



Superior Homes (Kenya) Ltd v East African Portland Cement Co Ltd; Mutemi & 2 others (Applicant) (Suing as the officials of Aimi Ma Lukenya Society) (Environment & Land Case 6 of 2022) [2023] KEELC 21025 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21025 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 6 OF 2022
A NYUKURI, J
OCTOBER 25, 2023
(FORMERLY MILIMANI ELC. NO. 931 OF 2013)**

BETWEEN

SUPERIOR HOMES (KENYA) LTD PLAINTIFF

AND

EAST AFRICAN PORTLAND CEMENT CO LTD RESPONDENT

AND

ALEX KYALO MUTEMI APPLICANT

PASCAL KISELI BASILIO MUNGUI APPLICANT

JULIUS MUTIE MUTUA APPLICANT

SUING AS THE OFFICIALS OF AIMI MA LUKENYA SOCIETY

RULING

Introduction

1. Before court is a Notice of Motion application dated 19th October, 2022 filed by the Intended Interested Party seeking the following orders;
 - a. Spent
 - b. That the Honourable Court be pleased to join the Applicants as Interested Parties in these proceedings.



- c. That the Honourable Court be pleased to set aside the consent Judgement entered into between the Plaintiff, Superior Homes Kenya, and the Defendant, East African Portland Cement Limited herein issued on 15th June 2022.
 - d. That this matter be consolidated with Machakos ELC No. 74 of 2014 and later Petition No. 10 of 2018 which was consolidated on the 15th February 2019 between Julius Mutie Mutua, Alex Kyalo Mutemi, Pascal Kisel and Basilio Mungui (Suing as the Officials of Aimi Ma Lukenya Society against East African Portland Cement Corporation (EAPCC), National Land Commission, Kenya Railways Corporation and the Hon. Attorney General. 1, 2, 3 and 4 Respondents respectively.
 - e. That costs of this Application be provided for.
2. The application is based on grounds on the face of it and supported by the Affidavit of one Julius Mutie Mutua, the Chairman of the Applicant, sworn on even date. He deposed that the Applicant was registered as a society on 18th April, 1953 and that they are the registered owner of land known as L.R No. 10424 (suit property) since 1980. It was his averment that they have had a long standing dispute with the Defendant over the suit property, leading to filing of a suit being Machakos ELC No. 74 of 2014 and later Petition No. 10 of 2018. He further stated that there have been several injunctive orders issued on the suit property, of which the Defendant has severally violated.
 3. The Deponent further stated that on 10th July, 2022 and 11th July, 2022 the Defendant entered the suit property claiming to have excised and transferred 100 acres of the suit property to the Plaintiff, despite the fact that the Plaintiff was not party to Machakos ELC No. 74 of 2014 consolidated with Petition No. 10 of 2018. That it was only during the hearing of ELC No. E059 of 2022 that this matter was disclosed.
 4. He stated that on 22nd July 2022, the Plaintiffs with impunity and assistance of state security forcefully displaced residents of the Applicants and started digging trenches the next day with the intention of constructing on a portion of the suit property herein. He stated that following this disturbance, the Applicant had sought for and obtained injunctive orders against the Plaintiffs and Defendants of which injunctive temporary orders were issued on 3rd August, 2022.
 5. It was his averment that the Defendants have failed to disclose material facts and not informed the court of the whole truth in order to prevent the court to understand and possibly decline adopting the consent order dated 15th June, 2022. He argued that this suit was sub judice to Machakos ELC No. 74 of 2014 as consolidated with Petition No. 10 of 2018 and the consent orders issued by this court were obtained irregularly, fraudulently and unlawfully through concealment of material facts as the Defendant failed to disclose existence of temporary orders, and that they misled the court that they were the registered proprietors of the suit property when it is the Applicant who are the registered owners thereof. He stated that the Defendant had been demolishing the Applicant's structures on the suit property.
 6. He further stated that their joinder to the suit was necessary in order to enable the court to defectively and conclusively deal with the matter and settle all questions pertaining the suit property. He attached a certificate of registration dated 27th November, 1962, a Sale Agreement dated 29th November, 1979; orders issued on 13th May, 2016, 21st July, 2016, 16th July, 2018, 26th March, 2019, 31st July, 2019, 18th September, 2019, 3rd August, 2022; photographs, OB NO.; transfer instrument and title document.
 7. The application was opposed. The Defendant filed a Replying Affidavit sworn on 23rd November, 2022 by Florence Mitey, the company Secretary and legal services manager of the Defendant. She deposed



that the application was misconceived as it sought to set aside a consent order where the Applicant was not a party and therefore that a party not privy to a consent order has no capacity to seek to set it aside. She stated that a consent order can only be set aside on grounds that can invalidate an agreement, which include fraud, collusion, illegality, mistake or an agreement contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. She stated that the Plaintiff and Defendant herein entered into a consent on 14th April, 2022 which was adopted as an order of the court on 15th June, 2022.

8. She further stated that the Defendant has been the owner of the suit property and therefore that the Applicant cannot purport to be the owner thereof. She stated that the Applicant failed to disclose that its title had been impeached on account of fraud, in ELC No. 74 of 2014. She averred that a forensic report revealed that the Applicant's documents were obtained by forgery and that the National Land Commission by an internal memo report showed that the Applicant's documents were forgeries. She stated that the orders made by court were *ex parte* orders that lasted for only fourteen (14) days. That the orders issued on 13th May, 2016 were never extended and were therefore non-existent; while orders issued on 19th October, 2022 automatically expired on 19th October, 2022 on lapse of twelve (12) months. She maintained that the Defendant was not in violation of any order and that the Defendant had the right to enter into consent with the Plaintiff for the expeditious determination of the matter. She stated that the Applicant was in the habit of filing suits without concluding previous suits and that they had filed ELC No. E059 of 2022 yet other suits had not been determined. She stated that the orders made in the latter suit contradicted the consent Judgment. She stated that the Applicant's actions are intended at embarrassing the court and clogging the system of administration of justice. She stated that no justification for setting aside consent orders had been given by the Applicant and that the Applicant had come to court with unclean hands.
9. The court directed parties to file submissions. On record are submissions filed by the Defendant on 23rd October, 2023.

Defendant's submissions

10. Counsel for the Defendant submitted that the application was an attempt by the Applicant to have a second cherry by gambling with judicial process by asking to set aside a Judgment they were not party to. On the question of joinder, counsel argued that to be joined to any proceedings, the Applicant was obligated to show that the suit was still alive which was not the case herein. To buttress this argument, counsel relied on the case of *Florence Nafula Ayodi & 5 Others v Jonathan Ayodi Ligure*.
11. It was further submitted for the Defendant that the Applicant did not meet the threshold for grant of orders for joinder as set out in the case of *Francis Kariuki Muruatetu & Another v Republic & 5 Others*. Counsel argued that an applicant for joinder must show personal stake, and prejudice to be suffered for non-joinder. Counsel argued that although the Applicant had stated that they are the registered proprietors of the suit property, their title had been impeached on account of fraud in Machakos ELC No. 74 of 2014 and that it was clear the Defendant was the registered proprietor of the suit property. It was contended for the Defendant that the Applicant had failed to demonstrate any stake in the suit property.
12. On whether the Applicant had met the threshold for setting aside consent Judgment, counsel argued that that prayer was incompetent and premature and unprocedural as it has been made by a stranger to the proceedings as no order for joinder had been made. Further, counsel relied on the decision in the case of *Hirani V. Kassam* [1952] 19 EACA 131 for the proposition that a consent Judgment can only be set aside where there is fraud, collusion, if the consent was based on insufficient material, on misapprehension or ignorance of material facts. Counsel argued that the Applicant failed to justify



setting aside consent Judgment and that orders relied upon by the Applicant were interim orders that lasted for only fourteen (14) days. Counsel pointed out that orders issued in ELC No. 59 of 2022 lapsed after twelve (12) months.

13. On the question of consolidation it was submitted for the Defendant that that prayer was improper, unprocedural and premature and that the prayer is incapable of being granted as it has been overtaken by events in view of the court's Ruling on 9th October, 2023 striking out ELC No. 74 of 2014 as consolidated with ELC Petition No. 10 of 2018.

Analysis and determination

14. I have considered the application, the response and submissions. The issues that arise for determination are;
 - a. whether the Applicant has met the threshold for joinder as Interested Party,
 - b. Whether there is justification for setting aside the consent Judgment entered between the Plaintiff and Defendant herein
 - c. Whether this suit should be consolidated with Machakos ELC 74 of 2014 consolidated with Machakos ELC Petition 10 of 2018.
15. On the issue of whether this suit should be consolidated with Machakos ELC No. 74 of 2014 as consolidated with ELC Petition No. 10 of 2018, I note that that suit was struck out on 9th October, 2023, and therefore, that prayer is overtaken by events.
16. As regards joinder, Order 1 Rule 10 of the *Civil Procedure Rules* provides that where a party's presence in a suit is necessary to ensure the court effectually and completely adjudicates upon and settles all questions involved in a suit, the court may, on application or on its own motion add such party to the proceedings before it. It is upon an applicant seeking joinder as Interested Party to show that they have an identifiable stake in the proceedings they seek to be joined and that they will be affected by the decision of the court whichever way it goes.
17. The *Black's law dictionary* defines interested party as "a party who has a recognizable stake (and therefore standing) in the matter." In the case of *Communications Commission of Kenya and 4 Others v Royal Media Services Limited & 7 Others* [2014] e KLR, in delineating the definition of an Interested Party, the court stated as follows;

An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause. Similarly in the case of *Meme v Republic* [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that;

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions;



- a. What is the intended party's state and relevance in the proceedings and
 - b. Will the intended interested party suffer any prejudice if denied joinder?
18. Under order 1 Rule 10 of the [Civil Procedure Rules](#), joinder of an Interested Party is allowed where adding such party to a suit will enable the court to effectually and completely determine the real issues in contention.
19. In the instant application, the Applicant sought joinder to this suit as an Interested Party, when the suit had already been determined by a consent Judgment. The basis for joinder was that a consent was entered into by the parties herein when the Applicant was the registered proprietor of the suit property and when there were suits and injunctions against the Defendant. As the provisions of Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) ensures joinder of a necessary party to assist the court determine all the issues in dispute, it is my view that where the issues in the suit have already been determined, like in this case, the provisions of Order 1 Rule 10 will be inapplicable as the dispute is already determined and there is nothing left to be determined. My view is fortified by the decision made in the case of [JMK v MWM & Another](#) [2015]e KLR where the Court of Appeal held as follows;

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.
20. Adding a party to a suit as an Interested Party should be differentiated from adding a party to a suit either as a Plaintiff or as a Defendant. This is because an Applicant added as Plaintiff may seek redress against the Defendant while a party added as Defendant may have remedies sought against them. Therefore, a party added to a suit as Plaintiff or Defendant becomes a principal party in the suit, and their pleadings like those of the primary parties in the suit dictate the issues and trajectory of that suit. However, a party added to a suit as an Interested Party cannot introduce a new cause of action or new issues in the suit. Their interest in a suit they seek to be joined is limited to an interest in the issues as defined by the primary parties. If an Interested Party has a distinct cause of action and claim of their own, requiring a remedy in their own right, as against any of the primary parties, then they ought to file their own claim.
21. I agree with the decision in the case of [Kingori v Chege & 3 Others](#) [2002] 2 KLR 243, where the court stated as follows;

Parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to be joined are parties who are necessary to the [constitution](#) of the suit without whom no decree at all can be passed....A proper party is one who has a [designated subsisting direct and substantive interest in the issues arising in the litigation](#) which interest will be recognizable in the court of law being an interest which the court will enforce. (Emphasis is mine)
22. Therefore, an Interested Party should have a recognizable interest in the issues raised by the primary parties. If the interest of an Interested Party has nothing to do with the issues of the primary parties but they have their own separate claim as against one or all of the primary parties, my view is that they ought to file their own suit where they themselves become primary parties either as Plaintiffs or Defendants as the case may be, so that their cause of action can be tried and determined principally by the court. An Interested Party ought not take over another person's suit by imposing their own cause of action



in a suit where they are not primary parties or make their dispute the main dispute in a suit where they are merely interested, and not the principal parties.

23. From the facts presented before court, it is not in dispute that the Applicants were plaintiffs in ELC Case No. 74 of 2014 as consolidated with Petition No. 10 of 2018, whose claim of was based on allegations that they are the registered owners of L.R. No. 10424 Athi River (the suit property). That suit was however struck out on 9th May, 2023. The Applicants attached documents to demonstrate ownership. Therefore, the question that ought to be answered is what interest does the Applicant have in the issues raised by the primary parties?
24. I have considered the issue in dispute between the primary parties in the instant suit which is whether or not there was an agreement for sale of land between the Plaintiff and the Defendant and whether being the vendor, the Defendant breached that agreement. I note that in the instant application, the Applicant's claim on the suit property has nothing to do with the sale agreement between the primary parties in this suit. It is clear that the Applicant's claim is a substantive claim against the Defendant based on their assertion that they are the registered owners of the suit property. Therefore, clearly, the Applicant intends to transform themselves into a principal party in this suit by altering the cause of action and redefining the issues in contention. In my view, the scope of being an Interested Party would not allow the Applicant herein to transform themselves into a primary party in this matter so as to ventilate the issue of ownership of the suit property as against the Defendant. In the circumstances, I am not persuaded that the Applicant has met the threshold for joinder as Interested Party in this matter.
25. A consent Judgment is a contract. The Applicant is not party to the consent entered into by the parties herein. Therefore, my view is that if the Applicant is aggrieved with the contract entered into by the parties in this suit, nothing stops them from challenging the legality of that contract in a suit where they are one of the principal parties where they dictate the issues to be determined. The foundation of the Applicant's claim of ownership of the suit property are documents which the Defendant has challenged by way of documentary evidence, contending that they are forged documents. There was no attempt by the Applicant to rebut or challenge the Defendant's evidence that the Applicant's title documents are forged; either by way of supplementary affidavit or further evidence or in any other manner whatsoever. The evidence of the Defendant as attached to their Replying Affidavit clearly demonstrate that the Applicant's title is based on forged documents. Article 40(6) of the Constitution protects the right to own and acquire property only to the extent that the property in dispute is lawfully acquired. Therefore, this court will not exercise its discretion in favour of a party whose prayer is founded on prima facie forged documents. As it is, the onus is on the Applicant to file a claim where they are primary or principal party and demonstrate that their title is not a forgery.
26. For the reasons given above, I am neither satisfied that the Applicant has shown that they deserve to be joined to this suit as an Interested Party, nor that there is sufficient justification for setting aside the consent Judgment entered in this suit.
27. In the end, I find the application dated 19th October, 2022 unmerited and the same is hereby dismissed with costs to the Respondents.
28. It is ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF OCTOBER 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE



In the presence of:

Ms. Nekoye holding brief for Mr. Simiyu for Applicant/Interested Party

Ms. Onchangwa holding brief for Mr. Nyachoti for Plaintiff

Ms. Nkatha holding brief for Mr. Muturi for Defendant

Mr. Abdisalam– Court Assistant

