



**Maina (Suing on behalf of the Estate of Peter Maina Waigwa) & 21 others v Kimemia Engineering Construction Company Limited & 3 others; Opwapo (Interested Party) (Environment and Land Case E439 of 2021) [2025] KEELC 5937 (KLR) (14 August 2025) (Ruling)**

Neutral citation: [2025] KEELC 5937 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE E439 OF 2021  
CG MBOGO, J  
AUGUST 14, 2025**

**BETWEEN**

**LUCY NJERI MAINA (SUING ON BEHALF OF THE ESTATE OF PETER MAINA WAIGWA) & 21 OTHERS & 21 OTHERS ..... PLAINTIFF**

**AND**

**KIMEMIA ENGINEERING CONSTRUCTION COMPANY LIMITED .... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**VITALIS OKOTH OPWAPO ..... INTERESTED PARTY**

**RULING**

1. Before this court for determination is the notice of motion dated 30<sup>th</sup> January, 2025 filed by the interested party, and it is expressed to be brought under Sections 1A,1B and 3A of the *Civil Procedure Act*, Order 1 Rule 10 and Order 9 Rule 9 of the Civil Procedure Rules seeking the following orders: -
  1. Spent.
  2. That the intended interested party/ applicant's advocate of the firm of Joyce Wairimu Mwangi & Co. Advocates be allowed to come on record post judgment.
  3. That the intended interested party/ applicant be enjoined in this suit as interested parties.



4. That pending the hearing and determination of this application, this honourable court be pleased to issue an order for stay of execution of the judgment delivered on 4<sup>th</sup> day of April 2024.
5. That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that the interested party/ applicant was not included in the 21 persons who claim ownership of the suit property despite his late father having been allocated stall No. 8 on Plot Number 187 in Mbotela Market since the year 1984.
3. The application was supported by the affidavit of the interested party/ applicant sworn on even date. The interested party/ applicant deposed that he learnt of this suit in December, 2024 when they were served with eviction notices from the 1<sup>st</sup> defendant, and that upon perusal of the file, he learnt that his family was not included amongst the plaintiffs who claimed ownership and possession of the suit property. The interested party/ applicant further deposed that he took over his late father's charcoal business which was confirmed as one of the assets of the deceased vide the confirmation of grant dated 20<sup>th</sup> April, 2017. He further deposed that he lodged complaints on 1<sup>st</sup> April, 2014, and on 20<sup>th</sup> July, 2023 with the Nairobi City Council, and contended that he did not get any notice about change of ownership as it was indicated in the allocation certificate.
4. The interested party/applicant deposed that unless this matter is determined on a priority basis, they are likely to suffer irreparable damages as the plaintiffs left out his name on purpose.
5. The application was opposed by the replying affidavit of Eddy Ndung'u Kimemia, the director of the 1<sup>st</sup> defendant sworn on 10<sup>th</sup> March, 2025. The 1<sup>st</sup> defendant deposed that the court issued a binding and final judgment, and that the execution of the decree was undertaken on 17<sup>th</sup> January, 2025 following due process. The 1<sup>st</sup> defendant further deposed that the doctrine of *functus officio* applies to this case, and that this court lacks jurisdiction to entertain any further applications seeking to reopen, revisit or undermine the judgment already executed. Further, it was deposed that the interested party/applicant has sought to rely on a certificate of confirmation of grant as evidence of ownership, yet the same documents do not establish ownership of the suit property.
6. The 1<sup>st</sup> defendant deposed that the interested party/applicant's sudden interest in challenging the execution is a mere afterthought designed to delay their enjoyment of the judgment. Further, that no credible evidence has been adduced to support his belated assertions, and that the application is an affront to the integrity of judicial authority and should be dismissed with costs.
7. The application was canvassed by way of written submissions. The interested party/applicant filed his written submissions dated 7<sup>th</sup> April, 2025 where he raised three issues for determination as listed below:
  - a. Whether the notice of motion dated 30<sup>th</sup> January, 2025 meets the threshold required for the enjoinder of an intended interest party under Order 1 Rule 10 (2) of the Civil Procedure.
  - b. Whether the court has power to stay the judgment and consequent eviction orders.
  - c. Whether the court is *functus officio*.
8. On the first issue, the interested party/applicant submitted that he seeks to be joined in the suit as an interested party to aid this court in determining the issue of possession and actual use of the suit property. Further, his interests were not represented, and thus he would be able to ventilate his case and obviate the risk of being denied his constitutional right to be heard. The interested party/applicant



- relied on the cases of Harrison Mwangi Nyota v Naivasha Municipal Council & 20 Others [2019] eKLR, and Tang Gas Distributors Ltd v Said & Others [2014] EA 448.
9. On the second issue, the interested party/applicant submitted that under Article 23 (3) of *the Constitution* of Kenya, courts have the power to create orders that protect a right and prescribe appropriate rules and damages related to that right. He further submitted that the 1<sup>st</sup> defendant cannot evict him without a fair hearing as elaborated under Order 22 Rule 86 of the Civil Procedure Rules.
  10. On the third issue, the interested party/applicant submitted that there exists certain exceptions to the functus officio rule, and that the issue of actual possession and use of Stall No. 8 on the suit property was not determined in the present suit, and that the court has the discretion to hear and determine the said issue so that the matter can be concluded to finality. Reliance was placed in the case of Jersey Evening Post Ltd v Ai Thani [2002] JLR 542 at 550.
  11. The 1<sup>st</sup> defendant filed its written submissions dated 22<sup>nd</sup> April, 2025 where it raised three issues for determination as listed below:-
    - i. Whether the application for joinder by the intended interested party satisfies the legal and procedural threshold under Order 1 Rule 10 (2) of the Civil Procedure Rules.
    - ii. Whether this honourable court retains jurisdiction to entertain the application or is functus officio.
    - iii. Whether the application is competent and/or merited.
  12. On the first issue, the 1<sup>st</sup> defendant submitted that Order 1 Rule 10 (2) of the Civil Procedure Rules is a procedural tool that aids in the effectual determination of an ongoing dispute, and not to breathe life into matters long buried beneath the finality of judgment. While relying on the case of Everton Coal Enterprises Limited v Androse Wakanyi Karanja & 5 Others, SC Application No. E026 of 2023, the 1<sup>st</sup> defendant submitted that the interested party/applicant seeks to hijack a proceeding that no longer exists with execution having taken place, and thus the cause is no longer pending. To buttress further on this issue, the 1<sup>st</sup> defendant relied on the cases of JMK v MWM & Another [2015] eKLR and Robert Githua Thuku v William Ole Nabala & 9 others [2018] eKLR.
  13. On the second issue, and while relying on the cases of Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR) and Mbita v Barasa & 2 Others; Laborde & 10 Others (Intended Defendant) [2023] KEELC 22168, the 1<sup>st</sup> defendant submitted that this court has already discharged its sacred duty in this matter and to entertain the present application would be to unseal a decree that the law deems sealed.
  14. On the third issue, the 1<sup>st</sup> defendant submitted that *the Constitution* is not a shield for delay or a refuge for those who slept through litigation. It was submitted that rights are enforceable but they must be pursued through proper and timely channels. While maintaining that execution has already taken place, the 1<sup>st</sup> defendant submitted that the suit property has rightfully been repossessed and the application is moot. Further reliance was placed in the cases of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR and Jaribu Holdings Ltd v Kenya Commercial Bank Ltd [2008] eKLR.
  15. I have considered the application, replying affidavit and the written submissions filed by the interested party/ applicant and the 1<sup>st</sup> defendant. In my view, the issue for determination is whether this court ought to allow joinder of the interested party in this matter.
  16. The instant application has been filed at a time when judgment has already been delivered and execution carried out. For purposes of proceeding with the determination of this application, prayer



2 commends itself for issuance at this stage in compliance with Order 9 Rule 9 of the Civil Procedure Rules. It would be important to point out that prayer 4 as structured or written cannot issue as it was only to be determined at the ex-parte stage, and the same having not been granted, cannot suffice for consideration at this stage.

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

“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.”

18. Looking at the above, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of a party may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.

19. The interested party/applicant seeks to be joined in these proceedings at a time when judgment has already been delivered and execution has taken place. The interested party/applicant avers that he has an interest in the suit property by virtue of his late father having acquired the same and which formed part of the assets devolved in the certificate of confirmation of grant. The interested party/applicant contended that the plaintiffs did not include them in the suit, and thus his interest were not considered contrary to *the Constitution*. A plain reading of the grounds relied upon by the interested party/applicant shows that he is keen to have the case reopened and commence afresh so that his issues can be ventilated as well. Interestingly, there is no prayer seeking to set aside the judgment except seeking joinder.

20. The Court of Appeal in the case of JMK -vs- MWM & Another [2015] eKLR stated as follows: -

“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...”

21. While I place reliance on the above cited authority, and in my view, the circumstance of this case would merit consideration if the suit was existing. There is no common question of fact or law that is existing. This I say based on the fact that execution having taken place as alluded by the 1<sup>st</sup> defendant, the suit



rests as concluded and final without any appeal. What would be the purpose of joinder when the 1<sup>st</sup> defendant has repossessed his property? The orders of this court cannot be issued in vain.

22. From the above, the notice of motion dated 30<sup>th</sup> January, 2025 is incompetent and lacks merit. The same is hereby dismissed with costs to the 1<sup>st</sup> defendant. Orders accordingly.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF AUGUST, 2025.**

**HON. MBOGO C.G.**

**JUDGE**

**14/08/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Karuga for the 1<sup>st</sup> Defendant

Ms. Wairimu Mwangi for the Interested party/Applicant

