



REPUBLIC OF KENYA



**Kassim & 2 others v Lee Funeral Services Limited; Muumbo & 2 others (Proposed Defendant)  
(Civil Case E096 of 2020) [2023] KEHC 3797 (KLR) (Civ) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE E096 OF 2020  
DO CHEPKWONY, J**

**APRIL 20, 2023**

**BETWEEN**

**JOHNSTONE KASSIM ..... 1<sup>ST</sup> PLAINTIFF  
ALEX MUNYASYA MUUMBO ..... 2<sup>ND</sup> PLAINTIFF  
CAROLYNE KALUNDE MUUMBO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**LEE FUNERAL SERVICES LIMITED ..... DEFENDANT**

**AND**

**BILLY MBUVI MUUMBO ..... PROPOSED DEFENDANT  
MWINZI MUUMBO ..... PROPOSED DEFENDANT  
MARK MUUMBO ..... PROPOSED DEFENDANT**

**RULING**

1. The Proposed Defendants/Applicants (hereinafter referred as Applicants) brought this application by way of Notice of Motion application dated 24<sup>th</sup> January, 2022 under the provisions of Order 45 Rules 1 and 2, Order 51 Rule 1 all of the *Civil Procedure Rules*, 2010, Sections 1A, 1B, 3A and 80 all of the *Civil Procedure Act* seeking for orders that:-
  - a) Spent;
  - b) That Billy Mbuvi Muumbo, Mwinzi Muumbo & Mark Muumbobe enjoined in these proceedings as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants;



- c) That this Honourable Court be pleased to vary, review and set aside the consent order dated 28<sup>th</sup> October 2020 and issued on 6<sup>th</sup> November 2020 by Justice Ong’udi.
  - d) That this Honourable Court do make any further orders that it deems fit and right for expedient disposal of this matter.
  - e) That the costs of this application be provided for.
2. The application is premised on the grounds on its face and supported by an affidavit deposed by Mwinzi Muumbo stating that the Plaintiffs/Respondents (hereinafter referred to as Respondents) in shrewd secrecy instigated the instant suit seeking for the body of the deceased, one Timothy Mwandu Muumbo, to be released to them in blatant contempt of the orders issued by Justice Muigai on 6<sup>th</sup> August 2018 in HCCA No.7 of 2016 - *Johnstone Kassim & Others v Billy Muumbo & Another*, which directed that:-
- “That the 1<sup>st</sup> born son/child of the deceased Mwinzi Muumbo according to Akamba Customary Law shall lead all the children of Timothy Mwandu Muumbo with patience, inclusivity, consensus and then with respect to their eldest brother and now head of Muumbo family to remove/receive the body of the deceased, facilitate settlement of the outstanding mortuary fees with family, clan, well-wishers and identify the place/spot where the deceased shall be buried in Mwingi/Nzeluni/318. All Muumbo family shall participate in the funeral.”
3. The Applicants contend that the Respondents filed an application in Succession Cause No.1673 of 2015 - Estate of Timothy Mwandu Muumbo seeking for mortuary funds to be derived from the estate of the deceased and have invoked the orders by Justice Ong’udi of 30<sup>th</sup> September, 2021, where they were directed to pay the mortuary fees by 31<sup>st</sup> January, 2022.
  4. He deposes that noting the orders were obtained fraudulently and by misrepresentation of facts, it is only prudent that they be enjoined in these proceedings and the consent order dated 28<sup>th</sup> October, 2020 and issued on 6<sup>th</sup> November, 2020.
  5. The Applicants aver that they have suffered great prejudice by the blatant disobedience and contemptuous acts of the Respondents who denied them an opportunity to participate in the burial of their father. If the consent order dated 28<sup>th</sup> October 2020 and issued on 6<sup>th</sup> November 2020 remains and is executed, the said order will be aiding an illegality.
  6. That it is imperative and in the interest of justice that the said orders of 6<sup>th</sup> November, 2020 be reviewed.
  7. The Plaintiffs/Respondents opposed the application through an affidavit in reply dated 28<sup>th</sup> February, 2022 and sworn by Carolyn Kalunde Muumbo, the 3<sup>rd</sup> Plaintiff/Respondent, stating that this matter was heard and determined and execution therein is at an advanced stage. That the parties are not affected and have nothing to do with the prayers in the Motion. She deposes that the Applicants were never parties in this matter which has since been concluded and the court is functus officio. Further that the application is an abuse of the court process and should be dismissed with costs to the Plaintiffs/Respondents.
  8. As per court’s directions issued on 24<sup>th</sup> March, 2022, the application was canvassed by way of written submissions. On record are the Plaintiffs’/Respondents’ submissions dated 6<sup>th</sup> June, 2022. I have not seen any submissions by the Proposed Defendants/Applicants.



9. I have read through the said submissions and the authorities relied upon for consideration in my analysis and determination of the application.

### **Analysis and Determination**

10. I have considered the Applicants' application dated 24<sup>th</sup> January, 2022, the grounds upon which it is premised, the response therein, submissions and the authorities cited by either party. I find the sole issue emerging for determination being whether the Proposed Defendants/Applicants have met the threshold to be joined in this matter.

11. Before I proceed to consider the application, I must point out that, while the application is disguised as one seeking the Applicants to be joined as Defendants the same has been brought under the wrong provision of the law. It has been brought under the provisions of Order 45 Rules 1 and 2 of the Civil Procedure Rules, which deals with applications for review.

12. The proper provision under which the application should have been brought is Order 1 of the Civil Procedure Rules. Order 1 Rule 3 of the said Rules provides that:

“All persons may be joined as defendants against any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”.

13. Further, Order 1 Rule 10(2) and 10(4) of the Civil Procedure Rules 2010 with respect to substitution and addition of parties, read as follows:-

“(2) 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.

(4) Where a Defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new Defendant and, if the court thinks fit, on the original Defendants.”

14. That notwithstanding, the application for joinder has been objected to by the Plaintiffs/Respondents and hence this court has a duty to determine whether or not allow the application for joinder of the Proposed defendants to these proceedings. In determining whether or not to allow the Applicants to be joined to these proceedings, I am guided by the principles for joinder as set out in the case of *Joseph Njau Kingori v Robert Maina Chege & 3 Others* [2002]eKLR, where Nambuye, J (as she then was) held as follows;

- a) He must be a necessary party.
- b) He must be a proper party.
- c) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff.



- d) The ultimate order or decree cannot be enforced without his presence in the matter.
  - e) His presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit.
15. The said principles were reiterated in the case of *Julius Meme v Republic & Another* [2004]eKLR, as follows:
- 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 preempt a likely course of proliferated litigation.
16. In the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* [2014]eKLR, it was stated:-
- “..... while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.
- Consequently, 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.”
17. The principles for joinder were also set out by the Supreme Court of Kenya in the case of *Francis K. Muruatetu & Another v Republic & 5 Others* [2016]eKLR, as follows: -
- a) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
  - b) The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
  - c) Lastly, a party must, in its application, set out the case and/or submission it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”
18. In this instant case, the proposed Defendants are seeking to be joined in these proceedings. They are also seeking for review of the consent order issued on 6<sup>th</sup> November, 2020. I have perused the annexures in support to the application and note that there is a decree issued in HCCA No.7 of 2016, where the Applicants are named as Respondents. The record also shows that there is a succession matter being Succession Cause No.1673 of 2015 - Estate of Timothy Mwandu Muumbo. The consent order



determined this matter and from the ruling delivered on 30<sup>th</sup> September, 2021, it is evident that this matter is concluded and is now at the execution stage.

19. The Applicants allege that the Plaintiff/Respondents filed an application in Succession Cause No.1673 of 2017 - Estate of Timothy Mwandi Muumbo seeking for the mortuary funds to be derived from the estate of the deceased and have invoked an order that directed them to pay the mortuary fees. They also alleged in their pleadings that the orders were obtained fraudulently and by misrepresentation of facts.
20. I have perused the order issued in HCCA No.7 of 2016 and my understanding of the said order, and more so orders No.(3) and (4) of the decree, was that no one should be penalized or condemned to pay mortuary fees of up to Kshs.3 million. Further, it was directed that funds shall be sourced for payments for outstanding mortuary bill and preparation of resting the deceased at the burial site.
21. I have also noted that the Applicants in this matter are also parties in Succession Cause No.1673 of 2015 - Johnstone Kassim & 2 Others v Billy Mbuvi Muumbo & Another which in my considered view, is also a right forum where the Applicants can adjudicate the dispute other than seeking to reopen this matter which was heard and is now concluded.
22. The second limb of the Applicants' application is anchored on Order 45 of the Civil Procedure Rules whereby the Applicants are seeking review of the consent order issued in this matter.
23. It has been held time and again that, a consent order is like a contract between parties and the court cannot re-write a contract for the parties. It can only be set aside or reviewed if it is proved that it was obtained by fraud, non-disclosure of material facts, mistake or for any other reason the court may deem necessary.
24. In the case of *Sofia Mohamed v Rodah Sitienei* [1992]eKLR, the Court stated as follows:-

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled, which are not carried out.”
25. Further, in the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266, the court held as follows;

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”
26. In the instant case, the Applicants have not shown that the consent judgment was obtained by either fraud, non-disclosure of material facts or mistake. Therefore, the application does not pass the test for this court to review or set aside the consent judgment in this matter.
27. Being guided by the reasoning in the above mentioned case, I do find that the Applicants have not demonstrated any identifiable interest and stake in the present suit to warrant the grant of the orders being sought.
28. In the upshot of the foregoing analysis, I make a finding that the applicants' application dated 24<sup>th</sup> January, 2022 lacks merit and is hereby dismissed with costs to the Respondents.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**D.O CHEPKWONY**



## **JUDGE**

In the presence of:

M/S Njoroge holding brief for M/S Mungai for Respondent/Plaintiff

Mr. Musembi counsel for Defendant/Applicant

Court Assistant - Mwenda

