REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

ELC APPEAL NO. E005 OF 2021

JOHN BARIU DOMISIANO.....APPELLANT

VERSUS

LUCY MWAROMO MUNGANIA.....1ST RESPONDENT

CATHERINE MUTHONI.....2ND RESPONDENT

(Being an appeal from the Ruling of the Honourable J. M Njoroge,

Chief Magistrate delivered on the 2nd December 2020

in Chuka CMCC 132 of 2015)

JUDGEMENT

1. The Appeal herein arises from the ruling dated and delivered on 2nd December,2020 by Honourable J. M. Njoroge Chief Magistrate in Chuka CMCC No.132 of 2015.

2. The appellant, being aggrieved by the said ruling filed the Memorandum of Appeal dated 8th July 2021 and sets out the following grounds:

i. That the learned Trial Magistrate erred in Law and fact in failing to find that the Appellant has an identifiable stake and or legal interest in the proceedings and enjoin him as an interested party in the primary suit.

ii. That the Learned Trial Magistrate erred in Law and in fact in failing to find that the judgement and or decree of November 2016 was adverse to the Appellant for not having participated at the trial and therefore rightly accord him an opportunity to be heard.

iii. That the Learned Trial Magistrate erred in Law in failing to appreciate that the Appellant has a constitutional right to be heard and protecting that right.

iv. That the Learned Trial Magistrate erred in Law and fact by finding that the trial court was funtus officio despite the fact that the application before it sought a review of the ex parte judgement.

v. That the Learned Trial Magistrate and in fact and Law in dismissing the appellant's application on the ground that the 2nd respondent failed to defend the claim and transferred the suit land during the pendency of the suit thereby condemning the appellant for the transgressions of the 2nd Respondent.

vi. The learned Magistrate ruling/order is against the weight of evidence on record at the trail thereof.

3. The Appellant prays that the appeal be allowed and the ruling of the trial court dated and delivered on 2nd December 2020 be set aside and the Appellant's application dated 20th December 2019 be allowed. The Appellant also prays that the Respondent bears the costs of this Appeal.

BACKGROUND OF THE APPEAL

4. The appeal is in regard to the ruling of the Honorable court in Chuka CMCC No.132 of 2015 in an application dated 20th December,2019 for orders that:

1. That this application be certified urgent and be heard ex-parte in the first instance.

2. THAT the Honourable Court be pleased to stay execution of the Judgement/Decree in Chuka CMCC No. 132 of 2015 (Lucy Mwaromo vs Catherine Muthoni & John Bariu Domisiano) pending the inter-parties hearing and determination of this application.

3. THAT the Honourable Court be pleased to set aside the ex parte hearing and the resultant judgement dated 2nd November,2016 and the matter be set down for hearing on merit.

4. THAT the Honourable Court be pleased to grant the interested party herein leave to be enjoined as a party in this suit.

5. That the Honourable Court be pleased to issue an order of inhibition inhibiting the registration of any dealings with land parcels No. MWIMBI/C.MAGUTUNI/1153 pending the inter-partes hearing and determination of this application.

6. THAT costs of this application be provided for.

5. The application was supported by the affidavit of John Bariu Domisiano. The 1st respondent opposed the application vide a replying affidavit dated 7/9/2020.

6. In his ruling, the learned trial magistrate noted that the suit was filed and finalized without the involvement of the 1st Defendant (Catherine Muthoni) who never entered appearance, even though she was duly served with the pleadings and delivered his judgement on 2/11/2016 in favour of the plaintiff. The learned trial magistrate stated that the applicant (the Appellant herein) had waited for a period of 4 years without moving the court to set aside the judgement. The court further made a finding that the defendant who was the aggrieved party to the judgement had not moved the court to challenge the judgement. In the court's view, the defendant, it would appear, was fully satisfied with the judgement and did not wish to disturb the same.

7. After considering the principles for setting aside an ex parte judgement under order 10 rule 11 of the Civil Procedure Rules, the trial magistrate found that the applicant in that suit remained a stranger, the case having been heard and determined and a judgement delivered, albeit without the Defendant's participation. The trial court found that the court was funtus officio and that the applicant lacked the locus to challenge a concluded case where he was not a party. The trial court also noted that in delivering a ruling on an application dated 22/3/2018, on 23/10/2019 incorporated the issues that had been raised in the application dated 20/12/2019.For those reasons, the learned trial magistrate found that the application dated 20/12/2019 was an abuse of the court process and dismissed the same with costs, hence this appeal.

THE APPELLANT'S CASE

8. The Appellant submitted that at the time the ex-parte judgement was entered against the defendant in Chuka CM court ELC Case No.132 of 2015 (Lucy Mwaromo vs Catherine Muthoni & John Baariu), the Appellant herein was already the registered proprietor of land parcel reference No. MWIMBI/C-MAGUTUNI/1153.That he had no notice of the suit in court and therefore his interests and rights were undefended in the suit. The Appellant submitted that any determination concerning parcel No. MWIMBI/C-MAGUTUNI/1153 touched on the Appellant's rights over the suit land which rights are guaranteed in the Constitution of Kenya,2010.

9. It was the Appellant's submission that he ought to have participated in the suit at the trial stage to assert his rights over the subject matter. The Appellant cited the provisions of Order 1 rule 10(2) of the Civil Procedure which provides when a party may seek joinder. The Appellant also referred to Rule 2 & 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013 and the Black's Law Dictionary on the definition of an interested party, and submitted that being the registered owner of the subject land, the Appellant ought to have been joined in the suit.

10. Counsel for the Appellant relied on the case of Judicial Service Commission Vs Speaker of the National Assembly & another, and submitted that the purpose of joinder of parties is to avoid multiplicity of suits.

11. It was further submitted that the Appellant never participated in the suit before the trial court and therefore had no opportunity to assert his rights over the same. The Appellant contended that he never knew of any litigation relating to the suit land since he was never served with any pleadings until April 2018 when he learnt that an ex –parte judgement had been entered against the 2nd Respondent in favour of the 1st Respondent herein. That the 1st Respondent failed to provide any evidence to show that the Appellant was notified of the proceedings in the trial court. The Appellant's counsel relied on the case of Brek Sulum Hemed v Constituency Development Fund Board & another (2014) eKLR and submitted that the Appellant has demonstrated that he has an identifiable stake in the subject matter being the registered proprietor of the suit property and currently in occupation of the same, and therefore it is only fair and just that he be joined in the suit before the trial court.

12. The Appellant contended that when the trial court became aware of his interest in the parcel of land under litigation and that he was not involved in the proceedings before the court, and having made an application for review of the judgement, the court ought to have allowed him to assert his rights over the said parcel. The Appellant's counsel relied on the case of Owners of the motor vessel 'Lilian S' -V- Caltex Oil (Kenya) Ltd (1989)KLR,William Ntomauta M'ethanga Sued As M'mauta Nkari v Baikiamba Kirimania (2017) eKLR:Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others (2013) eKLR: and CMC Holdings Limited vs James Mumo Nzioki (2004) eKLR.The Appellant's counsel also cited section 3A of the Civil Procedure Act and Sir Dinshah Mulla in The Code of Civil procedure and submitted that the inherent power of court can come to its aid to act ex debito justiciae to have any determination which affect the appellant set aside.

13. It was further submitted that the trial court decided the Appellants application on facts that were not before the court. That at the time the court made its decision in the matter at the trial stage, the Appellant was the registered proprietor of the parcel of land under dispute, and his registration as such was not challenged before a court of law. That the trial court arbitrarily took away the Appellant's right to own property without giving the Appellant an opportunity to defend his registration as such proprietor. It was submitted that the Appellant's appeal is merited and the same should be allowed.

THE 1ST RESPONDENT'S CASE

14. The 1st respondent submitted that the Appellant had no right over land parcel MWIMBI/MAGUTUNI/1153 and should not be joined in the trial court proceedings and that the trial court was right in dismissing the appellant's application. It is the 1st respondent's contention that the proceedings before the trial court was between the 1st and 2nd respondent and the matter proceeded ex –parte, against the 2nd respondent and an ex parte judgement was entered against the 2nd respondent who never made an application to set it aside,

15. The 1st respondent's advocate relied on the case of James Kanyita Nderitu &another –vs-Marios Philotas Ghikas &another (2016) eKLR on the factors a court takes into account while determining whether or not to set aside default judgement. The 1st respondent's counsel submitted that the court has unfettered discretion in setting aside ex –parte judgement but the same should be done judiciously. That the appellant did not give an explanation as to why he delayed in bringing his application before the matter came up for formal proof on the 19th October,2016 and judgement delivered on 2nd November, 2016.That the appellant brought his application four years after the ex parte judgement was delivered and cannot claim to have known about the suit after four years after judgement was entered.

16. The 1st respondent further submitted that the appellant is not a bona fide purchaser for value since the Green card indicated that he purchased the parcel of land on 12/7/2016 during the pendency of the suit. That the 2nd respondent decided not to participate in the proceedings before the trial court, and sold the suit land while the matter was still pending before court as rightly noted by the trial magistrate in his ruling. It is the 1st respondent's submission that the said transaction is defeated by the doctrine of lis pendens. That it is evident that the 2nd respondent did not confer or pass a clean title to the appellant. The 1st respondent further submitted that the trial court was right when it held that the court was functus officio and the appellant lacked the locus to challenge a concluded case. Counsel for the 1st respondent relied on the case of Telkom Kenya Limited –v- John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited (2014) eKLR and Raila Odinga & 2 others v Independent Electoral &Boundaries Commission & 3 others (2013) eKLR and submitted that the appellant was trying to reopen a concluded case and the court being functus officio could not entertain the application dated 20/12/2019 and therefore rightly dismissed the same. It is the 1st respondent's submission that the appeal herein lacks merit and an abuse of court process and prayed that the same be dismissed with costs.

ANALYSIS & DETERMINATION

17. I have perused and considered the Record of Appeal, the grounds of appeal and the submissions by the parties. This being a first appeal I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the Law.

The issues for determination as I can deduce from the grounds of appeal are whether the trial magistrate erred in Law and fact when, by his ruling dated 2nd December 2020, he disallowed the Appellant's application for setting aside the ex parte judgement in default of appearance and defence by the 2nd Respondent and disallowing the Appellant's application for joinder in the suit.

18. Order 10 Rule (2) of the Civil Procedure Rules provides for Affidavit of service upon non-appearance as follows:

> ***''where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the court''.***

19. Order 10 Rule 11 provides for setting aside of the judgement entered under Order 10.

20. The 1st respondent's suit was filed on 20th July,2015 against the 2nd respondent herein. The record shows that an affidavit of service by Jackson Murithi Robert, a process server was filed on 5th January 2016 in which he confirmed that the 2nd respondent (defendant) was served with the summons to enter appearance on 19th September 2015.The record further indicates that upon satisfying itself that the defendant was duly served with summons but neither entered appearance nor filed a defence entered interlocutory judgement in favour of the plaintiff and the matter proceeded for formal proof. The trial magistrate thereafter delivered the judgement dated 2nd November,2016 in favour of the plaintiff. It cannot be gainsaid that the said judgement was regularly entered. See the case of James Kanyita Nderitu v Maries Philotas Ghika &Another (2016) eKLR in which the court of Appeal made a distinction between default judgement that is regularly entered and one which is irregularly entered.

21. I have perused the entire trial court record. The court record confirms that there was an application dated 23rd March,2018 filed by the 1st respondent herein and which application was opposed by the Appellant who claimed to have purchased the suit land from the 2nd respondent (the defendant in the trial court). The court noted that the transfer of the suit property to the Appellant was done during the pendency of the suit. The trial court was of the view that the Appellant's recourse was against the 2nd respondent/defendant. The court observed that it was evident that the 2nd respondent/defendant did not confer or pass a clean title to the appellant herein. Consequently, the trial magistrate allowed the application dated 22nd March,2018 as prayed. That ruling was delivered on 23rd October,2019.

22. The court record further shows that there was no appeal against the ruling of 23rd October, 2019.Instead, the Appellant herein filed the

application dated 20th December,2019 for orders, inter alia, stay of execution of the judgement, setting aside of the default judgement and for the appellant to be joined as a party in the suit. That resulted in the ruling of 2nd December,2020, now the subject of this appeal.

23. I have perused the said ruling of 2nd December,2020 and I find that the trial magistrate ably considered the principles for setting aside a default judgement. Again, the court found that the appellant in that suit was a stranger and the case had been heard and determined and a judgement delivered. The trial court found that it was in fact funtus officio.

24. The **B**lack's Law Dictionary, Ninth Edition defines the describes *functus officio a*s: -

> "[having performed his or her office]" (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

25. The rule of *functus officio* has exceptions. **Section 99** of the **Civil Procedure Act** establishes the slip rule it provides that: -

> **"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."**

26. The Civil Procedure Rules provides under **Order 21 Rule 3 (3)** that: -

> "A judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review**."**

27. The law allows for the correction of the judgement but not its merits. The Court of appeal *in* **Telkom Kenya Limited Case** *(supra) also held that: -*

> **"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions..."**
>
> **The application for review by the applicant pointed to the fact that his name had been struck out by the amendment to the plaint and the court ought not to have attached liability to a 1st defendant who did not exist and dismissed the case of a 2nd and 3rd Defendant whilst the suit only had two defendants, which did not include the appellant, at the time of the hearing and decision making. The court due to these circumstances was not functus officio and was not barred from reviewing the judgment.**

28. Similarly in **Raila Odinga –Vs- IEBC & 3 Others Petition No. 5 of 2013** the Supreme Court of Kenya cited with approval the following passage from **"The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law"** by **Daniel Malan Pretorious**:-

> ..."**The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."**

29. In addition, the Supreme court also referred to the case of **Jersey Evening Post Limited –Vs- A. Thani [2002] JLR 542** at pg. 550 where the Court stated: -

> **"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."**

30. In my view the trial court rightly found that the court was funtus officio and that the appellant lacked the locus to challenge a concluded case where he was not a party. Based on the above analysis and the fact that the appellant was a stranger to the concluded case it was obvious the court's hands were tied since the court had already finalized the matter without the Appellant's involvement.

31. The trial court rightly considered the principles for setting aside an ex parte judgement under order 10 rule 11 of the Civil Procedure Rules, and the trial magistrate found that the appellant in that suit remained a stranger, the case having been heard and determined and a judgement delivered, albeit without the Defendant's participation. The trial court also rightly found that the court was funtus officio and that the appellant lacked the locus to challenge a concluded case where he was not a party.

32. I do note that it is clear from the records that the transfer to the Appellant was on 12/7/2016 during the pendency of the suit. The doctrine of lis pendens apply as it prevents transfer of the title of any disputed property without the courts consent.

33. Black's Law Dictionary 9th edition, **defines lis pendens as the jurisdictional, power or control acquired by a court over property**

while a legal action is pending. Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)- now repealed.

34. In the case of Mawji vs US International University & another (1976) KLR 185, Madan J.A stated thus…

> ***Every man is presumed to be attentive to what passes in courts of justice of the state or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of facts affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgement or decree in the suit.***

35. In this case, the suit property was subject of litigation and the defendant opted not to participate in the trial and instead transferred the suit property to the Appellant. Indeed, the appellant did participate in the earlier application dated 22nd March 2018 and therefore was aware of the existence of the suit much earlier. The Appellant did not make an application for joinder the moment he became aware of the suit.

36. The threshold of joinder was set out in the case of Francis **Karioki Muruatetu & Another v Republic & 5 others petition 15** as consolidated with 16 of 2013 (2016) eKLR and where the court held that the Applicant must: One must move the Court by way of a formal application. Enjoinment is not as of right, but is at discretion of the court: hence, sufficient ground must be laid before the Court, on the basis of the following elements:

> **(i) 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.**
>
> **(ii) 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.**
>
> (iii) **Lastly, a party must, in its application, set out the case and/or submissions 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**.

37. **Order 7 rule 9** of the Civil Procedure Rule states that;

The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.

38. Therefore, joinder of parties is permitted by law and can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the parties being joined, is necessary: or will just occasion unnecessary delay or costs on the parties in the suit.

39. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that common question of fact or law would arise between the existing and the intended parties. This is the test applied by F.Gikonyo in the case of **Lucy Nungari Ngigi** and 128 others v National bank of **Kenya Limited and another.**

40. In the case of Francis Karioki Muruatetu as stated above the court held that the applicant must demonstrate the personal interest that it has in the matter by laying sufficient grounds before the court; the prejudice it would suffer if it is not joined as interested party; set out the case that it intends to make before the court and demonstrate the relevance of the evidence being proffered to the court in determining the issue in controversy.

41. In all the above cases the court is clear that the interested party must demonstrate: interest or stake in the suit, that he will be affected by the outcome of the suit; his presence is necessary to enable the effectual and complete adjudication of the suit and that finally that the party's interest will only be articulated if allowed to in the proceeding.

42. From the record, it is clear that the appellant knew of the existence of the suit in March 2018 but made no application for joinder then. Further the court found that the suit property was transferred to the appellant during the pendency of the suit, hence the lis pendens rule was applicable.

43. I do find that the learned trial magistrate correctly analyzed the appellant's application and I find no basis to interfere with his ruling. In my view, the learned trial magistrate exercised his discretion correctly in dismissing the Appellant's application.

44. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF DECEMBER, 2021 IN THE PRESENCE OF:

C/A: Ndegwa

Kirimi h/b for Kiruai for Appellant & h/b for Igweta for Respondents

C. K. YANO

JUDGE.