



REPUBLIC OF KENYA



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Veeland Housing Company Ltd & 2 others v Kahinga & 8 others; Kimuri Housing Company Limited (Intended Interested Party) (Environment & Land Case 168 of 2017) [2022] KEELC 14483 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 168 OF 2017**

JG KEMEL, J

OCTOBER 31, 2022

BETWEEN

**VEELAND HOUSING COMPANY LTD 1ST PLAINTIFF
FAJ CONSULTANTS LIMITED 2ND PLAINTIFF
GLORIA NYAWIRA WAMBUGU 3RD PLAINTIFF**

AND

**DAVID WAWERU KAHINGA 1ST DEFENDANT
KAMAU CHEGE 2ND DEFENDANT
KAGUNYI NJUGUNA 3RD DEFENDANT
LEE MUCHIRI KAMAU 4TH DEFENDANT
PATRICK MACHARIA 5TH DEFENDANT
CALVARY LEMALKAT 6TH DEFENDANT
LONAH NYAKHAMA 7TH DEFENDANT
GEORGE KIARIE ZIPPORAH 8TH DEFENDANT
AILEEN KANJIRU JAPHER 9TH DEFENDANT**

AND

KIMURI HOUSING COMPANY LIMITED .. INTENDED INTERESTED PARTY



RULING

1. Before me are three (3) notices of motion dated July 23, 2021, September 15, 2021 and September 23, 2021 filed by the intended interested party, 8th and 9th defendants and 1st defendant respectively.

The Intended Interested Party's Application dated 23/7/2021

2. The intended interested party/applicant filed the instant motion seeking the following order that:
 - a. Spent.
 - b. Kimuri Housing Company Limited be enjoined as an interested party in the subject proceedings.
 - c. The judgment delivered on March 18, 2021 (sic) and all consequential orders be set aside and the matter be heard afresh with the full participation of the intended interested party/applicant.
 - d. Further and/or in the alternative, the subject suit be stayed pending the hearing and final determination of Nbi ELC 189 of 2015 – Kimuri Housing Company Ltd v David Waweru Kahinga & others.
 - e. Spent.
 - f. The costs of this application be provided for.
 - g. The honorable court be at liberty to issue such or further orders as it shall deem appropriate in the circumstances.
3. The application is premised on the grounds as thus; the applicant is the bonafide owner of LR No 79696 (suit land); it was not enjoined in this suit despite the 1st defendant being aware of the its claim over the suit land; there was material non-disclosure of the existence of another suit namely Nbi ELC 189 of 2015 – Kimuri Housing Company Ltd v David Waweru Kahinga & others (hereinafter called “Nbi ELC 189 of 2015”) in which the applicant is claiming the whole land while in this suit the plaintiffs’ claim was for the resultant subdivisions of the mother title; the judgement herein adversely affects the applicant as it is its land which the 1st defendant is being compelled to give titles and further that the orders in this suit are incapable of being implemented unless Nbi ELC 189 of 2015 is heard and determined.
4. The motion is supported by the affidavit sworn by Margaret Wambui Ngugi who introduced herself as the Managing Director of the applicant. She stated that in November 2005 her company dealing in real estate, learned about parcel of land known as LR No 7969 (IR 8607) – (the suit land) that was up for public auction at the instance of Fidelity Bank through private treaty with the debtor and guarantor. The applicant entered into a sale agreement on November 15, 2005 with Maude Laurencia Sullivan for the purchase of the whole property measuring 10.12 acres at the sum of Kshs 45 million some of which was channeled to the bank to clear the outstanding loan. See the copy of agreement and discharge of charge marked as M2 and M3. She added that the purchase price was paid through the applicant’s then counsel Kirundi & Co Advocates to Sullivan’s Advocates, P J. Kakad & Co Advocates



5. That as fate would have it Sullivan died on the August 1, 2006 before executing the transfer forms but left a valid will after which the executors commenced probate proceedings in HCCC P & A 3094 of 2006 obtaining a grant on February 14, 2007 marked M4.
6. That the conclusion of the sale was delayed by the probate proceedings but the applicant continued dealing with the executors in the transaction.
7. The applicant applied for the subdivision of the mother title and obtained subdivision approvals. See the annexed copies of notification of approval, application for development permission, copy of payment cheque and receipt approved subdivision plan and no objection letter from the Ministry of Lands marked M5.
8. Thereafter the applicant averred that it sold 40*80 plots to 3rd parties who have since constructed houses. The applicant has developed accompanying infrastructure such as road networks, street lighting and drainage sewer lines.
9. The deponent stated that in June 2010 the vendors executors signed the transfer in favour of the applicant (see annexure marked M6) and thereafter their advocate forwarded to the applicant the completion documents marked as M7 alongside the confirmation of grant marked M8.
10. She averred that notwithstanding the receipt of the completion documents aforestated the transfer could not be registered as the deed and correspondence files were missing necessitating a reconstruction.
11. That all seemed well until March 2015 when the applicant and the executors of the estate were notified of the presence of some third parties on the land , one of whom was the 1st defendant purporting to show potential purchasers some of the plots for sale. The matter was reported to Kasarani Police Station. In addition to that, the Nbi ELC 189 of 2015 case was filed to determine the rightful owner of the suit land. The police complaint was escalated to Directorate of Criminal Investigation that culminated to the charging of the 1st defendant in MCCR No 1274 of 2017.
12. That the applicant learned of the instant case on July 19, 2021 despite the existence of the Nbi ELC 189 of 2015 case where the applicant is the plaintiff and the 1st defendant is a party (the 1st defendant). That the drastic orders issued on the March 18, 2021 directly and indirectly interferes with the applicant's proprietorship and greatly prejudices the applicant and other third parties who claim proprietary interests over the suit land.
13. Consequently, she urged the court to grant her orders as prayed.
14. The motion is opposed by the plaintiff *vide* a grounds of opposition dated October 8, 2021. The gist of the grounds of opposition in summary is that the bulk of the annexures attached in the supporting affidavit of the motion are vague and illegible thus making it difficult for the plaintiff to adequately respond to the motion and urged the court to dismiss it for ambiguity.
15. In her replying affidavit sworn on November 15, 2021 the 1st plaintiff's Managing Director namely, Josephine Mwoi Wambugu deponed that the suit was heard and determined and therefore there is no suit capable of joinder; the plaintiffs were adjudged as the owners of the land which they have developed since 2016 and the applicant has no nexus to the concluded case to warrant the court to grant her prayers as drawn and the legal provisions cited in the motion are not pertinent to the case. Further that the applicant has not proven its ownership allegations and the attached title for LR 7969 does not reveal its name as the registered owner. That as at November 2, 2015 the registered owners of the suit land were David Waweru Kahinga and Christine Mbugua as demonstrated by JWM-1 – certified copy



- of the title deed. That there is no evidence of payment of the purchase price for the suit property and no will to show that the applicant is a beneficiary of the suit land as a purchaser was annexed.
16. In addition, the deponent impugned the transfer documents as invalid for want of dates, attestation and execution; no pin numbers for the executors; no consent from the Commissioner of Lands has been adduced and that the documents do not in any way establish the nexus between the applicant and the suit land. That the averment of the applicant that it applied and obtained development permission to subdivide the land is misleading as the applicant was not the registered owner of the suit land hence was devoid of the mandate to seek and obtain development permission on land that it did not own.
 17. Further that the applicant's fraudulent claims on the registration of David Waweru and Christine Mbugua are unproven. On whether this suit ought to have been filed in Nairobi and not Thika, she affirmed this court's jurisdiction on the basis of copy of title which described the suit land as Kiambu District and contended that the suit herein was filed in the correct forum.
 18. In summary the deponent opposed the application on the grounds that; no sufficient connection to the suit premises has been shown by the applicant; no proof of the alleged purchase of the suit land is shown; no testamentary evidence has been shown connecting the applicant to the property as alleged; no provision of the law has been shown which allows the applicant to reopen a case that has been concluded and more so where no proprietary interest has been established; no prejudice has been demonstrated in a concluded matter.
 19. The 1st - 9th defendants did not oppose the application.
 20. The applicants submissions were filed by the firm of J M Njenga & Co Advocates.
 21. On whether the applicant has demonstrated an identifiable interest in the subject matter/ whether the applicant is a necessary party to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, counsel reiterated the applicant's affidavit evidence that the applicant purchased the suit land from Sullivan *vide* the agreement of sale dated the November 15, 2005, the executors signed the transfer in favor of the applicant, and that the only reason the same was not registered was the deed file that was missing.
 22. Counsel stated that there is a case Nbi ELC 189 of 2015 pending determination of the question of ownership which the 1st defendant is aware given that he was duly served and actively participated in it.
 23. That the issue of determination of the ownership of the land is pertinent.
 24. The counsel argued that the instant case was filed on the presumption that the 1st defendant has proprietary interest over the suit land which position is not correct. That this is because the 1st defendant is a common defendant in both this case and the Nbi ELC 189 of 2015; both cases relate to the same subject property and the Nbi ELC 189 of 2015 touches on the ownership and subdivisions of the mother title; the question of ownership of the mother title ought to be determined first as that will clarify whether the 1st defendant has the capacity and a good title to transfer the subplots in favour of the plaintiffs. That it is questionable why this suit was filed in Thika ELC yet the suit land is located in Kasarani which is in Nairobi County and the proper forum is thus the ELC at Nairobi.
 25. Counsel relied on the case of *Shiviling Supermarket v Jimmy Ondicho* (2018) eKLR where the court said this with respect to the joinder of an interested party;

“The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it



must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”

26. Further counsel cited the case of *Mary Njeri Kabundi v Christine Mithiri Mbugua & 2 others* (2020) eKLR where the court citing the decision of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2014]eKLR held that an interested party is one who has a stake in the proceedings though he or she was not a party to the cause abinitio. He or she is the 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 case. Further that in the case of *Meme v Republic* [2004] 1KLR 637 the court observed that a party could be enjoined in a matter for the reasons that;
 - a. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
 - b. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
 - c. Joinder to prevent a likely cause of proliferated litigation.
27. Citing the above precedents, the applicant submitted that it has demonstrated vide the affidavit evidence that it has proprietary interest as the bonafide purchaser of the suit land thus maintains a valid stake in the pending proceedings.
28. The applicant submitted that joinder should be allowed to stop proliferated litigation given that if the 1st defendant is adjudged not to have a proper title in Nbi ELC 189 of 2015, his capacity to transfer the sub plots to the plaintiffs will be impugned on the ground that he will not be a having a valid title to pass to the plaintiffs. That joinder will also forestall the danger of there being two conflicting judicial decisions by courts of similar jurisdiction with the undesired occasioning of judicial embarrassment confusion and anarchy.
29. Counsel relied on a letter marked as Jmw1 dated the May 9, 2016 where the Principal Land Registrar stated that the title in favour of the 1st defendant and Christine Mbugua is a forgery and that based on this the title is capable of being impugned under section 26 of the *Land Registration Act* for having been acquired through fraud and or illegally and unprocedurally acquired. For that reason the applicant urged the court to stay these proceedings pending the determination of ownership of the land in Nbi ELC 189 of 2015.
30. Further counsel submitted that order 1 rule 10(2) of the *Civil Procedure Rules* allows for joinder at any time of the proceedings and that the court in CA No 15 of 2015 in allowing joinder after judgment espoused the need to give a liberal and wide interpretation to the rule and should not be restricted merely to the parties involved in the suit but all persons necessary to a complete adjudication should be made.
31. Relying on the case of *Michael Otieno Wagude v Morris Plural* (2021) eKLR the applicant submitted that a party may be enjoined at any stage which is irrespective of whether the case is concluded or not because the drafters of the law expressly stated any stage of the proceedings so that no bonafide party can be locked out of the seat of justice and to avoid a plethora of unnecessary litigation.
32. The plaintiffs through the firm of F. N Njanja & Co Advocates filed their submissions dated May 19, 2022.



33. Counsel submitted that the law does not allow a joinder of a party where proceedings have closed and Judgement rendered because there is no pending suit for a party to join. See the case of *Erastus Ndubiu T/A Emac Enterprises v Mugomoini Farmers Company Limited and Inshwil Builders Engineer Limited & Benjamin Kamande Githuka (as proposed interested parties)* where the court stated that joinder as contemplated under order 1 rule 10(2) is to be applied only where proceedings are pending and not after judgement has been entered.
34. It was his submission that the decision in the case of *JMK MWM & another* [2015] eKLR is not applicable to the facts of this case as a party was enjoined by the court of appeal after judgment on the basis that the judgement of the trial court had adversely mentioned the party and that amounted to condemning him unheard. That in the instant case the applicant is not adversely mentioned in the judgement and further that the applicant is not indicated as a proprietor of the suit as the suit land is registered in the name of the 1st defendant. That the copy of title annexed by the applicant cannot be relied on as it is incomplete to found an interest in land.
35. In impugning the alleged claim of purchasers' right in the suit land, the plaintiff submitted that the documents of transfer are incomplete. That a party must show the locus or nexus with the matter in question before the court allows joinder.
36. That the applicant has its own case in Nbi ELC 189 of 2015 with liberty to prosecute however they are at liberty to seek preservative orders and enjoin the plaintiffs and other third parties as desired.

Analysis And Determination

37. The key issue for determination is whether the applicant is deserving of the orders of joinder and setting aside of judgment delivered on the March 11, 2017.
38. Order 12 rule 7 of the *Civil Procedure Rules* provides that:-

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
39. In the case of *Patel v E.A Cargo Handling Services Ltd* (1974) EA 75, it was held that:-

“There are no limits or restrictions on the judge's discretion to set aside or vary an *ex-parte* judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”
40. According to my evaluation of the evidence and the record the judgement though *ex-parte* was a regular judgement given that all the parties were served. The applicant was not a party to the suit. I shall return to this prayer at the end.
41. It is not in dispute that this suit was heard and determined *ex-parte* and judgement delivered on the March 11, 2021. The claim of the plaintiffs was anchored on a purchaser's right on some of the disclosed plots and not the entire suit land. The 1st defendant in the instant case was ordered to transfer the subplots to the plaintiffs in fulfillment of orders of specific performance under a purchasers' right.
42. The title of the 1st defendant and one Christine Imbosa Mbugua over the suit land was not under challenge in this case.



43. It is also not in dispute that the applicant was not a party to this suit. Similarly, the plaintiffs in this case are not parties in Nbi ELC 189 of 2015.
44. It is the applicant's case that Nbi ELC 189 of 2015 exists and is ongoing in Nairobi. Copy of the amended plaint filed in 2015 was annexed. It was not disclosed whether the defendants have filed any defences to the applicant's case in Nbi ELC 189 of 2015. It avers that it was not aware of the existence of this case and only learned about it after judgment had been rendered and hence the prayer to reopen it and its joinder be made to allow it participate in the hearing fully.
45. It is observed that the common denominator in the two suits are two individuals David Waweru Kahinga and Christine Imbosa Mbugua who according to the title on record are the registered owners of the suit land. The applicants on the other hand claim a purchaser's interest of the suit land from Sullivan and later the executors of Sullivan's estate in Nbi ELC 189 of 2015. In their plaint they have impugned the title held by David Waweru Kahinga and Christine Imbosa Mbugua on grounds of alleged fraud and illegality.
46. The legal provision on joinder of parties is found in order 1 rule 10(2) Civil Procedure Rules that;
- “(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.”
47. Under the above rule a person may be added as a party to a suit in the following circumstances; when he ought to have been joined as a plaintiff or defendant and is not so joined or; when without his presence the question in the suit cannot be completely decided.
48. Joinder of a party is not a right but an exercise of discretion by the court. This was the decision in in EG v Attorney General; David Kuria Mbote & 10 others (interested parties) [2021] eKLR whereby the applicant sought to be enjoined in the appeal pending at the Supreme Court. The appellate court appreciated that joinder of a party is discretionary exercise of the power of the court in the following terms;
- “(1) The core of the court's power to join a party to any proceedings including at the appellate stage, as aptly discussed in Hamisi Yawa & 36,000 others v Tsangwa Ngala Chome & 19 others [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -
- a) The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral. b) The intended party's presence would enable court to resolve all the matters in the dispute.



- c) The intended party would suffer prejudice in case of non-joinder.) The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.”
49. Equally in the case of *Francis Kariuki Muruatetu Ltd & another v Republic & 5 others* in petition No 15/16 (2016) eKLR the court laid down the following parameters in determining an application for such joinder;
- “(1) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- (2) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- (3) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”
50. In the case of *JMK* (supra) the Court of Appeal held that:
- “Order 1 rule (10) (2) of the *Civil Procedure Rules* empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.”
51. The learned authors of *Sarkar’s Code of Civil Procedure* (11th Ed Reprint, 2011, Vol 1 P. 887), have given guidance on how the provisions of joinder should be interpreted by courts:
- “The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”
52. The *Constitution of Kenya (Protection of Rights and Fundamental freedoms practice and Procedure Rules) 2013* rule 2 defines an interested party as a “person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceeding or may not be directly involved in the litigations.”
53. In the SC Pet No 12 of 2013 *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others*, an interested party is defined as;
- “An interested party is one “[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...”

54. Additionally, in the case of *Pati Limited v Funzi Island Development Limited & 4 others; Kassim Bakari Mwamzandi (proposed interested parties); Law Society of Kenya (proposed amicus curiae)* [2019] eKLR the Supreme Court stated that in an application to be enjoined to proceedings as an interested party, one had to demonstrate that he or she had a personal interest in the subject matter before the court. On the other hand, an intended amicus curiae had to demonstrate his or her expertise in the subject matter before the court and how he or she would enrich and help the court reach a just determination. Further the court stated that in the determination of an application seeking joinder as either an interested party or *amicus curiae*, the important thing was the subject matter before court. There had to be a substantive question of law or point of controversy before the court. The application for joinder could not be made in a vacuum or in an anticipatory context. There had to be live cognizable issues and questions for determination before the court.
55. The Supreme Court was categorical that;
- “Consequently, it is imperative to note that in the determination of an application seeking joinder as either interested party or *amicus curiae*, at the core is the subject matter before court. There must be a substantive question of law or point of controversy before the court to which the application is made to. such joinder motion cannot be made in a vacuum or in an anticipatory context. There must be live cognizable issues and/or questions for determination before the court.” [emphasis added]
56. According to the *Civil Procedure Rules* therefore it is not in doubt that parties may be joined at any stage of the proceedings even after judgment provided that the party has demonstrated an identifiable stake; his presence is necessary to settle the matter and there is a right to be protected which would otherwise be adverse to the party.
57. A party must demonstrate a stake in a case. He cannot be allowed to introduce his own issues into the proceedings of the principal parties. This was the principle laid out by the Supreme Court in *Francis Kariuki Muruatetu* (supra) as follows;
- “(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. 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.”
58. The totality of the above authorities is that for such joinder to succeed, the applicant must demonstrate his identifiable stake in the proceedings for the court to consider.
59. In this case the applicant has admitted that it has filed its case in the Nbi ELC 189 of 2015 which is pending. As stated before the case of the plaintiffs was a purchasers’ right which right has been adjudged to conclusion. The applicant wants to reopen the case of the plaintiffs and prosecute his case which is to impugn the title of the 1st defendant seek specific performance from the estate of Sullivan.



60. According to the amended plaint in Nbi ELC 189 of 2015 dated the May 10, 2016, the applicant has sought inter alia; specific performance from the executors of the estate of the deceased vendor; a declaration that the sale and transfer of the suit land to Waweru and Mbugua was un procedural and illegal; a declaration that the plaintiff is the beneficial owner of the suit land; a declaration that any title held by Waweru and Mbugua is fraudulent null and void and an order for cancellation of the said title to issue.
61. What is the stake of the applicant in this suit? The applicant is adverting a claim of purchaser's interest in the whole suit land while in this case the plaintiffs' claim was for a portion of the suit land being disclosed and named subplots for which the court rendered judgement in their favour. I therefore find that the applicant is introducing a new cause of action in a concluded matter. I say so because the rights of Waweru and co- defendants vis-a-vis the plaintiffs' in this case has been determined by the court where the court held that the 1st defendant had a legal duty to transfer the plots to the plaintiffs.
62. I rely on the ruling of the Supreme Court in the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR whereby a court warned itself against exercising its discretion to enjoin a party whose aim is to seek to introduce or institute fresh cause of action. Relying on its decision in the *Mumo Matemu* (supra) the apex court had this to say;
- “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.”
63. It is therefore evident that the cause of action in this suit and that of Nbi ELC 189 of 2015 is dissimilar. The cause of action of the plaintiffs herein has been adjudicated fully and judgement granted in their favour.
64. The rationale in *Communications Commission of Kenya* (supra) is found in the latin word *dominus litis* which means the plaintiff is the master of his suit and he cannot be compelled to fight against a person against whom he does not claim any relief from as this will encourage undesirable intrusion of third parties into other peoples cases to ventilate their own grievances. As stated above the applicants cause of action is in Nbi ELC 189 of 2015 which suit is being actively prosecuted. The plaintiffs did not seek any reliefs from the applicant in this case.
65. There are therefore no issues in controversy for settlement in this case, the same having been determined. The presence of the applicant in my view is therefore not tenable.
66. Litigation has to come to an end. in order not to convolute the case of the plaintiffs the applicants should prosecute its case in the Nbi ELC 189 of 2015 to its logical end and advert its ownership claim. Reopening this case in my view will lead to multiplicity of cases. As at now I see no prejudice that the applicant shall suffer because its cause of action is actively being litigated in Nbi ELC 189 of 2015 where he has sought appropriate remedies against several parties including the 1st defendant and his co-owner of the suit land.
67. In the end, the applicant has not established an identifiable stake in the instant proceedings to grant the prayer for joinder. I find no prejudice that will be suffered as the applicant is not without a remedy – the same being in Nbi ELC 189 of 2015.



68. The prayer for joinder having failed, it follows that the prayers for setting aside and stay of proceedings have become moot.
69. The application is not merited. It is dismissed with costs in favour of the plaintiff.

8th & 9th Defendants Application Dated September 15, 2021

70. The 8th and 9th defendants filed the instant motion and prayed for orders that;
- a. Spent.
 - b. Allowed.
 - c. Spent
 - d. Spent.
 - e. Spent
 - f. The judgment delivered on the March 11, 2021 be and is hereby set aside and/or reviewed.
 - g. The applicants be granted leave to file a statement of defence and counter claim upon setting aside the judgment; and
 - h. Costs of this application and the suit be and is hereby awarded to the applicant.
71. The application is premised on grounds on the face of it and supporting affidavit of even date of Aileen Kanjiru Japher, the 9th defendant and 8th defendant's spouse. she averred that they never participated in the instant suit culminating in the judgment delivered on March 11, 2021 against them. That they were not served with any pleadings for them to respond and learned about the suit when the 1st defendant asked them to testify in his case but later for them to find out that they were sued as defendants. The 9th defendant deponed that the judgment ought to be reviewed for reason *inter alia* they were condemned unheard contrary to article 50 Constitution of Kenya; that as result of their non-participation, the 1st, 2nd and 3rd defendants concealed material facts from the court that would have enable the court to reach a different conclusion; that the 1st, 2nd and 3rd defendants unlawfully sold the suit land to the plaintiffs without their consent; that the suit land was left to them as a gift from the late Sullivan and the 1st defendant held the land in trust for them. She maintained that they will suffer irreparable loss should the application succeed (sic) since the plaintiffs have taken possession of the suit land and are carrying out construction thereon.
72. The application is opposed *vide* the plaintiffs' notice of preliminary objection and grounds of opposition dated November 15, 2021. They termed the application as an abuse of court process and that it is *res judicata*. That the remedy under order 40 rule 1 Civil Procedure Rules is not available to the 8th and 9th defendants post-judgment and accused the defendants of forum shopping by filing a prolix of applications seeking similar orders which have been dismissed. Reliance was placed on this court's ruling dated September 10, 2021.
73. Similarly, the application was prosecuted by way of written submissions.
74. The firm of Oruenjo Kibet & Khalid & Co Advocates filed submissions dated January 5, 2022 on behalf of the 8th and 9th defendants. Five issues were drawn for determination to wit whether the 8th and 9th defendants were represented; should the judgment be reviewed; should the judgment be set aside; is the matter *res judicata* and whether an order for stay of execution should be granted.



75. Firstly, the 8th & 9th defendants submitted that they were never represented due to non-service of court pleadings and to that end the resultant order should be set aside. The case of *Patel v East Africa Cargo Handling Services* was cited. That the impugned judgment does not disclose and state their defence and it was only after judgment that they learnt of the case against them contrary to the rules of natural justice. That they cannot pursue an appeal against a decision they did not participate in and as such the court should exercise its powers under section 80 [Civil Procedure Act](#) and order 45 rule 1 & 2 [Civil Procedure Rules](#) and review the assailed judgment. That their application is premised on discovery of new evidence that includes concealment of the case details by the 1st defendants.
76. On the prayer to set aside the judgment, the defendants submitted that in cases of non-service of pleadings, judgment should be set aside as a matter of right as it was held in the Court of Appeal case of [James Kanyiita Nderitu & Anor v Marios Philpot Gbikas & Anor](#) [2016] eKLR. Regarding the plea of *res judicata*, the defendants maintained that their motion is not *res judicata* as it seeks review. That the 1st defendant did not have any authority to act or depone on issues on their behalf and therefore he was not their legal representative.
77. On the other hand, the plaintiffs submitted that the 8th and 9th defendants are relentlessly litigating over the same subject matter which the court already found to be *res judicata*. They invited the court to consider their replying affidavits dated August 10, 2021 and their notice of preliminary objection.

Analysis & Determination

78. The issue for determination is whether the judgment should be set aside.
79. Order 10 rule 11 of the [Civil Procedure Rules](#) empowers the court to set aside an ex parte judgment for default of appearance and defence.
80. Order 12 rule 7 of the [Civil Procedure Rules](#) provides that where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just. Further the provision is buttressed by order 51 rule 15 of the [Civil Procedure Rules](#) which provides that the court may set aside an order made ex parte.
81. The court's power to set aside judgments is discretionary and must be exercised judiciously. The Court of Appeal in the celebrated case of *Shah v Mbogo and another* [1967] EA 116 held that:
- “This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
82. In instances where the court is satisfied that proper service was not effected upon a defendant, then judgment would be set aside as a matter of right. This position is affirmed by the Court of Appeal in the case of [Pithon Waweru Maina v Thuka Mugiria](#) [1983] eKLR and further in the case of [James Kanyiita Nderitu & another](#) [2016] eKLR, where it was held that;
- “From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion



in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another v Shab* (1968) EA 98, *Patel v E.A Cargo Handling services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* (1986) KLR 492 and *CMC Holdings v Nzioka* [2004] I KLR

In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

83. The gist of the application is non-service of the court pleadings on the defendants to accord them a chance to be heard during the trial. A perusal of the court record reveals that *vide* a notice of appointment of advocates dated March 8, 2017 and filed in court March 9, 2017, all the defendants were represented by the firm of Fred Mwhia Advocates. The record is clear that the summons were served through the firm of Fred Mwhia who accepted and acknowledged the same and consequently filed a memorandum of appearance on their behalf.
84. Further in affidavits filed in court by the 1st defendant, he deponed that he had authority of the rest of the 8 defendants; see supporting affidavit dated March 17, 2017 in the motion of even date where the 1st defendant was citing the plaintiffs for contempt of court. Specifically, at para.3 of the supporting affidavit, the deponent swore that the status quo order (which were allegedly being disobeyed by the plaintiffs) were made in the presence of the plaintiffs’ counsel, defendants’ counsel, and the 7th, 8th & 9th defendants.
85. It is also evident that the 5th defendant opted to be represented by the firm of F. N. Njanja Advocates *vide* the notice of change of advocates dated May 22, 2017. Save for the 5th defendant, there is no indication of withdrawal of representation by the rest of the defendants from the firm of Fred Mwhia Advocates.
86. There is also another reason why the allegations for non-service of pleadings must fail. This suit was consolidated with Thika ELC 404 of 2017 Christine Imbosa Mbogua v David Waweru Kahinga & 8 others. The 8th & 9th defendants in that suit are the same 8th & 9th defendants herein. That suit was consolidated with the present suit on February 18, 2020. Similarly, in Thika ELC 404 of 2017, the 8th & 9th defendants appointed the firm of Fred Mwhia & Co Advocates to act for them *vide* a notice dated July 7, 2017 and filed on July 11, 2017. In particular the 9th defendant, swore a replying affidavit dated November 10, 2017 on her own behalf and on behalf of her husband, the 8th defendant.
87. The argument that the 8th & 9th defendant attended court as the 1st defendant’s witnesses therefore fails in its totality. They were well represented until sometime in February 2022 when their Counsel,



Mr Mwihi filed a chamber summons dated February 9, 2022 to cease from acting for the 4th - 9th defendants. The chamber summons was served upon the defendants as confirmed by the affidavit of service sworn on March 9, 2022 and no objection was presented in this court. The question then arises how would the 8th & 9th defendants accept service of an application to cease acting for a non-existent retainer?

88. The failure to file defenses despite numerous reminders to do so is reflected on the court proceedings on record and the judgment delivered on March 11, 2021.
89. In my respectful view the 8th & 9th defendants were well represented throughout the trial; they failed to file a statement of defence in the suit; the failure to annex a draft statement of defence to the application puts the court in the dark as to whether indeed they had any defence and secondly whether there is any triable issue for the court to arbitrate.
90. In the end the application is therefore unmerited.

The 1st Defendant's Application dated September 23, 2021

91. This motion is filed by the 1st defendant seeking orders that;
 - i. Spent.
 - ii. Spent.
 - iii. There be an order setting aside the ex parte judgment delivered by this honorable court on March 11, 2021 and all subsequent orders pending the lush grant leave to file defence out of time as the parties had not complied with pre-trial requirements because summons to enter appearance had not been served.
 - iv. The costs of this application abide the outcome of the main suit.
92. The application is based on the grounds thereat that are echoed in the supporting affidavit of even date of David Waweru Kahinga, the 1st defendant. He deponed that the suit was filed in 2017 and he was served with an application under certificate of urgency only prompting him to instruct Fred Muhia Advocate to act for him in the suit. That before complying with pre-trial conference requirements, the matter was fixed down for hearing during the service week whereby it proceeded ex parte. That after the hearing, he instructed the firm of S. Ogeto Ongori Advocates who came on record when the matter was pending ruling and his attempt to file an application was futile as the file was in Meru. That the rest of the defendants were also not heard and the resultant judgment has caused harm on innocent victims hence the application. Copies of the court proceedings and impugned judgment were annexed as DWK -1.
93. The application is opposed *vide* the plaintiffs' replying affidavit dated May 23, 2022.
94. The plaintiffs contended that the 1st defendant has always been actively participating in the proceedings and duly represented by counsel. That in particular the 1st defendant was served with the summons to enter appearance which was received by his advocates as evidenced by JMW1 – copy of summons received by Fred Mwihi Advocate. That the suit under went pre-trial motions but the defendants opted not to take part in the hearings including the main hearing despite service of the hearing notice and implored the court to dismiss the application with costs.
95. In similar fashion as the other motions, parties agreed to prosecute this application by way of written submissions.



96. The 1st defendant did not file any submissions.
97. The plaintiffs on their part filed submissions dated May 19, 2022. It is submitted that the application is misplaced and the orders sought are not based on any legal provisions. That the 1st defendant by his own admission in the supporting affidavit averred that he instructed counsel to act for him and therefore fully participated in the trial proceedings alongside the other defendants through advocate Fred Mwihiia. The court was urged to dismiss the application with costs.

Analysis & Determination

98. The main issue for determination is whether the judgment should be set aside and allow the 1st defendant to file his defence and 7 counterclaim
99. The findings of whether the judgment ought to be set aside in the 8th and 9th defendants' application dated September 15, 2021 are fully adopted herein. This is because even the 1st defendant was represented by the same firm of Fred Mwihiia Advocates.
100. In his replying affidavit dated May 23, 2022, the plaintiff annexed a copy of the received summons dated September 26, 2019 served upon Mr Fred Mwihiia. The 1st defendant has not disputed the said summons and is taken as conclusive evidence of service.
101. There is evidence of attempted negotiations between the rival parties which regrettably did not bear fruit. See the court proceedings of June 23, 2017, July 11, 2017 and October 3, 2017.
102. On July 3, 2018 and in presence of both counsel, parties were directed to comply with order 11 on pre-trial conference and a further mention date taken to confirm compliance before the Deputy Registrar. However, the defendants did not appear on February 18, 2020 despite service – see affidavit of service dated February 17, 2020.
103. Cunningly the 1st defendant elected to change his advocates through a notice of change of advocates dated August 10, 2020. The matter proceeded for formal proof hearing on August 31, 2020 and the same is acknowledged in para.4 of the judgment. The application is for dismissal as well.
104. Ultimately the applications dated September 15, 2021 and September 23, 2021 must fail for the following reasons; the applicants were represented by one law firm through whom they actively prosecuted the interim applications on record; the summons to enter appearance were duly served; the judgement was a regular judgement; there is no draft defence presented by the applicants to show the court whether or not they have triable issues for the consideration of the court; no valid cause to set aside the judgment has been established.
105. The plaintiff shall have the costs of all the three (3) applications.
106. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 31ST DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

F. N. Njanja for 1st, 2nd and 3rd Plaintiffs

1st – 7th Defendants/Respondents – Absent



Otieno Collins HB Oruenjo for 8th and 9th Defendants/Respondents

Ms. Kimani HB Njenga for Interested Party/Applicant

Court Assistant – Dominic

