



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiunga & another v Mutuma; Githinji (Proposed Interested Party) (Environment and Land Appeal E004 of 2022) [2024] KEELC 5305 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5305 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

**CK YANO, J**

**JULY 18, 2024**

**BETWEEN**

**JAMES MWENDA KIUNGA ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN MAINGI KUNGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MWITI MORRIS MUTUMA ..... RESPONDENT**

**AND**

**JOSEPH MUCHINA GITHINJI ..... PROPOSED INTERESTED PARTY**

**RULING**

1. By a notice of motion application dated 1<sup>st</sup> March 2024, the proposed interested party/applicant is seeking orders to vary and/or set aside the orders issued on 23<sup>rd</sup> January, 2024 dismissing the application dated 23<sup>rd</sup> August 2023 and for the applicant to be granted leave to be joined in this suit as an interested party.
2. The application is brought pursuant to the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rule 1 and Order 1 Rule 15 of the *Civil Procedure Rules*, Article 48, 50(1) and 159 of the *Constitution* of Kenya and all other enabling provisions of the law. It is based on the following grounds;
  1. That the proposed interested party filed its application for joinder on 23<sup>rd</sup> August 2023.
  2. That the proposed interested party has all along prosecuted this case and attended all mentions and hearings without fail.
  3. That on 23<sup>rd</sup> January, 2024 the proposed interested party learnt that its application had been dismissed on 23<sup>rd</sup> January, 2024.



4. That the interested party's counsel was online on 23<sup>rd</sup> January, 2024 but was unable to be admitted on the Microsoft teams portal to prosecute its case.
  5. That the interested party is still willing to be joined in the case and prosecute this case to its logical conclusion.
  6. That it is trite law that mistake of counsel should never be revisited in an innocent party.
  7. That if the interested party is not joined in the suit he risks being chased away from the seat of justice and thus deny him an opportunity to be heard and ventilate the issues under dispute.
  8. That no prejudice will be suffered by the applicant (sic) in any way should this application be allowed.
  9. That it is in the interest of justice that the proposed interested party be joined to the suit as he has a legitimate claim in the dispute herein.
3. The application is supported by the affidavit of Orimba Tobias Odhiambo, counsel for the proposed interested party sworn on 1<sup>st</sup> March 2024 in which he repeats the above grounds.
  4. The application is opposed by both the appellants herein and the respondent herein. The appellants filed grounds of apposition dated 26<sup>th</sup> June 2024 wherein they aver that the application is frivolous, vexatious and scandalous since it is a calculated move by the applicant and the respondent to defeat the appellants claim to recover their family land. That the applicant was not a party at the trial and his cause of action, if any arose while this matter was still pending for determination before court. That the applicant has failed to demonstrate that he ever conducted any due diligence or visited the suit land before agreeing to accept the same as collateral from the respondent.
  5. The appellants state that the applicant and the respondent are working in collusion to defeat the appellant's right to the suit property which is their ancestral land and only home. That the applicant has failed to show how his joinder is necessary and/or relevant in the determination of this suit, adding that the joinder of the applicant will only bring in fresh issues yet this matter is at the tail end of the appellate stage since both the appellants and the respondent have filed their respective submissions on the appeal.
  6. The appellants aver that they have never seen the applicant on the suit land and has never attempted to fence the same as alleged. That the applicant ought to have carried out due diligence over the suit land before accepting the same which would have revealed that the appellants occupy the land with their families. That the applicant has no claim against the appellants and as such he should pursue other means to enforce his rights against the respondent if any. It is the appellant's contention that the application is an abuse of the court process and urged the court to dismiss the same with costs and proceed to fix a date for judgment.
  7. The respondent filed a replying affidavit sworn by himself on 30<sup>th</sup> April 2024. It is the respondent's contention that the applicant's apprehensions are baseless and unfounded. Relying on legal advice the respondent avers that there is no party known as interested party in Civil proceedings as the same has not been provided under the relevant statute and rules, hence the prayer to be joined as an interested party is misplaced and cannot be granted.
  8. The respondent states that the dismissal of the application was predicated upon failure by the applicant herein and his advocates to prosecute his application dated 23<sup>rd</sup> August 2023 specifically on 23<sup>rd</sup> January, 2024 when the same came up for hearing. That the knowledge of hearing of the application by the applicant is not disputed as he acknowledges the same. That the applicant has not proffered



any explanation why he did not attend court on 23<sup>rd</sup> January 2023 when his application came up for hearing. That the interested party is an indolent litigant and cannot fault his advocates as he has sworn no affidavit alleging that he was not aware of the hearing date or an explanation why he could not attend court. That the explanation that the counsel for the applicant was online but was not admitted has not been substantiated, and has not stated any efforts made.

9. The respondents state that the law grants this court power to dismiss a suit or an application for non-attendance which power was justly utilized in this case. It is the respondent's contention that the application is without merit because the reasons advanced in support of the application are not convincing and urged the court to dismiss it.
10. The application was canvassed by way of written submissions. The applicant filed his submissions dated 3<sup>rd</sup> May 2024 through the firm of T.O. Odhiambo & Company advocates while the respondent filed his dated 2<sup>nd</sup> May 2024. The appellants did not file any submissions. The court has read and considered the submissions filed and I need not reproduce the same in this ruling.
11. The applicant herein had filed an application dated 22<sup>nd</sup> August 2023 seeking to be joined in this suit as an interested party. On 2<sup>nd</sup> October, 2023, the court gave various directions in the matter including the disposal of the said application by way of written submissions. The said application was fixed for 23<sup>rd</sup> January, 2024 to confirm filing of submissions and/or hearing. On the said date, none of the parties attended court, including the applicant herein and his advocates. The applicant had not even filed submissions as directed by the court. Consequently, the court dismissed the said application for non-attendance and/or lack of prosecution. Now the applicant has filed present application seeking to set aside the orders of dismissal issued on 23<sup>rd</sup> January, 2024 and for leave to join the applicant herein in the suit as an interested party. It is my view that the prayer for joinder in this application is misplaced and an abuse of the court process since the same is the subject of the application which was dismissed on 23<sup>rd</sup> January, 2024. It is only if the application to set aside is successful that the earlier application may be considered. The applicant therefore cannot proceed with the prayer for joinder when the orders of dismissal are still in place. As it is, I think the applicant has convoluted the other prayer with the application for setting aside the orders that dismissed the earlier application. In my view it would have been prudent for the applicant to wait for the determination of the application seeking to set aside the orders of dismissal and have the application dated 22<sup>nd</sup> August 2023 heard if at all the same is reinstated. Accordingly, I decline to make a determination of the prayer for joinder at this stage.
12. Consequently, the only issue for determination is whether the court should set aside its orders of 23<sup>rd</sup> January, 2024 dismissing the applicant's application dated 22<sup>nd</sup> August 2023 and have the same reinstated for hearing.
13. The record shows that this matter was listed for the hearing of the application dated 22<sup>nd</sup> August 2023 on 23<sup>rd</sup> January, 2024. The parties had also been directed to file their respective submissions within 14 days from 13<sup>th</sup> December, 2023. When the matter came up virtually on 23<sup>rd</sup> January, 2024 via the Microsoft teams portal, none of the parties appeared in court. Submissions had also not been filed as directed by the court on 13<sup>th</sup> December, 2023. Consequently, the court dismissed the application dated 22<sup>nd</sup> August 2023 for non-attendance and/or lack of prosecution.
14. Order 12 Rule 3 of the *Civil Procedure Rules* allows the court to dismiss a suit for non-attendance while Rule 7 allows an aggrieved party to set aside that order and reinstate the suit or application upon such terms as may be just.
15. In the instant case, the reason given by the applicant's counsel is that he was online on the material day but was unable to be admitted on the Microsoft Teams Portal. He further stated that he learnt of



the dismissal of the application on the same day. However, counsel for the applicant did not explain how and from whom he learnt of the dismissal of the application on 23<sup>rd</sup> January, 2024. Further, the applicant and his counsel have not addressed the court on what efforts they made to reach the court at the earliest opportunity possible to explain their predicament. There is no evidence by the applicant and his counsel to show that they tried to reach out to the court to explain their predicament immediately the impugned orders were made. Instead, the applicant waited until 19<sup>th</sup> March 2024 when he filed the instant application. There is no explanation that has been given why the applicant waited for close to two months after learning of the orders of dismissal on 23<sup>rd</sup> January, 2024. In my view, the applicant is guilty of inexcusable and inordinate delay in bringing the application. No doubt, the delay has caused injustice and prejudice to the appellants and the respondent who are the main parties in this appeal who have already filed their respective submissions way back in September, 2023 on the appeal and are only awaiting to be given a date for judgment and which date could not be given because of the applications by the applicant herein.

16. In my view, the reason given for failure to attend court on 23<sup>rd</sup> January, 2024 is not convincing. Moreover, the application herein was not filed expeditiously, considering the applicant's admission that he learnt of the orders of dismissal on 23<sup>rd</sup> January, 2024.
17. Accordingly, it is my finding that the notice of motion dated 1<sup>st</sup> March 2024 is devoid of merit and the same is dismissed with costs to the appellants and the respondent.
18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

**IN THE PRESENCE OF:**

Court Assistant – Tupet.

Onchweri holding brief for Orimba for 4<sup>th</sup> proposed interested party/applicant

Mwirigi Kaburu for respondent

**C.K YANO**

**JUDGE**

