



**Meenye & Kirima Advocates v Gathoni Limited; Isabiriye & 2 others  
(Intended Interested Party) (Environment & Land Miscellaneous  
Case 39 of 2016) [2023] KEELC 18524 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18524 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE 39 OF 2016**

**OA ANGOTE, J**

**JULY 6, 2023**

**BETWEEN**

**MEENYE & KIRIMA ADVOCATES ..... PLAINTIFF**

**AND**

**GATHONI LIMITED ..... DEFENDANT**

**AND**

**JAMES ABIAM MUGOYA ISABIRIYE ..... INTENDED INTERESTED PARTY**

**PURITY GATHONI GITHAE AKBER ..... INTENDED INTERESTED PARTY**

**ABDUALLAH KASSAM ESMAIL ..... INTENDED INTERESTED PARTY**

**RULING**

1. The Applicants/Intended Interested Parties filed an application dated 15<sup>th</sup> September 2022 in which they sought for the following orders:
  - i. This Honourable Court be pleased to grant orders joining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants/ Intended Interested Parties in the instant miscellaneous application ELC Misc Case No. 39 of 2016 as interested parties.
  - ii. This Honourable Court be pleased to issue an order staying proceedings pending the conclusion of the ongoing investigations by the Ministry of Lands and Physical Planning, the DCI and the Registrar of Companies.
  - iii. The costs of this application be provided for.
2. The application is based on the grounds on its face and the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant, James Abiam Mugoya Isabir, who deposed that the Defendant is a limited liability company



which was incorporated on 18<sup>th</sup> October 1982 under the directorship of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants/ Intended Interested Parties and that on 7<sup>th</sup> February 1983, the Applicants executed a notification of change of directors and secretaries notifying the Registrar of Companies of the resignation of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants as directors and appointing the 1<sup>st</sup> Applicant as the sole director, while continuing to hold shares registered in their names as nominees.

3. It was deposed by the 1<sup>st</sup> Interested Party that the Defendant proceeded to acquire several properties under the Defendant company's name; that the suit property was registered on 13<sup>th</sup> February 1984 and the 1<sup>st</sup> Applicant commenced a number of transactions under the directorship of the Defendant and that neither of the Applicants have transferred their shareholding or directorship in the Defendant to any other person.
4. It was the 1<sup>st</sup> Interested Party's deposition that it has however become apparent that the shareholding and proprietorship of the 2<sup>nd</sup> Defendant/Company was fraudulently, unprocedurally and illegally transferred and linked to persons unknown to the Applicants and that the motivation of this fraudulent change of directorship of the 2<sup>nd</sup> Defendant is evident by the attempted transfer of the suit property which is the subject of the instant proceedings.
5. The 1<sup>st</sup> Interested Party averred that they have also become privy to correspondence between this Court and the DCI via letters dated 8<sup>th</sup> July and 24<sup>th</sup> August 2020 on investigations into the change of proprietorship of the 2<sup>nd</sup> Defendant; that they have since sought inquiry of the records from the Registrar of Companies on the aforesaid fraudulent change of directorship and that they have further invited the DCI to investigate the glaring forgery on the purported title documents in possession of the Defendants over the suit property.
6. The Interested Parties averred that unless the orders sought are granted, they will suffer prejudice in respect of their proprietary interests and rights and that there is a likelihood of conflicting findings by this court and the pending investigations, resulting in a multiplicity of suits in respect of the instant subject matter and parties.
7. A notice of preliminary objection dated 12<sup>th</sup> October 2022 was filed by the successful purchasers of the suit land, Kiburu Investments Limited and Mina Love Hotel & Restaurant Limited, who averred that this court lacks the requisite jurisdiction to hear and determine the Interested Parties' Notice of Motion application dated 15<sup>th</sup> day of September 2022.
8. It was averred that this court is functus officio since it rendered a final Judgement that conferred interests to Kibiru Investments and Mina Love Hotel Ltd and that as these proceedings have been commenced by way of Originating Summons. They cannot be the right forum to litigate the complex and weighty issues that the Interested Parties have sought to introduce.

### **Submissions**

9. The application was canvassed through written submissions. Counsel for the Interested Parties submitted that any further court orders or proceedings against the Defendant Company will culminate to a bewildering situation considering the state of affairs regarding the Defendant Company's directorship.
10. The Interested Parties' counsel relied on the case of *Teachers Service Commission vs Kenya National Union of Teachers; Secretary/Chief Executive Officer, Teachers Service Commission & Another (Contemnors); Cabinet Secretary for Labour and Social Protection & 2 Others (Interested Parties)* [2021] eKLR where it was held that it could be necessary to add Interested Parties post Judgment because in interpreting a Judgement, the same may affect the rights and interests of non-parties.



11. Counsel for the purchasers submitted that this court became functus officio upon adopting the consent Judgement herein on 2<sup>nd</sup> May 2019; that there is already a vesting order dated 3<sup>rd</sup> October 2019 and that the suit property L.R. No. 209/9704 (Grant No. IR 37243) has already been sold by public auction to Kiburu Investments Limited and Mina Love Hotel & Restaurant Limited.
12. It was submitted that the application is fatally defective and bad in law. According to Counsel, under Order 1 Rule 10(2) of the Civil Procedure Rules, a party is allowed to join a suit if its presence is necessary and helps the Court to effectually and completely settle or resolve a matter before it and that the application is a distraction from the principle of finality of litigation.
13. It was submitted that the application does not disclose any exceptional circumstance under which joinder of parties after Judgement should be allowed. Counsel relied on the case of Bellevue Development Company Limited vs Vinayak Builders Limited & another [2014] eKLR.

### **Analysis and Determination**

14. This court has considered the pleadings, evidence and submissions of the parties herein. The issues for determination before this court are:
  - i. Whether to allow the application for joinder by the intended Interested Parties.
  - ii. Whether to issue orders of stay of proceedings.
15. This suit was initiated as a non-contentious Miscellaneous Application to consider a Bill of Costs between the Plaintiff/Advocates who acted for the Defendants/ Clients in the unsuccessful sale of the suit property, L.R. no. 209/9704 in three separate transactions. A consent judgement was entered between the Plaintiffs and the Defendant on 17<sup>th</sup> January 2017 in respect of the Plaintiff's taxed costs.
16. Pursuant to the decree in this matter, the Plaintiffs had the suit property attached and sold by public auction on 20<sup>th</sup> June 2019 to recover the taxed costs and other charges.
17. That being the case, this court must first consider the Preliminary Objection filed by the Defendants before considering the application by the Intended Interested Parties. The Purchasers of the suit property, Kiburu Investments Ltd and Mina Love Hotel and Restaurant Limited, have opposed the application on grounds that this court lacks jurisdiction to hear and determine the application, the court having been rendered functus officio following the consent Judgement.
18. According to the said purchasers, these proceedings having been commenced by way of Originating Summons, they cannot be the right forum to litigate the complex and weighty issues that the Interested Parties have sought to introduce.
19. The Purchasers have sought to rely on the definition of '*functus officio*' as set out by the Court of Appeal in Telcom Kenya Ltd vs John Ochanda [2014] eKLR where it was held as follows:

“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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The



basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

- a. Where there had been a slip in drawing it up, and,
- b. Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.*, [1934] S.C.R. 186”

The Supreme Court in *RAILA ODINGA v IEBC* cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated;

...“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

20. The Appellate Court clarified that the doctrine of *functus officio* was meant to prevent a merit-based re-engagement with the case in a matter where it has already pronounced itself. It also identified some exceptions to this doctrine as follows:

“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd Vs Ai Thani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“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 or adjudication must be taken to a higher court if that right is available.”

21. A similar decision was made by the court in *Bellevue Development Company Limited vs Vinayak Builders Limited & Another* [2014] eKLR:

“Properly understood, whereas the court becomes *functus officio* when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of *functus officio*; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in



determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that “judgment has already been rendered by the court.”

22. The application herein is for joinder and for stay of the proceedings herein pending investigations by the Ministry of Lands and Physical Planning, the DCI and the Registrar of Companies. These prayers do not directly relate to the Judgement and decree issued by this court. Consequently, this court is not functus officio to determine the application.
23. The purchasers have also argued that this suit is not the appropriate forum to determine the complex and weighty issues introduced by the Applicants.
24. The Interested Parties’ claim that they are the bona fide directors and shareholders of the Defendant company will impact the post-judgement activities currently ongoing in this matter. For instance, there is currently an application on record dated 16<sup>th</sup> July 2021 to set aside the sale by auction of the suit property by the Plaintiff/ Advocates.
25. The Applicants have sought to be enjoined to this suit as Interested Parties to protect their interests. While joinder of an interested party is not provided for in the *Civil Procedure Act* and *Rules*, the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, Legal Notice No. 117 of 2013 defines an Interested Party as:

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation.”
26. The *Black’s Law Dictionary*, 9<sup>th</sup> Edition at page 1232 defines an interested party as:

“A party who has a recognizable stake (and therefore standing) in the matter”
27. The law on joinder of Interested Parties to suits has been settled by the Supreme Court of Kenya in the case of *Francis K. Muruatetu and Another vs Republic & 5 Others* (2016) eKLR as follows:

“Enjoinment is not a right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

  - i. 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.
  - ii. 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.
  - iii. Lastly, a party must, in its participation, 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.”
28. In the Supreme Court of Kenya decision, *Communication Commission of Kenya & 4 Others vs Royal Media Services Limited & 7 Others* [2014] eKLR, it was held as follows:

“An Interested Party is one who has a stake in the proceedings, though he was not a party to the cause ab initio. He or she is a 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.”

29. The Supreme Court held further that a party could be joined for reasons that: -
- i. His presence will result in complete settlement of all the questions involved in the proceedings.
  - ii. It is necessary to provide protection for the rights of a party who would otherwise be adversely affected in law.
  - iii. It is necessary to prevent likely proliferation of litigation.
30. Courts have held that they have the power to add a party to proceedings at any stage. The Court of Appeal has held that a party may be enjoined under Order 1 Rule 10 of the *Civil Procedure Rules* at any stage, even at the appellate stage. In *JMK vs MWM & Another* [2015] e-KLR, the Court of Appeal explained as follows:
- “We would agree that Order 1 Rule 10 [2] of the Civil Procedure Rules, contemplate an application for joinder of parties where proceedings are still pending before the Court...the Court of Appeal of Tanzania, in *Tang Gas Distributors Limited v. Said & Others* [2014] E.A. 448, held that the Court has power to add a party to proceedings, at any stage. A party can be joined even without applying. Joinder may be done either before, or during trial. It can be done after judgment. It can be done even at the appellate stage.”
31. Specifically, with respect to interested parties, the court in *Teachers Service Commission vs Kenya National Union of Teachers; Secretary/Chief Executive Officer, Teachers Service Commission & Another (Contemnors); Cabinet Secretary for Labour and Social Protection & 2 Others (Interested Parties)* [2021] eKLR held that there are circumstances in which it would be necessary to enjoin an interested party at the post-judgement stage:
- “The Court agrees with the Respondent, that ordinarily, joinder of Interested Parties should take place before or during trial. Courts have an obligation to hear and determine all issues placed them, and litigation, must come to an end. The doctrine of finality is important to the effectiveness and efficiency of the judicial system.
26. However, as shown in the decisions of Superior Courts above, it could be necessary to add Interested Parties post-judgment, that is to say after Judgment has been delivered or execution is underway, or even at the appellate stage. In interpreting or executing a Judgment, a party may affect the rights and interests of non-parties.”
32. According to the Applicants, the interest that they have in this matter is that they are the original and *bona fide* directors of the Defendant company; that they have never transferred their shareholding or directorship to any person and that through fraud, the shares and directorship of the Defendant company have been transferred and linked to persons unknown to them, and as such, the persons thereafter sold the suit property.
33. The Applicants have annexed the Certificate of Incorporation of the Defendant Company; its Memorandum and Articles of Incorporation; A Notification of Change of Directors dated 7<sup>th</sup> February 1983; an undertaking by the 1<sup>st</sup> Applicant not to transfer the suit land; a Certificate of Title to the suit property and a letter to the DCI dated 29<sup>th</sup> May 2020 inviting them to investigate this matter.



34. The Interested Parties further annexed records of the directorship of the Defendant company showing the Directors of the company as Ryan Kipkoech Ruttoh, Francis M Sanya Agoya, Anthony Gakuru Maina and Geoffrey Kibet Rutoh; the letters to the Registrar of Companies and Chief Land Registrar dated 13<sup>th</sup> June 2022 and the letters dated 28<sup>th</sup> July and 19<sup>th</sup> September 2022 from the Business Registration Service (BRS) to the alleged Directors of the Defendant Company.
35. On the strength of this evidence, it is apparent that the Applicants have a proximate interest in this suit, and if they are not joined as Interested Parties, they will suffer prejudice as their interests would not be taken into consideration in the matter.
36. On the basis of the foregoing, this court is satisfied that the Applicants have an interest in this suit and the subject matter. This is informed by the assertion by the Applicants that the 1<sup>st</sup> Applicant is the sole director of the Defendant and that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants are shareholders of the Defendant company. That being the case, it is necessary that the Interested Parties be joined to this suit.
37. The Interested parties have also sought for orders of stay of proceedings pending investigations by the DCI, Ministry of Lands and Physical Planning and the Registrar of Companies.
38. It is trite that orders of stay of proceedings are discretionary in nature and that they will only be granted once a sufficient basis has been laid out. *Halsbury Laws of England*, 4<sup>th</sup> Edition, Vol. 37 pages 330 and 332, provides as follows with respect to stay of proceedings:
- “The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”
- “This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”
- “It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”
39. An order for stay of proceedings needs to be balanced against a litigant’s right to expeditious justice under Article 159(2)(b) of the *Constitution*. In the suit before this court, it is critical to note that the suit property, under a decree of this court, has been sold to third parties through auction.
40. The Plaintiff has however filed an application challenging the sale. The said application is pending determination. It is also notable that under Order 22 Rule 75 of the *Civil Procedure Rules*, a party may apply to set aside a sale of immovable property in execution of a decree on grounds of fraud or irregularity.
41. At this juncture, the Applicants have not established that these proceedings are frivolous or manifestly groundless. However, the Applicants do raise the question of the validity of the Directors of Defendant. The issue that needs to be determined is whether the auction of the suit property is based on a decree that was fraudulently obtained.



42. This court is not persuaded that the Applicants have established cogent grounds for stay of proceedings. They should present the evidence to this court to show the alleged fraud to enable parties ascertain their positions, vis a vis the suit property.
43. On the basis of the forgoing, this court partially allows the application herein and issues the following orders:
- i. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties/Applicants be joined in this suit as Interested Parties.
  - ii. The Interested Parties to file a response to the Plaintiff's application dated 16<sup>th</sup> July 2021 within 21 days of delivery of this decision.
  - iii. Costs of this application to be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6<sup>TH</sup> DAY OF JULY, 2023**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Moriasi holding brief for Diro for Applicants

Ms Nyaga for Kibera for 1<sup>st</sup> Defendant

Court Assistant - Tracy

