Kenya Ihenya Limited v Chuchu & 2 others (Environment and Land Case Civil Suit 41 of 2007) [2022] KEELC 15487 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15487 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 41 OF 2007

J OMANGE, J

DECEMBER 8, 2022

BETWEEN

KENYA IHENYA LIMITED .... PLAINTIFF

AND

RUTH AMBURA CHUCHU .... 1ST DEFENDANT

ZIPPORAH WANGUI CHUCHU .... 2ND DEFENDANT

FLORENCE NJERI CHUCHU .... 3RD DEFENDANT

RULING

1. The applicants seek the orders that:
    a. Spent
    b. Nicholas Ndege and132 others be allowed to join these proceedings as interested parties.
    c. This honourable court be pleased to stay execution of its decree given on December 9, 2021 and issued on January 10, 2022 together with all consequential orders/process therein pending inter-parties hearing and determination of this application.
    d. Upon inter partes hearing of this application this honourable court be pleased to set aside its decree given on December 9, 2021 and issued on January 10, 2022.
    e. Costs of the application be provided for.
    f. Any other order this honourable court may deem fit to grant.
2. The application is based on the grounds that:
    a. The applicants being intended interested parties and having an identifiable stake in this dispute intend to join the proceedings and seek appropriate reliefs in the circumstances.

b. The intended interested parties / applicants are in actual possession and occupation of the subplots being subdivision of the suit property herein which they have done massive development thereon.

c. On May 14, 2022, the intended interested parties saw a newspaper advertisement by Chairman- Othniel K Waiguru of Kenya Ihenya Company Limited calling for a meeting of shareholders/plot owners of the land the subject matter to this dispute.

d. The intended interested parties were taken aback since the said Chairman- Othniel K Waiguru of Kenya Ihenya Company Limited is a total stranger to them yet they are plot owners on the subject parcel of land.

e. The intended interested parties / applicants carried out a quick independent investigation through which they learnt that there is a judgement delivered on December 9, 2021 and the decree thereof that directly affected their interest in the suit property and they were not parties to the suit.

f. The intended interested parties / applicants have effectively been condemned unheard against the principle of natural justice.

g. It is therefore only just and equitable that this honourable court ought to stay the execution of the said decree issued in respect to this matter pending hearing and determination of the application.

h. The plaintiff intentionally and deliberately refused and or ignored to join the applicants herein with aim solely calculated to deceive this court to give the favourable orders and to deny this honourable court opportunity of knowing the truth and determining this matter with correct facts and on merits.

i. It is unfortunate that the judgement and decree thereof in respect to this matter affected the applicant's ownership interest in their subplots of the suit property whereas they were not parties to this suit. Thus, having them condemned unheard against the principle of natural justice and spirit of the *Constitution*.

j. If the intended interested parties / applicants had participated in the proceedings, they could have adduced and placed before this honourable court important fact and evidence to enable this court determine this matter on merit and which would have occasioned different orders being issued by this honourable court.

k. It is in the interest of justice this court set aside the judgment and decree thereof to accord the intended interested parties opportunity to participate in the proceedings to enable this honourable court determine the matter on merits upon hearing all the parties.

l. The estate of the intended interested parties / applicants have legitimate interest over and in respect to the suit property and as such they have *locus standi* in these proceedings as they have been negatively prejudiced by the court decree given on December 9, 2022 which risks disowning them their respective sub-plots and development thereon destroyed.

m. The intended interested parties should be allowed to participate in this suit and this honourable court to set aside its judgment and decree to enable the applicants opportunity to present their case.

n. The intended interested parties stand to suffer irreparable monetary loss if the orders prayed are not granted and their development in their respective plots being subdivisions of the suit property risk being wasted, demolished and the plaintiff may use force to evict them.

o. In the circumstance, it is necessary for the intended interested parties to be joined to these proceedings and this court to review and set aside its decree given on December 9, 2021 as their presence before the court is necessary on order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

p. The applicants will suffer severely if the prayers sought herein are not granted as prayed.

q. The respondent stands to suffer no prejudice if the stay of the execution is granted and subsequently the said mandatory order is set aside.

3. The application is brought on the grounds that the applicants are in actual possession and occupation of the sub plots being sub division of the suit property on which they have carried out massive development. The applicants aver that they only learned of this suit after a judgement was delivered on December 9, 2021 which judgement directly affected their interest in the property. They contend that the decree affected their ownership rights and yet they were not given a chance to be heard. They urge the court to enjoin them as interested parties and thereafter review and set aside its judgement to allow them a chance to be heard.

4. The application is supported by an affidavit by Nicholas Ndege in which he depones that has authority to swear the affidavit on behalf of the other interested parties. He avers that he is the owner of plot 232 and 233 being sub division of parcel land no LR 7340/91 which is the subject matter of the suit. He depones that he and other intended interested parties have developed the properties allocated to them. He contends that the decree issued in this matter has adversely affected their interest. He insists that if the decree is not set aside, he and other interested parties are likely to suffer irreparable monetary harm and even be evicted from the suit property.

5. The respondents filed grounds of opposition to oppose the application. The main ground being that the court is functus officio having heard and finally determined the matter. The respondents further contend that there are appeals which have already been filed in respect of this matter. As such the court should not sit on appeal on its own judgement.

6. The application was canvassed by way of written submissions. Counsel for the applicant referred the court to article 25 (2) of the *Constitution* on the Right to a fair trial which he submitted the applicants had been denied. He further argues that the right to be heard when an adverse action is likely to be taken against a person is one of the pillars of natural justice. In this regard he refers the court to *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR* . In this case the court observed, "I have this to say it is important that in any judicial process adjudication parties involved be given an opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system."

7. Lastly he submitted that the court has power to allow joinder of parties so as to enable the parties a right to be heard.

8. Counsel for the respondent also filed submissions.

9. Counsel in his submissions strongly contends that this court is functus and lacks jurisdiction to hear this matter. He refers the court to several decisions that have defined the principle. He referred to amongst other cases the case of *Jersey Evening Post Limited v Al Thani [2002] JLR 542 at 550* wherein

the court posited: "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

10. The doctrine of *functus officio* was further considered by the Court of Appeal in *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR*, where the court held that - "Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon."

11. The last limb of the respondents submissions is that the applicant has not established any grounds for the court to set aside the decree and review its judgement.

12. I have considered the application herein and the submissions by counsels. The issues for determination are two; can the court allow joinder of parties when judgement and a decree have been issued? And secondly are their grounds to set aside the judgement?

13. The law that allows a court to join parties to a suit before it is order 1 rule 10 (2) of the *Civil Procedure Rules, 2010*. The section reads as follows:

    '(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.' (Emphasis, mine)

14. This provision is clear that the court has this power during the pendency of the proceedings. Nyamweya J in the case of *Lilian Wairimu Ngotho & Another v Moki Saving Co-Operative Society Ltd & Another (2014) eKLR*, had occasion to give clarity on this issue thus:- "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.

15. In this particular instance judgement has already been delivered and a decree issued. There no proceedings which the court can allow a party to be enjoined to. This court is functus in so far as enjoining parties is concerned. If any constitutional rights of the intended interested parties which have been breached as alleged by counsel for the respondent the remedy lies elsewhere.

16. While the court cannot enjoin a party after judgement, the court can review its judgement in certain circumstances. So I will address the second issue of whether the applicant has established sufficient grounds to set aside the judgement. Although the applicants referred to the prayers sought as setting aside, the prayer is really for a review of the courts judgement. The law on review is clear.

17. Section 80 of the *Civil Procedure Act* provides that: - "Any person who considers himself aggrieved- (a) by a decree or order from which an appeal is allowed by this act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

18. Order 45 of the *Civil Procedure Rules*, rule 1 provides that: - "1 (1) Any person considering himself aggrieved- 7 (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

19. Apart from the claim that the applicants were not heard, there is no attempt by the applicants to prove their application to the standards set out in order 45 rule 1. I also note that there is on record a chamber summons application allowing interested parties to come on record in this matter. The application which was allowed to on May 23, 2016 sought to bring on board interested parties who were in occupation of the sub plots. The applicants have not attempted to demonstrate any new matter or mistake or error. I am therefore unable to find any new material, mistake, error or sufficient cause that would warrant exercising discretion to set aside the courts judgement.

20. In the final result I find that this application has no merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF DECEMBER 2022.

JUDY OMANGE

Judge

In the presence of: -

Mr Korir for plaintiff/respondent

Ms Lumbasi holding brief for Mugo for intended interested party

Ms Awibi for Mr Ongoya for intended interested party

Mr Ongoya for intended interested parties

Steve - Court Assistant