



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 166 OF 2011**

**JOSEPH WAIHARO KURIA.....1<sup>ST</sup> PLAINTIFF**

**PETER GICHUI MWETHERA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**RULING**

On 17<sup>th</sup> March 2014 the proposed interested party filed two applications dated the same date. One Chamber Summons application sought to have the orders stated to have been granted on 16<sup>th</sup> December 2013 set aside and/or varied to include surrender of all sub-divided titles from Nairobi/Block72/2272. The other chamber summons sought an order to enjoin **Mugumo-ini Residential Association** as an interested party. On 28/7/2014 the Applicant sought the leave of the court to withdraw the chamber summons application seeking to set aside the order of 16<sup>th</sup> December 2013 and the court allowed the withdrawal of the application leaving the application for enjoinder to be determined.

In regard to the application for enjoinder the proposed interested party sets out the following grounds in support of the application.

1. The members of the interested party are entitled to the parcel of land known as **Nairobi/Block/72/2272** by virtue of having been in lawful possession of the land and having been authorised to develop and manage it as **Mugumo-ini Langata Market** to Nairobi City Council Standards.
2. That the interested party/Applicant herein needs to be enjoined so as to safeguard its interest in land parcel NO. **Block 72/2272** in which it holds the land on behalf of the City Council of Nairobi the proprietor.
3. That **Mugumo-ini Residential Association** intend to develop parcel NO. **Block 72/2272** to a formal market and thus have an interest in the parcel of land and it is in the interest of justice that they be enjoined as interested parties in the suit.
4. That the suit land is public land, managed by the City Council of Nairobi through the Association

and therefore should be protected from unlawful claims over the same.

One **Joseph Karanja Wachira** Secretary of the Association has sworn a supporting affidavit dated 17<sup>th</sup> March 2014 and claims that the members of the Association have been in occupation and possession of the subject parcel of land since 2006 with the authority of the City Council of Nairobi and avers that the Association should be enjoined to the suit as an interested party to safeguard its members interests.

The plaintiffs filed ground of objection to the proposed interested party's application on 2<sup>nd</sup> April 2014 and they contend that the Applicants have no basis to seek to be enjoined to the suit as they do not have any legal interest in the suit property. Besides the plaintiffs aver that the suit has been concluded through compromise of the parties and there is no suit pending trial in respect of which the proposed interested parties can be enjoined to participate in. The plaintiffs aver the suit has been settled amicably as between the parties and they have no pending dispute. The effect of enjoinder of the proposed interested parties would be to reopen a matter that has been finalized.

The plaintiffs further filed a replying affidavit sworn on 28<sup>th</sup> March 2014 by the 1<sup>st</sup> plaintiff in which the plaintiffs aver that they are the registered owners of land parcels Title Number **Nairobi/Block 72/3094**, **Nairobi/Block 72/2101** and **Nairobi/Block 72/3102** which originally formed part of Title **NO. Nairobi/Block 72/2272**. The plaintiffs depone that they applied for approval for the subdivision of Title **NO. Nairobi/Block 72/2272** which the City Council duly approved in 2001 as per the Council Minutes annexed and marked as "**JNK-2**". The plaintiffs depone that on 23<sup>rd</sup> September 2013 the plaintiff and the Defendant entered into consent in regard to the instant suit which effectively settled and concluded the matter and thus there is presently no pending suit to be determined as between the plaintiffs and the Defendant. The suit as between the plaintiffs and the Defendant has been fully compromised and there can be no basis for enjoining a party after the event.

The parties filed written submissions to ventilate their respective positions. The proposed interested party filed their submissions dated 25<sup>th</sup> June 2014 while the plaintiffs/Applicants filed their submissions dated 12<sup>th</sup> June 2014 on 13<sup>th</sup> June 2014. The Defendant/Respondent filed their submissions on 28<sup>th</sup> July 2014 in regard to both the application to set aside the consent order made on 27<sup>th</sup> September 2013 and the application for enjoinder to these proceedings by **Mugumo-ini Residential Association** as an interested party.

The application to set aside the consent order granted on 27<sup>th</sup> September 2013 having been withdrawn by the Applicant the only issue for determination is whether the proposed interested party should be enjoined to these proceedings. Order 1 Rule 10 (2) pursuant to which the instant application is made gives the court wide and unfettered discretion to join a party to any suit at any stage of the proceedings if the enjoinder of such a party is necessary to enable the court to effectually and completely adjudicate and settle all questions involved in the suit.

Order 1 rule 10(2) 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 party 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.

**The plaintiff and the Defendant have submitted that the suit between them has been settled through compromise and thus no questions/issues remain to be adjudicated upon in the suit and there can therefore be no legal basis upon which the proposed interested party can be enjoined. The suit by the plaintiffs against the Defendant sought the following prayers:-**

- a. An order of specific performance compelling the Defendant to either buy original Land Reference Number Nairobi/block 72/2272 or swaps the land with another property equivalent in value.

- b. Costs of this suit plus interest.
- c. Any other or further that the Honourable court may deem just and expedient.

The consent order approved by the court and granted by the court on 27<sup>th</sup> September, 2013 was in the following terms:-

1. That the plaintiffs do surrender title over **Nairobi/Block72/2272** to the Defendant forthwith.
2. That the plaintiffs do accept as partial settlement **L.R.NO.209/1498/15** in place of **Nairobi/block72/2272**.
3. That the defendant do identify another parcel of a value that compensates the plaintiffs fully.
4. That the terms herein above (ii) and (iii) are offered on strict condition that the plaintiffs do forthwith surrender to the Defendant title over **Nairobi/Block 72/2272** and the Commissioner of Lands do issued requisite Grant in respect of **L.R.NO.209/1498/15**.
5. That pursuant to obtaining the Grant in (iv) above and finalizing pertinent transfer over **L.R.NO.209/1498/15** and the parcel to be identified in (iii) above the suit herein be marked as settled with no order as to costs.
6. That the Defendant do offer an alternative plot in event the Grant **L.R.NO.209/1498/15** is not obtained.

The effect of the above consent order was to finally dispose the suit as between the plaintiffs and the Defendant and all that remained was the execution of the orders.

There were no issues in the suit that remained to be adjudicated upon or determined by the court. The consent order was analogous to a final judgment. In my view the proposed interested party cannot have any locus to enter the suit at this stage. There is no suit to determine as the parties to the suit had fully compromised the suit by the time the proposed interested party applied to be enjoined. At any rate the proposed interested party claims to be interested in the suit property by virtue of having been granted authority to occupy the market stalls by the Defendant but has no ownership documents for the property. The net effect of the compromise in the suit is to revert the suit property to the Defendant albeit against compensation with alternative land being made to the plaintiffs. The plaintiffs have ownership documents to the suit property which on the face it vests absolute ownership to them. The title of the plaintiffs can only lawfully be challenged under section 26(1) of the Land Registration Act NO. 3 of 2012 on the grounds of fraud to which the plaintiffs are shown to have been a party or if it is shown the plaintiffs obtained the title unprocedurally, unlawfully or through a corrupt scheme. The National Land Commission if it possess any evidence can challenge the plaintiff's title but until that happens the plaintiffs title remains absolute and indefeasible in terms of sections 24,25 and 26 of the Land Registration Act.

The Plaintiffs and the Defendant are entitled to enter into a compromise of the suit and having done so are entitled to have the orders arising there from executed and implemented. The proposed interested party in my view would have no interest in a suit that has been concluded between the parties and they lack a locus standi to bring the present application for enjoinder. They are a shade too late and their instant application can be likened to a herder seeking to contain the horses by closing the stable after the horses have bolted.

I find the application by the interested party to lack any merit and I order the same to be dismissed with costs to the Respondents.

**Ruling dated, signed and delivered at Nairobi this...6<sup>th</sup>.....day of February.....2015.**

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

..... for the Plaintiffs

..... For the Defendant