



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC SUIT NO.208 OF 2017**

**EUNICE NDUKU KIVELENGE &**

**WAVINYA KIVELENGE (Suing as the legal representatives of the Estate of**

**KIVELENGE NZANO).....PLAINTIFF/RESPONDENT**

**VERSUS**

**MATENGE NTHANO KIVALI.....DEFENDANT**

**FREDRICK MUTISYA KISILU.....INTERESTED PARTY/APPLICANT**

**RULING**

1. The application for ruling is the one dated 19<sup>th</sup> November, 2019 and filed in court on even date. It is by the Interested Party/Applicant and is expressed to be brought under Order 10 Rule 10, Order 12 Rule 7, Order 22, Order 51 Rule 1 of the Civil Procedure Rules, 2010, sections 1A, 1B and 3A of the Civil Procedure Act (cap 21) Laws of Kenya and all enabling provisions of the law for orders: -

**1) Spent.**

**2) Spent.**

**3) This Honourable Court be pleased to set aside the judgement delivered on 30/07/19 and the Proceedings herein.**

**4) The Applicant herein be enjoined in this suit as an Interested Party.**

**5) The Annexed Applicant's Draft Defence be deemed as duly filed and served upon the Respondents and their Advocates on record subject to further Orders on compliance with Order 11 of The Civil Procedure Rules, 2010.**

**6) This Honourable Court be pleased to grant leave to the Applicant to file and serve his Defence and to defend the suit and have the same determined on merits.**

**7) Costs of this Application be borne by the Respondents.**

The application is predicated on the six (6) grounds on its face and is supported by the supporting and supplementary affidavits of Fredrick Mutisya Kisilu, the Interested Party/Applicant herein, sworn at Machakos on 19<sup>th</sup> November, 2019 and 04<sup>th</sup> March, 2020 respectively.

2. The Plaintiffs/Respondents, Eunice Nduku Kivelenge and Wavinya Kivelenge have opposed the application vide the replying affidavit of Wavinya Kivelenge, the 1<sup>st</sup> Plaintiff/Respondent sworn at Makueni on 03<sup>rd</sup> February, 2020 with the authority of the 2<sup>nd</sup> Plaintiff/Respondent.

3. The Defendant/Respondent though served with the application on the 27<sup>th</sup> November, 2019, did not file his replying affidavit. The Interested Party/Applicant filed an affidavit of service sworn by Nzioki Mukula, an Advocate of the High Court of Kenya, at Machakos on the 28<sup>th</sup> January, 2020 and filed in court on the 03<sup>rd</sup> February, 2020.

4. The Counsel on record for the Interested Party/Applicant as well as the Plaintiffs/Respondents filed their written submissions on 04<sup>th</sup>

March, 2020 and 29<sup>th</sup> May, 2020 pursuant to the court's direction that the application be disposed off by way of written submissions.

5. The Interested Party/Applicant has deposed in paragraphs 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14 and 15 of his supporting affidavit that the Defendant/Respondent is the registered proprietor of the subject matter being land parcel number Nzai/Kalamba/25 as can be seen from the documents of ownership annexed as FKM-1, that between 1994 to 2004 the Defendant herein sold to the Interested Party/Applicant 2.2 acres of the aforementioned parcel of land vide a lawfully executed sale agreement marked as annexure FMK-2, that this matter proceeded in the absence of the Applicant leading to the judgement dated and delivered 30<sup>th</sup> July, 2019 and marked as annexure FMK 3, that the Plaintiffs/Respondents did not enjoin the Interested Party/Applicant as an Interested Party nor did the Defendant/Respondent enjoin him as a third party, that both the Plaintiffs/Respondents and the Defendant/Respondent are aware that the Interested Party/Applicant has an interest in the suit property herein, that the Interested Party/Applicant only became aware of the aforementioned suit and judgement a few days to the filing of this application, that on 11<sup>th</sup> November, 2019, the Interested Party/Applicant filed a suit by way of originating summons vide Makueni ELC civil suit No.82 of 2019(OS) seeking inter alia a declaration that he has acquired the aforesaid 2.2 acres of the subject matter by way of adverse possession as can be seen from a copy of the suit marked as FMK4, that he has been in uninterrupted occupation and possession of the said 2.2 acres which he has proceeded to develop as can be seen from photographs annexed as FMK-5, that he learnt from his area chief that the process of surveying the suit property was scheduled to take place on 27<sup>th</sup> November, 2019 as can be seen from the Surveyor's letter dated 05<sup>th</sup> November, 2019 and marked as FMK-6, that his interest in the suit property will not be protected during the said survey process since the intended sub-division is highly prejudicial, that he has a good defence which raises plausible and/or triable issues which ought to be canvassed on merits, that he is desirous of defending the matter to its logical conclusion and that if he is condemned unheard, his constitutional right to fair hearing will be infringed thus occasioning him detrimental loss.

6. In her replying affidavit, the 1<sup>st</sup> Plaintiff/Respondent has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 that she has been advised by her advocates on record which advise she verily believes to be true that the issue of ownership of land parcel number Nzai/Kalamba/25 has already been determined by the court vide the judgement delivered on 30<sup>th</sup> July, 2019, that the present application invites the court to sit on appeal of its own judgement which is contrary to the law, that in any event, the Defendant/Respondent ought to have enjoined the Interested Party/Applicant in the suit before the determination of the same since they are both represented by the same advocates, that without prejudice to the foregoing, the Interested Party/Applicant cannot claim to have bought 2.2 acres of land and at the same time claim adverse possessory rights, that in any event, if there was any land transaction concerning the suit property between the Interested Party/Applicant and the Defendant/Respondent, the latter should compensate the Interested Party/Applicant from his share of land or refund the purchase price, that the Interested Party/Applicant has redress in law against the Defendant/Respondent in respect to their land sale transaction involving the suit property and no claim whatsoever against the Plaintiff/Respondent, that the Plaintiff/Respondent will suffer prejudice should the court allow this stale application since the Plaintiffs/Respondents were not parties to the transaction between the Defendant/Respondent and the Interested Party/ Applicant as he will be required to answer to issues they are not privy to and that the application is meant to subvert the course of justice and is an abuse of the court process.

7. The Counsel for the Interested Party/Applicant framed four (4) issues for determination. These were: -

- 1) Whether the Judgement dated 30/07/19 should be set aside.**
- 2) Whether the Applicant should be enjoined as an Interested Party.**
- 3) Whether the Applicant should be allowed to defend himself.**
- 4) Who should bear Costs.**

8. On the other hand, the Counsel for the Plaintiffs/Respondents framed three issues namely: -

- 1) Whether the Applicant can be enjoined as an interested party in the suit and be allowed to defend himself.**
- 2) Whether the judgement delivered on 30/7/2019 should be set aside.**
- 3) Who bears the costs of the application.**

9. In my view issues number 2 and 3 as framed by the Counsel for the Interested Party/Applicant can be condensed into one thus, I will adopt the issues as framed by the Counsel for the Plaintiffs/Respondents.

10. I will start by addressing issue number two which is whether the judgement delivered on 30<sup>th</sup> July, 2019 should be set aside. The Counsel for the Interested Party/Applicant began by pointing out that the test for setting aside an ex parte judgement is twofold namely a good defence on merits and sufficient cause for the delay. The Counsel added that a good defence on merits does not denote a defence which must succeed but rather one which raises triable issues. That a triable issue connotes an issue which raises a prima facie defence which should go to trial for adjudication. The Counsel added that the Interested Party/Applicant has a good defence which raises plausible issues as captured in the draft defence and counterclaim to the supporting affidavit and marked as FKM-7.

11. It was also submitted that it is not in dispute that the Interested Party/Applicant is neither a party in this suit and nor was he aware of the same. That he became aware of the suit through the area chief that the suit property was scheduled for subdivision on 27<sup>th</sup> November, 2019 as can be seen from the Surveyor's letter annexed as FMK-6. The Counsel pointed out that both the Plaintiff/Respondent and the Defendant/Respondent are aware that the Interested Party/Applicant has an interest in the suit property by dint of having purchased 2.2. acres from the Defendant/Respondent and developed the same as can be seen in the photographs marked as FMK-5 showing mature orange trees.

12. It was the Counsel's further submissions that concomitantly, the Plaintiff/Respondent did not enjoin the Interested Party/Applicant as an interested party nor did the Defendant/Respondent issue third party notice against the Interested Party/Applicant yet they were all aware that he was an interested party in the matter and that any orders issued would affect him hence a clear manifestation of concealment and/or suppression of material facts.

13. It was also the Counsel's submissions that if the judgement that was delivered by this court on 30<sup>th</sup> July, 2019 is implemented as it is, the Interested Party/Applicant will suffer prejudice because the 2.2 acres that he bought and developed will fall into the Plaintiffs'/Respondents' half portion of the suit property which will orchestrate unnecessary future legal battles.

14. In support of his submissions, the Counsel cited the case of **Patel vs. E.A Cargo Handling Services Ltd [1974] EA 75** where Sir William Duffus, P, Law Ag V. -P and Musoke J.A opined thus: -

*“There are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as may be just. Mr. Inamdar has submitted that before the court grants an application under this rule, the court must first be satisfied that (a) there is a good defence, and (b) further be satisfied as to the cause of the delay in entering an appearance.”*

15. The Counsel further cited the case of **Kimani vs. McConnell & Another [1966] EA 547** where Harris, J held thus: -

*“Taking all these matters into account and endeavouring to apply the principles which I have ventured to state I am of the opinion that the judgement dated September 20, 1965, should be set aside in its entirety upon such terms as may be just. I will now hear the parties as to the terms of including costs. Application allowed, exparte judgement set aside on condition that defence filed within 28 days.”*

16. The Counsel also cited the case of **Elias Ndwiga Njoka vs. Land Registrar Kajiado & Another; Wanachuo Investment Ltd (Interested Party) & Another [2019] eKLR** where Christine Ochieng, J while faced with a similar application stated: -

*“I note the Interested Parties' were not parties to the suit at the time the judgement was entered herein. They have sought for stay of execution as well as review and setting aside of the judgement. From the proceedings above, it is clear that as a result of the criminal case where the 1<sup>st</sup> Interested Party's representative testified, the Plaintiff was well aware that there were other parties interested in the suit property and any orders made therein would affect them but he still failed to include them in the suit and also failed to personally serve the 1<sup>st</sup> Defendant who is the custodian of all records to land.”*

Her Ladyship went on to state that: -

*“The 1<sup>st</sup> Defendant including the Interested Parties' have alleged they never defended the suit culminating in the ex parte judgement as they were not served and learnt of the suit and judgement much later on. I note from the affidavit of the 1<sup>st</sup> Interested Party that once it established there was another suit, they proceeded to apply to enjoin the same, stay the proceedings as well as set aside the exparte judgement that had already been entered therein.”*

Her Ladyship further stated: -

*“It is against the foregoing that I find that the 1<sup>st</sup> Defendant including Interested Parties' have met the threshold of review and will proceed to set aside the exparte judgement delivered on 14<sup>th</sup> November, 2014 as well as the Decree and the Vesting Orders issued thereafter.”*

Her Ladyship concluded by holding that: -

*“Based on my analysis and findings above, I find the applications dated the 20<sup>th</sup> March, 2019 and 21<sup>st</sup> March, 2019 merited and will proceed to allow them.”*

17. The Counsel for the Plaintiff/Respondent in their submissions cited **Order 11 Rule 11 of the Civil Procedure Rules** which provides that:-

*“Where judgement has been entered under this Order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”*

18. Arising from the above, the Counsel submitted that the Court has discretionary powers to set aside or affirm its judgement based on rational considerations. The Counsel added that the same is anchored on the Court's main concern to do justice to the parties as was held in the case of **Patel vs. East African Cargo Services Ltd [1975] EA 75**.

19. The Counsel went on to submit that the judgement that was delivered by this Court was regular. That the Court heard both parties as provided for by both the substantive and procedural law. The Counsel added that the matter before Court was between the Plaintiff/Respondent and the Defendant/Respondent and that the Interested Party/Applicant is a stranger out to seek audience after judgement has been delivered. The Counsel was of the view that a look at the Interested Party's/Applicant's affidavit shows that he has raised issues which were not in issue in the suit. The Counsel added that to set aside the judgement would amount to Court sitting on appeal over its own judgement (*emphasis are mine*).

20. On the issue of whether or not the Interested Party/Applicant should be enjoined as an interested party and be allowed to defend the suit, the Counsel submitted that the Interested Party/Applicant has an interest in the suit property which is identifiable and proximate. The Counsel pointed out that non-joinder will cause the Interested Party/Applicant to suffer prejudice. In support of his submissions the Counsel cited the case of **Francis Karioko Muruatetu & Another vs. Republic & 5 Others [2016] eKLR** where the Supreme Court held: -

**“..... the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:**

*One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:*

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.*
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.*
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.*

21. The Counsel went on to submit that the right to a fair trial is non-derogable right that is enshrined under **Article 25(c) of the Constitution**. The Counsel added that since the Interested Party/Applicant has an interest in the suit property, he should not be condemned unheard and should be accorded fair hearing as provided for under **Article 50(1) of the Constitution**.

22. On the other hand, the submissions by the Counsel for the Plaintiff/Respondent were that there arises the question of whether or not the interested Party/Applicant has sufficient and merited reasons to warrant him to be enjoined in this suit. The Counsel submitted that the Plaintiff/Respondent does not dispute that the Interested Party/Applicant purchased a parcel of land from the Defendant/Respondent. The Counsel was quick to add that the transaction was between the Interested Party/Applicant and the Defendant/Respondent and that the Plaintiff/Respondent was not privy to the contract. The Counsel pointed out that the Interested Party/Applicant should pursue the Defendant/Respondent and has no reason to interfere with the Plaintiff's/Respondent's enjoyment of her judgement. In addition, the Counsel added that the Interested Party/Applicant should prosecute his Originating Summons No.82/2019 which he has filed against the Defendant/Respondent herein.

23. On the issue of costs, the Counsel for the Interested Party/Applicant submitted that under **section 27(1) of the Civil Procedure Act**, costs of and incidental to all suits shall be in the discretion of the Court or Judge. The Counsel was of the view that since the Plaintiffs/Respondents and the Defendant/Respondent did not include the Interested Party/Applicant in his suit as they were out to conceal facts from this Court, they should be condemned to pay costs.

24. The Counsel concluded by urging the court to allow the application as prayed.

25. The Counsel for the Plaintiff/Respondent did not make any submissions on the issue of costs.

26. Having read the application, the replying affidavit as well as the submissions by the Counsel on record for the Interested Party/Applicant and the Plaintiff/Respondent, it is clear that the Interested Party/Applicant was not a party to this suit which led to the judgement that was delivered on 30<sup>th</sup> July, 2019. It is also not in dispute that the Interested Party/Applicant purchased 2.2 acres of land from the Defendant/Respondent herein between 1994 and 2004. The Interested Party/Applicant has stated that he has mature orange trees in the portion that he claims to have bought from the Defendant/Respondent. The only inference that I can draw is that both the Plaintiff/Respondent and the Defendant/Respondent were well aware that the Interested Party/Applicant had an interest in the suit property and the least that the two could have done was firstly, the Plaintiff/Respondent ought to have enjoined him in the suit and secondly, the Defendant/Respondent could have issued third party notice to him if the former was not willing to enjoin him.

27. Given the fact that judgement was rendered in this suit on 30<sup>th</sup> July, 2019, the Plaintiff/Respondent cannot be heard to say that the Interested Party/Applicant should prosecute the Originating Summons number 82 of 2019 which he filed against the Defendant/Respondent without seeking to set aside the judgement herein because in my view, if the same is executed, the outcome of the Originating Summons is likely to end up as an academic exercise and/or moot.

28. I am satisfied that the Interested Party/Applicant has demonstrated that he will suffer prejudice if he is not enjoined in the proceeding as this will lead to him lose the 2.2 acres of land that he claims to have bought. Justice demands that he should be given a chance to present his side of the story before the court makes its determination. This therefore calls for the court to exercise its discretion in his favour.

29. I have looked at the annexed draft defence (FMK 7) and I do note that it raises triable issues. I am also satisfied by the explanation given by the Interested Party/Applicant that he wasn't aware of this suit until when he was alerted by the area chief and hence rushed to file this application.

30. Arising from what I have enumerated above, it would be unfair to condemn the Interested Party/Applicant unheard. The upshot of the foregoing is that the Application has merit and I will proceed to grant prayers 3, 4 and 6 of the application on condition that the Interested Party/Applicant files his defence and counterclaim within the next 30 days from the date hereof. For avoidance of doubt, the Interested Party/Applicant shall be enjoined to this suit as the 2<sup>nd</sup> Defendant herein. He shall also have the costs of this application.

**Signed, dated and delivered at Makueni via email this 24<sup>th</sup> day of July, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Ms. C. Nzioka