



Mugoh v Gitonga; Nderu (Intended Interested Party) (Environment and Land Appeal E007 of 2022) [2024] KEELC 6725 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6725 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E007 OF 2022
A KANIARU, J
SEPTEMBER 24, 2024**

BETWEEN

TISIANO COSMAS MUGOH APPELLANT

AND

JOSEPH NDURURI GITONGA RESPONDENT

AND

JACOB NJERU NDERU INTENDED INTERESTED PARTY

RULING

1. I am called upon to make a determination on an amended Notice of Motion dated on 11.10.2022 filed by the Appellant. The application has been brought under Order 42 rule 6, Order 1 rule 3 of the *Civil Procedure Rules* section 3A of the *Civil Procedure Act*, Section 19(1) and (2) of the *Environment & Land Act* as well as Article 159 2(d) of the *Constitution*. The appellant is seeking orders that:
 1.
 - (a) That Jacob Njeru Nderi be enjoined in this application as an Interested Party.
 - (b) That the appellant be allowed to amend the memorandum of appeal, the index and the notice of motion herein in terms of the annexed draft amended notice of motion.
 - (c) That the said amended notice of motion be deemed as duly filed and served.
 2. That this honourable court be pleased to strike out and or dismiss the suit/plaint by the plaintiff in Embu CMC ELC No. 70 of 2019 *Joseph Ndururi Gitonga vs Tisiano Cosmas Mugo and Jacob Njeru Nderi* dated 11.09.2019 against the appellant since the court has no jurisdiction to entertain the same.



3. That this court be pleased to set aside the ruling and orders of H.N Nyakweba in Embu CMC ELC No. 70 of 2019 against the appellant dated 19.10.2021 for being a nullity.
 4. That pending hearing and determination of this application and the appeal herein dated 11.10.2022, the court be pleased to order stay of proceedings in Embu CMC ELC No. 70 of 2019 *Joseph Ndururi Gitonga vs Tisiano Cosmas Mugoh and Jacob Njeru Nderi* until the appeal dated 17.01.2022 is heard and determined.
 5. That this court be pleased to order the learned senior principal magistrate Hon. H Nyakweba do recuse himself from hearing the Embu CMC ELC Case No. 70 of 2019.
 6. That this court be pleased to order the file in Embu CMC ELC Case No. 70 of 2019 be returned to the Chief Magistrate for reallocation to an impartial Magistrate.
 7. That costs of this application be provided for.
 8. Any other relief the court may deem fit.
2. The application is premised on the grounds that Jacob Njeru Nderi was the 2nd Defendant in the trial court and was inadvertently not joined as an Interested Party in this matter. That the ruling subject of this appeal was issued in favour of the Intended Interested Party and therefore he has an interest in this matter. That the court has no jurisdiction to hear or determine the suit by the respondent in Embu CMC ELC Case No. 70 of 2019 and that the Hon. Senior Magistrate H. Nyakweba in that case exhibited incompetency and open bias in conducting the proceedings in the said case. That the learned Magistrate failed to make a ruling on a Preliminary Objection raised by the Appellant challenging the jurisdiction of the court.
 3. The application was responded to by the Intended Interested Party through a Notice of Motion application dated 02.11.2022 where he appeared to be opposing his joinder as Interested Party. The same party also filed a replying affidavit 13.02.2023 saying that he had no objection to the Appellant's amended Notice of Motion. He then went on to give a history of the case which is the subject of this appeal and also sought the transfer of the suit land to him, among other things which this court will delve into.
 4. The Respondent opposed the application by way of a replying affidavit and he deposed that the Appellant's prayer that he be allowed to amend the Memorandum of Appeal is overtaken by events since he had already filed it without the order of this court. He accused the Appellant of raising issues beyond the scope of the subject matter of the lower court suit, being the removal of a restriction. It was his position that the issues raised on the conduct of the Magistrate and jurisdiction are meant to distract the court and waste time.
 5. The application was canvassed by way of written submissions. The appellants submissions were filed on 29.11.2023 where it was submitted, *inter alia* that the reason he is seeking to amend the notice of motion dated 13.06.2022 was because he inadvertently omitted the name of the intended interested party when he was filing it and he also omitted to do so in appeal herein. He went on to give reasons why the trial court does not or did not have the jurisdiction to entertain the lower court case. He also submitted that the ruling, the subject of the appeal herein ought to be set aside as it was issued by a court without jurisdiction.
 6. The Interested Party's submissions were filed on 06.02.2024 and he reiterated the issues raised in his replying affidavit.



7. I have considered the application, the responses made to it, as well as the party's submissions. I find that the issue for determination is whether the application has merit. Though the same is not fatal to the application, it is notable that the appellant has brought his application on the wrong provisions of law, that is, Order 42 rule 6 of *Civil Procedure Rules*, which provides for stay of execution pending appeal yet he has made no prayer for stay of execution. Order 1 rule 3 also provides for who may be joined in a suit as a defendant yet the appellant is not seeking for joinder of a Defendant. His prayer is about joinder of an Interested Party.
8. Nonetheless, it is my considered view that the motion as presented lacks merit for the following reasons: Firstly, this court is bemused at best by the manner in which the Appellant's application has been presented. The Appellant in his application is seeking to be allowed to amend an application, a memorandum of appeal and an index which he has already amended and filed. He also makes reference to an annexed draft amended notice of motion but has not attached it to the application for consideration. He wants the court to deem a non-existent draft as filed and served. It is also notable that some of the substantive orders that he is seeking in his application are the same orders he is seeking in his pending appeal. The orders are therefore of a final in nature and are not suitable for an interlocutory application such as this one. I will elaborate later.
9. Secondly, this court takes judicial notice that some of the prayers sought by the Appellant have been overtaken by events. The Hon. H.N Nyakweba is now retired and therefore the matter complained of will inevitably now be before a different court.
10. Thirdly, from the face of the motion, there is no doubt in the mind of this court that the manner in which this application has been presented is defective. It takes the form of an omnibus application. This is because the orders sought by the appellant are governed by different rules and different judicial principles. The fact that so many orders of *Civil Procedures Rules* are involved, some of them wrongly, and so many prayers made in one single application makes effective adjudication difficult and/ or impossible. The application is obviously omni-bus.
11. I have said I will elaborate: In *Rajiput vs Barclays Bank of Kenya Ltd and 3 others* (2004) 2KLR 393, a scenario much like the one at hand here played out, with the facts being as follows:

The plaintiff filed a suit alleging that the 1st, 2nd and 3rd defendant had fraudulently charged his land and later transferred it to the 4th respondent. In the suit, he asked the court to issue orders restraining the defendants from dealing in any way with the land and for a declaration that both the statutory notices served on him informing him of the intended sale and transfer were void. Further, he prayed for discharge of the encumbrances on the land and the release of title documents to him.

Simultaneously with the suit, the plaintiff filed an interlocutory application in which he asked for the same orders, including an order to restrain the defendant from evicting him from the land. Before the application was heard, the plaintiff brought yet another one, this time containing a number of prayers, namely; to restrain a firm of auctioneers from distressing for rent on his goods; an order granting him leave to institute contempt proceedings against the 4th defendant, leave to amend the plaint and finally, that the suit be heard on priority basis.

Both applications were opposed by the defendant who argued, *inter alia*, that the plaintiff was not entitled to injunctive relief sought in his application and that he had sought final orders which could not be granted at the interlocutory stage. It was also submitted that the plaintiff's second application was omni-bus in that it carried a multiplicity of prayers all of which could not possibly be decided.



It was held, *interalia*, that the plaintiffs second application was an all-cure Omni-bus application. The Omni-bus application was incapable of proper adjudication by the court because each of the relief sought apart from being governed by different rules, was also subject to long established judicial principles which needed to be raised and considered by the court. That alone made the application incurably defective and a candidate for striking out.

The court also faulted the plaintiff for seeking final orders in interlocutory application.

12. In the application now before the court, the appellant raises the issue of jurisdiction in the memorandum of appeal. The intention obviously was that the court should handle the issue while handling the appeal. But the applicant also raises the issue of jurisdiction in the application now under consideration. What this in effect means is that he has pushed forward the issue of jurisdiction and now wishes that it is handled via the application. He has done so without withdrawing the issue from his memorandum of appeal. The appellant is therefore inviting the court to pronounce itself on the same issue twice over. Besides, the same issue is sought as a final order in the appeal. It is that same final order being sought by way of the interlocutory application now before court. This is unsound and legally unacceptable.
13. As regards the Omnibus nature of the application, it is plain that the appellant is seeking for joinder of a party, amendment of the application, memo of appeal and index, striking out of the suit, setting aside of a ruling, stay of proceedings, recusal of the presiding officer, reallocation of the suit to a different court, and costs, all of which would be governed by different orders of *Civil Procedure Rules* and different principles of law. All this is meant to be done in one single application. It is indeed a tall order and the effectiveness of doing all this is hard to guarantee.
14. It is for the foregoing reasons that I find the application before me now fundamentally defective and unwieldy. I hereby dismiss it with costs to the respondent.

RULING DATED, DELIVERED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH SEPTEMBER, 2024.

A. KANIARU

JUDGE, ELC – EMBU

In the presence of Respondent and the Interested party. Appellant is absent.

Court Assistant - Leadys

