



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

Civil Suit 1573 of 1995

**DANIEL NGANGA KAMANDE..... 1<sup>ST</sup> PLAINTIFF**

**CHARLES KAMAU WANGUHU.....2<sup>ND</sup> PLAINTIFF**

**JANE WANGARI KIBE.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**NGUCANIRIO FARMERS**

**COMPANY LTD.....DEFENDANT/JUDGEMENT DEBTOR**

**JOSEPH WCHIRA WANENE & 8 OTHERS.....INTERESTED PARTIES**

**RULING**

By a judgement dated 22<sup>nd</sup> October 2004, the **Hon. Justice J B Ojwang** (as he then was) made the following orders:

**(a) That, a permanent injunction be and is hereby issued against the Defendants being on or remaining in occupation or possession of the suit land;**

**(b) That, the sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000) shall be paid by the Defendants to the plaintiff as general damages, within 40 days from the date hereof;**

**(c) That, the Defendants shall bear the costs of this suit;**

**(d) That, the Defendants shall pay interest at Court rate on items (b) and (c) above, from the date of this judgement;**

**(e) That, the Defendant's prayer for the nullification/cancellation of the registration of the plaintiff as the proprietor of Nyahururu Settlement Scheme No. 39, is refused;**

**(f) That, the Defendant's prayer that each member of the Defendant company be declared the legal owner of his/her respective piece of land, is refused.**

**(g) That, the Defendant's Counterclaim is dismissed with costs.**

In execution of the said judgement an eviction order was issued on 4<sup>th</sup> April 2011 authorising the Court Bailiff to remove the judgement debtor and any person bound by the decree who may refuse to vacate the suit property.

Faced with this set of circumstances, the interested parties herein filed an application to be joined in these proceedings and in his ruling dated 20<sup>th</sup> December 2011, the **Hon. Mr. Justice Mwera**, granted leave to all the interested parties herein to be joined in these proceedings.

That decision paved way for the filing of the applications the subject of this ruling. The two applications are dated 21<sup>st</sup> December 2011 and 18<sup>th</sup> May 2012 by the 9<sup>th</sup> and 7<sup>th</sup> interested parties respectively seeking primarily orders that the said judgement dated 22<sup>nd</sup> October 2004 and the eviction order emanating therefrom be set aside and/or varied. Both applications are expressed to be brought under the provisions of sections 1A and 1B of the Civil Procedure Act.

The 9<sup>th</sup> interested party's application is supported by an affidavit filed by **Esther Wairimu Kabiro**, the 9<sup>th</sup> Interested Party herself on 21<sup>st</sup> December 2011. According to her she is the proprietor of Laikipia/Nyahururu/39, Plots Nos. 234, 235, 246, 247, 248, 149, 150, 151 and 129 each measuring less than a quarter acre on which she has lived with her late husband since 1970 and constructed 4 permanent houses thereon with a garden for seasonal crops. She deposes that originally all persons occupying land

parcel no. Laikipia/Nyahururu/Block 39 had loosely formed a group known by the name of the defendant but the group was mismanaged and hijacked by the plaintiffs and was never registered. According to her the defendant only exists in the plaintiff's "fertile imagination" and was named as the defendant in this suit purely to further the plaintiffs' fraudulent activities since **Ngucanirio Farmers Co. Ltd** is non-existent. According to her she only came to know of the judgement and the eviction orders herein from her chief when she went to seek burial permit for her husband on 27<sup>th</sup> May 2010. Therefore, she avers, these proceedings were stage managed by the plaintiffs and their agents and/or servants for the sole purpose of obtaining eviction orders against non-parties to the suit of which she is one.

On his part and in support of his application, the 7<sup>th</sup> interested party swore an affidavit on 18<sup>th</sup> May 2012 in which he deposed that he purchased plot No. 815 Nyahururu scheme which forms part of LR No. Laikipia/Nyahururu/39, the subject matter of this suit from Settlement Fund Trustees and relied on the document annexed to his affidavit in support of his application seeking to be joined in these proceedings to support his claim. According to him whereas plot No. 515 was to excised from the suit property, he noticed in 1984 from the Registry Index Map sheet that the same had not been done as a result of which he instituted HCCC No. 5704 of 1992 to compel the District Land Registrar Laikipia to excise the said plot and issue him with a certificate of title. A consent was duly entered into in that suit, a suit in which one **Naomi Wanjiru Kamande** was a party, to have the said plot duly excised and a decree was duly issued. However, the said **Naomi Wanjiru Kamande** passed on before the said transfer was executed and there is an application pending in the said suit to have the said transfer executed by the Deputy Registrar instead. Therefore, in the applicant's view unless the decree herein together with the eviction order are set aside and/or varied, he stands to suffer irreparable loss and damages.

As for the affidavit referred to by the 7<sup>th</sup> interested party, that affidavit was sworn in support of the application dated 9<sup>th</sup> September 2011 and though the filed copy does not bear the date when it was sworn, it was filed on 13<sup>th</sup> September 2011. In the said affidavit he has reiterated the history of how he purchased the said plot from Settlement Funds Trustees and for approval for the excision of the same from the suit land.

It is important to note that the 8<sup>th</sup> interested party informed the court that he would be relying on the papers filed by him on record. One such document is the affidavit sworn in support of the application dated 14<sup>th</sup> October 2011. According to the said affidavit, the 8<sup>th</sup> interested party together with other people collected money towards the purchase of land and chose the said **Naomi Wanjiru** as their representative. In 1972, the said **Naomi Wanjiru** informed them that a plot had been found whereat they came back from where they were in Tanzania and demanded to be shown the allotment letter. According to him the said Naomi secured a title secretly in 1993 although she admitted that she had utilised other people's contribution in the said purchase. According to the applicant the said Naomi filed two previous suits one of which the court allocated some land to the defendants and in the other, of which the applicant was also sued, it was ordered that a valuation report be filed which was not done. According to the applicant the plaintiffs who are administrators of the estate of the deceased have refused to apportion to him his share of the land. In his submissions which he had filed in support of the same application the applicant reiterated what was contained in the supporting affidavit and contended that he has been staying on the suit property for over 39 years with his family and has developed the land since 1980. He accordingly wants the Court to protect his Constitutional rights to property.

In opposition to the said applications, **Daniel Ng'ang'a Kamande** swore an affidavit on 27<sup>th</sup> April 2012 in which he deposed that with respect to the 9<sup>th</sup> interested party, her interest is protected and is not

adversely affected by the judgement. However the allegation of the existence of the plots is denied. The deponent further denies that they ever were shareholders in the Defendant Company since they were only substituted as plaintiffs in this suit on 3<sup>rd</sup> February 2000 by virtue of being the administrators of the Estate of **Naomi Kamande**. According to him the existence of the defendant was never denied but was in fact admitted and has relied on an affidavit sworn by one **Patrick Kigotho Kabiro** in his capacity as a member of the defendant on 10<sup>th</sup> January 2005. It is further contended that the application is *res judicata* since the matters raised herein were subject of ELC HCCC No. 328 of 2010 against the plaintiffs which was struck out on the ground that the same was an abuse of the Court process. According to the deponent, **Kabiro Kigotho** now deceased was the 9<sup>th</sup> interested party's husband and was mentioned severally as the Chairperson of the defendant company. According to the deponent, the application lacks merits.

The application was prosecuted by way of written submissions.

Only two sets of submissions are on record – one filed on behalf of the 9<sup>th</sup> interested party and the other on behalf of the plaintiff and this is due to the fact the rest of the interested parties were unrepresented.

According to the 9<sup>th</sup> interested party, the plaintiffs misled the Court by bringing these proceedings against non-existent parties to stage manage the proceedings with the purpose of obtaining an eviction order against the occupiers of the suit land without making them parties to the suit. According to the inquiry made to the Registrar of Companies on the 9<sup>th</sup> interested party's behalf, the defendant does not exist as a limited liability company but only exists as a business name, it is contended. It is submitted that this issue was never disclosed to the court when the court delivered its judgement. Since it was not disclosed that the applicant among other persons could be affected by the eviction orders, it is submitted that the judgement went against the requirement that a party be given a hearing before adverse orders are made against him hence the need to set the same aside. On setting aside the judgement, it is submitted, all the parties will be accorded a fair hearing based on the facts and the merits of the case. According to the 9<sup>th</sup> interested party the allegation of the status of the defendant has not been challenged and that the other issues raised by the plaintiffs are irrelevant. With respect to the issue of *res judicata*, it is submitted that the issue of setting aside judgement was not the subject of the said earlier suit and in any case *res judicata* does not apply where the court had no jurisdiction to entertain the matter. When a suit is struck out on the basis that it is incompetent *res judicata*, it is submitted, does not apply and reliance is placed on **Mulla the Code of Civil Procedure 6<sup>th</sup> Edn.**

On the part of the plaintiffs it is submitted that since there is only one defendant in this suit against whom the judgement is directed, the interested parties are not affected in any way. Relying on the ruling by **Mwera, J** herein on 20<sup>th</sup> December, 2011, it is submitted that judgement having been given the only thing pending is execution hence judgement cannot be challenged. Relying on **Dominic Elkayani Lesormat & 336 Others vs. Machamuka Farmers Co. Ltd & 17 Others [2008] KLR 337**, it is submitted that the interested parties being non-parties to the suit cannot apply to have the judgement set aside. It is further submitted that the issues raised herein ought to have been ground of attack in the earlier suit and in any case the existence of the defendant was admitted in the defence. Since the said issue of non-existence of the defendant and fraud were not raised before judgement was delivered, it is submitted, the same cannot be raised at this stage, moreso since the defendant never preferred any appeal against the judgement.

Having considered the record together with the submissions of counsel this is the view I form of the matter.

The application, as already stated is brought under sections 1A and 1B of the Civil Procedure Act. The said provisions provide as follows:

**1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

**(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.**

**1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—**

**(a) the just determination of the proceedings;**

**(b) the efficient disposal of the business of the Court;**

**(c) the efficient use of the available judicial and administrative resources;**

**(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**

**(e) the use of suitable technology.**

It is clear that the foregoing provisions are not enabling provisions but are procedural provisions to be invoked when the Courts are considering matters before them. The said provisions in my view do not therefore clothe the Court with jurisdiction to grant any orders but are meant to facilitate the attainment of justice in any matter before a Court of law. In other words the said provisions are a means to an end and not an end in themselves and are to be invoked by the court **“in the exercise of its powers under this Act or the interpretation of any of its provisions”**.

However, taking into account the seriousness of the subject matter being land and the issues raised being the breach of the rules of natural justice, I am prepared to invoke the provisions of Article 159(2)(d) of the Constitution and ignore that procedural lapse and consider the matter without undue regard to technicalities of procedure.

The plank of the applicants' case is that the plaintiff's played a fraud upon them by filing a suit against a non-existent party and using the judgement to evict them from the suit land without them being accorded an opportunity of being heard. Their contention is that they have been in occupation of the suit land for a very long time and are beneficially entitled thereto. For the 7<sup>th</sup> interested party, his claim is strengthened by the fact that he has in his favour an order of the Court entitling him to part of the suit land. Yet this fact was never disclosed to the Court when the Court was hearing this matter. That order has not been seriously disputed by the respondents.

It is further contended that although the defendant is sued as a limited liability company, from the records of the Registrar General, there is no limited liability company going by such name. What is there is a business name registered under Cap 499 Laws of Kenya. This factual allegation is similarly not seriously contested.

The respondent's case is that since judgement has been entered, the applicants have *no locus* in challenging the judgement which is at the execution stage which judgement has not been challenged by the defendant. This contention does not hold much weight when it is taken into account that the allegation made is that the defendant is not a legal entity and that the whole legal proceedings was instituted for fraudulent purposes. In my view no Court of law should shut its eyes from such allegations simply because a judgement has been delivered especially when the people seeking the Court's intervention allege that they were deliberately locked out from participating in the proceedings leading to the judgement. If Courts of law stand by and watch with their hand tied, not by anybody else, but by rules of procedure when there is clear evidence that injustice is likely to be perpetrated, Courts will loose credibility and the rule of law will be thrown to the winds. I accordingly disabuse the respondents of the notion that once a party obtains a judgement which is not appealed against by any of the parties to the dispute, no other person is entitled to challenge the same even if his rights are thereby affected. Under Order 45 rule one *any person* aggrieved by a decision is entitled to apply for review of the same. By using the *any person* rather than *any party*, the Rules Committee, in my view, clearly envisaged that there are circumstances in which a person other than a party to a suit may be genuinely aggrieved by a decision which for reasons best known to the parties none of them is interested in challenging. In **Peninah Wambui Mugo vs. Moses Njaramba Kamau Nakuru HCCS No. 238 of 2004 Koome, J** (as she then was) was of the following view, a view with which I respectfully associate myself:

**“Under section 80 of the Civil Procedure Act, any person, though not a party to the suit, whose direct interest is being affected by the judgement therein is entitled to apply to a review. The words “any person” and “for any sufficient reason” used under section 80 of the Civil Procedure Act clearly are meant to include a person who has a direct interest in the litigation or its result but has been deprived of a hearing as a party in relation to his interest...Since the plaintiff and the defendant were aware of the applicant's interest in the suit property but chose not to make her a party there is merit in the application since the applicant has discovered new and important facts being that the defendant and the plaintiff failed to disclose her interest and to have her summoned to court as the person who was in occupation and who will be affected by the orders of the court”.**

To uphold the respondent's view would amount to giving a judicial seal of approval to unscrupulous parties who would mischievously institute legal proceedings either against non-existent parties or against wrong parties and use decisions obtained therefrom to inflict pain and injury to persons who were never accorded an opportunity to defend themselves. To do so would be unconstitutional and the Court is enjoined to act in accordance with the Constitution. To do otherwise would amount to the abdication of the Court's Constitutional mandate under the Constitution.

I perfectly agree with the respondents that since the applicants were not parties to the suit they are not affected by the judgement. The law as I understand it is that non-parties to legal proceedings are not bound by orders made therein. . In the case of **Earnest Orwa Mwai vs. Abdul S. Hashid & Another Civil Appeal No. 39 of 1995** the Court of Appeal stated thus:

**“Since Hashid was not a party to the decision in which the Court ordered that the lorry be released to the objector, and since he had obtained title to the lorry at a lawful auction before the said decision was made, property had passed and that decision did not bind him since he was not made a party”.**

In **Ramdev Malik vs. Lionel Albert Callow [1958] EA 99** it was held *inter alia* that the principle is that where a decree has been obtained by fraud practised upon the other side, by which he was prevented from presenting his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the court by which it was passed. A party aggrieved by such a decision is therefore entitled to set the same aside either in the same suit or in a separate suit.

This also takes care of the argument that the stage at which the proceedings had reached i.e. execution does not permit for setting aside the judgement. Section 80 of the Civil Procedure Act which provides for review does not prescribe the time within which an application for review may be entertained though Order 45 rule 1(1) prescribes that such an application be made “without unreasonable delay”. What is reasonable delay, however, is a matter of fact depending on the circumstances of each case. It must however be remembered that the Court’s inherent power reserved under section 3A of the Civil Procedure Act “court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court” is unlimited.

The other objection taken by the respondents is that this suit is *res judicata* since an earlier suit was struck out as amounting to an abuse of the process of the Court. In delivering the said decision the Court found that it did not have the competence or the jurisdiction to grant the orders that were sought therein. *Res judicata*, it is trite, only applies where a matter has been determined on merits and not where the matter is disposed of by the Court due to want of jurisdiction. In fact one of the prerequisites for the invocation of the doctrine is that the suit must have been disposed of by a Court of competent jurisdiction. I accordingly, find that *res judicata* does not avail the respondent herein. See the cases of **The Tee Gee Electrics & Plastics Co. Ltd. vs. Kenya Industrial Estates Ltd. Civil Appeal No 333 of 2001 [2005] 2 KLR 97** and **Jairo Angote Okonda vs. Kenya Commercial Bank Ltd. Civil Appeal No. 216 of 1999.**

The other issues raised question the merits of the case and I do not think it would be proper for the Court to go into the same at this stage. A party should not be denied an opportunity of being heard simply because the Court believes that he does not have a credible case to put forward. The uselessness of a party’s case is no justification to deny a party the right to natural justice.

The respondent’s contention that the judgement was not obtained against the applicants and therefore it is not directed against them rings hollows in light of the fact that the eviction order that was obtained pursuant to the said judgement was not limited to the defendant only but was expressed to authorize the removal of “the judgement debtor and any person bound by the decree who may refuse to vacate” the suit property. To say that that eviction order was only directed at the judgement debtor is to split hairs.

Having considered all the circumstances relevant to this matter it is my view and I hereby hold that to allow this judgement to stand with the attendant consequences would occasion a grave miscarriage of justice.

Accordingly, I allow the applications dated 21<sup>st</sup> December 2011 and 18<sup>th</sup> May 2012, set aside the judgement herein and consequential orders emanating therefrom in so far as the same affect the interested

parties herein with costs to the interested partes.

**Ruling read, signed and delivered in Court this 3<sup>rd</sup> day of July 2012**

**G.V. ODUNGA**

**JUDGE**

In the presence of **Peter Kinuthia Kibata** the 8<sup>th</sup> interested party