



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS (COMMERCIAL DIVISION)

ELC CASE NO. 745 OF 2001 (O.S)

LILIAN WAIRIMU NGATHO.....1ST PLAINTIFF/RESPONDENT

ELIZABETH MURUNGARI NJOROGE.....2ND PLAINTIFF/RESPONDENT

=VERSUS=

MOKI SAVINGS CO-OPERATIVE SOCIETY LTD.....1ST DEFENDANT/RESPONDENT

LUCY WANJIRU KIRUHL.....2ND DEFENDANT/RESPONDENT

AND

BEATRICE NJERI GACHUKIA.....1ST PROPOSED INTERESTED PARTY /APPLICANT

JOYCE WARINGA NJUGUNA.....2ND PROPOSED INTERESTED PARTY/APPLICANT

SUSAN MUGURE NJUGUNA.....3RD PROPOSED INTERESTED PARTY/APPLICANT

JAMES NJOROGE MWANGI.....4TH PROPOSED INTERESTED PARTY/APPLICANT

SAMUEL KARIMI KARIGI.....5TH PROPOSED INTERESTED PARTY/APPLICANT

VENANSIO MBATARU KARIUKI.....6TH PROPOSED INTERESTED PARTY/APPLICANT

MICHAEL MBIRA NGINGI.....7TH PROPOSED INTERESTED PARTY/APPLICANT

FRANCIS KARIUKI MACHARIA.....8TH PROPOSED INTERESTED PARTY/APPLICANT

GEORGE MURIGU GITHUKU.....9TH PROPOSED INTERESTED PARTY/APPLICANT

SAMMY THUMBI NY AMBARE.....10TH PROPOSED INTERESTED PARTY/APPLICANT

SIMON GATHII MACHARIA.....11TH PROPOSED INTERESTED PARTY/APPLICANT

JAMES NDUATI KURIA.....12TH PROPOSED INTERESTED PARTY/APPLICANT

JAMES MARAGWA WERU.....13TH PROPOSED INTERESTED PARTY/APPLICANT

JUSTINE WILLY KARIUKI.....14TH PROPOSED INTERESTED PARTY/APPLICANT

JAMES MATHO WAKABA.....15TH PROPOSED INTERESTED PARTY/APPLICANT

DAVID MWANGI G. GUCEEA.....16TH PROPOSED INTERESTED PARTY/APPLICANT

JAMES NJOROGE NJAU.....17TH PROPOSED INTERESTED PARTY/APPLICANT

CICILIA NDURUKA.....18TH PROPOSED INTERESTED PARTY/APPLICANT

RICHARD GICHINI NJOROGE.....19TH PROPOSED INTERESTED PARTY/APPLICANT

BETH WAIRIMU KAHIU.....20TH PROPOSED INTERESTED PARTY/APPLICANT

RULING

INTRODUCTION

1. The proposed interested parties herein have filed several Applications in respect of which one of the major Reliefs sought by the proposed interested parties specifically seeks to be enjoined in the proceedings as interested parties, with a view to vindicating their rights and/or interest arising from ownership of various parcel of lands, which are said to be sub-divisions of L.R NO. 5964/1, hereinafter referred to as the original parcel of land.

2. Given the number of applications that have been filed by the interested parties herein, it is appropriate to cluster the applications on the basis of the law Firms that filed same. Consequently, I shall now proceed to and place the various Applications into Clusters as hereunder;

1ST CLUSTER

3. The 1st cluster of applications touch and/or concerns the 1st to 5th proposed interested parties/Applicants, who are presented by the firm of M/s Masore Nyangau & Co. Advocates and in this cluster there are a total of five applications, but which seek the same reliefs and/or orders save for the parcels of land alluded to in respect of each Application.

4. As pertains to these set of applications, the Reliefs that are apparent on the face thereof are as hereunder;

i.(spent)

ii. *the honourable court be pleased to order that Beatrice Njeri Gachukia be joined to this suit as an interested party and to hear her and make such orders in the interest of justice, to protect her interest in L.R No. 22926/120, derived from LR. No. 5964/1, pending the inter parties hearing of this application*

iii. *The honourable court be pleased to stay the execution of Decree emanating from the judgment of Hon Justice J. B Ojwang, Judge, delivered in this case on the 30th July 2010, namely to stay the cancelation by the commissioner of lands and/or the chief registrar of title pending the hearing and determination of this application*

iv. *The honourable court be pleased to set aside the judgment of Hon. Justice J. B Ojwang, delivered in this case on the 30th July 2010, together with all consequential orders.*

v. *That upon the setting aside of the said judgment and all its consequential orders the honourable court be pleased to order that Beatrice Njeri Gachukia be joined to the suit as a Defendant and that this suit be heard de novo*

5. The rest of the applications in this cluster have adopted a similar approach and seek the same and/ or substantially similar Reliefs save for the names of the applicants and the affected title numbers.

6. It is also worthy to note, that the proposed interested parties, in this cluster have also sworn affidavits in support of various Notice of motions, in respect of which same have pleaded their respective cases.

7. Suffice it to say, that the proposed interested parties/ Applicant herein have pointed out that same purchased various portions of the original title, namely L.R No. 5964/1 from the Defendants herein or such other persons, who had purchased from the Defendants. Nevertheless, the proposed interested parties/ Applicants herein have pointed out that upon the purchase of portions of the original title, [the predecessor title] same was subdivided and thus gave rise to various subdivision, the latter which are registered on the names of the 1st to 5th proposed interested parties /Applicants herein.

8. It is further averment of the 1st to 5th proposed interested parties that at the time of purchase of the said portions of the original title,

culminating into the various subdivisions, same were not aware of the ongoing cases, that affected the original title.

9. It is the proposed interested parties case that upon the purchase, the resultant subdivision, were transferred into their respective names and that same are now the Registered Owners thereof. In this regard, the Proposed Interested Parties have thus averred that they are bona fide purchasers for value, without any notice of defect in the preceding title.

10. On the other hand, the said proposed interested parties herein have also signaled that upon purchase of portions of the original title, the subdivision thereof and the subsequent transfer of the resultant subdivisions to and/or in their favor, respectively, the proposed interested parties entered upon and thus took possession of the said sub-divisions.

11. It is the proposed interested parties' further averments that after same were issued with titles, same commenced the process of developing their respective parcel of lands. In this regard, the proposed interested parties herein, have averred that the resultant sub-divisions are substantially developed with assorted projects/buildings.

12. Despite being the registered owners of the resultant sub-divisions, which are duly developed, the proposed interested parties in this cluster have indicated that same were never joined into this proceedings nor were same served with the Court Processes/ Pleadings .

13. Further the proposed interested parties have also averred that as a result of the non joinder into the matter, the subject matter was prosecuted up to and including the rendition of judgment on 30th July 2010, without notice to and/or participation on their part. Consequently, the proposed interested parties herein have thus contended that same were condemned unheard.

14. On the other hand, the proposed interested parties have also averred that having purchased portions of the original parcel of land, without notice of any effect, same are therefore bona fide purchasers for value, without notice of any defect. In this regard, the proposed interested parties/' Applicants herein now seek for the intervention of the honourable court.

15. It is also the averment of the said proposed interested parties, that other than being bona fide purchaser for value, which is contended to be a proposed defense, same also contends that they similarly do have a Right relating to compensation and indemnity, even against the Defendants, subject to proof before a court of law.

16. In short, the proposed interested parties herein, have contended that they are truly interested parties to the subject matter and that their rights and/or interest over and in respect to the sub-division in respect of the original parcel of land have been affected and/or been infringed upon.

17. In view of the foregoing, the proposed interested parties in this cluster have sought for the intervention of the honourable court by having the judgment rendered on the 30th July 2010, reviewed and/or set aside

2ND CLUSTER

18. The second cluster contains the applications filed by the 6th to 10th interested parties through their counsel namely, M/s Kibatia & Co Advocates. For clarity, this cluster comprises of notice of motion applications dated the 28th August 2012 and 20th September 2012, respectively, each speaking to a different proposed interested party.

19. In terms of the Reliefs sought, the proposed interested parties in this cluster have sought same Reliefs, typified by those referred to as hereunder;

a. That VENANSIO MBATARU KARIUKI be and is hereby joined in this suit as an interested party to protect her rights over and in respect of LR. No. 22925/130, which is a sub-division of LR NO. 5964/1

b. The honourable court be pleased to stay the execution of the Decree emanating from the judgment of Hon Justice J. B Ojwang delivered on 30th July 2010 and stay cancelation of the title in respect of same pending hearing of this application.

c. That this honourable court be pleased to review and/or set aside the said judgment by Hon. Justice J. b ojwang delivered on the 30th July 2010, and all consequential orders emanating therefrom and this suit be heard de novo.

d. The interested party be thereafter be joined in this suit as a Defendant and the suit be heard de novo

20. Suffice it to say, that the subject applications in the second cluster, are also supported by various affidavits and in respect of which the applicants have reproduced nearly the same averments as the ones adverted to by the applicants in the first cluster.

21. Briefly, the applicants herein have also raised the issue of being bona fide purchasers for value without notice of any defects, in the title of the Defendants herein.

22. It is also the averments of the Applicants in this cluster that the subject suit was filed and prosecuted, whilst the Plaintiffs knew or had reasons to know that the original title had been sub-divided, but same did not deem it fit and/or expedient to join the applicants.

23. On the other hand, the applicants on this cluster contend that having not been joined in the said proceedings, orders were made, which have impacted on their titles, albeit without their knowledge and/or participation. In this regard, the applicants have averred that same have

been condemned without being heard.

THIRD CLUSTER

24. The third cluster relates to the 11th to the 15th proposed interested parties, who are represented by the firm of M/s Kinoti & Kibe Advocates. For clarity, the proposed interested parties herein were previously represented by the firm of M/s Njeru Boniface and Company Advocates.

25. On their part, the applicants in this cluster have sought Reliefs in the manner following, albeit subject to the relevant Titles owned by each;

i.(spent)

ii. *The honourable court be pleased to join the Applicant Simon Gathii Macharia (read the rest of the applicants) as interested parties in this proceedings.*

iii. *The honourable court be pleased to review and set aside the judgment of this honourable court given on the 30th July 2010, and all subsequent orders pursuant thereto.*

iv. *Pending the hearing of prayers number 1, 2 and 3 above there be a stay of execution of the decree issued by this honourable court.*

26. In respect of the applications falling in this cluster, it is also worthy to point out that the various applicants have also sworn and/or deposed to facts, the substratum of which is that same also purchased portions of the original parcel of land, which was thereafter subdivided, giving rise to the resultant sub-divisions.

27. On their part, the applicants in this cluster aver that same are interested parties in the subject matter and thus ought to have been joined in the suit and/or allowed the opportunity to defend their rights and/or interest, before any adverse order could issue.

THE FOURTH CLUSTER

28. The fourth cluster relates to the proposed interested parties number 16th to 20th and the same are represented by the firm Njiru Boniface Advocates and in respect of this cluster the reliefs sought are in the manner following, subject the relative Titles of each Applicant;

i.(spent)

ii. *The honourable court be pleased to join David Mwangi G Gucea as an Applicant in this matter.*

iii. *The honourable court be pleased to make further directions as maybe just in reference to the joinder of the applicants*

iv. *Cost of the application be provided for.*

29. Similarly, the applicants in this cluster also filed affidavits in support of the applications and in this regard same also adverted to having not been afforded an opportunity to be heard, over and in respect of the subject matter, even though same affected their title and/or properties.

30. It also the further averments by the applicants in this cluster that having purchased the portions of the original parcel number LR No. 5964/1, culminating to various sub-division, they were interested parties and therefore ought to have been afforded the opportunity to be heard.

31. Nevertheless, the applicants herein reiterate the same position as the ones, raised by the rest of the proposed interested parties/ Applicants;

32. Suffice it to say, that the golden thread that runs across the applications by the proposed interested parties/ Applicants is that same are keen and/or desirous to be joined in the subject matter and thereafter to be heard, in a bid to vindicate their (applicant's title), which emanated from the sub-division of the original title.

Response by the Plaintiff's/Respondent's

33. Upon being served by the various applications alluded to herein, the Plaintiff's/Respondent's filed a host of replying affidavits sworn by Elizabeth Murungari Njoroge sworn on various dates, including the 18th October 2012, to this affidavits the deponent has attached various annexures supporting the averments therein.

34. According to the said deponent, the sale, sub-division and ultimately the transfers in favor of the proposed interested parties, occurred and/or took place in the face of lawful court orders, which were duly registered against the title. In this regard, the Plaintiff's/Respondent's avers that all such transfers and registration are therefore fraudulent and thus invalid.

35. On the other hand, the Plaintiff's/Respondent's have also averred that the proposed interested parties applicant knew and/or were aware of the existent of the suit herein as well as the order of the court but nevertheless, same did not deem it fit and/or appropriate to apply for the joinder. For clarity, the Respondent's have alluded to the newspaper advertisement which spoke to caveat list against the various subdivisions arising from the original parcel of land.

36. It is also the Plaintiff's/Respondent's position that the transfer of the original parcel of land to and/or in favor of the Defendant's herein, having been adjudicated upon by the court of appeal which found same to be fraudulent, the proposed interested parties herein therefore has no lawful and/or legitimate claim, which therefore can anchor the proposed joinder.

37. Besides, the Plaintiff/Respondent's herein have also adverted to the facts that the Applicants were aware of and/or knowledgeable of the existent of the orders of the court, but nevertheless same chose to participate in the purchase, sub-division and acquisition of the original parcel of land. In this regard, the Respondents contends that the proposed interested parties cannot propagate the defense of bona fide purchaser for value.

38. On the other hand, the Plaintiff's/Respondent's also raised issues of law whereby same contended that the proposed interested parties not having been parties to the subject proceedings, same cannot seek for orders of review. In this regard, it is the respondent's case that the application by the proposed interested parties are legally untenable.

39. The other issues that have also been raised by the Respondents is, being that the subject Issue, pertaining to the transfer of the original Suit Property, having previously been heard and disposed of and judgment rendered, by various Courts, including the Court of Appeal, no orders for joinder can lawfully be made and in any event, such an order if made, would be an exercise in futility.

SUBMISSIONS

40. It is common ground that upon the subject applications being filed, directions were given that the various applications on record be canvassed and/or disposed of by way of written submissions. Consequently, the parties proceeded to and filed submissions as hereunder;

41. On behalf of the 1st to 5th proposed interested parties, submissions were filed by the firm of M/s Masore Nyangau on the 17th June 2013. For clarity, the said written submissions have highlighted the thematic issues and/or areas upon which the 1st to 5th proposed interested parties seek to impeach the judgment delivered on the 30th July 2010.

42. On behalf of the , 6th to 10th Proposed Interested Parties ,the written submissions, were filed by the firm of M/s Kibatia & Co Advocates.

43. On behalf of the rest of the proposed interested parties, namely 11th to the 15th, their submission were filed by the firm of M/s Njeru Boniface, who was *hitherto* on record, before the firm of Kinoti & Kibe Advocates, filed a notice of change in respect of the Proposed interested parties /applicants, namely, the 11th to the 15th applicants. Suffice it to say, that the submission dated on the 17th June 2013, are on record.

44. On their part, the Plaintiffs/Respondents filed their written submissions dated the 16th July 2013, which responded to and/or concerned all the notice of motions applications filed by and/or on behalf of the proposed Interested parties /Applicants.

45. I must state, that all the aforesaid submissions are part of the record and have thus been considered and/or examined.

ISSUES FOR DETERMINATION

46. Having reviewed the notice of motions applications filed on behalf of the proposed interested parties, the affidavits in support, as well as the annexures having been attached thereto and having taken into consideration the written submissions, by the Applicants on one part and having similarly reviewed the replying affidavit (various) filed on behalf of the Plaintiffs/Respondents, as well as the lengthy written submissions, totaling 15 pages, the following issues lend themselves for determination;

I. Whether the applicants' not having been part of the suit, same cannot approach the court for Review.

II. Whether the applicants herein have a stake in the suit and hence ought to be enjoined as interested parties or still as Defendants.

III. Whether the proposed interested parties have a tenable defense/claim that can be ventilated before the court.

IV. Subject to issue number [1] herein before, whether the proposed interested parties have satisfied the prerequisite conditions to warrant review or otherwise

V. What Rreliefs ought to be granted

ANNALYSIS AND DETERMINATION

ISSUE NUMBER 1

47. The first issue herein arises from the contention by the Plaintiffs/Respondents that the provisions of order 45 of the civil procedure rules,

which relate to and/or concerns review, does not envisage an application by a non-party. In this regard, it is the submissions by the Plaintiffs/Respondents, that the subject applications herein is legally untenable.

48. Based on the foregoing argument, it is imperative that the provision of order 45 of the civil procedure rules, which is shortly going to be basis of this discourse, be reproduced. Same provides as hereunder;

“Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

49. The aforesaid provisions, start by referring to any person aggrieved by an order or decree, for which no appeal is provided for or in respect of which no appeal has been mounted by the applicants, such a party is at liberty to file an application for review. It is worthy to note, that the term any person, is not defined under the provisions of the said section.

50. Nevertheless, the said term is wide and therefore can be taken in its literal meaning to include any person, who though not a party to a suit has proven and/or direct interest in the subject matter before the court and whose interests are otherwise affected by a judgment and/or decision, which is the subject of review.

51. As pertains to the subject matter, there is no dispute that the titles held by the applicants herein arose from and/or generally are subdivisions of the original parcel of land. In any event, it is common ground that the judgment of the court, which is the subject of the said proceedings together with the consequential orders have a direct impact on the titles that were derived from the mother title.

52. Owing to the foregoing, it is my humble position that the Applicants/proposed interested parties herein fall within the cadre of Persons envisaged and/or included in the term of any person.

53. In respect of the foregoing findings, I take guidance from the decision in the case of **Ngororo v Ndutha & Another (1994) eKLR**, where the honourable court of appeal held as hereunder;

However, we would observe that under section 80 of the Civil Procedure Code, as we shall point out herein later, any person, though not a party to the suit, whose direct interest is being affected by the judgment therein is entitled to apply for a review. The 2nd respondent therefore has a locus standi.

54. In a nutshell, it is therefore my finding and holding that though the proposed interested parties herein, were not parties, to the suit *ab initio*, same have been provided by the window to pursue and/or approach this honourable court pursuant to the provision of order 45 rule 1 of the civil procedure rule, 2010.

ISSUE NUMBER 2

55. Following the rendition of the judgment in respect of the subject matter, the honourable court made orders to the effect that the subsequent titles derived from the original title L.R NO. 5964/1 Nairobi are invalid.

56. On the other hand, the honourable court also made an order that the Defendants and their agents and/or servants are hereby restrained by way of permanent injunction from alienating, sub-dividing, selling and/or in any other way interfering with parcel LR. No. 5964/1 Nairobi and all subsequent titles derived from the said L.R No. 5964/1.

57. Looking at the nature of the reliefs that were granted by the honourable court in terms of the judgment under reference, one cannot lose sight of the fact that some of the titles that were being nullified belonged to and were registered in the names of the proposed interested parties/ Applicants.

58. It is also common ground, that at the time the judgment under reference was being delivered, the proposed interested parties/Applicants, were not parties to the suit and therefore were incapable of defending the titles, which at the material point in time, belonged to and were registered in their names.

59. Notwithstanding the foregoing, it is also worthy to recall that the issue of the original title to the suit property, having been sub-divided and was thus non-existent was raised before the honourable court by counsel for the Defendants, but however, counsel for the Plaintiffs herein, did not and/or appeared not to have taken the cue, with a view to authenticating whether indeed the original title had been sub-divided and if so, who were the beneficiaries thereof.

60. It is my humble opinion, that if the original title, which was subject of the proceedings, have been subdivided and the resultant subdivision created and transferred in favor of 3rd parties, then it behooved the Plaintiffs/Respondent herein to have pursued the matter, including seeking amendment and joinder of the parties who(*sic*) were the beneficiaries of the subdivisions

61. Indeed, the honourable judge whilst commenting on the issues as pertains to the 3rd parties made the following comments;

“A reference to the right of third parties, in the manner aforesaid, is forensically quite attractive; ultimately such third parties would be said to be innocent purchasers for value, without notice of any defect in the vendors title. A person in such category, conventionally is the darling of equity; and the court would protect his/her claim against challenge on account of tainted earlier dealings in the property. In the instance case however, there is no evidence giving a basis for this court to provide any such special protection”.

62. It appears from the foregoing excerpt that the honourable judge envisaged a situation that if there was evidence of third parties and such third parties were present before him (which was not the case) then the court would have gone ahead to protect the interest of third party purchasers from being challenged on account of tainted earlier dealings with the property.

63. On the other hand, the honourable judge also appears have vindicated the position that even though there was no evidence placed before him in respect of third parties purchasers, and if indeed third parties purchasers existed, the court would have ventured to offer such special protection to same.

64. Suffice it to say, that at the point in time when arguments were being made before the judge on the existence of third parties, neither the Plaintiffs/Respondents nor the Defendants/Respondents, sought leave to join the purchasers portions of the suit property.

65. In my humble view, either the Plaintiffs/Respondents herein or the Defendants had an obligation to apply to join the purchasers of portions of the suit property. To the extent that same were not joined, the proceedings were carried out and/or undertaken on the back of the said purchasers without same being afforded an opportunity to be heard.

66. Be that as it may, I have gone an extra length, just to show that the proposed interested parties herein have a stake both in the suit property, whose subdivisions are currently registered in their names, as well as in the instant suit, given that the ultimate orders arising from this suit are bound to affect the suit property ,including the Titles derived therefrom ,particularly, those registered in the names of the Interested Parties.

67. In any event, it must be observed that the proposed interested parties just as the Plaintiff's/Respondents are entitle to equal benefit and protection under the law. In this regard, the provisions of Article 27 of the Constitution 2010, which are reproduced herein after, becomes relevant;

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

68. Other than the foregoing provisions, I am also inclined to invoke the provision of Article 50(1), of the constitution, which provides as hereunder;

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

69. In my humble view, the proposed interested parties/ applicants have a dispute and/or issue, which same are keen to ventilate, address and/or to have same determined. The only way the dispute herein can be determined is by having the proposed interested parties, admitted to the subject suit and thereafter allowing same to ventilate their claim, no matter how weak their case is. Suffice it to say, that the proposed interested parties, cannot be driven away from the seat of justice without a hearing.

70. Finally, I am still constrained to point out that the proposed interested parties herein also have a right to access to justice in terms of Article 48 of the Constitution. In this regard, where a party, honestly seeks to be heard such a party cannot be locked out.

71. The provision of the constitution 2010 aside, the stake of the interested parties herein also falls within the anticipation of the provisions of order 10 rule 1 (2) of the civil procedure rules, 2010 which provides as hereunder;

“(2) No order may be made under sub-rule (1) unless the summons has been served and Order 32 rule 3 (4) has been complied with, unless the court otherwise orders”.

72. Finally, before penning off from the issue, as to whether the proposed interested parties/applicants are indeed interested parties, I take guidance from the decision in the case of **Francis Kariuki Muruatetu & Another v Republic & 5 Others (2016) eKLR**, where the Supreme Court referred to the case of **Trusted Society of Human Rights Alliance V Mumo Matemo & 5 Others (2014) eKLR** defined an interested party as hereunder;

”...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...”

73. In answer to the second issue herein, I find and hold that the proposed interested parties are truly interested parties and therefore same have a legitimate stake, both in the suit as well as the Suit Property, which is the mother title, to participate in these proceedings

ISSUE NUMBER 3

74. Having dealt with and /or considered the immediate preceding issue, as to whether the proposed interested parties have a stake hold in

the subject property and by extension the suit, the issue that next flows from the foregoing is whether the proposed interested parties have any legitimate claim capable of attracting a plenary hearing.

75. In this regard, it is paramount to recall and / or otherwise reiterate the obiter dictum by Hon. Justice J. Ojwang', Judge (as he then was), in the course of the judgement that is now sought to be reviewed ,set aside and/ or vacated.

76. According to Hon. Justice Ojwang', Judge, the plea of an innocent purchaser for value, Is a critical plea and often is the darling of equity. In the judge's own words, the court would be prepared to give special protection to such cluster of persons and to protect their dealings in respect of the suit property, notwithstanding the tainted past transactions affecting same provided that the purchaser was neither party nor privy to the fraud.

77. Without belabouring the point, it is my humble opinion that the proposed interested parties herein are open and amenable to raise and propagate the plea of bona fides purchaser for value.

78. Nevertheless, whether or not the plea of bona fide purchaser for value without notice, would withstand a barrage of questions during cross examination is a separate and distinct matter. Same, will however have to await the appropriate moment and/or time to interrogate same.

79. On the other hand, the proposed interested parties, state that same purchased the various portions of the original parcel of land which were thereafter transferred to and registered in their favour.

80. Even though the proposed interested parties contend that same were not aware of the existence of the suit and the various orders that were affecting the title, one thing that remains evident is that in the event of judgement being entered against the defendants, same may have a go at the people who sold and transferred the titles unto same.

81. In my humble view, there is a glimpse of the issue of compensation which the proposed interested parties may, if same are well advised, pursue this kind of claim and may very well be ventilated by way of a counter claim against the defendants.

82. Other than the plea of compensation that I have alluded to, there is also the issue of indemnity, as against the registrar of titles, who is said to have connived with and/or issued titles, to the proposed interested parties. In this regard, there is a likely claim pertaining to indemnity which may similarly arise and or be propagated by the applicants.

83. In a nutshell, it is important to take cognizance of the fact that the interested parties herein are at liberty to raise all or any of the defenses. However, the fact that each of the foregoing defenses are available to the proposed interested parties, does not mean that the said defenses will succeed.

84. Suffice it to say, that all that an interested party or a proposed defendant is obliged to show, at this juncture is that same has a triable defense raising a bona fide triable issue, which can be ventilated before a court of law. In this regard, the existence of one triable issue, if bona fide, would be sufficient.

85. To fortify the foregoing holding, I invoke and refer to the decision in the case of **Desbro (Kenya) Limited versus Polypopies Ltd and Another (2018) eKLR:**

“What then is a defense that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

86. Taking into account the foregoing observation, I hold the opinion that the proposed interested parties herein, may very well have triable issues in the defenses that same may file and/or raise, subject to leave of this honourable court.

Issue number 4

87. The starting point to addressing the subject issue, is to recall the finding made in respect in the first issue herein where I held that the proposed interested parties are within the genre described as Any person.

88. Having found and held that the proposed interested parties are persons affected by the judgment and/or decree of this honourable court, the question that now remains outstanding is whether the Applicants herein have embraced and/or established any one of the conditions prescribed under the condition of Order 45 Rule 1 of the civil procedure rules 2010.

89. In my humble view, the proposed interested parties/ Applicants not having been parties to the subject proceedings, same cannot predicate and/or anchor the subject applications on the basis of error and/or mistake apparent on the face of record.

90. Nevertheless, by virtue of being the registered owners of the resultant subdivisions, which emanated from the suit property and which subdivisions are subject to nullification, it is my humble view that the applicants herein can ground and/or anchor the subject applications on the basis of the existence of sufficient cause. Indeed, the averments by the proposed interested parties, speak to having being condemned without being heard, and in my humble view, such an averment, which is anchored on Article 50 (1) of the constitution, founds a sufficient cause.

91. The second condition requires that 'sufficient cause' be shown by the applicant. But what is 'sufficient cause'? It is a question of fact and the court has to exercise its discretion in the varied and special circumstances of each case. The same question was posed by this Court in the case of Okiya Omtata Okoiti & another v Okiya Omtata Okoiti & 4 others [2016] eKLR and was answered as follows:

"In The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur) Musinga, JA saw sufficient cause to be:

“Sufficient cause” or “good cause” in law means:

“.....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See BLACK’S LAW

DICTIONARY, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

91. I must point out that there has been a serious discourse/ arguments between the proposed applicants and the Plaintiff’s/Respondent’s, as to when the proposed interested parties came to know of the existence of the suit and by extension the decree of the court. On one hand, the Plaintiff’s/Respondents have indicated that there was sufficient material to warrant the applicants herein getting to know of the suit and the resultant decree and in this regard the Plaintiff’s/Respondents points to the various advertisements placed in the local Newspapers pertaining to the caveat emptor, as well as notices that were fixed to the suit property.

92. On the other hand, the proposed interested parties have averred that same discovered the existence of this particular suit, when the request for a loan facility on behalf of one Susan Mugure Njuguna, was declined by M/s Equity Bank Limited on the basis of there being court orders affecting the title in question, which was one of the resultant subdivisions arising from the suit property.

93. Having reviewed the competing averments, I must say that I find the depositions by the proposed interested parties/applicant credible and I adopt same. For the avoidance of doubt, I am not persuaded that the applicants herein, would have been aware of the suit and knowledgeable of the consequence thereof and still fail to take corrective measures to vindicate their interest.

94. Be that as it may, I have come to the conclusion that the Applicant have established a sufficient cause to warrant the review sought and I must point out that the ,consequence of declining to review, would amount to condemning the proposed interested parties and leaving same with no legal redress.

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95. The subject matter was filed and/or lodged in this honourable court in the year 2001 and the judgment which is the subject of the various application herein was rendered by Hon. Justice (professor) J. B. Ojwang on the 30th July 2010. From the foregoing, it is apparent that the suit is more than 20 years old, whereas the said judgment is 11 years and counting.

96. Looked at on the face of it, one would be persuaded to bring the matter to rest and hold that it would be inequitable to reopen such an old matter. Certainly, this school of thought, would be inspired by the principles of Equity and Social justice, which are part of the national values and principles of good governance, stipulated in Article 10 (2) (b) of the constitution of Kenya 2010.

97. However, the converse of the foregoing position would be to lockout the proposed interested parties/applicants and thereby deprive some of the aspect of the National Values and Principles of Good Governance relating to the rule of law, equality, human rights and non-discrimination, which are similarly fundamental in the protection of the bill of rights.

98. Having anxiously balanced the values of Equity and Social justice, which would in way bring in closure to the subject matter, against the competing national values adverted to in the preceding paragraph and which are more aptly espoused by Articles 22 (1), 25 (c), 27 (1 & 2), 40 (2), 48 and 50 (1), I am more inclined to abide the path of the rule of law which envisages that any party ought to be heard before being condemned.

99. From the forgoing and having anxiously considered the competing interests, represented by the different sides of the divide, I am constrained, albeit with a heavy heart, to allow the various applications filed by and/or on behalf of the proposed interested parties/Applicants

FINAL DISPOSITION

100. In conclusion, the orders that commend themselves to me are as hereunder;

- i. That the various applications filed by and/or on behalf of the proposed interested parties herein be and is hereby allowed.*
- ii. The judgment dated and delivered on the 30th July 2010, be and is hereby reviewed and/or set aside.*

iii. The proposed interested parties/applicants be and are hereby admitted into the subject suit as Defendants.

iv. Pursuant to and in line with the foregoing order, the Plaintiffs/Respondents be and are hereby directed to amend the originating pleadings to embody and/or otherwise include the Defendants herein as parties to the suit.

v. The admitted Defendants (the proposed interested parties herein), shall forthwith enter appearance within 14 days and thereafter file their respective statement of defense and/or such other pleadings as may be just and/or expedient within 14 days from the date of service by the Plaintiffs/Respondents.

vi. Within 30 days from the filing of the statement of defense and/or such latter pleadings, the subject matter shall be mentioned before the Deputy Registrar for purposes of pre-trial conference and thereafter same be set down for hearing.

vii. To facilitate expediency and towards fast tracking the subject matter the suit herein shall be mentioned before the Hon. Deputy Registrar on 7th December 2021, for further directions.

viii. Each party shall bear own costs of the subject applications.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE

ENVIRONMENT AND LAND COURT,

MILIMANI.

In the presence of;