



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 187 OF 2015 (O.S)**

**(Suing on his own behalf as a Beneficiary of the estate of the late**

**MUKOMA WA NJIRI.....PLAINTIFF**

**VERSUS**

**NATINAL LAND COMMISSION.....1<sup>ST</sup> DEFENDNAT**

**MINISTRY OF LAND HOUSING & URBAN DEVELOPEMENT.....2<sup>ND</sup> DEFENDNAT**

**AND**

**JIMNA NJUGUNA KIMUNYA.....1<sup>ST</sup> INTERESTED PARTY/APPLICANT**

**PETER MBURU KARIUKI.....2<sup>ND</sup> INTERESTED PARTY/APPLICANT**

**RULING**

**INTRODUCTION**

1. The Interested parties herein has filed an Amended Notice of Motion Application dated the 24<sup>th</sup> of May 2021 and in respect of which same seeks the following Reliefs;

I. ....(spent)

II. *This honourable court be pleased to issue a temporary injunction restraining the Plaintiff, whether by himself, his servant, or any person whatsoever from subdividing, encroaching upon, interfering with, wasting, damaging, alienating, occupying, developing or disposing of or in any other manner interfering with the interested parties ownership and peaceful, actual and exclusive possession, enjoyment and use of the parcel of land known as L.r No. Limuru/Kamiruthu/201, pending the hearing and determination of this suit.*

III. *The honourable court be pleased to review and set aside the honourable court judgment delivered and dated on the 12<sup>th</sup> September 2018, and direct this case be heard afresh with the participation of the interested parties.*

IV. *Costs of this application be provided for.*

2. The subject application, has been anchored and/or premised on the grounds contained and/or referred to at the foot of the amended Notice of Motion Application dated 24<sup>th</sup> May 2021, and same is further supported by the affidavit of one Peter Mburu Kariuki, sworn on the 21<sup>st</sup> May 2021, and to which the Interested parties has annexed a total of 13 annextures.

3. Following the filing and service of subject application, the Plaintiff herein responded by filing two sets of documents, namely grounds of opposition dated the 21<sup>st</sup> July 2021, as well as a Replying affidavit, the latter filed on the 17<sup>th</sup> August 2021. For clarity, the Plaintiff herein has controverted the interested parties averment to and/or in respect of the suit property.

4. After the filing and service of the Replying Affidavit, the interested parties sought for and obtained leave, to file and serve a Further affidavit, with a view to responding to and/or answering the allegations raised by the Plaintiff/Respondent. In this regard, the interested

parties indeed filed a Supplementary affidavit sworn on the 27<sup>th</sup> September 2021.

### **DEpositionS by the parties**

5. The Affidavit in support of the subject application was sworn by Peter Mburu Kariuki, namely the 2<sup>nd</sup> interested party herein. In respect of which, same contends that the suit property herein was allocated to and/or in favor of the interested parties vide letter of allotment issued and dated the 12<sup>th</sup> April 1996.

6. It was the further averment by the 2<sup>nd</sup> Interested party that upon the issuance of the letter of allotment, same proceeded to and paid the Stand premium, as well as the other statutory levies, indicated and/or prescribed at the foot of the letter of allotment.

7. On the other hand, the Interested parties have further averred that after the allocation of the suit property, same proceeded and took possession thereon and that the interested parties, thereafter proceeded to assume ownership of the suit property.

8. Other than the foregoing, the Interested parties have also averred that despite having been allocated the suit property, they were surprised that the Plaintiff/Respondent, had filed and/or commenced the instant suit and thus converted same.

9. In any event, the interested parties have also proceeded to aver that the subject suit was filed by the Plaintiff herein and that same did not cause the court process and/ or pleadings to be served upon the Defendants/Respondents.

10. Other than the foregoing, it was the interested Parties' case that the suit property, belongs to and is registered in the names of the Interested Parties.

Consequently and In view of the foregoing, the interested parties have therefore sought to be joined into the proceedings.

### **Plaintiff/Respondent case**

11. Upon being served with Amended Notice of Motion Application herein, the Plaintiff herein filed *inter – alia* Replying affidavit, whereby same opposed the application and in particular, averred that the suit property, namely Limuru/Kamirithi/201, is separate and distinct from L.R No Limuru/Kamirithu/480, the latter which is registered in the names of the Interested parties.

12. On the other hand, the plaintiff also averred that the Interested parties herein, have no lawful and/or legitimate rights over and in respect of the suit property, which suit property, has since been transferred and registered in the names of the Plaintiff/Respondent.

13. Besides, the Plaintiff has also averred that to the extent that the interested parties herein were not parties to the original suit, the same cannot now heard to seek for an order for setting aside and/or variation.

14. Notwithstanding the foregoing, the Plaintiff has also averred that not being parties to the suit and given that same have not sought to be joined as interested parties, the interested parties herein cannot now seek to set aside the judgment and the decree.

15. Consequently, the Plaintiff has implored the honourable court to find and hold that the subject Application, which has been brought by strangers, is thus incompetent, premature and hence unlawful.

16. On the other hand, the Plaintiff has also contended that the interested parties have also not established and/or laid before the honourable court, any sufficient stake, Interest and/or basis, upon which to evaluate their interest and/or claim in respect of the suit property.

### **SubmissionS:**

17. The Application herein came up for hearing on the 22<sup>nd</sup> July 2021, on which date the honourable court gave orders and/or directions towards the hearing and disposal of the Application. For clarity, it was ordered and/or directed that the said Application be canvassed and be disposed of by way of written submissions.

18. Pursuant to and in line with the directions, the interested parties proceeded to and indeed filed their set of submission on the 5<sup>th</sup> October 2021 and same also cited and relied on a number of decisions.

19. According to the interested parties, the suit property is alleged to have been allocated and/or alienated in favor of the interested parties, and in this regard same have a lawful interest and/or stake in the subject matter.

20. It is further submitted that after the suit property was allocated to the interested parties, same processed the title documents, culminating into the claim for and/or in respect of the suit claim.

21. Further, the interested parties have also contended that when the suit herein was filed, same were not served and/or issued with the necessary pleadings, to enable same to file any response and/ or participate in the Defence of same.

22. Notwithstanding the foregoing, the Plaintiff herein, contended that the interested parties ought not to be joined, given that same have not shown and/or established any interest and/ or claim to the suit property, which is separate and distinct from the property, claimed by the

Interested Parties.

### **Issues for determination**

23. Having reviewed the Notice of Motion Application dated the 24<sup>th</sup> May 2021, as well as the supporting affidavit and the further supporting affidavit, and also the written submissions filed on behalf of the interested parties, on one hand, and the Replying affidavit and the Grounds of opposition filed by the Plaintiff, the following salient issues are germane and/or worthy of determination;

I. *Whether the Interested parties herein can be admitted or joined in the proceedings herein in the absence of a prayer for such joinder or at all*

II. *Whether an order for temporary injunction can issue in the absence of any substantive suit filed by an Applicant/interested party*

III. *Whether the interested parties who have not been joined and/or admitted, can seek for an order of review and whether any ground for Review has been established*

IV. *Whether the Interested parties herein have a legitimate stake/claim in the subject suit to warrant inclusion*

### **Analysis and determination**

#### **Issue number 1**

24. It is common ground that the interested parties herein were never parties to the initial suit, to warrant them making any substantive application, for purposes of hearing, determination and/or disposal.

25. Having not been parties to the original proceedings, it behooved the interested parties herein, to first and foremost, seek from the court an order to be joined in the proceedings as such interested parties, so as to get a foothold, upon which the interested parties can thus be heard and/ or afforded any right audience

26. In my humble view, it is to the admission of such a party as an interested party that enables the admitted interested party, to thereby have a right of audience and by extension the *locus standi*, to be able to pursue any substantive orders and/or reliefs in the subject matter.

27. However, in respect of the subject matter, the proposed interested parties, have neither sought for any prayer and/or relief to be admitted into the matter as interested parties and in the absence of such prayer, I am afraid that the court cannot proceed to do so.

28. In support of the foregoing position, I beg to invoke and rely on the decision in the case of **IEBC v Stephen Mutinda Mule (2013) eKLR**, where the honourable court of appeal restated the law as hereunder;

***“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....***

***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”***

29. The Amended Notice of Motion was crafted by and/ or on behalf of the interested parties herein, who knew or otherwise should know, the nature of Reliefs to seek from the honourable court.

30. Suffice it to say, that in the wisdom of the interested parties, they did not require an order of the court to deem same as admitted and/ or joined, as interested parties and in my humble view until and unless the interested parties are admitted as parties in the subject matter, they [same] would remain Strangers and thus be incapable of appropriating a right of audience.,

31. On the other hand, the interested parties herein, perhaps imagine that by filing the application and terming themselves as the interested parties, that such terminology and/ or self Baptism, would thus suffice, to constitute and make them, read, the Interested Parties, parties to the case.

32. In my humble view, a party who has not been admitted and/ or joined to an existing suit and who is seeking admission and/or joinder is either a proposed Defendant or proposed Interested Party.

33. Consequently, the Applicants herein are and remain proposed interested parties and it would take an order of the court, made pursuant to **Order 1 Rule 10 (2) of the civil procedure rules 2010**, to enable same to be embodied and/or conferred with the title interested parties and therefore be able to participate and/ or take part in the proceedings.

34. To the extent that there is no such request, I am not disposed to grant any and in the absence of an order admitting, joining and/or deeming the proposed interested parties herein as parties, the substantive orders sought are thus not available, whatsoever.

#### ISSUE NUMBER 2:

35. On the other hand, it is also apparent that the proposed interested parties herein have also sought for an order of temporary injunction in the subject same have invoked the provisions **of Order 40 Rule 1 & 2 of the Civil Procedure Rules**.

36. In my humble view, the provisions of **Order 40 Rule 1 of the Civil Procedure Rules, 2010**, can only be invoked or relied upon by a party who has filed a suit, whether vide a Plaint, Originating Summons and/or Petition, subject to the relevant and applicable law.

37. Alternatively, the remedies under **Order 40 Rule 1 of the Civil Procedure Rules, 2010** can also be adverted to by a Defendant or Respondent, who has filed a counter claim or a cross Petition, and not otherwise.

38. Suffice it to say, that the condition upon which an order of temporary injunction can and often do issue espouses *inter – alia*, the existence of a Prima facie case, which in my humble view, connotes that the person seeking the orders of temporary injunction indeed has a suit, which raises prima facie issues.

39. In support of the foregoing position, I can do no better than to refer to the decision in the case of **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others** [2003] KLR, where the Court held as follows:

**“In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”**

40. From the foregoing decision, it cannot gainsaid that before an application of temporary can be sought, the claimant must of necessity, have a Substantive suit, upon which the Application for temporary injunction, is predicated, grounded and/or premised.

41. However, in the instant situation, the interested parties have sought for an order of injunction, but in the absence of any precipitate suit, noting that the subject suit belongs to the Plaintiff/Respondents and in any event, the suit was heard and concluded upon the rendition of the Judgment by the Court.

42. In my humble view, the Application and in particular, the limb seeking for temporary injunction, has been made in vacuum and same, is thus incapable of being granted, either as sought or at all.

#### ISSUE NUMBER 3:

43. Other than the prayer for temporary injunction, the Interested parties herein, have also sought for an order for Review and setting aside of the judgment and consequential decree rendered on the 12<sup>th</sup> September 2018, and for a direction that the subject matter be heard *de -novo* with the participation of the interested parties.

44. Whereas I am alive to the fact that the provisions of **Order 45 Rule 1 of the Civil Procedure Rules, 2010**, are worded in such a manner that Any person, irrespective of whether the person was party to the suit or otherwise, can move the court for an order for Review, as was held 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.*

45. Nevertheless, to facilitate partaking of and/or seeking a substantive Relief, it is imperative to note, that a person who was *hitherto* not a party, must first seek to joined in the proceedings and thereby accrue and/or attract the requisite *locus standi*, to found the request and/or application for Review.

46. In respect of the instant matter however, I have found and held that the interested parties herein, had not applied vide the subject Application, to be joined as Interested parties. Consequently, and without any prayer for joinder, it is therefore difficult to appreciate how the interested parties hereof (*who remains strangers and/or outsiders*) can accrue or attract a substantive order for Review.

47. Just as I found while dealing with the first issue herein, I am afraid that without being joined to the proceedings as interested parties, the Application herein, which is seeking for Review, has similarly, been made in Vacuum.

48. Notwithstanding the foregoing, even assuming that the interested parties herein do not require an Order for joinder as such, and that same can be able to mount the Application for Review even from outside the proceedings, it would still be necessary that the Interested

parties herein, do establish the Grounds upon which Review can be granted.

49. In my humble view, the Amended Notice of Motion Application has neither espoused nor captured any of the grounds, upon which an order for Review can be premised.

50. For the avoidance of doubt, a party who seeks an order for Review is enjoined to identify or isolate the grounds, upon which the Relief is being sought and thereafter to avail to the honourable court credible evidence, in terms of an affidavit, speaking to and / or establishing the foundation upon which such an order, should issue.

51. However, in respect of the subject matter, no such grounds have been pleaded. Consequently, the Interested parties herein, cannot seek to prove that which has neither been pleaded nor alluded to in the affidavit, sworn by the Interested Parties, or at all.

52. Notwithstanding the foregoing, no evidence has been availed and/or supplied, even to establish, the basis for grant of Review.

53. In the absence of any evidence that rises to the threshold stipulated and/or envisaged under the provisions of order 45 rule 1 of the civil procedure rules 2010, I am afraid that the prayer for Review, which has been sought herein cannot issue, firstly on account of there being no basis laid, and secondly, on the grounds that there is NO Evidence that have been adduced to warrant such an order.

54. In support of the foregoing position, I invoke and subscribe to the Decision in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR**, where the honourable court observed as hereunder;

*The principles which can be culled out from the above noted authorities are:-*

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.*
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.*
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.*
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.*
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.*
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.*
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.*
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.*
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.*

### **ISSUE NUMBER 3:**

55. Before a court of law can admit and joined a Party to a suit as an interested party, it behooves the party seeking admission and/or joinder, to lay before the honourable court sufficient evidence and/or basis and to establish a nexus with the issues in the suit/case in respect of which same seeks to be joined.

56. In support of the foregoing position, I subscribe to the decision in the case of **Shivling Supermarket Limited Vs Jimmy Ondicho Nyabuti and 2 others (2018) eKLR** the court observed as follows:

***“The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject***

***matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit....”***

57. Premised on the foregoing decision, it becomes apparent that before a party is admitted as interested party, there must be evidence of an identifiable nay tangible Interests. In respect of the instant matter, the interested parties have contended that same are the lawful owners of the suit property and thus the basis upon which they have made the subject Application.

58. However, it must be noted that the suit property herein is known as L.R No. Limuru/Kamirithu/201, yet the letters that have been exhibited by the interested parties as well as the certificate of lease, upon which same anchor their claim relates to a separate and distinct title, namely, **Limuru/Town/480** and not the suit property.

59. On the other hand, the Interested parties herein, have also contended that their interest in the subject property, which they say was allocated unto same, is because they have been in adverse possession thereof for more than 24 years.

60. I am afraid that a claim for adverse possession can not arise in a matter where the Applicant claims to be the registered owner of the suit property. In this case, the interested parties cannot be the title holders in respect of what was reportedly, allocated to them and still take a claim for Adverse possession in respect of the said suit property.

61. In my humble view, the interested parties herein, have no identifiable and/or genuine claim to the suit property and in the absence of such identifiable interest,[ which ought to have been shown in the affidavit ], the Interested Parties, can therefore not seek to be joined in the subject matter.

62. Suffice it to say, that he who claims to own a particular property, cannot similarly propagate a claim for adverse possession, because one is the antithesis of the other.

63. In support of the foregoing position, I adopt and restate the observation of the court of appeal in the case of **Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR**

*In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property.*

#### **FINAL DISPOSITION:**

64. Though the Application herein has been mounted by persons who describe themselves as Interested parties, it is sufficient to note and observe, that the said parties ought not and should have described themselves as Proposed Interested Parties, pending an order of the court to admit and/ or join same, as Interested parties.

65. Nevertheless, because they have described themselves as such, I would use the term Interested parties, albeit, in a loos manner to embody and include the same and direct that the Application so filed on behalf of the said interested parties herein, is bereft and devoid of Merits and thus same is hereby Dismissed.

66. Costs ordinarily follow the Event and the subject Application having failed, I hereby direct that the Proposed Interested Parties herein, shall pay Costs to the Plaintiff/ Respondent.

67. Finally, the orders of status quo, which were issued by the court on the 23<sup>rd</sup> September 2021, are hereby vacated and/or Discharged.

68. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT,**

**MILIMANI.**

**IN THE PRESENCE OF;**

**JUNE NAFULA COURT ASSISTANT**

**MR GEORGE MWAURA FOR THE INTERESTED PARTIES.**

**N/A FOR THE PLAINTIFF/ RESPONDENT.**