



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 245 OF 2017

(FORMERLY NRB HIGH COURT CIVIL SUIT NO. 3086 OF 1994)

ERASTUS NDUHIU t/a EMAC ENTERPRISES.....PLAINTIFF/RESPONDENT

VERSUS

MUGOMONI FARMERS COMPANY LIMITED.....DEFENDANT/RESPONDENT

AND

INSHWIL BUILDERS ENGINEER LTD.....INTERESTED PARTY/RESPONDENT

BENJAMIN KAMANDE GITHUKA...PROPOSED INTERESTED PARTY/APPLICANT

RULING

There are two matters for determination. The **Notice of Motion Application** dated **27th August 2019**, by the Proposed Interested Party and the **Notice of Preliminary Objection** dated **17th September 2019** by the interested party .

In the **Notice of Motion Application** the Proposed Interested Party sought for orders that;

- 1. That this honourable Court be pleased to sanction the joinder of Benjamin Kamande Githuka as an Interested Party Herein.***
- 2. That this Honourable Court be pleased to issue an order directing the Government Document examiner to examine Affidavit in support of the Defendant's Amended Chamber Summons dated 5th November 2004 and the agreement for sale dated 11th July 2003 to ascertain whether Benjamin Kamande Githuka, the proposed Interested Party signed them.***
- 3. That this Honourable Court be pleased to set the time within which the Government Document examiner should file a report herein in compliance with Order 4 above.***
- 4. That this Honourable Court be pleased to review vary or set aside the Ruling and order made on 17th December 2009.***
- 5. This Honourable Court be pleased to re hear the Defendant's Amended Chamber Summons dated 5th November 2004.***
- 6. That the costs of this Application be provided for.***
- 7. That this Honourable Court be pleased to make such and further orders as it may deem just and fit in the circumstances of the case.***

The Application be premised on the grounds that on the **5th of November 2004**, the Defendant filed an Amended Chamber summons seeking the lifting of prohibitory orders dated **9th April 1998**, issued against **L.R Kakuzi/Kirimiri 7/37**. That the said orders be served upon the land Registrar and the Land register to register the said suit property in the name of **Inshwil Builders Engineering Limited**. Further that on **17th December 2009**, the said orders were granted.

It was contended that the Affidavit in support of the said Defendant's Chamber Summons was sworn by one **Benjamin Kamande Kinanga**, who is allegedly the proposed Interested Party. That the Proposed Interested Party's name is **Benjamin Kamande Githuka** and not **Benjamin Kamande Kinanga** as captured in the Affidavit in support of the Amended Chamber Summons filed on **5th November**

2004. However, the proposed Interested Party's father's name is **Kinanga**, which explained the mistake made by purported agents of the Defendants. Further that the proposed interested Party is the holder of **Identity Card No. 16063941**, and was appointed a Director of the Defendant in **2000**, and served up to **9th March 2003**. That he has never transacted any business for and on behalf of the Defendant. Further that he is aware that the Defendant held a **Special General Meeting** on **17th May 2003**, and new official were elected to the Board of Directors. That he has recently discovered an Agreement for sale dated **11th July 2003**, between the Defendant and the 1st Interested Party, in which one signature is purported to be his. Further that he has no interest in the affairs, management or otherwise of the Defendant. That on **17th July 2019**, he received a letter dated **15th July 2019** from the Defendants in which he was required to explain how the suit property changed hands. That he was ailing and was undergoing treatment and was thus unable to move the Court in **July 2019** due to financial and time constraints.

It was further averred that there is need to ascertain whether the Proposed Interested Party executed the Affidavit in support of the Defendant's Amended Chamber Summons dated **5th November 2004** and the Agreement for sale dated **11th July 2003**, as he is certain that he did not execute it and the Court was fraudulently deceived by use of a forged signature, Further that it is essential that the Defendant's Amended Chamber summons dated **5th November 2004**, be re heard to enable the Court correct the impropriety occasioned by the Defendant's agents. That there is no Appeal preferred by any of the parties and a fraudulent deceit of the Court constitutes sufficient reason why the ruling and orders made on **17th December 2009** should be reviewed. Further that the delay in bringing the Application is excusable and can be explained as the Proposed Interested Party ceased to be a Director on **9th March 2003**, and recently became aware of the state of affairs. That being sick, he was unable to move the Court early. That the impropriety perpetuated by the Defendant can only be corrected by review. Further that the Defendant is keen to institute proceedings against the Interested Party on account of his alleged involvement in its affairs. That the Proposed Interested Party would suffer irreparable harm if the 1st Interested Party is not restrained from selling offering for sale or transferring or in any way disposing the suit property.

In his supporting Affidavit **Benjamin Kamande Githuka** averred that he has been advised by his Advocates on record that the impropriety perpetuated by the Defendants agents can only be corrected by way of **review** of the orders of **17th December 2009** or else the said Orders will always be tainted with illegality. That it is in the interest of Justice that the orders sought are granted.

The Application is opposed and the Defendant filed a Replying Affidavit sworn by **Patrick Gakura Muraya** on **23rd January 2020** and averred that there is nothing outstanding in this matter as the main suit was finally determined on **24th May 1995**, when the Application dated **6th December 1994** to strike out the Defence was allowed and the Decree was issued on **24th May 1995**. He averred that in **2017**, the Defendant had filed a Notice of Motion Application dated **2nd February 2017**, nearly the same as the current Motion and which this Court heard and delivered a Comprehensive Ruling on **9th April 2018**, and the Court concluded that the matter is a concluded one and the Application was not proper. He reiterated all the matter of law as pleaded and contained in the Interested Party's Preliminary Objection dated **17th December 2019**.

He further averred that he has been advised by the Interested party's Advocate that the Preliminary Objection raises weighty issues of law that are capable of disposing the Notice of Motion dated **27th August 2019**, as the said Motion has no merit, is frivolous and vexatious. Further that it is clear that the said **Benjamin Kamande Githuka**, was at one time a Director of the Defendant's Company and is still a shareholder. That he has been advised by the Interested Party's Advocate which advise he believes to be true that the instant Notice of Motion has been filed by the Proposed Interested Party in his own capacity and not as Director of **Mugomoini Company Limited** as it is clear from the orders sought by him. That the Applicant has not in his Application disclosed in what capacity he is seeking to be joined to the suit. Further that he has not disclosed what is his standing for viz a viz the suit property or any subsequent subdivisions.

It was his contention that in view of the Ruling delivered by this Court on **9th April 2018**, the ground upon which the current Motion is grounded on and all matters pleaded in the entire supporting Affidavit, are matters that have already been overtaken by events and in any event the Applicant has no **locus standi**. Further that **Benjamin Kamande Githuka** and **Benjamin Kamande Kinanga**, are one and the same person as Registrar of Companies in response to a letter dated **3rd March 2003**, by the Defendant confirmed that directors were 7 including **Benjamin Kamande Kinanga**. Further that in a previous suit it was confirmed that the two names refer to the same person. Further that the Applicant's interest is well taken care of in another suit filed in **Muranga ELC No. 67 of 2018**, which was filed following the delivery of the Ruling by this Court on **9th April 2018**.

The Interested Party filed a Notice of Preliminary Objection dated **17th September 2019** on the grounds that;

- 1. That the Proposed Interested Party has no Locus standi and/or legal capacity to file the Application dated 27th August 2019 and/ or to be joined as an Interested Party.**
- 2. That in this matter the main suit was finalized on 24th May 1995, when the Application dated 6th December 1994 to strike out the Defence was allowed and Decree issued on 24th May 1995 by Justice Hayanga.**
- 3. That there is no pending suit upon which the Application dated 27th August 2019, can be premised on as required under Order 40 and 45 of the Civil Procedure Rules.**
- 4. That temporary Injunction orders under Order 40 of the Civil Procedure Rules cannot issue where there is no pending suit.**
- 5. That the review jurisdiction of the Court under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules has not properly been invoked as there is inordinate and unreasonable delay in seeking to review, vary or set aside the Ruling and the Order made on 17th December 2009, by Lady Justice Sitati ten years ago.**

6. That a similar Application by the Defendant dated 2nd February 2017, and filed in Court on 8th February 2017, was on 9th April 2018, dismissed by this Honourable Court with an advice that if the Defendant felt aggrieved it should file a new cause of action as litigation must come to an end.

7. That the issues the proposed Interested party / Applicant intends to raise in the current Application dated 27th August 2019 are the same issues that have been raised by the Defendants in the new suit filed by the Defendant against the Interested party in Muranga ELC Case No, 67 of 2018 filed on 17th August 2018 after the delivery of the Ruling of 9th April 2018 by this Honourable Court, the said Muranga ELC No. 67 of 2018 is coming up for ruling on 23rd September 2019.

8. That the interest if any of the proposed Interested Party who is a shareholder of Mugumoini Farmers Co Ltd is well taken care of by the said Mugumoini Farmers Co Ltd in the now pending suit in Muranga ELC 67 of 2018.

9. That the Application dated 27th August 2019 is not supported by cogent facts and evidence and the Application does meet the test required for Court to issue an injunction orders or review vary, set aside the Ruling and Order made on 17th December 2009.

10. That the Application has no merit, is frivolous and vexatious, is incompetent and bad in law and is clearly filed in Court in bad faith and as an afterthought.

11. That the Defendant has not approached this Court with clean hands and has not made full disclosure of all material facts as this suit had already been determined through a Decree by Justice Hayanga on 24th May 1995 and also by the Ruling by this Honourable Court of 9th April 2018.

The Court had directed the two Applications to be canvassed together by way of written submissions. The Parties filed their respective rival written submissions which the Court has carefully read and considered.

As a Preliminary objection is capable of disposing a matter preliminarily the Court finds it prudent to first determine if the said Notice of Preliminary Objection is merited. In the event the Preliminary Objection is upheld, then there would be no need to determine the Notice of Motion Application by the Proposed Interested Party.

Are the Objections raised by the Interested Party capable of being referred to as a Preliminary Objection? The locus classicus on Preliminary Objection is the case of Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696 where the Court described a Preliminary Objection to mean:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further Sir Charles Nabbold, JA stated that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

Having given the description of a **Preliminary Objection**, it is evident that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

Further, a **Preliminary Objection** must stem from the pleadings and raises pure point of law. See the case of Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

The Interested Party has raised various grounds in support of its Preliminary Objection. That the Applicant has no **locus standi** to file the Application amongst other grounds. However, the main ground that has been raised in the Preliminary Objection is that there is no pending suit upon which the Application dated 27th August 2019 can be premised on as required under **Order 40 and 45 of the Civil Procedure Rules**.

The Application dated 27th August 2019 is brought under various provisions of law amongst them **Order 45 Rule 1 and 51** of the Civil Procedure Rules that seeks for a review.

The Applicant has sought for review of Order made on 17th December 2009. However, it is not in doubt that the instant suit had already been finalized. As this Court held in its Ruling dated 9th April 2018, the matter was concluded and execution proceedings followed

The Applicant has sought to be enjoined as an interested party before his Application can be heard and determined. Given that the suit herein has already been finalized and given that the Interested Party has raised the issue of whether the Applicant has **locus standi**, and since the issue of **locus standi** denotes the right to bring a suit, the Court finds that what has been raised by the Interested Party herein amounts to a Preliminary Objection.

So is the Preliminary Objection merited? The Applicant has sought to be enjoined in the suit. It is not in doubt that the Defence was struck off on **24th May 1995**, which effectively concluded the suit herein. The question would then be which suit would be the proposed interested Party be enjoined in. **Order 1 Rule (2) of the Civil Procedure Rules** provides;

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.

The rule clearly provides for enjoining parties at any stages of the proceedings. In this instant case Judgment has already been rendered, there is no Application on record to set aside or vary it. Therefore it is the Court's considered view that there would be no way the Proposed Interested party would be enjoined in the suit as the proceedings have been finalized. This is so as the Applications that he seeks to review were brought after Judgment had already been entered and were only Applications with regards to execution. See the case of **Absolom Opini Mekenye ...Vs...James Obegi [2018] eKLR** where the Court held that;

“Order 1 Rule 10 (2) in my view envisages a situation where the suit has not been heard and determined and that is why it provides for joinder of a party either as plaintiff or defendant or a party 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 (emphasis added). Where a judgment has been entered it is my considered opinion that a party cannot be enjoined to the proceedings unless the judgment is either reviewed and/or set aside in a manner to accommodate the participation of the enjoined party.

*The Court of Appeal in the case of **JMK -vs- MWM & Another [2015] eKLR (Civil Appeal No. 15 of 2015 – Mombasa)** while considering the application of Order 1 Rule 10(2) of the Civil Procedure Rules stated thus:-*

*“We would however agree with the respondent that Order 1 Rule 10(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sarkar's Code [supra] quoting authority, decisions of Indian courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of Civil Procedure Rules in **Tanga Gas Distributors Ltd -vs- Said & Others [2014] E. A 448** stated 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 proceeding has been finally disposed of and there is nothing more to be done that the rule becomes in applicable...”*

18. In the present matter at the time the plaintiff applied for the joinder of the interested parties' judgment had been entered and the plaintiff was in the process of executing the decree. The joinder of the interested parties at that stage would not have enabled them to participate in the proceedings as parties.”

Further it is also not in doubt that without being enjoined in the suit, it then follows that the Applicant would have **no locus standi** to bring the Application.

The Court finds that there is no existing suit upon which the Proposed Interested Party seeks to be enjoined. Without being enjoined in the suit, then the Proposed Interested Party would not have any locus to bring the Application. The Court finds and holds that the Preliminary Objection is merited.

The Upshot of the foregoing is that the Court finds that there is no suit upon which the Proposed Interested Party can be enjoined. Further there is no suit upon which the Application dated **27th August 2019** can be hinged upon and given that the Proposed Interested Party cannot be enjoined, he has no **locus standi** to bring the Application.

Consequently the Court finds and holds that the **Notice of Motion Application** dated **27th August 2019**, is **not** merited and the same is dismissed entirely with costs.

Further the Court finds that the **Notice of Preliminary Objection** dated **17th September 2019** is merited and the same is allowed entirely and Upheld.

It is so ordered.

Dated, signed and Delivered at Thika this 17th day of December, 2020.

L. GACHERU

JUDGE

17/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Ms.Mwangi Holding Brief for Mr. Kamere for the Plaintiff/Respondent

No Appearance for the Defendant Respondent

Mr. Kanyi Ndurumo for the Interested Party

Mr. Saluny for the Proposed Interested Party /Applicant

L. GACHERU

JUDGE

17/12/2020