The Applicants explained that the failure to include the sale agreements belonging to the 3rd, 4th, 5th, 7th, 8th, 10th, 11th, 13th, 15th, 17th, 18th, 20th, 21st, 22nd, 23rd, 24th, 26th, 28th, 30th, 31st, 32nd, 34th, 36th, and 38th Applicants herein was an omission occasioned by inadvertence on the part of their Advocate on record. However, they annexed the missing sale agreements, marked as BKG-1, to the Further Affidavit sworn by Benson Kiriko Githakwa.
22. Regarding the issue raised by the Defendant/Respondent that the sale agreements annexed by the 2nd, 9th, 12th, 29th and 39th Applicants predate the sale agreement dated 17th September 2013, executed between the Plaintiff and the Defendant for disposal of the suit land, it was argued that the 2nd, 9th, 12th, 29th and 39th Applicants herein entered into sale agreements with the Plaintiff to enable her raise the first instalment in respect of the purchase of the suit property and furthermore the aforesaid initial instalment was duly paid over to the Defendant/Respondent.
23. The Court directed that the instant Notice of Motion Application, be canvassed by way of written submissions. The Applicants filed their written submissions on 21st February 2023, through the Law Firm of Mburu Machua Company Advocates. The Applicants submitted that they are bonafide purchasers of the suit property, which they purchased from the Plaintiff in year 2013, and they took possession immediately, and have uninterruptedly occupied the suit property for more than ten years.



24. The Applicants relied on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, and on Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, in support of the contention that they have established “an identifiable stake or legal interest” in the suit, warranting joinder as Interested Parties.
25. Further. The Applicants relied on the holding of the Supreme Court in the case of Communications Commission of Kenya Vs Royal Media Services Limited & 7 Others Petition no. 15 of [2014] eKLR to buttress the argument that no prejudice would be suffered by the parties to the subject suit if the present Application is allowed.
26. It was their further submissions that the Applicants are likely to suffer prejudice if the instant Application is disallowed because they stand to lose their portions of land that were carved out of the suit property.
27. The Applicants reiterated the elements to be established by an Applicant for successful joinder, as set out by the Supreme Court in the cases of Trusted Society of Human Rights Alliance Vs Mumo Matemo & 5 others [2015] eKLR and Francis Kariuki Muruatetu & another v. Republic & 5 others [2016] eKLR. Further reliance was placed on the holding of the Court in the case of Skov Estate Limited & 5 others v. Agricultural Development Corporation and another [2015] eKLR.
28. Ultimately, the Applicants submitted that their presence in the suit would assist the Court in determining the issue of which party was in breach of the obligations set out in the various sale agreements presented before the Court.
29. The Defendant/Respondent filed its written submissions on 4th March 2024, through the Law Firm of Kanyi Ndurumo & Company Advocates, and submitted that the Applicants are not necessary parties to the suit, pursuant to the meaning of Order 10 Rule 2 of the Civil Procedure Rules, because their presence will not aid the Court to effectually and completely adjudicate on all questions raised in the suit.
30. The Defendant also submitted that, in terms of Order 1 Rule 10 of the Civil Procedure Rules, in case where a person wishes to be joined in a suit as an interested party, he needs to show that his presence is necessary in the proceedings.
31. Further, the Defendant submitted that as there exist no questions to be adjudicated between the Proposed Interested Parties/ Applicants, and the Defendant, it follows that the Applicants do not qualify for joinder as Interested Parties.
32. The Defendant cited in extenso the holding of the Court in the case of Skov Estate Limited & 5 others v. Agricultural Development Corporation and another [2015] eKLR in support of its opposition to joinder of the Proposed Interested Parties.
33. This court has carefully considered the instant Notice of Motion Application, the annexures thereto, the written submission together with the cited authorities and finds the single issue for determination is whether the Proposed Interested Parties entitled to the Orders sought.
34. The Proposed Interested Parties quoted the case of Francis Kariuki Muruatetu & another v Republic & 5 others Petition No. 15 as consolidated with Petition No 16 of 2013 [2016] eKLR, where the Supreme Court set out the requirements for successful application for joinder of an Interested Party. The said Court listed three principles to be considered in an application for joinder of a Proposed Interested Party, as follows:



- i. “The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
 - ii. (The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
 - iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”
35. Further, the Supreme Court, in the case of *Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 others* [2015] eKLR re-stated the same principles , wherein it was held the applicant has to have a stake in the subject matter before the Court; he has to show that he will be affected by the decision of the Court; and that his interests will not be articulated well in his absence from the proceedings.
 36. Additionally, in the case of *Skov Estate Limited & 5 others v. Agricultural Development Corporation and another* [2015] eKLR, the Court emphasized the point that the applicant in an application of this nature must demonstrate that it is necessary that he/she be enjoined in the suit. That it is important for him to show that the issues before the Court cannot be effectively adjudicated upon in his absence. Being affected by the order of the Court is not enough, as the Applicant must show that in addition to being affected, the reliefs which will be granted will not be fully decided upon because an important element of fact, which he has, shall miss if he is not added to the proceedings.
 37. The Court of Appeal in the case of *Pashito Holdings Limited & Another Vs Paul Ndungu & 2 Others* [1997]KLR, stated as follows:

“The rule of “audi alteram partem”, which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English law (2nd Edition);

It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him”.
 38. Further, in the case of *Elizabeth Nabangala Wekesa Vs Erick Omwamba & 3 Others; Esther Momanyi Omwamba (applicant)* [2021] eKLR, the Court held as follows:

“There is no doubt anymore that if a party wishes to be joined in a matter he or she must move the Court during the pendency of the proceedings in that matter... the main point is that it (suit) is still alive.”
 39. Similarly, in the case of *Leonard Kimeu Mwanthi v Rukaria M’twerandu M’iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties)* [2021] eKLR, the Court declared as follows: “A party claiming to be enjoined in proceedings must have an interest in the pending litigation.”
 40. This court having been sufficiently guided as above, has carefully perused the sale agreements annexed by the Proposed Interested Parties/Applicants as BKG-1 and BKG-2, and had noted the contents thereon. The Applicants are allegedly in possession of their respective portions of the suit land.
 41. It is apparent that this case has not been heard and it is at its infancy and therefore not finalized. The matter has an interlocutory Application pending and was still proceeding before this instant



Application was filed. It cannot be argued that this Application has been brought to court too late in the day. Therefore, this stage is appropriate for an application of this nature.

42. Additionally, this Application is brought under Order 1 Rule 10(1) of the Civil Procedure Rules, and consequently, it cannot be faulted for non-compliance with the applicable legal procedure.
43. The Defendant's contention that some of the sale agreements annexed by the Applicants pre-date 17th September 2013, when the Plaintiff and the Defendant herein executed a contract for the sale of the suit land is a question of fact, which can only be fully ventilated if the Applicants are afforded an opportunity to be heard in the Court.
44. The Proposed Interested Parties/ Applicants were not made parties to the suit or served with the proceedings. This Court holds and finds that the Applicants have advanced a reasonable claim, in the nature of a potential proprietary interest, over the suit property. It would be contrary to the rules of natural justice for this Court to issue orders that would affect their proprietary interests without being granted an opportunity to be heard.
45. Further, the Defendant/ Respondent did not avail any evidence to support the allegations of a conspiracy contrived by the Applicants herein and Mugumoini Farmers Company Ltd, the original registered proprietor of the suit property, as forming the basis of the instant Notice of Motion Application. This court will borrow the holding in the case of Hellen Wangari Wangechi Vs Carumera Muthini Gathua [2005] eKLR, where the Court held as follows:

“It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed.”

46. Further, Section 107 of the *Evidence Act*, provides as follows:
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”

47. In addition, Sections 109 and 112 of the *Evidence Act* (CAP. 80) state as follows:

S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

S.112 “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

48. Having considered the instant Notice of Motion for joinder of interested parties, the rival written submissions and the relevant provisions of law, the court finds the said Application is merited and consequently, the said Application is allowed entirely. Accordingly, prayers (b) and (c) of the Proposed Interested Parties Notice of Motion Application dated 15th January 2024, be and are hereby allowed, with costs being in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF APRIL 2024.

L. GACHERU



JUDGE

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Absent - Plaintiff/ Respondent.

Mr. Ndurumo Kanyi for Defendant/ Respondent

Ms. Luvita for Proposed Interested Parties / Applicants

L. GACHERU

JUDGE

