



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO. 94 OF 2017**

**JAMES MATHUVA MUKWA.....PLAINTIFF**

**-VERSUS-**

**NZAVI NGULUI.....DEFENDANT**

**-AND-**

**MWANZWII MUTUA.....INTERESTED PARTY/APPLICANT**

**RULING**

1. The Interested Party/Applicant filed the Notice of motion dated 22<sup>nd</sup> February, 2021 under certificate of urgency of even date. It is brought under **Articles 48,40 and 159 of the Constitution, Section 3A of the Civil Procedure Act** in addition to **Order 12 Rule 7 and Order 22 Rule 22 of the Civil Procedure Rules, 2010**.

2. The Interested Party/Applicant seeks the following Orders:

**i) [SPENT]**

**ii) [SPENT]**

**iii) THAT all the Orders made in this matter and all the proceedings be set aside and the Applicant be enjoined as a Defendant and be allowed to defend the suit accordingly and the suit be heard afresh.**

**iv) THAT the costs of this application be provided for.**

3. The application is supported by the affidavit of Mwanzwii Mutua sworn on the same day. It is premised on the grounds that the Interested Party/Applicant will be affected by the Orders for eviction issued against the Defendant on 28<sup>th</sup> January, 2021. That the Applicant was appointed as the Administrator of the estate of the late Kyavi Mutua Thyaka and that the Deceased held an interest in the suit property Parcel No. Makueni/Nguu/1283 having been allocated the plot in 1994 by the Director of Land Adjudication and Settlement. That the Applicant has settled in the suit property ever since. That the Applicant was not heard in this suit and hence never got an opportunity to ventilate his case.

4. The Interested Party/Applicant added that he wishes to defend the suit in a bid to demonstrate that the Plaintiff/Respondent obtained the Title Deed to the suit property fraudulently. That the complaints surrounding allocation of the suit property are in the attention of the Ministry of Lands and the same is being investigated. Accordingly, the Interested Party/Applicant prays that these proceedings and orders incidental thereto be set aside and the case be heard afresh.

5. The application is opposed by the Plaintiff/Respondent through the replying affidavit sworn by James Mathuva Mukewa on 7<sup>th</sup> April, 2021. It was deposed that the application is fatally defective and an abuse of the court process. That the Court is *functus officio* having made a final determination on this matter vide the judgment dated 19<sup>th</sup> February, 2018. That the Applicant has filed an independent suit against the Plaintiff to wit **ELC Case No. E7 of 2020 Mwanzii Mutua (Suing as the personal representative of the Estate of Kyavi Mutua Thyaka -vs- James Mathuva & 3 others** and hence he should not be joined in this suit as that would be *res sub judice*.

6. The Plaintiff/Respondent adds that the Interested Party/Applicant is guilty of laches having participated in these proceedings as a defence witness. That the eviction orders were specific against the Defendant and not the Interested Party/Applicant. That the temporary stay of execution granted to the Interested Party/Applicant ought to be set aside for non-disclosure of material facts.

7. In a further affidavit sworn by Damaris Mukui Mwanja on 26<sup>th</sup> May, 2021, the affiant who is a daughter to the Interested Party/Applicant rebutted the averment made by the Plaintiff/Respondent insisting that she had been living in the suit property for over 2 decades having been given the land by her father.

8. The Interested Party/ Applicant filed submissions in support of the application on 27<sup>th</sup> May, 2021. He argued that the discretion to reopen this case remains with the Court and that such discretion must be exercised judiciously. That Article 159 of the Constitution requires that substantive justice be done while disregarding procedural technicalities.

9. The Plaintiff/Respondent filed submissions in reply on 7<sup>th</sup> June, 2021. Three issues were identified for determination namely: -

i) **Is the Court *functus officio*?**

ii) **Is the Applicant guilty of laches/inordinate delay in filing the application for joinder?**

iii) **Is the suit bad in law for being *res sub judice*?**

10. With regard to the first issue, it was submitted that the matter was heard to its logical conclusion with the culmination of a judgment. That thereafter, a decree was issued and a further order made for the eviction of the Defendant. That the Civil Procedure Act does not make a provision for the reopening of a case once the suit has been heard and determined and that the Interested Party/Applicant had not demonstrated otherwise. On the next issue, the Respondent submitted that the Applicant was aware that the Defendant was sued in 2003 to the extent of being called as a defence witness. That since 2003, the Interested Party/Applicant had never filed an application for joinder and at this stage, he was guilty of inordinate delay.

11. Lastly, the Plaintiff/Respondent submitted that with the filing of **Makueni ELC Case No. E7 of 2020** (supra), where the Interested Party/Applicant is seeking declaratory orders as the rightful owner of the suit property, then reopening this suit and joinder of the Interested Party/Applicant would be *res sub judice*. That is because, the same parties would be involved over the same cause of action. In urging the Court to dismiss the application, the Respondent relied on the following authorities:-

i) **ICEA Lion General Insurance Co. Ltd v Julius Nyaga Chomba [2020] eKLR**; and

ii) **Brian Muchiri Waihenya v Jubilee Hauliers Ltd & another; Geminia Insurance Co. Ltd (Interested Party) [2018] eKLR**

12. The gravamen of this application is the Interested Party's/Applicant's suggestion that if this Court should grant the prayers sought, then the Interested Party/Applicant will have the occasion to defend his title to the suit property beside the Defendant herein against whom judgment has already been entered. If I were to agree with that suggestion, the net effect would be to reopen this suit for a rehearing of the evidence only this time, the Plaintiff/Respondent would be defending the Applicant's counterclaim. Inevitably too, the Defendant herein would have a second bite at the cherry defending his claim to the subject matter of this suit. That suggestion is totally untenable.

13. This Court is already *functus officio* in regards to the Plaintiff's /Respondent's claim against the Defendant. That is so because I rendered a conclusive judgment on 19<sup>th</sup> February, 2018 regarding the issues that were being argued in the pleadings. My decision was based on the evidence and the merits of each individual claim. Therefore, no proceedings are extant before this Court in relation to which jurisdiction could be exercised to allow joinder of the Interested Party/Applicant.

14. 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** underscored the essence of the doctrine of *functus officio* 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... 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."** [emphasis added]

15. To further compound the issue, the Interested Party/Applicant has filed an independent suit **Makueni ELC Case No. E7 of 2020** (supra) against the Plaintiff/Respondent. If I were to allow the application, common questions of law and fact would arise in both suits because the same parties would be championing their claims. Undoubtedly, that scenario would offend the hallowed principle of *sub judice* which this Court is bound to uphold under Section 6 of the Civil Procedure Act.

16. It is beyond question that the application herein is an abuse of process of this Court and must indeed fail. I hereby dismiss it with costs to the Plaintiff/Respondent.

**SIGNED, DATED AND DELIVERED VIA EMAIL THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**MBOGO C.G.**

**JUDGE**

**9/2/2022**

Court Assistant:

CA:T.Chuma