REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 457 OF 2013

MUTHITHI INVESTMENTS LIMITED……………….......... PLAINTIFF

VERSUS

ANDREW S KYENDO…………..………….………….. 1ST DEFENDANT

AMINA MOHAMMED…………………..……………2ND DEFENDANT

WILLIAN K MWANGINGI……………….…………3RD DEFENDANT

ROSEMARY NYOKABI………………...………………4TH DEFENDANT

JAMES BANGA……………………….………..……..5TH DEFENDANT

MESHACK O. AMBUKA……………………………….6TH DEFENDANT

BERNARD M. MUTTAHA………….…..………………7TH DEFENDANT

W OKEYA MBATA………….……………………………...8TH DEFENDANT

J M KAGAI……………………………………………….9TH DEFENDANT

JANE WANGECI……………………………………….10TH DEFENDANT

RAPHAEL K THIMBA…………………………...…….11TH DEFENDANT

MARY N KAGO…………………………………..……….12TH DEFENDANT

DICK OUMA OCHIENG…………………...……….13TH DEFENDANT

DAVID AUMA…………………………….…………14TH DEFENDANT

PATRICK NDIRANGU……………………………..15TH DEFENDANT

SAID ALI ABU……………………….…………………16TH DEFENDANT

SAMUEL NGATIA………………...……………………17TH DEFENDANT

JAMES NJOROGE……………………………………..18TH DEFENDANT

MARY NDUKU KIOKO…………………………...…..19TH DEFENDANT

MAINA MUTAHI……………………………...……..20TH DEFENDANT

JOHN MWAURA WAINAINA……………..…………21ST DEFENDANT

MUDIA MUCHEMI……………………..…………...22ND DEFENDANT

NAMAN OGEMBO OGEMBO OGWENO……..……23RD DEFENDANT

RULING

1. Before court for determination are two applications. The first application is the notice of motion dated 19/12/2018 by the 7th defendant, seeking stay of execution of the judgment in this suit, pending the decree holder's compliance with the requirements of Section 152B of the Land Act, in terms of the following verbatim prayers:

> ***1) That this application be certified as urgent owing to the extreme urgency disclosed and be heard exparte in the first instance.***
>
> ***2) That pending the hearing and determination of this application, the execution of any aspect of the "Eviction Order" herein dated and issued on 17th September 2018 be suspended, stopped and stayed forthwith.***
>
> ***3) That any process of the execution of any aspect of the judgment herein or the "Eviction Order" herein purportedly issued on 17th September 2018 be stayed pending compliance with the mandatory terms of Section 152B of the Land Act and a return date issued to confirm compliance.***
>
> ***4) This honourable court do take up proceedings on compensation due to the applicant for the damage occassioned by the unlawful eviction conducted by the plaintiff herein from the suit property***
>
> ***5) Directions do issue on the hearing of these proceedings***
>
> ***6) The costs of this motion be to the applicant.***

2. The second application is the notice of motion dated 11/1/2019 brought by the Nairobi City County Government, seeking joinder and review and/or setting aside orders in the following verbatim terms:

> ***1) This motion be certified as urgent and service thereof on the respondent and the defendants be dispensed with in the first instance.***
>
> ***2) The intended interested party/applicant herein, Nairobi City County Government, be granted leave to be forthwith enjoined as an interested party, (and/or as an additional defendant), upon such terms as this honourable court may determine.***
>
> ***3) Pending the hearing and determination of this motion, there be a stay of execution and/or further execution of the decree herein dated 13th May 2014 and the eviction order herein issued on 17th September 2018 until further orders of the court.***
>
> ***4) Upon the grant of prayer 2 herein, this honourable court be pleased to review and set aside in toto the judgment herein, the judgment and the decree dated 13th May 2014 and all consequential process including the eviction order issued on 17th September 2018, and the suit be heard de novo.***
>
> ***ALTERNATIVELY TO PRAYER 4 ABOVE***
>
> ***5) Upon the grant of prayer No 2 herein, this honourable court be pleased to review and set aside in toto the judgment herein, the judgment and the decree dated 13th may 2014 and all consequential process including the eviction order issued on 17th September 2018, and the suit be struck out for being an abuse of the court process on the basis of being res judicata.***
>
> ***6) The costs of this motion be awarded to the applicant.***

3. The two applications were brought through the firm of J Harrison Kinyanjui & Co Advocates and were argued together on 5/2/2019. A date for ruling on the two applications was given. A few days prior to the date scheduled for ruling, the said law firm brought an application seeking to stay delivery of the ruling. The application which sought to stay delivery of the ruling was subsequently prosecuted and ultimately determined through a ruling rendered on 21/1/2020. The application was dismissed. That paved way for determination of the two applications dated 19/12/2018 and 11/1/2019 respectively. I will make my pronouncements on the two applications sequentially in the order in which they were filed.

<u>Application dated 19/12/2018</u>

4. The 7th defendant who brought the notice of motion dated 19/12/2018 contended that the plaintiff/decree-holder had embarked on execution through eviction without complying with the requirements of Section 152G of the Land Act. Mr Kinyanjui, counsel for the applicant, argued that Section 152G requires that the eviction notice be in writing and be placed at five conspicuous places. He contended that in the case of a large group of persons, the notice must be published in a newspaper of wide circulation. He urged the court to stay the execution pending compliance with the requirements of Section 152G of the Land Act.

5. The case of the plaintiff /decree holder is that the application dated 19/12/2018 is a non-starter and an abuse of the process of the court. They argue that the applicant fully participated in the proceedings leading to the judgment and decree in this suit, went to the Court of Appeal and abandoned the appeal, and has now elected to lie on oath. They further contend that the applicant together with the other defendants were given 90 days within which to vacate the suit property but have since 2014 decided to ignore the decree of the court. The plaintiffs add that an eviction notice was duly served and acknowledged by the applicant through subsequent filings in court.

6. The plaintiff faulted the applicant's reliance on the framework in Section 152(a) to 152(i), contending that eviction notice under Section 152(e) does not apply to execution of court decrees.

7. I have considered the application dated 19/12/2018 together with the response thereto and the rival submissions. I have also considered the relevant legal frameworks. The key question to be answered in the said application is whether the applicant has laid proper legal basis for an order of stay of execution under the framework in the Land Act.

8. The impugned execution relates to a judgment rendered in this suit way back in 2014 by Mutungi J. The court found that the suit property belonged to the plaintiff. The court directed the defendants, among them the applicant herein, to vacate the suit property within 90 days. The defendants filed a notice of appeal but subsequently abandoned the appeal. The judgment and decree of the court therefore remains unchallenged by the applicant. The applicant elected to disobey the court order for the last five years. Against that background, the applicant seeks protection of the court whose orders he has elected to disobey. Without saying much, evaluated against the above background, this application is a blatant abuse of the process of the court. The court would be appending a thumb of approval to impunity if it were to grant a stay order to a litigant who has blatantly elected to deliberately disobey a court order that he has not challenged through an appeal.

9. Secondly, the applicant's reliance on Section 152E of the Land Act are misplaced because that framework does not relate to evictions carried out in execution of court decrees. Thirdly, there is no evidential material presented to the court to demonstrate that the decree holder has or is about to violate the eviction procedure spelt out in Section 152E of the Land Act or any other Section of the Land Act.

10. My finding therefore is that the applicant has failed to lay a proper basis for stay of execution under the framework in the Land Act. Consequently, the notice of motion dated 19/12/2018, brought by the 7th defendant, is dismissed. The 7th defendant shall bear costs of the application.

Application dated 11/1/2019

11. The application dated 11/1/2019 was brought by the Nairobi City County Government and was supported by an affidavit sworn on 11/1/2019 by Mr David Oseko. It was expressed to have been brought under Sections 1, 1A, 1B and 34 of the Civil Procedure Act and Order 1 rules 1, 4(a), 9, 11 and 13 of the Civil Procedure Rules. The said application is opposed by the plaintiff who is a decree holder in this suit.

12. The case of the applicant is that it is the original owner of the suit property, and therefore was and remains a relevant party to the proceedings in this suit. It further contends that no dealings of whatever nature can be carried out in relation to the suit property without its involvement. It adds that it never consented to the vesting of the suit property in the plaintiff in **Nairobi HCCC No 457 of 1999**. Lastly, it is the case of the applicant that it should be accorded the protection of the law to assert its title to the suit property.

13. The plaintiff opposed the application through a replying affidavit sworn on 31/1/2019. The case of the plaintiff is that it holds a 99 year lease over the suit property, from the defunct City Council of Nairobi. A Previous dispute over its entitlement to the suit property was settled through a consent in **Nairobi HCCC No 457 of 1999**, which consent culminated in the execution and registration of a lease in its favour by the City Council of Nairobi. The plaintiff's position is that this suit is not the forum through which to challenge the consent which culminated in the lease which vested the suit property in the plaintiff. It is the plaintiff's case that the applicant was not and is not a necessary party in this suit because the decree issued in this suit is not directed against the applicant.

14. The application was canvassed through written and oral submissions. Urging the court to grant the application, Mr Kinyanjui, counsel for the applicant contended that Section 34 of the Civil Procedure Act precluded the applicant against filing a fresh suit relating to the same subject matter. Counsel added that because costs of the suit had not been assessed, the suit was still alive and an order of joinder can properly be made. Reliance was placed on the decisions in: (i) **Farooq Imtiaz Mohamed Malik v Director of Police Investments & 3 Others [2018]eKLR;** and (ii) **Kenya Industrial Estates Limited v Anne Chepsiror & 5 Others [2015]eKLR.**

15. In response, Mr Ochieng Oduol, counsel for the plaintiff, itemized the following as the issues falling for determination in the application dated 11/1/2019: (i) Whether the applicant is an interested party and or a necessary party to these proceedings; (ii) whether the judgment of the court should be reviewed and/or set aside and the case be heard either *de novo* or struck out: and (iii) who bears the costs of the application.

16. Counsel argued that the applicant was not a necessary and proper party to the determination of the suit which culminated in the judgment of 13/5/2014 because its interest in the suit property had been resolved vide the consent order dated 8/2/2000 and the resultant lease dated 5/2/2001. Counsel argued that the cause of action in this suit is that of trespass to land by the defendants herein and does not in any way affect the applicant's rights as a lessor. Counsel added that this suit is not the forum through which to challenge the consent dated 8/2/2000.

17. Counsel for the plaintiff further argued that the applicant had not satisfied the criteria for setting aside a judgment under Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. Counsel asked the court to award costs of the application to the plaintiff.

18. I have considered the notice of motion dated 11/1/2019. I have also considered the response thereto and the parties' submissions. Similarly, I have considered the relevant legal framework and jurisprudence. Two key questions fall for determination in the said application. The first question is whether the applicant has satisfied the criteria for review or setting aside of a judgment. The second question is whether the applicant has satisfied the criteria for joinder as an interested party in a matter where judgment has already been rendered. I will make brief analysis and determination of the two questions in that order.

19. Review jurisdiction of this court is exercised within the framework of Section 80 of the Civil Procedure Act and Order 45 rule 1 (1) of the Civil procedure Rules. Section 80 of the Civil Procedure Act provides thus:

80 Any person who considers himself aggrieved-

a) By a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of the judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

20. Order 45 rule 1(1) of the Civil Procedure Rules provides as follows:

45 (1) Any person considering himself aggrieved—

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

21. Before the court exercises its jurisdiction to set aside a regular judgment on an application by an interested party, the court must be satisfied that the party who seeks the setting aside order is one who is adversely affected by the impugned judgment.

22. The application under consideration was brought almost five years after the impugned judgment. The suit was filed in 2004. It took 10 years for the court to determine the dispute. The key issue in the suit was whether the defendants were trespassers on the suit property, liable to be evicted. The court found that the defendants were trespassers and ordered them to vacate the suit property. The orders issued by the court read as follows:

i. That the defendants, their agents and/or servants are ordered to vacate and deliver vacant possession of the suit property LR No 23917 Nairobi to the plaintiff within Ninety (90) days from the date of this judgment failing which an eviction order to issue on application.

ii. A permanent injunction restraining the defendants by themselves, their agents, servants, tenants, licencees and/or any person whatsoever from being on remaining entering in continuing in occupation, erecting, constructing of continuing with construction of any structures whatsoever on the plaintiff's parcel of land, Land Reference No 23917 Nairobi be and is hereby issued.

iii. The plaintiff is awarded Kshs 1,000,000/- as general damages for trespass together with interest at court rates from the date of judgment

iv. ***Costs of the suit with interest at court rates***.

23. It is clear from the wordings of the above orders that they were not and are not directed against the applicant. The applicant has not demonstrated a proper basis upon which it can be considered to be a proper interested party aggrieved by the above orders.

24. In the absence of a clear demonstration of the basis upon which the applicant can be considered to be a party properly aggrieved by the judgment rendered by Mutungi J in 2014, there would be no basis for exercising jurisdiction to review or set aside the judgment herein at the instance of the applicant. My finding on the first question is that the applicant has not satisfied the requisite criteria for review and or setting aside of the judgment in this suit.

25. The second question is whether the applicant has satisfied the requisite criteria for joinder in a suit after judgment has been rendered. The general principle on joinder is that a court can, either on its own motion or by an application, join a party before passing judgment in the matter before it. Re-affirming this principle, the Court of Appeal stated as follows in **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016]eKLR:**

"Black's Law Dictionary 970 (10th ed. 2014 states that in law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceedings. A judgment is the final court order regarding the rights and liabilities of the parties; it resolves all the contested issues and terminates the law suit; it is the court's final and official pronouncement of the law on action that was pending before it. A judgment has the effect of terminating the jurisdiction of the court that delivered the judgment. Save as expressly provided for by a law (for example in revisionary jurisdiction or under the slip rule) a judgment makes the court functus officio and transfers jurisdiction to an appellate court if appeal is allowed. It marks the end of litigation before the court that pronounced the judgment. When used in relation to a court, functus officio means that once a court has passed a judgment after a lawful hearing, it cannot reopen the case. 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 power may, as a general rule, exercise those powers only once in relation to the same matter"

26. Secondly, it is generally agreed that joinder of a party to a suit after judgment has been rendered is jurisdiction which is exercised only in exceptional circumstances. In ***Merry Beach Limited v Attorney General & 18 Others [2018]eKLR*** the Court of Appeal affirmed this position in the following words:

> ***"However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. In joining such a party a court would also have to set aside the judgment entered to give him/her an opportunity to be heard."***

27. To qualify to be joined as a party to a suit in which judgment has already been rendered, an applicant is required to demonstrate that it was a necessary party and was improperly omitted from the proceedings. Secondly, the applicant is required to demonstrate that an order which affects it adversely has been issued in the matter.

28. The plaintiff in this suit became the leasehold proprietor of the suit property after the applicant's predecessor entered into a consent in a different suit. The consent vested the suit property in the plaintiff. Subsequently, the applicant's predecessor issued a lease to the plaintiff. The consent has not been set aside. Secondly, the 99 year lease has not expired. Thirdly, if the applicant seeks to challenge the consent, this is not the proper forum for challenging the consent. The consent can only be challenged through an application in the suit in which it was issued.

29. There is therefore no basis for contending that the applicant is an interested party in this suit. The Supreme Court of Kenya in the case of T**rusted Society of Hudson Rights v Mumo Matemu & 5 Others [2014]eKLR** defined an interested party as follows:

> ***"An interested party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause".***

30. No order was sought in this suit against the applicant. No order has been issued against the applicant. The applicant has not demonstrated how it is affected by the judgment rendered by Mutungi J in 2014. The applicant's predecessors willingly entered into a consent and subsequently issued a lease to the plaintiff. The consent has not been set aside. Lastly, if the applicant has a legitimate cause of action against the plaintiff, the forum for ventilating that cause of action is not this suit which was concluded in 2014.

31. Consequently, I see no proper basis for joining the applicant as an interested party in this suit. My finding on the second question therefore is that the applicant has failed to satisfy the criteria for joinder as an interested party post-judgment.

Disposal Orders

32. In light of the above finding, I make the following disposal orders in relation to the motions dated 19/12/2018 and 11/1/2019:

> ***a) The notice of motion dated 19/12/2018 brought by the 7th defendant is dismissed for lack of merit***
>
> ***b) The notice of motion dated 11/1/2019 brought by the Nairobi City County Government is dismissed for lack of merit.***
>
> ***c) The applicants in the two applications shall bear costs of their respective applications.***

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Obuya holding brief for Mr Ochieng Oduol for the plaintiff

June Nafula - Court Clerk