REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 139 OF 2011

1. PRESBYTERIAN CHURCH OF EAST AFRICA

PWANI PRESBYTERY....................................1ST PLAINTIFF

2. THE PRESBYTERIAN FOUNDATION............PLAINTIFFS

VERSUS

1. JUMA JEFA MBOE

2. SIDI CHENGO NGATO................................DEFENDANTS

R U L I N G

1. Before the court for determination are two application by Notice of Motion dated 4/10/2013 and amended on by the 1st – 3rd interested party and that dated 17/12/2013 filed by the 4th interested party.

2. Both applications seek in the main an order that the proceedings, judgment, decree and consequential orders issued in this matter be set aside and an order that the interested parties be permitted and granted leave to participate in the proceedings. The 1st – 3rd interested parties have an additional prayer for review of the decision by Kasango J dated 26/9/2013 by which judgment was entered for the plaintiff against the defendant and which judgment the interested parties contend was executed by denotion of their perimeter walls.

3. The application by the 1st – 3rd interested parties was supported by three affidavit of the 3rd interested sworn on 9/12/2013, 10/12/2013 and on 22/9/2014. The application and the affidavits, as aforesaid, allege the following facts to found the application and the remedies sought:-

> **a. That purporting to execute orders issued in this suit in which the applicants were never parties, the plaintiff/respondent on 27/9/2013 demolished the applicants perimeter wall fence around that parcel of land known as KILIFI/KAWALA “A”/KADZONZO/306 which is contended was not the subject matter of this suit thereby occasioning to the applicants loss estimated at Kshs.7,500,000.00**
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> **b. That KILIFI/KAWALA “A”/KADZOZO/306 belong to and is registered in the name of the applicants as the absolute proprietors and there are pending two suits at the Environment and Land court being MSA ELC Case No. 219 and 211 both of 2013 both acknowledging the interests of the applicants and the fact that they are in occupation of the property.**

c. That the acts complained about were carried out by goons and unless the orders sought are granted the applicants stand to suffer irreparable loss incapable of adequate compensation by an award of costs and that if the orders are not granted they shall have been condemned unheard and property deprived.

4. The 1st-3rd applicants also filed a notice of preliminary objection challenging the jurisdiction of the court.

5. On its part the 4th interested party grounded its application on the facts that having, filed **Mbs ELC 211 of 2013** against the interested parties and another, and before obtaining orders in that suit, the plaintiff invaded the 4th interested party's property known as LR 28405 CR No. 49739 thereby occasioning damage assessed at Kshs.1,814,791. That, at the time the invasion took place and allegedly pursuant to court orders issues in this matter, the said interested party had not been made a party and the property was not a subject matter of the litigation herein. To prove his allegation of impropriety and overreaching, the 4th interested party exhibited copies of the plaint in E & L Court Case No. 211 of 2013 dated 20/9/2013 and filed in court the same day, which confirm that the interested parties had been on the property and even erected a perimeter wall. The 4th interested party equally exhibited a title deed over KILIFI/KAWALA "A"/KADZONZO/96 in its name.

6. In opposition to the said applications the plaintiff did file varied grounds of opposition as follows:-

i. Grounds of opposition dated 10/10/2013

ii. Grounds of opposition dated 21/7/2014

iii. Notice of Preliminary Objection dated 6/10/2014.

The gist of the three documents are largely that the court has become *functus officio*, that litigation must come to an end, that no joinder can be ordered after judgment and that no prayers can issue to a non-party to the suit.

7. On 5/11/2013 Mr. Gikandi Ngibuini Advocate swore and filed an affidavit disclosed to have been filed pursuant to court orders of 10/10/2013. However, my reading of the court file does not reveal that any such order was ever issued. That notwithstanding, Mr. Gikandi has always participated in these proceedings and therefore, that affidavit cannot be ignored. The purpose of that affidavits seems to have been to bring to the attention of the court the existence of yet another suit HCC No. 198 of 2012 between one Nicholas Munyi Kaigwa and the plaintiff herein as the 1st defendant and the 1st and 2nd defendants as 2nd and 3rd defendants herein a fact that he contends, the plaintiff duty to court could have demand that it frankly and fully disclose but it did not disclose. On the basis of such none disclosure Mr. Gikandi contends in the affidavit that the court has a discretion, *suo motto*, to set aside and review its judgment to enable all the various suit between the parties be consolidated and heard together.

Submissions by the parties

8. At the hearing Mr. Thangei appeared for the plaintiff/respondent while Mr. Mogaka and Kariuki appeared for the 1st – 3rd and 4th interested parties/applicants with Mr. Gikandi appearing for one Nicholas Munyi Kaigua who I shall treat as 5th interested party.

9. Mr. Mogaka took the chance to begin and abandoned his prayer for joinder while stressing the prayer for setting aside and review. He pointed out that any party affected by a judgment is under section 80 and order 45 Rule 1 entitled to seek setting aside by review. He referred the court to the plaint on record and the judgment ensuring therefore and ask the court to find that order no. 3 as granted in the judgment went beyond the prayers in the plaint since it decreed demolition of a perimeter fence belonging to the 1st-3rd interested parties. To him that relief was never sought and was granted in an apparent error and contrary

to rules of Natural Justice and the Constitutional right to a fair hearing. To him the fact that an order was issued by the court against parties not before the court was sufficient reason to set aside and review the judgment. The counsel added that the fact that there are other suits pending in court and the prospects of a double registration were additional valid reasons to set aside.

10. On behalf of the 4th interested party, Mr. Kiarie adopted his submissions and associated himself with the submissions by Mr. Mogaka. He added that the 4th interested party/applicant did not come to know about the existence of this case till the plaintiff demolished its walls in purported execution of the court orders issued herein yet the 4th interested party has a title to the land on which the demolition took place. He faulted the demolition for having been undertaken without a warrant to a court bailiff to get vacant possession. All the while the plaintiff herein was aware of the interested party's presence on the premises a fact proved by the fact that on the 20/9/2013, and before the judgment herein was delivered, the plaintiff sued the 4th interested party in E & L C No. 211 of 2013 and obtained orders against the defendants including the 4th interested party herein as the 5th defendant in that other suit. To Mr. Kiarie, the fact that the plaintiff had, prior to judgment sought to be set aside, sued the 4th interested party and obtained an *ex-parte* injunction against him was a demonstration of the plaintiffs acknowledgement and knowledge of the 4th interested party as a necessary party to the proceedings and therefore in failing to join him and seeking to obtain orders and enforce against him was untenable in law as the 4th interested party was condemned unheard hence he has a remedy in setting aside so that it gets a chance to be heard. Mr. Kiarie pointed out that with the acknowledgment of a dispute between his client and the plaintiff herein a clear injustice has been committed and would remain unremedied unless the judgment is set aside.

11. Mr. Kiarie then cited the decision in **Presbyterian Foundation Vs Charles Ndungu & 3 other (2016) eKLR** for the proposition that the court has the jurisdiction to set aside a judgment that affects a party not party to the suit; **Satwant Singh Vs Janet Lilan & Another** was also cited for the proposition that there is jurisdiction in a court to join any necessary party at any time of the proceedings; **Kenneth Kipkeomboi Vs NSSF (2014) eKLR** for the holding that merely that a court has given an order does not make it *functus officio* and that the court retains the power to order review or setting aside ***Merry Beach Ltd vs AG and 17 Others, Malindi HC Pet 5 of 2011*** for the finding that where a court finds that a party who ought to have been heard was not heard, it reserves the right to set aside a judgment to enable the party be heard.

12. For the 5th interested party, Mr. Gikandi aligned himself with the submissions by both Mr. Mogaka and Mr. Kiarie and added that HCC No. 198 of 2012 was filed long before the judgment herein was entered and it behoved the plaintiff and its counsel to have disclosed that fact to court. That fact having been kept away from the court's attention led to the court being led to issue orders of demolition on a matter subject of incomplete. Proceeding and thereby stealing a march on the 5th interested party. That having happened, Mr. Gikandi submitted, it is only just to set aside an order that would not prejudice any of the parties interested in the litigation. Mr. Gikandi then cited the decision in Ngolwa Mwaime vs Alexander Kimathi for the proposition that Rules of justice are inherent in all proceedings be they judicial or administrative. He pleaded with the court to set aside so that the right to a fair hearing could be achieved.

13. On his part Mr. Thangei vehemently opposed the plea by the interested parties and relied on his papers as filed including the said grounds of opposition, Notice of preliminary objection and submissions. He took the first objection that the right to be joined in a suit is not available post judgment and can only be available in pending proceedings and not where these exist a final judgment like in this case. For that submission he cited the decision in **Lilian Ngalo vs Moki Cooperative Society (2014)eKLR** where the court held that there cannot be joinder after judgment.

14. Mr. Thangei then added that under the doctrine of *Lis pendens*, the defendants herein were bound not to dispose of the property subject of the suit while the suit was pending and that under the said doctrine the interested parties were equally bound not to accept any conveyance from the defendant. He cited the decision in ***Telkom Kenya Ltd vs John Ochanda*** **(2014)** eKLR for that submission.

15. On Mr. Mogaka's application he pointed out that no orders could issues to the 1st-3rd interested parties the three having abandoned their prayer for joinder. His view was that setting aside is only available to parties and not non-parties. Reliance was then placed on the decision in ***Kingori vs Chege Mwoki*** **(2002) 2 KLR 243** for the proposition that reliefs are only available to parties to a suit and not otherwise.

16. On the existence of other suits being HCC No. 198 of 2012 and ELCC 211 of 2013 and ELCC No. 219 of 2013, Mr. Thangei conceded that the same were filed and were pending by the time of delivery of the judgment but pointed out that the reasons for filling same are peculiar to those suits. He reiterated that section 80 and order 45 are available to parties to the suit and not strangers and that the oxygen principle frowns upon endless litigation.

17. In his final submissions Mr. Mogaka sought to remind the court that the plaintiff had conceded the existence of other suits disclosing the interests of the interested parties and that unless the judgment is set aside there is real danger of an absurdity in that they shall have been declared vested interests upon, the plaintiff over the titles belonging to the interested parties.

18. Mr. Kiarie on the other side for the 4th interested party sought to clarify that in the HCC No. 211 of 2013 there had been a false declaration that the 4th interested party trespassed on the land in September 2013 when infact he got in the year 2011 and fenced the land. On jurisdiction to order joinder post judgment Mr. Kiarie placed reliance on the decision in ***JMK vs MWM AND ANOTHER 2015)eKLR*** to the effect that as long as an applicant demonstrates that a decision has been made which affects it, the court has a duty to ensure that he get a fair hearing and natural justice by according him the right to be heard by ordering that fresh hearing be conducted. In conclusion and response to the submissions on *Lis Pendens*, Mr. Kiarie dismissed the principle as not applicable to the 4th interested party because he acquired title prior to this suit and was not aware of its existence.

19. Last to make a rejoinder has Mr. Gikandi who said that section 80 would have no meaning if the submissions by Mr. Thengei were to hold sway. He stressed that the interested parties are affected parties who would only be heard if setting aside is ordered and an opportunity to be heard is accorded.

20. Those essentially make the summary of the parties positions taken by papers filed and oral submissions. I have taken regard to all the materials availed and I have come to the opinion that the following issues avail themselves for determination by the court.

> **i. Is there jurisdiction in court to order joinder of a party after the delivery of judgment?**
>
> **ii. Can the court order setting aside and or review in favour of a party who was not a participant in the proceedings giving rise for a judgment?**
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> **iii. Does delivery of a judgment IPSO facto render the court functus officio?**
>
> **iv. Are the applicants/1st-5th interested parties necessary parties deserving their day in court in these proceedings?**

21. All the issue are closely related and intertwined and in this Determination, a determination on the 4th issue would be a determinant in what become of the others.

22. It is a common ground and not disputed that the 1st, 2nd 3rd, 4th and 5th own different parcels of land registered differently from that owned by the plaintiff. Prior to the judgment by Kasango J dated the 26/9/2013 the plaintiff was aware of that fact and had filed suits against those parties. That fact of filing suits against the interested parties was an acknowledgement of a dispute over some land which once before court, should be left to the courts' determination. Even if this matter was filed without such knowledge, the moment the plaintiff came to know about the interest of the interested parties on the subject of litigation it, was its duty to court to make a frank and full disclosure and not to lead the court to

issue an order of eviction against persons who were not parties to the suit and had not been accorded the opportunity to be heard. The fact that the court deemed it necessary to order that any person who had erected any structure on the suit land would have such walls demolished was to this court a clear indication that such persons were necessary party that ought to have been made parties. That however appears not to have been done apparently because no application in that regard was presented to court. Ground has however shifted since then and the interested parties have come to court exhibited their interest in the subject of litigation by showing their titles to the land.

23. It might as well be that the parcels of land are distinct or that a party is mistaken as to its boundary or just that the ministry of lands has ran into that untidy situation of having parallel titles. Whatever it is that brings a dispute between the parties, it falls at the door steps of the court to determine such dispute. This determination lead me to the inevitable conclusion that to the extent that a dispute is acknowledge between the plaintiff and the interested parties, the interested parties are necessary parties that the Rules of Natural justice, the right to a fair hearing under Article 50 and the right to property under article 40 demand that they be heard before any adverse order is issued.

24. That there are disclosed necessary parties against whom there is in existence a court order issued without their participation dictates that the proceedings be opened and an opportunity granted to them to participate and put forth their side of the story that is to this court the only just and fair way a court of law should approach such a dispute. I would for that reason open the proceedings set aside the judgment dated 26/9/2013 for reasons that it was issued pursuant to the failure by the plaintiff to disclose to court the interests of the interested parties.

25. As said before, the finding that the interested parties are necessary parties dictate that they be accorded an opportunity to be heard that can only happen if the judgment is set aside. I therefore order that the judgment of 26/9/2013 be set aside. Having so set aside on the basis that there was a mistake by that failure on the part of the plaintiff, which the court ought to have detected but did not detect, it follows from the pleadings and the prayers in the plaint that the interested parties be made parties so that the dispute may get on the rail towards being resolved between all the parties.

26. The rules of procedure aside, the dispute is about title to land which is to this court a valuable property and whose right is enshrined in the constitution. The judgment on record having been set aside, and there being a finding that the interested parties are necessary parties to the suit, in order to bring these parties to the suit, it is only just that they be joined.

27. The plaintiff/respondent argued and so forcefully that after judgment there cannot be an order for joinder and that the court has become *functus officio*. That cannot be true. To say that the mere existence of a judgment, however obtained, put a decision beyond reproach, would be to miss the point and reward impropriety and injustice many a times. My finding is that any process of the court that has left a necessary out and unheard is not a fair and just determination. In fact before a court of law determines a dispute with all concerns being afforded a chance to be heard the court reserves the right to set aside its orders to facilitate such parties being heard. It matters not that a judgment has been rendered or even a decree extracted and executed. Nothing done in violation of the right to be heard can be allowed to stand. I may only add that if there exists any principle or rule of law or practice anywhere that would suggest support for such, such would be unconstitutional and void to the extent that it negates on the right to be heard and heard fairly.

28. Using the inherent powers of the court, now that the judgment has been set aside, I direct as follows:-

> **i. The Plaintiff shall within 14 days from today, file and serve an amended plaint to include the interested parties as defendants, take out summons to enter appearance and serve same upon the advocates on record for the 1st - 5th interested parties within 14 days after the summons shall have issued.**
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> **ii. This being a land matter and it having been handled by this court, may be pursuant to the transition provisions and the practice directions earlier on issued, and taking into account**

that the land court is now fully operational, I direct that this matter be transferred to the Environment and Land Court forthwith and that further proceedings be taken there.

29. I order that the costs of the application be costs in the cause.

Ruling delivered at Mombasa this 8th day March 2017.

HON. P.J.O. OTIENO

JUDGE

In the presence of:-

Mr. Muhereza for Thangei for plaintiff/respondent

Mr. Olwande for 1st -3rd interested parties

Ms. Layo for Mr. Kiarie for 4th interested party and for Mr. Gikandi for the 5th interested party.

Hon. Justice P. J. O. Otieno J

8/3/2017