Kimwele v Kubora & another; Mwasya & 5 others (Interested Parties) (Environment and Land Case 16 of 2017) [2025] KEELC 5636 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5636 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ENVIRONMENT AND LAND CASE 16 OF 2017

JM MUTUNGI, J

JULY 30, 2025

BETWEEN

MWANZIA KIMWELE ..... PLAINTIFF

AND

KITHOME KUBORA ..... 1ST DEFENDANT

IBRAHIM MUSINGA ..... 2ND DEFENDANT

AND

MWANGANGI MWASYA ..... INTERESTED PARTY

GABRIEL MUIMI MWANZIA ..... INTERESTED PARTY

LUCY NDANU MWANZIA ..... INTERESTED PARTY

PHILIP WAMBUA MWANZIA ..... INTERESTED PARTY

PETER MUNYOKI MWANZIA ..... INTERESTED PARTY

JOHN MUTUA MWANZIA ..... INTERESTED PARTY

RULING

1. Before me for determination is the Intended Interested Parties/Applicant's Notice of Motion application dated 3rd April 2025. The Applicants seek the following substantive orders:

    1. This Honourable Court be pleased to enjoin the intended Interested Parties to this suit.

    2. This Honourable Court does hereby issue an order to set aside the judgment of this Honourable Court dated 28th May 2021 and vacate all consequential orders thereto.

    3. This Honourable Court be pleased to grant leave to the Intended Interested Parties to file and serve their defence and to defend the suit and have the same determined on merit.

2. The application is premised on the grounds set out in its body and the Supporting Affidavit sworn by the 5th Applicant/Intended Interested Party on behalf of the Intended Interested Parties herein. The Applicants assert that the Intended Interested Parties have lifelong ties to the suit land, having lived, married, and buried family members thereon. They claim that the 1st Defendant/Respondent, accompanied by Police Officers, unlawfully demanded that they vacate the land, asserting it belonged to him. The Applicants contend they were unaware of the legal proceedings pertaining to the suit land until the Judgment was issued. They claim that this resulted in them being denied a fair hearing. They argue that the Judgment lacks clear details about which portion of the land in question belongs to the Defendants, making it susceptible to abuse by the 1st Respondent, who could potentially lay claim to any area. They further point out that the 1st Defendant has had the 6th Intended Interested Party arrested as part of a strategy to intimidate them into relinquishing their claim to the property. The Applicants claim they face irreparable harm and significant loss if evicted and seek a stay of execution from the Court. They assert they have legitimate interest in the case and pray that the Court grant the application to allow for a comprehensive resolution of the issues on merit.

3. The 2nd Defendant filed a Replying Affidavit dated 25th April 2025, on behalf of himself and the 1st Defendant. The Defendants averred that Kithome Kubore initiated the case against them and that they successfully raised a counterclaim against him. They point out that Kithome Kubore's eldest son, Samuel Mwanzia, filed a similar application dated 19th September 2023, which this Court considered and dismissed on 29th October 2024. Additionally, the Defendants aver that Samuel Mwanzia, who is a brother to the Intended Interested Parties, filed another application dated 19th October 2024, which he withdrew on 29th October 2024. The Defendants assert that the Intended Interested Parties have been aware of the suit their father filed against them and are essentially attempting to reintroduce the same application that their older brother presented to the Court, which has already been determined. They contend that since the issues of ownership have been resolved, there are no active matters left to be tried. The Defendants maintain that this application is an afterthought, an abuse of the Court process, and that the 1st Defendant should be allowed to enjoy the benefits of the Judgment that he got in his favour.

4. The Defendant/Respondents also raised Grounds of Opposition/Preliminary Objection on the same date. Their objections are based on the following points:

    1. The Honourable Court delivered its Judgment in this matter on 23rd April 2021, and that Judgment remains in effect. Therefore, the Court is functus officio, meaning it has no further authority to act in this case after issuing the Judgment. Consequently, there are no live issues left to be adjudicated between the original parties or their successors in title.

    2. Given the Honourable Court's Ruling on 29th April 2024, which dismissed the application to set aside the Judgment, the current application is merely an abuse of the Court process. Additionally, it is scandalous and frivolous.

5. The application was canvassed through written submissions. The 1st and 2nd Defendants filed their submissions dated 20th May 2025. Counsel for the Defendants/Respondent argued that it was the father of the Intended Interested Parties who filed the initial claim and subsequently failed to prosecute it. As such, the Intended Interested Parties do not possess any independent legal rights that could be litigated against the two Defendants. Counsel contended that the Applicants have intentionally omitted their elder brother, Samuel Mwanzia, who had previously sought the same orders in this Court. In the initial application dated 19th September 2023, Samuel Mwanzia claimed in paragraph 5 of his Supporting Affidavit that neither he nor any other family members were aware of their father's suit. However, the Court declined to set aside the Judgment and also denied Samuel's request to be joined in

the suit. Further, through another application dated 19th August 2024, Samuel sought to be included in the case as an Administrator of his father's estate, but he eventually withdrew this application.

6. Counsel maintained that the Ruling of this Honourable Court dated 29th April 2024 remains valid. He argued that the applications filed before this Court demonstrate that the Intended Interested Parties' application is vexatious and constitutes an abuse of the Court's process. Counsel asserted that they are attempting to achieve what their brother, Samuel, failed to accomplish through legal maneuvering and subterfuge. Counsel contended the issue between the Applicant's father and the defendants was resolved in 2021, and although their brother, Samuel attempted to set aside the judgment, he was unsuccessful. Counsel argued that the Intended Interested Parties do not possess a better standing in court than their brother, Samuel Mwanzia. He further submitted that the Applicants have not approached the Court with clean hands, as they neglected to inform the Court that they are the sons of the Plaintiff and have also omitted to include their elder brother's name in an effort to mislead the Court into believing they stand independently from him and their deceased father.

7. Counsel further argued that an application for joinder can only be filed in ongoing proceedings. In the present case, since a Judgment was delivered in 2021 and a Ruling was made on 29th April 2024, there is nothing further to be addressed in this matter. In support of his submissions Counsel placed reliance on the Case of Everton Coal Enterprises Limited –vs- Rose Wakanyi Karanja & 5 Others (2023) KESC 98 (KLR) , Supreme Court of Kenya application No. E026 of 2023, where the Court stated the following:

> " 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 Orders 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 questions involved in the particular proceedings before it."
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> > Noting that the original dispute between the 1st to 4th Respondents and 5th and 6th Respondents having been settled in a Judgment rendered on 29th July 2016, there were no proceedings to which the applicant could properly join four years later on 5th June 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;
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> > > "...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 of the proceedings, either before, or during the trial; and that it is only when a suit or proceedings has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable."

8. The Intended Interested Parties filed their written submissions on 23rd May 2025. Counsel raised three issues for consideration; the prayer to join the Applicant as an Interested Party, whether the Judgment delivered on 28th May 2021, should be set aside, and who should bear the costs. In regard to the first issue, Counsel argued that joining the Intended Interested Parties as Interested Parties is necessary

because they have a direct claim and/or interest in the disputed land. Their inclusion is crucial as it allows them the opportunity to participate in the proceedings, and will enable the Honourable Court to resolve the ownership issue definitively;

9. To clarify the definition of an Interested Party, Counsel cited the case of Communications Commission of Kenya & 4 Others v. Royal Media Services Limited & 7 Others, Petition Number 7 of 2014, eKLR, where the Supreme Court of Kenya provided relevant observations.

> " An interested party is one who has a stake in the proceedings, though he/she was not a party to the cause ab initio. He/she is one who will be affected by the decision of the Court when it is made, either way a person feels that his interest will not be articulated unless he or she himself/herself appears in the proceedings and champions his or her cause."

10. Counsel also sought to rely on the case of Sikor Estate Limited & 5 others v. Agricultural Development Corporation & Another (2015) eKLR. In addressing the matter of an Interested Party seeking to be added to a suit, Justice Sila Munyao made the following statement:

> " In my view, for one to convince the Court that he/she needs to be enjoined to the suit as an Interested Party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the Court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A Judgment or order in most cases does not only affect the litigants in the matter. It does have ramification for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in the suit as an Interested Party."

11. Counsel further in addressing the second issue contended the assertion made by the Intended Interested Parties, claiming that had not been served, had not been contested or challenged. He pointed out that the allegation stating that these parties were children of the Plaintiff did not constitute proof of their involvement or participation in the proceedings. Counsel noted that the criteria for setting aside an ex parte judgment are twofold: there must be a good defence on the merits and a sufficient cause for the delay. He argued that the Applicants in this case have a defence that raises triable issues, which should be brought to trial. To support his argument, he placed reliance on the cases of Patel v. Cargo Handling Services Ltd (1974) EA 75 and Elias Ndwiga Njoka v. Lands Registrar Kajiado & Another – Wanachio Investment Ltd (interested party) & Another (2019) eKLR.

12. I have considered the application, the Replying Affidavit, the Grounds of Opposition and parties' written arguments and the authorities cited by the parties Counsel in support of their submissions. The following issues stand out for determination.

    1. Whether this Court is functus officio and therefore lacks jurisdiction to entertain the application.

    2. Whether the orders sought by the Intended Interested Parties for Joinder, setting aside and leave to defend are legally sustainable.

Whether this Court is functus officio

13. he principle of functus officio prevents a Court from revisiting its decision once a matter has been conclusively determined. This doctrine ensures the finality of litigation and stops Courts from sitting on Appeal in their own decisions.

14. Black's Law Dictionary (10th ed. 2014) defines a Judgment as a decision made by a Court regarding the rights and obligations of the parties involved in a legal action or proceeding. A Judgment is the Court's final order concerning these rights and liabilities; it resolves all contested issues and concludes the suit. It represents the Court's definitive and official pronouncement on the law related to the case that was before it. Once a Judgment is issued, it effectively terminates the jurisdiction of the Court that rendered it. Except as expressly provided by law (for example, in cases of revisionary jurisdiction or under the slip rule), a Judgment makes the Court "functus officio," meaning it cannot reopen the case. If an Appeal is allowed, the case's jurisdiction transfers to an Appellate Court. The concept of "functus officio" signifies that once a Court has issued a Judgment following a lawful hearing, it is unable to revisit the matter. This doctrine serves as a mechanism by which the law upholds the principle of finality. According to this doctrine, an individual granted adjudicative or decision-making powers may, as a general rule, not alter or reconsider their prior decisions.

15. In the case of Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] , the Court of Appeal held that:

> " ..... a Judgment brings to an end the jurisdiction of the Court that delivers the same. In our considered view, the concept of partial judgment or Interim Judgment after hearing of the parties is unknown to the Kenyan law. A Court of Law in delivering its Judgment must determine the rights and liabilities of parties. Save for the limited exceptions provided for in Law, delivery of Judgment marks the end of litigation and marks the end of jurisdictional competence of the Court. If a Court is inclined to grant or make interim orders, it is within its powers to do so. However, a Court cannot deliver Judgment and invite further pleadings to be filed or reserve contested matters for its consideration and determination."

16. Judgment in this matter was delivered on 28th May 2021, and the issues between the Plaintiff (Interested Parties father) and the Defendants were fully adjudicated. That Judgment remains on record and has not been set aside through a successful review or Appeal.

17. The Applicant's Counsel anchored his arguments on the fact that the Judgment was made exparte, and that the Applicants were neither served nor involved in the proceedings. The Court record, however, reflects a different situation.

18. The suit was initiated based on the pleadings filed by the Plaintiff, who was the father of the Applicants. The Plaintiff failed to attend Court when the matter was fixed for hearing though served prompting the dismissal of his case for nonattendance. The Defendants who had filed a defence and Counterclaim were permitted by the Court to proceed with the hearing of the Counterclaim exparte. The Court after reviewing the evidence delivered a Judgment in favour of 2nd Defendant allowing his Counterclaim on 28th May 2021. This Judgment has not been set aside, reviewed and/or varied. That Judgment remains a final Judgment as between the Plaintiff and the Defendants. As between the Plaintiff and the Defendants there is no pending suit in which the proposed Interested Parties can apply to join in any capacity. As per the record, the original Plaintiff, Mwanzia Kimwele died on 26th February 2024 and has not been formally substituted with the result that the suit cannot be continued in his name and even if, the suit; had not been concluded the suit by the Plaintiff would have abated on the expiry of

12 months from the date of his death. There is no live case for the Intended Interested Parties to join, even if they satisfied the criteria for joinder, which they do not.

19. In this case, the matter was heard against the Plaintiff, who was served on all occasions after his Advocate filed an application to cease acting. Prior to this application, the Defendants/Respondent diligently served the Plaintiff's advocate, and when they omitted to do so, this Court ensured that the matter was removed from the cause list to guarantee service was effected. Therefore, the Judgment delivered on 28th May, 2021 was a regular Judgment, in respect of which I do not consider there would have been sufficient grounds to warrant setting aside of the same

20. Regarding the prayer for joinder as Interested Parties. The Court in my view is functus Officio in this matter as the matter was heard and concluded and a Judgment was rendered. Order 1 Rule 10(2) of the Civil Procedure Rules allows for joinder only during ongoing proceedings. The Supreme Court in the case of Everton Coal Enterprises Ltd (supra) was emphatic that joinder of parties was only permissible in ongoing proceedings and not in a matter that has been concluded as in the instant case. Indeed a proper reading of Order 1 Rue 10(2) of the Civil Procedure Rules supports this position Order 1 Rule 10(2) provides 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.

21. This provision does not envisage that where a matter has been concluded, a party can apply to be joined either as a Plaintiff or Defendant. In my view only a party who had been a party in the concluded suit can properly apply to set aside a Judgment made in such a matter, review or Appeal.

22. In the premises I find no merit in the Notice of Motion application dated 3rd April 2025 and I dismiss the same with costs to the Defendants/Respondents.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 30TH DAY OF JULY 2025.

J. M. MUTUNGI

ELC - JUDGE