



Ongicho v Wamatuba & 3 others; Masaku (Intended Interested Party) (Environmental and Land Originating Summons E008 of 2021) [2023] KEELC 138 (KLR) (18 January 2023) (Ruling)

Neutral citation: [2023] KEELC 138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2021**

A NYUKURI, J

JANUARY 18, 2023

**N THE MATTER OF THE ESTATE OF THE LATE ALOYS GEKONGE TUMBO OERI
(DECEASED)**

AND

**IN THE MATTER OF PROPERTY KNOWN AS MAVOKO MUNICIPALITY/MACHAKOS
LR. NO. 337/3211 I.R 134550**

BETWEEN

EVANS ASUGA ONGICHO PLAINTIFF

AND

TESSY WAMATUBA 1ST DEFENDANT

WILSON MUTSAMI MULIRU 2ND DEFENDANT

ROSE PHOEBE TUMBO OERI 3RD DEFENDANT

REGISTRAR OF TITLES–NAIROBI 4TH DEFENDANT

AND

PATRICK MASAI MASAKU INTENDED INTERESTED PARTY

RULING

1. By a chamber summons dated April 6, 2021, Patrick Masai Makau, the intended interested party/applicant sought the following orders;
 - (a) That Patrick Masai Makau being an interested party herein be allowed to join these proceedings.



- (b) That upon grant of prayer 1, above, the plaintiff be ordered to deposit in court as security within 30 days for and on behalf of the interested party Kshs 45,000,000/- in favour of the interested party Patrick Masai Makau pending hearing and determination of this suit.
- (c) That costs of this application be provided for.
2. The application was anchored on the grounds on its face as well as the affidavit sworn by the applicant. It is the applicant's case that the intended interested party purchased 5 acres of land from Aloys Gekonge Tumbo Oeri -deceased, which purchase is acknowledged by the plaintiff. Further that on September 8, 2008, the applicant purchased 5 acres out of Machakos Municipality LR No 337/3211 IR 134550 at a consideration of Kshs 2,750,000/-, whereof he deposited Kshs 1,000,000/- leaving a balance of Kshs 1,750,000/-.
3. He further stated that Aloys Gekonge Tumbo Oeri died before he could transfer the land to him or refund his deposit. That a further agreement was entered into on April 3, 2012 with the deceased for refund of Kshs 4,000,000/-, but the refund was not done. That since 2008 todate, the suit property has gained value to Kshs 9,000,000/- per acre. According to the applicant, the plaintiff has acknowledged his claim in applications made in this court. He states that the originating summons should only be considered after he is paid his dues.
4. No response was filed in opposition to the application. The application was canvassed by way of written submissions. On record are the applicant's submissions filed on January 14, 2022.

Submissions

5. Counsel for the applicant submitted that the intended interested party has a valid claim in regard to the 5 acres of land he purchased from the late Aloys Gekonge Tumbo from LR No 337/3211. Counsel argued that the plaintiff and the defendants were fighting over the suit property and that therefore it would be proper to have the money owed to the applicant deposited in court.

Analysis and Determination

6. I have carefully considered the application, the supporting affidavit and submissions filed by the applicant. The issues that arise for determination are;
- (a) Whether the applicant has met the threshold for joinder to this suit as interested party;
- (b) Whether the prayer to deposit a sum of Kshs 45,000,000/- as against the plaintiff is merited.
7. For a person to be joined to a suit as an interested party, they must demonstrate that they have a recognisable stake in the proceedings. The *Black's Law Dictionary* defines an interested party as a party who has a recognizable stake (and therefore standing) in a matter.
8. In the case of *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR, paragraph 37, the Supreme Court set out elements to satisfy the court in an application for joinder as interested party as follows;
- “One must move to court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements;



- (1) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identified and must be proximate enough, to stand apart from anything that is merely peripheral.
- (2) The prejudice to be suffered by the 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.
- (3) 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."

9. In the same case, it was held that the issues to be determined by the court are the issues as presented by the primary parties as an interested party may not frame its own fresh issues, or introduce new issues for determination by the court.
10. In the instant application, the applicant states that he entered into a land sale agreement with the late Aloys Gekonge for sale of 5 acres part of the suit property. Further that he paid a sum of Kshs 1,000,000/- as deposit and was to pay the balance on transfer of the property. That subsequently the applicant and the late Aloys Gekonge agreed that the latter would refund a sum of Kshs 4,000,000/- to the applicant but that he died before the said transfer. The applicant has pointed out that the indebtedness by the late Aloys Gekonge is acknowledged by the plaintiff. I have perused the originating summons and I note that indeed the plaintiff has referred to an agreement dated April 3, 2012 between the applicant and the late Aloys Gekonge and indicated that the amount to be refunded is Kshs 4,000,000/-. The same plaintiff has also made a claim against the same deceased's estate for a sum of Kshs 11,288,000/- and has sought to dispose of the suit property to recover his claim and the alleged claims of ten other persons.
11. It is clear therefore that the intended interested party will be affected by the decision that will be made in this matter, as his agreement with the late Aloys Gekonge is one of the matters that will ultimately be determined by this court. This means that the Intended interested party has an identifiable stake in these proceedings.
12. In the premises, I find and hold that the applicant has met the threshold for joinder as interested party and he ought to be joined as such.
13. On the issue as to whether the plaintiff should deposit in court the sum of Kshs 45,000,000/-, I note that the applicant has stated that the same was in regard to an agreement between him and the late Aloys Gekonge. As the applicant does not have an apparent claim as against the plaintiff as his claim is against the late Aloys Gekonge, he cannot therefore compel the plaintiff to deposit moneys claimed by him against the estate of the deceased, as the plaintiff is also an alleged co-creditor to the deceased's estate.
14. In the premises, I find and hold that the prayer that a sum of Kshs 45,000,000/- be deposited in court by the plaintiff is premature at this stage.
15. The upshot is that the application dated April 6, 2021 is partially allowed as follows;
 - (a) Patrick Masai Makau be and is hereby joined to these proceedings as an interested party.
 - (b) The interested party to file and serve his pleadings in 14 days of this ruling.
 - (c) Costs of the application shall be in the cause.



16. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF
JANUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

A. NYUKURI

JUDGE

In the presence of;

Mr. Mutua Makau for the Applicant

Mr. Lumbasi holding brief for Mr. Simiyu for the 1st and 2nd Defendants

Mr. Ongicho the Plaintiff in person - present

Josephine – Court Assistant

