



**Nzyoki, Muinde & Kyele (Suing for and on behalf of and as the Chairman, Secretary and Treasurer of Kiliku Savings Scheme S.H.G) v Gatatha Farmer Co-op Society Ltd & another; Murinda (Intended Interested Party) (Environment & Land Case 101 of 2012) [2022] KEELC 3439 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3439 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 101 OF 2012**

**A NYUKURI, J**

**JULY 6, 2022**

**BETWEEN**

**MELCHIZEDEK NDOLO NZYOKI, JAMES KELI MUINDE, N'THENYA WILLY KYELE ..... PLAINTIFF**

**SUING FOR AND ON BEHALF OF AND AS THE CHAIRMAN, SECRETARY AND TREASURER OF KILIKU SAVINGS SCHEME S.H.G**

**AND**

**GATATHA FARMER CO-OP SOCIETY LTD ..... 1<sup>ST</sup> DEFENDANT**

**PETER KIBERA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MICHAEL MURINDA ..... INTENDED INTERESTED PARTY**

**RULING**

1. This ruling is in respect of the preliminary objection dated 3<sup>rd</sup> November 2021 as well as the Notice of Motion application dated 11<sup>th</sup> February 2021.
2. By a Notice of Motion dated 11<sup>th</sup> February 2021, the intended Interested Party/Applicant sought the following orders;
  - (a) That this matter be certified urgent and hearing thereof be *ex-parte* in the first instance.
  - (b) That the Honourable Court be pleased to enlarge time for the intended interested party to file his pleadings.



- (c) That the Honourable court be pleased to vacate its directions of the 26<sup>th</sup> of February 2019 barring the interested party from further participating in the proceedings before this Honourable Court.
- (d) Costs of this application be provided for.
3. The application was anchored on the supporting affidavit of Billy Amendi, advocate for the intended interested party on 11<sup>th</sup> February 2021. The Applicant averred that he was joined to these proceedings as an Interested Party and the court granted him leave to file pleadings within specific timelines; that his former advocate Messers J.K. Ngaruiya & Company Advocates failed to comply with the orders of court and did not file pleadings timeously and consequently the court barred him from further participating in these proceedings.
4. The Applicant further stated that the Applicant represents the five members of the community that held the land then called Emma farm; that the Applicant was never informed of the orders barring him from participating in this suit by their former advocates; that the members' documents were stolen and imposters presented themselves before this court as Plaintiffs and that the Applicant has a good case and that the Applicant ought not to suffer for actions of indolence on the part of his former advocate.
5. In response to the application, the 1<sup>st</sup> Respondent filed ground of opposition on 12<sup>th</sup> November 2021. They stated that judgement in this matter was delivered on 25<sup>th</sup> September 2020 and therefore the application was overtaken by events; that the Applicant had opportunity to lodge its claim if any, between 27<sup>th</sup> July 2010, when the application for joinder was filed, and 26<sup>th</sup> February 2019, when he was barred from participating in the proceedings, after failing to file pleadings over a period of over eight years; that the Applicant had opportunity within that period to find out what was transpiring in court; that the Applicant cannot come to court after nine years to purport to blame his former advocate for his own inactions; that the Applicant has opportunity to file an independent claim if he has any against the parties herein and that reopening this matter at this stage would be unfair to the 1<sup>st</sup> Defendant who has moved on.
6. In addition, the 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection dated 3<sup>rd</sup> November 2021 where they raised a Preliminary Objection to the Notice of Motion dated 11<sup>th</sup> February 2021 on the following grounds;
- a) That this Honourable Court is functus officio and has no jurisdiction to entertain the application herein, final judgement in this matter having been delivered on 25<sup>th</sup> September 2021.
- b) The application before this court is neither for execution of the said judgment nor for its review, which are the only instances when this honourable court would have jurisdiction after final judgement.
- c) The Notice of Motion dated 11<sup>th</sup> February 2021 is incompetent having been filed by an advocate who is not properly on record for failure to comply with the requirement of Order 9 Rule 9 of the [Civil Procedure Rules](#) 2010 and should therefore be struck only.
7. On 8<sup>th</sup> November 2021, this court directed that both the preliminary objection and the application shall be determined together and directed parties to file written submissions. On record are the Applicant's submissions filed on 28<sup>th</sup> September 2021 and the 1<sup>st</sup> Defendant's submissions filed on 12<sup>th</sup> November 2021.



## Submissions

8. The Applicant's counsel submitted that although the Applicant sought to be joined to these proceedings *vide* an application dated 26<sup>th</sup> July 2018, the same was abandoned by his former advocate which led to the court barring him from further participating in these proceedings. Counsel further argued that failure to comply with the orders of 26<sup>th</sup> February 2019 were not relayed to the Applicant by his former advocate and that therefore mistakes of an advocate should not be visited upon the Applicant.
9. It was further argued for the Applicant that it is in the interest of justice to have this court vary its orders barring the Interested Party from being joined to these proceedings. The Court was urged to ignore technicalities in the spirit of Article 159 of the Constitution and proceed to join the Applicant to these proceedings as the Applicant has a stake and standing in the proceedings. Counsel argued that the Applicant was the Chairman of Kiliku Saving Scheme Self Help Group squatters who acquired land parcel No. L.R. 848/3 in 1913, and who have since taken possession thereof together with other members making a total of 1000 members.
10. Counsel also submitted that joining the Applicant to these proceedings will prevent a likely proliferation of litigations, as non-joinder will prejudice the Applicant and other members of the Self Help Group. Counsel was of the view that the Applicant's intention was not to delay or derail the proceedings or waste courts time but that the Applicant had a genuine claim for which he craved for an opportunity to be heard. Counsel placed reliance on the cases of Mary Njeri Kabundia v Christine Mithia Mbugua & 2 others [2020] eKLR, Moses Wachira v Niels Bruel & 2 others [2015] eKLR, Communication Commission of Kenya & 4 Others v Royal Media Services Ltd & 7 others [2014] eKLR and Central Kenya Limited v Trust Bank & 5 Others Civil Appeal No. 222 of 1998, all of which this court has considered.
11. Counsel for the 1<sup>st</sup> Defendant submitted that this court is *functus officio* and lacks jurisdiction to entertain the application as judgement in this matter was delivered on 25<sup>th</sup> September 2020 and no appeal has been filed against it. Consequently, that there are no proceedings pending in this matter in which time can be extended for the Applicant to file pleadings.
12. It was further submitted for the 1<sup>st</sup> Defendant that no prayer has been made in regard to the final judgment and therefore the only proceedings that can be entertained at this stage are execution proceeding or application for review of judgement. Counsel relied on the cases of John Gilbert Ouma v Kenya Ferry Services Limited [2021] eKLR and Brian Muchiri Waibenya v Jubilee Hauliers Limited & Geminia Insurance Company Limited (Interested Party) [2018] eKLR for the proposition that where a judgment has been entered, the court cannot revisit the matter other than as provided for in law. It was further submitted that the issue of jurisdiction and particularly the court being *functus officio*, was not a matter of procedural technicality that may be cured by Article 159 of the Constitution. It was counsel's observation that the rule of Natural Justice which provides that no party shall be condemned unheard only requires each party to be given an opportunity to be heard and that such opportunity was given to the applicant, but he squandered the same.
13. It was also contended for the 1<sup>st</sup> Defendant that the leadership of the Plaintiff was not an issue in this suit and that in any event, leadership of groups such as the plaintiff may change with time, but that does not mean that judgement against the group is not binding on the group and hence can only be raised on appeal.



14. Counsel also submitted that the authorities cited by the Applicant were distinguishable from the facts of this case. Counsel emphasized that a party can only join proceedings which are pending or file fresh proceedings, hence reopening finalized proceedings is untenable in law.

### **Analysis and Determination**

15. I have considered the application, the affidavit in support, the grounds of opposition, the preliminary objection and the record. The issues that arise for determination are;
- a) Whether the application is incompetent for having been filed by an Advocate who had not obtained leave to come on record for the Interested Party.
  - b) Whether this court is *functus officio* in respect to the application filed.
  - c) Whether the Applicant has met the threshold for extension of time.
16. The Defendant argued that the application dated 11<sup>th</sup> February 2021 is incompetent for having been filed by an advocate who is not properly on record for failure to comply with the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#). The said provision states as follows;
- “When there is a change of advocate, or when a party decides to act in person, having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court;-
- a. Upon an application with notice to all the parties, or
  - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
17. I have perused the record and note that the firm of Billy Amendi & Company Advocates filed their Notice of Appointment of Advocates on 6<sup>th</sup> June 2019. As at that date, judgement had not been entered in this matter, as the same was entered on 25<sup>th</sup> September 2020. Therefore, the application dated 11<sup>th</sup> February 2021 cannot be said to have been incompetent for noncompliance with Order 9 Rule 9 of the [Civil Procedure Rules](#), as the Applicant did not need leave of court for the firm of Billy Amendi to come on record for him in the matter.
18. The power to enlarge time by the court is provided for under Order 50 Rule 6 of the [Civil Procedure Rules](#) as follows;
- “Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by Order of the court, the court shall have power to enlarge such time upon such terms (if any) as the jurisdiction of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
19. It is therefore clear that under Order 50 Rule 6 of the [Civil Procedure Rules](#), the court has power to extend time where the interest of justice so demands.
20. In the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR, the court held as follows;



- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
  - iii. Whether the court should exercise the discretion to extended time is a consideration to be made on case to case basis.
  - iv. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
  - v. Whether there will be any prejudice suffered by the Respondent if the extension is granted.
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
21. I have considered the history of this mater and I note that the Applicant sought to be joined as an Interested Party to this matter *vide* an application dated 26<sup>th</sup> July 2018, which application was allowed on 10<sup>th</sup> December 2018 where the applicant was also granted leave of 21 days to file his pleadings. As the Applicant failed to comply with the said orders, on 26<sup>th</sup> February 2019, he was barred by the court from participating in this matter.
  22. While the Applicant has blamed his former advocates namely J.K Ngaruiya & Company Advocates for failure to file pleadings and for failure to inform him of the court's decision to bar him from participating in the proceedings, he has not explained why he did not seek the extension of time when his new advocates Billy Amendi & Company Advocates came on record on 6<sup>th</sup> June 2019, and had to wait until 15<sup>th</sup> February 2021 to seek for extension of time. As at that time, the suit had not been heard to conclusion as the application for joinder was filed after the 1<sup>st</sup> Defendant had given their testimony in court and the matter was pending hearing of the 2<sup>nd</sup> Defendant's case.
  23. The record shows that the 2<sup>nd</sup> Defendant testified on 26<sup>th</sup> September 2019, and thereafter this matter was mentioned four times, namely on 4<sup>th</sup> December 2019, 4<sup>th</sup> March 2020, 20<sup>th</sup> May 2020 and 15<sup>th</sup> July 2020; before judgment was delivered on 25<sup>th</sup> September 2020.
  24. In considering whether or not to extend time, the court ought to consider whether extending time will meet the ends of justice for all the parties in a matter. In the instant case, the Applicant has not attempted to explain the delay of 20 months since he learnt from his new advocate that he had been barred from participating in the suit. In my considered view, a delay of 20 months without any explanation is unreasonable and cannot be excused.
  25. In any event there is a limit to the extent to which a party can rely on the blame laid on their advocate in respect of indolence. A case belongs to a litigant and not their advocate, and in the event that an advocate has not updated a litigant of the status of their matter, the latter cannot sit pretty, fail to consult the advocate or the court, and later complain that the advocate has indolent. It is their case and not their advocate's and therefore equity expects them to be proactive and take steps to appropriate the opportunity to be heard given to them by law and the court. I agree with the 1<sup>st</sup> Defendant's argument that the right to be heard is as good as an opportunity to be heard which ought to be utilized by every party.



26. In my view, the applicant had the opportunity to be heard but failed to use the same without any reasonable justification or excuse. Although every litigant is entitled to have their day in court, that is not an open cheque for them to utilize that day when they deem fit. The 1<sup>st</sup> Defendant argued that judgement was entered on 25<sup>th</sup> September 2020 and that they have moved on and reopening proceedings will expose them to prejudice. They have also argued that the issue is not just reopening proceedings, there is a judgement on record which the Applicant has been mum about. No prayer for review of judgement has been made, and that therefore this court is *functus officio*.
27. The Applicant's prayer is for extension of time for filing his pleadings and that the order barring him from participating further in the proceedings before the court, which was made on 26<sup>th</sup> February 2019 be vacated. While the Applicant is aware that there is judgment on record, he has not sought to set aside, vary or review the judgment. Clearly, from the orders of 10<sup>th</sup> December 2018, the pleadings which were to be filed by the Applicant as ordered by the court, were pleadings which ought to have been filed before judgment was entered. As judgment has already been entered, and no prayer for setting aside judgement has been made it cannot be tenable for the court to allow the Applicant to file pleadings after entry of judgement, which remains intact on record. Besides, the Applicant has failed to satisfy the court the reasons for delay to file his pleadings. In my view therefore as there is no challenge on the judgment this court cannot entertain an application to reopen the matter.
28. In the case of *Jersey Evening Post Limited v Al Thani* [2002] ILR 542 at 550 cited with approval in the case of *ICEA Lion General Insurance Co. Ltd v Julius Nyaga Chomba* [2020] eKLR the court held as follows;
- “ A court is *functus officio* 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 functions when its judgement or orders 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 high court if that right is available.”
29. The Applicant argues that he has a good claim and that he ought to be given opportunity to be heard. In my view as the Applicant has not sought to set aside judgment then this court remains *functus officio* as it has already pronounced itself on the rights of the parties.
30. The upshot is that the application dated 11<sup>th</sup> February 2021 is dismissed for being unmeritorious, with costs to the 1<sup>st</sup> Defendant.
31. Orders Accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6<sup>TH</sup> DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**A. NYUKURI**

**JUDGE**

In the presence of

Mr. Kiura for the Defendant

Ms Khamala holding brief for Mr. Amendi for Intended Interested Party

Ms Josephine Misigo – Court Assistant

