

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC CASE NO. 98 OF 2017

ALOIS MUIAPLAINTIFF/RESPONDENT

-VERSUS-

EDWARD MUTINDA NDETEI1ST DEFENDANT
COUNTY GOVERNMENT OF MAKUENI2ND DEFENDANT

-AND-

PIUS MALUNGU NDAMBUKIINTENDED INTERESTED PARTY

RULING

1. The Interested Party/Applicant filed the Chamber Summons dated 8th April, 2025 under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act in addition to Order 1 Rule 10 (2), 14 and Order 10 Rule 11 of the Civil Procedure Rules.
2. The following orders were sought: -
 - 1) [SPENT]
 - 2) **THAT this Honourable Court be pleased to grant leave to the Interested Party herein to be enjoined in these proceedings as a Co-defendant.**
 - 3) [SPENT]
 - 4) [SPENT]
 - 5) **THAT this Honourable Court be pleased to set aside the proceedings and judgment delivered on 28/12/2018 and all consequential orders and decrees pending the hearing and determination of this suit.**

6) THAT this Honourable Court be pleased to grant leave to the Interested Party to file his defence and be heard before being condemned unheard.

7) THAT costs of this application be provided for.

3. In support of the application, the Applicant filed the supporting affidavit sworn by himself on 8th April, 2025. He averred that this court delivered its judgment on 28/12/2018 and issued eviction orders against anyone found to have trespassed into the Plaintiff's property. He further averred that his Plot No. 648 Emali Market was illegally combined into Title No. Emali Township Block 1/198 belonging to the Plaintiff.
4. It is the Applicant's case that the Plaintiff chose to file the current suit against the 1st Defendant while leaving behind the Applicant and others not before this court seeking similar orders for eviction. It was his contention that the Plaintiff obtained the judgment herein through concealment of material facts and with the intention of defeating justice. He urged the court to allow the application as he has been condemned unheard.
5. The Plaintiff filed a preliminary objection dated 20th May, 2025 opposing the application on the basis of the following grounds: -
 - 1) **That the judgment sought to be set aside was delivered on 28th December, 2018 in favour of the Plaintiff/Respondent on ownership of land Parcel No. Emali Block 1/198 which judgment was upheld by the Court of Appeal in Civil Appeal No. 123 of 2019.**
 - 2) **The Honourable Court by pronouncing itself by delivery of the judgment dated 28th December, 2018 and pronouncing itself on previous applications for stay of execution became *functus officio***

and the Honourable Court cannot sit as an appellate court on its decision.

- 3) That seeking to have the Honourable Court stay and/or set aside a judgment would be tantamount to sitting on appeal against the judgment of the Court of Appeal in Civil Appeal No. 123 of 2019.**
 - 4) That the Applicant seeks to set aside a judgment in a principal matter he was not a party which matter was heard and determined.**
 - 5) That an interested party cannot be joined in a matter which has been heard and determined. A party can only be joined in pending proceedings as held by the Supreme Court in Application No. E06 of 2023 – Everton Coal Enterprises Limited -vs- Rose Wakanyi Kavenga & 5 others.**
 - 6) The Applicant’s remedy would be to file a separate suit over his alleged Plot No. 648 Emali Market and not to seek to overturn a judgment delivered over six years ago and confirmed by the Court of Appeal.**
6. The Intended Interested Party filed submissions dated 17th June, 2025 on both preliminary objection and the instant application. On his behalf, Counsel contended that a judgment of court cannot be enforced against a person who was not a party to the case. That the Applicant did not participate in the suit herein and therefore the application should be allowed.
 7. Submitting on whether this court is *functus officio*, Counsel contended that the Applicant is raising issues which were not considered at the hearing of the suit which need to be assessed on their merits.
 8. Submitting on whether this court would be sitting as an appellate court if the application were to be allowed, Counsel opined that the Applicant has disclosed his personal interest in this matter stating that he has developed a portion of the

suit property. It was further submitted that the Plaintiff was involved in previous suits with the Applicant over the same property yet the Applicant was left out in this current suit.

9. On whether the Applicant can be enjoined in a case that has been heard and determined, Counsel contended that the Applicant has established that he has a bona fide direct interest in the suit property. Lastly, on whether the Applicant should file a fresh suit, Counsel argued that this court is best placed to stay the wrongful execution. It was also argued that a fresh suit would only lead to a multiplicity of suits when the Applicant's case can be appropriately ventilated in this suit by way of a counterclaim. Counsel urged the court to dismiss the preliminary objection with costs and to allow the application herein as prayed.
10. The Plaintiff filed his submissions dated 24th June, 2025. In support of the preliminary objection, Counsel contended that a judgment was delivered by this court on 28th December, 2018 and the same was upheld in Civil Appeal No. 123 of 2019 vide the judgment dated 7th July, 2023. It was submitted that the matter herein was heard on the merits inter partes.
11. Submitting on grounds 2 and 3 of the preliminary objection, Counsel contended that this court became functus officio upon delivering its judgment dated 28/12/2018. That since the judgment of this court was upheld by the Court of Appeal, setting aside an already confirmed judgment would amount to sitting on appeal of its own judgment.
12. On grounds 4 and 5, it was submitted that the Applicant cannot purport to set aside a judgment that he was not involved in as a principal party. Reliance was placed on the Supreme Court decision in **Application No. E006 of 2023 – Everton Coal Enterprises Limited -vs- Rose Wakanyi Kavenga & 5 others.**
13. On ground 6, Counsel submitted that the Applicant had not supplied the court with any decree or order where the Plaintiff had been adjudged as not being the

owner of the suit property. Counsel opined that the only option available to the Applicant was filing a separate suit. He urged the court to uphold the preliminary objection and to dismiss the chamber summons herein for being devoid of merit.

14. The law on preliminary objections is settled. A preliminary objection must be on a pure point of law. Justice Law coined an apt description of what constitutes a preliminary objection in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** (at page 700) wherein the learned judge held as follows: -

“In 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.”

15. In the same case, Sir Charles Newbold, P. held as follows: -

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

16. In **Oraro v Mbaja [2005] eKLR**, J.B. Ojwang J. (as he then was) described it as follows: -

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

17. The Applicant seeks joinder in these proceedings in addition to the setting aside of the entire proceedings and judgment of this court. On the other hand, the main contention by the Plaintiff is that the court is *functus officio* after hearing the matter on merit and making a final determination. The Plaintiff further argues that the Applicant has no locus since it was not a party to the proceedings from inception. Issues of locus standi and *functus officio* are well-known points of law which if properly argued will no doubt lead to a termination of proceedings.

18. Joinder of parties to proceedings is governed by Order 1 of the Civil Procedure Rules. In respect of joinder of defendants to a suit, Order 1 Rule 3 of the Civil Procedure Rules 2010 outlines as follows: -

‘All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.’

19. Order 1 Rule 10 (2) goes on to provide as follows: -

‘(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.’

20. In the present application, the Applicant has made the application for joinder long after the suit was determined since judgment was delivered on 28th December, 2018 and the said judgment upheld by the Court of Appeal in Civil Appeal No. 123 of 2019 vide the judgment dated 7th July, 2023. In view of the foregoing, there is no suit pending determination for which the Applicant may be joined as a Defendant.

21. In the case of **Everton Coal Enterprises Limited v Karanja & 5 others [2023] KESC 98 (KLR)**, the Supreme Court expressed itself at length on the stage at which a party may apply for joinder to proceedings in the following terms: -

“Strictly speaking, though joined, the applicant was not a party to “the proceedings” in the Court of Appeal having been joined post-judgment, yet a joinder contemplates a situation where proceedings are still pending before the court and in terms of rule 5(d)(ii) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) which is in pari materia with order 1 rule 10(2) of the Civil Procedure Rules, a party will only be added to on-going proceedings in order to enable the court adjudicate fully upon and settle all the questions involved in the particular proceedings before it.

*Noting that the original dispute between the 1st to 4th respondents and the 5th and 6th respondents having been settled in a judgment rendered on July 29, 2016, there were no proceedings to which the applicant could properly join four years later on June 5, 2020, when the ruling by the first bench of the Court of Appeal was rendered. This question has been settled in a long thread of past decisions. For example, in *JMK v MWM & another* [2015] eKLR, the court stressed that;*

“...an application for joinder of parties can be filed only in pending proceedings; that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings, either before, or during the trial; and 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 inapplicable”.

*See also the Court of Appeal judgment in *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR on the finality of a judgment as a decision of a court resolving all the contested issues and settling the rights and liabilities of the parties before it...”*

22. In the present application, the Applicant avers at paragraphs 3 and 4 of the supporting affidavit that he is the legal owner of Plot No. 648 Emali Market the same having been allocated to him by Masaku County Council. He further averred that his plot was illegally mapped/combined with the suit property and that he is now threatened with eviction and demolition pursuant to the decree of this court.

23. Vide the judgment and decree dated 28th December, 2018, the Plaintiff was granted *inter alia* an order of eviction of anyone found to have trespassed onto the Plaintiff's property and demolition of any structures erected on the said land

Title No. Emali Township Block 1/198 as provided for under Section 152 E of the Land Act.

24. These are two distinct properties whose ownership, the Applicant and the Plaintiff respectively claim but for which one, Title No. Emali Township Block 1/198, a judgment has been favourably delivered for the Plaintiff. Accordingly, an order for joinder of the Applicant cannot issue at this stage post-judgment.

25. In the case of **Bellevue Development Company Limited v Vinayak Builders Limited & another [2014] KEHC 5507 (KLR)**, the Court observed as follows:-

“[22] In its attempts in further creativity, the applicant has sought to join Mr. Mwaniki Gachoka, Arbitrator as a party to the current proceedings way after judgment in a matter in which the said Arbitrator was not a party in the first place and where his appointment was made way after judgment. It is the 1st Respondent’s considered Submissions that joinder of a party cannot issue after judgment particularly after the case has been heard and conclusively determined. The Law on joinder of parties in civil proceedings is governed by Order 1 of Civil Procedure Rules, 2010. Rule 10(2) therefore is explicitly clear on when joinder can obtain. This can only obtain during the pendency of the suit. [23] Joinder is usually followed by amendment of pleadings so as to specifically make allegations and include prayers seeking relief against the joined party. For this reason alone joinder cannot obtain. Not only can the pleadings not re-open but also that judgment has already been entered herein. The suit is concluded. Joinder is not of any help to the Plaintiff. Perhaps the only course available to the Plaintiff is to file a fresh suit particularly since the proceedings it seeks to impugn are fresh Arbitral proceeding commenced after this suit and which are subsequent to the terminated proceeding.”

26. In the above case, the court went on to outline some instances when a party may be joined to a suit post-judgment. The court aptly stated as follows: -

“[42] Joinder of parties is possible after judgment. I will give some example where such joinder of parties is permitted; 1) in cases of representative suits; or 2) substitution of one or more parties, for instance, in case of death, or incapacity of a party or change of status of a party; or 3) in execution process. In the broader sense, it is deemed to be a kind of joinder of parties where a contemnor was not a party in the suit where judgment has already been entered and for which he is being cited for contempt of court. Equally, it is a joinder of parties where an objector raises objection to execution under Order 22 rule 51 of the CPR. However, any joinder of parties post-judgment will have to surmount any possible constitutional objections on the front of rules of natural justice and the principle of finality of litigation. Applying the said test on the present case, I find that Mr Paul Mwaniki Gachoka was not the subject of the earlier arbitral proceedings which were the subject of these proceedings. I have also found he was not a successor of the 2nd defendant although his appointment was after the resignation of the 2nd defendant herein. Although the 1st Respondent alludes to some sort of contempt, I have also found that Mr. Gachoka has not been cited for contempt of court as by law required and this application is not one for contempt of court. I hold that he is not even a necessary party and should not be joined as a party in these proceedings.”

27. In light of the foregoing, it is manifestly clear that the Applicant has no locus standi in these proceedings and the application for joinder cannot issue since the suit has already been heard and determined.

28. While making a determination on the question of *functus officio*, the court in the *Bellevue case (supra)* aptly observed as follows: -

“[w]hereas the court becomes functus officio when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court.”

29. In the present suit, the Court has performed its duties as pertains the dispute between the Plaintiff and the Defendants. The decree was issued and perfected and upheld by the Court of Appeal. There has therefore been a finality to the litigation in respect of the suit property. Therefore, the Applicant does not have *locus standi* to seek joinder and moreover, this court is *functus officio*.

30. The upshot is that the application dated 8th April, 2025 is devoid of merit is devoid of merit and is dismissed with costs. Furthermore, the preliminary objection dated 20th May, 2025 is merited and is upheld with costs.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
THIS 30TH DAY OF OCTOBER, 2025.**

IN THE PRESENCE OF:

Mr. Mbindyo for Respondent.

Mr. Muli for Mr. Nzavi for Applicant.

Court assistant – Steve Musyoki

ORIGINAL