**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 131 OF 2013**

**ELISHA KARE BUSIENEI.....1ST PLAINTIFF**

**AGNES ROP.....2ND PLAINTIFF**

**STEPHEN KEMBOI.....3RD PLAINTIFF**

**JACKSON KIBOR.....4TH PLAINTIFF**

**VERSUS**

**JAPHET KIPYEGO CHEPKWONY**

***(Suing as the administrator of the estate of***

**ELIZABETH J. SIRMA.....1ST DEFENDANT**

**REBECCA SOY.....2ND DEFENDANT**

**GIRO COMMERCIAL BANK LTD.....3RD DEFENDANT**

**AND**

**NICHOLAS GITUHU KARIRA.....1ST APPLICANT/INTERESTED PARTY**

**ALLAN GEORGE NJOGU KAMAU.....2ND APPLICANT/INTERESTED PARTY**

**AND**

**FESTUS MITEI KIPTOO.....1ST PROPOSED INTERESTED PARTY/APPLICANT**

**JEPKORIR KIPLAGAT.....2ND PROPOSED INTERESTED PARTY/APPLICANT**

**RULING**

**1.** This is a ruling on two consolidated applications, one dated **10/7/2019** and the other one dated **18/9/2019**.

**2.** The application dated **10/7/2019** has been brought by the first set of applicants/interested parties, **Nicholas Gituhu Karira** and **Allan George Njogu Kamau,** who seek the following orders:-

**(a) …spent**

**(b) That this court be pleased to stay execution of its judgment/decree delivered on 18/7/2016 pending the inter partes hearing and determination of this application and eventually of the suit herein.**

**(c) That this court be pleased to review/set aside and/or vary its judgment delivered on the 18/7/2016, reopen case and enjoin the applicants into the suit as interested parties pending the inter partes hearing and determination of this application and eventually of the suit herein.**

**(d) That costs be provided for.**

**3.** This first application is brought under **Section 1A, 1B, 3, 3A & 80 (a) (b) of the Civil Procedure Act, Order 45 Rule 1, 2 & 3 of the Civil Procedure Rules 2010,**

**4.** The application is supported by the affidavit of the 1st applicant/interested party sworn on **10/7/2019** as well as his two further affidavits, one dated **16/10/2019** and the other one dated **13/11/2019.**

**5.** The application dated **18/9/2019** has been brought by another set of two Proposed Interested Parties, **Festus Mitei Kiptoo** and **Jepkorir Kiplagat,** who seek the following orders:-

**(1) That pending the hearing and determination of this application and further orders of this court, the applicants be granted a temporary stay of execution of judgment issued on 18/7/2016 together with orders issued pursuant thereto pending hearing and determination of this application interpartes.**

**(2) That the proposed interested parties herein be granted leave to enjoin in this suit, tender evidence and participate in the proceedings herein.**

**(4) Any other relief as the court may deem fit and just to grant in the circumstances of this application**

**(3) That the costs of this application be provided for.**

**6.** The latter application is brought under **Order 51 Rule 1 and Order 22 Rule 75 of the Civil Procedure Rules 2010, Section 1A, 1B, 3 and 3A of the Civil Procedure Act.**

**7.** The application is supported by the affidavit of the 1st proposed interested party/applicant sworn on **18/9/2019.** That affidavit reiterates the same matters set out in the grounds at the bottom of the application.

**8.** The grounds upon which the first application is made are that the applicants therein purchased from **Japheth Kipyego Chepkwonya** and **Elizabeth Sirma** for the consideration of **Kshs.2,000,000/=** which sum they paid in full **one acre** of land from the land comprised in **Eldoret Municipality Block 14/586** and **two acres** from the land comprised in **Eldoret Municipality Block 14/604** on **6/1/1997**; that they took possession of the then vacant plots; that in **1998** the plaintiffs herein lodged proceedings against the defendants in respect of plot **No. 586** and **604** which suit was heard and determined without joinder of the applicants who have up to this day occupied and utilized the suit land. The applicants maintained they ought to have been enjoined in that suit since it affected their properties; in the alternative the plaintiffs and the defendants in this suit ought to have brought to the attention of the court the presence of the applicants on the suit properties or counterclaimed against the applicants. It is alleged that they were therefore not accorded a chance to participate in the suit; they are willing to be enjoined to the suit and heard by way of review to bring on board additional evidence which was not tendered during the trial and which they consider as admissible. It is averred that the final orders touching on the parcels in question were issued by the court and the applicants though not enjoined in the suit are now living with the dire consequences of the court's decision yet they were not heard. The applicants further aver that they had filed **Eldoret ELC No. 295 of 2016** involving the defendants herein but they were advised to reopen the suit herein by way of review. They assert they possess considerable evidence regarding the suit land and may suffer irreparable loss unless the orders sought are granted.

**9.** In the second application the grounds relied on are that the applicants' family members have been in possession of the suit properties for many years; that they have developed permanent structures thereon and they stand to be evicted from the suit parcels unless the orders sought are granted; that they were condemned unheard in contravention of the principles of natural justice and stand to suffer irreparable loss if the orders sought are not granted since they may be evicted at any time yet they have a stake in the suit properties, having purchased land for value therefrom.

**10.** The two applications are therefore similar in nature; the four individuals are now applying for joinder as well as reopening of the suit for hearing so as to include their evidence claim that they were not enjoined by the existing substantive parties.

**11.** In response to both applications the **4th plaintiff, Jackson Kiprotich Kibor,** filed on **17/10/2019** a sworn replying affidavit dated **16/10/2019** on his own behalf and on behalf of the other plaintiffs. His response is that the applications are a mere afterthought aiming at frustrating or obstructing the course of justice; that this suit had been pending since **1998** and was concluded on **18/6/2016**; that the land title to the suit land is in the name of all the parties (the four plaintiffs and the 1st and 2nd defendants) who were the shareholders; that there is nothing that warrant the revisiting of the judgment of **18/6/2016** as the applicants were not partners or parties in the ownership of **Eldoret Municipality Block 14/604** (part of **LR No.11383**); that the applicants knew of the existence of the matter; that there is no new and important evidence at this stage which was not in possession of or within the reach of the applicants before and during the trial; that the court has no power to review its judgment in the manner requested by way of reopening a matter that is concluded because an appeal had been lodged to the Court of Appeal; that the applicants are relying on a certificate of lease this court declared as irregularly obtained and therefore illegal; that review of a judgment only applies in favour of parties but not strangers to the suit; that the applicants are guilty of lack of due diligence since a caution and a court order issued in **1998** had been registered against the title and, in any event, none of the applicants have exhibited any title registered in their favour; that there is no privity between the applicants and the plaintiffs as they purchased the land from a cross section of the defendants and the issue of ownership has been settled hence any claim should be directed to the sellers and tried in a separate suit and not this one. The plaintiffs aver that the principles that litigation must come to end and that justice should not only be done

but it should be seen to be done require to be observed; that the principle of bona fide purchaser for value does not apply to the applicants; that the applicants engaged in deceit with intent to deprive the plaintiffs of their right and are party to a fraud which they jointly committed together with the defendants; that there are no overriding interests created in favour of the applicants and their contracts which they seek to enforce are illegal and enforceable. In his belief, the deponent asserts, the applicants have come to court with unclean hands; that previous applications by other interested parties in the position of the current applicants have previously been dismissed by the court; that the issue may be resolved by way of a suit against the person who sold the applicants' land either for land or for refund. Lastly it is averred that the application has been brought after an unreasonable delay.

**12.** The applicants filed their submissions on **14/11/2019.**

**13.** This court requires to address the background to the two applications. The history of the matter is that the four plaintiffs sued the 1st, 2nd and 3rd defendants in this court at Eldoret in **16/12/1998** in respect of the suit land. Further back in time, history of the suit land is that six men banded together into informal partnership and purchased **LR No. 11383** near Eldoret Township measuring **421.5 acres.** Those buyers included the 1st and 4th plaintiffs, the husband to the 2nd plaintiff and the father to the 3rd plaintiff, the father to the 1st defendant and the husband of the 2nd defendant. In the **1980s** the suit property was subdivided with each partner getting a number of plots each measuring **1 acre**; however some of the land was not subdivided and was to be subdivided later for distribution. Some blocks were reserved for public utilities. The claim in this suit was that Elizabeth Sirma (now deceased) fraudulently had herself registered as owner of plot No. **Eldoret Municipality Block 14/604** which was one of the blocks which had not been subdivided as well as **Eldoret Municipality Block 14/586** which had been earmarked as a public utility plot. The claim against the 2nd defendant was that she had laid claim over **Eldoret Municipality Block 14/653**. In a judgment dated **18/6/2016** the following orders were made:

> **(a) A declaration that the parcel Nos. Eldoret Municipality Block 14/586, 603 and 653 are jointly owned by the plaintiffs and the 1st and 2nd defendants.**
>
> **(b) An order is hereby issued directing the cancellation of the name of Elizabeth Jepchoge Sirma in LR No. Eldoret Municipality Block 14/586 and 604 and replacing it with the names of the plaintiffs and the defendants jointly.**
>
> **(c) As evidence adduced herein has showed that the title to LR No. Eldoret Municipality Block 14/653 is not in the 2nd defendant's name there can be no order for cancellation as to do so will be giving orders in vain. The facts remains that the said property remains property of the plaintiffs as well as the defendants and any order for cancellation of the titles which may have been obtained can be pursued in a separate claim.**
>
> **(d) A permanent order of injunction is hereby issued restraining the defendants from interfering with the disputed properties.**
>
> **(e) The defendants shall bear the costs of this suit.**

**14.** The plight of the first set of applicants is clear to see in view of the above orders: they had purchased land from the 1st defendant and his mother (now deceased) from parcels Nos. **586** and **604**. The second set of applicants' predicament is that they purchased land out of plot No. **604**. Both set of parties alleged that there was no notice of defect in title.

**15.** The issues that arise for determination in this application are as follows:-

> ***(a) Are the applicants entitled to an order of joinder in the suit after judgment?***
>
> ***(b) Are the applicants entitled to the setting aside of judgment and the reopening of the suit for the purpose of hearing of their evidence in the matter?***
>
> ***(c) What orders should issue*?**

**16.** The issues are discussed as hereunder:

> ***(a) <u>Are the Applicants entitled to an order of joinder in the suit after judgment?</u>***

**17.** On a purely preliminary basis the applicants aver that the applications are unopposed by the 1st 2nd and 3rd plaintiffs and all the defendants. They maintain that the 4th plaintiff has not demonstrated that he has any authority to swear affidavits in reply on behalf of the rest of the plaintiffs.

**18.** The common gist of the two applications is that this suit was heard and determined without joinder of the applicants who have up to this day occupied and utilized the suit land. The applicants maintained they ought to have been enjoined in that suit since it affected their properties; the plaintiffs and the defendants in this suit ought to have brought to the attention of the court the presence of the applicants on the suit properties or counterclaimed against the applicants. It is alleged that they were therefore not accorded a chance to participate in the suit yet the orders issued in the judgment affect them and they have developed permanent structures thereon; they aver that they stand to be evicted from the suit parcels upon which event they may suffer irreparable loss unless the orders sought are granted.

**19.** Central to the applications before court is the issue of whether the applicants' right to be heard in this suit existed. The right to be heard is embedded in **Article 50** of the Constitution which provides as follows:

**"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."**

**20.** Citing the decision in the case of **Presbyterian Foundation -vs- Charles Ndungu & 3 Others [2016] eKLR** the applicants aver that this court has jurisdiction to set aside a judgment that affects a party who had not been made a party to the suit. They rely on the case of **Presbyterian Church of East African Pwani Presbytery and Another -vs- Juma Jefa Mboe & Another [2017] eKLR** for the proposition that the court may enjoin any necessary party at any stage of the proceedings. They refer to the case of **Kenneth Kipkemboi -vs- NSSF 2014] eKLR** for the proposition that the mere fact that the court has given an order does not make it *funtus officio* and that it retains the power to review or set aside the said order in the interest of justice. They stress that the **Kenneth Kipkemboi** case amplifies the *audi alteram partem* which is in effect expressive of the concept that in law no man should be condemned unheard. Finally they also cite the case of **Merry Beach Ltd & A.G. & 17 Other Malindi HC Pet. No. 5 of 2011** for the proposition that where a court finds that a party who ought to have been heard was not heard it reserves the right to set aside the judgment to enable that party to be heard.

**21.** Citing **Order 45 rule 2(2)** they aver that the provisions thereunder confer upon this court's jurisdiction to hear and determine the instant applications notwithstanding the fact that it is not the very court that issued the judgment being sought to be set aside. It is submitted that if the instant application is not granted the plaintiffs will continue to interfere with the suit land.

**22.** In the second application the applicants cite the decision in the case of **Mbaki & Others -vs- Macharia [2005] EA 206** and **Sagram Singh -vs- Election Tribunal Koteh, AIR [1955] SC 664** and urge that the applicants should not be condemned unheard. They also rely on **Kenya Ports Authority -vs- Kushon Kenya Ltd Civil Appeal No. 142 of 1995** and urge that this court should consider the weighty issues of fraud raised by the plaintiffs can be addressed only by a substantive trial. They also rely on **Order 10 rule 11** of the Civil Procedure Rules, which provides that where a judgment have been entered the court may set aside the judgment and any consequential decree upon such terms as are just and state that the decision of **Omondi Kokole -vs- the Town Clerk & Another Kisumu HCC No. 834 of 2005** illustrates this fact.

**23.** In our justice system the constitution, the supreme law of the land, guarantees a citizen's inalienable right to be heard. This court's task in the instant application is to establish whether the applicants should have been heard, and if they were ever accorded such an opportunity to be heard.

**24.** It is not for this court to examine in exquisite detail the depth of the merits of their claim at this juncture and in so doing try their case in this application. In this court's view the applicants have reasonably established that they have *some* form of interest in the suit land. They have also demonstrated that the orders made in the conflict between the plaintiffs and the defendants are bound to *affect* their interest in the said land. The claims of complicity in fraud which are levelled against the applicants by the 4th respondent at the moment are immaterial; how can there be deemed to be conclusive evidence of fraud at this stage on the part of the applicants simply at the word of the 4th respondent, and that without any trial at which they were called upon to defend themselves?

**25.** There is no doubt that this court has jurisdiction to enjoin a party to a suit at any stage of the proceedings. **Order 1 Rule 10(2)** of the Civil Procedure Rules is the authority for that proposition. It 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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."**

**26.** In the case of **Lilian Wairimu Ngatho & Another -vs- Moki Savings Co-operative Society Limited & Another [2014] eKLR** the court, (Nyamweya J.,) held as follows:

**"The provisions of Order 1 Rule 10(2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in Black's Law Dictionary Ninth Edition at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising."**

**Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage."**

**27.** In the instant applications a prayer for the setting aside of judgment was made contemporaneously with the prayer for joinder.

**28.** In this court's view where the two prayers are sought in that manner, the application is competent. This court dismissed an application for joinder in Kitale **Land Case No. 64 of 2011 -Boaz Kipchumba Kaino -vs- G.H. Tanna & Sons Ltd** and **Abdu Mukwana,Fredrick Sambula, Wanjala Wesela** and **Robert Makona** on the ground that no prayer for setting aside judgment was included therein.

**29.** In the case of **Carol Silcock -vs- Kassim Sharrif Mohamed [2013] eKLR** the court allowed the application for joinder after judgment to cure the mischief of the plaintiff having to prove fraud all over again against a person in whose favour title had been fraudulently transferred.

**30.** In the case of **J M K -vs- M W M & Another [2015] eKLR** the court observed as follows:

> **"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."**

**31.** In the **Boaz Kipchumba Kaino case (supra)** this court observed as follows:

> **"In the J M K -vs- M W M & Another [2015] eKLR the Court of Appeal set aside an order of the Employment and Labour Relations Court made on an application filed after judgment seeking to enjoin the applicant as a party in the matter. However the court in that case considered two factors:**
>
> **1. The applicant's reputation was at stake in that the employment and labour relations court had found the applicant guilty of sexual harassment without granting the applicant an opportunity to be heard.**
>
> **2. The application had alongside the order of joinder sought the setting aside of the judgment."**

**32.** In the light of the foregoing, I view the applications before me as fit for consideration and that this court has the jurisdiction in certain circumstances to enjoin a party after judgment has been delivered. Certainly in this case, the applicants have passed the test, and in my view they can be enjoined to this case.

> ***(b) Are the Applicants entitled to the setting aside of judgment and the reopening of the suit for the purpose of hearing of their evidence in the matter?***

**33.** The applicants have an interest in the land and certainly are entitled to be enjoined in the matter. Only a setting aside of the judgment followed by a substantive trial involving them in the matter can enable them realise their constitutionally guaranteed right to be heard in this manner. They have sought an order of setting aside judgment. For those reasons I find that they are entitled to that order.

***(c) What Orders should issue?***

**34.** Consequently I find that the interested parties' applications dated **10/7/2019** and **18/9/2019** respectively have merit and I grant the same and I issue the following orders:

> **(a) The judgment in this suit delivered on the 18/7/2016 and all consequential orders are hereby set aside.**
>
> **(b) The applicants are hereby enjoined into the suit as interested parties as follows:**
>
> **(i) Nicholas Gituhu**
>
> **Karira.....1st Interested Party**
>
> **(ii) Allan George Njogu Kamau…….……2nd Interested Party**
>
> **(iii) Festus Mitei**
>
> **Kiptoo….....3rd Interested Party**
>
> **(iv) Jepkorir Kiplagat…..4th Interested Party**
>
> **(c) That the interested parties herein are granted leave to tender evidence and participate in the proceedings herein.**

It is so ordered.

**Dated, signed** and **delivered** at **Kitale** on this **10th** day of **February, 2020**.

**MWANGI NJOROGE**

**JUDGE**

**10/2/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for parties

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**10/2/2020**