IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL (APPLICATION) NO 116 OF 2015

BETWEEN

APPOLLOS KENNEDY MWANGI .... APPLICANT

AND

MARGARET WANJIKU CHEGE ....1ST RESPONDENT/APPELLANT

DANIEL KIPKEMBOI BETT ....2ND RESPONDENT

DAVID KIBITOK KEMBOI ....3RD RESPONDENT

JOSEPH RONO...4TH RESPONDENT

(Application for leave to be enjoined as an interested party in an appeal from the judgment of the Environment and Land Court of Kenya at Kitale (Obaga, J.) dated 23rd September, 2015

in

ELC CASE NO. 55 OF 2009)

****

RULING OF J. MOHAMMED JA

Background

[1] By a Notice of Motion dated 8th March, 2016, **Appollos Kennedy Mwangi** (the applicant) seeks to be enjoined in **Civil Appeal No. 116 of 2015** (the Appeal) as an interested party. This application was premised on the ground that the property, the subject matter of the Appeal, formed part of the estate of **Appollos Mwangi Muna** (**the deceased**). **Margaret Wanjiku Chege** (the appellant) is the 1st respondent herein. Daniel **Kipkemboi Bett** is the 2nd respondent herein, **David Kibitok Kemboi** is the 3rd respondent herein, while **Joseph Rono** is the 4th respondent herein.

[2] A brief background of the application is that in 1964, a group of 18 persons (the purchasers), the respondents included, purchased **LR. No. 1800/3 Kaptien Farm** measuring about 408 acres. They took out a loan from Agricultural Finance Company (AFC) to finance the purchase. The property was subsequently registered in the names of the 2nd and 3rd respondents. When AFC threatened to auction the suit property after a default in servicing the loan, the purchasers approached the deceased who had a neighbouring property, LR No. 1800/4. Each of the 18 purchasers was to cede 6 acres to the deceased so that he could cultivate the land and use the proceeds to service the loan. In addition to the 108 acres, was a farm house built on 12-acres on the land. In total, 120 acres was ceded to the deceased (the suit property comprising 120 acres of LR No. 1800/3 Kaptien Farm).

[3] This was the genesis of the dispute. The purchasers contended that the 120 acres (suit property) was **leased** to the deceased in order for him to cultivate and thereafter service the loan from the proceeds. On the other hand, the deceased contended that he had **purchased** the suit property from the purchasers **Chege Mwangi,** a son of the deceased and his wife **Margaret Wanjiru Chege** (the appellant) the 1st respondent herein occupied the farm house on the suit property. After the death of Chege Mwangi, the appellant continued to reside on and cultivate the suit property.

[4] The deceased eventually paid the loan to AFC and the purchasers sought vacant possession of the suit property. The deceased died on 21st November, 2001. In a Will made on 21st November, 1999 the deceased bequeathed 30 acres of the suit property to the appellant. The deceased also bequeathed to his other dependents portions of the suit property. The deceased had filed a suit in **Eldoret High Court, No. 35 of 1997** claiming that he was entitled to the suit property. The suit was fully heard and dismissed in a judgment delivered on 19th November, 2002 by **Nambuye, J**. (as she then was).

[5] The appellant's continued occupation of the suit property prompted the respondents to file suit at the **ELC Kitale No. 55 of 2009** seeking a declaration that they are the rightful owners of Kaptien Farm and that the appellant is not entitled to the 132 acres she was claiming. Obaga J. ruled in favour of the respondents, consequently declaring the appellant a trespasser on the suit property and issuing an eviction order. Further, the appellant was found liable to pay Kshs.8 million in mesne profits for the years the respondents had been unjustly dispossessed of the suit property. Aggrieved by that decision, the appellant filed Civil Appeal No 116 of 2015. Before the Appeal could be heard, the applicant filed this application.

[6] The application is supported by the affidavit of the applicant and is based on the grounds that: the applicant is one of the four (4) administrators of the Estate of **Appollos Mwangi Muna** (deceased); that as an administrator, the applicant is involved in the day to day running of the estate in consultation with the other Administrators to protect the interest of and for the benefit of the estate; and that the applicant is aggrieved by the judgment of the learned Judge (Obaga, J.) dated 23rd September, 2015, granting declaratory orders regarding ownership of the suit property; and in issuing declaratory orders with regard to land belonging to the estate which did not form part of the land ceded to the deceased.

[7] It was the applicant's further contention that he has a duty and an obligation to the beneficiaries to act legally and protect their interests under the **Law of Succession Act (LSA)** and other relevant laws; that the applicant as the proposed interested party, has legitimate interest to be enjoined in this appeal to protect the interests of the beneficiaries before the Appeal is heard and determined.

[8] The appellant, **Margaret Wanjiku Chege** (the 1st respondent herein), had no objection to the application by the applicant, seeking leave to be enjoined as an interested party in the appeal. In her replying affidavit dated 21st October, 2016, sworn in reply to the application she averred that the various grounds of appeal she raised in the appeal will directly affect the estate of the deceased; that the trial court had noted that since she was not an administratrix of the estate of the deceased, she could not make claims against that estate and the estate was therefore condemned without being heard.

[9] The application was opposed by the 2nd, 3rd and 4th respondents by way of a replying affidavit sworn on 28th April, 2016 by **Joseph Rono**, the 4th respondent herein. In it, he averred that the application is misplaced, incompetent and bad in law on the grounds, *inter alia*, that while the applicant seeks to act for the benefit of the estate of the late deceased, the applicant has not sought consent from the other administrators to be enjoined in the appeal; that as such, the applicant has failed to show that he has locus to make the application that would warrant his joinder in the appeal as an interested party.

[10] It was the 4th respondent's further claim that the administrators of the estate of the deceased were aware of the suit in the lower court and should have applied to be joined in the suit in the **Environment and Land Court (ELC)** as co-defendants; that both the applicant and the 1st respondent herein were aware that the deceased had failed to establish his ownership over the suit property in a previous suit (Kitale High Court Civil Case No. 35 of 1997) where he had sued the 4th respondent, among other parties, and which was dismissed with costs; that the Will of the deceased, in so far as it touches on the suit property is null and void, as was held by the learned Judge (Obaga, J.), who noted that the deceased had drafted his Will with the expectation that High Court Civil Case No. 35 of 1997 would be determined in his favour.

Submissions

[11] During hearing of the application, **Mr. Nderitu**, appearing on behalf of the applicant urged us to allow the application. He submitted that even at this stage, it would be consistent with the judgment for the applicant to participate in the proceedings if this Court deemed it necessary. Relying on the Appellate Jurisdiction Act and the overriding objectives, learned counsel emphasized that the duty of this Court is to facilitate the just and expeditious disposal of disputes, and that there would be no prejudice suffered by the parties should the applicant participate in the appeal as an interested party.

Mr. Ndarwa, learned counsel for the 1st respondent did not oppose the application. He submitted that there is a nexus between the 1st respondent's appeal and the applicant's position and was amenable to allowing the applicant to be granted leave to participate in the appeal to enable the court come to a just and fair determination of the appeal.

[12] Opposing the application, counsel for the 2nd, 3rd and 4th respondents relied on written submissions filed on their behalf by **Messrs. J. K. Bosek & Company Advocates**. It was the 2nd, 3rd and 4th respondents' submission that the applicant intends to raise matters that are *res judicata*, and which had been concluded in **Kitale High Court Civil Case No 35 of 1997**; that in that case, a court of competent jurisdiction had determined the issue of ownership of the suit property; that there was no appeal against that decision and the matter ought to be allowed to rest. It was counsel's further submission that the applicant cannot bring this application with a view to making representations which would, in effect, challenge or appeal the decision of the court in Kitale HCCC No. 35 of 1997, in view of the fact that the executor of the Will of the deceased did not lodge an appeal against that decision.

[13] Counsel submitted that the applicant's argument is founded on a void Will as the same cannot supersede a court decree in order to bequeath property not owned by the deceased; that the applicant was not a party to the suit before the High Court leading to the appeal; that the application does not set out the enabling provisions of law as required; that the issues raised by the applicant are *res judicata*, having been conclusively determined in Kitale HCCC NO. 35 of 1997; that in that suit, the finding of the court was that the deceased had not bought the suit property, which finding was never appealed against; and that the applicant seeks to be enjoined in a personal capacity and not as an administrator of the deceased's estate.

Determination

[14] This application is brought under the **Appellate Jurisdiction Act, the Court of Appeal Rules, 2010** and the **Court of Appeal Practice Directions 2015**, the sum of which gives this Court jurisdiction to hear appeals from the High Court. As was stated by this Court in **Attorney General vs Kenya Bureau of Standards & another [2018] eKLR,** (Civil Appeal (Application) No. 132 of 2017, the power of this Court to join a party to an appeal:

> ***"..can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned."***

[15] In **Central Kenya Limited v Trust Bank Limited & 5 others [2000] eKLR,** (Civil Appeal No. 222 of 1998), this Court held that a court would generally allow the joinder of parties as long as there would be no injustice or prejudice occasioned by such joinder.

From these authorities, I have no doubt that this Court has the power to entertain this application and may, if the circumstances so permit, allow for the joinder of a party to proceedings before this Court.

[16] On the question whether the applicant has made out a case for his joinder to the appeal, in **Francis Karioko Muruatetu & another v Republic & 5 others [2016] eKLR,** (Supreme Court Petition No(s.) 15 & 16 of 2015 (Consolidated), the elements applicable where a party seeks to be joined in proceedings were set out as follows:

> ***"The following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: One must move the court by way of a formal application. Enjoinment is not as of right, but at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:***
>
> ***(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 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.***
>
> ***(ii) 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."***

[17] In **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR,** (Petition No. 12 of 2013), the Supreme Court elucidated the role of an interested party in proceedings before the court and stated as follows:

> ***"… [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.***

[18] It is notable that the concept of an "interested party" is not provided for either in the Appellant Jurisdiction Act or the Court of Appeal Rules (the Court Rules) instead, provision has been made under Rule 77 of the Court Rules for an affected party.

Rule 77 of the Court Rules provides as follows:

> ***"(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.***
>
> ***Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.***
>
> ***(2) Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal."***

[19] I find that the estate of the deceased was an affected party and therefore the executors of the deceased's will ought to have been served.

[20] In **Hamisi Yawa & 36,000 others v Tsangwa Ngala Chome & 19 others [2018] eKLR,** (Civil Application No. 100 of 2018), this Court rendered itself as follows on the issue of joinder of parties:

> ***"11. … The rationale behind the joinder of any party to proceedings is to have on board a necessary party for purposes of determining the real issues in dispute. Perhaps, this is reason behind the general guiding principle that joinder of a party like amendment of pleadings, should be freely allowed and at any stage of the proceedings, provided that it will not result in prejudice***

or injustice to the other party which cannot properly be compensated for in costs."

[21] The applicant herein is a son of the deceased and is one of the four (4) administrators of the Estate of the deceased. He seeks to be enjoined in Civil Appeal No. 116 of 2015 which is an appeal against the judgment delivered in ELC Kitale No. 55 of 2009.

[22] **In Central Kenya Ltd v Trust Bank Limited & 5 others** (Supra), this Court stated as follows:-

> ***"… We stress that power of the Court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage. Indeed a party can be joined even without applying."***

[23] In the circumstances of this case, I find that the applicant's stake and relevance in the appeal as an administrator of the estate of the deceased has been established. It has not been established by the respondents that joinder of the applicant will prejudice the other parties or that the joinder will convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.

[24] Accordingly, I allow the notice of motion dated 8th March, 2016 with costs to the 2nd, 3rd and 4th respondents.

Dated and delivered at Kisumu this 30th day of December, 2019

J. MOHAMMED

……………………..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

RULING OF H. OKWENGU, JA.

My sister Mohammed, JA has captured the essence of the motion before us in her draft that I have the opportunity to read. I do not therefore need to set out the facts. I am in entire agreement with the conclusion that she has arrived at. The motion has been properly brought before the court and since the dispute subject of the appeal involves ownership of LR N0. 1800/3 Kaptien Farm which it is claimed belonged to the deceased and since the applicant has a stake in the estate of the deceased both as an administrator and a beneficiary, the applicant is an interested party in the appeal. Accordingly, the application will be allowed and the applicant shall be joined as an interested party in Civil Appeal No. 116 of 2015.

This ruling has been delivered in accordance with Rule 32(3) of the Court of Appeal Rules Githinji, JA having ceased to hold office by virtue of retirement from service.

Dated and delivered at Kisumu this 30th day of December, 2019.

HANNAH OKWENGU

…………………...……………..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR