



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**E.L.C NO. 27 OF 2018**

**EPHANTUS KAGUTHA MWANGI.....PLAINTIFF/APPLICANT**

**VS**

**COUNTY COUNCIL OF THIKA..... 1<sup>ST</sup> DEFENDANT /RESPONDENT**

**WIWANO WA KYAUME WOMENS GROUP...2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF MURANGA.....PROPOSED 3<sup>RD</sup> PARTY**

**RULING**

1. The ruling is with respect to the application filed on the 29/9/17 under Order 51 Rule 1, Order 1 Rule 3 and 5, Order 10(2) of the Civil Procedure Rules and 1 A, 1B, 3A and 63 of the Civil Procedure Act, Art 159 of the Constitution and other provisions of the law.
2. The Applicant sought orders that the proposed 3<sup>rd</sup> party be enjoined to the suit and be compelled to comply with the judgement of the Court delivered on 24/6/13 in his favour.
3. The application is premised on the grounds adduced thereto and the supporting affidavit of the Applicant. He deponed that the presence of the 3<sup>rd</sup> party is essential for the final determination of the execution of the decree of the Court issued on the 24/6/2013. That on the formation of the County Governments in 2013 the property fell within the jurisdiction of the County Government of Muranga and not Kiambu. That this was after the delivery of judgement. That upon delivering the judgment of the Court to the County administrator at Mabanda market who is in charge of the area, he was advised that the suit land now falls within the jurisdiction of Muranga County.
4. That he stands to be prejudiced if the application is not granted as he will not be able to actualize the fruits of his judgement.
5. It is on record that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were served with the application but failed to file any response. The result is that the application is undefended.
6. The Applicant filed written submissions on the 1/9/2020 which basically reiterates the contents of the Applicant 's supporting affidavit.
7. The key issue is whether the proposed 3<sup>rd</sup> party can be enjoined to the suit post judgement and whether the intended 3<sup>rd</sup> party is a necessary party and who meets cost of the application.
8. It is clear from the record that the Court heard the suit ex parte and delivered its judgement in favour of the Applicant against the 1<sup>st</sup> Defendant on the 24/6/13 as follows;

“a)that the 1<sup>st</sup> Defendant do point out the beacons of Plot No 90 Ithanga ,Market, Thika County to the Plaintiffs within 45 days of being served with the decree in this case and /or.

b). failing a) above judgement be and is entered in favour of the Plaintiff against the 1<sup>st</sup> Defendant for Kshs 500,000/- being the current market value (undeveloped) of plot No 90 Ithanga market whereupon the Plaintiff will relinquish any further claim to the suit property.

c). interest at Court rates on (b) above from the date of judgement until payment of the amount in full

d). costs of the suit with interest at Court rates.”

9. *The provisions of Order I Rule 10(2) of the Civil Procedure Rules, 2010 states as follows;*

“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”.

10. The definition of proceedings as per **Black’s Law Dictionary Ninth Edition at page 1324** is that it concerns ...

“the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”.

11. In the case of **Lilian Wairimu Ngatho & Another –Vs- Moki Savings Co-Operative Society Limited & another [2014] eKLR** the Court held as follows;

“The Court noted the above definition and the effect of Order 1 Rule 10 (2) and held that a party can only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the Court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the Court has already made its findings on the issues arising.

12. In this case there are no proceedings subsisting in Court to enable joinder of a party. The suit was heard and determined by the Court and a judgement delivered on the 24/6/13. The Applicant seeks to enjoin the 3<sup>rd</sup> party in a suit that was long determined. The reality of which is that there is no suit and no proceedings pending. A party can and may legally be enjoined to an existing suit and or proceedings.

13. The law is now settled that a necessary party is one without which no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision of the question involved in the proceedings.

14. In the current application the controversy or the dispute in respect to the suit land was effectively and effectually determined by the Court that pronounced itself on the judgement. There is nothing left for the Court to determine. What remains is the execution of the decree in favour of the Applicant.

15. The 3<sup>rd</sup> Party therefore is not a necessary party because there is no suit existing to allow for its joinder, the suit having been heard and determined.

16. The suit was filed on the 22/7/2010 against the then County Council of Thika. Upon the promulgation of the Constitution, County Governments were set up under Article 176. The Constitution stipulated the composition and the powers of the said County Governments. Article 188 of the Constitution provided for the manner in which the boundaries of a County would be altered and recommended the establishment by Parliament of an independent commission for this purpose. The criteria for alteration of boundaries is set out in Article 188 (2) which included inter alia population trends, physical infrastructure geographical features.

17. Under the new Constitution therefore County councils established under the County Councils Act ceased to exist effective the 3/4/2013. The Transitional Authority, an independent commission was set up to transition the assets of the then County Councils to County Governments.

18. The Applicant has averred that upon the creation of County Governments the suit land being situate at Ithanga Market was transferred to the County Government of Muranga. Art 188 decrees that the boundaries of a County shall be altered only by a resolution recommended by an independent commission and approved by Parliament and the Senate. The Applicant did not produce any evidence in form of resolution or such other evidence to support this averment. There is therefore no evidence to show that Ithanga Market and in particular the suit land was transferred to the County of Murang’a.

19. Further the Applicant has not tabled evidence to show that the liability arising out of the judgement of the Court in his favour that is to say allocation of Plot 90 Ithanga Market and in default the payment of Kshs 500,000/- to the Applicant in the alternative, is payable by the County Government of Murang’a. Nothing has been shown that the County Government of Murang’a is the beneficiary of the plot 90 Ithanga Market or had the duty to pay the Applicant the sum of Kshs 500,000/- or allocate him the suit land.

20. The question that the Court must address is whether by enjoining the 3<sup>rd</sup> party its rights to be heard will be infringed. In the case of **Absolom Opini Mekenye –Vs- James Obegi [2018] eKLR** the Court held that the joinder of the interested parties after judgment would not have enabled them to participate in the proceedings as parties. In that matter the Plaintiff applied for the joinder of the interested parties’ after judgment had been entered and the Plaintiff was in the process of executing the decree. The interested parties had become registered as owners of the parcels of the suit land and had acquired rights of ownership that could not be taken away from them without due process being followed. The Court found that the joinder has the hallmarks of having been irregularly obtained. That there was no variation of the judgment and decree issued in the matter and the subsequent orders that were subsequently obtained relating to the cancellation of the

interested parties titles to land and eviction of the Defendant and the interested parties was a clear departure from the judgment that was given by the Court. Further that parties are bound by their pleadings and that the Court ought not to grant orders not sought and/or pleaded.

21. In the case of **Onyango -Vs- Attorney General (1987-1989) E.A 456** where Nyarangi, JA held that:

“..... the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect them to act fairly.”

22. It is therefore clear that in the circumstances of this case, joinder at this stage will violate the right of the 3<sup>rd</sup> Party to be heard on the issues in controversy since it was not a party to the suit. This Court would hesitate to compel a party who is a complete stranger to a suit to comply with a judgement in a suit for which it did not participate.

23. For the forgoing reasons the application has no merit.

24. It is dismissed with no orders as to costs.

**25. It is so ordered.**

**DATED, SIGNED & DELIVERED AT MURANG'A THIS 30<sup>TH</sup> DAY OF NOVEMBER 2020.**

**J. G. KEMEI**

**JUDGE**

Delivered in open Court in the presence of;

Ms Kilonzo for the Plaintiff

1<sup>st</sup> Defendant: Absent

Ms Maria Mbithe(rep) for 2<sup>nd</sup> Defendant

3<sup>rd</sup> Defendant: Absent

Njeri: Court Assistants