



Kayongo v Embakasi Ranching Co. Ltd; Munira (Proposed Interested Party) (Environment & Land Case 1125 of 2016) [2023] KEELC 21109 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21109 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1125 OF 2016
JO MBOYA, J
OCTOBER 26, 2023**

BETWEEN

MONICA ATIENO KAYONGO PLAINTIFF

AND

EMBAKASI RANCHING CO. LTD DEFENDANT

AND

EGLAH WANGARI MUNIRA PROPOSED INTERESTED PARTY

RULING

Introduction And Background

1. The instant Ruling relates to two (2) Application(s), one filed by and on behalf of the Plaintiff herein, whereas the other Application has been filed by the proposed Interested Party/Applicant.
2. Given the diverse orders and/or reliefs sought at the foot of the various Applications, it is important to highlight the nature of the reliefs sought. Consequently and in this regard, the court shall endeavor to highlight the reliefs sought at the foot of each Application seriatim.
3. Vide the Application dated the 18th August 2022; the Plaintiff/Decree Holder has sought for the following reliefs;
 - i. The Honorable court be and is hereby pleased to issue an order vesting the ownership of properties known as L.R No. Nairobi Block 4990, Nairobi Block 4991, Nairobi Block 105/4998 and Nairobi Block 105/4999 upon the decree holder.
 - ii. That this Honorable court be pleased to order and direct the Chief Land Registrar to issue lease hold titles in respect of properties known as L.R No. Nairobi Block 4990, Nairobi Block



4991, Nairobi Block 105/4998 and Nairobi Block 105/4999 to the Plaintiff/ Decree Holder without any reference to the Defendant/Judgment Debtor.

- iii. This Honorable court be and is hereby pleased to direct the deputy registrar of this court to execute the leases, Instrument of Transfer and any other Document that ordinarily ought to be executed by the Defendant/Judgment Debtor so as to give effect to prayers 1 and 2.
 - iv. That for the avoidance of doubt, this Honorable court does hereby dispense with the participation of the Defendant/Judgment Debtor of execution of Decree issued on the 15th October 2021.
 - v. Costs of the Application be borne by the Defendant/Respondent.
4. The instant Application is premised and anchored on various grounds which have been enumerated in the body thereof. Furthermore, the Application is further supported by the Plaintiff/Applicant sworn on the 18th August 2022.
 5. Suffice it to point out that despite having been served with the instant Application, the Defendant/Respondent neither filed Grounds of opposition nor Replying affidavit. Instructively, the Application under reference is factually unopposed.
 6. The second Application is the one dated the 10th July 2023; and in respect of which the Proposed Interested Party/Applicant has sought for the following reliefs;
 - i.Spent.
 - ii. That execution of the Decree herein be stayed pending the hearing and determination of this Application.
 - iii. That the Proposed Interested Party be joined as an Interested Party herein particularly in relation to the Plaintiff's pending Application herein dated 18th August 2022.
 - iv. That this suit be placed before the Presiding Judge of the Milimani Environment and Land Court for directions on the hearing of the pending application vis a vis the pending hearing of Elc Case E291/2022 - Monica Atieno Kayongo Vs Christopher Kimani Gikonyo And Eglah Wangari Munira.
 - v. That the Plaintiff's pending Application Herein Dated 18th August 2022; Be Heard Together With Elc Case E291/2022 - Monica Atieno Kayongo Vs Christopher Kimani Gikonyo And Eglah Wangari Munira.
 - vi. That the costs of this Application be granted to the Interested Party/Applicant.
 7. For coherence, the second Application is premised and anchored on the various grounds which have been alluded to at the foot thereof. Additionally, the said Application is supported by the affidavit of the proposed interested Party and which is sworn on even date.
 8. On the other hand, upon being served with the Application under reference, the Plaintiff/Respondent responded thereto vide a Replying affidavit; and in respect of which same has contended, inter-alia, that the Application in question is prohibited by the doctrine of Res-Judicata.
 9. For good measure, the two Applications came up on the 12th July 2023; whereupon the advocates for the respective Parties covenanted to canvass and dispose the two Application(s) simultaneously. In this regard, the court adopted the agreement by the Parties and thereafter circumscribed the timelines for the Parties to file and exchange written submissions.



Parties' Submissions:

Applicant's Submissions:

10. The Plaintiff/Applicant herein adopted the grounds at the foot of the Application dated the 18th August 2022; as well as the averments contained in the body of the supporting affidavit. Furthermore, the Plaintiff thereafter highlighted and amplified three (3) salient issues for due consideration by the court.
11. Firstly, Learned counsel for the Plaintiff has submitted that upon the filing of the instant suit, same proceeded to and extracted summons to enter appearance, which were thereafter served upon the Defendant.
12. Additionally, Learned counsel has submitted that subsequent to being served with the summons to enter appearance and Plaint, the Defendant duly instructed the firm of M/s Chege Kibathi & Company Advocates; to enter appearance and file statement defense.
13. On the other hand, Learned counsel has submitted that thereafter the instant matter was heard and disposed of vide Judgment rendered on the 9th September 2021, which Judgment has neither been set aside, varied and/or rescinded.
14. At any rate, Learned counsel for the Plaintiff has contended that despite being privy to and knowledgeable of the terms of the Judgment and the consequential decree, the Defendant/ Respondent has neither complied with nor adhered to the terms of the Judgment under reference.
15. Based on the foregoing, Learned counsel for the Plaintiff has thus invited the Honourable court to find and hold that the Judgment of the court ought to be enforced and thus it is appropriate and expedient for the court to grant the requisite vesting order, to enable the Plaintiff to benefit from the fruits of the litigation herein.
16. Secondly, Learned counsel for the Plaintiff has submitted that the proposed interested Party/Applicant had previously filed the Application dated the 20th April 2023; and wherein same sought to be joined as a Defendant. In addition, Learned counsel has also contended that the proposed Interested Party had also sought to set aside the Judgment of the court issued on the 9th September 2021.
17. Be that as it may, Learned counsel for the Plaintiff has contended that the said Application was heard and dismissed by the court in terms of the Ruling rendered on the 2nd March 2023.
18. Arising from the foregoing, Learned counsel for the Plaintiff has thus submitted that the current Application by and on behalf of the proposed Interested Party is barred and prohibited by the Doctrine of Res-Judicata.
19. In support of the submissions that the current Application by the proposed Interested Party is barred by the Doctrine of Res-Judicata, Learned counsel has cited and relied on the decision in Civil Appeal Number 9 of 2021 (formerly environment and land appeal case number 1 of 2019).
20. Thirdly, Learned counsel for the Plaintiff has submitted that the court is Functus officio and thus divested of the requisite Jurisdiction to entertain and adjudicate upon the subject Application.
21. To this end, Learned counsel for the Plaintiff has submitted that the court has since handled, entertained and ultimately adjudicated upon an Application touching on joinder of the proposed Interested Party.



22. In support of the submissions touching on the Doctrine of Functus officio, Learned counsel for the Plaintiff has cited and relied on the case of Raila Odinga & Others vs IEBC & Others (2013)eKLR, where the Supreme Court elaborated upon the import, tenor and scope of the Doctrine of Functus officio.
23. Premised on the foregoing, Learned counsel for the Plaintiff has thereafter invited the court to find and hold that the Application dated the 18th August 2022; is meritorious and thus ought to be allowed.
24. Conversely, Learned counsel for the Plaintiff has submitted that the Application by and on behalf of the proposed Interested Party/Applicant, is devoid/ bereft of merits; and in any event, constitutes to an abuse of the Due process of the court.

Proposed Interested Party's Submissions:

25. The Proposed Interested Party filed written submissions dated the 18th September 2023; and in respect of which same has raised and canvassed one (1) issue for due consideration by the court.
26. It is the submissions by and on behalf of the proposed interested Party that the Plaintiff herein has since filed another suit, namely, Milimani ELC No E291 of 2022; against the proposed Interested Party and another and in respect of which the Plaintiff lays a claim to and in respect of the suit properties.
27. On the other hand, Learned counsel for the proposed Interested Party has also submitted that the proposed interested Party was a member of the Defendant herein; and same was duly allocated Plots Numbers R50 and R51; which have since been registered and are now known as L.R No's Nairobi Block 105/4990 and 4991, respectively.
28. Arising from the foregoing, Learned counsel for the proposed interested Party has therefore contended that it is therefore appropriate and expedient for this court to join the proposed interested Party in respect of this matter; and thereafter to have the instant file/suit transferred to the Presiding Judge of the Environment and Land Court, so as to facilitate with consolidation with the pending suit.
29. Additionally, Learned counsel for the proposed Interested Party has submitted that though the interested Party had previously filed an application for joinder in the matter, same related to joinder as a Defendant and not as an Interested Party. In this regard, Learned counsel has therefore submitted that the current Application is therefore not barred by the Doctrine of Res-Judicata.
30. In support of the submissions for Joinder, Learned counsel for the proposed Interested Party has cited and relied on the holding in the case of David Kiptugen versus Commissioner of Land & 4 Others (2016)eKLR.
31. In a nutshell, Learned counsel for the proposed Interested Party has therefore impressed upon the Honourable court to find and hold that the Application is meritorious and thus ought to be allowed.

Issues For Determination:

32. Having reviewed the two (2) Applications, which were canvassed together and upon taking into consideration the written submissions filed by and on behalf of the Parties, the following issues do emerge and are thus worthy of determination;
 - i. Whether the proposed Interested Party ought to be joined in the subject matter, either as sought or at all.
 - ii. Whether the Application by the Proposed Interested Party is prohibited by the Doctrine of Res-Judicata; and by extension Section 7 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya.



- iii. Whether the Application by the Plaintiff and which seeks for a vesting order is meritorious.

Analysis And Determination

Issue Number 1 Whether the proposed Interested Party ought to be joined in the subject matter, either as sought or at all.

33. It is common ground that the suit herein was heard and determined vide Judgment rendered by the court on the 9th September 2021. Instructively, the said Judgment remains in existence and has neither been set aside, varied and/or rescinded.
34. Furthermore, it is also important to state and underscore that the proposed interested Party herein together with others filed an Application dated the 20th April 2023; and wherein same sought for various reliefs, inter-alia, setting aside of the Judgment under reference.
35. Arising from the said Application, namely, the Application dated the 20th April 2023, the court was obliged to and indeed rendered a Ruling on the 2nd March 2023, whereupon the named application was dismissed.
36. From the foregoing position, there is no gainsaying that the suit beforehand has been heard and determined and there is no outstanding issue, pending hearing and determination, save for Execution proceedings for purposes of enforcement of the Decree attendant to and arising from the Judgment of the Court.
37. To the extent that the suit herein has since been heard and concluded, the question that does arise is whether the proposed interested Party can now be joined into the suit either as an Interested Party or otherwise.
38. However, in my humble view, it is imperative to underscore that the joinder of a Party either as an Interested Party or otherwise, presupposes that there is a suit which is pending hearing and determination and not otherwise.
39. Furthermore, it is also important to point out that the joinder of a Party in whatsoever capacity is intended to enable the Party joined to participate in the proceedings and thereby to enable the court to effectively and effectually determine the issues in controversy/ Dispute.
40. Clearly, the joinder of a Party is meant to achieve a legal and legitimate purpose. For good measure, the purpose of joinder is to enable the court to effectively entertain and thereafter determine the issue(s) in dispute.
41. Put differently, it is my humble view that the joinder of a Party in a particular suit and in whatsoever capacity, is not meant for cosmetic purposes. In this regard, there is no gainsaying that a Party, the proposed interested party not excepted, cannot seek to be joined into the instant proceedings, long after the hearing and determination of the matter.
42. To my mind, upon proclamation of a Judgment, the court determines all the issues in controversy and henceforth, one cannot talk about any pending issue requiring effective and effectual determination, so as to warrant the proposed joinder.
43. To be able to appreciate the tenor of the foregoing exposition of the law, it is imperative to take cognizance of the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010.
44. For good measure, the contents of the said provisions are reproduced as hereunder;



10. Substitution and addition of parties [Order 1, rule 10.]

- (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
 - (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.
45. Other than the foregoing, it suffices to point out that the ingredients to be established and or demonstrated before a Party can be joined into subsisting/ existing Suit or proceedings were also elaborated upon by the Court of Appeal in the case of Civicon Limited versus Kivuwatt Limited & 2 others [2015] eKLR, where the court held and observed as hereunder;

“The question is whether the right of a person may be affected if he is not added as a party. Generally in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided.

Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings.”

46. Similarly, the issue of joinder was also highlighted and elaborated upon in the case of Pravin Bowry versus John Ward & another [2015] eKLR, where the court held thus;

“There is no requirement under the said provisions for a draft of the pleading to be amended to be included as is the procedure in an ordinary application for amendment of pleadings. There is no requirement as there is in an ordinary application to join a third party for leave of the court to be sought. An applicant need only file the application and there is no requirement to serve that application upon the party intended to be joined as a co-defendant. Indeed the court itself may add such a party to the suit so that such addition will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”

47. The court proceeded and observed as hereunder;

“The exercise of this jurisdiction is pegged upon the discretion of the court in making a determination as to whether the party sought to be added will facilitate the effectual and complete settlement of all the questions in the suit.

48. To the extent that the instant suit has since been concluded and Judgment delivered, there is no outstanding proceedings, save for execution proceedings, in respect of which the proposed Interested Party can be joined either in accordance with the provisions of Order 1 Rules 10(2) of The Civil Procedure Rules; or otherwise.



Issue Number 2 Whether the Application by the Proposed Interested Party is prohibited by the Doctrine of Res-Judicata; and by extension Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

49. Other than the fact, that the instant suit has since been heard and fully determined vide Judgment rendered on the 9th September 2021, there is the ancillary issue, pertaining to and concerning a previous Application that had been filed by and on behalf of, inter-alia, the proposed interested Party herein.
50. For the avoidance of doubt, it is worthy to point out that the proposed Interested Party herein together with others had filed an Application dated 20th April 2023; and in respect of which same sought to set aside the Judgment of the court.
51. Additionally, the proposed Interested Party had also sought to be joined into the proceedings as a Defendant. However, it suffices to underscore and reiterate that the said Application was dismissed.
52. Furthermore, it is also worth stating that following the dismissal of the Application dated the 20th April 2023; the proposed Interested Party herein thereafter proceeded to and filed a Notice of Appeal, as well as a substantive appeal before the Court of Appeal.
53. Notwithstanding the foregoing, what concerns the court at this juncture is whether the proposed Interested Party, who had hitherto filed the Application dated the 20th April 2023; can now revert back to court and seek the orders enumerated at the foot of the current Application.
54. To my mind, the issues raised and the reliefs sought at the foot of the current Application are issues which were within the knowledge of the proposed Interested Party; and thus ought to have been made ground(s) of offence or defense, (whichever is appropriate), during the prosecution of the previous Application.
55. Instructively, if the issues adverted to at the foot of the current Application were omitted by the proposed interested Party, it must then be taken that the issues beforehand were relinquished and thus abandoned.
56. Nevertheless, it suffices to underscore that the issues in question properly and rightfully ought to have been made issues at the foot of the previous Application; and thus same are barred by the doctrine of Constructive Res-judicata in accordance with the provisions of Section 7(4) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
57. In this respect, it is my finding and holding that the proposed Interested party cannot no seek to re-agitate the issues alluded to at the foot of the current Application, which issues ought to have been addressed and/or canvassed vide the previous Application. Simply put, the proposed interested party cannot allowed to litigate by instalments.
58. As concerns the import, tenor and scope of the Doctrine of Res-Judicata, it suffices to adopt and reiterate the holding of the Court of Appeal in the case Kenya Commercial Bank Limited versus Benjoh Amalgamated Limited [2017] eKLR, where the court observed and stated as hereunder;

“To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of



accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer's accounts, has been or could have been raised before the High Court in the previous suits."

59. Arising from the foregoing, my answer to issue number two (2); is to effect that the Application by the proposed Interested Party is therefore prohibited by the Doctrine of Constructive Res-Judicata.

Issue Number 3 Whether the Application by the Plaintiff and which seeks for a vesting order is meritorious.

60. There is no gainsaying that upon the filing of the instant suit, same was subsequently set down for hearing and whereupon the Plaintiff tendered evidence before the court, culminating into the delivery of the Judgment on the 9th September 2021.
61. Notably, the Defendant herein duly participated in the proceedings, including cross examining the Plaintiff's witnesses; and thereafter the Defendant intimated to the Honourable court that same was not calling any witnesses.
62. Flowing from the address and/or intimation by the Defendant, the court proceeded to and indeed closed the Defendant's case.
63. Subsequently, the matter was reserved for Judgment and which Judgment was ultimately delivered in favor of the Plaintiff.
64. Pertinently, the Judgment which was delivered on the 9th September 2021; has neither been set aside, rescinded nor varied to date.
65. Consequently and to the extent that the said Judgment has neither been rescinded nor varied, the question that does arise is whether the said Judgment is enforceable or otherwise.
66. To my mind and in my humble view, the Judgment which was delivered by the court remains lawful and legitimate and hence it behoves the court to facilitate its enforcement and ultimate realization.
67. At any rate, unless the court facilitates the implementation and/or realization of the judgment, then there is a likelihood of the Judgment being rendered redundant, otiose and/or futile. However, it is not lost on this court that orders of court are never made in vanity and/or futility.
68. Premised on the foregoing, I therefore come to the conclusion that the Plaintiff as the successful Party, is indeed entitled to partake of and benefit from the fruit of the subject litigation, namely, the Judgment of the Court.
69. For good measure, the Plaintiff can only benefit from and/or partake of the fruit of the Judgment if the current Application dated 18th August 2022 is allowed.
70. In short, it behoves the Honourable court to ensure that the Ends of Justice are duly met and/or satisfied. Further and in any event, the court must always endeavor to ensure that her orders are duly enforced and realized for purposes of fostering the rule of law.
71. In a nutshell, I come to the conclusion that the Application by and on behalf of the Plaintiff is meritorious and are thus worthy of being granted.



Final Disposition:

72. From the foregoing discourse, it must have become crystal clear that the Application by and on behalf of the Plaintiff is meritorious, whereas the application by the proposed Interested Party is devoid/bereft of merits and are otherwise legally untenable.
73. Consequently and in the premises, I am minded to and Do hereby make the following orders;
- i. The Application dated the 10th July 2023; be and is hereby Dismissed with costs.
 - ii. The Application dated the 18th August 2022; be and is hereby allowed in terms of prayers (i), (ii), (iii) and (iv) thereof.
 - iii. Costs of the Application dated the 18th August 2022; shall be borne by the Defendant/ Respondent.
74. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Juma for the Plaintiff/Decree Holder.

Mr. Njoroge Nganga for the Proposed Interested Party.

N/A for the Defendant/ Respondent.

