



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 121 OF 2014**

**1. MATHIAS MASIVA AHAZA**

**2. MARIKO MAHUGU MAJANGA**

**3. RAMADHAN ISANDA CHITE.....PLAINTIFFS**

**(Suing as trustees of Magongo Pentecostal Assemblies of God)**

**VERSUS**

**1. SAMUEL GICHUKI**

**2. VICTOR MWANYIKA**

**3. FRANCIS MWANGEKA.....DEFENDANTS**

**AND**

**1. MARIAM SALI SAID**

**2. PETER O. AUMA.....INTENDED INTERESTED PARTIES**

**RULING**

1. The applications for determination are the Chamber Summons dated 11<sup>th</sup> February 2019 in which the interested parties/applicants seek to be enjoined in this suit as interested parties and the Notice of Motion dated 11<sup>th</sup> February, 2019 in which they seek orders of stay of execution of the judgment and decree herein and for the said judgment to be set aside and for leave to the applicants to file their defences out of time. The applications are based on the grounds thereon and supported by the affidavits of Mariam Salim Said sworn on 11<sup>th</sup> February 2019. The Applicants aver that they are the legal/beneficial owners of the two houses without land subject of the execution herein and that they were never served with any pleadings and or notices with regards to the matter.

2. It is deponed that on 24<sup>th</sup> January, 2019 the applicants were called and informed by one of their tenants residing in their house without land on PLOT NO. 413/VI/MN Magongo Kira Sudi in Mombasa that a decree had been pinned on the front and back doors of the houses. That the Applicants proceeded to the premises and found the decree pinned as aforesaid. The Applicants then instructed their advocate who upon perusal of the court file informed them of the present suit. The applicants aver that they were not sued as defendants nor served with any pleadings. It is their case that they purchased their houses without land from Mildred Nyangwange and John Ngeso Pamba and upon taking possession, rented them out to tenants. That they have been collecting rent from their tenants without any interference and or claim from any person until the decrees herein were pinned in their houses.

3. The applicants aver that upon purchase of the houses they were introduced to the owners of the plot being a Wakf of the Estate of one Soud Bin Ali Bashir who issued the applicants with the consent for sale and to whom the applicants have been paying ground rent. The applicants want the court to determine the connection between PLOT NO. 413/VI/MN MAGONGO AND SUBDIVISIONS NO.3517 (ORIGINAL NO.3490129) SECTION VI/MN to establish the applicants' rights and interests. It is the applicants' contention that they stand to suffer irreparably if their tenants vacate and the demolition allowed to proceed since these are their lifetime investments through which they collect monied to sustain their daily livelihood. The applicants have annexed copies of Agreements for sale, decree and receipts. They have also attached a proposed statement of defence.

4. In opposing the applications the plaintiffs filed a notice of preliminary objection dated 28<sup>th</sup> May 2019 and a replying affidavit sworn by Mathius Masiva Ahaza on 28<sup>th</sup> May, 2019. It is the plaintiffs' contention that the Applicants claim that they purchased the houses without land on 14<sup>th</sup> January 2015 and 2<sup>nd</sup> June 2016 respectively when the matter was already filed in court on 27<sup>th</sup> May 2014. That the Plaintiffs case was for eviction orders against the defendants, their agents and or servants from the plot known as SUBDIVISIONS NO.3517 (ORIGINAL NO. 3490/29) SECTION VI MAINLAND NORTH, and that the matter has already been heard and determined by the court and there is nothing pending.

5. The application was canvassed by way of written submissions. The applicants filed their submissions on 21<sup>st</sup> June 2019 while the plaintiffs filed theirs on 27<sup>th</sup> August 2019. I have considered the applications, the preliminary objection raised and the submissions made. The prayer sought in the Chamber Summons dated 11<sup>th</sup> February 2019 is for leave to enjoin the applicants as interested parties in these proceedings. Order 1 rule 10(2) of the Civil Procedure Rules provides as follows:

**10 (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 effectively and completely to adjudicate upon and settle all the questions involved in the suit, be added"**

6. The court has discretion to order the name of a person who ought to be enjoined whether as plaintiff or defendant, or whose presence before the court may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the said suit. The question herein is whether the Applications ought to be enjoined as interested parties.

7. In the amended plaint dated 25<sup>th</sup> June, 2014 the plaintiffs who are suing as Trustees of Magongo Pentecostal Assemblies of God pleaded that Magongo Pentecostal Assemblies of God is the registered owner of the land known as SUBDIVISION NO.3517(ORIGINAL NO.3490/29) SECTION VI MAINLAND NORTH. The plaintiffs sought orders of eviction and permanent injunction against the defendants, their agents and/or servants and for them to demolish all structures erected in the suit land and/or plot and payment of damages for unlawfully trespassing on the plot. The case was heard and determined and judgment was entered in favour of the plaintiffs.

8. The applicants were not parties to the suit and while the suit was still pending they did not seek leave to be enjoined in the proceedings. The applicants have now filed an application for leave to be enjoined in the matter. The applicants have stated that they purchased houses without land from Mildred Nyagwange and John Ngeso Pamba on 14<sup>th</sup> January 2015 and 2<sup>nd</sup> June 2016 respectively. The sale agreements annexed to the affidavit in support of the application herein indicates that the Applicants purchased houses without land on PLOT NO.413/VI/MN Magongo Sudi Area, Mombasa. The Plaintiffs suit against the defendants was over subdivision No. 3517 (Original No.3490/29) Section VI Mainland North. It is clear that these are two different parcels of land. The applicants' right if any, can be addressed separately without joining them in this suit. Besides, it is also the view of this court that the court is functus officio. It is a general principle in law that litigation must come to an end. Ordinarily, a suit would come to an end when a court has rendered a decision and that decision has been acted upon or executed. At that point, the court is said to be functus officio and any party who is aggrieved must now pursue the course of appeal or review to a higher court. In this case, the court did deliver its judgment on 6<sup>th</sup> October, 2018. The decree has already been extracted. I am of the view that in the circumstances this court is in fact functus officio and is not entitled to revisit the matter. The court has already noted that the applicants alleged that they purchased their houses without land on 14<sup>th</sup> January 2015 and 2<sup>nd</sup> June 2016. This suit was filed on 27<sup>th</sup> May, 2014. It is clear therefore that the applicant's acquisition, if time was done during the pendency of the case. In any case, it was over a different parcel. It is my considered view therefore that the applicants should not be joined in the suit as interested parties as there is nothing pending adjudication.

9. The other issue for determination is whether the court should grant stay of execution and set aside the judgment herein. The principles guiding the setting aside judgment are trite that the court has wide powers to set aside save that where the discretion is exercised, the court will do so on terms that are just. In the case of **Patel –v- East Africa Cargo Handling Services Ltd (1974) EA 75** at page 76 Duffus P states thus:

***"There is no limit or restriction on the Judge's discretion except that if he does vary the judgment he does so on such terms as may be just....The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on merits...."***

10. In **Shah –v- Mbogoh (1967) EA 116** at page 123, Harris J, stated:

***"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."***

11. In this case, the Applicants in their proposed statement of defence aver that their Swahili type houses are located on PLOT NO.413/VI/MN Magongo and not PLOT NO. SUBDIVISION NO.3517 (ORIGINAL NO.3490/29) SECTION VI MAINLAND NORTH. It is clear that the interests of the applicants are in a plot different from the suit property for which judgment has already been delivered and decree issued. In my view, even if the Applicants were enjoined in the suit, which I have declined, the intended defence raises no triable issues which call for trial as it relates to a different parcel of land. Further, the court has declined to join the Applicants to the suit, therefore the orders for setting aside cannot issue. In addition, it is my view that the application for stay of execution is not merited.

12. The upshot is that the notice of motion dated 11<sup>th</sup> February 2019 and the Chamber Summons dated 11<sup>th</sup> February 2019 lack merit and are hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 15<sup>th</sup> day of January 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Mrs. Kipsang holding brief for Asige for plaintiff

Mutugi for Mulei for 1<sup>st</sup> and 2<sup>nd</sup> Intended Interested Parties

No appearance for Defendants.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**