



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1151 OF 2005

JAYBINIX INVESTMENTS LIMITED.....PLAINTIFF

=VERSUS=

HAWI DEVELOPERS LIMITED.....1ST DEFENDANT

THE DIRECTOR OF SURVEY.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

AND

- 1. SULEIMAN NYAMWAYA OKOTH**
- 2. ANTHONY MUHIA NGANGA**
- 3. AYLWI JONES**
- 4. CATHERINE AND GERALD OOSTERWIJK**
- 5. MWIRERI INVESTMENT COMPANY**
- 6. JOHN NJORA NDIRITU AND JANE WANGU NJORA**
- 7. MOHAMMED HASSAN ABDULAH**
- 8. RESILIENT INVESTMENT LIMITED**
- 9. ABDUL HAJI**
- 10. JANET MUSYA**
- 11. DANIEDL ISHAMAEL OPANDE**
- 12. KENNEDY OMBUKI**
- 13. JACOB OMBONGI**
- 14. GLADYS JEPKOECH BIY**
- 15. STANLEY NJERU GACHOKI**
- 16. MATHEW GITONGA NTUARA**
- 17. IAN GORDON STAMP**

18. EDWARD MUNGATANA

19. ANGELA DUSABIMANA

20. MONICA ODEDE

21. FRANKLIN ONJALA OMBAKA

22. RACHAEL ODEDE

(SUING AS OWNERS OF UNITS IN HAWI APARTMENTS

ON ALL THAT PROPERTY KNOWN AS LR NO 209/14990/4).....APPLICANTS

RULING

1. This is the Notice of Motion dated 23rd September 2021 brought under section 1A, 1B, 3A of the Civil Procedure Act, orders 1, rule 10, 40, rules 1 and 3 and 51 of the Civil Procedure “Rules and all other enabling provisions of the law.

2. It seeks orders:-

1. Spent.

2. Spent.

3. That the Applicants be joined parties to this suit as Defendants to this suit and be allowed to plead to the Plaintiff’s claim.

4. That the consent judgment entered herein on 4th December, 2009 as well as the decree issued on 8th April 2009 be set aside.

5. That cost so this application be provided.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (e).

4. The application is supported by the affidavit of Suleiman Nyamwaya Okoth, the 1st Applicant herein sworn on the 29th September 2021 and a supplementary affidavit sworn on 25th October 2021.

5. The Application is opposed. There is a replying affidavit by Jaimeen Tushar Patel, a director of the Plaintiff/Respondent sworn on the 13th October 2021.

6. On the 14th October 2021 the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

7. Ms Muriithi holding brief for Mr. Imanyara told the court that the 1st Defendant did not wish to oppose the application.

8. The Applicants submissions are dated 26th October 2021. It is the Applicant’s case that they purchased their respective apartments between 2005 and 2007 and fulfilled all their obligations under their respective sale agreements. That their individual leases were registered against the Mother Title. That they have sufficient interest to challenge the impugned consent.

9. The Plaintiff’s/Respondent’s submissions are dated 29th October 2021. Its contentions that the consent judgement and the subsequent decree was entered regularly between consenting parties who freely chose to determine the suit by way of an out of court settlement. Further that this court became *functus officio* upon adoption of the consent and cannot entertain an application for joinder or setting aside judgment at this point.

10. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the Applicants can be enjoined as defendants in this case.

(ii) Whether the consent judgment ought to be set aside.

(iii) Who should bear costs of this application?

11. **Order 1 Rule 10(2)** of the Civil Procedure Rules 2010 provides that:

“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”

12. In the instant suit the proceedings were concluded upon adoption of the consent dated 4th December 2009. There are no proceedings pending before this court. In the case of **JMK vs MWW & Another [2015] eKLR** it was held that:-

“Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar’s Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

*This Court adopted the same approach in **CENTRAL KENYA LTD. V. TRUST BANK & 4 OTHERS**, CA NO. 222 OF 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is 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.”

*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 as 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 our Civil Procedure Rules, in **TANG 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 the 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; and that a party can even be added at the appellate stage.*

It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014”.

13. It Should also be noted that the Applicants seek to be enjoined to the suit without seeking to re-open this suit.

14. The Applicants herein seek that the consent judgment be set aside. The said consent was adopted by the court on 4th December 2009. At the time of the consent the Applicants herein were not parties to the suit. In the case of **Flora N. Wasike vs Destimo Wamboko [1982-88] IKAR 625**. It was held that:-

“It is now well settled law that consent judgment or order has a contractual effect and can only be set aside on grounds which could justify setting a contract aside or if certain conditions remain to be fulfilled which are not carried out.”

Similarly in the case of **Mbugua Ikumbu vs Barclays Bank of Kenya Limited [2015] eKLR**, the Court of Appeal held that:-

“The law on variation of a consent judgment is now well settled. The variation of a consent judgment can only be on grounds that would allow a contract to be vitiated. These grounds are but not limited to fraud, collusion, illegality, mistake or agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts”.

Also in **Brooke Bond Liebig vs Mallya [1975] EA 266** the Court of Appeal held thus:

“A consent judgment may only be set aside for fraud, collusion or for any reason that would enable the court to set aside an agreement.

I am guided by the above authorities in finding that the Applicants herein have not demonstrated any of the grounds to warrant the consent judgment to be set aside.

15. The Applicants have brought this application after an inordinate delay. It is over eleven (11) years since the consent judgment was entered. The delay has not been explained. In the case of **Abigail Barma vs Mwangi Theuri ELC No 393 of 2013**, the court made reference to **Snell’s Equity 30th Edition at P.33 paragraph 3-16 (quoting Lord Camdem LC in Smith v Clay [1967] 3 Bro C.C 639 n where it was asserted that a court of equity;**

“has always refused to aid stale demands where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing”.

16. I find that this court is *functus officio* upon the consent judgment being adopted. I rely on the case of **Raila Odinga & Others vs IEBC [2013] eKLR**.

17. In conclusion, I find no merit in this application and the same is dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF NOVEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Amboko for the Applicants

Mr. Ongeru for the Plaintiff/Respondent

No appearance for the Defendants

Steve - Court Assistant