



Kogo v Proske (Sued in his Capacity as the Co-Administrator of the Estate of Lyduska Hornik) & 2 others; Obiero (Interested Party) (Environmental and Land Originating Summons E023 of 2023) [2024] KEELC 13571 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13571 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E023 OF 2023
LN MBUGUA, J
DECEMBER 5, 2024**

BETWEEN

EDWARD KIPKOECH KOGO APPLICANT

AND

DIANELLA MORETTI PROSKE (SUED IN HIS CAPACITY AS THE CO-ADMINISTRATOR OF THE ESTATE OF LYDUSKA HORNIK) 1ST RESPONDENT

ROBERTO SAINGHI 2ND RESPONDENT

BENITA SIGEI HORNIK (SUED IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF LYDUSKA HORNIK PIOTTO) 3RD RESPONDENT

AND

PIUS OYUYO OBIERO INTERESTED PARTY

RULING

1. Before me is the Interested Party’s Notice of Motion Application dated 26.4.2024 seeking orders of injunction against the 3rd respondent from dealing in any way with the suit property L.R.10107 or interfering with the applicants occupation of the said land. He also seeks orders for preservation of the said land and to effect service through a Newspaper.
2. The application is premised on the grounds on the face of the application and the applicant supporting affidavit where he contends that he resides on the suit property for a period of over 25 years. He avers that he filed a case No. ELC 314 OF 2016 claiming the



suit land by way of adverse possession. However, the 3rd respondent has threatened him with eviction and he is apprehensive that the said threats may be actualized.

3. The plaintiff did not file any response to the application.
4. The application is opposed by the 1st Respondent via her Replying affidavit dated 15.5.2024 where she contends that she is a co-administratrix of the estate of Lyduska Hornik Piotto (Deceased) pursuant to a grant issued in H.C. Succession case No. 2039 of 2008. She avers that the applicant is not a main party and does not have a main claim in this suit and cannot therefore seek for injunctive orders. She is not aware of any threats allegedly made by the 3rd respondent.
5. The 2nd respondent filed written submissions dated 17.9.2024 but there was no replying affidavit filed in response to the

application.

6. The 3rd respondent filed a Notice of appointment via Henry Omwega & Associates dated 4.7.2024 but no other documents have been filed by the said party.
7. I have considered all the arguments proffered herein including the submissions of the applicant dated 21.6.2024. It is noted that none of the parties herein save the 1st respondent filed a response to the application. For the 2nd respondent, he did file written submissions, but the same have been disregarded in view of the fact that the primary pleading, the response to the application is missing. To this end, I make reference to the case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR, where the Supreme Court of Kenya had this to say in respect of such submissions;

“A Replying Affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect.”

8. Notwithstanding that the application has not been responded to by most of the parties, this court still has a duty to consider the merits of the said application. In the case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others [supra] the Supreme Court of Kenya stated that;

“As a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders. It behooves the court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted”.

9. Thus the court will interrogate the issues raised in the application to establish if the orders sought are merited. In doing so it is pertinent for the court to give a brief background of the dispute herein. This suit was filed by the plaintiff by way of an Originating Summons dated 17.5.2023 where the plaintiff was claiming the suit property by way of adverse possession. He averred that the suit property was registered in the name of Lydushka Hornik Piotto. The Respondents sued were Dianella Morreti, Roberto Sainghi, and Benita Sigei as administrators of the estate of Hornik Piotto.
10. The current applicant was to file an application dated 12.9.2023 seeking orders to be joined in these proceedings as an interested party. The application was not opposed and was allowed on 21.9.2023, of which the Interested party was directed to file and serve his pleadings within 14 days, and all parties were to file and serve their paginated trial bundles containing their witness statements and documentary evidence within 60 days and a date for Pre trial was set on 29.1.2024.



11. Against this back ground, can the court grant the orders sought by the applicant. ? On injunctions, the governing law is set out under Order 40 (1) (a) and (b) of the Civil Procedure Rules 2010. In the Court of Appeal case of National Bank of Kenya Limited v Juja Coffee Exporters Limited [2021] eKLR, the court had this to say on applications for injunctions;

“In keeping with the long-standing principles in *Giella vs. Cassman Brown Co Ltd* [1973] E.A. 358, the grant or refusal of an interlocutory injunction is a matter of exercise of judicial discretion and an applicant is required to show a prima facie case with a probability of success; secondly, that it would suffer irreparable harm which would not be adequately compensated by an award of damage; and lastly if the court was in doubt, to determine the application on a balance of convenience”.

12. As rightly stated by the 1st respondent, the applicant is not a main party in this suit as he only applied to be joined these proceedings as an Interested Party. Of great concern is the fact that the applicant did not comply with the directions of the court given on 21.9.2023 directing him to file his pleadings within 14 days. A perusal of the digital file reveals that the applicant did not file anything after he was joined in these proceedings until the time he filed the current application 7 months later. Thus as far as these proceedings are concerned, the claim of the applicant is unknown.

13. In *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 Others* (Interested Parties); *Death Penalty Project (Intended Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR) (Civ) (28 January 2016) (Ruling), the Supreme court of Kenya stated as follows;

“Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. Emphasize added.”

14. In *Trusted Society of Human Rights Alliance v Mumo*

Matemo & 5 Others [2014] Petition 12 of 2013 eKLR, where the Law Society of Kenya sought to be enjoined as an Interested Party, the Supreme Court was very particular on the extent that an Interested Party can intervene in a case. It held that:

“A suit in Court is a ‘solemn’ process, “owned” solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit....”

15. In *Francis Kariuki Muruatetu & Another v. Republic & 5 Others* Petition No 6 of 2016; [2016] eKLR the Court limited the role and function of an interested party/amicus curiae as follows:

“... Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those ‘new issues’ cannot, therefore, be allowed...”

16. In *Japhet Muroko & Another vs Independent Electoral and Boundaries Commission (IEBC) & 3 Others* [2017] eKLR, it



was stated that:

“ Participation of an interested party should not amount to introduction of new causes of action altogether”.

17. The applicant did not initiate this suit, and he is not defending the same either; He also appears disinterested in lodging any statement of claim going by his failure to comply with the directions given by the court on 21.9.2023 on filing of pleadings. It is therefore unacceptable and untenable for the applicant to steer these proceedings towards a consideration of new issues through applications. The court cannot therefore delve into the issue as to whether he has a prima facie case or not. Needless to state that the court is aware that the applicant did file the suit ELC 314 of 2016 claiming the suit land by way of adverse possession. However, the said suit was filed against a deceased person and cannot therefore see the light of day.
18. In the end, I find that the application dated 24.4.2024 is not merited, the same is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5th DAY OF DECEMBER 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

Ann Makori for Applicant / Interested Party

Kahura for 1st Respondent and holding brief for Harun for 2nd Respondent

Court Assistant: Vena

