



Miano (Suing as the legal administrator of the Estate of Francis Miano Kaara) v Miano (Sued as the legal administrator of the Estate of Ruita Kaara alias Mwangaria Kaara (Environment & Land Case 32 of 2021) [2023] KEELC 16068 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 32 OF 2021
EC CHERONO, J
FEBRUARY 28, 2023**

BETWEEN

**TERESIA WAMWIRUA MIANO (SUING AS THE LEGAL ADMINISTRATOR
OF THE ESTATE OF FRANCIS MIANO KAARA) PLAINTIFF**

AND

**CHARLES MURIUKI MIANO (SUED AS THE LEGAL ADMINISTRATOR
OF THE ESTATE OF RUITA KAARA ALIAS MWANGARIA
KAARA DEFENDANT**

RULING

1. The applicants, Peter Maina Mwangaria and Symon Kariuki Mwangaria, vide a Notice of Motion dated January 27, 2022 are seeking the following orders; -
 1. Spent
 2. That the Honourable court be pleased to grant leave to the applicants Peter Maina Mwangaria And Symon Kariuki Mwangaria to be enjoined as interested parties in this case.
 3. That this honourable court be pleased to order a stay of execution of the decree issued on October 14, 2021 pending the hearing and determination prayer 4 and 5 herein
 4. That this honourable court be pleased to set aside the consent filed on August 31, 2021 and the subsequent decree issued on October 14, 2021
 5. That the costs of this application be in the cause.
2. The application is supported by the affidavit of Symon Kariuki Mwangaria and grounds apparent on the face of the said application. The application is further supported by numerous annexures to the supporting Affidavit.



3. The said application is opposed by Teresia Wamwirua Miano the plaintiff herein vide a Replying Affidavit sworn on February 11, 2022. Numerous documents are also annexed to the said Affidavit in opposition to the application. The said application is also opposed by the Defendant Charles Muriuki Miano vide a Replying affidavit sworn on February 11, 2022. The said Affidavit contains numerous documents in support of his opposition to the application.
4. When the application came up for hearing on 14/2/2022, the parties agreed to dispose the same by written submissions.

Applicants' Case And Submission

5. According to the Applicants, the Plaintiff and the Defendant are mother and son as well as wife and son of the late Francis Miano Kaara . The Applicants also stated that the said Francis Miano Kaara (deceased) was brother to one Ruita Kaara alias Mwangaria Kaara and that their Father Ruita Kara alias Mwangaria Kaara (deceased) was the registered owner of LR Mwerua /Kagio-ini/66. The Applicants further stated that sometimes in November,2021, the Defendant herein served them with an application for confirmation of Grant in Kerugoya CM Succession Cause No 250 of 2006 which relates to their Father's estate. They annexed a copy of the Summons for confirmation of grant dated November 16, 2021. They said that they were surprised to find a Decree attached to the said Summons for confirmation which gave the Estate of their uncle 1/2 share of their Father's land as they were not aware of any court proceedings against their Father's Estate.
6. The Applicants said that they instructed their Advocate on record to peruse the court file where they discovered that their aunt and their cousin had sued each other in respect of their Father's estate vide a plaint filed in court on August 27, 2021 and a consent settling the matter was filed on 31st, August, 2021 while a Decree was issued on October 14, 2021. They stated that they were never informed of the suit against the Estate of their Father.
7. The Applicants further stated that there is clear evidence of fraud and collusion between the Plaintiff and the Defendant as the Defendant has been named in the Succession Cause as the person getting the 1/2 share out of LR No Mwerua /Kagio-ini/66 Decreed to the Estate of Francis Miano Kaara notwithstanding the fact that He is the legal representative of the Estate of Ruita Kaara alias Mwangaria Kaara
8. They contend that the plaintiff who has filed the matter herein as the legal representative of the estate of Francis Miano Kaara is not named as the beneficiary in Kerugoya CM Succession Cause No 250 of 2006 .
9. The first annexure to the Affidavit in support of the application is a copy of a letter from the area Assistant chief, Giachong'e sub-Location addressed to Jackline Kiragu advocate dated December 14, 2021 confirming that Ruita Kaara alias Mwangaria Kaara (deceased) death certificate No xxxx and his wife who was also deceased was issued death certificate No xxxx.
10. The said chief's letter further indicates that the deceased Ruita Kaara alias Mwangaria Kaara is the registered owner of LR No Mwerua /Kagio- Ini/66 and that he was survived by the following; -
 1. Peter Maina Mwangaria (son),
 2. Margaret Wambui Mwangaria(daughter),
 3. Nancy Njeri Mwangi(daughter-in-law),
 4. Hulidah Nyawira Mwangaria(daughter)



5. Doris Wanjira Mwangaria(daughter)
 6. Symon Kariuki Mwangaria(son)
 7. Edith Wanjiru Mwangaria(daughter)
 8. Zipporah Wangui Mwangaria(daughter)
 9. Ann Muthoni Mwangaria(daughter)
11. The second annexure is another letter from the chief, Giacong'e location again addressed to Jackline Kiragu Advocate dated 24/i/2022.In the said letter, the chief is confirming that the deceased is survived by, among others, two sons who are the Applicants herein. The other annexures are copies of an application for confirmation of grant in Kerugoya Succession Cause No 250 of 2006

Plaintiff's Case and Submissions

12. In Her Replying affidavit, the plaintiff deposed that she instituted this suit as the legal representative of the Estate of her late husband Francis Miano Kaara and that she sued the defendant, Charles Muriuki Miano as the Administrator of the Estate of Ruita Kaara alias Mwangaria Kaara who was appointed by the court in Kerugoya Succession Cause No 250 of 2006
13. The plaintiff stated that the Decree issued by this Honourable Court is proper and that the application filed herein is intended to frustrate the conclusion of the said Succession Cause which has been pending for the last 16 years.

The Defendant's Case And Submissions

14. The Defendant on his part stated that He is the legal Administrator of the Estate of Ruita Kaara alias Mwangaria Kaara while the plaintiff is the Legal Administrator of the Estate of Francis Miano Kaara (deceased). He annexed a copy of Grant of letters of Administration intestate issued vide Kerugoya Succession Cause No 250 of 2006
15. He also confirmed that the late Ruita Kaara alias Mwangaria Kaara (deceased) was registered as the owner of LR No Mwerua /Kagioini/66 to hold the same in trust for himself and his late brother, Francis Miano Kaara . He said that he Has instituted this suit properly as the administrator of the estate of Ruita Kaara alias Mwangaria Kaara (deceased)

Legal Analysis And Decision

16. I have considered the application, the Affidavits, both in support of the application and in opposition, the annexures thereto, the rival submission as well as the applicable law. The issues for determination in this application are two. The first is joinder of the applicants as interested parties and setting aside of the consent orders filed on 31/8/2021 and the subsequent decree issued on October 14, 2021.
17. Order 1 rule 10(2) of the *Civil Procedure Rules* which is the applicable law for joinder of parties provides as follows; -

"(2) 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.”

18. Numerous decisions on the interpretation of that rule has been made by superior courts in Kenya and other comparative jurisdictions. In *Bravin Bowry- v – John Ward & Another*, (2015) KLR the Court of Appeal referred to its earlier decision in *Civicon Ltd –v- Kivuwatt Ltd & 2 Others* (2015) where it observed as follows;

“ Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary party, and should be enjoined.

----from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 rule 10(2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

19. The court of Appeal in the same decision also referred to the Ugandan case of *Deported Asians Custodian Board –v –Jaffer Brothers Ltd* (1999) 1 EA 55 (SCU) where it was stated as follows; -

“ A clear distinction is called for between a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable to court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter-----

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit, one of the two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in the suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

20. The Applicants at paragraph 6 of the supporting Affidavit stated that their Father, the late Ruita Kaara alias Mwangaria Kaara was the registered owner of LR No Mwerua /Kagio-ini/66.
21. Again at paragraph 8 of the said Affidavit, the Applicants deposed that they were surprised to find a Decree attached to the summons for confirmation of grant which gave the Estate of their Uncle, Francis Miano Kaara , 1/2 share of their Father’s land as they were not aware of any Court proceedings against their Father’s Estate.



22. I have considered the averments by the Applicants on oath and the annexures to the supporting Affidavit. It appears that though there is a pending proceedings for confirmation of a grant given to the Respondents Kerugoya Succession Cause No 250 of 2006 , Charles Muriuki Miano who is the defendant in this case is also indicated as the Administrator in the said Succession Cause. The filing of this suit by the plaintiff against his Mother as Defendant while there is a pending succession cause involving the same parties over the same subject matter makes it necessary to join the Applicants as parties.
23. Since the Applicants are sons of the late Ruita Kaara alias Mwangaria Kaara (deceased) who is the registered owner of land parcel No Mwerua /Kagio-ini/66, they stand to be disinherited from the Estate of their deceased Father (Ruita Kaara alias Mwangaria Kaara) unless they are joined as parties in this suit. I therefore find the first prayer merited.
24. On the second prayer, the Applicants are seeking to set aside the Decree issued by this Honourable Court on October 14, 2021 on grounds that they were not notified of the filing of this suit and the issuance of the said Orders which involves the Estate of their late Father and that they only came to learn of the same when they were served with an application for confirmation of grant in Kerugoya CM Succession Cause No 250 of 2006 . In response to those averments under oath, the plaintiff/ Respondent who is the mother to the defendant at paragraph 6 thereof stated as follows;-
- "6. That I did not name and/or include the applicants herein or any other family member as parties to the suit since they were not the legal representatives of Ruita Kaara alias Mwangaria Kaara despite them being his sons."
25. The Defendant/Respondent who is also the son to the plaintiff stated in his Replying Affidavit at paragraph 6 of His Replying Affidavit as follows ;-
- "6. That the said Ruita Kaara alias Mwangaria Kaara (deceased) was registered as the owner of LR Mwerua /Kagio-ini/66 to hold the same in trust for himself and his late brother Francis Miano Kaara . (Annexed and marked CMM2 is a copy of the certificate of official search).
26. From their response to their application under oath, the Respondents admit that the suit property which is also a subject of Succession Cause in Kerugoya CM Succession No 250 of 2006, which is said to be pending hearing and determination. From the annexures to the Supporting Affidavit, it is clear that if the plaintiff wanted to litigate over the suit property which is also a subject of Succession Cause No 250 of 2006, She should have involved the Applicants who are beneficiaries of the Estate of the registered owner, Ruita Kaara alias Mwangaria Kaara. By filing this suit against Her son and purporting to determine the ownership of a property by way of a consent over a matter which is pending in a Succession Cause without involving the Applicants who are beneficiaries is not only on fraudulent, but is also dishonesty on the part of the Plaintiff and the Defendant/Respondent.
27. On whether the consent order issued on October 14, 2021 should be set aside, the Court of Appeal (Hancox JA) in the case of *Floran Wasike V Destimo Wamboko* (1988) eKLR cited Setton on *judgments and orders*(7th Edition) vol 1 page 124, and reiterated that
- "Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them---- and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy



of the court ; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement."

28. I agree with the above decision and the principles espoused which are binding on this court. When this Court was asked by the Counsels appearing for the plaintiff and the defendant that they had compromised the suit and wanted to record a consent, this Honourable Court allowed and proceeded to adopt the same in good faith and in the believe that the advocates who are officers of this Honourable court were not concealing any material fact. When the plaintiff and the Defendant who are mother and son filed the instant suit over a property which was subject of a Succession Cause No 250 of 2006 where the Applicants are beneficiaries without involving them, that act in my view was dishonest and intended to disinherit the Applicants from the Estate of their Father, Ruit Kara alias Mwangaria Kaara . I find that the said consent issued on October 14, 2021 is liable for setting aside/discharge on grounds that the same was obtained through collusion and/or without sufficient material facts. Consequently, the notice of motion dated January 27, 2022 is merited and the same is allowed as follows; -

1. The consent orders of this Honourable court issued on October 14, 2021 are hereby set aside and/or varied
2. The Applicants, Peter Maina Mwangaria And Symon Kariuki Mwangaria be and are hereby joined as Defendants in this Suit
3. The Applicants are granted leave to file and serve their Defence to this suit within 14 days from the date of this Ruling
4. The Consent order filed before this Court on August 31, 2021 and the subsequent Decree issued on October 14, 2021 hereby vacated, varied reviewed and/or set aside
5. The costs shall be in the cause

READ, DELIVERED AND SIGNED VIRTUALLY THIS 28TH DAY OF FEBRUARY, 2023.

HON. E.C CHERONO

ELC JUDGE

In the presence of;-

1. M/S Kiragu for Applicant
2. Mr Mwangi Kinyua for the Defendant/Respondent and H/B for C.S Macharia for the Plaintiff
3. Joy C/A

