



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, ASIKE-MAKHANDIA & J. MOHAMMED, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 172 OF 2010

BETWEEN

ROSE WAKANYI KARANJA .....1ST APPELLANT

GRACE WANGARI KARANJA .....2<sup>ND</sup> APPELLANT

KENNETH NDICHU KARANJA .....3<sup>RD</sup> APPELLANT

WILLIAM MUIGAI KARANJA ..... 4<sup>TH</sup> APPELLANT

AND

GEOFFREY CHEGE KIRUNDI ..... 1ST RESPONDENT

LUCY WAMAITHA CHEGE .....2<sup>ND</sup> RESPONDENT

**EVERTON COAL ENTERPRISES LIMITED.....PROPOSED INTERESTED PARTY**

*(An application for review of the judgment of the Court of Appeal at Nairobi*

*(Warsame, Mwilu & Sichale, JJ. A) dated 29<sup>th</sup> June, 2016 in*

**Civil Appeal No. 172 of 2010)**

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**RULING OF THE COURT**

Before us is a notice of motion application by Everton Coal Enterprise Limited, “the application” dated 23<sup>rd</sup> September, 2016 brought pursuant to Articles 10, 20(3), 25(c), 40, 48, 50, 60(1) (b) (d), 159(2) (a) (d), 163(4) (b) and 259(1) of the Constitution; Sections 3A and 3B of the Appellate Jurisdiction Act; and Rules 1(2), 42, 43 and 77(1) of the Court of Appeal Rules. The applicant seeks to be enjoined in these proceedings as an interested party. There are other prayers in the application. However, at the *inter partes* hearing of the application, the applicant abandoned those prayers and only sought the prayer stated above.

The brief facts leading to the application are that the applicant vide an agreement dated 5<sup>th</sup> May, 2009 purchased L.R No. 10090/23 hereinafter, “**the suit property**” situated in Juja within Thika Municipality comprising of 20.85 ha from the respondents for a consideration of Kshs. 100 million. Transfer in favour of the applicant was registered on 11<sup>th</sup> May, 2009 and the applicant took possession. However, later that year the applicant was sued by Josvir Traders Agencies Limited in Nairobi HCCC No. 237 of 2009 who claimed to have purchased the suit property for Kshs. 50 million and had paid a deposit of Kshs. 22,500,000/-. That is when the applicant came to learn that Josvir Traders Agencies Limited had entered into a sale agreement of the suit property with the respondents. The sale was nevertheless rescinded when

Josvir Traders Agencies Limited could not pay the full purchase price.

Further, the respondents had sued the appellants in Nairobi HCCC No. 1401 of 2004 (OS) as consolidated with Nairobi Succession Cause No. 3608 of 2003 in which judgment was delivered on 31<sup>st</sup> March, 2009 which resulted in the appeal the subject of the present application. The judgment of the High Court in effect transferred the suit property back to the respondents and a transfer to that effect was executed on 24th April, 2009. The respondents then sold the suit property to the applicant.

Dissatisfied with the judgment of the High Court, the appellants lodged an appeal to this Court. After a full hearing, the appeal was allowed, the effect of which was to revoke the transfer of the suit property to the applicant. However, the applicant was not a party to the appeal. An adverse order affecting the rights of the applicant was made without it being accorded a right to be heard, hence the instant application.

The application is based on the grounds that: the applicant had acquired title to the suit property and therefore had an indefeasible interest in it; it was not involved as a party to the proceedings in the appeal despite the court being notified of its interest in the suit property; its rights had been adversely affected by the decision of this Court in the appeal; and that the joinder of the applicant in the proceedings was necessary for the conclusive and wholesome determination of the issues considered in the decision of this Court in the appeal.

The application was further supported by the affidavit of **Patrick Karanja Ngugi**, a director of the applicant in which he maintained that the applicant was an innocent purchaser for value of the suit property without any notice of any defect in the title and that there was no suit pending before court when the applicant made the purchase. He pointed out that the suit property had since changed user from agricultural land to commercial and that it had made subdivisions with the approval of the Municipal Council of Thika. He asserted that it would only be just, fair and equitable that it be joined in the proceedings so that it may participate either as an interested party during the review of the judgment or hearing of the same in the Supreme Court. He further deposed that it's joinder to the proceedings was necessary for the wholesome and conclusive determination of the issues raised. It maintained that when the appeal was allowed on 29th July, 2016, it was aggrieved despite the Court of Appeal being notified that the suit property had been transferred to the applicant, the Court ignored that fact. He relied on Rule 77(1) to emphasize the fact that it had been affected by the appeal, but had never been served with any documents from the High Court suit or the resultant appeal which occasioned a miscarriage of justice as the judgment negatively affected its rights. Thus it was deprived of the right to a fair hearing. He deposed that the doctrine of *lis pendens* was wrongly applied based on a faulty interpretation of the principle and its effect by this Court. He reiterated that for the court to impugn the registration of transfer in its favour, a bonafide purchaser for value, was a gross misdirection and unfair as there was no evidence of fraud or misrepresentation committed by the applicant.

In a replying affidavit sworn by the 4<sup>th</sup> appellant on 14<sup>th</sup> March, 2017 it was deposed that the application was untenable, unfounded in law, unmerited and an abuse of the court process as the applicant lacked *locus standi* to file the application, having not been a party to the appeal. He alleged that the application was unraveled, a concealed conspiracy and scheme by the applicant and the respondents to pervert and subvert the course of justice on several grounds but not limited to the applicant holding the suit property in trust of the 1st respondent vide a trust deed dated 13th May, 2009.

When the application came up for hearing all the parties were represented by learned counsel. Mr. **Owano** and **Mr. Kanjama** represented the applicant, **Mr. Githinji** and **Mr. Mworira** represented the appellants while **Mr. Makori** represented the respondents. They had all filed written submissions which they opted to highlight orally.

**Mr. Owano** reiterated that the applicant acquired the suit property in 2009 for a consideration of Kshs. 100 million from the respondents and had the title. He argued that the applicant never participated in the appeal whose decision adversely affected it. Counsel urged that the joinder was necessary for the conclusive determination of the dispute as the applicant holds title to the suit property. Counsel also submitted that the Court of Appeal having been notified of the interest of the applicant in the suit property subject of the appeal, it was incumbent upon it to require that the applicant be joined in the appeal for effectual and conclusive determination of the appeal. That the ensuing failure resulted in a judgment that did not effectively determine the issues and that the only remedy was for the applicant to be allowed to participate in the proceedings. He further urged that Section 3(2) & (3) of the Appellate Jurisdiction Act empowered this Court to call additional evidence which extend to and include the power to join a party to further the overriding objective in terms of Sections 3A and 3B of Appellate Jurisdiction Act.

Counsel further relied on the case of **J M K v M W M & Another [2015] eKLR** in submitting that a joinder was necessary in this case due to unique issues in the case. That the joinder of the applicant for purposes of the proposed review application or certification to the Supreme Court would enable effective and conclusive determination of issues in the proceedings. He also relied on the same case for the proposition that joinder can be effected even after judgment.

He faulted the court for having acknowledged that the suit property had changed hands and the effect of the transfer to a third party, but had disregarded and sidestepped the issue. He further faulted the court for having had the opportunity to question the validity of the alleged transfer but failed to do so thereby failing to determine emerging issues in the proceedings.

Lastly, counsel maintained that at the time the applicant acquired the suit property there were no court proceedings pending. The suit

property was transferred to the applicant long before the appeal was lodged and this had also informed the court's decision in not granting the appellants an order for stay as it was cognizant of the fact that the suit property had been transferred and it would have been futile for the Court to grant orders that would be unenforceable.

**Mr. Githinji** opposed the appeal. He argued that the application was an abuse of the court process and refuted the allegation that the applicant was not aware of the case in the High Court and the appeal. That the decision of this Court in the appeal was based on the doctrine of *lis pendens*. Counsel's contention was that the application was purporting to introduce new and incredible facts while seeking a setting aside of the impugned judgment under the guise of being an innocent purchaser for value of the suit property. That the new evidence sought to be introduced was not an issue in the previous proceedings and that the applicant lacks *locus standi* to institute any legal proceedings against the appellants.

Mr. Makori on his part supported the application. He submitted that at the time this Court rendered its decision in the appeal, the suit property had already changed hands hence this was a matter that called for investigation and the court should have allowed or called for one before rendering its decision. He maintained that the applicant ought to have been heard.

In a brief joinder, Mr. Kanjama pointed out that there was a court order from this Court relating to the suit property which belongs to the applicant. Counsel emphasized that the application was not an abuse of the court process as this Court was not *funtus officio*. He maintained that this court had jurisdiction to review its judgment and it can also handle subsequent applications post judgment. Lastly, counsel submitted that a party affected by a court order had the right to move the court to seek appropriate remedies. He urged the court to allow the applicant to join the proceedings.

We have carefully considered the application, the affidavits in support, the replying affidavit, submissions by respective counsel and the law. The issue for determination is whether the applicant should be joined to these proceedings as an interested party post judgment of this Court.

The applicant contended that the notice and record of appeal should have been served upon it as an interested party since the judgment affected it one way or the other. Rule 77 of the Court of Appeal Rules enjoins an intended appellant to serve copies of the notice of appeal on **"all persons directly affected by the appeal"** before or within seven days after lodging the notice of appeal.

**"Provided that the Court may on application, which may be made *ex parte*, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court"**.

It is not in dispute that the appellants knew that, not only the applicant but that Josvir Traders Agencies Limited had an interest in the suit property having been mentioned in their pleadings. That they were aware of the dispute between the two parties over the suit property. However, the appellants failed to adhere to Rule 77 above. This denied the applicant the right to be heard and participate in the appeal. It is trite that the right to be heard before an adverse decision is made against a party is fundamental and infiltrates our entire justice system. This Court in **Mbaki & Others v Macharia & Another [2005]2 EA 206**, at page 210, stated:

***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

For this reason, the legal system has inserted relevant provisions in the Constitution and legislative texts to ensure the realization of that right. Of relevance to this appeal before us is Rule 5 (d) (ii) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (popularly known as Mutunga Rules) which provides:

***"5.(d) 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 just-***

***(i) order that the name of any party improperly joined, be struck out; and***

***(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.***

The applicant seeks to be added to the appeal after judgment was delivered. It is trite that the guiding principle in joinder of parties is that it should be freely allowed and at any stage of the proceedings, provided that the joinder should not result in prejudice or injustice to the other party.

It is also common ground that this Court was notified of the applicant's interest in the appeal before it as the third party to whom the suit property had been sold and transferred by the respondents. This is the third party affected by the judgment of this Court and now seeks a remedy to be joined to the appeal and participate in subsequent proceedings as the case may be. In the case of **J M K v M W M & Another**,

(supra) this Court while discussing Order 1 Rule 10(2) of the Civil Procedure Rules which is in *pari materia* with Rule 5 (d) (ii) of the Mutunga Rules 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. vs. 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.” (emphasis provided)*

It follows that a court can either on its own motion or by an application only enjoin a party before passing judgment in the matter before it. In **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR** where this Court stated that:

*“Black’s Law Dictionary 970 (10<sup>th</sup> ed. 2014 states that in law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. A judgment is the final court order regarding the rights and liabilities of the parties; it resolves all the contested issues and terminates the law suit; it is the court’s final and official pronouncement of the law on action that was pending before it. A judgment has the effect of terminating the jurisdiction of the court that delivered the judgment. Save as expressly provided for by law (for example in revisionary jurisdiction or under the slip rule) a judgment makes the court functus officio and transfers jurisdiction to an appellate court if appeal is allowed. It marks the end of litigation before the court that pronounced the judgment. When used in relation to a court, functus officio means that once a court has passed a judgment after a lawful hearing, it cannot reopen the case. The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter.”*

However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been delivered. One such exception is where a matter has been determined and adverse orders issued against a party who was neither given notice of the suit nor heard on the issue in dispute as was the case in this appeal. It is trite that the circumstances must justify the joinder, it is clear that the appellants knowingly and intentionally left out the applicant from the appeal proceedings even after they got wind of the transfer. The applicant on the other hand had demonstrated that it would have been desirable for it to be added as an interested party. Its presence would enable it participate in future proceedings either by way of a review application to this Court or in the Supreme Court since it holds title to the suit property. The issue of interest or liability between the parties cannot be sufficiently and conclusively determined without affecting the applicant.

As already stated, the applicant has sought to be joined to this appeal as an interested party. The Supreme Court had the occasion to pronounce itself on who an interested party is in the case of **Communications Commission of Kenya & 4 Others v Royal Media Services Limited & 7 Others, [2014] eKLR** it stated thus:

*“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court’s decision in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:*

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

Similarly in the case of **Meme v Republic, [2004] 1 EA 124**, the High Court observed that a party could be enjoined in a matter for the reasons that:

(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) Joinder to prevent a likely course of proliferated litigation.

*We ask ourselves the following questions: a) what is the intended party’s stake and relevance in the proceedings? And b) will the intended interested party suffer any prejudice if denied joinder?”*

It is not in dispute that the applicant holds title to the suit property. The applicant thus has a stake in the appeal even though it was not a party thereto. It is also factual that the applicant was affected by the decision in the appeal and is justified in being apprehensive that its interests

were not well articulated unless it appeared in the proceedings. It is also common ground that the questions posed by this Court as to how transfer to the applicant was effected or made could only be answered by the applicant. A joinder would be necessary so as to protect the rights of the applicant and also prevent a likely cause for proliferated litigation.

In the circumstances, we are satisfied that the applicant has a stake in the proceedings as the current owner of the suit property with a valid title which has not been challenged and that substantial prejudice will be suffered by it, if the application for joinder is denied at this stage. Accordingly, it would be in the interest of justice for us to exercise our discretion and allow the application. For these reasons, we allow the Notice of Motion dated 23<sup>rd</sup> September, 2016 in terms of prayer 2. That is to say that the applicant has been joined in the proceedings as an interested party. We give no order as to costs.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of June, 2020.**

**M. KOOME**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**