



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL NO. 346 OF 2002

MUNGAI & OTHERS.....1ST PLAINTIFF

VERSUS

JOHN WAINAINA..... 1ST DEFENDANT

JOHN GATHUMU 2ND DEFENDANT

NZAU MWALIMU NZAU.....3RD DEFENDANT

FRANCIS MIKUNYUA KIRIMA..... 4TH DEFENDANT

ZIMMAN SETTLEMENT SCHEME5TH DEFENDANT

AND

JOSEPHAT MATHIA MUIGAI..... 1ST INTERESTED PARTY

SAMUEL KUNG’U MUIGAI2ND INTERESTED PARTY

BENEDICT HONGO ODHIAMBO 3RD INTERESTED PARTY

RULING

The interested party, **Josphat Mathia Muigai** and **Samuel Kingu Muigai**, by a Notice of Motion application dated 13th November, 2014 brought under section 1A, 1B, 3A and Order 1 Rule 10 (1) & (2) Civil Procedure Rules seeks the following orders:-

- i. That leave be granted to the applicants to file the application out of time.
- ii. That the names of the late **James Muigai**, be substituted by the names of **Josephat Mathia Muigai** vide confirmed letters of administration dated 16th December 1977(must have meant 16.12.1997)
- iii. That costs of the application be in the cause.

The application is supported on the grounds that:-

- a. That the late **James Muigai & 20 others** bought Land Reference Number Nairobi/Block.123/1-

279 formerly **L.R.NO.57/26 from M/S Kentiles Limited** on 8th October 1977 and have been in use occupation and ownership to date.

- b. That **Josephat Muthia Muigai** is a representative of the estate of the late **James Muigai**.
- c. That the Judgments of **Hon. Justice Majaja** has since confirmed the subject land belongs to the late **James Muigai & 20 others**.

The said **Josephat Mathia Muigai** has sworn an affidavit in support of the application where he annexes a copy of the Grant of probate to show that he is one of the joint administrators of the estate of **James Ngengi Muigai**. The applicant has also filed a further affidavit annexing an abstract of title showing the conveyance dated 8th October 1977 relating to the transfer of **L.R.NO.57/26** which was registered at the Lands Office on 11th October 1977. A copy of the Transfer dated 8th October 1977 (title) and a surrender of the title in exchange of approval of a subdivision scheme dated 4th November 1991 are annexed to the further affidavit.

Pursuant to an application dated 16th August 2013 the applicants were on 2nd October 2013 by consent ordered to be joined as interested parties in the suit as representatives of the estate of the late **James Muigai**.

To contextualize the application by the interested parties it is necessary to revert to how the suit was initiated. By a plaint dated 26th February 2002 filed in court on the same date the parties were described thus:-

MUIGAI & OTHERS..... PLAINTIFF

-VS-

JOHN WAINAINA

JOHN GATHUMU..... DEFENDANTS

NZAU MWALIMU

Paragraphs 1, 2 & 3 of the plaint provides as follows:

1. **The plaintiff is a partnership comprising 21 persons and whose address for the purposes of this suit is C/O Ngatia & Associates Advocates, Post Bank House, P.O. Box 56688, Nairobi.**
2. **The Defendants are male adults who reside in Nairobi. The plaintiff's Advocates undertake to serve summons upon the Defendants.**
3. **On 8th October 1977, the plaintiff purchased all that parcel of land comprising 215 acres or thereabouts from Kentiles Ltd (in liquidation) being Land Reference Number 57/26. The conveyance was duly registered in favour of the plaintiffs.**

From the foregoing it is clear that the plaintiff instituted the suit as a firm comprised of 21 persons. The 21 persons are the persons named as the purchasers in the conveyance dated 8th October 1977 referred to in paragraph 3 of the plaint. **JAMES MUIGAI** was one of these purchasers and duly executed the referred to conveyance. The verifying affidavit in respect of the plaint sworn by one **Robert Wamuthi Mutahi** stated that the deponent was a partner in the plaintiff partnership and that he had been authorized by the Co-partners to make the affidavit to verify the averments contained in the plaint. Thus the plaint was brought for and on behalf of the 21 persons who comprised the partnership.

The 1st and 2nd Defendant filed a notice of preliminary objection to the interested parties application dated 13th November 2014 on the grounds that:-

- i. The suit offends the provisions of Order 5 Rule 1 (2) and 2 (1) of the Civil Procedure Rules as no

- summons were ever filed with the plaintiff and none has been extracted for the last 13 years and there has therefore been no service upon the Defendants.
- ii. That the suit is therefore still born and there being no suit, there is no party to be substituted by the applicants in their said application.
 - iii. The plaintiffs have taken no reasonable steps to have this suit listed and heard in the last 13 years that the suit has been in limbo and the same is therefore liable to be struck out in limine pursuant to order 17 Rule 2 (3) of the Civil Procedure Rules.
 - iv. The suit is fatally defective and is a non starter and the joinder of the plaintiff or an interested party cannot resuscitate it.

The 4th and 5th Defendants through the replying affidavit sworn by one **Francis Kirima M'kunyua** on 10th February 2015 oppose the interested parties application to be substituted to represent **James Muigai**. The 4th and 5th Defendants aver that the said **James Muigai** was already deceased as at 26th February 2002 when the suit was filed and could therefore not have been a party to these proceedings. The 4th and 5th Defendants further aver **Robert Wamithi Mutahi** who swore the verifying affidavit on behalf of the plaintiffs in the suit did not exhibit a letter of authority by the plaintiffs to act on their behalf. The greater part of the 4th Defendant's affidavit deals largely with matters of evidence which would best be for the trial as the averments relate to the merits of the plaintiffs case or otherwise.

Curiously, on 23rd March 2015 one **James Mburu Nuthu** describing himself as the Chairman of the 5th Defendant, **Zimman Settlement Scheme Society** swore an affidavit stating he was representing the members of the society and that he had authority to withdraw all applications filed by the society against the plaintiff and the interested party, **Josephat Mathia Muigai** and **Samuel Kungu Muigai**.

On 10th February, 2015 the law firm of **Ole Kaikai & Company Advocates** filed a Notice of change of Advocates to act for the 1st, 2nd and 3rd Defendants and filed an application on behalf of the 1st and 2nd Defendants alleging they had not been served with summons but on 23rd March 2015 one **John Gathumu** swore an affidavit disowning the application and stating that he wished to withdraw all applications brought against the plaintiff and the interested parties/Applicants.

That was not all as on 10th October 2014 someone who signed off as **Mungai** plaintiff/Applicant filed a Notice to act in person after purporting to withdraw instructions from the firm of **Kabue Thumi & Company Advocates**. This **Mungai** who filed the notice to act in person as per the court record has subsequently not appeared whenever the matter has come up for hearing or mention. The court record infact does not show any person has appeared for the plaintiffs since 16th April 2004 when **Hon. Justice Kihara Kariuki** (as he was) delivered a ruling on an application dismissing the Defendants application for injunction directed against the plaintiffs. The parties as from that date it appears sought other avenues to try to resolve their dispute notably through **HC Petition NO. 13 of 2010** filed by one **Robert Wamithi Mutahi** one of the partners of **Muigai & others** seeking to quash an intended prosecution on allegations of fraud and forgery in obtaining the conveyance of **L.R. NO. 57/26 to Muigai & others in 1977**. After hearing the petition **Lady Justice Gacheche** in her judgment held that **Muigai & others** were lawfully and properly registered as the owners of the subject property and issued an order of prohibition. **Hon. Justice Majaja in HC Petition NO. 461 of 2011** was called upon to review more or less the same facts and circumstances that **Gacheche, J** was called upon to review save that the complaints had changed sides. In the case before **Gacheche J** the complainants were the officials of the 5th defendant herein against "**Muigai & Others**" while in the case before **Majaja, J** "**Muigai & others**" were the complainants against the officials of the 5th Defendant. The learned Judge in the case stated:-

“-----it is clear that the criminal process and the resultant court proceedings are being used to settle what is an otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership”.

Hon Justice Majaja was categorical that the parties ought to direct the efforts towards having their

dispute resolved through the Civil Court and on the account he restrained the Director of Public Prosecutions (DPP) from further investigating any allegations of fraud or forgery of the conveyance dated 8/10/1977 from **Kentiles Ltd** to **Muigai & others** relating to properties known as **Nairobi/Block 123/1-279** (formerly **L.R.NO.57/26**) Kasarani unless otherwise directed by the court.

The interested parties application to be enjoined in these proceedings of 16th August 2013 in the premises was informed by the advisory arising from **Hon. Justice Majaja's** judgment.

The 3rd interested party **Githu-Zima** Society oppose the 1st and 2nd interested parties instant application on virtually the same grounds as the 1st and 2nd Defendants and the 4th and 5th Defendants and filed grounds of opposition dated 19th March 2015.

Parties filed written submissions to ventilate their respective positions and in their submissions reiterate the facts and the law in support of their respective submissions. I have considered the pleadings and the application and the parties submissions and the issue for determination is whether the 1st and 2nd interested parties application to substitute Josephat Mathia Muigai as one of the plaintiffs in place of and/or to represent the interest of the estate of **James Muigai & others** should be granted.

As stated earlier the plaint was clear that the suit was brought by a partnership "**Muigai & others**" which comprised of 21 persons. The partners jointly purchased **L.R.NO.57/26** which was conveyed to them vide the conveyance dated 8th October 1977 which was duly registered. The exhibited copy of the conveyance carries all the names of the 21 persons and the name of **James Muigai** is the first of the names in the conveyance. The 1st interested party **Josephat Mathai Muigai** is one of the co-administrators of the estate of **James Muigai** while the 2nd interested party, **Samuel Kungu Muigai** is his brother. On 2nd October 2013 the court interalia made the following consent orders:-

1. **That leave be and is hereby granted to the firm of Wachakana & co. Advocates to act for the proposed interested parties,**
2. **That Josephat Mathia Muigai and Samuel Kungu Muigai be and are hereby joined as interested parties in the instant suit,**
3. **That Francis M'Ikunyua Kirima and Zimman Settlement Society be and are hereby enjoined as Defendants in the instant suit.**
4. **That as regards prayer (iv) the same is to proceed to trial,**
5. **That the enjoined new parties have leave of 21 days to file any necessary pleadings and thereafter the parties may move the court appropriately.**

The 1st and 2nd interested parties contend **James Muigai** was a partner of **Muigai & others** and was their father and they are in the premises entitled to step into his shoes to represent the interest of the estate. The Respondents have argued that since the said **James Muigai** was deceased at the time the suit was filed there is no way he could have been a party to the suit. That is where the Respondents miss the point as the suit was not brought in the individual names of the partners but in the name of the firm "**Muigai & others**". Under section 3 (1) of Partnership Act, Cap 29 Laws of Kenya partnership is defined thus:-

1. **Partnership is the relation which subsists between persons carrying on business in common with a view of profit.**

Section 6 gives the meaning of "**firm**" thus:-

"persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm name.

In the instant suit the plaintiffs stated they were suing as a partnership which comprised 21 persons who were bonded together by being joint purchasers of the suit, property and were making a joint claim

against the Defendants. The substitution sought by the interested parties to have **Josephat Mathia Muigai** being a personal representative of the estate of the late **James Muigai** as per Grant of probate of the will of **James Muigai** issued on 16th December 1997 as per “**J1**” cannot be likened to an applications for substitution under Order 24 (3)(2) where a party dies and an application needs to be done for substitution with a personal legal representative.

In the instant case **James Muigai** had already died by the time the suit was filed and infact **Josephat Mathia Muigai** had already been appointed as one of the administrators/Executors but the partners had opted to bring the suit as a partnership. In my view the applicants are perfectly entitled under order 10 Rule 1 & 2 of the Civil Procedure Rules to apply for the name of **Josephat Mathia Muigai** to be substituted in place of **James Muigai** as one of the plaintiffs to be able to proceed with the suit as plaintiff either on his own behalf or on behalf of all the other plaintiffs. The court under Order 1 Rule 10 (2) can make an order for a party to be substituted or a party to be added if it appears just to do so. In the present case it is my view that the substitution of “**James Muigai**” with **Josephat Mathia Muigai** is necessary to enable the latter to proceed with the suit as one of the plaintiffs representing the estate of **James Muigai**.

The Respondents further opposed the applicants application on the basis that no summons to enter appearance were extracted and served on the defendants. I have perused the court record and it is not possible to verify that assertion as it appears a holding file and/or temporary file was opened after the original file went missing. Infact the bulk of the earlier documents are copies.

From what I can see from the record **Hon. Justice D.M. Rimita** (as he then was) delivering a ruling on 28th May 2003 on an application by the 1st, 2nd and 3rd Defendants dated 7th April 2003 stated thus:-

-----on 18th April, 2002, they (the defendants) applied for stay of execution of the orders of Rawal, J issued on 11th April, 2002.

The Defendants application for stay was dismissed on 21st May 2002.

But that was not all. Although there was a Notice of Appeal in place, the defendants filed an application for review of the orders of Rawal, J made on 11th April, 2002. This application was dated 23rd May 2002 and was filed in court on 24th May 2002. The matter was placed before Kuloba J, under certificate of urgency but Kuloba J, refused to certify the application as urgent. The defendants were therefore bound to serve the application and fix the same for hearing.

But what followed is a shame and I did not enjoy listening to it. The defendants ofcourse with the assistance of their counsel and the court registry made sure that the original file that had the true record of what had happened disappeared.

Although there is a set practice on opening of skeleton files this practice was ignored and without informing the advocate for the plaintiffs a file was opened and the same baptized “Holding file”.

On 7th April, 2003 an application for orders for review of Rawal J’s orders was filed. The application is in all fours with the application dated 23rd May, 2002 which Kuloba J, had refused to certify as urgent.

The application was placed before Mbitto J, on 7th April 2003 under certificate of urgency”.

Indeed the file before the court is the “**baptized holding file**” as the first record is that of **Mbitto, J** on 7th April 2003. What became of all the records from 26th February 2002 to 7th April 2003? In that scenario is it possible to tell whether or not the summons had been extracted in the absence of the records?. I do not think so.

Be it as it may be, the 1st, 2nd and 3rd Defendants filed a joint statement of defence through the law firm of **M/S Billy Amendi & Company Advocates** on 20th January 2004. The suit was fixed for hearing on 7th & 8th July 2004 but the record does not show that any proceedings took place during the dates scheduled for hearing. The 1st, 2nd and 3rd Defendants apart from filing their joint defence have participated and taken active part in all the numerous applications that have been brought in this matter since the filling of the suit. The essence of serving summons is to bring to the notice of the defendant of the institution of the suit against them and to require the defendants to respond to the suit by filing an appearance and defence. The 1st, 2nd and 3rd defendants filed their defence and were ready to have the suit proceed to hearing. I find no basis for their present application seeking to have the plaintiffs suit struck out on the basis that no summons had been served upon them. The appropriate time to file such an application, if indeed no summons had been served, would have been before filing a defence. Once a party has filed a defence he is estopped from claiming he was not served with summons since at any rate he has filed a defence in answer to the plaint and the court at that point is called upon to determine the suit on merits having regard to the plaint and the defence filed. However, at any rate, as indicated earlier the original court record was tampered with and the court is not in a position to verify whether or not summons to enter appearance were extracted and served. The ends of justice in the present case militate against the striking out of the plaintiffs plaint. All the parties should be granted an opportunity to present their respective cases.

The 4th and 5th Defendants were enjoined to the suit on the application of the 1st and 2nd interested party pursuant to the application dated 16th August 2013. Their support of the 1st and 2nd Defendants application to have the plaintiffs plaint struck out is understandable as that would serve their interests. The interested parties sought the injunction of the 4th and 5th Defendants since the orders they seek against the 1st, 2nd and 3rd Defendants would also affect them since the plaintiffs claim the 4th & 5th defendants have unlawfully and illegally entered onto the plaintiffs suit property. The same applies to the 3rd interested party, **Githu-Zima Society** who were enjoined to the suit as they were interested parties and stood to be affected by any orders that the court may issue in favour of the plaintiffs and thus it was essential that they be enjoined so that they could ventilate their interests.

That having evaluated the application by the 1st and 2nd interested parties dated 13th November 2014 I am satisfied that one **JAMES MUIGAI** was one of the partners who purchased **L.R.NO.57/26 Kasarani Nairobi** pursuant to the conveyance dated 8th October 1977. The suit having been commenced under the partnership firm name "**MUIGAI & OTHERS**" I am of the view that either or all the 21 persons who comprised the partnership could prosecute the suit and that any of the individual partners would be entitled to seek to be allowed to prosecute the suit as plaintiff. As at the time the suit was filed **JAMES MUIGAI** had died and one **JOSEPHAT MATHIA MUIGAI** and **NGENGI MUIGAI** had been appointed as executors of the will of the said **JAMES MUIGAI** (deceased) and thus the said **JOSEPHAT MATHIA MUIGAI** has the locus to apply to be allowed to substitute **JAMES MUIGAI** (deceased) in this suit as such executor of his will and to represent the interests of the estate of the late **James Muigai** (deceased)

In the premises I grant the request to substitute **James Muigai** (deceased) with **Josephat Mathia Muigai** to represent the interest of the estate of **James Muigai** in this suit. The 1st and 2nd Defendants application dated 10th February, 2015 is without merit and the same is hereby dismissed.

Flowing from the ruling I have made in regard to the application by the interested party allowing **Josephat Mathia Muigai** to be substituted in place of his late father it does appear the Notice of Motion application by the 4th and 5th Defendant dated 26th September 2014 which seeks the setting aside and/or review of the consent orders granted on 2nd October 2013 and issued on 11th November 2013 would be rendered superfluous. If the application was to be granted in the manner proposed the 4th & 5th Defendant would cease to have any locus in the suit noting that they were enjoined to the suit courtesy of the application by the 1st and 2nd interested party. It is not clear whether the 4th & 5th Defendants wish to remain parties to the suit.

On 28th August 2014 after wrangling by various parties in various suits namely **HCCC NO. 653 of 2009** and **HCCC NO. 483/2009** where the plaintiffs claim subtitles derived from the parent title the subject of this suit while delivering directions on the conduct of the pending matters I rendered myself thus:-

“-----As understand, it is the claim by “Muigai & others” that it is their title L.R.NO. 57/26 that was subdivided and that all the subdivisions title NOS. Nairobi/Block 123/1-279 belong to them. The principal contestants in regard to ownership of the parent title is “Muigai & others and Zimman Settlement Scheme”. Once the issue of ownership of the parent title is determined then the issue as to who was entitled to deal with the titles and/or who is the owner of the subtitles will be clear. The plaintiffs in HCCC NO. 483 of 2009 and HCCC NO. 653 of 2009 have no claim against the partnership of “Muigai & others” and their cases cannot property be tried together. These plaintiffs have either acquired an interest in the suit property through individual partners of “Muigai and others”-----and/or through the officials of Zimman Settlement Scheme and in my view have to await the determination of the issue of ownership”.

The issue of ownership of the suit property being central and key to the resolution of this matter which has seen many court battles both Civil & Criminal the same will not be solved through endless interlocutory applications which has characterized this matter all through. The court has a duty to expedite the resolution of disputes. The timeous resolution of disputes is a key element in the administration of justice and the overriding interest of the courts is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The justice of this matter calls for the timely and expeditious determination of the ownership issue of the suit property that has dogged this matter for the last very many years. The court had this in mind when it inter alia issued the following directions:-

2. That all pending interlocutory applications in HC ELC NO. 346 of 2002 are hereby ordered to be dispensed with to pave way for the hearing and determination of the suit on its merit.

3. That the parties to the suit including the interested parties are directed to comply with Order 11 Civil Procedure Rules within the next 45 days from the date of this ruling and in particular to exchange bundles of documents and witness statements.

I reiterate the directions and specifically order and direct that the 4th and 5th defendants Notice of Motion dated 26th September 2014 be and is hereby dispensed with and the 4th & 5th Defendants are allowed a further 30 days from the date of this ruling to comply with Order 11 of the Civil Procedure Rules. The court further directs that the suit be fixed for pre trial directions on 24th June 2015.

The costs for the applications shall be in the cause.

Ruling dated, signed and delivered this **8th** day of **May**, 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A PLAINTIFFS

Mr. Kenyatta Oduor for 4th & 5th DEFENDANTS

N/A INTERESTED PARTIES