



**Nguthi & 28 others v Mungai & 3 others; Gitundu & another (Proposed Interested Parties)
(Suing on Behalf of Kihururu Self Help Group) (Environmental and Land Originating
Summons 120 of 2013) [2023] KEELC 20356 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20356 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 120 OF 2013
LN MBUGUA, J
SEPTEMBER 28, 2023**

BETWEEN

JACKSON MUIRURI NGUTHI & 28 OTHERS PLAINTIFF

AND

MOSES NDUNGU MUNGAI 1ST DEFENDANT

SIMON NDUNDA METHO 2ND DEFENDANT

KASIVA NZOMO NGWALO 3RD DEFENDANT

MITA NZOMO NGWALO 4TH DEFENDANT

AND

GIDRAPH NGUGI GITUNDU PROPOSED INTERESTED PARTY

DANSON MWORIA NJHIA PROPOSED INTERESTED PARTY

SUING ON BEHALF OF KIHURURU SELF HELP GROUP

RULING

1. Judgment was entered in this matter on May 12, 2022. Subsequently, the proposed Interested parties herein referred to as the ‘Applicants’ filed the Notice of Motion application dated March 28, 2023 which is for determination before this Court. They seek orders to be joined in this suit as well as orders to review and / or vary the aforementioned judgement to the extent that the same apply to and/or affect that parcel of land known as Mavoko Town Block 2/9247. They also seek a declaration that the issue of ownership of the said parcel is res – judicata having been canvassed in Milimani CMCC No 11556 of 2003.



2. The application is based on grounds on its face and on the supporting affidavit of Danson Mworia Njihia sworn on March 28, 2023. He avers that the Applicants became registered owners of the suit parcel having bought 10 plots each measuring 40 by 80 feet excised from the 1st Defendant's parcel of land then known as Mavoko Town Block 2/15459.
3. However, the 1st Defendant refused to transfer the land to the group, thus they sued him in CMCC No 11556 of 2003 which suit was determined by a consent dated February 20, 2007. The 1st Defendant was ordered to transfer the said 10 plots as 1 block creating the parcel known as Mavoko Town Block 2/9247.
4. He avers that in the course of proceedings in a matter in Mavoko CMECL No 65 of 2019 Gidraph Ngugi Gitundu & another v S.M Kioko & others, they were served with the judgement issued herein.
5. He argues that counsel on record for the Plaintiffs Mr. B.M Musyoki was aware of their interest in the suit property having litigated over the same in a previous case Machakos ELC case No 12 of 2009 - *Alice Njoki Waitiki & 4 others v Moses Ndungu Mungai & 3 others*.
6. He states that the situation obtaining now is that there are 3 orders made by 3 different courts of competent jurisdiction but which are conflicting thus non is capable of execution.
7. The application is opposed by the Plaintiffs vide the replying affidavit of the 7th Plaintiff sworn on May 26, 2013 (it ought to be 2023). He avers that it was fraudulent for the Applicants to have registered themselves as owners of the subject land long after this suit was filed and while aware that the court in Machakos High Court Civil Case No 12 Of 2009 had issued an order barring any dealing with the suit parcel.
8. He avers that the 1st Defendant in the Mavoko case referred to by the Applicants has been on his plot since 2004 while the 2nd and 3rd Defendants in that case who are the 6th and 2nd Plaintiffs in the instant suit have been on their plots since 1996.
9. He avers that Milimani CMCC No 11556 of 2013 did not involve the same subject matter as in this suit, neither did it involve the same parties. He adds that even assuming the applicants are entitled to 10 plots from the suit land, it is more than what they were awarded which is 10 plots measuring 40 by 80 which translates to 0.446 hectares but the subject suit measures 0.615 hectares.
10. It was argued that this suit was published in a daily Newspaper, thus the Applicants were aware of this suit and the Plaintiffs had no duty to inform them of this suit as they were unknown to them.
11. In response to the Plaintiffs' replying affidavit, the applicants filed a supplementary affidavit sworn by Danson Mworia Njihia on June 13, 2023. He reiterates that the Interested Parties were not aware of the existence of this suit by the time they obtained the registration of the subject parcel, and that the alleged court order issued in Machakos HCCC No 9 of 2012 was set aside by an order dated November 19, 2018 issued in the same matter.
12. The Defendants did not file responses to the application.
13. The application was heard via written submissions. The Applicants submissions are dated June 30, 2023, where they address the following issues;
 - a. Whether the Applicants Gidraph Ngugi Gitundu and Danson Mworia Njihia should be joined to the suit on behalf of Kihururu Self Help Group?
 - b. Is there any merit in allowing the Applicant's prayer seeking to review, set aside and vary the orders as contained in the judgement that was delivered by this Honourable court on May 12,



2022 to the extent that the same affects and apply to that parcel of land known as Mavoko Town Block 2/9247?

- c. What prejudice if any would the Plaintiff's suffer if the orders sought in the said application dated March 28, 2023 are allowed?
14. On the 1st issue, the applicants submit that they are the registered owners of the subject land and if they are not enjoined, they stand to be condemned unheard contrary to Article 48 and 50 of the constitution.
15. On the 2nd issue, the Applicants submit that from the wording of the judgement issued herein, dated May 12, 2022, final order 1 of the court wrongly presupposes that the Applicants' parcel of land Mavoko Town Block 2/9247 is registered in the name of the 1st Defendant whereas it is registered under the names of Gidraph Ngugi Gitundu, Danson Mworira Njihia and George Njoroge Ngugi who were not parties in the suit.
16. On the 3rd issue, the applicants submit that since counsel for the plaintiffs deliberately misled the court in believing that the subject parcel was registered in the name of the Defendants, the Plaintiffs do not stand to suffer any prejudice since they are authors of their own misfortune.
17. The Plaintiff's submissions are dated July 4, 2023 where they address the following issues;
 - a. Whether the applicants have sufficiently demonstrated that they have met the prerequisites of being considered Interested Parties?
 - b. Whether the Applicants should be enjoined in the suit?
 - c. Whether the orders contained in the judgement delivered by this Honourable Court on May 12, 2022 should be reviewed, set aside or varied?
 - d. Whether the issue of ownership of the subject parcel of land is resjudicata to CMCC No.11556 of 2003?
 - e. Whether the Plaintiff will suffer any prejudice if the orders sought are not granted?
18. On the 1st issue, the Plaintiffs submit that for a party to be enjoined in a matter, the case must be alive in court. They rely on the case of Florence Nafula Ayodi & 5 others v Jonathan Ayodi Ligure, John Tabalya & another; Benson Girenge Kidiavai & 67 others (applicants/intended interested parties) [2021] eKLR.
19. On the 2nd issue, the plaintiffs submit that the applicants have not established that they will suffer prejudice if they are not enjoined and that they do not have a direct interest in these proceedings.
20. On the issue whether this suit is resjudicata CMCC No 11556 of 2003, the Plaintiffs argue that the pleadings and decree in that matter were not placed before this court for it to make a determination of the issue at this point.
21. On whether the orders for review of the judgement issued herein should be granted, the Plaintiffs submit that the same cannot be awarded to the applicants before an order enjoining them is granted as review is a remedy only available to persons who are aggrieved by orders which they have a right of appeal over and in this case, the Applicants do not have the right as they are not parties to the suit.
22. I have considered all the rival arguments. At the time the court entered judgment in this matter on May 12, 2022, it was meant to believe that the 1st Defendant was the registered owner of the parcel of land known as Mavoko Town Block 2/9247 as per a search dated February 14, 2012. The court is now being told that the Applicants herein were issued with a title to the said parcel on 25.4.2019 as trustees of Kihururu Self Help Group. That the titles were issued in execution of court orders issued on February



20, 2007 in Milimani CMCC No 11556 of 2003, where the applicants herein were awarded 10 plots of 40 by 80 feet out of Mavoko 2/15459.

23. The court has also learnt that there was litigation in the case *Alice Njoki Waitiki & 4 others v Moses Ndungu Mungai & 3 others* [2018] eKLR where judgment was entered on September 21, 2018. The court noted the Applicants' interest in the subject land as follows;

“The consent order that was produced by the 3rd and 4th Defendants in Milimani CMCC No 11556 of 2003 shows that the 1st Defendant herein was ordered to transfer to the Plaintiffs (the 3rd and 4th Defendants' herein) ten (10) plots each measuring 80 x 60 feet out of land known as Mavoko Town Block 2/5459. The court further ordered that the Plaintiffs (the 3rd and 4th Defendants' herein) were to undertake the sub-division of the said land and have the title documents processed.”

24. The Plaintiffs filed this suit claiming Mavoko Town Block 2/9247 by adverse possession but they failed to enjoin the Applicants yet they knew the Applicants had an interest as they had expressed it in *Alice Njoki Waitiki & 4 others v Moses Ndungu Mungai & 3 others* [2018] eKLR where the Plaintiffs were parties and they were represented by the same counsel who appears for them in this matter.

25. There is a need to get to the bottom of the dispute herein.

Further, it is pertinent for this court to understand the import and impact of the decisions already delivered by other courts in respect of the subject matter so as to avoid confusion as well as issuance of conflicting decisions.

26. I find that the plaintiffs herein are guilty of failure to disclose the existence of the previous cases. In the case of *in re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR, the court had this to say in relation to none disclosure of material facts;

“But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

27. I am further assisted by the reasoning of the Supreme Court in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] Eklr. To this end, I find that the application is merited and I proceed to give the following orders;

1. The entire judgement dated May 12, 2022 is hereby set aside.
2. The Applicants are hereby joined in these proceedings as interested parties.
3. The Applicants are directed to file and serve their statement of claim within 21 days from the date of delivery of this ruling otherwise the orders given herein shall lapse.
4. The costs of the application shall abide the final outcome of the suit.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

B.M Musyoki for plaintiffs

M/s Mwangi holding brief for Mrs. Ngugi both Applicants, Interested Parties

Court Assistant: Eddel

