



Njau v Muiruri; Kambo (Intended Interested Party) (Environment and Land Appeal 93 of 2019) [2023] KEELC 21696 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21696 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 93 OF 2019
AA OMOLLO, J
NOVEMBER 23, 2023**

BETWEEN

KABURU NJAU APPELLANT

AND

KABIRU MUIRURI RESPONDENT

AND

MOSES WAWERU KAMBO INTENDED INTERESTED PARTY

(Judgment on 18th April, 2023, by the Hon. S. Okong'o J.)

RULING

1. The Appellant/Applicant filed a preliminary objection dated 9th June 2023 with regard to the Intended Interested Party/ Applicant 's Notice of Motion dated 2nd June, 2023 stating that the application be struck out with costs on the grounds that this Court is fuctus officio upon delivery of the judgment on 18th April, 2023, by the Hon. S. Okong'o J. That the Court has no Jurisdiction to grant leave to the Applicant to lodge a Notice of Appeal by virtue of Rules 75 (2) and 77 (1) of the [Court of Appeal Rules](#) 2010 as that is the jurisdiction of the Court of Appeal.

Submissions

2. The Appellant/Applicant filed submissions dated 4th July 2023 in support of his preliminary objection while the Intended Interested Party filed submissions dated 24th July 2023 in opposition of the same.
3. The Appellant submitted that once a court of law has delivered its judgments the said matter either at the trial Court or at the appeal stage cannot be reopened unless by way of reviews on grounds stipulated under Section 80 of the [Civil Procedure Act](#) and under Order 45 of the [Civil Procedure Rules](#) of 2010, or by way of an appeal to a higher Court.



4. The Appellant argued that the primary reliefs sought by the Applicant do not qualify for the tests, and ingredients envisaged under Sections 80 and 99 of the [Civil Procedure Act](#), to warrant attention of reopening the already concluded appeal noting that the court is functus officio. In support he cited the case of [Telkom Kenya Limited v John Ochanda \(suing on his own behalf and on behalf of 996 \(others\)\)](#) (2014) eKLR and [Albert Fred Ekirapa v Nyongesa Sirari & 4 others](#) [2022] eKLR.
5. The Appellant further submitted that the intended party was neither a party at the trial Court nor at the hearing and determination of the Appeal but seeks to be joined after the end of the appeal, thus has no locus as his only intention is to seek to introduce fresh cause of action which did not form the basis of the determined appeal. In support of this submission, the Appellant relied on the case of [Mary Kitsao Ngowa and 36 others -v- Krystalline Limited](#) (2015) eKLR stating that the jurisdiction of the Appellate Court is to look into issues that were presented before the trial court.
6. The Applicant/Intended interested party submitted that the right to be heard is a valued right and it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. He relied in the holding of the Court of Appeal in [Mbaki & Others v. Macharia & Another](#) [2005] 2 EA 206.
7. He further submitted that in the delivered Judgement which is at the execution stage, the Applicant, Moses Waweru Kambo was held liable for the eviction Orders. Further, the Applicant, submitted that the issues he is raising are properly within Section 34 of the [Civil Procedure Act](#), Cap 21 which provides that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.
8. The Appellant submitted that the court is not functus officio as alleged in the P.O in the context of Section 34 of the [Civil Procedure Act](#) which accords room to incept the doctrine of functus officio. That in this instance, the Applicant's issues under Section 34 of the [Civil Procedure Act](#) had not been determined, hence there is no finality to the proceedings.
9. In support, the Applicant cited the case of [Githunguri Dairy Farmers Co-Operative Society v Ernie Campbell Co. Ltd & Another](#) [2018] eKLR, [Kennedy Ooko Jacob t/a Ssebo Intel. Co. Auctioneer v John Abich Ochanda](#) [2021] eKLR, [Kuronya Auctioneers v Maurice O. Odhoch & Another](#) [2003] eKLR and [South Nyanza Sugar Co Ltd v Alfred Sawa Mdeizi t/a Pave Auctioneers](#) (2010) eKLR, adding that he cannot lawfully file a separate suit when Section 34 of the [Civil Procedure Act](#) cited above binds him in mandatory terms to seek relief in the execution process before this same Court.
10. He stated that he is a directly affected party and in order to stay the execution adverse to him in furtherance of the Judgement of the Appeal herein, he needs to be enjoined in the proceedings. He relied in the description of who is an interested party as in the case of [Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others](#) (2014)eKLR and on joinder of the Applicant in the case of [Meme v. Republic.](#) [2004] I EA 124 and [David Kiptugen v Commissioner of Lands. Nairobi & 4 others](#) [2016] eKLR where the Applicant in the said Appeal filed an application before the Court of Appeal to be enjoined as an interested party to the appeal and for remission of the matter back to the trial court for hearing de novo and the court allowed the application.
11. The Applicant submitted that Courts in our jurisdiction have had occasion to allow joinder of parties in post-judgment stages as was the case in the case of *R v Commissioner of Lands*: Misc. Appl. No. 96 of 1998 and [Mike Maina v Commissioner of Lands & Others](#): Civil Appeal No. 221/1997.



12. He also submitted that he seeks that upon joinder then he be granted the leave to file an appeal and relied on the holding in the case of *Teachers Service Commission v Kenya National Union of Teachers 3 others* application no. 16 of 2015 [20151 eKLR.
13. In determining the preliminary objection, I will considered the import of the provisions of section 34(1) of the *Civil Procedure Act* and Order 10 of the *Civil Procedure Rules* relied upon by the Intended party to oppose the preliminary objection. Section 34(1) states thus;
- “ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
14. A literal reading of this section refers to all questions arising between the parties to the suit in which the decree was passed which in my interpretation does not aid the intended applicant since he was not a party to the original suit. Neither is he a representative of the Respondent who is still pursuing the claim on their own accord. And the explanation is given of who a party is under section 34(3) to mean,
- “ for the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.”
15. The intended party also referred to the definition of an interested as given by the Supreme Court of Kenya in the *Mumo Matemo case supra* at paragraph 14 and 18 thus;
- “ 14. *Black’s Law Dictionary*, 9th Edition, defines “intervener” (at page 897) thus: “One who voluntarily enters a pending lawsuit because of a personal stake in it” (emphasis provided); and defines “Interested Party” (at p.1232) thus:
- “ “A party who has a recognizable stake (and therefore standing) in a matter”.
18. Consequently, 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. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his cause is to ensure that a legal and legitimate decision is achieved.” (underline mine for emphasis).
16. The decision of the Supreme Court of Kenya is binding upon this court and their description of who is an interested party is in tandem with section 34 of the *Civil Procedure Act*. However, I find the circumstances under which the order was made in the *Mumo Matemo case* to be distinguishable from the present case on the basis that in the matter had not been heard and concluded. Hence the reasons considered for allowing the application does not apply in this case where the court which had the original dispute is not the same one that is being moved.



17. Order 1 rule 10 (2) of the *Civil Procedure Rules* (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.” (underline mine for emphasis).

18. The dispute between the Appellant and the Respondent herein have been effectually and completely determined. In my view, the manner in which the applicant ought to contest the execution of the decree ought not be by way of joinder since the matters in dispute were already determined. Secondly, on the basis that the intended party is claiming the suit land by way of purchase from the Defendant in the suit makes his claim unrelated matter to the claim by the Appellant. Therefore, the argument that the intended party was not being given an opportunity to be heard is misplaced.

19. I have considered the case law cited by the intended party including the persuasive authority in *Bonventure Odeyo Obuyu v Bernard Mulembo Namwamba & Ano* (2019)eKLR which held that the Court is mandated to add a party even at the execution stage. However, this court ought to ask which decree is the intended party referring to that can allow his joinder. The initial decree is what resulted to the filing of the present appeal whose order they intend to challenge before the court of appeal. It is my considered opinion that until the intended party is joined in the original suit, this court in its appellate jurisdiction cannot join a new party at the execution stage.

20. Consequently, I find merit in the preliminary objection and allow it. The intended interested party’s application dated 2nd June 2023 is ordered struck out with costs to the appellant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2023.

A. OMOLLO

JUDGE

