

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC LOS NO E019 OF 2024

MOSES MURUNGA (suing in his personal capacity and as the legal representative of the Estate of **BONFACE IPOMAI PAPA** - Deceased
APPLICANT

= VERSUS =

SIMON IKWARASI OSIKE
DEFENDANT

= AND =

SIMON IDEWA BARASA **1ST INTERESTED PARTY**

LINET AUJATA EMODO **2ND INTERESTED PARTY**

R U L I N G

1. **MOSES MURUNGA** (the Plaintiff herein and suing as the legal representative of the Estate of **BONFACE IPOMAI PAPA** and also in his personal capacity) moved to this Court vide his Originating Summons dated 13th May 2024 in which he sought judgment against **AFRICANUS IKWARASI OSIDE** (the Defendant) in the following terms with respect to the land parcel **NO NORTH TESO/KOCHOLIA/7312**:

(a) A declaration be and is hereby issued that the Plaintiff has been in open, uninterrupted, peaceful and quiet use and possession of the whole of the land parcel NO NORTH TESO/KOCHOLIA/7312 for a period of over 12 years consecutively and has consequently

acquired rights and interest therein by way of adverse possession and or by operation of the law.

(b) A declaration be and is hereby issued that the respondents rights and interests in the land parcel NO NORTH TESO/KOCHOLIA/7312 have been extinguished by operation of the law.

(c) A declaration be and is hereby issued that the respondent holds the whole of land parcel NO NORTH TESO/KOCHOLIA/7312 in trust for the Applicant to whom it has vested and should be registered.

(d) An order be and is hereby issued that the caution placed on 27/1/2023 (entry NO2 in the register) on land parcel NO NORTH TESO/KOCHOLIA/7312 be and is hereby removed and/or lifted forthwith.

(e) An order be and is hereby issued that the Defendant do transfer the whole of the land parcel NO NORTH TESO/KOCHOLIA/7312 to the Plaintiff and in default the Deputy Registrar of the Court be authorized to execute all necessary documents/instruments to effect such transfer on behalf of the Defendant.

(f) The Defendant be and is hereby condemned to pay costs of the suit.

(g) Any further orders and reliefs this Court deems fit to grant.

The Defendant did not file any response to the Originating Summons. That notwithstanding, on 25th February 2025 in the presence of **MR WERE** counsel for the Plaintiff with the Defendant acting in person, the following consent order was recorded:

“By consent, there shall be judgment for the Plaintiff against the Defendant as per the Originating Summons dated 13th May 2024. The parties to meet their own costs.”

I now have for my determination the Notice of Motion dated 7th April 2025 by **SIMON IDEWA BARASA** and **LINET AUJATA EMODO** (the 1st and 2nd Interested Parties respectively) premised under the provisions of **Sections 3, 3A and 18** of the **Civil Procedure Act, Order 1 Rule 10(2), Order 22 Rule 22** and **Order 45 Rules 1 and 2** of the **Civil Procedure Rules** as well as **Article 47 and 48** of the **Constitution**. They seek the following orders:

- a) Spent**
- b) That the Interested Parties be enjoined as parties in this suit.**
- c) Spent**
- d) That the consent order recorded on the 25.2.2025 be reviewed, varied and set aside in its entirety.**
- e) That upon grant of prayer (d) above, MALABA PM ELC case NO E003 of 2024 be**

transferred to this Honourable Court for consolidation with this suit.

f) Any other order that this Honourable Court deem fit to grant.

g) Costs.

2. The Motion is based on the grounds set out therein and supported by the affidavit of the 1st Interested Party.
3. The gravamen of the Motion is that the Interested Parties and the Defendant herein have a pending suit over the same parcels of land i.e. **NORTH TESO/KOCHOLIA/7311** and **7312** (the suit land) at **MALABA COURT** being **MALABA COURT ELC CASE NO E003** of **2024**. That the Plaintiff herein has also applied to be enjoined in the said suit where the firm of **MS FWAYA MASAKHWE WERE ADVOCATES** who are the advocates for the Plaintiff herein are also appearing for him in **MALABA COURT ELC CASE NO E003** of **2024** where he is the 2nd Interested Party. However, through fraud and in an effort to defeat the interest of justice and the Interested Parties herein, the Plaintiff and Defendant in this case recorded a consent herein without disclosing the existence of the case at **MALABA COURT**. And in order to protect their interests, the Interested Parties placed cautions on the suit land. They have since discovered that the decree in this case was issued but is yet to be implemented. That the Interested Parties occupy the suit land and if the decree is not stayed, the execution thereof will result in the Interested Parties suffering damage that cannot be compensated in monetary terms as they live on the suit

land with their family. The decree herein was therefore obtained through fraud as the Plaintiff's counsel was aware about the **MALABA COURT** case. The judgment herein should therefore be set aside to pave way for the two suits to be heard and if this Court had been informed about the existence of the **MALABA COURT** case, it would not have endorsed the consent herein.

4. The following documents are annexed to the Motion:
 - 1) Copy of the plaint in **MALABA ELC CASE NO E003** of **2024** involving the 1st Interested Party as Plaintiff and the Defendant herein.
 - 2) Copies of the list and statements of the witnesses filed in **MALABA ELC CASE NO E003** of **2024**.
 - 3) Copies of list of documents filed in **MALABA ELC CASE NO E003** of **2024**.
 - 4) Copy of the defence filed in **MALABA ELC CASE NO E003** of **2024**.
 - 5) Copy of decree issued in this case.

In opposing the Motion, the Plaintiff filed a replying affidavit dated 2nd May 2025 in which he has deposed, inter alia, that the Interested Parties were not parties to this suit at the time the consent order was endorsed on 25th February 2025. That this case and the **MALABA COURT** case are not related since case is a claim in adverse possession while the **MALABA COURT** case **NO E003** of **2024** was for an order of permanent injunction. That a perusal of the pleadings in the **MALABA CASE NO E003** of **2024** shows that the Defendant herein acknowledges that the land parcel **NO NORTH TESO/KOCHOLIA/7312** belongs to the

Plaintiff. Therefore, there was no requirement of any disclosure of the **MALABA CASE NO E003** of **2024** in this case since the causes of action are different. The Plaintiff's interest is in **NORTH TESO/KOCHOLIA/7312** while the Defendant's interest is in **NORTH/KOCHOLIA/7311**. That the consent was voluntary and was entered into in the presence of the Plaintiff, the Defendant and his wife and therefore it is misleading for the Interested Parties can pursue their claim in the **MALABA COURT CASE** as the Plaintiff has no claim against the Interested Parties whether in this case or in the **MALABA COURT CASE**. In view of the Notice of Appeal filed herein, the Motion offends the provision of **Order 45 Civil Procedure Rules** and in any case, there is no discovery of new and important matter or evidence nor mistake or the error on the record nor any other sufficient reason to warrant a review. The Interested Parties have not demonstrated any of the parameters to warrant the setting aside of the consent order. This application should therefore be dismissed with costs.

5. The following documents are annexed to the replying affidavit:

- 1: Copy of defence in **MALABA ELC CASE NO E003** of **2024**.
- 2: Copy of Notice of Appeal filed herein.

The Interested Parties filed a supplementary affidavit dated 3rd June 2025 and deposed by the 1st Interested Party in which he states, inter alia, that the replying affidavit is based on falsehoods. That the Plaintiff filed this suit while aware of the existence of **MALABA ELC CASE NO E003** of

2024 and therefore the consent recorded herein is tainted by fraud since the Plaintiff was duty bound to disclose that the subject matter is also being litigated in another suit involving the same parties. That it is not true that the Interested Parties claim is in the land parcel **NO NORTH TESO/KOCHOLIA/7311**. Rather, their interest is in the whole of the suit land. That the Plaintiff has himself applied to be enjoined in **MALABA ELC CASE NO E003** of **2024**. This Court is not functus officio and has the jurisdiction to review its orders. That the filing of the Notice of Appeal per se, is not an appeal and there is an apparent error on the face of the record. That the Interested Parties have been on the suit land for over 12 years yet they were not heard in contravention of the provisions of Article 50 of the Constitution and the consent judgment affects their proprietary rights. The Interested Parties annexed to their supplementary affidavit the proceedings in **MALABA ELC CASE NO E003** of **2024**.

6. The Motion has been canvassed by way of written submissions. The same have been filed by **MR BW'ONCHIRI** instructed by the firm of **OMUNDI BW'ONCHIRI ADVOCATES** for the Interested Parties and by **MR WERE** instructed by the firm of **FWAYA MASAKHWE WERE ADVOCATES** for the Plaintiff. The Defendant did not participate in these proceedings.
7. I have considered the Motion, the rival affidavits and annexures thereto as well as the submissions by counsel.
8. The Interested Parties seek the following substantive orders:

- 1) That they be enjoined in these proceedings.
- 2) That the consent judgment herein be reviewed, varied and set aside in its entirety.
- 3) That MALABA ELC CASE NO E003 of 2024 be transferred to this Court and be consolidated with this suit.

I shall consider those prayers in that sequence.

1) ORDER TO BE JOINED IN THESE PROCEEDING:

9. **Order 1 Rule 10(2)** of the **Civil Procedure Rules** provides that:

(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 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.” Emphasis mine.

An Interested Party was defined as follows in the case of **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE -V-**

MUMO MATEMU & 5 OTHERS, SUPREME COURT PETITION NO 12 of 2013 [2014 eKLR] at paragraphs 17 and 18:

17: “Suffice it to say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law; that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

18: “Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.” Emphasis mine.

The above was adopted by the same Court in the case of **FRANCAS KARIUKI MUARATETU & ANOTHER -V- R and KENYA NATIONAL COMMISSION ON HUMAN RIGHTS & 2 OTHERS** as **INTERESTED PARTIES SUPREME COURT PETITION NO 15 and 16 of 2015 consolidated [2016 KESC 12 KLR]**. In that case, the **SUPREME COURT** had the following to say at paragraph 37:

“From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an Interested Party:

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

The personal interested 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. 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. Lastly, a party must, in it’s application set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submission. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

In his submissions on this issue, counsel for the Plaintiff has, cited the case of **BARASA KANEJE MANYA - 2020 KEHC 1 KLR** and invited the Court to find that the

Interested Parties wish to be **“enjoined”** in the proceedings and not to be **“joined”**. In that case, it was held that:

“Join and enjoin exist in the English lexicon, but they do not mean the same thing. To ‘join’ a party to a suit means to add that person to the suit. To ‘enjoin’, in law, means to injunct, or to bar a party from doing something. Enjoinder means a prohibition order by injunction.”

It is of course correct that the Interested Parties have in paragraph (b) of their Motion sought to be **“enjoined as parties in this suit”** rather than to be **“joined”**. It is also correct that the term used in the relevant legal provision which is **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** is that the Court may order any party to be **“joined”** rather than **“enjoined”**. Further, the term **“enjoin”** is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as:

“To legally prohibit or restrain by injunction.”

In his submissions, counsel for the Plaintiff states thus:

“We invite this Court to take judicial notice that parties are bound by their pleadings. We take it that the intended Interested Parties do not want to be ‘joined’ but to be ‘enjoined’ in the suit probably because the Court is now functus officio.”

I consider this pre-occupation by the Plaintiff with the difference between the terms **“joined”** and **“enjoined”** to be really a matter of semantics in the circumstances of this case. Firstly, the Plaintiff has not suggested that he has

been prejudiced by not knowing what remedy the Interested Parties really seek from this Court. Secondly, even the **SUPREME COURT** in the case of **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE -V- MUMO MATEMU & 5 OTHERS** (supra) at paragraph 37 used the words “... where a party seeks to be enjoined in proceedings as an Interested Party” and went further to add: “Enjoinder is not as of right.” I do not think that this Court, applying its judicial mind to the issues at hand, should spend much time trifling with matters semantics rather than serving substantive justice.

10. Having said so, the Intended Interested Parties no doubt have a stake in these proceedings. The certificate of Official Search filed in **MALABA ELC CASE NO E003** of **2024** show that the 1st Interested Party and one **LINET AUJALA EMODO** jointly lodged a caution on the land parcels **NO NORTH TESO/KOCHOLIA/7311** and **NORTH TESO/KOCHOLIA/7312** on 27th January 2023 claiming a “purchasers’ interest”. That caution is still in situ and yet those parcels of land are also the subject of this Originating Summons in which a decree has already been extracted. Therefore, the interests of the Interested Parties with respect to the suit land is not remote. They clearly have an identifiable stake in these proceedings and will clearly be prejudiced if this suit is determined without their participation. It is also of note that both Interested Parties claim that they occupy the suit land wherein, as per their pleadings in **MALABA ELC CASE NO E003** of **2024** part of their family members are buried. Of course, whether or not

their claim to the suit land will be up-held is a matter to be determined on the evidence during trial. But their plea to be joined in these proceedings is not far-fetched. It is well merited and I will allow it.

2) REVIEW, VARY AND SET ASIDE THE CONSENT

JUDGMENT:

11. It is not in dispute that a consent judgment was recorded herein on 25th February 2025 by which the Plaintiff had sought judgment against the Defendant in terms of the prayers sought in the Originating Summons dated 13th May 2024. I have, at the commencement of this ruling, set out the prayers which the Plaintiff sought and I need not rehash them again. Suffice it to state that the judgment was in respect to the land parcel **NO NORTH TESO/KOCHOLIA/7312**. The record shows that the Interested Parties filed a Notice of Appeal dated 10th April 2025 alleging that they were dissatisfied by my ruling delivered on 7th April 2025. I did not deliver any ruling on 7th April 2025 and neither did any other judge deliver any ruling in this suit on that day. Indeed this is the first ruling being delivered in this case. I can only describe the Notice of Appeal dated 10th April 2025 as hot air.
12. With regard to the prayer seeking a review of the consent judgment recorded on 25th February 2025, **Order 45 Rule 1(1)** of the **Civil Procedure Rules** provides that a review can only be allowed where the Applicant can prove that there has been discovery of new and important matter or evidence, on account of some mistake or error apparent on

the face of the record or for any other sufficient reason. The application must be made without unreasonable delay. In the circumstances of this case, I am persuaded that the Interested Parties did not know about the existence of this suit until 3rd April 2025 when they visited the Registry at Busia Court and obtained the decree herein. This Motion was filed on 7th April 2025 just a few days later. This was new and important matter which was not within the Interested Parties knowledge. It is also a sufficient reason to warrant a review of the consent judgment herein.

13. Most importantly, in my view, the consent judgment endorsed by the Court herein on 25th February 2025 was obtained through fraud and in particular, by the failure of the Plaintiff and Defendant herein to disclose to this Court about the existence of **MALABA ELC CASE NO E003 of 2024** which involved the Interested Parties herein and the Defendant over the same suit land. Fraud consists of some deceitful practice or willful device resorted to deprive another of his right or to injure him. It is also defined as a knowing misrepresentation or concealment of material fact. When the Plaintiff filed this Originating Summons on 12th June 2024 seeking orders that he had obtained the land parcel **NO NORTH TESO/KOCHOLIA/7312** by way of adverse possession, he did not disclose that the same parcel of land was also the subject of a previous suit being **MALABA ELC CASE NO E003 of 2024** yet that was a material fact. If this Court had been made aware about the existence of that previous suit, it would have been slow to record the consent judgment on 25th February 2025. The

Interested Parties seek that the said consent judgment be set aside.

14. The circumstances in which a consent judgment may be interfered with were considered in the case of **HIRANI -V- KASSAM 1952 19 EACA 131** when the following passage from **SETON ON JUDGMENTS AND ORDERS 7TH EDITION VOL 1 PAGE 124** was approved.

“Prima facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court or if consent was given without sufficient material facts or misrepresentation or in ignorance of material facts, or in general for a reason which would enable the Court to set aside the agreement.”

Emphasis mine.

The above was adopted in the case of **BROOKEBOND LIEBIG(T) LTD -V- MALLYA 1975 E.A. 266**. See also the case of **FLORA WASIKE -V- DESTIMO WAMBOKO 1982-88 I KAR 266**.

15. On 25th February 2025 when the Defendant herein attended this Court and recorded the consent, he even addressed me saying he wanted to transfer the land parcel **NO NORTH TESO/KOCHOLIA/7312** to the Plaintiff because he had sold it to the Plaintiff's father. On that basis, this Court adopted the consent. The Defendant did not inform the

Court that he was also a Defendant in **MALABA ELC CASE NO E003** of **2024** where he had been sued by the Interested Parties over the suit land. Indeed, in **MALABA ELC CASE NO E003** of **2024**, among the orders sought was that he was holding the suit land in trust for the Interested Parties. There can be no doubt that failure to disclose to this Court the existence of **MALABA ELC CASE NO E003** of **2024** was deceitful and fraudulent. And since that conduct resulted in the endorsement of the consent as a judgment of this Court, the same must be set aside. That prayer is allowed.

3) TRANSFER OF MALABA ELC CASE NO E003 of 2024 TO THIS COURT:

16. The pleadings in **MALABA ELC CASE NO E003** of **2024** are no doubt within the jurisdiction of that Court. However, in this suit, the claim is hinged on adverse possession which is not within the jurisdiction of the subordinate Court. It is only proper that the two suits are consolidated by transferring **MALABA ELC CASE NO E003** of **2024** to this Court. That prayer is also allowed.
17. Costs follow the event. The Interested Parties shall have the costs of the Motion to be met by the Plaintiff.
18. Ultimately therefore and having considered the Notice of Motion dated 7th April 2025, I make the following disposal orders:

1) The Interested Parties are joined in these proceedings.

- 2) The consent judgment recorded on 25th February 2025 and all consequential orders are hereby set aside.
- 3) MALABA ELC CASE NO E003 of 2024 is transferred to this Court for consolidation and hearing.
- 4) The Plaintiff shall meet the costs of the Motion.

**BOAZ N. OLAO
JUDGE**

16TH OCTOBER 2025

**Ruling dated, signed and delivered on this 16th day of
October 2025 by way of electronic mail.**

**BOAZ N. OLAO
JUDGE**

16TH OCTOBER 2025