



**Muhindi & 4 others v Miso; Masambu & another (Interested Parties) (Environment & Land Case 12 of 2014) [2023] KEELC 19201 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19201 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 12 OF 2014**

**EO OBAGA, J  
JULY 26, 2023**

**BETWEEN**

**RAPHAEL KAGALI MUHINDI ..... 1<sup>ST</sup> PLAINTIFF**

**RAPHAEL KAGALI MUHINDI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MARY JEROTICH MISOI ..... 1<sup>ST</sup> APPLICANT**

**JOSEPH MASAMBU ..... 2<sup>ND</sup> APPLICANT**

**KENNETH MBWANGA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**MARY JEROTICH MISOI ..... DEFENDANT**

**AND**

**JOSEPH MASAMBU ..... INTERESTED PARTY**

**KENNETH MBWANGA ..... INTERESTED PARTY**

**RULING**

1. This is a ruling in respect of Notice of motion dated March 21, 2023 in which the Defendant/Applicant and the Interested parties/Applicants seek the following orders:-
  - a. Spent
    - a. spent
    - b. That Joseph Masambu, the 1<sup>st</sup> Interested party/Applicant and Keneth Mwanganga the 2<sup>nd</sup> Interested party/Applicant be enjoined to the instant suit as Interested parties.



- c. That the Applicants be granted leave to file Notice of Appeal out of time and consequently that the respective Notices of Appeal lodged on March 8, 2023 and March 15, 2023 deemed as duly filed in accordance with Rule 77 of the *Court of Appeal Rules* 2022.
  - d. That pending hearing and determination of the Appeal and/or Intended Appeal lodged in the Court of Appeal there be an order of stay of execution/enforcement of the judgement/Decree of the Honourable court given on June 24, 2021 that allowed the plaintiffs' claim for adverse possession and consequently allocated him 0.83 hectares comprised in the Land parcel registration number LR. Nandi/Chebilat/129 measuring 3.8 hectares that is duly registered in the name of the 1<sup>st</sup> Applicant.
  - e. Costs be in the cause.
2. The Plaintiff/Respondent had filed an originating summons against the Defendant/Applicant seeking an order to be declared as having obtained 0.83 hectares comprised in Nandi/Chebilat/129. After hearing of the originating summons a judgement was delivered on June 24, 2021 in favour of the Plaintiff/Respondent.
3. After entry of judgement the firm of Kipkosgey Choge and company advocates who were acting for the Defendant/Applicant entered into a consent with the firm of Rotich, Langat and partners Advocates to come on record to act for her.
4. On March 8, 2023, the firm of Kutto & Kaira Nabasenge Advocates purported to enter into a consent with the firm of Kipkosgey Choge & Co Advocates who had already come out of record having paved way to the firm of Rotich, Langat and partners Advocates.
5. The Defendant/Applicant contends that after judgment was delivered, her then advocates Ms Kipkosgey Choge & Co Advocates kept assuring her that she had won the case only to discover too late that judgement was against her. She contends that the Plaintiff/Respondent is in the process of executing the judgement which will affect the Interested party/Applicants to whom she sold land to as their houses may be demolished.
6. The Defendant/Applicant states that she and the Interested parties have filed notices of appeal against the judgement of June 24, 2021 and they are therefore seeking extension of time to lodge the appeal and have the notices which have already been filed deemed as having been properly filed. It is on this basis that the Defendant/Applicant seeks stay of execution to avert the imminent eviction of herself and the Interested parties.
7. The Respondent opposed the Applicants' application based on a replying affidavit sworn on April 6, 2023. The Respondent contends that he Applicants' application is an abuse of the process of the court as they have filed a similar application before the Court of Appeal seeking same reliefs.
8. The Respondent further contends that the Advocate who has filed this application is not properly on record and that the Applicants have filed the application after 22 months; that they have not demonstrated what substantial loss they will suffer and that the interested parties cannot be joined in this case after judgement and in any case the interested parties do not have any claim against the Plaintiff/Respondent.
9. The Applicants filed written submissions on April 20, 2023. The Respondent filed submissions on May 8, 2023. I have carefully considered the Applicants application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. The issues which



emerge for determination are firstly whether the present application is an abuse of the court process. Secondly, whether the firm of Kutto & Kaira Nabasenge Advocates are properly on record. Thirdly, whether the Interested parties can be joined in this case. Fourthly, whether the Applicants are entitled to extension of time to file notices of appeal and lastly, whether this court has jurisdiction to validate notices of appeal filed before the court of appeal.

10. On the first issue, there is no contention that the Applicants have filed a similar application before the court of appeal. The act of filing applications before different courts amounts to an abuse of the process of the court. The Applicants are arguing in their submissions that the Court of Appeal is overwhelmed and that by the time the application before the Court is determined, the one filed before this court would have been determined and the notices which were filed would have been validated.
11. The Applicants' argument is without merit. A party should make a decision on which court should deal with his or her application and not to make a gamble by filing applications in two different courts at the same time. This is clearly an abuse of the process of the court.
12. On the second issue, there is no contention that the firm of Kipkosgey Choge & Co Advocates is the one which was acting for the Defendant until judgement was delivered. After delivery of judgement, the firm of Kipkosgey Choge & Co Advocates consented to the firm of Rotich, Langat & Partners Advocates taking over. This being the case, the firm of Kutto & Kaira Nabasenge Advocates should not have purported to obtain another consent taking over from the firm which was already not on record. The firm of Kutto & Kaira Nabasenge should have obtained a consent from the firm of Rotich, Langat & partners Advocates. This was not the case. The firm of Kutto & Kaira Nabasenge advocates are therefore not properly on record.
13. On the third issue, it is clear that the Interested parties are seeking to come on to this suit after judgement. There is no doubt that they may be affected going by what they claim through the Defendant/Applicant. However, this notwithstanding, the question which this court should ask is whether, their joinder will help in the circumstances. There is no input which they will bring into this suit which will assist them. They would have only benefitted if they applied to be joined in the Court of Appeal.
14. On the fourth issue, there is a delay of almost two years since the judgement was delivered. The Applicants have tried to argue that they could not bring up this application as the previous lawyers of the Defendant/Applicant kept promising the Defendant/Applicant that she had won the case. The Defendant/Applicant claims that she came to know of the judgement after the Respondent began the process of execution by filing an application dated February 3, 2023.
15. The Defendant/Applicant is not being candid. She cannot claim to have become aware of the judgment in 2023 when she had already engaged the services of the firm of Rotich, Langat & partners to take over from the firm of Kipkosgey Choge & Co Advocates. A consent to change is made after delivery of judgement. This shows that the Defendant/Applicant was aware of the judgement.
16. In the case of *Nicholas Kiptoo Korir Arap Salat – Vs- Independent Electoral & Boundaries Commission and 7 others (2014) eKLR*, the Supreme Court of Kenya set out the conditions to be met before extension of time can be granted. They stated as follows:-

' ... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. This being the first case in which this court is called



upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of such discretion;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.'

17. The Applicants have not explained the delay in filing this application to the satisfaction of the court. They have instead tried to pretend that they were not aware of the judgment by giving excuses which do not hold water. I therefore find that the Applicants have not convinced the court that they deserve extension of time to file appeal.

18. On the last issue, this court has no jurisdiction to validate the notices before the court of Appeal. Infact those notices are incompetent and the Court of Appeal has pointed so to the Applicants. It is therefore clear that the Applicants' application is not only incompetent but it also lacks merit. I proceed to dismiss it with costs to the Plaintiff/Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 26<sup>TH</sup> DAY OF JULY, 2023.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Mogambi for Plaintiff.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

**26<sup>TH</sup> JULY, 2023**

