



**Gio-Fo Limited v National Land Commission & 4 others; Kahindi & 12 others (Intended Interested Party) (Environment & Land Petition 14 of 2019) [2024] KEELC 1059 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1059 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 14 OF 2019  
FM NJOROGE, J  
FEBRUARY 29, 2024**

**BETWEEN**

**GIO-FO LIMITED ..... PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, KILIFI ..... 3<sup>RD</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KILIFI ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**LUCAS MWAMUBNDA KAHINDI & 12 OTHERS .... INTENDED  
INTERESTED PARTY**

**RULING**

1. The application for determination is a Notice of Motion application dated October 18, 2023 filed on October 19, 2023 by the Intended Interested Parties. The application is brought under section 1A, 1B, 3A, 3B and 63 (e) of the [Civil Procedure Act](#), order 51 rule 1 and order 1 rule 10 of the [Civil Procedure Rules, 2010](#) for orders:-
  1. Spent.
  2. That this honourable court be pleased to stay its orders/judgment dated October 2, 2020.
  3. Spent.



4. That the honourable court be pleased to grant the order that the intended interested parties herein be joined to this suit and allowed to defend the same as respondents.
  5. The defendants and the petitioner's agents, servants and or employees and the OCS Watamu police station be restrained from harassing and threatening the intended interested parties and or from demolishing their business premises.
  6. That the Petitioner be ordered to serve the petition upon the interested parties.
2. In support of the application are the grounds on the face of the motion and the affidavit sworn by Wanje Mlanda Abased, one of the intended interested parties, who deposed that the Petitioner herein mischievously failed to serve the Petition on the Intended Interested Parties despite being aware that the latter have been in occupation of the land parcel Chembe/Kibabamshe/439, the suit property for over 20 years. That the Intended Interested Parties only became aware of the Petition and its determination on 16<sup>th</sup> October 2023 through their advocates on record, following harassment by the DCI Watamu seeking to evict them from the suit property.
  3. They also relied on the supplementary affidavit sworn by Wanje Mlanda on November 27, 2023.
  4. The Petitioner opposed the application. It filed a Replying Affidavit sworn by Alfonso Forino, its director, on November 3, 2023 wherein he deposed that the Petitioner is the registered proprietor of the suit property having purchased the same on 11<sup>th</sup> September 2009 from a third party. That the Petitioner has since been in quiet possession of the suit property until the year 2021 when the Intended Interested Parties invaded it. The director added that the Petitioner filed the Petition to stop the 1<sup>st</sup> Respondent's attempt to revoke its title to the suit property and give the same to the 5<sup>th</sup> Respondent. The Petition was allowed on October 2, 2020 by Olola J and execution finalized. That the Petitioner has no claim against the Intended Interested Parties and cannot be forced to sue any person they wish not to.
  5. The Application was canvassed by way of written submissions. It is clear that the Respondents neither filed any response or submissions.

#### **Intended Interested Parties' submissions**

6. Counsel submitted that it is necessary that the application is allowed to give the intended Interested Parties an opportunity to defend public land. To him, the suit property was set aside for public use and had the Petitioner served the Intended Interested Parties, the outcome of the petition would have been balanced. He added that to be condemned unheard infringes the parties' constitutional rights under article 50 (1) and in the absence of such a proper hearing, the judgment delivered on October 2, 2020 is irregular. Counsel relied on the case of *Sangram Singh v Election Tribunal*, KOTEH, AIR 1955 SC 664 at 711 and *Kenya Transmission Company Limited v Kibotu Limited* E&L No. 107 of 2019 (Eldoret).
7. Counsel further submitted that it is important to preserve public utilities from any manner of grabbing or change of user and in doing so, the input of the physical planning department is paramount. On this, counsel relied on the case of *Jimmy Gichuki Kiago & others v Transitional Authority & others* ELC No. 2 of 2011 Kitale. He added that assertion that one is an innocent purchaser was not enough on an illegal sale of a public land as it was explained in Kisumu ELC No. 708 of 2015 *Kenya Anti-Corruption Commission v Online Enterprises Limited & others*. To counsel, the judgment delivered in this case must be stayed or set aside to allow the intended interested parties defend the suit.
8. Counsel argued that the court is clothed with wide discretionary powers to set aside the judgment which he referred to as interlocutory. To him, the judgment was irregular and should be set aside for



the Intended Interested Parties' defence to be heard on merits. Counsel cited the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75; *Philip Kiptoo Chemwolo & Mumias Sugar Co. Limited v Augustine Kubende* (1982-88) KAR 1036; and *Chumo Arap Songok v David Kibiego* CA No. 141 of 2004. Counsel urged the court to allow the application in the interest of justice and since the Intended Interested Parties have an arguable defence.

### **Petitioner's Submissions**

9. On his part, counsel for the Petitioner identified two issues for determination - whether this court has jurisdiction to grant the orders sought and whether the application is merited.
10. In relation to the first issue, counsel submitted that the decree in this petition has been executed and all the arguments raised by the Intended Interested Parties determined in the said judgment. To him, this court has no jurisdiction to set aside a regular judgment decided by another judge of concurrent jurisdiction as is the case herein, but only on appeal. Counsel relied on the cases of *Mashreq Bank PSC v Kuguru Food Complex Limited* [2018] eKLR and *CCD v ENB, PKN, VD & BU* [2018] eKLR.
11. On the second issue, counsel argued that since the judgment and decree have long been executed, there is nothing to stay in this case. Counsel added that a suit is a solemn process owned solely by the parties and an interested party may not introduce its own fresh issues to a suit. He added that a stranger may not be allowed to participate in a case once judgment is delivered and a joinder of parties cannot be made after determination of a suit. To this end, counsel relied on the case of *Methodist Church of Kenya v Mohamed Fugicha & 3 others* [2019] eKLR.
12. To counsel, this court became *functus officio* after judgment was delivered. To buttress this argument counsel relied on the case of *Raila Odinga & 2 others v IEBC & 3 others* [2013] eKLR.
13. I have carefully considered the application, affidavits in support, replying affidavit, submissions and authorities presented by both sides. The following issues are for determination: -
  - i. Whether an order for stay of execution of the judgment and decree issued on October 2, 2020 should be issued.
  - ii. Whether the Intended Interested Parties should be allowed to join the suit at this stage.
  - iii. Whether the application is merited.

### **Analysis And Determination**

14. In this interesting application, the Intended Interested Parties want execution of the impugned judgment stayed and that they be allowed to participate in the already determined petition. To my mind, the order they should have sought was that of setting aside judgment, which they have failed to do. This explains why the issue of setting aside featured prominently in submissions by both parties. Though it is uncontroverted that execution is now finalized and the register regarding the suit property regularized as stipulated in the impugned judgment, I will address that issue later on in this ruling. However, for the reason that execution has been finalized, the prayer for stay has obviously been overtaken by events and cannot be granted at this point.
15. Even assuming that the orders sought was that judgment be set aside, I expressly disagree with the Intended Interested Parties that the impugned judgment was interlocutory. The Petition was duly served on all parties therein and the matter proceeded to full hearing. The Intended Interested Parties were not parties in the petition, therefore, there was no need for service to be effected upon them.



16. Further, judgment herein was not made ex parte. It was a regular judgment and no sufficient reasons have been advanced to set it aside. Their argument that had the Land Registrar testified the outcome would have been different does not hold any water. I say so because the 4<sup>th</sup> Respondent acting on behalf of the Land Registrar supported the position taken by the 5<sup>th</sup> Respondent who indeed participated in the proceedings. The court analyzed the evidence and arrived at a conclusion in favour of the Petitioner.
17. Moreover, the Intended Interested Parties aver that they have and continue to reside on the suit premises on the belief that the same is public land. I have perused the impugned judgment, it is clear to me that this issue was substantially addressed therein though the Petitioner's allegation that the Intended Interested Parties only moved into the suit property in the year 2021, long after judgment had been delivered.
18. There is no doubt that order 1 rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.
19. I am guided by the Court of Appeal's explanation in JMK v MWM & another [2015] eKLR on the above provision where joinder is sought long after judgment is delivered. The Court explained: -

“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.”
20. The applicants herein seek to join the petition as interested parties, approximately three years after its conclusion. Owing to what I have stated above, I think in the circumstances of this case there is nothing to warrant this court to grant the order that they seek.
21. As I conclude I must state that the suit before the court in this case was a petition, heard by way of affidavit evidence and not oral evidence, in which the issue of violation of procedure employed by the National Land Commission featured prominently in the determination as to whether the constitutional rights of the petitioner had been violated. It has for long been the proper position in practice that the issue of validity of a disputed title needs be tried in a normal suit commenced by way of plaint so as to give parties the opportunity of viva voce evidence including cross-examination and examination of and challenge to the documents relied on both for and against the title's validity. The declarations and other orders made in the judgment delivered in the present matter and the reinstatement of title in the petitioner's favour are strictly based on the determination as to whether the National Land Commission violated the provisions of article 47 of the Constitution of Kenya 2010 with regard to the petitioner by acting while no rules were in place, and whether and revocation that resulted from that determination was valid; they are also based on the simple complaint that the



petitioner was never made aware of the nature of complaint against it, if any, by the National Land Commission before the offending gazette notice was issued; they do not inure the petitioner against any other suit regarding validity of title by any other aggrieved person or persons not named as and not connected to the parties that petition so as to foul the res judicata rule, as long as he has sufficient facts that in law constitute a distinct cause of action against the petitioner, and also sufficient evidence to support the claim; the same case applies to the touted execution of the judgment that restored the registration. However, it is evident that the claim or claims would have to be ventilated in a suit or suits other than this already concluded petition.

22. Given the above analysis, I am not convinced that the application has any merits. It is hereby dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

