



**Chege & 2 others (Being the Administrators Ad Litem of the Estate of Chege Ng'ang'a alias Chege Nganga alias David Chege Ng'ang'a - Deceased) v Ngundu Farmers Co-operative Society Limited & 2 others; Kimani (Being the Administrator of the Estate of Asaphkimani Kuria - Deceased) (Interested Party) (Environment & Land Case 335 of 2018) [2024] KEELC 3818 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3818 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 335 OF 2018**

**JA MOGENI, J  
MAY 9, 2024**

**BETWEEN**

**MERY WAMBAIRE CHEGE ..... 1<sup>ST</sup> PLAINTIFF  
STEPHEN NGANGA CHEGE ..... 2<sup>ND</sup> PLAINTIFF  
IRENE RUGURU CHEGE ..... 3<sup>RD</sup> PLAINTIFF  
BEING THE ADMINISTRATORS AD LITEM OF THE ESTATE OF CHEGE  
NG'ANG'A ALIAS CHEGE NGANGA ALIAS DAVID CHEGE NG'ANG'A -  
DECEASED**

**AND**

**NGUNDU FARMERS CO-OPERATIVE SOCIETY LIMITED ... 1<sup>ST</sup> DEFENDANT  
THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**MARGARET WANJIRU KIMANI (BEING THE ADMINISTRATOR OF THE  
ESTATE OF ASAPHKIMANI KURIA - DECEASED) ..... INTERESTED PARTY**

**RULING**

1. Before me for determination is the Notice of Preliminary Objection dated 11/07/2023 by the Plaintiffs/Respondents which seeks to strike out the Interested Party's Application dated 19/06/2023 on the following grounds:



1. The Interested Party is not a proper party to this suit having not sought leave nor has any leave been granted for the Interested Party to be enjoined as such in this suit contrary to Order 1 Rule 10(2) of the Civil Procedure Rules, 2010.
  2. The Interested Party and her representative firm of Advocates are strangers to this suit and cannot be granted audience having not sought leave nor has any leave been granted to come on record after entry of Judgement on 8/06/2023 contrary to Order 9 Rule 9 of the Civil Procedure Rules, 2010.
  3. The Interested Party's claim in respect to a share of the property being Title No. Nairobi/Block 126/749 has been overtaken by events, this property having long been distributed to respective beneficiaries of the Estate of Chege Ng'ang'a alias Chege Nganga alias David Chege Ng'ang'a (Deceased) as per the Certificate of Confirmation of Grant dated 27/01/2023 issued in High Court Succession Cause No. E2457 OF 2021 - Nairobi-In the Matter of Estate of Chege Ng'ang'a alias Chege Nganga alias David Chege Ng'ang'a (Deceased) with the beneficiaries having long taken possession of their respective shares.
  4. The Interested Party's claim and/or interest in a property that formed part of the Estate of Chege Ng'ang'a alias Chege Nganga alias David Chege Ng'ang'a (Deceased) being Title No. Nairobi/Block 126/749 ought to have been canvassed in High Court Succession Cause No. E2457 OF 2021 - Nairobi- In the Matter of Estate of Chege Ng'ang'a alias Chege Nganga alias David Chege Ng'ang'a (Deceased).
  5. This Honourable Court lacks jurisdiction over the distribution of a deceased person Estate.
  6. The Interested Party Notice of Motion Application dated 19/06/2023 is thereby fatally defective and made in abuse of the Court Process.
2. The Notice of Preliminary Objection is opposed through a Replying Affidavit sworn by Margaret Wanjiru Kimani, the Interested Party herein on 16/01/2024.
  3. The Interested Party/Applicant filed the Notice of Motion Application dated 19/06/2023 pursuant to Article 40 & 60 of *the Constitution* of the Republic of Kenya, Order 1, Order 22 Rule 22, Order 40, Order 50 & Order 51 Rule 1 & 13 of Civil Procedure Rules, Section 1A, 1B, 3A and 95 of the *Civil Procedure Act* and all enabling provisions of the laws of Kenya. The Applicant is seeking for the following Orders:
    1. Spent.
    2. Spent.
    3. Spent.
    4. That the Honourable Court be pleased to set aside the judgment dated and delivered on 8/06/2023 and the resultant order and/or decree and, in place, order that the suit be heard de novo.
    5. That the Honourable Court be pleased to join the Interested Party/ Applicant to the suit and, further, be pleased to enlarge time
    6. and grant the Interested Party leave to file Statement of Defence and Counterclaim out of time.
    7. That pending inter partes hearing and determination of this suit, the Honourable Court be pleased to grant an order of injunction against the Plaintiffs/Respondents and/or their



agents, servants, employees and any person claiming through the Plaintiffs/Respondents from invading, alienating, selling, transferring, charging, leasing, disposing or dealing, in any manner whatsoever, with the property known as NAIROBI/BLOCK 126/749.

8. Spent.
9. That in the alternative, pending inter partes hearing and determination of this suit, the Honourable Court be pleased to grant an order of Status Quo ante 8/06/2023
10. That costs of the Application be provided for.
4. The Application is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Margaret Wanjiru Kimani, the Applicant herein, sworn on 19/06/2023.
5. In response to the Application, the Plaintiffs/Respondent filed a Notice of Preliminary Objection together with a Replying Affidavit sworn by Mery Wambaire Chege on 11/07/2023.
6. On 24/10/2023, the Court directed that the Notice of Preliminary Objection be heard together with the Application dated 19/06/2023 by way of written submissions. A Ruling date was scheduled. By the time of writing this Ruling, it is only the Interested Party/Applicant who had duly submitted and I have considered them. The Interested Party/Applicant filed her written submissions dated 16/01/2024 on the even date.

#### **Issues for determination**

7. Having considered the instant Application, Preliminary Objection together with the Interested Party/Applicant's submissions and the authorities cited to me, the following arise as the issues for determination before this court.
  - a. Whether the preliminary objection raised is merited.
  - b. Whether the proposed Interested Party's Application dated 19/06/2023 is merited.

#### **Analysis and Determination**

##### **Whether the Preliminary Objection raised is merited.**

8. As a Preliminary objection is capable of disposing a matter preliminarily the Court finds it prudent to first determine if the said Notice of Preliminary Objection is merited. In the event the Preliminary Objection is upheld, then there would be no need to determine the Notice of Motion Application by the Proposed Interested Party.
9. A preliminary objection was clearly described in the case of Mukisa Biscuits Manufacturing Company Limited –versus- West End Distributors Limited (1969) EA 696 where Sir Charles Newsbold P. stated;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion.”



10. In the same authority Law J A. stated;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary objection may dispose of this suit.....”

11. The Plaintiffs/Respondents have raised various grounds in support of their Preliminary Objection. Essentially, it is their case that the Applicant has no locus standi for file the Application amongst other grounds. I note that there is no pending suit upon which the Application dated 19/06/2023 can be premised on as required under Order 40 and 45 of the Civil Procedure Rules. The Application has been brought pursuant to various provisions of law amongst them Order 40 of the Civil Procedure Rules that seeks for a temporary injunction. The proposed Interested Party also seeks to set aside the Judgment delivered on 8/06/2023, which falls under Order 45 of the Civil Procedure Rules.

12. The Applicant has sought for the court to set aside the judgment delivered on 8/06/2023. It is not in doubt that the instant suit had already been finalized as this court delivered a judgment and the matter was concluded. There is no doubt that the Applicant/Interested party was not a party to the suit.

13. This Court notes with concern the lackadaisical way or casual manner in which counsel drew their pleadings and even submissions. For instance, counsel for the Applicant in the said Application dated 19/06/2023, refers to his client as the Interested Party. The pleadings should have referred to his client as a proposed Interested Party since the Applicant has not been joined in the proceedings. Therefore, the reference in the pleadings is wrong.

14. The Applicant has sought to be enjoined as an interested Party. Given that the suit herein has already been finalized and given the Plaintiff has raised the issue of whether the Applicant has locus standi, and since the issue of locus standi denoted the right to bring a suit, the Court finds that what has been raised by the Plaintiff herein amounts to a Preliminary Objection.

15. So, is the Preliminary Objection merited? The Applicant has sought to be enjoined in the suit. it is not in doubt that judgment was delivered in this matter on 8/06/2023. This effectively concluded the suit herein. The question would then be which suit would be the proposed Interested Party be enjoined in. Order 1 Rule 10 (2) of the Civil Procedure Rules provides;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

16. The ideal situation is that a person should be added to a suit before the delivery of the Judgment. However, that does not mean that a party cannot be joined in a suit after the delivery of the Judgment where circumstances demand so. The rule clearly provides for joining parties at any stages of the proceedings. In this instant case, Judgment has already been rendered. Among the prayers being sought in the proposed Interested Party’s application is an order to set it aside. The Prayer that follows is a prayer for her to be enjoined in the suit. it is my considered view that the proposed Interested Party would be enjoined in the suit if the Judgment is set aside. This would require the Court to interrogate the application first.



17. In the case of Absolom Opini Mekenye ...Vs...James Obegi [2018] eKLR where the Court held that;

“Order 1 Rule 10 (2) in my view envisages a situation where the suit has not been heard and determined and that is why it provides for joinder of a party either as plaintiff or defendant or a party whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit (emphasis added). Where a judgment has been entered it is my considered opinion that a party cannot be enjoined to the proceedings unless the judgment is either reviewed and/or set aside in a manner to accommodate the participation of the enjoined party.

The Court of Appeal in the case of JMK -vs- MWM & Another [2015] eKLR (Civil Appeal No. 15 of 2015 – Mombasa) while considering the application of Order 1 Rule 10(2) of the Civil Procedure Rules stated thus:-

“We would however agree with the respondent that Order 1 Rule 10(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sarkar’s Code [supra] quoting authority, decisions of Indian courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of Civil Procedure Rules in Tanga Gas Distributors Ltd –vs- Said & Others [2014] E. A 448 stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes in applicable...”

18. In the present matter at the time the plaintiff applied for the joinder of the interested parties’ judgment had been entered and the plaintiff was in the process of executing the decree. The joinder of the interested parties at that stage would not have enabled them to participate in the proceedings as parties.”

19. In the instant Application, a prayer for setting aside of judgment was made contemporaneously with the prayer for joinder. In this Court’s view, where the two prayers are sought in that matter, the application is competent.

20. In light of the foregoing, my view is that allowing the Preliminary Objection on this ground, would occasion miscarriage of justice.

21. Another ground of objection is that the Interested Party and her representative firm of Advocates are strangers to this suit and cannot be granted audience having not sought leave nor has any leave been granted to come on record after entry of Judgement on 8/06/2023 contrary to Order 9 Rule 9 of the Civil Procedure Rules. It is also of note that a preliminary objection, in law, needs to be clear and self-evident requiring no minute scrutiny of facts. (See Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR).

22. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application



with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”
23. Order 9 Rule 9 of the Civil Procedure Rules applies to parties who wish to change advocates after the entry of judgment. In my considered view and as has been held in various court decisions and rightly posited by the respondent, the intent of Order 9 Rule 9 and 10 of the Civil Procedure Rules was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. In the present case, the Court already found that the Applicant/Interested party was not a party to the suit. It is therefore incorrect for Counsel to contend that M/s Ngithi, Koome & Associates Advocates required the leave of the court to come on record.
24. The third ground raised in the preliminary objection is that the Interested Party’s claim has been overtaken by events as the suit property has long been distributed to respective beneficiaries. In my view, this is not a ground upon which a preliminary objection may be founded. It is trite law that preliminary objection should be based on pure points of law. This ground is argumentative and could only be proved by calling evidence. See Moses Wanjala Lukoye –Vs- Benard Alfred Wekesa Sambu & 3 Others [2013] eKLR. The argument that the Interested Party’s claim in respect to a share of the suit property has been overtaken by events, this property having long been distributed to respective beneficiaries of the Estate of Chege Ng’ang’a alias Chege Nganga alias David Chege Ng’ang’a (Deceased) as per the Certificate of Confirmation of Grant dated 27/01/2023 issued in High Court Succession Cause No. E2457 OF 2021 - Nairobi-In the Matter of Estate of Chege Ng’ang’a alias Chege Nganga alias David Chege Ng’ang’a (Deceased) with the beneficiaries having long taken possession of their respective shares is, in my opinion an assertion that bears factual aspects and calls for proof by adducing evidence for its authentication. In other word, witnesses may have to be called or evidence adduced to prove the fact that the property has been distributed and this court cannot make an assumption without evidence in that regard. The third ground accordingly fails the test of preliminary objection.
25. The Plaintiffs/Respondent aver that the Interested Party’s claim ought to have been canvassed in the Succession court and that this Court lacks jurisdiction over the distribution of the deceased person estate. On the other hand, the Interested Party contends that the suit before this Court relates to ownership of the suit premises and therefore this court has jurisdiction to determine if Asaph Kimani Kuria was a bona fide purchaser for value having bought 4 acres to be excised from the suit property from Chege Ng’ang’a alias Chege Nganga alias David Chege Nganga- deceased. That the correct court to determine the issues of ownership of the 4 acres to be excised from the suit property is the ELC Court and not the Succession Court.
26. The jurisdiction of a court flows from *the Constitution* and or statute or both. This position was affirmed by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR. The *Law of Succession Act* in section 47 provides for the jurisdiction of the High Court in respect of matters falling under the Act as follows: -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”



27. Article 162(2) (b) of *the Constitution* provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. To give effect to Article 162 (2) (b) of *the Constitution*, Parliament enacted the Environment & Land Court Act. Section 13(2) of the Environment & Land Court Act provides as follows:-

- “2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes –
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - b. relating to compulsory acquisition of land;
  - c. relating to land administration and management;
  - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland; and
  - e. any other dispute relating to environment and land.”

28. The jurisdiction of the Environment and Land Court vis a vis the High Court with respect to succession matters was considered by Nyamweya J. in *Mbula Muoki Ndolo & Another vs Kenya Power and Lighting Company Limited* [2017] eKLR as follows:

“In *Salome Wambui Njau* (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v *Caroline Wangui Kiguru*, ELC (2013) eKLR, I held that in matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of *the Constitution* and the High Court as the Succession Court under Section 47 of the *Law of Succession Act* would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.”

29. Similarly, the court in *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR had this to say;

“.....The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved



through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

30. In the instant case, the Interested Party’s claim revolves around ownership of 4 acres to be excised from the suit property. The Applicants’ case is that her late husband purchased 4 acres of land from Chege Ng’ang’a through a sale agreement dated 13/11/1984 for the sum of Kshs. 26,000.00. That the deceased proprietor executed a share transfer form and that the same conferred ownership of the said 4 acres upon her husband. It is clear that the matter does not relate to the distribution of assets comprised in the estate of Chege Ng’ang’a alias Chege Nganga alias David Chege Nganga- deceased to the beneficiaries.
31. Having carefully studied the pleadings, it is abundantly clear to this court that the main point of contention is the ownership of the suit property. Indeed, disputes as between the estate of a deceased person and third parties need not be determined within the succession cause. The legal infrastructure in place provides for a resolution elsewhere, and upon a determination being made by the civil court, the decree or order can be made available to the probate court, if need be, for implementation.
32. From the filed pleadings, it is apparent that the 4 acres to be excised from the suit property is outside the realm of the succession court, the same having been allegedly sold off to the Interested Party’s late husband. She claims that he was a bona fide purchaser for value, a question which undoubtedly involves the application of the law on title to land and which this court is competent to determine. That being the case, it is the finding of this court that this court is vested with jurisdiction to determine this suit.
33. There is thus no substance in the argument of the Plaintiffs/Respondents that this court has no jurisdiction. Grounds 4 and 5 fail the test of a preliminary objection.



34. Based on the above findings, I find that the Preliminary Objection dated 11/07/2023 is devoid of merit and the same is dismissed.

**Whether the proposed Interested Party's Application dated 19/06/2023 is merited.**

35. Having dismissed the Defendant's Preliminary Objection, I shall now focus my gaze on the Interested Party's Application dated 19/06/2023. The main issues for determination in this application are whether the proposed Interested Party can be enjoined, whether the court should set aside the judgment dated and delivered on 8/06/2023 and order that the suit be heard de novo and whether the Applicant has met the threshold for granting an order of temporary injunction/status quo ante 8/06/2023 pending determination of this suit.
36. The Applicant/Proposed Interested Party deponed that she is the Administrator and sole beneficiary of the estate of Asaph Kimani Kuria- Deceased who was her husband. That on or about 13/11/1984, her husband bought 4 acres of land from Chege Ng'ang'a alias Chege Nganga alias David Chege Nganga-Deceased through a sale and purchase shares for the sum of Kshs. 26,000.00. Subsequently, the deceased proprietor executed a share transfer form in the presence of the District Officer Easter Division-Nairobi and the same conferred ownership of 4 acres upon her husband. She contends that she has been following up on transfer and registration of the 2 shares with the 1<sup>st</sup> Defendant but to date, her husband's share of the property has never been transferred to his name.
37. The Applicant contended that when following up on the registration of the 4 acres that her husband bought, she discovered that the Plaintiffs/Respondent had approached the Honourable Court claiming absolute ownership of the property to the exclusion of her husband and that judgment had been delivered on 8/07/2023. She has never been served with any pleadings concerning ownership of the property and had she been served, she would have filed her Statement of Defence and Counterclaim in the matter so as to claim the 4 acres her husband had bought.
38. It is her contention that if the judgment of the Honourable Court is not stayed and set aside, the estate of Asaph Kimani Kuria-Deceased stands to suffer irreparable harm and loss, which harm and loss cannot be quantified. Her Statement of Defence and Counterclaim for the 4 acres of land that her husband had bought from the deceased proprietor will enable the court to effectively and conclusively determine the question as to whether her husband had a valid claim for the 4 acres to be excised from the property.
39. She added that the Applicant is ready and willing to abide with all orders and directions that the Honourable Court will deem fit to grant to expedited disposal of the matter. this application has been made without unreasonable delay and that the Respondents shall not suffer any prejudice if this Application is heard and determined on its merits. Finally, that it is in the interest of justice and equity that this application be allowed as prayed.
40. Lastly, she deponed that if the judgment is enforced as it is, the estate of Asaph Kimani Kuria-Deceased stands to suffer and will lose out on a valuable property that was legally and lawfully acquired. That the Respondents failed to disclose to the Honourable Court that the deceased proprietor had sold 4 acres of the suit land to Asaph Kimani Kuria and, therefore, the Honourable Court was denied an opportunity to render a true and accurate judgment based on accurate information.
41. In response, the Plaintiffs deponed that The Plaintiffs contended that the present application is devoid of any merits. She averred that Chege Ng'ang'a alias Chege Nganga alias David Chege Ng'ang'a (Deceased) did not sell the suit property to Asaph Kimani Kuria - Deceased, as claimed. The alleged Sale Agreement provided by the Interested Party lacks authentication, and both parties involved are



- deceased, rendering it unreliable. The Interested Party's claim to a portion of the property is refuted by the fact that they were never in possession of it. Additionally, the dispute between Chege Ng'ang'a and Asaph Kimani Kuria was resolved amicably, and compensation was provided. Furthermore, upon Chege Ng'ang'a's demise, his estate was distributed among beneficiaries, as confirmed by the High Court Succession Cause. Asaph Kimani Kuria's beneficiaries are not entitled to claim a share of the property as they were compensated during Chege Ng'ang'a's lifetime. Therefore, the Interested Party's claim is belated and lacks merit, and there are no grounds for the court to grant their application.
42. It is the Respondent's contention that the Interested Party has not established ownership and/or beneficial interest in the property being Title No. Nairobi/Block 126/749. That it is clear that the Interested Party claim to a share of Title No. Nairobi/Block 126/749 on behalf of the Estate of Asaph Kimani Kuria (Deceased) is an attempt to belatedly thwart the distribution of the said property to the beneficiaries of the Estate of Chege Ng'ang'a Alias Chege Nganga Alias David Chege Ng'ang'a (Deceased). No sufficient cause has been demonstrated to grant any of the Orders sought. In any event, the Orders sought by the Interested Party have been overtaken by events by virtue of distribution of the property being Title No. Nairobi/Block 126/749 among the beneficiaries of the Estate of Chege Ng'ang'a Alias Chege Nganga Alias David Chege Ng'ang'a (Deceased).
43. The Plaintiffs aver that the Interested Party remains a stranger in this suit and cannot obtain any of the Orders sought. That the plaintiffs and the other beneficiaries of the Estate of Chege Ng'ang'a Alias Chege Nganga Alias David Chege Ng'ang'a (Deceased) stand to suffer great prejudice, loss and damage in the unfortunate event of grant of the Orders sought by the Interested Party. On the other hand, the Interested Party has no rights to a share of Title No. Nairobi/Block 126/749 having not been in possession hereof at any time whatsoever and stands not to suffer any prejudice, loss and damage that can be put right by way of compensation.
44. Litigation ought to come to an end to enable Decree holders enjoy the fruits of the Judgement. That further, service of Summons in this suit was ordered to be effected through substituted service by an advertisement in compliance to which the Plaintiff/s/decree holders placed an advertisement in the standard newspaper of 8/09/2020 but despite the said public advertisement the interested parties did not institute their claim until after hearing and judgement entered in favour of the decree holder
45. The common gist of this application is that this suit was heard and determined without joinder of the Applicant who claims that her husband purchased 4 acres which was to be excised from the suit property but had never received a title to date. The Applicant maintains that the Respondents failed to disclose to the Court that the deceased proprietor had sold 4 acres of the suit land to Asaph Kimani Kuria and therefore the Court was denied an opportunity to render a true and accurate judgment based on accurate information. She believes that her statement of defence and counterclaim for the 4 acres of land that her husband had bought from the deceased proprietor will enable the court to effectively and conclusively determine the question as to whether her husband had a valid claim for the 4 acres.
46. Central to the applications before court is the issue of whether the applicants' right to be heard in this suit existed. The right to be heard is embedded in Article 50 of *the Constitution* which provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”



47. In our justice system *the constitution*, the supreme law of the land, guarantees a citizen's inalienable right to be heard. This court's task in the instant application is to establish whether the applicant should have been heard, and if she was ever accorded such an opportunity to be heard.
48. It is not for this court to examine in exquisite detail the depth of the merits of their claim at this juncture and in so doing try their case in this application. In this court's view the applicant has reasonably established that she has some form of interest in the suit land. She has also demonstrated that the orders made in the conflict between the plaintiffs and the 1<sup>st</sup> defendant are bound to affect her late husband's interest in the said land.
49. There is no doubt that this court has jurisdiction to enjoin a party to a suit at any stage of the proceedings. Order 1 Rule 10(1) of the Civil Procedure Rules is the authority for that proposition. It provides as follows:

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

50. In the case of Lilian Wairimu Ngatho & Another -vs- Moki Savings Co-operative Society Limited & Another [2014] eKLR the court, (Nyamweya J.,) held as follows:

"The provisions of Order 1 Rule 10(2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in Black's Law Dictionary Ninth Edition at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising."

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage."

51. In the instant application a prayer for the setting aside of judgment was made contemporaneously with the prayer for joinder.
52. In this court's view where the two prayers are sought in that manner, the application is competent.
53. In the case of J M K -vs- M W M & Another [2015] eKLR the court observed as follows:

"Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the



suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

31. In the Boaz Kipchumba Kaino case (supra) this court observed as follows:

“In the J M K -vs- M W M & Another [2015] eKLR the Court of Appeal set aside an order of the Employment and Labour Relations Court made on an application filed after judgment seeking to enjoin the applicant as a party in the matter. However, the court in that case considered two factors:

1. The applicant's reputation was at stake in that the employment and labour relations court had found the applicant guilty of sexual harassment without granting the applicant an opportunity to be heard.
2. The application had alongside the order of joinder sought the setting aside of the judgment.”

54. In the light of the foregoing, I view the application before me as fit for consideration and that this court has the jurisdiction in certain circumstances to enjoin a party after judgment has been delivered. Certainly, in this case, the applicant has passed the test, and in my view, she can be enjoined to this case.

55. The Applicant has an interest in the land and certainly is entitled to be enjoined in the matter. Only a setting aside of the judgment followed by a substantive trial involving her in the matter can enable her realize her constitutionally guaranteed right to be heard in this manner. She has sought an order of setting aside judgment. For those reasons I find that she is entitled to that order.

#### **Temporary injunction/status quo ante be restored**

56. First, the Black's Law Dictionary, Butter Worths 9<sup>th</sup> Edition, defines Status Quo as a Latin word which means: “the situation as it exists”.

57. The purpose of an order of status quo has been reiterated in a number of decisions. In Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR, Odunga J. stated,

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...”



58. In *TSS Spinning & Weaving; Company Ltd Vs Nic Bank Limited & another* [2020] eKLR, the unpacked the purpose of a status quo order as follows:

“In essence therefore, a status quo order is meant to preserve the subject matter as it is/ existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”

59. Apart from preserving the substratum of the subject matter, the court has also found an order of status quo as a case management strategy, where the court is keen to prevent prejudice as between the parties to a matter pending the hearing and determination of the main suit.

60. Having discussed the definition and purpose of a status quo order, the next question is the nature of the order and whether it differs from an injunctive order.

61. *Murithi J in Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012*, described the nature of a status quo order as follows:

“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

62. The Plaintiffs/Respondent have deponed that the Estate of Chege Ng'ang'a alias Chege Nganga alias David Chege Ng'ang'a (Deceased) which comprises the subject property has long since been distributed among his beneficiaries as per the Confirmation of Grant and respective beneficiaries taken their respective shares. The subject property is no longer part of the Estate of Chege Ng'ang'a alias Chege Nganga alias David Chege Ng'ang'a (Deceased). Aside from this, I note that it is not in dispute that the Applicant/Interested Party has never taken possession of the suit property.

63. Status quo orders can be made by the court on its own motion in exercise of its general jurisdiction. Status quo orders can be issued for the purpose of preserving the subject matter of the property, for case management reasons and in a bid to prevent prejudice from being visited against either party to the case. The status quo orders are to freeze any activities that might imperil the final outcome of the case by preserving the subject matter as is, pending the hearing and final determination of the main suit. Lastly, status quo orders are different from injunctions, meaning that the considerations to be established for grant of injunctions are not necessary under status quo orders.

64. Guided by the above, the Court finds that the Applicant has failed to satisfy the conditions precedent to a grant of the injunctive orders sought. Further, it is this Court's view that the Applicant has not convinced the court that there is any need for restoration of the status quo ante.

#### **What orders should issue?**

65. Consequently, I find that the Interested Party's application dated 19/06/2023 has merits and I grant the same and I issue the following orders:



- a. The Preliminary Objection dated 11/07/2023 is dismissed.
- b. The Judgment in this suit delivered on the 8/06/2023 and all consequential orders are hereby set aside and the suit be heard de novo.
- c. The applicant is hereby enjoined into the suit as an interested party.
- d. That the interested parties herein are granted leave to tender evidence and participate in the proceedings herein.
- e. I make no order as to costs.
- f. Further order, Mention on 11.06/2024 for further directions.

66. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2024.**

.....

**MOGENI J**

**JUDGE**

In the virtual presence of: -

Mr. Kariuki GE for Decree Holder/Respondent

No appearance for Plaintiff and Interested Party

C. Sagina - Court Assistant

