



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 329 OF 2014

CHARLES GATHARI KANIARU.....PLAINTIFF/RESPONDENT

VERSUS

PASTOR FRANCIS N MUROKI.....1ST DEFENDANT

ISAAC KAMAU MWAURA.....2ND DEFENDANT

PASTOR JOSHUA WAMBUA.....3RD DEFENDANT

GEORGE M WACHIRA.....4th DEFENDANT

NAIROBI CITY COUNTY..... 5th DEFENDANT

RULING

INTRODUCTION:

1. Vide Notice of Motion dated 10th December 2020, but amended on the 26th October 2021, the Applicants/Proposed Interested Parties herein approached the court seeking the following Reliefs;

- (i)*Spent.*
- (ii) That the Applicant’s advocates be granted leave to come on record.
- (iii) That the Applicants be (sic) enjoined in this suit.
- (iv) That the Court Stay Execution of orders issued through decree on 18th June 2018, pending the hearing and determination of this Application.
- (v) That time to bring this Application be extended.
- (vi) That the Court be pleased to Set aside or Re the Review the Ex parte orders issued through judgement delivered on 25th September 2017, pending the hearing and determination of this application.
- (vii) That the Applicants be given leave to file their Defense and other respective Documents and that the matter proceed *inter partes*.

(viii) That the costs of the application be provided for.

2. The Subject Application is premised and/ or based on the various Grounds enumerated at the foot thereof, including the following:

a) That the judgement granted on 25th September 2017 and consequential orders thereof by Hon Justice K Bor are prejudicial to them.

b) That the suit was heard and determined without the presence of the Applicants who are the rightful owners of the subject property.

c) That the Applicants reside and work in the United States of America and were not aware of the existence of the suit.

d) That they came to know about the suit through the Defendants upon being served with a notice to show cause issued on 4th September 2020.

e) That the Defendants are not the owners of the subject property, but care takers on behalf of the Applicants.

f) That the subject property forms part of plot no. 156 Kariobangi South River Bank which has mysteriously been changed to Plot No. 272 Kariobangi South River Bank.

g) That at the time of initial survey when the Applicants were allocated the said plot, there was no Plot No. 293 Kariobangi South River Bank on the survey map.

h) That the Respondent was the surveyor who, through the instructions of Nairobi City Council surveyed the area where the Applicant plot is.

i) That the Respondent is the one who pointed out to the Applicants the plot they were allocated measuring 0.2 Ha.

j) That the Respondent, in connivance and in cahoots with other parties caused the Applicant's plot to be further subdivided on the survey map thereby giving rise to Plot Number 293 Kariobangi South River Bank.

k) The Respondent illegally and irregularly caused a letter of allotment to be issued to him as appears in the documents filed.

l) That the said plot measures 0.2 Ha but the Respondent is claiming part of it.

m) The Applicants have been in possession and occupation of the plot since 1993.

n) The beacons which the decree issued to the Respondent have never been erected for them to be replaced as there only exists one plot measuring 0.2 Ha and owned by the Applicants.

o) The Respondent has never occupied the Applicant's land and he is cunningly trying to wiggle the arm of justice to enrich himself unjustifiably.

p) The Applicants have extensively invested in the said property, and they are bound to suffer great injustice if the decree issued to the Respondent is executed.

3. Upon being served with the Subject Application, the 1st, 2nd and 3rd Defendants filed their Replying affidavit on 4th November 2021 and supported the Applicant's application.

4. It is further averred that they have been working with the Applicants since 1999 and that the portion of the suit land claimed by the Respondent belongs to the Applicant. At any rate, it is further stated that none of them instructed the firm of Gathii Irungu & Co Advocates.

5. On the other hand, the Subject Application is opposed by the Plaintiff/Respondent, who have filed Replying affidavit sworn by the Respondent on 3rd March 2021.

6. According to the Respondent, the suit herein was filed against the Defendants for trespassing onto his land. That upon service, the Defendants appointed the firm of Gathi Irungu & Advocates who filed a memorandum of appearance, defense and list of documents and witness statements on their behalf.

7. Besides, the Respondent further contends that the Applicant's concession that the Defendants are their care takers means that they (Applicants) were therefore aware of the case prior to the notice to show cause. That while the Applicants claim Ownership of Plot No 156 and 272 Kariobangi South River Bank, his claim was for Plot No 293, now, LR 12062/885.

8. On the other hand, the Respondent admits that he worked as the City Council surveyor and that he had shown the Applicants their plot at the initial stages of the survey, which plot changed in the final part development plan. That no survey work can be completed without beacons being put in place which confirms that the Applicants had seen the plot prior to the finalization of the survey.

9. Further, the Respondent has stated that surveyors are not in charge of allocating plot numbers or approving Part Development Plans. That he was allotted Plot No 293 and he paid the stand premium. That Plot Nos 272 and 156 claimed by the Applicants are visible in both the Part Development Plan and Survey Plan, and that therefore they have no claim over and in respect of his property. He notes that the Defendants are yet to appeal the decision by the court, decided in his favour and that therefore the Applicants' case ought to be dismissed.

SUBMISSIONS:

10. By consent, the parties agreed to dispose of the application by way of written submissions. In this regard, the Applicants filed their submissions on 27th October 2021, same largely adopted the contents of their application. Citing Order 1 Rule 9 and 10 of the Civil Procedure Rules, 2010 on misjoinder of parties, it is their submission that the court has power to allow joinder of the proper parties even after judgement has been delivered. Reliance is placed on the decision in **JMK v MWM & Another [2015]eKLR** and **Tang Gas Distributors Ltd v Said & Others [2014]EA 448**.

11. On the other hand, the Respondent filed his submissions on 9th December 2021 and same contends that the Application is frivolous and lacking in merit. For clarity, the Respondent posits that a final judgement was issued in the case on 25th September 2017 and there are no pending proceedings.

12. Besides, the Respondent has also contended that the prayer for the advocates to come on record for the Applicants is misconceived as they were not part of the suit. In this regard, it is contended that Order 1 Rule 9 and 10 of the Civil Procedure Rules, 2010 are unavailable to a concluded case.

13. Nevertheless, Respondent has also averred that the Plots claimed by the Applicants are separate and distinct from his properties. Consequently, same has urged the court to dismiss the Application.

ANALYSIS AND DETERMINATION:

14. Having reviewed the Notice of Motion Application, the Supporting Affidavit thereto and the Replying Affidavit filed on behalf of the Plaintiff/ Respondent, together with the respective submissions, it is my finding that The first question for determination, and which question holds sway on whether the other prayers sought can be granted, is whether the Applicants can be joined as Interested parties after judgement has been delivered.

15. As correctly identified by the parties, Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 provides for the substitution and addition of parties to a suit. The section reads as follows:

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

‘(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)

16. It appears that the provision anticipates the joinder or substitution of parties during the pendency of the suit, because the core purpose of the joinder is to enable the court to settle the issues in the suit, effectually and completely. There is a long line of decisions to support this position. See

Mayfair Holdings Ltd v Municipal Council of Kisumu; Pauline Mauwa Akwacha (Interested Party/Applicant) [2020] eKLR

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising...Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage.”

17. In **Lilian Wairimu Ngotho & Another Vs Moki Saving Co-Operative Society Ltd & Another (2014) eKLR**, Nyamweya J held as follows:-

“The provision of Order 1 Rule 10(2) states that joinder of a party can be made at any state of the proceedings. Proceedings are defined in Blacks Law Dictionary Ninth Edition at page 1324 as ‘the regular and orderly progression of a law suit including all acts and events between the time of commencement and the entry of judgment.’ A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court to effectively and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its finding on the issue arising.”

18. On the other hand, the Honourable Court of Appeal has also weighed in on this discussion. See the Decision in the case of **JMK v MWM & another [2015] eKLR**, where the Court, citing its earlier decision in **Central Kenya Ltd. V. Trust Bank & 4 Others, CA NO. 222 OF 1998**, held thus:

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs...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. Sarkar’s Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania,

while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in Tang Gas Distributors Ltd V. Said & Others [2014] Ea 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”(Emphasis, mine)

19. It is not contested that judgement in the suit upon which the Applicants seek joinder was delivered on 25th September 2017. Consequently, the prayer for joinder therefore fails on account of the non-pendency of the suit.

20. The court takes notice of the fact that although the Court of Appeal in the above cited decision of **JMK v MWM & another [2015] eKLR**, found the prayer for joinder to be untenable, it still went ahead to consider the prayer for review, set aside the ruling and ordered a *de novo* hearing of the case.

21. In making this determination, it was informed by the fact that the guidance given by the court to the Applicants to file an appeal was untenable since the proposed Interested Parties were not party to the proceedings.

22. Nevertheless, In the present case however, bearing in mind that the Applicants appear to be laying claim to distinct parcels of land from those claimed by the Respondent in the suit, the Applicants have opportunity to file a fresh suit against the Respondent, if they are so inclined, for determination by the court. For clarity, this will give them opportunity to fully ventilate their issues, an opportunity unavailable to them should they have been admitted as interested parties (which they cannot, as found, on the basis that the suit is not pending).

23. Be that as it may, it must be remembered that the Right of Interested parties are limited to the issues raised in the main suit and same cannot come up with separate Issues for Determination, which are in conflict with the ones raised by the Principal Parties.

24. In support of the foregoing statement of the Law, I beg to cite and adopt the Supreme Court’s holding in **Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR**;

“An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”

CONCLUSION:

25. It is common ground that the suit herein was determine and/or concluded vide judgment rendered on the 25th September 2017. Consequently, there is no more suit upon which a party can be joined and/or admitted to, either in the manner sought by the Applicants or at all.

26. In the premises, amended Notice of Motion application dated 26th October 2021, is devoid of merits.

27. Based on the foregoing, the said application be and is hereby dismissed with costs to the Plaintiffs Only, owing to the fact that the Defendants, had supported the Application by the

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Gatumuda for the Plaintiff/Respondent

N/A for the Defendant/Respondent

N/A for the Interested party/Applicant