



REPUBLIC OF KENYA



KENYA LAW
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Kariuki v Mugo & 13 others; Njeri (Intended Interested Party) (Environment & Land Case 215 of 2017) [2024] KEELC 13462 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13462 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 215 OF 2017
JG KEMEI, J
NOVEMBER 22, 2024

BETWEEN

WANJIKU KARIUKI PLAINTIFF

AND

PAUL NJAU MUGO 1ST DEFENDANT

MONICA MURUGI WACHIRA T/A JEMUUE INVESTMENTS 2ND DEFENDANT

DANIEL NJUE NJOROGE 3RD DEFENDANT

MARTIN MUGENDI MWITI 4TH DEFENDANT

SAMUEL GITHIU NJAU 5TH DEFENDANT

MARGARET WANJIRU MUCHAI 6TH DEFENDANT

JUSTUS MUINDU MUE 7TH DEFENDANT

PHILIP KIGUMO NJOROGE 8TH DEFENDANT

SAMUEL NGUGI NJOROGE 9TH DEFENDANT

JOSEPH NGUCU NJERI 10TH DEFENDANT

MERCY WANJIRU NGUCHU 11TH DEFENDANT

AFRASIAN MUMBI NGUCU 12TH DEFENDANT

ROY GICHEHA WAMBUGU 13TH DEFENDANT

WANJIKU NGUGI 14TH DEFENDANT

AND

GEORGE KAMAU NJERI INTENDED INTERESTED PARTY



RULING

1. This suit was filed on the 2/12/2016 by the Plaintiff and amended on the 12/6/17. After a number of false starts the hearing started in earnest on the 9/5/2023 when three witnesses testified. The Plaintiff duly closed her case on even date and the next hearing was fixed for 11/9/2023.
2. On the 27/9/23 Mr Ngaruiya Counsel for the 4th, 9th & 14th Defendants and the intended Interested Party filed two Applications of even date seeking the following orders;
 - a. That George Kamau Njeri , the intended Interested Party be enjoined into the case.
 - b. That the 4th, 9th and 14th Defendants be granted leave to file their witness statements and List of Documents out of time.
 - c. Costs be provided for.
3. The intended Interested Party's Application is premised on the grounds annexed thereto and the Supporting Affidavit of George Kamau Njeri inter alia sworn on the 27/9/23 where he deponed that he is the registered owner of the suit parcel No Ruiru/Ruiru East Block 2/19873 having purchased it from the 2nd Defendant vide the agreement of sale dated the 25/5/2016 and issued with a title (GKN1) on 2/6/2016. That despite seeking orders to cancel his title, he was disappointed that the Plaintiff chose not to enjoin him notwithstanding that the orders he is seeking are likely to affect him adversely without the benefit of being accorded the opportunity to be heard on his defence. That upon learning about the case from his neighbors some of whom are parties, he moved the Court for orders for joinder so as to defend his title.
4. Martin Mugendi, Mwiti Samuel Ngugi Njoroge and Wanjiku Ngugi being the 4th 5th and 14th Defendants filed a joint Supporting Affidavit sworn on the 27/9/23 regarding leave to file witness statements and List of Documents out of time. They deponed that they became aware of the suit in July 2023 when informed by the 10th Defendant and instructed the law firm of Ngaruiya & Co Advocates to act for them. That their new counsel perused the Court file and informed them that the firm of Boaz & Thomas Advocates had filed a notice of appointment intimating that they were acting for them. They were also informed that the said firm failed to file their witness statements nor their list of documents. They averred that they have never instructed the law firm of Boaz & Thomas Advocates to represent them. They urged the Court to allow them file the documents albeit out of time.
5. The Application is opposed by the Plaintiff through her Grounds of Opposition filed on the 17/9/2024 on the following grounds;
 - a. The Application is misconceived mischievous and meant to delay fair determination of the suit.
 - b. Pleadings closed pretrial conference concluded and the Plaintiffs case closed hence the Application comes too late in the day and has been overtaken by events
 - c. The Application is meant to delay fair determination of this matter and hence an abuse of the Court process.
6. The other Defendants did not oppose the Applications.
7. On the 14/5/24 parties elected to canvass the two Applications by way of written submissions. Save for the Plaintiff/Respondent, none of the parties complied with the directions of the Court with respect to the filing of written submissions.



8. The Applicants rehashed the contents of their Replying Affidavit and added that they will be prejudiced if the suit is allowed to proceed without their witness statements and list of documents and that the Plaintiff stands to suffer no prejudice if the Application is allowed.
9. The Applicants urged the Court to be guided by the provisions of Article 50(1) and 159 of *the Constitution* with respect to fair and just hearing so as to administer substantive justice. That they have a defence of bona fide purchasers for value which will be lost if they are not allowed to be heard.
10. With respect to joinder, the intended Interested Party contends that he is the registered owner of the suit land which is being impugned by the Plaintiff and the orders sought by the Plaintiff have the impact of cancelling his title without being heard.
11. The key issues for determination are;
 - a. Whether leave to file witness statements and List of Documents out of time should be allowed.
 - b. Whether joinder of the intended Interested Party should be allowed.
 - a. Whether leave to file witness statements and List of Documents out of time should be allowed.
12. Filing documents out of time is within the exercise of discretionary powers of a Court. The guidelines in exercise of such power is provided for in the case of Shah Vs. Mbogo & Another [1967] EA 116 the Court of Appeal of East Africa held that:

“ This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
13. In the celebrated case of Shah Vs. Mbogo & Another [1967] EA 116 the Court of Appeal of East Africa held that:

“ This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
14. Further in the case of Richard Nchapai Leiyangu v IEBC & 2 Others (2013) eKLR the Court stated that:

“ We agree with the noble principles which go further to establish that the Courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”
15. In this case the Applicants have averred that though the record shows that Boaz & Thomas Advocates represented them in the suit, they contend that they have never appointed them. That they were made aware of the dispute in July 2023 whereupon they instructed their current counsel on record.
16. The record shows that with leave of the Court the 1st -11th Defendants were served via substituted service through the Nation Newspaper of 7/7/2017 and 14/9/2017 as can be exhibited by the Affidavits of Service on record.



17. On the 18/12/2017 the Plaintiff sought for a request for judgment against the 2nd - 14th Defendants who having been served with summons to enter appearance, failed to enter appearance and file a statement of defence within the prescribed time. On the 12/4/2018 the law firm of Ishmael & Company Advocates entered appearance on behalf of the 2nd -14th Defendants. This firm filed a statement of defence on behalf of all the Defendants on 5/11/2018 alongside the pretrial questionnaire, list of agreed issues, List of Documents and List of Witnesses.
18. Shortly thereafter the said firm moved the Court by way of chamber summons dated the 24/1/2019 seeking leave to cease acting for the Defendants. The grounds being that the Defendants had failed to provide instructions to the said counsel despite numerous attempts to contact the Defendants. The Application was granted by the Court on 25/3/2019 when the Court in same breath ordered the Defendants to be served in person.
19. The law firm of Chiuri & Chiuri & Co. Advocates came on record on behalf of the 7th Defendant on 25/4/2019.
20. Equally the firm of Boaz & Thomas Advocates came on record on behalf of 1st -6th and 8th -14th Defendants on the 2/5/2019.
21. On 4/9/2020, the law firm of Lillian Marion Associates came on record for the 3rd Defendant and proceeded to file his statement of defence, witness statements, list of issues for determination and list of documents.
22. On the 29/9/2021 the law firm of J K Ngaruiya & Co Advocates came on record for the 10th, 11th, 12th and 13th Defendants.
23. On the 28/11/2022 the law firm of Chiuri & Chiuri Company Advocates sought leave to cease acting for the 7th Defendant on the grounds of want of further instructions.
24. Following in quick succession, the law firm of Boaz & Thomas Advocates also ceased acting for the 1st -6th and 8th – 14th Defendants for want of instructions.
25. The Court granted their Applications vide orders issued on the 16/6/2023.
26. Vide substituted service through the Nation Newspapers dated the 7/3/2023, the Plaintiff served the hearing notice for 9/5/23 upon the 1st -12th Defendants.
27. The analysis above demonstrates that though the Applicants were said to have instructed the firm of Boaz & Thomas Advocates, there is nothing on record to show that they did not. If as the record suggests, they had instructed the firm of Boaz & Thomas Advocates, the question is whether the Applicants are part of the reasons why the said firm ceased acting for want of instructions. The case is entirely the parties and not the advocates and in the absence of instructions, the advocate cannot go beyond the instructions of his client. That said the firm ceased acting in 2023 for lack of instructions. It is not ordinary for counsel to file written instructions from their clients.
28. Even if the Court was to give the Applicants the benefit of doubt that they did not instruct the said law firm, the Court notes that the Applicants failed to annex the witness statements and the list of documents they desire to file. The Court cannot allow the Application in a vacuum. It was incumbent upon the Applicants to annex the documents to their Application so as to put the Respondents on notice on the nature of evidence being sought to be adduced so as to prepare to counter the same. Moreso now that the Plaintiff already closed her case.



29. In the circumstances the Court is unable to exercise its discretion in a vacuum. The Application is therefore struck out for being incomplete.

b. Joinder of the intended Interested Party

30. On the second issue of whether or not to allow joinder, the Court agrees with the Plaintiff that the Application is being made too late in the day after the Plaintiff has closed her case. That said, the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules provide that: -

“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.”

31. The question the Court should ponder on is whether the delay in joining the suit is inordinate or in other words whether it is too late for the intended Interested Party to be part of the suit. The provisions of the Civil Procedure Rules above state that “the Court may at any stage of the proceedings”. The proceedings in this case are undoubtedly still alive given that the Court has not pronounced itself on the judgement. The Court finds that there is no time bar to the Applicant’s Application being enjoined at this stage of the proceedings.

32. I am guided by the decision of the Court in the case of Kingori Vs Chege (2002) 2 KLR whether it was stated as follows;

“In my view in deciding an Application for joinder, the Court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or bound by the outcome of the suit. However, the Court must guard against frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before the Court for determination.”

33. The Court is also enjoined to look favorably at an Application for joinder if it is in the best interest of justice and would not prejudice the interests of the Defendant. See the case of Anthony Gachoka Vs National Hospital Insurance Fund & 3 Others[2005] KEHC 1164 (KLR)

34. In the case of Francis Kariuki Muruatetu & Anor. Vs Republic & 5 Others (2016) eKLR the Court held that an Applicant must demonstrate the personal interest that he has in the matter by laying sufficient grounds before the Court; the prejudice he would suffer if he is not enjoined as Interested Party; set out the case that he intends to make before the Court and demonstrate the relevance of the evidence being proffered to the Court in determining the issue in controversy. In other words, a party must disclose a cause of action which is either not before the Court or if it is before the Court, the nature of it is such that it cannot be effectually and completely determined by the Court without the party being heard.

35. In addition, the Court should look at the rights being claimed and reliefs that would flow from the party being sought to be enjoined. The safeguard being so as not to throw out a litigant from the seat of justice without being heard. The Court is guided by the decision in the case of Lucy Nungari Ngigi & 128 Others vs. National Bank of Kenya Limited & Anor. Civil case No. 517 of 2014 (2015) eKLR which stated as follows;-

“Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the



same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where such persons brought separate suits, any common question of law or fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rules. The Court may even on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties”.

36. Joinder of a party is a discretionary relief and like all discretions flowing from the Court, Courts are called upon to be guided by the principles set out in the case of *Shah Vs. Mbogo* [1967] E A 116 and 123B where Judge Harris J as he then was, had this to say –

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

37. In this case the intended Interested Party urged the Court to allow the Application on the basis that; he is the registered owner of one of the suit lands; he was not enjoined despite the adverse impact the orders of the Court are likely to affect his title; cancellation of title without being accorded the opportunity to be heard will be draconian; he learned about the case through the 10th Defendant and moved the Court expeditiously and that it serves the interest of justice to accord him the right to be heard.

38. Being guided by the precedents cited above, I find that the interest of justice will be served if the Application is allowed so as not to drive the Interested Party out of the seat of justice.

39. Final orders for disposal

- a. The Application for leave to file additional documents is incomplete and it is hereby struck out.
- b. The Application for orders of joinder of the Interested Party as the 15th Defendant be and is hereby allowed.
- c. The 15th Defendant is directed to file and serve his Statement of Defense and comply with the provisions of Order 11 within the next seven (7) days in default the orders issued herein shall lapse.
- d. Upon service the Plaintiff and the rest of the Defendants are at liberty to file and serve their responses within seven (7) days in default any documents filed out of time shall stand disallowed.
- e. The Plaintiff is at liberty to recall the witnesses if need be.
- f. Costs shall be in the cause.

40. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 22ND DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Olonde for the Plaintiff

Ms. Njoka HB Ngaruiya for 2nd – 14th Defendants

Ms. Njoka HB Ngaruiya for the Interested Party

Court Assistant – Phyllis

