REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CASE NO. 133 OF 2014

SAMUEL MATUNDE MUCHINA.....PLAINTIFF/RESPONDENT

VS.

SAMUEL KIPTOO RUTO & 9 OTHERS.....DEFENDANTS

AND

JOSHUA KIRWA BETT

(Suing as the Power of Attorney for

PRISCILLA JEBUNGEI KIRWA).....1ST INTERESTED PARTY/APPLICANT

DANIEL KIRWA SAWE.....2ND INTERESTED PARTY/APPLICANT

KIMAGUT ARAP KIYAI.....3RD INTERESTED PARTY/APPLICANT

PETER KIPCHIRCHIR KEMBOI.....4TH INTERESTED PARTY/APPLICANT

SIMON CHIRCHIR.....5TH INTERESTED PARTY/APPLICANT

JANE J. TARUS.....6TH INTERESTED PARTY/APPLICANT

GIDEON KIPKEMBOI RUTO.....7TH INTERESTED PARTY/APPLICANT

CHRISTOPHER KIPKEMEI KORIR.....8TH INTERESTED PARTY/APPLICANT

RULING

This ruling is in respect of an application dated 22nd January 2020 seeking for orders that the applicants be enjoined as interested parties and a stay of execution of the decree pending the hearing and determination. Parties agreed to canvass the application by way of written submissions which were duly filed.

APPLICANTS'CASE

Counsel for the applicants submitted that the plaintiff filed a suit against the defendants seeking a declaration that they were trespassers on the land parcel UASIN GISHU/NDALAT/30 and that the applicants being in occupation of the suit land were not aware of the existing suit and were informed after judgment was delivered on 5th December 2019.

Counsel further submitted that the plaintiff failed to disclose to the court the existence of **Civil Suit No. 14 of 2013 – Samuel Mutinda Muchina v Joshua Kirwa Bett & Samuel Kiprugut Murei** which is still pending in court.

Mr Yego Counsel for the applicants submitted that the orders arising out of judgment delivered by the court on 5th December 2019 are likely to adversely affect the Applicants' interest in land, considering the fact that they were not served with court documents. That the Applicants bought the land from the Plaintiff/ Respondent on various diverse dates and have built permanent homes therein and as such have demonstrated the legal interest in the case.

Counsel responded to the submission by the respondent's counsel that they were not properly on record by submitting that the Applicants appointed the firm of **Z K. YEGO LAW OFFICES** to prepare this application and to defend the application pursuant to provisions of Order 9 Rule 9 which provides: -

> "Where there is a change of advocates, or when a party decides to act in person having previously engaged another advocate, after judgment has been passed, such change or intentions to act in person shall not be effected without an order of the court: -
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> a) Upon an application with notice to all parties; or
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> b) Upon consent filed between the outgoing advocates and the proposed incoming advocates or party intending to act in person as the case may be.

Counsel submitted that the court should be guided by provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 which provides: -

> "...justice shall be administered without undue regard to procedural technicalities...

Further that the proposed interested parties are not yet parties to this suit hence it is premature to file notices of appointment. Such notices can only be filed once the present application is filed.

Counsel listed the interests that each applicant has in the suit land as follows:

> a) PRISCILLA JEBUNGEI KIRWA bought 2 acres from the Plaintiff/Respondent in the year 1996 vide an agreement executed on 11th June 1996 at an agreed consideration of Kshs. 100,000. The 1st Applicant has a Power of Attorney to represent PRISCILLA JEBUNGEI KIRWA generally in relation to the suit parcel UASIN GISHU/NDALAT/30. Later on, an award was issued by the Principal Magistrate in AWARD NO. 58 OF 2001 where PRISCILLA JEBUNGEI KIRWA whereby she went ahead to enforce her legal rights as the owner of the 2 acres and the Plaintiff/ Respondent was ordered to transfer the parcel to her.
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> b) The 2nd Applicant has authority to litigate on behalf of the deceased SAMWEL MUREI who died on 13th December 2016 and at the time of filing this application, the Grant of Letters of Administration Ad Litem was awaiting signing by the Magistrate on duty at the Eldoret Chief Magistrates Courts. Additionally, the 2nd Applicant was awarded 3 acres vide AWARD NO. 48 OF 2002 after the Plaintiff/ Respondent failed to pay Kshs. 5,300/ = to the deceased in respect of the 3 acres.
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> c) In 2012, both the 1st and 2nd Applicants filed a counterclaim against the Plaintiff/Respondent in ELDORET HCC NO. 161 OF 2012 seeking orders that they may be transferred their respective portions of land. The Plaintiff/ Respondent has ever since been evasive in signing the transfer forms.
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> d) The 3rd Applicant purchased 0.2 acres from the Plaintiff for a consideration of Kshs. 20,000 which was paid in full. He has enjoyed nec vi nec clam, nec precario (peaceful, open and continuous) possession of the parcel of land for more than 12 years, thus granting him equitable rights to ownership of the 0.2acres by way of Adverse Possession.

Counsel therefore submitted that the Plaintiff/Respondent's claim is res judicata as the same having been determined by the Land Disputes Tribunal in AWARD NO. 48 OF 2002 and that the Plaintiff/ Respondent to date has never appealed against that decision. Counsel therefore urged the court to allow the application as prayed.

RESPONDENT'S CASE

Counsel for the respondent opposed the application and submitted that the court has no jurisdiction to entertain the motion as the suit has already been concluded and judgment duly delivered against the persons who were parties to the action only. The judgment and the original suit did not in any way involve the interested parties at any point.

Counsel submitted that the court as it is functus officio on the matter as the claim laid before it for adjudication by the plaintiff has been fully addressed to conclusion. Counsel relied on the case of **Kenya Airports Authority vs. Mitu-Be11 Welfare Society & 2 Others, (2016) eKLR** in which it was observed;

> "*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 proceeding. 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 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.*

On the issue of joinder of parties, Mr. Mogambi counsel for the respondents submitted that the same is regulated by order 1 Rule 10 of the Civil Procedure Rules, 2010 which contemplates that a joinder can only be effected if there are proceedings which are ongoing and in this current case the same is concluded. Counsel relied on the case of J **M K v M W M & Another [2015] eKLR** in which it was observed;

"We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court."

Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. 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. vs. 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. "*

Mr Mogambi counsel for the respondent relied on the case of **Merry Beach Limited v Attorney General & 18 Others [2018] eKLR** in which Justices **Visram, Karanja and Koome** allowed an appeal challenging an order granting the joinder of a party post - judgment and setting aside the judgment. The Learned Judges observed;

"*In the end, we think we have said enough to demonstrate that the learned Judge erred in joining the 19th respondent to the suit and setting aside the judgment therein. Consequently, the appeal herein has merit and is hereby allowed. We set aside the learned Judge's ruling dated 16th September, 2016 and substitute it with an order dismissing the 19th respondent's application for joinder."*

Counsel submitted that the 1st applicant ought to have executed the decree in the matter where the award was given i.e. Eldoret CM Award no. 58 of 2001 12 years from the date of judgment as required by the limitation of Actions Act. That the 2 nd applicant has not produced a grant of letters of administration ad litem had thus he has no authority to litigate on behalf of the estate of the late Samuel Kiprugut Murei as provided by section 82 of the Law of Succession Act.

It was counsel's submission that the 3rd applicant has no legal interest in the suit land as the enforcement of any rights under the alleged agreement KAK having not been carried out within 6 years is barred by section 4(1) of the Limitation of Actions Act. That the 4th applicant has failed to demonstrate an interest capable of enjoinment to the suit as Simon Metto from whom the application allegedly purchased the suit land from did not have a registered power of attorney from the respondent entitling him to act as his representative.

Mr. Mogambi also submitted that the 5th applicant has no interest capable of being enjoined to the suit as the applicant cannot enforce a contract between himself and Thomas Kiplagat Boen while the respondent is not a party to the contract as the doctrine of privity of contract bars the same.

Further that the 6th applicant has not established an interest that would entitle joinder into the suit as the respondent is not privy to the contract between herself and Monica J Maritim dated 3rd February 2008. The enforcement of the agreement is time barred by section 4 of the limitation of actions act.

That the 7th Applicant has not proven that he is entitled joinder into the suit as he is not privy to the agreement between the applicant and Ezekiel Cheruiyot Kemei. The agreement dated 6th February 2009 is unenforceable for failing to comply with section 3(3) of the Law of Contract Act., likewise to the 8th applicant who has not demonstrated an interest that would warrant joinder as he is not privy to the agreement between the applicant and David Samoei.

Counsel therefore urged the court to dismiss the application with costs to the respondents.

ANALYSIS AND DETERMINATION

This is an application for joinder of interested parties and stay of execution. The issues for determination are as to whether the court can entertain an application for joinder after judgment and whether the applicants have met the threshold to be enjoined as interested parties. Finally, whether the applicants are entitled to a stay of execution of the decree.

Order 1 Rule 10(2) of the Civil Procedure Rules provides;

(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.

In J M K v M W M and another, the court held;

We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. *Sarkar's Code,* (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. 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.

From the authorities cited, the court can allow applications for joinder after judgment if assessment of damages is pending. In this particular case there is no assessment of damages pending. The matter is concluded and therefore does not fall in the category of proceedings that are ongoing.

The applicant has disclosed some information which in effect shows that they can pursue their interests elsewhere having litigated at the Land Disputes Tribunal with awards to boot. Why did the applicants not execute the orders of the Tribunal which were adopted by the court as submitted?

In the case of **Robert Githua Thuku v William Ole Nabala & 9 Others [2018] eKLR** Justices Karanja, Koome and Odek observed;

> *"Nonetheless, as with any inclusion to a suit, the party seeking to be joined must demonstrate an interest in the matter. The circumstances of the suit must justify the joinder. In addition, the joinder should not be intended to vex the other parties or convolute the matter (See.* ***Attorney General vs. Kenya Bureau of Standards & Another [2018] eKLR)****. Consequently, the appellant was in this case required to first and foremost, demonstrate that he had an actionable interest and a right to be in the suit; what is otherwise known as locus standi. As per the decision of this Court in the case of Alfred Njau & 5 others v. City Council of Nairobi [1983] eKLR; locus standi was defined thus:*
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> *"The term locus standi means the right to appear in court and, conversely, as is stated in JoZowitt's Dictionary of English Law, to say that a person has no ZOCUS standi means that he has no right to appear or be heard in such and such a proceeding"*
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> *What gives a person a right to be heard or standing before Court is well defined by the Black's Law Dictionary, 9th Edn, which states that to have standing, one must show that:*
>
> *1) The challenged conduct has caused him actual injury and;*
>
> *2) The interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.*

The applicants must prove that they have an identifiable interest which is at stake and not just busybodies who would want to convolute the case.

On the second issue as to whether the applicants have met the threshold for joinder of interested parties, the same is as was stated in the case of **Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others**, *Sup. Ct. Pet. No. 12 of 2013* - at paragraphs 17 and 18 of the ruling where it was held:

> *'Consequently, 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.*

The 2nd applicant did not have the grant of letters of administration ad litem to represent the estate of the deceased. Section 82 of the Law of Succession Act provides;

> **Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—**
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> (a) **to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative**;

This essentially knocks her out as she does not have locus standi to represent the estate of a deceased person.

The 1st applicant has a power of attorney which states that he is to appear in court on her behalf and argue a case on her behalf. It does not specify the exact case. Further, it allows him to attend the land control board and do everything possible to allow her get clean title. The 3rd to 8th applicants claim to have purchased the suit land or portions thereof from alleged agents of the respondent.

This is a matter that is concluded and a judgment rendered. The defendants did not give evidence even though their advocate was on record and later filed submissions in the case. There is nothing left in terms of assessment of damages which would allow joinder of parties. The applicants have other avenues to execute their awards which is not through this case that has been finalized.

The applicants' application is for stay of execution pending the hearing and determination of this application and joinder of interested parties. It does not pray for setting aside the judgment which is on record. The question is after being enjoined then what next? What do they want to do with the enjoinment in a case that is concluded?

I find that the application has no merit and is therefore dismissed with costs to the respondents.

DATED and DELIVERED at ELDORET this 9TH DAY OF JUNE, 2020

M. A. ODENY

JUDGE