



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT NAIROBI
ELC SUIT NO. 1159 OF 2000

1. MICHAEL MUOHI GATUNE
2. FRANCIS MUCHAI KARERA
3. KARAMBA WAINAINA
4. DAVID NJOROGE CHEGE
5. JOHN MUHINDI
6. LIVINGSTONE NDUTIRE
7. NELSON GICHUHI NJOROGE
8. ALEXANDER KARUGO
9. SAMSON CHEGE GICHUNGI
10. EZEKIEL KURIA KIGATHI & OTHERS.....PLAINTIFFS

VERSUS

1. LUKA KIMEU MUTEVU
2. JOSEPHAT MULEI MUTUNGI
3. BERNARD MULWA MULI
4. RICHARD MUTHINI KASYOKA
5. JOHN MBITHI MUTEVU
6. JOSHUA NGOVU
7. WAYUA NGANDA.....DEFENDANTS

AND

ROYAL CAPITAL LIMITED.....INTERESTED PARTY

AND

1. VICTORIA S. MUTHIANI
2. MARY KALONDU KYAULA

3. JOHN WAMBUA KITHUKU

4. JONAH MWANZIA MUINDE

5. SERAH MUENI WAMBUA

6. MICHAEL MUTISYA NZUNGI

7. NTHEI KIMATU

8. DAVID MUSAU KIMEU

9. THOMAS MUASYA NDONYE...APPLICANTS/INTENDED INTERESTED PARTIES

RULING

The facts that gave rise to this suit are set out in detail in the judgment of this court that was delivered on 12th June, 2020. The plaintiffs brought this suit against the defendants on 21st July, 2000 through a plaint dated 19th July, 2000 that was amended on 25th August, 2000. In the amended plaint, the plaintiffs described themselves as the registered owners and representatives of the registered owners of the parcels of land known as Makuyu/Kambiti/Block 1/1-54, 61 and 62 (hereinafter referred to as “the suit properties”). The defendants were described in the amended plaint as representatives of all the unlawful occupants of the suit properties. The plaintiffs averred that the defendants had without lawful authority or excuse invaded the suit properties and occupied the same. The plaintiffs averred that the defendants were engaged in cultivation, sand harvesting, charcoal burning and cattle grazing on the suit properties and had thereby caused loss and damage to the plaintiffs. The plaintiffs averred that despite demand and notice of intention to sue having been given, the defendants had failed to vacate the suit properties. The plaintiffs sought judgment against the defendants jointly and severally for;

1. An order that the plaintiffs be allowed to sue in a representative capacity on behalf of all the registered owners of the suit properties against the defendants in their representative capacity.
2. Eviction of the defendants from the suit properties and an order restraining them from re-entering the said properties.
3. Mesne profits.
4. Costs and interest.

The defendants filed a joint statement of defence and counter-claim on 20th May, 2003. The defendants admitted that the plaintiffs were the registered proprietors of the suit properties. They denied however that they were occupying the suit properties unlawfully. The defendants averred that they were occupying the suit properties without permission, consent, leave or license from the plaintiffs and their predecessors in title and that they had been cultivating and using the suit properties for uninterrupted period of over 12 years. The defendants averred that they occupied the suit properties before the plaintiffs acquired the same and that the plaintiffs were always aware of their occupation and interest in the suit properties.

The defendants averred that they had also carried out developments on the suit properties and that they had by virtue of adverse possession become entitled to be registered as the proprietors of the suit properties. The defendants denied that the plaintiffs were entitled to the reliefs sought in the amended plaint. The defendants averred that their rights over the suit properties by virtue of adverse possession accrued before the plaintiffs acquired the said properties and as such the registration of the plaintiffs as the owners of the suit properties did not affect their interests in the properties. The defendants averred further that the plaintiffs’ suit was incompetent and bad in law for non-compliance with the provisions of Order 1 rule 8 of the Civil Procedure Rules and other related provisions of the law. In their counter-claim, the defendants reiterated the contents of their defence and prayed for judgment against the plaintiffs for;

1. A declaration that the defendants had acquired absolute titles to the suit properties by adverse possession.
2. A declaration that the defendants were entitled to be registered as the proprietors of the suit properties in place of the plaintiffs and that the plaintiffs should execute valid transfers or assignments in favour of the defendants free from encumbrances.

On 5th April, 2018, Royal Capital Limited (“the interested party”) was granted leave to join the suit as an interested party. In its application for joinder dated 28th March, 2018, the interested party averred that it was the registered proprietor of the parcels of land known as Makuyu/Kambiti/Block 1/ 7, 8, 9, 11, 12 and 61 which were some of the properties whose ownership were in dispute in the suit between the plaintiffs and the defendants. The interested party averred that it was opposed to the defendants’ counter-claim as concerns Makuyu/Kambiti/Block 1/ 7, 8, 9, 11, 12 and 61.

The suit was heard over a number of days. The court delivered a judgment in the matter on 12th June, 2020 on the following terms;

1. The defendants shall vacate and handover to the plaintiffs all those parcels of land known as Makuyu/Kambiti/Block I/ 17, 44, 6, 27, 48, 83, 20, 15, 32 and 43 respectively within ninety (90) days from the date hereof in default of which the plaintiffs shall be at liberty to apply for their forceful eviction from the said properties.

2. A permanent injunction is issued restraining the defendants by themselves or through their agents, servants or representatives from re-entering Makuyu/Kambiti/Block I/ 17, 44, 6, 27, 48, 83, 20, 15, 32 and 43 once they vacate or are evicted therefrom.
3. The defendants' counter-claim is dismissed.
4. The plaintiffs shall have the costs of the suit and the counter-claim.

In the judgment, the court had framed 4 main issues for determination as follows;

1. Whether the plaintiffs' suit was competent or properly before the court.
2. Whether the defendants had trespassed on the suit properties.
3. Whether the plaintiffs were entitled to the reliefs sought against the defendants.
4. Whether the defendants were entitled to the reliefs sought against the plaintiffs.
5. Whether the interested party was entitled to any relief.

Of the above issues, those relevant to the application before the court are the 1st, 3rd and 5th issues. On the first issue, the court stated as follows:

“It is common ground that the plaintiffs brought this suit on their own behalf and on behalf of other persons not named in the amended plaint. It is also common ground that the plaintiffs sued the defendants on their own account and as representatives of other unnamed persons occupying the suit properties. I am in agreement with the defendants that in the circumstances, the plaintiffs had an obligation to comply with the requirements of Order I rule 8 of the repealed Civil Procedure Rules. The plaintiffs were required to apply to court for directions on how to notify the persons on whose behalf they had brought the suit and those on behalf of whom the defendants had been sued so that those who wished to apply to join the suit could do so.

I am of the view that the purpose of the notice under Order I rule 8(2) of the repealed Civil Procedure Rules was to give those persons on whose behalf a suit was instituted or was being defended an opportunity to join the suit in case they wished to do so and in the event that they did not apply to join the suit, for them to be bound by the outcome of the suit. What then is the effect of failure to comply with Order I rule 8 of the repealed Civil Procedure Rules? I am not in agreement with the defendants that such omission renders a suit incompetent and bad in law. In my view, the omission merely denies a plaintiff the benefit of a representative suit. In the present suit, the plaintiffs who are referred to in the amended plaint as “others”, on whose behalf the plaintiffs brought this suit and the unnamed defendants on whose behalf the defendants were sued having not been given notice of the institution of this suit and an opportunity to join the suit, cannot be bound by the outcome of the suit. The plaintiffs having failed to comply with Order I rule 8 of the Civil Procedure Rules, their suit ceases to be a representative suit.

The upshot of the foregoing is that the plaintiffs' suit is not incompetent and bad in law as claimed by the defendants. The suit is however not a representative suit and the same shall be determined only as between the parties before the court.”

On the 3rd issue, the court held that the plaintiffs had proved that they were the registered proprietors of the parcels of land known as Makuyu/Kambiti/Block I/ 17, 44, 6, 27, 48, 83, 20, 15, 32 and 43(hereinafter referred to as “the disputed properties”) and that the defendants were trespassers on the said properties. The court held that plaintiffs were entitled to an order for possession of the disputed properties and an injunction restraining the defendants from re-entering the said properties once they vacated the same.

On the 5th issue, the court found that the interested party did not make any claim against the defendants on which the court could pronounce itself. In the circumstances, the court held that it was unable to grant any relief in favour of the interested party against any of the parties to the suit.

What is now before me is a Notice of Motion application dated 10th August, 2020 brought by the applicants seeking the following orders:

1. That the firm of Wanjohi & Wawuda Advocates be granted leave to come on record for the applicants.
2. That the applicants be enjoined in the suit as defendants and be granted unconditional leave to defend the suit.
3. That the judgment entered herein on 12th June, 2020 and all consequential orders/decrees ensuing therefrom be set aside and the suit heard a fresh.
4. That the court be pleased to give such other orders as it may deem fit in the interest of justice.

The application that was supported by the affidavit of Mary Kalondu Kyaula sworn on 10th August, 2020 was brought on the following grounds: The applicants were residents of Muthanga Farm which comprises of among others, Makuyu/Kambiti/Block I/6, 15, 17, 20, 27, 32,

43, 44, and 83("the properties"). When the plaintiffs brought this suit, they claimed that they sued the defendants in a representative capacity. The plaintiffs did not however issue a notice in that regard as required by law. The plaintiffs had obtained judgment and were using the local administration to harass and threaten the applicants with forced eviction from the properties. The applicants were not parties to the suit neither were they aware of this suit. The applicants were only informed of the judgment made in the suit by the local administration. The orders obtained herein by the plaintiffs against the defendants were obtained through deceit, wrongful connivance, non-disclosure and deliberate misrepresentation of material facts. The plaintiffs did not obtain the leave of the court to proceed with the suit in a representative capacity and that no notice was issued either by the defendants or the plaintiffs that a representative suit had been instituted against the defendants in a representative capacity. The plaintiffs failed to disclose to the court that the orders issued by the court would affect several other persons apart from the defendants. Since the applicants were in possession of the properties and were the ones directly affected by the decision of the court, it was only fair that they be joined in the suit and the suit heard on merit. If the orders sought were not granted, the applicants would have been condemned unheard.

The application was supported by the defendants through a replying affidavit sworn by Lukas Kimeu Mutevu on 23rd September, 2020. The defendants contended that it was the responsibility of the plaintiffs to notify the applicants who were to be affected by the orders issued in this suit of the institution of this suit and that since the plaintiff failed to issue the notice, the orders issued by the court on 12th June, 2020 could not be enforced against the applicants and the defendants.

The application was opposed by the plaintiffs and the interested party. The plaintiffs filed grounds of opposition dated 24th September, 2020 while the interested party filed a notice of preliminary objection dated 15th September, 2020. The plaintiffs averred that the court having delivered a final judgment on the matter on 12th June, 2020, the court was *functus officio* and as such lacked jurisdiction to grant the orders sought by the applicants. The plaintiffs averred further that the applicants' application was brought in bad faith with unclean hands for the sole purpose of delaying the execution of the judgment of the court. The plaintiffs averred further that the application lacked merit, was frivolous vexatious and amounted to an abuse of the process of the court.

In its notice of preliminary objection, the interested party contended that the court was *functus officio* and as such could not entertain the application by the applicants. The interested party averred further that the application was *res judicata* the suit having been heard and fully determined by the court. Finally, the interested party averred that the application was an abuse of the process of the court.

The application was heard orally on 7th October, 2020 when Ms. Wangoko appeared for the plaintiffs, Ms. Njeri and Ms. Mwailemi for the applicants and Mr. Etole for the defendants. In her submissions in support of the application, Ms. Njeri relied entirely on the grounds set out on the face of the application and the supporting affidavit of Mary Kalondu Kyaula. She submitted that the applicants had occupied the properties for several years and that they were affected by the judgment made by the court on 12th June, 2020. Ms. Njeri submitted that the applicants had been threatened with eviction from the properties. In her submission in further support of the application, Ms. Mwailemi reiterated that the applicants were in occupation of the properties. Ms. Mwailemi submitted that the objections raised by the plaintiffs and the interested party to the application were misconceived. She submitted that parties can be joined to a suit at any stage of the proceedings. Ms. Mwailemi submitted that the applicants had a right to be heard. She urged the court to allow the application.

In his submission, Mr. Etole associated himself with the submissions by Ms. Njeri and Ms. Mwailemi. He also relied on the defendants' replying affidavit that was filed in support of the application. Mr. Etole submitted that the court was not *functus officio* and that the court had power under section 80(a) of the Civil Procedure Act to entertain the application.

In her submission in opposition to the application, Ms. Wangoko relied on the plaintiffs' grounds of opposition dated 24th September, 2020. Ms. Wangoko submitted that the court having made a judgment on the dispute that was before it and a decree having been extracted from the same, the court was *functus officio* and had no jurisdiction to revisit the judgment. Ms. Wangoko submitted that the applicants were all along aware of the suit and that the application had been brought in bad faith and amounted to an abuse of the court process.

Mr. Kimani for the interested party associated himself with the submissions by Ms. Wangoko's that the court was *functus officio*. He submitted that the issues that had been raised by the applicants in the application were *res judicata* the same having been raised and considered by the court in its judgment. Mr. Kimani submitted that the court had held that the suit herein was not a representative suit. He submitted that since this was not a representative suit there was no obligation on the plaintiffs to join the applicants to the suit or to notify the applicants of the institution thereof.

In her submissions in reply, Ms. Mwailemi reiterated that what the applicants were seeking before the court was an opportunity to be heard. She reiterated that the applicants were in possession of the properties and as such were affected by the judgment of the court. Ms. Mwailemi submitted that the applicants should have been informed of the suit.

I have considered the applicants' application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and the notice of preliminary objection that were filed by the plaintiffs and the interested party in opposition to the application. The application was principally brought under Order 1 rule 10(2) of the Civil Procedure Rules which provides as follows:

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

10. (1).....

(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.

In *J.M.K v M.W.M & another* [2015] eKLR, the Court of Appeal stated that:

“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.

It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014.

The appellant however had not applied solely to be added as a party to the suit; he had also applied for review and setting aside of the judgment of the court to give him an opportunity to be heard. In other words, the appellant was effectively applying for review and setting aside of the judgment of the Industrial Court and an order for *de novo* hearing of the suit, which would afford him an opportunity to be heard. The learned judge properly found, in our view, that the Court had jurisdiction to review and set aside its judgment. However, he declined to do so on the grounds that the issues that the appellant was raising could only be raised in an appeal rather than in an application for review.”

It is clear from the foregoing that the court has power to join a party to a suit even after judgment where such a party has sought a review or setting aside of the judgment. In the application before me, the applicants have not only sought to be joined in this suit which has been concluded but have sought also the review and setting aside of the judgment that was delivered by this court on 12th June, 2020. In the circumstances, I am in agreement with the applicants that the court is not *functus officio*. The applicants have sought the setting aside of the judgment of this court delivered on 12th June, 2020 on the ground that they were not heard before the judgment was made and that they were affected by the said judgment. What I need to determine is whether the applicants were entitled to be heard before the said judgment of 12th June, 2020 was made.

In the judgment of 12th June, 2020, I considered whether this was a representative suit or not and whether or not the defendants were sued in a representative capacity. My findings on those issues were in the negative. I stated expressly in the judgment that the suit before the court was between the plaintiffs who had sued and the defendants who had been sued. That means that the decision of the court was only going to affect the parties to the suit. The decree of the court extracted from the said judgment and issued on 12th October, 2020 is very clear that the orders issued were only directed at the defendants who were parties to the suit.

Due to the foregoing, I find no merit in the applicants’ application. The plaintiffs had a right to choose whom to sue. The plaintiffs sued the defendants only and obtained judgment only as against the said defendants. The applicants who were not sued and against whom judgment was not given cannot seek to re-open the suit for hearing afresh. The applicants have not convinced me that they are affected by the judgment of 12th June, 2020. The judgment as I have mentioned earlier was not against them and did not order them to do or abstain from doing anything. I am unable in the circumstances to see how they are affected by the said judgment. I am not satisfied therefore that the applicants were entitled to be heard in this suit before judgment was delivered. For that reason, I find no basis for setting aside the said judgment and joining the applicants in the suit.

The upshot of the foregoing is that the applicants’ application dated 10th August, 2020 has no merit. The application is dismissed with costs to the plaintiffs and the interested party.

Delivered and Dated at Nairobi this 4th Day of February 2021

S. OKONG’O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Ms. Wangoko for the Plaintiffs

Ms. Etole for the Defendants

Mr. Kimani for the Interested Party

Mr. Wanjohi for the Applicants

Ms. C. Nyokabi - Court Assistant