



**Mulwa & 3 others (Suing as the Current Chairman, Secretary and Treasury of Kasitu Plot Owners Self Help Group) v Fundi (Sued as a Legal Representative of the Estate of Josephat Nzioka Wambua (Deceased)) & 5 others (Environment and Land Case Civil Suit 74 of 2009 & 310 of 2017 (Consolidated)) [2025] KEELC 3451 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3451 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE CIVIL SUIT  
74 OF 2009 & 310 OF 2017 (CONSOLIDATED)**

**AY KOROSS, J**

**APRIL 29, 2025**

**BETWEEN**

**JOSHUA NZIVE MULWA ..... 1<sup>ST</sup> PLAINTIFF**

**JULIUS MUTINDA KANYOTU ..... 2<sup>ND</sup> PLAINTIFF**

**CHARLES MATHEKA ..... 3<sup>RD</sup> PLAINTIFF**

**SUING AS THE CURRENT CHAIRMAN, SECRETARY AND TREASURY OF  
KASITU PLOT OWNERS SELF HELP GROUP**

**AND**

**CHARLES FUNDI (SUED AS A LEGAL REPRESENTATIVE OF THE ESTATE OF  
JOSEPHAT NZIOKA WAMBUA (DECEASED)) ..... 1<sup>ST</sup> DEFENDANT**

**CHARLES FUNDI (SUED AS A LEGAL REPRESENTATIVE OF THE ESTATE OF  
FRANCIS KIKUVI NZIOKA (DECEASED)) ..... 2<sup>ND</sup> DEFENDANT**

**CHARLES FUNDI (SUED AS A LEGAL REPRESENTATIVE OF THE ESTATE OF  
AGNES MUTINDI NGANDI (DECEASED)) ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND CASE CIVIL SUIT 310 OF 2017**

**BETWEEN**

**GLADYS NJERI MAINA ..... 1<sup>ST</sup> PLAINTIFF**

**FELISTA NDUKU MUNANDA ..... 2<sup>ND</sup> PLAINTIFF**



**AND**

**JOSHUA NZIVE MULWA JULIUS MUTINDA KANYOTU& CHARLES  
MATHEKA (SUED AS THE CURRENT OFFICIALS OF KASUITU PLOT  
OWNERS SELF HELP GROUP) ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPHAT NZIOKA WAMBUA ..... 2<sup>ND</sup> DEFENDANT**

**FRANCIS KIKUVI NZIOKA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This matter has been in court for close to 16 years, and it has never been concluded to date. The delays have mostly been attributed to the demise of some of the defendants, reluctance by their family members to substitute them and an unending flurry of applications.
2. It appears out of frustration for non-substitution; one Charles Fundi went to the probate court and obtained a grant of letters of ad litem on 25/05/2022 for purposes of defending this matter on behalf of the defendants in ELC Civil Case No. 74 of 2009.
3. On his appointment as their legal representative, he filed a notice to act in person dated 7/06/2022. However, there is no evidence that he ever served the counsels on record, particularly M/s. J.M. Tamata & Co. Advocates who appeared for these deceased defendants.
4. Be that as it may, the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the current suit was revived, and all the deceased defendants were substituted by their legal representative, Charles Fundi.
5. Shortly thereafter, a consent was filed before the court on 28/07/2022, but the court declined to adopt it as a judgment because the plaintiffs or their counsel in Environment & Land CIVIL Case 310 of 2017 (“consolidated case”) had not appended their signatures. Indeed, this written consent was never executed by their counsel on record, M/s. P.M. Mutuku & Co. Advocates.
6. Shortly thereafter, Justus Muema Muthoka, Harrison Muinde Kivaya and Paul Maingi Juve Ngai sought to be joined in this matter as interested parties, but, in a ruling rendered on 20/09/2023, this court declined such a request.
7. Immediately after such dismissal, the law firm of M/s. J.M. Tamata & Co. Advocates filed the instant motion that is the subject of determination.
8. In it, counsel alleged he represents the “defendants”, but it emerged from the supporting affidavit of Harrison Muinde Kivaya that these alleged defendants are none other than the same parties whom this court had declined their joinder to these proceedings.
9. Having laid the background, this court will now proceed with the substance of the issue that is before it and, in doing so, will summarise each of the parties’ cases.

**Alleged defendants’ case**

10. This ruling seeks to determine the notice of motion dated 18/10/2023 that has been moved under Sections 1, 1B and 3A of the *Civil Procedure Act* and Order 22 Rule 51 of the Civil Procedure Rules (CPR).



11. The alleged defendants who have filed the motion have sought numerous reliefs from this court, some of which have been granted, and the residual prayers for determination are: -
  - a. That the court be pleased to set aside orders made on 21/07/2022.
  - b. That the court be pleased to set aside a notice to act in person dated 7/06/2022.
  - c. That the honourable court be pleased to set aside or expunge from the record a consent dated 25/07/2022 and filed in court on 28/07/2022.
  - d. That Harrison Muinde Kivaya, Justus Muema Muthoka, and Paul Maingi Juve Ngai, who are the new officials of Kasuitu, do replace the deceased defendants.
12. The motion is supported by the grounds set out on the body thereof and the supporting affidavit of Harrison Muinde Kivaya, which he deposed on 18/10/2023.
13. In summary of the grounds and affidavit, he stated that Charles Fundi acted clandestinely by replacing the deceased defendants' advocates, substituting the deceased defendants in the proceedings and purportedly entering a consent that defeated the interests of the deceased defendants. He argued the consent was illegal and irregular.
14. To buttress the position, an affidavit was deposed by John Ndandi Maele, which he swore on 6/11/2023. In it, he maintained that the deceased 3<sup>rd</sup> defendant was his wife.
15. Further, he stated Charles Fundi was a stranger to his family, and he never allowed him to file any grant before the probate court over matters concerning his wife. He urged this court to revoke the grant.
16. A further affidavit was also deposed on 27/05/2024 by one of the alleged defendants, Justus Muthoka Muema.

#### **Plaintiffs' case**

17. In opposing the motion, Julius Mutinda Kanyotu, who is one of the plaintiffs, filed an affidavit he swore on 23/02/2024.
18. He contended M/s. J.M. Tamata & Co. Advocates, who then represented the 1<sup>st</sup> defendant, were given an opportunity to substitute the deceased defendants to no avail, and the plaintiffs were constrained to substitute them in the manner they did.
19. He argued that the consent was proper and met the legal threshold and that the alleged defendants were strangers to the proceedings. He urged this court to disregard the affidavits of John Ndandi Maele and Rosaitor Kalekye Kin'gelui. It is noted this court did come across the latter affidavit.

#### **Defendants' case**

20. The deceased defendants' representative, Charles Fundi, opposed the motion by filing his affidavit sworn on 6/06/2024, which was filed by the law firm of Ms. John Maina Ndegwa & Co. Advocates. The averments therein were more or less similar to those of the plaintiffs, and this court will not reiterate them.
21. Significantly, the plaintiffs in the consolidated suit did not participate in these proceedings.



## **Parties' submissions**

22. The court directed the parties to file written submissions. In compliance, the alleged defendant's law firm on record filed 2 sets of submissions dated 14/01/2025 and 4/02/2025, the plaintiffs' law firm on record, Ms. Nzei & Co. Advocates, filed theirs on 23/01/2025, and those of the defendants' counsel on 7/01/2025.
23. Therefore, upon identifying and considering the issues for determination, this ruling shall, later on in its analysis and determination, consider the arguments posited on the particular issue in the submissions and also bear in mind the law and judicial precedents.

## **Issues for determination.**

24. This court has carefully considered the motion, its grounds, affidavits, and the filed written submissions, and the following issues, which shall be handled separately, arise for determination.
  - a. Whether the alleged defendants are strangers in these proceedings.
  - b. Whether the orders of 21/07/2022 should be set aside.
  - c. Whether the consent dated 25/07/2022 and Charles Fundi's notice to act in person should be expunged from the record.
  - d. What orders should be issued, including an order as to costs?

## **Analysis and Determination**

### **a. Whether the alleged defendants are strangers in these proceedings.**

25. The header of this ruling has clearly outlined the parties to these proceedings, and being parties, certain rights and responsibilities accrue to each one of them, which privileges and burdens a stranger cannot enjoy or suffer as the case may be.
26. That is why a stranger to court proceedings cannot be heard to seek prayers or reliefs in an application such as this one or in a suit.
27. The role of parties to proceedings was explicated by the Supreme Court of Kenya in *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others; Nature Foundation Limited (Proposed Interested Party)* [2014] KESC 52 (KLR) in the following manner at paragraph 27 thereof: -

“We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause. On this point, we are guided by the principle which we had pronounced in the *Mumo Matemo* case (at paragraph 24), as follows:

A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”



28. That is why, well knowing they were not parties to the proceedings, the alleged defendants who were and still are “strangers” to these proceedings in a motion dated 8/09/2022, sought to be joined as interested parties as envisaged by Order 1 Rule 10 (2) of the Civil Procedure Rules.
29. Upon consideration of the motion, the court dismissed it in a ruling rendered on 20/9/2023. Undeterred, and instead of appealing against the decision, they have decided to do what this court regards as self-metamorphosized and have now given themselves the title of “defendants”.
30. This new crystallisation of names, which they have now purportedly given themselves, cannot do as they have never been parties to the proceedings. It therefore follows that they cannot participate in these proceedings or even seek reliefs before this court.
31. Given the ruling of this court of 20/9/2023, this court concludes the alleged defendants have abused the court process, and this court will not entertain their actions. In the end, this court finds and holds the alleged defendants are not parties to this matter and their application is thus incompetent.
32. Before this court pens off, it has been observed that another application for joinder as an interested party has been filed by John Muthama Kimea dated 13/02/2025, purportedly as the chair of Kasuiti Plot Owners Self-Help Group. In its earlier ruling of 20/9/2023, this court’s obiter dictum stated as follows: -

“I do not think that a mere election of new group officials would vest a real stake in the applicants because if that were the case, then every election, there would be joinder of new office bearers to the suit, which means that the suit may not be determined at all.”
33. In light of the ruling of 20/9/2023, this application, which has been filed by John Muthama Kimea dated 13/02/2025 for joinder, may obviously follow the same fate as all other previous applications for joinder by purported officials of Kasuitu Plot Owners Self-Help Group.
34. Further, to save the court’s time and considering all parties are represented and John Muthama Kimea (intended interested party) acts in person, let counsels access the application by John Muthama Kimea dated 13/02/2025 through the court’s CTS.
35. As for any person questioning the limited grant of Charles Fundi, nothing stops them (if at all) to move the probate court with speed and make the necessary application to revoke the grant or grants.
36. For the foregoing reasons and finding, it is unnecessary to consider the other issues. Thus, in dealing with issue (d), this court is satisfied that the alleged defendants’ motion dated 18/10/2023 is incompetent and is hereby struck out with no orders as to costs. In the end, I hereby issue the following orders: -
  - a. That the notice of motion dated 18/10/2023 is hereby struck out with no orders as to costs.
  - b. Unless with leave of the court, no further applications shall be entertained in this matter.
  - c. Directions on the application dated 13/02/2025 shall be made on 23.06.2025.
  - d. The plaintiffs in this matter to serve the plaintiffs in the consolidated suit with a mention notice.

Orders accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF APRIL, 2025.**

**HON. A. Y. KOROSS**



**JUDGE**

**29.04.2025**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform**

In the presence of;

John Kimea for intended interested parties

N/A for the other parties

Mr. Tamata for applicants

Ms Kanja- Court Assistant

