



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CASE NO. 110 OF 2009**

**BETWEEN**

**NANCY NYAWIRA**

**RICHARD**

**NGIBUINI.....PLAINTIFFS**

**WAMBUGU**

**VERSUS**

**ARCHER DRAMOND MORGAN LTD.....**

**DEFENDANT**

**AND**

**CHIEF LAND REGISTRAR.....1ST  
INTERESTED PARTY**

**POST OFFICE SAVINGS BANK.....2ND  
INTERESTED PARTY**

**AND**

**CRISPIN EUSTACE MUSUNDI.....INTENDED  
INTERESTED PARTY**

## **RULING**

1. This is a ruling on a post-judgment notice of motion filed by the 3rd intended interested party (“intended IP”), dated 23/05/2025, and expressed to be brought under **Article 159(2)** of the **Constitution of Kenya, 2010, Sections 1A, 1B, 3A** and **63(e)** of the **Civil Procedure Act, Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, and all other enabling provisions of the law. He seeks the following orders from this court: -

***a) Spent.***

***b) This honourable court be pleased to grant leave to the intended IP to be joined as the 3rd IP in this suit.***

***c) Spent.***

***d) Spent.***

***e) This honourable court be pleased to set aside the judgment entered in the suit hereof, together with all consequential proceedings and orders arising therefrom.***

***f) This honourable court be pleased to set aside the proceedings in this suit thus far, reopen the same for hearing and grant unconditional leave to the intended IP to defend this suit on its merit.***

***g) The costs of this motion be provided for.***

2. The motion is supported by several grounds on the face of it and by the supporting affidavit of the intended IP, deposed on 23/05/2025. In a nutshell, the grounds in support of the motion are that he is the registered owner of the property known as Maisonette unit no. 8, erected on land reference no. 27317 (**“unit 8”**), within the development known as Hillcrest Park, situated at Athi River, Machakos County, as lessee for a term of 99 years from 01/10/80, vide IR No. 131957, and that he is in personal, actual physical possession of the same. He purchased it from the defendant for a sum of Kshs. 5,650,000, vide an agreement for sale dated 22/12/2010 (during the subsistence of this suit), which was financed through a mortgage from the 2nd IP.
  
3. That his lease was duly registered by the Lands Registry on 19/09/2011, (during the subsistence of this suit) as entry no. 82. He became aware of this suit in August 2019, when the plaintiff had obtained eviction orders. It was at this point that the 2nd IP, his financier, sought to be joined in this matter after he had informed it of the eviction orders. Subsequently, on 12/05/2025, he discovered that warrants issued to the court bailiff, authorising him to take possession, had been slipped under the door of unit 8. He was directly affected by this court's orders.
  
4. This motion is strenuously opposed by the plaintiffs’ grounds of opposition dated 16/06/2025, and the following grounds are raised: -

**a) The intended IP has failed to raise sufficient grounds to warrant setting aside the judgment entered in terms of the arbitral award dated 16/12/2009.**

**b) The intended IP was not a party in the arbitral proceedings and the resultant arbitral award leading to the judgment issued by Justice J.M. Ngugi on 15/02/2012.**

**c) This honourable court is functus officio, having determined the question of rights over the suit property between the parties (including the intended IP) vide a ruling delivered by Justice O.A. Angote on 8/05/2020.**

**d) It is trite law that the intended IP has a legal recourse against the defendant herein as already determined by Justice O.A. Angote in his ruling on 8/05/2020.**

**e) The motion, if allowed, will greatly prejudice the plaintiffs, as all issues pertaining to the suit property have already been determined.**

***f) The dispute leading to this suit was subject to an arbitration clause, which the intended IP was not privy to; therefore, the intended IP cannot be privy to any proceedings of the arbitration and the resultant execution proceedings.***

5. Additionally, these grounds were reiterated in the replying affidavit sworn on 29/01/2025 by their counsel, **Gikandi Ngibuini**, wherein the decisions of 15/02/2012, 05/07/2019, and 08/05/2020 were submitted to the court. The counsel also maintains that the motion constitutes an abuse of the court process, bad in law, and a non-starter. The other parties did not participate in these proceedings.
6. Upon court directions, the motion was argued through written filed by **M/s. Kinoti & Kibe Co. Advocates** for the intended IP, dated 1/07/2025. Unfortunately, the plaintiffs' counsel did not file their submissions. Accordingly, the intended IP's counsel's arguments and the provisions of law and judicial precedents relied upon shall be taken into consideration in the analysis and determination of the issues for determination, which are: a) **whether the intended IP can be joined to the proceedings post-judgment** and if in the affirmative, b) **whether the other reliefs sought should be granted.** These issues shall be addressed shortly concomitantly.

7. Regarding the 1<sup>st</sup> issue, the applicable legal provision for joinder of a party as an interested party is provided for in **Order 1 Rule 10(2)** of the **Civil Procedure Rules (CPR)** which has primarily been interpreted to mean that the party who ought to be joined or added to civil proceedings as a party to the suit either as a defendant, plaintiff or interested party whose presence in the proceedings would be necessary to assist the court determine the matter effectually and completely should be joined to the proceedings. This proviso 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.”***

8. Further, the meaning of the definition of an IP is resounded in the Supreme Court of Kenya's decision of **Trusted Society of**

**Human Rights Alliance v Matemo & 5 others**  
**[2014] KESC 32 (KLR)** in the following words: -

***“3. An interested party was one who had a stake in the proceedings, though they were not initially a party to the cause. Such a person felt that their interest would not be well articulated unless they personally appeared in the proceedings, and championed their cause.”***

9. However, although the intended IP seems to have a stake in unit 8, the law anticipates that for a party to be joined to the proceedings or an entertainment of such a request for joinder, there have to be live proceedings that are pending between parties to the suit, which is not so in this case, as the arbitral award of 16/12/2009 was adopted as a judgment of this court on 12/02/2012 and in a ruling rendered on 5/07/2019, the defendant’s application for leave to appeal against this decision was declined.
10. Moreover, it must be mentioned that it has now been seven years since the intended IP became aware of this legal action. Instead of seeking to be joined as a party, he entrusted his financier, the second IP to be joined, who subsequently did so. This second IP adequately represented his interests in the suit. In the ruling issued on 8/05/2020, Justice O.A. Angote thoroughly addressed the interests of the 2nd IP and the intended IP, as outlined below.

***“In the current Application, the Applicant’s Company Secretary has deponed that the Defendant herein sold to a member of staff of the 2<sup>nd</sup> Interested Party, Crispin Eustance Musundi, the suit property and a Lease was drawn and registered to that effect. According to the 2<sup>nd</sup> Interested Party, it charged the suit property by way of a charge dated 19<sup>th</sup> July, 2011. I have perused the Lease document that was entered into between Crispin Musundi and the Defendant on 19<sup>th</sup> July, 2011. The said Lease shows that the Defendant sold the suit property to Crispin for Kshs. 5,650,000. The Lease was registered in favour of Crispin on 19<sup>th</sup> September, 2011 and charged to the 2<sup>nd</sup> Interested Party on the same day. It is obvious that the Defendant herein sold the suit property during the pendency of the suit. Indeed, the Defendant sold the suit property to Crispin after the Arbitrator had already ruled in favour of the Plaintiffs...The Defendant sold the suit property notwithstanding the fact that the Arbitrator had made an Award directing him to transfer the suit property to the Plaintiffs in the year 2009. The law and equity frowns upon those whose actions are meant to defeat the course of justice. The Defendant in this case acted unlawfully, and neither party can***

***derive from the unlawful acts of the Defendant. The purported transfer of the suit property to Crispin Eustance Musundi during the pendency of this suit, and after the Award of the Arbitrator, is null and void. The subsequent charge of the suit property to the 2<sup>nd</sup> Interested Party is equally null and void. That being the case, the 2<sup>nd</sup> Interested party cannot set aside the proceedings of this court, or the Award of the Arbitrator. In any event, even if the proceedings of this court are set aside; what will the 2<sup>nd</sup> Interested Party tell the court? The issue of ownership between the Plaintiffs and the Defendant were settled by the Arbitrator, and adopted by the Court. The 2<sup>nd</sup> Interested Party will therefore have nothing to say, even if these proceedings are re-opened.”***

11. This decision of 8/05/2020, which found that the acquisition of unit 8 by the intended IP was unlawful due to it occurring subsequent to the issuance of the arbitral award, has not been overturned by the Court of Appeal.
12. Pointedly, it follows that the judicial precedents relied upon by the intended IP's counsel for joinder are distinguishable from the scenario herein, as those cases dealt with instances of pending proceedings. Nonetheless, when dealing with similar circumstances as the case herein, the binding decision by the

Court of Appeal of **JMK v MWM & MFS** [2015] KECA 524 (KLR), which this court associates itself with, stated: -

***“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 as 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 our Civil Procedure Rules, in TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 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 the 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 inapplicable; and that a party can even be added at the appellate stage.”***

13. Being guided by the law and judicial precedence, and in the end, this court finds in the absence of pending proceedings, it cannot join a party to a suit post judgment, finds the motion is incompetent and an abuse of court process and finds that it is *functus officio*. For these findings, it is constrained from exercising its judicious discretion on the merits of some of the reliefs sought. As established in the aforementioned decision of 8/05/2020, the sole remedy available to the intended IP is to initiate a damages claim against the defendant and not to reopen the case. Let him vacate the suit premises. As it is trite law that costs follow the event, the plaintiffs shall have costs.

14. As this court concludes, it notes that there are several pending applications by the plaintiffs seeking to evict the intended IP so they may enjoy the benefits of their judgment. It also appears that an informal notice of withdrawal for one of the applications has been filed. Therefore, this court hereby issues the following disposal orders:

***a. The notice dated 23/05/2025 is hereby struck out with costs to the plaintiff.***

***b. This file is hereby effectively marked as closed.***

***c. A mention date shall be given for directions on the plaintiff's applications dated 27/10/2025 and 19/11/2025.***

***d. The plaintiff is at liberty to file a formal notice of withdrawal of these pending applications.***

It is so ordered.

**Delivered and Dated at Machakos this 17<sup>th</sup> February, 2026.**

**HON. A. Y. KOROSS  
JUDGE  
17.02.2026**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant

Mr. Wachira for defendant and holding brief for Kinoti for 3<sup>rd</sup> interested party

Mr. Kuria for 3<sup>rd</sup> and 2<sup>nd</sup> interested parties

Miss Aluoch holding brief for Mr. Gikandi for plaintiff