



REPUBLIC OF KENYA



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**JMN v SWM & 2 others (Environment and Land Appeal
E006 of 2021) [2021] KEELC 4736 (KLR) (19 May 2021) (Judgment)**

Neutral citation: [2021] KEELC 4736 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E006 OF 2021**

LN GACHERU, J

MAY 19, 2021

BETWEEN

JMN APPELLANT

AND

SWM 1ST RESPONDENT

AMM 2ND RESPONDENT

JMG 3RD RESPONDENT

(Being an Appeal from the Ruling delivered on 4th March, 2021, by Hon. M. Kinyanjui (P.M) in Kandara Chief Magistrates Court in ELC No. 16 of 2020)

JUDGMENT

1. The appellant JMN, is the defendant in Kandara ELC Case No 16 of 2020, the 3rd respondent JMG is the plaintiff therein, while SWM and AMM the 1st and 2nd respondents herein are the 1st and 2nd interested parties respectively in the said suit.
2. By a notice of motion application dated December 23, 2020, brought under order 1 rule 10(2) of the [Civil Procedure Rules](#) and sections 3A and 1B of the [Civil Procedure Act](#), the 1st and 2nd interested parties (1st and 2nd respondents) sought for orders that; -
 - a. The court be pleased to admit the 1st and 2nd interested parties to enjoin them as parties to the suit and leave be granted to file pleadings in this matter.
 - b. That the Judgment and any consequential orders be stayed and status quo be maintained.
 - c. That the OCS Githumu Police Station to enforce the orders
 - d. That the Costs of the Application be provided for.



3. The application is premised on the grounds set out on the face of the application and on the supporting affidavit of SWM sworn on December 23, 2020. SW deponed that she was the 2nd wife of the defendant (appellant) and his 1st wife was RW (deceased). That she and her husband purchased land parcel No LOC 3/Gichagini/XXX, sometimes in 2005. That land parcel No LOC 3/Gichagini/XXX, was subdivided into three portions to wit land parcel No LOC 3/Gichagini/XXX, XXX, and XXX. That the said subdivisions are occupied by her sons as follows; the 2nd interested party occupies land parcel No LOC 3/Gichagini/1664, land parcel No LOC 3/Gichagini/XXX, is occupied by Peter Karuga Mwangi and land parcel No LOC 3/Gichagini/XXXX is occupied by WWM. That the aforementioned persons occupy and use the said parcels of land with the blessing and consent of the defendant.
4. That on or around December 21, 2021, the plaintiff together with the Commanding Officer, Githimu Police Station served her with an order from the honourable court. That the said order had the effect of restraining her and the 2nd interested party claiming possession of land parcel No LOC 3/Gichagini/XXX. That the 2nd interested party has been cultivating and living on the said land. That a perusal of the court file indicated that the defendant entered into a sale agreement discretely on June 16, 2020, without involving his family members. That SWM, who signed the spousal consent is a stranger to her and the defendant has never been married to her. That the defendant by getting a stranger to sign the spousal consent, had the intention of selling the suit property to the detriment of the 1st and 2nd interested parties. That the plaintiff is now the registered owner of all that parcel of land known as LOC 3/Gichagini/XXX, and is in the process of evicting the 2nd interested party.
5. The application was opposed through the replying affidavit sworn by Josephat Mwangi Nduti, the defendant (appellant), on January 7, 2021. He averred that the application as filed before the court was fatally defective and was an abuse of the court process and the prayers sought are untenable and lack legal merit. That he was 85 years old and practiced polygamy; and to wit he had 3 wives namely; RW (deceased), Susan Wambui (1st interested party) and SW. That he legally owned five parcels of land and he had made due provisions for all his 3 families and children. That in particular, the interested parties occupy five (5) acres of land adjacent to Nduti Tea Factory. Therefore it was false and wrong for the interested parties to misrepresent to the court that they have no land and are destitutes. That the interested parties are trying to forcibly take away his absolute property and his ownership of the same is protected and guaranteed by law.
6. Further, that the suit property measures 0.225 ha, which he legally sold to the plaintiff after following all due process and consulting with his family. That the transaction between the plaintiff and himself had already been concluded and the Plaintiff had already acquired title to LOC 3/Gichagini/XXXX. That contrary to the allegations made by the applicants, they were both made aware of the sale and transfer and chose not to attend a meeting at the Chief's office, where they were summoned. That the subject property was his and he had absolute ownership of the same. That he purchased the suit land with his own resources and it was not matrimonial property or inherited property.
7. The application was also opposed by the plaintiff, JMG, through a replying affidavit sworn on January 7, 2021. It was the plaintiff's averment that he was the rightful and bonafide owner of LOC 3/Gichagini/XXX, measuring approximately 0.5 acres as a purchaser for value from the defendant. That at the time of purchase, the subject land was not cautioned or encumbered by any restriction. That the proposed interested parties were always aware of his interest over the subject land and it was false for them to state that the sale transaction was done without their knowledge. That the application is actuated by malice and is spiteful. That the defendant sold to him the suit land to settle various debts arising from accumulated medical bills. That he had heavily invested in the subject land and had taken



a bank loan to finance the purchase, which he continues to pay. That he had no contract with the interested parties and he should therefore not be drawn to their dispute.

8. To rebut the averments of the respondents in both replying affidavits, the applicants (1st and 2nd interested parties) filed a supplementary affidavit sworn by SWM, on February 3, 2021. She reiterated the averments in her application and the supporting affidavit attached to it. She further deponed that it is true that she and her children originally occupied LOC 3/Gichagini/XXX, but the same was subdivided in to LOC 3/Gichagini/XXX, XXXX, and XXX, for each of her sons. That the consent obtained from the Land Control Board was spurious as the defendant utilised the spousal consent of another woman instead of hers, yet she was in occupation of the land. That the sale transaction was done in secrecy and she only got wind of it in August 2020, when they sought the intervention of local administration. That she contributed to the resources that were used to purchase the suit land and therefore it was matrimonial property. That the said SW who executed the spousal consent is not a spouse of the defendant and has a pending matter in Succession Cause 2108 of 2015, wherein she has falsely claimed to be the wife of the deceased. That she attempted to place a caution on the suit land, but the title was missing in Muranga Land Registry. That it was her suspicion that the plaintiff was involved in the said disappearance as he was a land surveyor and a land dealer who regularly frequents the land registry.
9. The application was canvassed by way of written submissions. The parties filed their respective written submissions and on March 4, 2021, the trial court delivered a ruling in favour of the applicants and stated as follows;

“In this case the question is what is the interested parties state and relevance in the proceedings. The answer is simple, the interested parties are family members and they have a direct interest in the matter and I do find their presence necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit. ...

18. Having established the interested parties are necessary parties in the suit and in the interest of justice I do grant prayers 2 and 3 pending hearing of the suit. Costs in the cause”
10. The appellant was aggrieved by the above determination of the trial court in favour of the respondents herein and has sought to challenge the said judgment through the memorandum of appeal dated April 6, 2021, and sought for orders that;
 1. The ruling and order of the lower court delivered on March 4, 2021, be set aside.
 2. The costs of this appeal be awarded to the appellant.
 3. Any other relief the court may deem fit to grant.
11. The grounds of appeal are; -
 1. The learned magistrate erred in law and fact in her ruling and decision ‘interested parties’ in a concluded matter.
 2. The learned magistrate erred in law and fact in enjoining complete strangers unknown to law, who had no claim filed in court as required by law.
 3. The learned magistrate erred in law and fact by purporting in its ruling to set aside a legal and completed agreement for sale of land thus essentially misconducting itself in its purport to supervise a contract.



4. The honourable court erred in law and fact by entertaining a claim that touched on the distribution of matrimonial property as defined by the 1st and 2nd respondents whereas it had no jurisdiction.
12. The appeal was canvassed by way of written submissions. the appellant through the law firm of Mumbi Muritu Advocates, filed his written submissions dated December 17, 2021. He identified two (2) issues for determination by the court and submitted that the 3rd respondent filed Kandara Civil Suit No 16 of 2020, against the appellant. That the said suit was settled via a consent dated October 6, 2020, which was adopted as an order of the court on October 16, 2020. That after the consent judgment was entered, the 1st and 2nd respondents filed an application to be joined as interested parties, which application was allowed. That the trial magistrate failed to consider that the issues in the suit had been adjudicated upon and consent judgment entered. That the application to be joined in the suit did not set aside or vary the consent judgment already entered. That the trial court on its own volition reviewed the consent judgment by allowing prayers 2 & 3, pending the hearing of the suit and she failed to appreciate that the court was *functus officio* and the same could not be heard again unless consent judgment is varied and/or set aside.
13. The appellant relied on the case of *Absolom Opini Mekenye v James Obegi* [2018] eKLR, where the court stated as follows;

“Order 1 rule 10(2) of the [Civil Procedure Rules](#) which the plaintiff invoked in the application for joinder provides as follows:

“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.”

15. In the present matter the plaintiff sought the joinder of the 1st, 2nd and 3rd interested parties after the court had heard the case and rendered judgment. A party under order 1 rule 10(2) of the [Civil Procedure Rules](#) can either be joined as a plaintiff and/or defendant. ... Order 1 rule 10 (2) in my view envisages a situation where the suit has not been heard and determined and that is why it provides for joinder of a party either as plaintiff or defendant or a party 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 (emphasis added).

Where a judgment has been entered, it is my considered opinion that a party cannot be enjoined to the proceedings unless the judgment is either reviewed and/or set aside in a manner to accommodate the participation of the enjoined party. The Court of Appeal in the case of *JMK v MWM & another* [2015] eKLR (Civil Appeal No 15 of 2015 – Mombasa) while considering the application of order 1 rule 10(2) of the [Civil Procedure Rules](#) stated thus:-

“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 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 *Civil Procedure Rules* in *Tanga 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 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. ...”

14. Further it is the appellant’s submissions that the 1st and 2nd respondents’ application to be joined as interested parties after the case had been finalized was null/void and it was imperative to note that they did not even apply to set aside or vary the judgment. He relied on the case of *Erastus Ndubiu t/a Emac Enterprises v Mugumoini Farmers Company Limited; Inshwil Builders Engineer Ltd (Interested Party); Benjamin Kamande Gitbuka (Proposed Interested Party)* [2020] eKLR where the court held and sated as follows;

“So is the preliminary objection merited? The applicant has sought to be enjoined in the suit. It is not in doubt that the defence was struck off on May 24, 1995, which effectively concluded the suit herein. The question would then be which suit would be the proposed interested party be enjoined in. order 1 rule (2) of the *Civil Procedure Rules* provides;

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.

The rule clearly provides for enjoining parties at any stages of the proceedings. In this instant case Judgment has already been rendered, there is no application on record to set aside or vary it. Therefore, it is the court’s considered view that there would be no way the proposed interested party would be enjoined in the suit as the proceedings have been finalized. This is so as the applications that he seeks to review were brought after judgment had already been entered and were only applications with regards to execution.”

15. The 1st and 2nd respondents filed their written submissions dated February 22, 2022, through the law firm of TW Murage and Company Advocates. The respondents submitted that the court should be guided by order 10 rule 2 of the *Civil Procedure Rules* in deciding whether they should be joined. They



relied on the Supreme Court case of *Communications Commission of Kenya & 3 others vs Royal Media Services Limited & 7 others* [2014] eKLR, where it was held that

“[22] In determining whether the applicant should be admitted into these proceedings as an interested party, we are guided by this court’s ruling in the mumo matemo case, where the court (at paragraphs 14 and 18) held:

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

[23] Similarly, in the case of *Meme v Republic* [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

[24] We ask ourselves the following questions:

- (a) what is the intended interested party’s stake and relevance in the proceedings? and
- (b) will the intended interested party suffer any prejudice if denied joinder?”

16. It was the respondents further submission that in the appeal herein, they are the wife and son of the appellant and that the appellant had sold off the suit land without informing them, yet they lived on the said suit land. That they were directly affected by the actions of the appellant and as such joinder in the suit would provide protection of their rights, which would otherwise be adversely affected and/or infringed.

17. It was their further submissions that their joinder to the suit would not occasion any prejudice to the appellant. They joined issue with the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR where it was held that;

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”

18. That the learned magistrate was correct in her findings that the 1st & 2nd respondents, were interested parties as they were being rendered destitute and homeless through an illegal process. That the Sale agreement between the appellant and the 3rd respondent was illegal and hence it was void ab initio by dint of section 21 of the *Land Control Act*. That the suit land formed part of matrimonial property owned by the appellant and the 1st respondent and therefore the alleged 3rd wife of the appellant fraudulently



executed the spousal consent. They urged this court to dismiss the appeal with costs and uphold the ruling of the lower court in its entirety.

19. The court has considered the evidence placed before the trial in court as well as the rival written submissions thereafter by parties. The court has also carefully considered the findings of the trial court, and the submissions of counsels herein and finds as follows; -

This being the 1st appellate court, it has a duty to analyze and re-assess the evidence on record and reach its own independent decision. In the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, the court held in part that:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

20. Therefore, the court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyze the same, evaluate it and arrive at an independent conclusion.

21. The appeal herein is on whether the learned magistrate exercised her discretion properly in allowing the application for joinder of parties made by the 1st and 2nd respondents herein. Before this court can interfere with such discretion, it must be satisfied that the learned magistrate misdirected himself in some matter and as a result arrived at a wrong decision or that she misapprehended the law or failed to take into account some relevant matter. Madan, JA (as he then was) captured the principle more succinctly in *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] EA 898 as follows:

“The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

22. Having now carefully read and considered the record of appeal, the grounds of appeal, the written submissions by the parties, and the ruling by the trial court, the court and finds that the issues for determination are:-

- a) Whether the trial magistrate erred in allowing the 1st and 2nd respondents to be joined in Kandara ELC No 16 of 2020 as interested parties after a consent had been filed and adopted as an order of the court.
- b) Whether parcel No LOC 3/Gichagini/1664 is matrimonial property.
- c) Whether the appeal is merited.



1. Whether The Trial Magistrate Erred In Allowing The 1st And 2nd Respondents To Be Joined In Kandara ELC No 16 Of 2020 As Interested Parties After A Consent Had Been Filed And Adopted As An Order Of The Court

23. It is not in dispute that the appellant was the original owner of land parcel No LOC 3/Gichagini/494, which was subdivided into three portions to wit land parcel No LOC 3/Gichagini/XXX, XXXX, and XXX. Further, it is not in doubt that the appellant is the husband of the 1st respondent and the 2nd respondent is his son. It is also not in dispute that land parcels No LOC 3/Gichagini/XXX, 1666, and 1668 were all initially registered in the name of the appellant.
24. It is the appellant and 3rd respondent's contention that on June 16, 2020, they entered into a sale agreement for land parcel No LOC 3/Gichagini/XXX. The 3rd respondent averred that he paid the consideration as agreed, but the Appellant failed to transfer the said land to him. That the appellant's failure is what prompted him to file Kandara ELC 16 of 2020, to enforce his rights under the sale agreement. That the suit was settled via a consent dated October 6, 2020, which was adopted as an order of the court on December 16, 2020. The 1st and 2nd respondents were aggrieved by the said order, and via an application dated December 23, 2020, they sought to be joined in that suit as interested parties. They alleged that they were interested parties as they lived on the suit land and were not consulted by the appellant herein when he sold the land to the 3rd respondent herein. That the said spousal consent deponed and signed by one SWM was null and void, as the said S was not married to the appellant and that she neither resided nor owned the suit land.
25. On the other hand, the appellant stated that SWM, was his third wife and therefore she rightly executed the spousal consent. That he was the absolute owner of the suit land and the same did not form part of matrimonial property between him and the 1st Respondent.
26. The rights of a registered owner of property is clearly set out under sections 24, 25 and 26 of the [Land Registration Act, 2012](#). Section 24(a) provides:
- “ 24. Subject to this [Act](#)
- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
- Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the [Act](#). The rights of a registered owner are however subject to overriding interests declared by section 28 of the [Land Registration Act](#) as not requiring noting in the register.
27. Having stated the above, this court will now proceed to look at the substantive issues of joinder of interested parties to a suit.
28. The substitution and addition of parties to a suit is governed by order 1 rule 10 (2) of the [Civil Procedure Rules](#) which provides;
- “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.”

29. The *Black’s Law Dictionary*, 9th Edition at page 1232 defines an “interested party” as;
- “A party who has a recognizable stake (and therefore standing) in the matter”
30. The ‘Mutunga Rules’, the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 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”
31. The *Rules* further at part II clause 7 provides that, a person with leave of the court, may make an oral or written application to be joined as an interested party or the court, on its own motion, may also join an interested party to the proceedings before it
32. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, the court explained when an interested party ought to be joined in a proceeding. It was held as follows;-
- “A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty”.
33. In the case of *Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR, the Supreme Court of Kenya held that;
- “(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party, we are guided by this court’s ruling in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:
- “[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is 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...”
34. The Supreme Court in the above case went on to cited the case of *Meme v Republic* [2004] 1 EA 124, where the High Court observed that a party could be enjoined in a matter for the reasons that:
- “i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. Joinder to provide protection of the rights of a party who would otherwise be adversely affected in law;



iii. Joinder to prevent a likely course of proliferated litigation.”

35. The above provisions and precedents suggest that parties may be joined to proceedings at any stage of the proceedings. It is this court’s considered view however, that order 1 rule 10(2) of the Civil Procedure Rules envisages joinder where a suit is yet to be heard fully and determined on merit. In this instant appeal, judgment has already been rendered via a consent order dated October 6, 2020, which was adopted as an order of the court on December 16, 2020, and there is no Application on record to set it aside or vary the said consent judgment. See the case of Absolom Opini Mekenye v James Obegi [2018] eKLR where the court held that;

“Order 1 rule 10 (2) in my view envisages a situation where the suit has not been heard and determined and that is why it provides for joinder of a party either as plaintiff or defendant or a party 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 (emphasis added).

Where a judgment has been entered it is my considered opinion that a party cannot be enjoined to the proceedings unless the judgment is either reviewed and/or set aside in a manner to accommodate the participation of the enjoined party.”

36. Further, the Court of Appeal in the case of JMK v MWM & another [2015] eKLR (Civil Appeal No. 15 of 2015 – Mombasa) while considering the application under order 1 rule 10(2), of the Civil Procedure Rules stated thus: -

“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 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 Civil Procedure Rules in Tanga 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 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...”

37. Having found that Kandara ELC 16 of 2020, was dispensed with via the consent dated October 6, 2020, and adopted as an order of court on December 16, 2020, it is this court’s considered view that there would be no way the Proposed Interested Parties, would be joined in the suit as the proceedings had been finalized. Further, an order for stay and *status quo* would not cure the anomaly as stay of execution does not amount to setting aside of judgment and cannot be used interchangeably as the respondents have done in their application.

38. Even if this court were to find that the 1st and 2nd respondents were properly joined to Kandara ELC 16 of 2020; which they were not and proceed to consider the prayer for suspension of the consent order pending the hearing and determination of the substantive issues raised by the applicants, the question to be asked is; what will a suspension of the consent order achieve if the applicants are not made parties to the Suit? They have not asked for the reopening of the suit that is now deemed finalized.



39. The applicants who are the 1st and 2nd respondents herein stated that they wanted to be heard on the substantive issues that they have raised. However, the substantive issues in any litigation are those raised by the principal parties. It must be appreciated that the role of interested parties is minimal and peripheral. This is informed by the definition of an interested party by rule 2 of the Mutunga Rules as follows:

“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

40. Interested parties cannot introduce their own issues into the proceedings of the principal parties. This principle was stated by the Supreme Court in *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR as follows:

“(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether a new issue to be introduced before the court.”

41. The principal parties in the concluded suit compromised the issues with the approval of the learned magistrate as required by law. The applicants (1st & 2nd respondents herein) could not therefore be heard to say that they wanted the consent of the principal parties to be set aside so that they can prosecute the said suit.

42. The upshot of the foregoing is that the learned magistrate wrongly interpreted the law by enjoining the 1st and 2nd respondents to an already concluded suit where there was no application to vary and/or set aside the consent order already entered.

2. Whether Parcel No LOC 3/Gichagini/XXX is Matrimonial Property

43. Matrimonial property is defined under section 6 of the *Matrimonial Property Act, 2013*. The said section describes matrimonial property as follows;

“(1) For the purposes of this *Act*, matrimonial property means—

- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes;

or

- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

44. In addition, section 93 of the *Land Registration Act, 2012* states as follows;

“Co-ownership and other relationships between spouses.



Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.”

45. The 1st respondent averred she contributed financially towards the purchase of land parcel No LOC 3/Gichagini/XXX, and therefore it formed matrimonial property. As a result, therefore it was her averments that the appellant could not purport to sell the said parcel of land or part thereof without acquiring her consent. The appellant avers that the learned magistrate erred in law by entertaining a claim that touched on the distribution of matrimonial property.
46. The appellant alleged that he bought the land parcel No LOC 3/Gichagini/XXX, using his own resources and without any help and the said land does not form part of matrimonial property. The claim in Kandara ELC 16 OF 2020, sought for a declaration of ownership by enforcing the sale agreement between the plaintiff and the defendant therein. The said claim did not in any way deal with matrimonial property or the distribution of it and therefore the trial magistrate was properly clothed with jurisdiction to deal with the claim.

3. Whether The Appeal Is Merited

47. The appellant had sought for the setting aside of the trial court’s ruling joining the 1st and 2nd respondents as interested parties in Kandara ELC 16 of 2020. The trial court held that the 1st and 2nd respondents herein are family members and they have a direct interest in the matter and their presence was necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit. This court on the contrary finds and holds that the learned magistrate joined the 1st and 2nd interested parties (1st & 2nd respondents herein) to an already concluded suit, where in there was no application filed for the setting aside of the said consent judgment entered on December 16, 2020. Therefore, it follows that the trial court misapprehended the law and fact and thus the appeal herein is merited.
48. Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the memorandum of appeal, together with the written submissions, the court finds and holds that the trial magistrate misapprehended the law by allowing the application for joinder dated November 26, 2020.
49. The upshot of the foregoing is that the appellant’s appeal herein is found merited and consequently the said appeal is allowed and the ruling of the trial court delivered on March 4, 2021, is hereby set aside. The appellant will have the costs of this appeal.
50. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19TH DAY OF MAY, 2022.

L GACHERU

JUDGE

Delivered virtually in the presence of;

Alex Mugo - Court Assistant.

No Appearance for the Appellant.

Mr Mwangi for the 1st, 2nd & 3rd respondents.



L GACHERU
JUDGE

