



Mwaura & 64 others (Suing on their own behalf and of all other persons affected by the Compulsory acquisition for the construction of the Thogoto-Gikambura-Mutarakwa Road) v Kenya Rural Roads Authority & 3 others (Environment & Land Case 318 of 2014) [2023] KEELC 19306 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 318 OF 2014**

JO MBOYA, J

JULY 27, 2023

BETWEEN

**FRANCIS KURIA MWAURA & 64 OTHERS PLAINTIFF
SUING ON THEIR OWN BEHALF AND OF ALL OTHER PERSONS
AFFECTED BY THE COMPULSORY ACQUISITION FOR THE
CONSTRUCTION OF THE THOGOTO-GIKAMBURA- MUTARAKWA ROAD**

AND

**KENYA RURAL ROADS AUTHORITY 1ST DEFENDANT
KENYA ROADS BOARD 2ND DEFENDANT
MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT 3RD
DEFENDANT
NATIONAL LAND COMMISSION (THE COMMISSIONER OF
LANDS) 4TH DEFENDANT**

RULING

Introduction And Background

1. Vide Notice of Motion Application dated the 20th January 2023, the Plaintiffs/Applicants' herein have approached the Honorable court seeking for the following reliefs;
 - i. That the Applicants' be granted Leave to amend the Plaint as per the Draft Plaint annexed thereto.



- ii. That upon Leave being granted as per the above prayer, the Plaintiffs/Applicants be granted 21 days to file the Further amended Plaint;
 - iii. That the Honorable Court be pleased to grant any other orders that it may deem fit in the Interest of Justice.
 - iv. That the cost of this Application be in the main suit
2. The instant Application is premised on the numerous grounds which have been elaborated upon and alluded to in the body of the Application. Furthermore, the instant Application is supported by the affidavit of Stephen Mariga Njoroge; sworn on the 20th January 2023; and in respect of which the Deponent has annexed three sets of documents.
3. Instructively, upon being served with the instant Application, the 1st Defendant/Respondent filed a Replying Affidavit sworn by Engineer Enock K Ariga; sworn on the 5th June 2023; and wherein the Deponent has contended, inter-alia, that the instant suit, which is the subject of the Application for amendment was compromised and settled vide consent which was adopted as Judgment of the court on the 9th February 2018.
4. Further and in addition, the Deponent of the Replying affidavit has also averred that other than the fact that the suit herein was settled vide consent and is therefore non-existent, the question of interest which is the subject of the intended amendment was also disposed of by this Honourable court vide Ruling rendered on the 10th March 2022 and hence same is Res-judicata.
5. Be that as it may, the Application beforehand came up for hearing on the 12th June 2023; and whereupon the advocate for the respective Parties agreed to canvass and dispose same by way of written submissions. In this regard, the Honorable court thereafter proceeded to and issued directions pertaining to and concerning the filing and exchange of written submissions.
6. Pursuant to and in line with the directions under reference, the Plaintiffs/Applicants filed written submissions dated the 20th June 2023, whereas the 1st Defendant/Respondent filed written submissions dated the 26th June 2023, respectively.

Submissions By The Parties

a. Applicants' Submissions:

7. The Applicants' herein filed written submission dated the 20th June 2023; and in respect of which same has raised, highlighted and canvassed two (2) issues for consideration by the Honourable court.
8. Firstly, Learned counsel for the Applicants has submitted that the Applicants' herein have established and demonstrated the existence of sufficient cause and basis to warrant the grant of Leave to amend the Plaint and thereafter to introduce the cause of action pertaining to and concerning the question of interests arising out of the compensation money paid in respect of compulsory acquisition.
9. Further and in addition, Learned counsel has submitted that the amendment sought with a view to introducing a claim for statutory interests to be paid to the Plaintiffs' herein, does not constitute and/or amount to the introduction of a new cause of action, or otherwise.
10. Additionally, Learned counsel for the Applicants' has submitted that the question of the statutory interests is directly related to the main issue which is the subject of the instant suit; and thus the introduction of the claim cannot alter and or vary the character of the main suit or at all.



11. Further and in any event, Learned counsel for the Applicants has submitted that it is incumbent upon the Honorable court to grant the application for amendment and allow the Applicants to implead the question of Statutory Interests, so as to avert the filing of a multiplicity/ plethora of suits by and on behalf of the Applicants herein, on account of the issue of interests.
12. In support of the foregoing submissions, Learned counsel for the Applicants has cited and relied on various decisions, inter-alia, the case of Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Ltd [2013]eKLR, Lewar Ventures Ltd v Equity Bank (K) Ltd [2022]eKLR and Institute for Social Accountability & Another v Parliament of Kenya & 3 Others [2014]eKLR, respectively.
13. Secondly, Learned counsel for the Applicants has submitted that even though the Applicants' previous counsel had been instructed to file an Application for Leave to amend the Plaint, same failed to file the requisite Application; and hence the Applicants herein sought to engage and to instruct the current advocate with a view to procuring the Leave to amend.
14. Nevertheless, Learned counsel has submitted that the failure and/or lapsed by the erstwhile advocate to file the Application for Leave to amend, ought not to be visited upon the Applicants' herein, who have been keen and desirous to pursue the question of amendment.
15. Furthermore, Learned counsel for the Applicants' has submitted that even though the previous counsel for the Applicants had been instructed to pursue the issue of amendment of the Plaint, same however chose to file an Application claiming interest, albeit without amendment of the Plaint; and which Application was dismissed by the Honourable Court vide Ruling rendered on the 10th March 2022.
16. Be that as it may, Learned counsel for the Applicants has contended that this Honorable court is still vested with the requisite Jurisdiction and discretion to engage with and entertain the current Application for amendment.
17. Secondly, Learned counsel for the Applicants has also submitted that the proposed Plaintiffs who are also sought to be joined in the suit are persons who have a direct interest and stake in the dispute beforehand, insofar as their parcel of lands were also compulsorily acquired and yet same were not compensated in accordance with the provisions of Article 40(3) of *the Constitution* 2010.
18. In the premises, Learned counsel for the Applicants has submitted that the intended joinder is therefore meant to enable the Honorable court to entertain and adjudicate upon all the issues in dispute under one roof and thus to mitigate the filing of a plethora of suits.
19. As concerns the Jurisdiction of the court to join the intended Plaintiffs, Learned counsel for the Applicants has invoked and cited the provisions of Order 1 Rules 10(2) of the Civil Procedure Rules, 2010; which same contends bestows the Honorable court with the requisite Jurisdiction to join any Party who has an interest and or stake in the dispute under investigations by the Honourable court.
20. Other than the foregoing, Learned counsel has cited and relied on the decision in the case of Lucy Nungari Ngigi & Others v National Bank of Kenya Ltd & Another [2015]eKLR, to highlight the position that the Honourable court can undertake joinder of a Party at any stage of the proceedings.
21. Lastly, Learned counsel for the Applicants has also submitted that Leave to amend a pleading can be allowed and/or granted, even when the intended amendment will defeat and/or negate an accrued right, inter-alia, the plea of Limitation of Actions or otherwise.
22. In this respect, Learned counsel for the Applicants has invited the Honourable court to adopt and apply the ratio decidendi in the case of Kenneth Kariuki Githii v Royal Media Services Ltd [2009]eKLR, where the Honourable court canvassed and dealt with the aspect of amendment even



where same was alleged to defeat the defense of Limitation of Actions, which had accrued to the adverse Party.

23. Premised on the foregoing, Learned counsel for the Applicants has implored the Honourable court to find and hold that the instant Application is meritorious and thus deserving of being granted.

b. 1st Defendant's/respondent's Submissions:

24. The 1st Defendant/Respondent has filed written submissions dated the 26th June 2023; and in respect of which same has similarly raised, highlighted and canvassed four (4) issues for consideration by the Honourable court.
25. First and foremost, Learned counsel for the 1st Defendant/Respondent has submitted that the Application for Leave to amend is intended to implead and bring to the fore a new and distinct issues, which is at variance with the cause of action which was impleaded before the court in terms of the original Plaintiff.
26. Consequently and in this regard, Learned counsel has contended that an amendment which seeks to introduce a new cause of action, which is at variance with the original claim; ought not to be allowed by the court.
27. Secondly, Learned counsel for the 1st Defendant/Respondent has submitted that the instant suit, which is sought to be amended was compromised and fully settled by the Parties in terms of a consent, which was thereafter adopted and constituted as the Judgment of the court vide the orders made on the 9th February 2018.
28. Consequently and in view of the foregoing, Learned counsel for the 1st Defendant/Respondent has submitted that there is no more suit capable of attracting an amendment either in the manner sought by the Applicants or at all.
29. Thirdly, Learned counsel for the 1st Defendant/Respondent has submitted that the question/issue of statutory interests, which the Applicant herein seeks to introduce by way of an amendment at the foot of the current Application was canvassed and disposed of vide Ruling of this Honourable court rendered on the 10th March 2022; whereupon the court dismissed the claim seeking for an award of statutory interests on the claim by the various Plaintiffs before the court.
30. Having been heard and disposed of vide the Ruling rendered on the 10th March 2022, Learned counsel for the 1st Defendant has therefore submitted that the claim for statutory interests is therefore prohibited by dint of the Doctrine of Res-Judicata.
31. Lastly, Learned counsel for the 1st Defendant/Respondent has submitted that the intended Plaintiffs, who are sought to be joined into the instant proceedings as additional Plaintiffs, have neither demonstrated their interests nor proved their stake in the suit beforehand.
32. In any event, Learned counsel has submitted that the cause of action by and on behalf of the intended Plaintiffs, including Compensation for compulsory acquisition and statutory interests attendant thereto; are statutorily time barred and hence incapable of being ventilated before the court or at all.
33. In support of the foregoing submissions and particularly to anchor the submissions that the intended Plaintiffs have no demonstrable interests in the suit beforehand; Learned counsel for the 1st Defendant has cited and quoted inter-alia the decision in the case of Lucy Nungari Ngigi & Others v National Bank of Kenya Ltd & Another [2015]eKLR, King'ori v Chege & 3 Others [2002] 2KLR 243; Civicon Ltd v Kivuwatt Ltd & 2 Others [2015]eKLR, respectively.



34. In view of the foregoing, Learned counsel for the 1st Defendant/Respondent has thus invited the Honourable court to find and hold that the instant Application is misconceived, bad in law and otherwise legally untenable. Consequently, Learned counsel has sought to have the application be dismissed with costs to the 1st Defendant.

Issues for Determination

35. Having reviewed the Application dated the 20th January 2023; and the Response thereto and upon taking consideration of the written submissions filed by and on behalf of the named Parties; the following issues do arise and are thus worthy of consideration;

- i. Whether there is a Suit which is capable of being amended to facilitate (sic) the inclusion of the claim of Statutory interests and joinder of additional Parties.
- ii. Whether the Honorable Court is Functus Officio.
- iii. Whether the Question/issue of statutory Interests, which is sought to be claimed at the foot of the amendment is barred by the Doctrine of Res-judicata or otherwise.

Issue Number 1

Whether there is a Suit which is capable of being amended to facilitate (sic) the inclusion of the claim of Statutory interests and joinder of additional Parties.

36. Before delving into the issue highlighted herein before, it is imperative to note and reiterate that the instant suit was filed by the current Plaintiffs/Applicants and in respect of which same sought inter-alia payment of compensation arising from compulsory acquisition of various properties by and on behalf of the 4th Defendant, who undertook the acquisition for and on behalf of the 1st Defendant/Respondent herein.

37. Following the filing and/or lodgment of the instant suit and upon service of the summons to enter appearance and Plaint; the Parties in respect of the instant suit entered into negotiations culminating into various consents being entered into and endorsed by the Honourable court.

38. Firstly, the Parties herein entered into and executed a consent at the foot of the Letter dated the 12th June 2017; and which was thereafter adopted by the Honourable court on the 14th June 2017.

39. Pursuant to and arising from the said consent, the only issue that remained outstanding and pending determination was the question of Party and Party Bill of costs; which the Parties could not agree on. Consequently, the Honorable court ordered and directed that Party and Party bill of costs be resolve by way of written submissions.

40. Subsequently and in line with the directions of the Honourable Court, the advocates for the respective Parties thereafter filed their written submissions to determine the incident/question of costs.

41. However, before the Honourable court could render a Ruling on the question of costs, the advocate for the respective Parties filed yet a further settlement, wherein the question of Party and Party bill costs was resolved and a consent was adopted by the court the 8th February 2018.

42. Moreover, the Parties therein continued with their engagements with a view to ensuring that the Party and Party costs, which had hitherto been agreed upon and a consent adopted by the court were complied with. In this regard, the Parties appeared before the Honourable Court on the 23rd October



- 2018; whereupon Learned counsel for the Plaintiff confirmed that the Party and Party costs had been paid.
43. Arising from the foregoing, the question that now needs to be interrogated is whether post the entry into and endorsement of the settlement by the Parties; there is still any segment of the suit herein, which remains outstanding/ pending hearing and determination.
 44. Clearly and to my mind, the entry into the consent and thereafter the payment of the compensation money as well as the costs of the suit, terminated and concluded the entire suit before this Honorable court.
 45. Arising from the foregoing, the entire of the matter before the Honourable court was settled and disposed of. Consequently and in this regard, it is difficult to understand what the Plaintiffs/ Applicants herein are seeking to amend and thereafter to prosecute before the Honourable court.
 46. Furthermore, the moment the matter is settled, there is closure and hence no further proceedings can be continued with; not until and unless the settlement, which has been duly recorded is rescinded, varied and/or set aside.
 47. Additionally, it is imperative to state and underscore that whereas the Honourable court has the requisite Jurisdiction and discretion to join any Party to the suit, in accordance with the provisions of Order 1 Rule 3 and 10(2) of The Civil Procedure Rules, 2010; such joinder can only be taken at any stage of the proceedings but not otherwise.
 48. For good measure, it is imperative to reproduce the contents of Order 1 Rule 10(2) of The Civil Procedure Rules, 2010, which states as hereunder;

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.
 49. Having taken cognizance of the foregoing position, I beg to state and underline that the proceedings in a case are deemed to exist prior to and before the delivery of a Judgment. However, upon the delivery of a Judgment, (whether procured by consent or otherwise), the proceedings terminate and thereafter no joinder can be undertaken whatsoever.
 50. Additionally, it is not lost on this court that the joinder of any Party in whatsoever capacity (whether as a Plaintiff, Interested Party or necessary Party) is calculated to enable the Honourable court to effectually and effectively determine an issue in controversy and not otherwise.
 51. Be that as it may, there is no gainsaying that a Judgment in a matter determines and disposes of all the issue in controversy and is thus final in nature. In this regard, upon the delivery of a Judgment, there is no gainsaying that no further issue remains in controversy, which can thus warrant the joinder of any Party or at all.



52. In this respect, it is instructive to adopt and reiterate the holding of the court in the case of *Mayfair Holdings Ltd versus Municipal Council of Kisumu; Pauline Mauwa Akwacha (Interested Party/Applicant)* [2020] eKLR, where the court stated and observed as hereunder;

“We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar’s Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings.”

This position was also affirmed by the Court of Appeal in the case of *Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd)* [2019] eKLR.

Nyamweya J in *Lilian Wairimu Ngatho & another v Moki Savings Co-operative Society Limited & another* [2014] eKLR also held that:

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.”

53. Premised on the foregoing, I come to the conclusion that the current Application, which is seeking Leave to amend the Plaint with a view to impleading a claim for statutory interests and joinder of additional Plaintiffs, is evidently stillborn.

Issue Number 2

Whether the Honorable court is Functus Officio.

54. Whilst discussing issue number one hereinbefore; I have proclaimed and indeed reiterated that the Parties to the subject suit entered into and executed various consents, whose import and tenor were to settle and indeed settled the dispute beforehand.
55. Furthermore and for good measure, it is common ground that a consent entered into and endorsed by the Honourable court constitutes a Judgment and is thus binding on the Parties thereto.
56. In respect of the subject matter, the Plaintiffs herein engaged the Defendants and ultimately same agreed to and entered into a consent. Furthermore, upon entry into the consent the Plaintiffs herein were variously paid the compensation money, in terms of the acknowledgment that were alluded to and documented by the court.
57. Having pointed out the foregoing, the question that must now be addressed is what is the Legal import and tenor of a Consent Judgment and whether there can be any further engagements; after the court has rendered/ delivered a Judgment, save for Execution of the resultant Decree.



58. To my mind, Parties come before courts of law seeking for determinations and the moment the determination is made, the Parties are duly bound. On the other hand, the court after rendition of a Judgment becomes *Functus officio*.
59. To be able to understand the Legal import and implication of the Doctrine of *Functus officio*, it suffices to cite and reiterate the holding of the court of appeal in the case of *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, where the court stated thus;
- “A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”
60. Without belaboring the point, it is my finding and holding that the Doctrine of *Functus officio* applies to and in respect of the subject matter and thus this Honorable cannot be invited to re-engage with a matter that is fully concluded and finalized.

Issue Number 3

Whether the question/issue of Statutory Interests, which is sought to be claimed at the foot of the amendment is barred by the Doctrine of *Res-Judicata*

61. The Plaintiffs/Applicants herein are seeking leave to amend the *Plaint* so as to introduce inter-alia a claim for statutory interests, which ought to have been paid over and in respect of the compensation monies.
62. Nevertheless, it is worthy to recall and reiterate that the Plaintiffs/Applicants herein had hitherto filed an *Application* dated 16th October 2020; and wherein same sought to be paid statutory interests on the various sums which were decreed in favor of the Plaintiffs/Applicants.
63. Furthermore, upon the filing of the named *Application*, same was placed before the Honorable court whereupon the *Application* was heard and thereafter disposed of vide ruling rendered on the 10th March 2022. Instructively, the *Application* under reference and in particular, the claim for interests was dismissed.
64. Notwithstanding the foregoing, the Plaintiffs/Applicants herein have since reverted to court and same are seeking Leave to amend the *Plaint* with a view to canvassing the question of statutory interests; which had already been dealt with and disposed of by the court.
65. In this regard, the question that comes to mind is whether this court can re-engage with the issue pertaining to and concerning payment and statutory interests to and in favor of the Plaintiffs herein, which issue was alive at the foot of a previous *Application* mounted by the Plaintiffs.
66. To my mind, a court of law can only deal with and engage with a particular matter once; and where a party is aggrieved and/or dissatisfied, the only recourse available is an appeal to a higher court and not otherwise.



67. Be that as it may, the Plaintiffs herein have returned to this court and same seek to invite this court to grant leave for purposes of amendment with a view to allowing the Applicants to re-agitate/ regurgitate the same question of (sic) payment of Interest.
68. In my mind, the moment the court rendered the ruling dated the 10th March 2022, this court cannot be re-invited, presently or otherwise to re-adjudicate upon the same question. Clearly, the issue of payment of statutory interests is Res-judicata. For coherence, the Provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya, suffice.
69. To this end, I beg to reiterate the ratio decidendi of the Court of Appeal in the case of Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd [2016]eKLR, where the court stated and held thus;

“Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson [1843] 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of Mburu Kinyua v Gachini Tutu [1978] KLR 69 Madan, J. Quoting with approval Wilgram V.C. in Henderson v Henderson (supra) stated:

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case.

The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time” (emphasis added).

70. In a nutshell, it is my finding and holding that the intended amendment, with a view to canvassing the question of payments of the statutory interests, if any, is prohibited by the Doctrine of Res-judicata and is thus legally untenable.

Final Disposition

71. Having calibrated on the issues beforehand and taking into account the obtaining Jurisprudence, there is no gainsaying that the current Application which is being ventilated by the Applicants, is no doubt misconceived and otherwise stillborn.
72. Consequently and in the premises, the Application dated 20th of January 2023; is devoid and bereft of merits and is thus Dismissed with costs to the First Defendants/Respondents only.
73. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023.

OGUTTU MBOYA

JUDGE



In the presence of:

Benson – court Assistant

Mr. Jimmy Maina for the Plaintiffs/Applicants

Ms. Ambani for the 1st Defendant/Respondent

Ms. Ndundu for the 3rd Defendant/Respondent

N/A for the 4th Defendant/Respondent

