



Kutto v Kugu; Keter (Intended Interested Party) (Environment & Land Case 123 of 2012) [2024] KEELC 7467 (KLR) (12 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7467 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 123 OF 2012
FO NYAGAKA, J
NOVEMBER 12, 2024**

BETWEEN

SILAH KIPRUGUT ARAP KUTTO PLAINTIFF

AND

ELIUD KIPROTICH ARAP KUGU DEFENDANT

AND

ESTHER KETER INTENDED INTERESTED PARTY

RULING

1. The Intended Interested Party, one Esther Keter, applied to this Court through an Application dated 12/08/2024. She brought it under Order 1 Rule 10(2) and Order 45 Rule 1(A) (*sic*) of the [Civil Procedure Rules](#) 2010, Sections 3, 3A and 63(e) of the [Civil Procedure Act](#). She sought the following orders:-
 1. spent
 2. That pending the hearing and determination of this application, the Intended Interested Party be hereby enjoined as an interested party.
 3. spent
 4. That this Honorable Court be pleased to review the judgements delivered on the 13th day of March, 2013 and all the consequential orders be set aside. The applicant to be granted leave to file pleadings as well as such documents to support her claim over the suit property.
 5. That the costs of this application be provided for.
2. The application was grounded on six (6) points, the first one being that on 13/03/2013, the court delivered judgement touching on the instant matter to the effect that the Defendant had encroached



onto the land comprised in title number Moi's Bridge/ Moi's Bridge Block 12 (Excullen)/244 which measured one acre of thereabouts. By the Judgment the District Surveyor Uasin Gishu was ordered to establish the correct position of the boundary between the land comprised in the said title, an order that the Defendant does surrender to the plaintiff the portion encroached onto the same being part of the said title. The plaintiff to have costs of the suit and interest thereon.

3. Further, the Honourable Court relied on the evidence of one Sila Kutto (now deceased) who was the Plaintiff who produced a copy of the title deed, a copy of the green card to the part of land and a copy of the Area List and area map. It also relied on the evidence of the land surveyor and the plaintiff's submissions, based on the fact that the Defendant never entered appearance. The Plaintiff misrepresented facts to the court. There was new emerging evidence that was never placed before the court by the Plaintiff. The application was made in good faith and in the interest of justice.
4. The application was supported by the affidavit sworn by the Applicant on 12/08/2024. She stated that she was the widow of the Defendant and the Administrator of the Estate of the Defendant, who died on 07/04/2017, hence she had an interest in the suit land. She wished to be enjoined as an Interested Party to protect the interests of all other beneficiaries of the Estate of the Defendant. They are currently an occupation of the suit property. She was aware that the Respondent filed suit against her late husband and it proceeded ex parte. Her husband never entered Appearance, and attempts to set aside the judgment was in vain as the court dismissed his application to set the judgment aside. After the demise of her husband she failed to do substitution to take his place. She was not even aware of the existence of the matter until she received a letter from the Land Surveyor that he intended to carry out the survey exercise in execution of the decree. She came to this court seeking to be substituted, but the application was dismissed.
5. Further, that in the case of *Kenya Medical Laboratory Technicians and Technologists Board and 6 others v Attorney General and 4 others* [2017] eKLR, Mativo, J. explained the circumstances under which a party ought to be enjoined in proceedings. She gave the summary of the finding of the judge in the case. She deposed that by virtue of being a spouse to the Defendant and currently in occupation of the suit land together with other beneficiaries, they stood to be greatly affected by the enforcement of the judgment should they be evicted from the property and it was prudent that she be enjoined in the suit.
6. She deposed also to the case of *Elton Homes Builders v Davies and others* [2019] eKLR wherein the court allowed the joinder of an interested party after judgment entered. She relied on the *Constitution of Kenya* on the right to protection of one's property where it provides that the property should not be taken away arbitrarily from the owner without him being accorded an opportunity to be heard. She knew joinder of an Interested Party was cost saving, with the sole purpose of avoiding multiplicity of suits. It was in the interest of justice that the Court allows her to be enjoined. She reproduced the contents of the decree against those of the grounds of the application. She then deposed that the plaintiff intentionally misled the court.
7. She deposed that she was aware that the Plaintiff informed the court that the Defendant, who is the registered owner of the land parcel No. Moi's Bridge/ Moi's Bridge Block 12 (Excullen) 242 was the first one to settle in the area before the Plaintiff did. But the Plaintiff did not inform the court that he purchased his parcel of land being the suit land from Miss Dina J. Tenai who was the original allottee. It was apparent from the face of the record, as is stated in the judgment the Plaintiff produced the documents she mentioned above as his evidence. He never produced a copy of an allotment letter or sale agreement, neither did he inform the court how he came into possession of the suit property. She deposed further that the Plaintiff ought to have produced a copy of the agreement of sale and the copy of an allotment letter or Grant of Letters of Administration that led to the issuance of title in his favour.



8. Further, the Plaintiff misled the court that the Defendant was in occupation of part of the suit land despite having prior knowledge that the Defendant, through an agreement, dated 03/03/2003, purchased part of the suit land, being part of parcel No. 244 from its original owner. Additionally, the Plaintiff failed to inform the court that he colluded with one Dina Tenai to register the entire parcel of land by planting the name of the Plaintiff, despite having the knowledge that part of the land had been sold to the defendant. He also failed to inform the court that the parties had on several occasions tried to settle the matter before the Area Chief. She annexed and marked EK3 a copy of the letter from the area chief. She deposed that the portion of land in dispute bordered parcel No. 242 on the lower side and that was the same parcel in issue the Defendant and his family was in occupation. It would have been prudent to summon Dina Tenai before the court to furnish evidence as to the true ownership of the property. The Plaintiff failed to furnish the court with the above evidence stated, and the Defendant, who had not entered appearance could not produce the same when the decree was passed.
9. She deposed further that the decree was made on account of a mistake or error apparent on the record as the Plaintiff did not establish how he came into occupation. Of the suit property and if there was an agreement to that effect. It was the burden of the Plaintiff to prove his case on a balance of probabilities even if the case was heard by way of formal proof and failure by the Defendant to contest the case did not absolve the Plaintiff from that duty. She relied on the case of *Gichinga Kibutha v Caroline and Nduku* [2018] eKLR which discusses the burden of proof. She attached a copy of the draft Defence and Counter-claim, stating that she had an arguable case with chances of success and therefore, it was necessary for the court to review its orders to prevent a case of unjust enrichment.
10. The application was opposed through an affidavit sworn by Rebecca Kutto on 06/09/2024. In it she deposed that the Application was incompetent and bad in law and should be struck out or dismissed. It was filed through a law firm, which was not properly on record and therefore incompetent. The Applicant was the wife of the deceased Defendant and she had admitted as much at paragraph 5 of her Affidavit. She had no interest in the suit property other than being an occupation on account of being a wife of the deceased Defendant. She did not appeal the Ruling of 20/05/2024 which dismissed her application for substitution. Having failed to be substituted, the application for joinder as an Interested Party was clearly an abuse of the process of the court. Prayers 2 and 3 could only be made by a person who was a party to the proceedings because the Applicant was not yet enjoined as one. The prayers were incompetent and bad in law and were aimed at seeking a review of a judgement delivered on 13/03/2013, well after 13 years of the delivery of the judgment and therefore the delay was unacceptable. Her application for substitution was denied for having been made after six and half years the death of the Defendant.
11. There was no error apparent on the face of the record. The Plaintiff's title or ownership was not under challenge in the trial court. Further, the matters pleaded between paragraphs 14 and 19 of the Supporting Affidavit were the subject of a suit filed in Eldoret Court, being Eldoret ELC No. 5 of 2015, Eliud Kugu v Sila Kiprugut Arap Kutto and Dina J. Tenai. She annexed a copy of the plaint and defence and marked them as EK 1 and 2. She deposed further that after the Defence got filed in the Eldoret case, the suit never took off until 07/04/2017 when the Plaintiff died. The application was devoid of any merits and should be dismissed.
12. The parties filed submissions in respect of the application. The Applicant filed her dated 08/09/2024 on 11/09/2024. The Respondent filed his dated 23/09/2024 the same date. This Court has considered the submissions of the parties in entirety. It needs not rehash them in summary or at length here. There are three issues that this court is of the view that it should consider. One, whether all or some of the prayers in the instant application are competent. Two, whether the application is merited. Three, who to bear the costs of the Application.



13. Before I begin the analysis of the instant application, I note that contrary to the contention by the Respondent that the application was filed by a law firm that was not properly under record, the law firm was properly on record after judgment by virtue of the fact that there was a consent signed between the Advocates currently on record and those who previously handled this matter on behalf of the defendant. Thereafter, a Notice of Change of Advocates was filed by the firm which filed the instant Applicant. I now turn to the patent issues for determination.
14. On the first issue, it is trite law that an individual or person who is not a party to the proceeding or matter before a court is not competent to and cannot successfully competently make any substantive prayers in the matter. To be clear, this Court borrows from the reasoning of the learned judge in Masinjila ((Suing as the legal representative of the Estate of Joshua Andala Masinjira (Deceased)) v Solmat Enterprises & 2 others; Kamau (Proposed Interested Party) ((Suing on behalf of the Catholic Diocese of Kitale)) (Environment & Land Case 37 (E033) of 2021) [2023] KEELC 17006 (KLR) (25 April 2023) (Ruling) where his Lordship held:-

“ 21. ... An Interested Party is defined, under Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (referred to herein as the Mutunga Rules, 2013), Gazetted on 28/06/2013, as “interested party” means

“ a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

In other words, there has to be a nexus between who the person is and the existing proceedings by way of a stake or legal duty.

22. In the case of *Francis Kariuki Muruatetu & another v Republic & 5 others*, Petition 15 as consolidated with 16 of 2013 [2016] eKLR, the Supreme Court of Kenya set out guidance on the requirements for successful application for joinder as an Interested Party. At paragraph 37 it gave three principles to be followed, by stating that the Applicant(s) must show:

- (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 interested 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.
- (iii) 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.



23. Rule 7(1) of the same *Rules*, being the *Mutunga Rules*, 2013 provides that

“A person, with leave of the Court, may make an oral or written application to be joined as an interested party.”

This means that anyone wishing to be enjoined as an interested party has to seek the leave of the Court to do so. What then is the position of a person who has not been granted leave of the Court to be enjoined as such. He/she is a stranger to the proceedings. He is neither a party nor participant. In such circumstances he does not enjoy the position of a party to the proceedings. It means further that he does not have the rights and duties of a party to the suit or proceedings. Parties to the suits are the only ones who have the capacity to move the Court substantively unless leave is granted to them to do so, for instance, as *amicus curiae*.

24. The above analysis means that a person who intends to move or moves the Court to be enjoined as an interested party is only a proposed interested party in so far as the proceedings are concerned. Whatever prayers he makes before being enjoined, other than the one for leave to be enjoined are made by a stranger and cannot be allowed before the party is enjoined in the proceedings.”

15. This Court holds the same view in this matter and explains further below how prayer 4 fails of the Application fails. The prayer was sought by an Intended Interested Party. It cannot be granted because it is premised on the joinder of the said Intended Interested Party. Therefore, it was made by a person who was not part of the proceedings. The said party is a stranger to the proceedings. In any event, it is not pleaded in the application that the prayer is predicated upon this Court granting the said party the prayer for joinder as an Interested Party. Therefore, the prayer fails.

16. The second issue is whether the application is merited. It is worthy of note that the Applicant is before the court by virtue of holding a Grant of Letters of Administration to the Estate of the late Eliud Kiprotich Arap Kugu who the Defendant in this matter was before he died. She admits as much at paragraph 5 of her Affidavit. After she obtained the Letters of Administration, she moved to this court and vide an application dated 04/12/2023 in which she thought to be substituted as the Defendant, in place of the said Eliud Kugu (deceased). Upon the court considering the application on merits it arrived at the finding that the application was not merited. It dismissed it on 20/05/2024. The Applicant never appealed or set aside the same. Thus, there is a finding on merits that the said party could not be enjoined as she sought.

17. The Applicant has now ‘mutated’ to come to this court as an Interested Party. This reminds the learned judge herein of the lessons in biology about the developmental stages of an insect. These are Egg, Lava, Pupa and Imago. This imagery is used herein to exemplify the various capacities the Applicant seems to be keen to use to move the court, as follows. At first, she was a dependent and spouse of the deceased Defendant. That is likened to the Egg stage. Then she ‘hatched’ into the Lava stage by obtaining Letters of Administration and moving the Court for substitution vide the application dated 04/12/2023. Having failed, she ‘evolved’ and now moves the Court, at the Pupa stage, as an Intended Interested Party. This court wonders in what form she will move it at the Imago stage, since the instant application is bound to fail for the reasons explained both in the previous paragraphs and those below! It is my humble learned view that the Applicant is a party who is now abusing the process of this court by moving it right, left and center. She seems to be taking the trajectory of her late husband who after



failing to set aside the judgment herein decided to file a matter in the Eldoret court, being Eldoret Land Case No. 25 of 2015 which must have abated after a year of her husband's death. This court hopes that this Applicant will stop 'evolving' and let this matter rest here and she gives vacant possession of the suit land portion that the judgment herein found in favour of the Plaintiff, rather than vexing the Court with applications or suits.

18. Be that as it may, this Court notes, and it is clear to all parties, that there is already a judgment pending execution which is being challenged. This suit is, therefore, not pending for determination. In order for one to be enjoined as a party, an interested party to the proceedings there has to be live proceedings before the Court. There is a plethora of authorities regarding the point that for one to be enjoined as an Interested Party the proceedings should be ongoing, particularly, at their nascent stage. It can be even at the appellate stage but the condition is that the proceedings be alive in that court.
19. In the case of *Hopf v Director of Survey & 2 Others; Sakaja & 2 Others (Interested Parties)* (Environment & Land Case 4 of 2021) [2022] KEELC 6 (KLR) (4 May 2022) (Ruling), this Court held:-

“It is worth noting that an application for joinder of an interested party may be made even at the appellate stage of the proceedings. The only condition to be met first is that the proceedings are still alive. The second point that the Court should take care of is that the proposed interested party should not use the procedure to institute a fresh suit, particularly if his application is made at the appellate stage.

19. On these two points I am guided by the holdings of the Court of Appeal and Supreme Court of Kenya respectively the following cases. The applicant in *David Kiptugen v Commissioner of Lands, Nairobi & 4 others* [2016] eKLR filed an application before the Court of Appeal to be enjoined as an interested party to the appeal and for remission of the matter back to the trial court for hearing de novo. The court allowed that application and held;

“We agree with Ms. Kirui that whatever the outcome of the appeal, if the applicant is not joined in this appeal, he will be deprived of an opportunity to be heard on his claim to the ownership of the suit land. That will of course be unconstitutional and against the rules of natural justice.”

20. Second, in the case of *Communications Commission of Kenya & 4 Others v Royal Media Services Limited*, the Supreme Court in declining a similar application for joinder of an interested party held:-

“The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal... We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause.”

20. As I pen off, I have a few things to say. I note that Eldoret, ELC No. 25 of 2015, whose Plaintiff and Defence the Respondent has annexed copies to her Affidavit as EK 1 and 2 squarely relate to the parties and the subject matter sought to be introduced herein by way of a counterclaim in this suit. This is clearly borne out through the contents of the draft Defence and Counterclaim titled “Intended Interested Party Draft Defence and Counterclaim” which is annexed to her Affidavit as EK 4. They



are not novel, particularly at paragraphs 15 to 20 thereof, and the reliefs sought. Thus, in terms of Section 6 of the *Civil Procedure Act* there have been previous proceedings regarding this matter in the said Court. It would be procedurally unacceptable to introduce them again in this suit. The law bars such a claim hence the Applicant's plea for the Court to consider that there is an arguable Defence and Counterclaim fails, not only on that account but for the reason that the prayer was made by a stranger to the proceedings as explained above.

21. Furthermore, prayer No. 2 was couched in such a manner as to terminate at the conclusion of the instant application. This is because it was the Applicant prayed that

“...pending the hearing and determination of this application, the interested party be hereby enjoined as an interested party.”

It means that, for practical purposes of the prayer the Applicant could only be enjoined until this Application is determined. After that she would be nowhere! This is the problem of poor pleadings: this court has many times without number wondered loudly and expressly regarding the paucity of (presenting) properly drafted pleadings to a court. This shortcoming is a great danger to the legal profession in this country. This repeated failure by professionals to do proper pleadings is making the profession to scream bleeding. It ought to be addressed by law schools and other training bodies lest the profession removes itself from the learned friend pedestal.

22. The totality of the finding of this court is that the application herein is wholly unmeritorious, and it's dismissed with costs to the Respondent.
23. Order accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 12TH DAY OF NOVEMBER, 2024.

**HON. DR. IUR F. NYAGAKA,
JUDGE, ELC KITALE**

In the presence of:-

Kiarie Advocate.....for the Plaintiff

Mafumbo Advocate.....for the Intended Interested party

