



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 22 OF 2014**

TERESIA WAMBURA MUTIE.....PLAINTIFF/1<sup>ST</sup> RESPONDENT

VERSUS

MACKENZIE SILA MUTISO .....DEFENDANT/2<sup>ND</sup> RESPONDENT

AND

MARGARET WANZA.....1<sup>ST</sup> PROPOSED INTERESTED PARTY/APPLICANT

STEPHEN MUTISYA.....2<sup>ND</sup> PROPOSED INTERESTED PARTY/APPLICANT

CAROLINE NZILANI.....3<sup>RD</sup> PROPOSED INTERESTED PARTY/APPLICANT

LILIAN NTHAMBI.....4<sup>TH</sup> PROPOSED INTERESTED PARTY/APPLICANT

**RULING**

1. In the Notice of Motion dated 25<sup>th</sup> June, 2019, the Interested Parties have sought for the following orders:

**a. That the Applicants herein be and are hereby enjoined in this suit as Interested Parties.**

**b. That the firm of Mohamed Madhani & Company Advocates be and is hereby granted unconditional leave to come on record for the Applicants.**

**c. That this Honourable Court be and is hereby pleased to stay the execution of the order and Decree emanating from the Judgment issued by Hon. Justice O. A. Angote on 10<sup>th</sup> December, 2018 and all other proceedings in this case pending hearing and determination of Machakos ELC. Case No. 61 of 2019 (O.S).**

**d. That this Honourable Court be and is hereby pleased to set aside the Decree and orders emanating from the Judgment herein issued by the Hon. Justice O. A. Angote delivered on 10<sup>th</sup> December, 2018.**

**e. That this Honourable Court be and is hereby pleased to order that ELC No. 22 of 2014 be consolidated with Machakos ELC Case No. 61 of 2019 (O.S) and heard afresh.**

**f. That the court be pleased to make other orders as it may deem fit for the interest of justice.**

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Proposed Interested Party who has deponed that vide a Judgment dated 10<sup>th</sup> December, 2018, this court issued injunctive and eviction orders against the Defendant from a portion of land known as Machakos/Kiandani/243 measuring 87 feet by 260 feet; that the Plaintiff attempted to evict them from the suit property and that the Plaintiff also blocked the access road they have been using to access their homes since 1981.

3. According to the Proposed Interested Parties, the suit property was initially registered in the name of Bernard Mutie Munyaka in 1989; that the Plaintiff obtained the Letters of Administration in respect of the Estate of the late Bernard Mutie Munyaka on 12<sup>th</sup> June, 2013 without involving them and that the Plaintiff obtained a Title Deed in respect of the suit land on 15<sup>th</sup> March, 2013 by way of transmission

without involving them.

4. The Proposed 1<sup>st</sup> Interested Party deponed that the Plaintiff is abusing the orders of the court to evict them; that the Proposed Interested Parties were not parties to this suit and that they have been in open and unchallenged possession of the suit property since the year 1981.
5. The 1<sup>st</sup> Interested Party finally deponed that they have since filed Machakos ELC Case No. 61 of 2019(OS) seeking reliefs against the unlawful eviction and adjudication of their claim for adverse possession with respect to the suit property. According to the 1<sup>st</sup> Interested Party, this Application and their claim in Machakos ELC. Case No. 61 of 2019(OS) have been promptly filed and that they have a valid claim.
6. In response, the Plaintiff deponed that the Interested Parties are the family members of the Defendant; that the Proposed 1<sup>st</sup> Interested Party is the Defendant's wife, while the Proposed 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties are the children of the Defendant.
7. According to the Plaintiff, the Applicants are not strangers to the legal proceedings herein; that the Applicants have had several cases regarding the suit property; that the intended eviction of the Applicants is lawful after obtaining a valid order of eviction; that this court is *factus officio* and that Order 1 Rule 10 of the Civil Procedure Rules permits joinder of a party before trial and not after Judgment.
8. The Plaintiff deponed that after her late husband sold a portion of L.R. No. 245, Machakos, measuring 100 feet x 200 feet to the 1<sup>st</sup> Applicant's husband, the 1<sup>st</sup> Applicant's husband fenced the entire land forcing his husband to file HCCC No. 65 of 1986, Machakos; that the said court file disappeared; that when she filed this matter, the 1<sup>st</sup> Applicant's husband (*the Defendant*) filed a Defence and Counter-claim and that the evidence that emanated from these proceedings was that the Defendant, who is the 1<sup>st</sup> Applicant's husband, bought only a portion of the suit land measuring 100 x 200 feet.
9. The Plaintiff finally deponed that the orders of this court have since been implemented and that the Applicants have never developed the portion of land measuring 87 x 250 feet.
10. On his part, the Defendant deponed that he is a stranger to ELC. No. 61 of 2019 which is being pursued by the Proposed Interested Parties; that it is not true that the Proposed 1<sup>st</sup> Interested Party used to attend court and that he has been separated from the Proposed 1<sup>st</sup> Interested Party since the year 1986.
11. The Defendant finally deponed that he has always pursued the cause of action herein without involving the Proposed Interested Parties; that the Proposed Interested Parties are adults who can pursue their cause without involving him and that the Application should be allowed.
12. The Proposed 1<sup>st</sup> Interested Party/Applicant filed a Further Affidavit in which she deponed that the Defendant is a polygamous man and has been living in Nairobi since 1977; that she has never accompanied the Defendant to court; that they did not participate in these proceedings and that they are not agents of the Defendant.
13. It is the deposition of the Proposed 1<sup>st</sup> Interested Party that their claim is for adverse possession which is different from the 1<sup>st</sup> Defendant's claim which was under contract; that in any event, the Plaintiff did not follow due process while evicting them and that the Application should be allowed.
14. In his submissions, the Applicants' advocate submitted that the Applicants are the occupiers of the entire land known as Machakos/Kiandani/243 which comprises two portions, one portion measuring 100 feet by 260 feet while the second portion measures 87 feet by 260 feet.
15. Counsel submitted that the Judgment of this court was only directed to the Defendant; that the Plaintiff's argument that the Applicants were the agents of the Defendant is farfetched and that the Applicants did not participate in the proceedings that gave rise to the said Judgment at all.
16. The Proposed Interested Parties' advocate submitted that it would be improper to maintain an order issued when a party had not been enjoined as an Interested Party and that this suit should be consolidated with Machakos ELC. No. 61 of 2019(O.S).
17. The Plaintiff's/Respondent's advocate submitted that this suit was heard in full and Judgment delivered by the court in favour of the Plaintiff; that the Plaintiff executed the order of the court and that joinder of parties can only be done during proceedings and not after Judgment has been delivered.
18. The Plaintiff's counsel submitted that it was not the Plaintiff's duty or business to indulge and inform the Applicants about the pendency of the suit; that the Defendant was the Purchaser of the suit property and that one cannot be allowed to use his children or spouse to acquire another person's property. Both the Plaintiff and the Interested Parties' advocates filed Further submissions and Authorities which I have considered.
19. In her Plaint dated 27<sup>th</sup> February, 2014, the Plaintiff averred that she is the owner of a portion of land known as Machakos/Kiandani/243. It was the Plaintiff's case that the Defendant had trespassed on the suit land, and prayed for an order of eviction.
20. On the other hand, the Defendant argued that he had purchased the suit property from the Plaintiff's husband. In the Counter-claim, the Defendant prayed for the transfer of the suit property in his name. After hearing the evidence of both the Plaintiff (*1<sup>st</sup> Respondent*) and the Defendant (*2<sup>nd</sup> Respondent*), this court Decreed as follow:

**a. An injunction be and is hereby issued restraining the Defendant, his servants, workmen and agents, from entering on and/or from erecting or causing to be erected thereon any structures, or from in any way interfering with the Plaintiff's use and enjoyment of a parcel of land known as Machakos/Kiandani/243 (save for a parcel of land measuring 100feet by 260feet which the Defendant bought in 1977).**

**b. An order of eviction of the Defendant be and is hereby issued from the said suit property (save for a parcel of land measuring 100feet by 260feet which he bought in 1977).**

21. The court therefore found that the Defendant was only entitled to the portion of the suit land measuring 100 feet by 260 feet which he bought in 1977, and not to the remaining portion of the land known as Machakos/Kiandani/243.

22. Upon the court ordering for the eviction of the Defendant, the proposed Interested Parties herein filed a distinct suit being Machakos ELC. No. 61 of 2019 (O.S). In the said suit, the proposed Interested Parties herein prayed for a declaration that they have become the legal owners of land measuring 87 feet by 260 feet comprised in Machakos/Kiandani/243 which is the suit land herein.

23. In the said Originating Summons, the proposed Interested Parties alleged that they have been in open and uninterrupted possession of the said land since 1981 and that they stand to be evicted unless the orders are granted. The only Respondent in the Originating Summons is the Plaintiff herein.

24. When the Proposed Interested Parties moved the court in Machakos ELC. No. 61 of 2019 (O.S) for an order of injunction, this court directed that the current Application be heard and determined first. In the current Application, the proposed Interested Parties are seeking for an order allowing them to be joined in this suit and for the Decree and proceedings to be set aside. After the Decree and proceedings have been set aside, the Interested Parties want this two suits to be consolidated. The first issue that I should determine is whether the court can join the Proposed Interested Parties in this matter after Judgment.

25. Order 1 Rule 10(1) of the Civil Procedure Rules provides as follows:

**“(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. The ideal situation is that a person should be added to a suit before the delivery of the Judgment. However, that does not mean that a party cannot be joined in a suit after the delivery of the Judgment where circumstances demand so. The circumstances under which a party may be joined in a suit after the delivery of the Judgment was set out by the Court of Appeal in the case of *J.M.K vs. M.W.M & Another (2015) eKLR* as follows:

**“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...”**

27. The most common, and probably the only instance, where a party will be joined in proceedings after Judgment is where he shows, to the satisfaction of the court, that he was not heard. In such a case, the court is obliged to set aside its Judgment, and allow the party to be joined in the proceedings. That is the position that obtained in the *J.M.K case (supra)* in which the Court of Appeal held as follows:

**“We are equally satisfied that in the particular circumstances of this appeal, the industrial court ought to have reviewed and set aside its judgment dated 30<sup>th</sup> May 2014 to afford the appellants an opportunity to be heard.”**

28. The next issue for determination is whether the Judgment of the court herein should be set aside. Indeed, the proposed Interested Parties cannot only be joined in this suit after the setting aside of the Judgment of the court, which Judgment decreed the Defendant to vacate a portion of the suit land which he allegedly bought from the Plaintiff's claim.

29. The proposed Interested Parties claim is that they should have been heard in this matter; that although the Defendant is the husband of the Proposed 1<sup>st</sup> Interested Party and the father of the Proposed 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties, they were not made aware of the suit and that they were condemned unheard.

30. The occupation of the suit land, or apportion thereof, was on the basis of the purchase of the same by the Defendant from the Plaintiff's husband in 1977. This position is informed by the Defendant's evidence in which he averred as follows:

**“THAT I remember on or about 3<sup>rd</sup> December, 1977 through a written agreement I bought a part of land title number Machakos/Kiandani/243 from Bernard Mutie... That again sometime in the year 1983, the Plaintiff deceased husband sold part of the remaining plot to me for a consideration which I paid in installments to the Vendor. That again in the year 1986 the Plaintiff sued me in Machakos HCCC No. 65 of 1986 for payment of the last installment for the said piece of land and which amount I fully paid. That since I purchased the said land I have been staying there without any**

**complain.”**

31. The fact that the proposed Interested Parties took possession of the suit property, or a portion thereof, on the basis of the purchase of the land by the Defendant, who is their husband and father respectively, is confirmed by the Proposed 1<sup>st</sup> Interested Party’s Affidavit in which she has deponed that she has been in occupation of the land since 1981.

32. In its Judgment, this court found that the only valid purchase of the portion of the suit land is in respect of land measuring 100 feet by 260 feet and not any other. Although the 1<sup>st</sup> proposed Interested Party has deponed that they were not aware of these proceedings, the bottom line is that the proceedings were in respect of the purchase, which purchase was by the Defendant and not the Proposed Interested Parties. That being so, and in view of the pleadings before this court, the interests of the proposed Interested Parties, who are a spouse and children of the Defendant, were ventilated by the Defendant.

33. Considering that it is the Defendant who purchased the land, the argument by the proposed Interested Parties that they should have been heard in this matter is a red herring. Indeed, their interests in the suit land were taken care of by the Defendant.

34. Considering that the issue of which land was purchased by the Defendant has been determined by the court, I find and hold that the proposed Interested Parties were not necessary parties in this matter. For that reason, their evidence viz-a-viz the Plaintiff’s claim was not necessary.

35. Having concluded that the proposed Interested Parties’ interests in respect to the purchase of the suit was ventilated by the Defendant, the right of the Interested Parties to be heard in this matter was not breached. Indeed, the Interested Parties were not necessary parties.

36. In the circumstances, I decline to set aside the Judgment of the court. Indeed, the issues of fact and law raised in this matter and ELC. Case No. 61 of 2019 (O.S) are not similar. The two suits cannot be consolidated.

37. Having declined to set aside the Judgment of the court, it follows that the proposed Interested Parties can neither be joined in this suit nor can this suit be consolidated with Machakos ELC No. 61 of 2019 (O.S). In the circumstances, the Application dated 25<sup>th</sup> June, 2019 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF MARCH, 2020.**

**O.A. ANGOTE**

**JUDGE**