



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 250 OF 2017**

**MESHACK MWAKA MUSYOKI** (*Suing on*

*behalf of the Estate of*

**HENRY MUSYOKI KILONZI-(deceased).....PLAINTIFF/RESPONDENT**

**VERSUS**

**GLADYS MUTHEU MAKAU.....DEFENDANT/RESPONDENT**

**AND**

**JOSEPH MBOGE KYATHE.....1<sup>ST</sup> INTERESTED PARTY/APPLICANT**

**BENSON MUTHWI MAKULA.....2<sup>ND</sup> INTERESTED PARTY/APPLICANT**

**BENJAMIN KILONZO.....3<sup>RD</sup> INTERESTED PARTY/APPLICANT**

**HADSON NYAMBARIGA.....4<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**JOEL NTHEI MWANZIA.....5<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**KELLEN IGOKI MURITHI.....6<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**ANDREW WAMBARI NG'ANG'A.....7<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**AMINA SHIDA ADAM.....8<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**ANNE KERUBO SAMOKA.....9<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**FRANCIS WANDHOGHO MWAITA..10<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**ONDITI OUMA.....11<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**RULING**

1. The Notice of Motion dated 2<sup>nd</sup> May, 2019 was filed under Section 3A of the Civil Procedure Act, Order 40 Rules 2(1), (2), 3(1) and 4, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules and Article 159(2) of the Constitution. The Interested Parties have sought for the following orders:

**a) Spent.**

**b) That this Honourable Court do grant leave to the Interested Parties herein to be enjoined as parties to this suit.**

**c) Spent.**

**d) That upon hearing and determination of this Application inter partes the Honourable Court be pleased to order and it is hereby ordered that the Consent dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018 entered into between the Plaintiff and the Defendant be set aside.**

**e) That upon hearing and determination of this Application inter partes the Honourable Court be pleased to order and it is hereby ordered that this matter be and is hereby consolidated with ELC No 386 of 2017, since both suits are over the same suit property originally known as 12715/179.**

**f) That upon hearing and determination of this Application inter partes the Honourable Court be pleased to order and it is hereby ordered that any subdivision of land known as 12715/179 done pursuant to the consent order dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018 entered into between the Plaintiff and the Defendant be and is hereby cancelled.**

**g) That upon hearing and determination of this Application inter partes the Honourable Court be pleased to order and it is hereby ordered that any transfers of land known as 12715/179 done pursuant to the Consent order dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018 entered into between the Plaintiff and the Defendant be and are hereby reversed.**

**h) That upon hearing and determination of this Application inter partes the Honourable court be pleased to order and it is hereby ordered that any party purporting to benefit and constructing structures on the subject property on the purported sub-divisions of land known as 12715/179 done pursuant to the Consent order dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018 be and are hereby stopped from such activities pending the hearing and determination of this suit and ELC No. 386 of 2017.**

**i) That upon hearing and determination of this Application inter partes the Plaintiff and the Defendant and/ or their servants and/ or agents be restricted by way of a temporary injunction from purporting to enjoy and exercise the power and rights gained through executing the Consent orders made in this matter on 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018 between the Plaintiff and the Defendant to the detriment of the Interested Parties herein pending the hearing and determination of this suit and ELC No. 386 of 2017.**

**j) That costs of this Application be provided for.**

2. The Application is supported by the Affidavit of Joseph Mboge Kyathe, the 1<sup>st</sup> Interested Party, sworn on 2<sup>nd</sup> May, 2019 on his behalf and on behalf of the other Interested Parties. The 1<sup>st</sup> Interested Party deponed that the Interested Parties have sued the Plaintiff herein over the suit property L.R. No. 12715/179 in Machakos ELC No. 386 of 2017.

3. The 1<sup>st</sup> Interested Party deponed that that the consent order dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018 allowed the sub-division of the suit land; that the said consent changes the entire face of the suit property; that the consent will render Machakos ELC No. 386 of 2017 a non-starter and that the Interested Parties took possession of the suit property and have been using the same for over 20 years.

4. The 1<sup>st</sup> Interested Party further deponed that pursuant to an Agreement that was entered into between the deceased owner and Mbukoni Holdings Limited, Mbukoni Holdings Limited sub-divided and sold the suit property to them; that they were astonished to be served with the consent order and that the said consent was entered into despite the existence of Machakos ELC Case No. 386 of 2017.

5. It was deponed on behalf of the Interested Parties that after the parties herein secretly entered into the Consent order dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018, the parties herein used the order to facilitate the destruction of the fences and beacons that were put in place; that the said consent order was also being used to evict the Interested Parties and that the Interested Parties have an interest in the suit property.

6. The Plaintiff opposed the Application vide a Replying Affidavit sworn on 1<sup>st</sup> July, 2019. The Plaintiff deponed that the court was *functus officio* by virtue of the consent order that was on record; that the suit had already been finalized and that after the Consent order dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018, L.R No. 12715/13404 and L.R No. 12715/179 ceased to exist as a result of the subdivision.

7. The Plaintiff deponed that on 9<sup>th</sup> April, 2019, the Application dated 7<sup>th</sup> November, 2018 for the joinder of the Interested Parties was withdrawn by consent and that this court cannot revisit the same issue. According to the Plaintiff, the Interested Parties are strangers and do not possess the suit property as claimed; that the Interested Parties has filed an Application for injunction in ELC No. 386 of 2017 which has never been heard and that the Interested Parties should prosecute their suit.

8. In a Further Replying Affidavit sworn on 9<sup>th</sup> August, 2019, the Plaintiff averred that the suit land L.R. No. 12715/179 was registered in the name of the deceased - Henry Kilonzi Musyoki, who died on 3<sup>rd</sup> July, 2016; that that the deceased entered into an Agreement for Sale of the suit property with Mbukoni Holdings Limited on 18<sup>th</sup> December, 1997 and that the said Mbukoni Holdings Limited did not pay the whole purchase price and as a result, the deceased rescinded the sale.

9. It was deponed that the Defendant realized that she was conned by Mbukoni Holdings Limited and opted to settle the matter out of court; that the Defendant cannot be blamed for settling the suit out of court and that the Interested Parties ought to pursue their suit without reviving the instant suit.

10. The Application was canvassed by way of written submissions. The Interested Parties' counsel submitted that the consent order was entered into with the intent of excluding the Interested Parties. Reliance was placed on the case of **Board of Trustees National Social Security Fund vs. Michael Mwalo (2015) eKLR**.

11. Counsel submitted that fraud had not been proven against Mbukoni Holdings Limited; that when the consent order was entered into, it was not disclosed that the Interested Parties were in actual possession of the suit property, namely, L.R. No. 12715/179 and that the Interested Parties purchased the suit property from Mbukoni Holdings Limited.

12. On the issue of consolidation of this suit and Machakos ELC No. 386 of 2017, it was submitted that the Interested Parties filed Machakos ELC 386 of 2017 against the Plaintiff claiming purchasers' interest in L.R No. 12715/179; that the Interested Parties had filed Machakos Civil Suit No. 641 of 2008 against the late Henry Musyoki Kilonzi and Mbukoni Holdings Limited seeking to enforce their purchasers' interest on LR 12715/179 and that the suit was withdrawn under unclear circumstances.

13. It was submitted by the Interested Parties' advocate that Machakos ELC No. 386 of 2017 and this suit pertain to the same subject matter being L.R.No. 12715/179; that the main contest is between a son to the deceased and Mbukoni Holdings Limited who purchased the land from the deceased owner and that the court should consolidate the instant suit with ELC No. 386 of 2017. Counsel relied on the case of **Stumberg & Another vs. Potgieter (1970) EA 323**, amongst other cases.

14. The Plaintiff's counsel submitted that there was an Application dated 7<sup>th</sup> November, 2018 filed by the 1<sup>st</sup> to 6<sup>th</sup> Interested Parties seeking orders similar to the instant Application which was withdrawn on 9<sup>th</sup> April, 2019 by the consent of the parties; that the Interested Parties are not signatories to the consent order and that as such, they do not have the *locus* to challenge the consent. Counsel relied on case of **Dunlop Pneumatic Tyre Co Ltd vs. Selfridge & Co Ltd (1915) AC 847**.

15. Counsel submitted that the instant suit was finalized on merit; that the Interested Parties have a pending Application for injunction in Machakos ELC No. 386 of 2017 and that their actions amount to duplicity of orders and in effect an abuse of the court process.

16. It was the Plaintiff's counsel's argument that the Interested Parties have not demonstrated a cause of action as against the Plaintiff in the instant case; that they have not filed a Defence or Counter-claim to ventilate their claim and that the prayers sought in the Application are not supported by any pleadings.

17. Learned counsel submitted that the Interested Parties' claim is time barred pursuant to the provisions of Section 4 of the Limitation of Actions Act and that the action for recovery of land ought to have been brought within 6 years. Counsel relied on numerous authorities which I have considered.

18. The Interested Parties gravamen seems to be hinged on the Consent order that was entered into between the Plaintiff and the Defendant dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018 which, *inter alia*, provided as follows:

**"IT IS HEREBY ORDERED BY CONSENT:**

**1. THAT the Plaintiff and the administrator of the Estate of Henry Musyoki Kilonzo (Deceased) are hereby ordered to finalize the sub-division of all that piece of land known as Land Reference Number 12715/179 located in Syokimau area Machakos County.**

**2. THAT the Registrar of Titles is ordered to issue titles for all sub-divisions arising from L.R. No. 12715/179.**

**3. THAT the Plaintiff and the administrators of the Estate of Henry Musyoki Kilonzi are ordered to transfer L.R. No. 12715/13404, a sub-division of L.R. No. 12715/179 to the Defendant who has purchased the same from the Estate.**

**4. THAT the Plaintiff and the administrator of the Estate of Henry Musyoki Kilonzi to cater for the costs of transfer of L.R No. 12715/13404 to the Defendant's name as agreed between them.**

**5. THAT the Defendant will only develop L.R No. 12715/13404 and will remove any structures encroaching on any other sub-division of L.R No. 12715/179 at her cost.**

**6. THAT the Defendant is at liberty to seek damages from Mbukoni Holdings Limited for damages for the fraudulent sale of the Plaintiff's Estates' land without authority or permission/consent.**

**7. THAT each party to bear own costs of the suit."**

19. The above consent was as a result of this suit which was filed by the Plaintiff against the Defendant where it was averred that the Defendant was a trespasser on land L.R No.12715/179. With the above consent, this suit was compromised in terms of Order 25 Rule 5 of the Civil Procedure Rules and as such, the claim against the Defendant had been settled.

20. Having considered the pleadings and the submissions of counsel, the issues for determination are whether the Interested Parties can be joined as parties to a suit that has been concluded, and whether the Interested Parties can be granted the orders sought in the Application.

21. The law governing joinder of parties is Order 1 Rule (10) (2) of the Civil Procedure Rules. Order 1 Rule 10 (2) empowers the court, at any stage of the proceedings, upon an Application by either party or *suo moto*, 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.

22. Commenting on the provisions similar to our Order 1 Rule 10 (2), *Sarkar's Code of Civil Procedure (11<sup>th</sup> Ed. Reprint, Reprint, 2011, Vol. 1 p887)*, provides as follows:

***“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.”***

23. Order 1 Rule (10) (2) of the Civil Procedure Rules contemplates an Application for amendment or joinder of parties where proceedings are still pending before the Court. However, there are situations where a party can be joined in a finalized suit.

24. That is the position that the Court of Appeal took in the case of *J M K vs. M W M & Another (2015) eKLR* where the Judges quoted with approval the decision by the Court of Appeal in Tanzania in *Tang Gas Distributors Limited vs. Said & others (2014) EA 448*.

25. In the said decision, the Court of Appeal of Tanzania held 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 trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceedings have 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.

26. For a party to be so enjoined, his presence must be necessary in determining the matter. Hence, the Applicants have to show that they have a stake in the proceedings and that their presence will help the court determine the issues at hand. The mere mention of the term “Interested Party” does not entitle them to be enjoined as parties to the proceedings.

27. In the Complaint, the Plaintiff averred that Land Reference number 12715/179 (*the suit property*) is registered in the name of the Henry Musyoki Kilonzi (*deceased*); that the Defendant trespassed on the said land in the year 2017 and that the Defendant should be evicted from the said land.

28. In one of her Supplementary Affidavit sworn on 19<sup>th</sup> September, 2017 in response to the Defendant's Affidavit sworn on 24<sup>th</sup> August, 2017, the Plaintiff deponed that the Agreement that her late father entered into with Mbukoni Holdings Limited for the sale of the suit land to third parties was revoked in 1998 after the said Mbukoni Holdings Limited failed to pay the full purchase price.

29. In the same Affidavit, the Plaintiff deponed that her late father had given to Mbukoni Holdings Limited, the original mother title and that the purported sale of a portion of the suit property to the Defendant was null and void.

30. In the current Application, the Interested Parties' case is that the Agreement that the Plaintiff's late father entered into with Mbukoni Holdings Limited allowed Mbukoni to sub-divide the suit property into smaller plots and sell the plots to the members of the public; that they bought the said plots with the full knowledge of the deceased and that they have been in possession of their respective portions of land for over 20 years.

31. The fact that the Plaintiff's late father entered into an Agreement in respect to the suit property with Mbukoni Holdings Limited has been admitted by the Plaintiff in her Replying Affidavit sworn on 9<sup>th</sup> August, 2019. In the said Affidavit, the Plaintiff has deponed that the Agreement that her father entered into with Mbukoni Holdings was rescinded for non-payment of the purchase.

32. That being the case, and without going into the merits of the Agreements that Mbukoni Holdings Limited entered into with the Plaintiff's late father and the Interested Parties, it is my findings that the Interested Parties, prima facie, have an interest in the outcome of this suit. The validity of the Agreements between the Plaintiff's late father, Mbukoni Holdings Limited and the Interested Parties will be determined at trial.

33. That being so, the Interested Parties ought to be joined in this suit to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The said joinder can only be meaningful if the consent that the Plaintiff and the Defendant entered into is set aside.

34. Indeed, the effect of the consent order that the Plaintiff and the Defendant entered into was to have the suit property sub-divided and all the titles to be released to the Plaintiff. The order further provided that any all structures “*encroaching*” on the suit land should be removed.

35. The cumulative effect of the consent that was entered into between the Plaintiff and the Defendant was to have the titles arising out of the sub-division of the suit property to be out of reach of the Interested Parties, and to also evict those who are already in possession of the suit land property before hearing them. That, in my view, was an attempt by the Plaintiff to deny the Interested Parties the right to be heard, an attempt that this court frowns upon.

36. Considering that the Interested Parties have filed Machakos ELC No. 386 of 2017 claiming the suit property, and the Plaintiff herein having entered appearance and filed a Defence, and in view of the common questions of law and facts in the two suits, the interests of justice demands that the two suits be consolidated. This will enable the two suits to be disposed of at the same time.

37. However, in view of the fact that Machakos ELC No. 386 of 2017 is not before me, and considering that the Interested Parties have not filed pleadings in this suit, I shall not delve into the issue of whether an order of injunction should issue or not. An application for injunction should be filed and argued separately.

38. For those reasons, I allow the Application dated 2<sup>nd</sup> May, 2019 as follows:

- a) *Leave be and is hereby granted to the Interested Parties to be enjoined as Defendants to this suit.*
- b) *The Consent Order dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018 entered into between the Plaintiff and the Defendant be and is hereby set aside.*
- c) *Any sub-division of land known as L.R No. 12715/179 done pursuant to the consent order dated 25<sup>th</sup> September, 2018 and issued on 28<sup>th</sup> September, 2018 entered into between the Plaintiff and the Defendant be and is hereby stayed pending the hearing and determination of this suit and Machakos ELC No. 386 of 2017.*
- d) *This suit is hereby consolidated with Machakos ELC No. 386 of 2017.*
- e) *Each party to cater for his/her own costs.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5<sup>TH</sup> DAY OF JUNE, 2020.**

**O.A. ANGOTE**

**JUDGE**