



Nyangacha v Nyagwaka; Barasa (Applicant) (Environment & Land Case 354 of 2016) [2023] KEELC 215 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 354 OF 2016**

M SILA, J

JANUARY 26, 2023

BETWEEN

SABINA KEMUNTO NYANGACHA PLAINTIFF

AND

RAYMOND NYAGWAKA DEFENDANT

AND

BARASA APPLICANT

RULING

(Application by certain persons seeking to be joined to this suit as interested parties and to have the judgment set aside; plaintiff filing suit contending to be the proprietor of the suit land and suing the defendant for trespass and eviction; defendant filing defence but not participating in the trial of the matter; judgment entered in favour of the plaintiff; applicants now contending that they are in occupation of the suit land and that the title of the suit land no longer exists as it has been subdivided with them holding titles to the subdivisions; the new titles having been issued to the applicants prior to the court pronouncing judgment; the issue of the subdivisions not having been brought to the attention of the court before delivery of judgment; applicants having made out a case that they have an interest in the suit land and deserve being joined to the suit as interested parties; judgment was entered in favour of the plaintiff for the suit land when the title to it did not exist as it had already been subdivided; judgment liable to be set aside)

1. This Ruling is in relation to an application dated 13 June 2022, filed by two individuals, namely Wycliff Nyaanga Nyagitari and Innocent Nyagitari Barasa. They bring this application under Order 45 Rule 1 and 2 of the [Civil Procedure Rules](#), and Sections 1, 1A, 1B, 3A and 63 of the [Civil Procedure Act](#), seeking the following orders :-



- i. That this court be pleased to enjoin (sic) the said Wycliff Nyaanga Nyagitari and Innocent Nyagitari Barasa as interested parties for purposes of this application.
 - ii. That the court be pleased to stay the execution of its Judgment delivered 24 March, 2022.
 - iii. That the court be pleased to vary, review and/or set aside the Judgment delivered on 24 March, 2022.
2. In support of their application, the applicants, through an Affidavit sworn by Wycliff Nyaanga Nyagitari, aver that in May 2022, three persons, amongst them an auctioneer, visited their home which is situated on the parcel of Land Known as Kitaru Settlement Scheme/13 (hereinafter referred to as the suit property) with instructions to evict them. He deposes that he later discovered that a suit had been filed against his uncle in 2016 and he proceeded to instruct his Advocate to peruse the file to confirm the status of the case. Upon perusal of the file his advocate discovered that the case was heard ex-parte and a judgment delivered on 24 May, 2022 in favor of the plaintiff.
3. He deposed that despite having stayed in the suit property together with his siblings for 54 years, he has never been sued by anyone claiming ownership of the suit property. His reading of the Judgment revealed that the Defendant herein was ordered to vacate the suit property despite him not being the only occupant of the suit property. He decried that the Judgment meant that all the occupants of the suit property ought to be evicted from the suit property despite the fact that the defendant was not the only occupant of the suit property. He beseeches that there is urgent need to have them joined as interested parties to the suit, so that they are able to give the court their side of their story, as execution of the judgment would affect them.
4. He averred too, that it was within his knowledge that on 7 November, 2016, the Land Registrar Nyamira County, wrote to plaintiff/respondent informing her of the nullification of her title over the suit property. The Land Registrar actualized the nullification on 8 January, 2019, and caused the suit property to be registered in the name of Innocent Nyagitari Barasa a son to Sabina Kemunto (Deceased). Subsequently the suit property was subdivided into the parcels Kitaru Settlement Scheme/134, 135, 136, 137 and 138. He annexed the green card and title to the parcel number 137, which title is in his name, to his supporting affidavit. He contended that the plaintiff did not bother to inform the court about the said changes in the suit property that occurred before the hearing and delivery of the judgment.
5. In response to the application the plaintiff/respondent filed a replying affidavit on 25 July, 2022. She averred that the application was a travesty of justice and an attempt by the applicants to divert the course of justice as they are proxies of the defendant who wants to have the judgment overturned in his favor despite having been accorded an opportunity to be heard by the court. She went on to state that the applicants had intentionally hidden their relationship with the defendant in order to cover up their illegal attempts to grab her land. She deposed further that the defendant was an uncle and a brother to the 1st and 2nd applicants, respectively, and therefore there was no way they could claim that they were not aware of the suit against the defendant. She averred that the subdivision of the suit property was fraudulently procured by the defendant, in collusion with corrupt land officials, during the pendency of the matter, so as to defeat its course. She also stated that the applicants are not occupants of the suit property as they allege and that they have their own land within Nyamira.
6. The background is that the plaintiff filed suit against the defendant on November 1, 2016. She contended to be the registered owner of the suit land and that in the month of October 2016, the defendant illegally entered the land and started constructing a permanent house, and cultivated a portion thereof without her authority. The plaintiff alleged that as a result of the defendant's acts of



trespass, she had been deprived of the use of the suit property. Consequently, the plaintiff sought the following reliefs:

- a. A declaration that the plaintiff is the lawful registered owner of land parcel number Kitaru Settlement Scheme/13.
 - b. An order of eviction directed against the defendant, his agents and/or servants from L.R No. Kitaru Settlement Scheme/13.
 - c. A permanent injunction restraining the defendant either by himself or his agents, servants, employees and/or anyone claiming under the defendant from entering upon, re-entering, trespassing onto, cultivating, building structures and/or in any other manner dealing with the suit land that is L.R No. Kitaru Settlement Scheme/13.
 - d. Costs of this suit and interest.
7. Upon being served with the plaint and summons, the defendant filed a defence dated May 20, 2019, through counsel, in which he denied the plaintiff's claim and alleged that the plaintiff acquired the suit property by way of fraud. In the course of time, his appointed counsel ceased acting, citing lack of instructions, as the defendant lived abroad.
 8. The case was set down for hearing but only the plaintiff testified without the defendant participating in the matter. After the close of the plaintiff's case the defendant's case was marked as closed without any evidence offered on his behalf as he failed to attend court or send any witnesses. The court went on to direct the parties to file and serve their written submissions but only the plaintiff complied.
 9. The court, bearing in mind that the evidence of the plaintiff was not challenged by the defendant during the hearing of the case, came to a conclusion that the plaintiff had proved the trespass claim against the defendant and thus entitled to the prayers she had sought in the plaint.
 10. It against this background that the interested parties have approached this court seeking to be joined to this matter and to have the judgment stayed, reviewed, varied and/or set aside, to enable them participate in the suit and give their side of the story. They of course contend that the execution of the judgment will affect them as they are occupants and also have title to subdivisions of the suit land.
 11. I directed that the application be disposed of by way of written submissions and I have taken note of the submissions filed by both counsel for the applicants and counsel for the respondent.
 12. Having considered the application, the annexures attached to the supporting affidavit, the response to the application, the submissions filed by counsel, the background of the suit, and the judgment of this court delivered on March 24, 2022, the main issues for determination are;
 - a. Whether the proposed interested parties/applicants should be joined as parties to the suit for purposes of this Application
 - b. Whether the judgment delivered on March 24, 2022 should be reviewed, varied and or set aside.
 13. Order 1 Rule 10(2) of the *Civil Procedure Rules* states as follows: -

“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 or settle all questions involved in the suit, be added.”

14. The applicants herein have sought to be joined as interested parties to the suit for the reason that they occupy some parts of the suit property and also have titles to subdivisions of the suit property. It is their position that before judgment, the plaintiff’s title to the suit land, that is Kitaru Settlement Scheme/13, had already been cancelled, and the land subdivided into four parcels which are now registered in their names. They also claim that the execution of the judgment would lead to them being evicted from the suit property and their proprietary interest thereto extinguished.

15. The first step will be to define who an interested party is. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defines an interested party as.

“ 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;

16. The Supreme Court of Kenya in Communications Commission of Kenya and 4 others vs Royal Media Services Limited & 7 others Petition No. 14 of 2014, (application by Nature Foundation Limited to be joined as interested party) [2014] eKLR , stated as follows on the issue of joinder of a person as interested party :-

(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

“ “[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

(23) Similarly, in the case of Meme v Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

(24) We ask ourselves the following questions: (a) what is the intended interested party’s stake and relevance in the proceedings? and (b) will the intended interested party suffer any prejudice if denied joinder?

17. I have analysed the position of the applicants vis-à-vis the above dictum. It will first be observed that the applicants are currently not parties to this suit but they hold titles to subdivisions of the suit land. In fact, from the documentation that they have provided, it is apparent that the suit land, under the



title Kitaru Settlement Scheme/13 ceased to exist on 26 August 2021, when it was subdivided into the parcels No. 134, 135, 136, 137 and 138. These titles are not in the name of the plaintiff but in the names of the applicants herein. When the court proceeded to write and deliver judgment on 24 March 2022, the title of the plaintiff did not exist and the plaintiff held no such title. It was thus futile for the court to issue a declaration that she is the lawfully registered proprietor of the land parcel Kitaru Settlement Scheme/13. The fact that the suit land no longer existed at the time that judgment was being delivered was not brought to the attention of the court by either plaintiff or defendant. It is through this application that it is being brought to the court's attention. I am persuaded that if the court was aware that the title of the plaintiff to the suit land did not exist it would not have entered judgment in favour of the plaintiff.

18. In as much the respondent claims that the applicants are proxies of the defendant, and that their titles are fraudulently procured, the fact remains that at the time the judgment was written, the plaintiff held no title to the suit land. The changes in the character of the suit property were never presented nor considered by this court in its judgment. The only just and fair determination this court can do is to set aside the judgment and allow the applicants to be joined to this suit as interested parties.
19. I therefore make the following orders :-
 - a. That, Wycliff Nyaanga Nyagitari and Innocent Nyagitari Barasa are hereby joined as interested parties to this suit.
 - b. The Judgment delivered on 24 March, 2022 is hereby set aside and no execution should issue in respect of that judgment.
 - c. There will be no orders as to the costs of this application.
20. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 26 DAY OF JANUARY, 2023.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

