



**Mulani v Mulani; Safaricom Investment Co-operative Society Limited (Interested Party)
(Environment & Land Case 181 of 2012) [2024] KEELC 4001 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 181 OF 2012**

CA OCHIENG, J

MAY 21, 2024

BETWEEN

JOYCE MWELU MULANI PLAINTIFF

AND

TABITHA NDUKU MULANI DEFENDANT

AND

**SAFARICOM INVESTMENT CO-OPERATIVE SOCIETY
LIMITED INTERESTED PARTY**

RULING

1. What is before Court for determination is the Plaintiff/Applicant's Notice of Motion Application dated the 5th September, 2023 where she seeks the following Orders:-
 1. That the Honourable Court be pleased to grant a stay of proceedings in this matter and for avoidance of doubt that the pretrial directions in this matter scheduled for the 30th August, 2023 be stayed pending the hearing and determination of this Application.
 2. That the Honourable Court be pleased to set aside the proceedings and subsequent orders entered on 23rd June, 2022 and all other consequential orders thereto in their entirety.
 3. That upon the grant of prayer 2 above, the Honourable Court be pleased to reserve a date for judgement in this matter.
 4. That the costs of the Application be in the cause.



2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of JOYCE MWELU MULANI where she explains that when the matter came up in court on the 23rd June, 2022, their Advocates on record informed the court that they were not opposed to the Application for joinder of the Interested Party. She contends that the Interested Party's Application was limited to joinder, but not for leave to file documents. She claims the Court on its own accord granted leave to the Interested Party to file its documents. Further, that parties are bound by their pleadings and in the absence of the prayer seeking leave to file documents, the Defence and documents filed by the Interested Party are a nullity and should be struck off, from record. She avers that the Court granted a date for pretrial directions scheduled for 30th August, 2023. Further, that the hearing in the case had already been conducted and parties filed respective submissions thus the reopening of the hearing, is an affront to her constitutional right to access justice. She reiterates that allowing the matter to proceed for pretrial and fresh hearings as opposed to reserving a Judgment date, will occasion delay in the expeditious disposal of this suit. Further, if the Interested Party was a necessary party to these proceedings, it should have approached the court earlier, before the hearing was conducted and concluded.
3. The Defendant opposed the instant Application and filed a Replying Affidavit sworn by TABITHA NDUKU MULANI where she deposes that Prayer No. (1) in the instant Notice of Motion Application has been overtaken by events. She contends that the Interested Party was enjoined in these proceedings so as to defend its interest and not to act as a spectator in the proceedings. She insists that the Interested Party's pleadings are properly filed as per the dictates of the Civil Procedure. She argues that the Courts are invested with inherent powers under Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and can act suo motu for purposes of reaching the ends of justice. Further, the Honourable Court acted within its powers to grant leave to the Interested Party to file its necessary pleadings. She reiterates that the matter should proceed for hearing before Judgment is delivered, instead of condemning a party unheard.
4. The Interested Party opposed the instant Application by filing a Replying Affidavit sworn by JARED OSORO NYAGWOKA, its Project Officer where he deposes that the Plaintiff did not oppose their Application for joinder. He insists that, the Interested Party, has a stake in the proceedings as the property in dispute is currently registered in the name of the Defendant, who has already sold and received the full purchase price from it; thus any adverse orders issued against the Defendant will directly affect it. He contends that, it would be prudent if it is allowed to participate in these proceedings to articulate its position, which can only be done by filing documents. He reiterates that the Plaintiff has failed to adduce proper grounds to warrant the setting aside/review of the impugned orders.
5. The instant Notice of Motion Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the Notice of Motion Application dated the 5th September, 2023 including the respective Affidavits and rivalling submissions, the only issue for determination is whether the court should set aside the orders issued on 23rd June, 2022 in its entirety.
7. The Plaintiff in her submissions reiterated her averments and contended that the grant of leave suo motu was an oversight on the part of the Court, as it had lodged itself into the seat of the litigant. She insisted that parties are bound by their pleadings. To buttress her averments, she relied on the following decisions: Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (2014) eKLR; Malawi Supreme Court of Appeal in Malawi Railways Ltd v Nyasulu (1998)



- MWSC 3; Adetonn Oladeji (NIG) Ltd v Nigerian Breweries PLC SC 91/2002 and Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission (2017) eKLR.
8. The Defendant in her submissions provided a highlight of the proceedings herein and contended that the Orders that the Plaintiff sought to set aside were entered on the Court record, after the parties consented to the same. Further, that the instant Application is an afterthought and brought in bad faith. To support her arguments, she relied on the following decisions: Flora N. Wasike v Destimo Wamboko (1988) eKLR; Intercountries Importers & Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 Others (2019) eKLR and [*Perera v Nation Media Group & 2 Others \(Civil Appeal No. 122 of 2016\)*](#).
 9. The Interested Party in its submissions stated that the Plaintiff is attempting to set aside the consent entered into voluntarily and abuse the court process. It insisted that an Application for joinder can be done at any stage including at the appellate level. Further, that its application for joinder was not opposed by any party. It argued that, how then did the Plaintiff not expect it, to file its documents in order to articulate its interests in the claim herein, whereas it had been allowed to participate in the proceedings. It averred that this could only be possible if it filed pleadings. It further submitted that the Plaintiff responded to its Defence via a Reply dated the 18th November, 2022, after which the Court certified the matter ready for hearing. Further, it is only thereafter, that the Plaintiff filed the instant Application. It reiterated that the Plaintiff has not laid sufficient grounds to justify variation and/or setting aside of the consent order dated the 23rd June, 2022. To support its averments, it relied on the following decisions: Elizabeth Nabangala Wekesa v Erick Omwamba & 3 Others; Esther Momanyi Omwamba (applicant) (2021) eKLR; Lazarus Kirech v Kisorio arap Barno (2018) eKLR and SMN v ZMS & 3 others (2017) eKLR.
 10. The Plaintiff has sought to set aside the proceedings and subsequent orders entered on 23rd June, 2022 in its entirety and for the court to reserve a Judgment date. From the court record, I note on 23rd June, 2022, the Interested Party's Application dated the 9th November, 2021 seeking joinder to this suit, had been fixed for hearing. On the said date, both the Plaintiff's and Defendant's Counsels' who were present stated that they did not oppose the said Application. This Court thereafter proceeded to allow the Application for joinder and granted the Interested Party leave of twenty-one (21) days to file and serve its Defence after which, the Plaintiff and Defendant were granted leave of twenty-one (21) days to file their respective responses. Further, the court then fixed the matter for mention for directions on 11th October, 2022. The Interested Party proceeded to file its Defence including Documents, after which the Plaintiff and Defendant also filed their respective responses. The Plaintiff has now claimed the Court sat on the litigant's seat, as it granted the Interested Party orders to file pleadings, which it had not sought. She hence sought to set aside the orders issued on 23rd June, 2022 in its entirety. I note the Plaintiff has brought the instant Application pursuant to Sections 1A, 1B, 3 and 3A of the [*Civil Procedure Act*](#) as well as Order 45 and 51 of the Civil Procedure Rules.
 11. Section 1A, 1B, 3 and 3A of the [*Civil Procedure Act*](#) stipulates thus:-
 - “ 1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1). (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.



1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings; (b) the efficient disposal of the business of the Court; (c) the efficient use of the available judicial and administrative resources; (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties;

3. In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

12. In the case of *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR, the Court of Appeal observed that:-

“Section 3A of the *Civil Procedure Act* appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Of course this power has now been broadened by the introduction in 2009 of overriding objective in sections 1A & 1B and in 2010 by Article 159 of *the Constitution*.

The extent of inherent powers of the court was eloquently explained by the authors of the *Halsbury’s Laws of England*, 4th Edn. Vol. 37 Para. 14 as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.” See also Meshallum Waweru Wanguku (*supra*) emphasis mine

This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. It is situations like the one before us that call for the exercise of the inherent powers of the court.” Emphasis mine

13. In this instance, the Plaintiff was comfortable with the joinder of the Interested Party as a spectator but did not want it, to file pleadings or tender evidence, that would assist the court in rendering its



decision. I note in the Application for joinder, which the Plaintiff did not oppose, the Interested Party in its grounds seeking joinder stated that it was an innocent purchaser of suit land Konza South/Konza South Block 5/756. Further, that, it was not aware of the Plaintiff's claim over the said suit land, when it purchased it. It also confirmed having subdivided the suit land and sold to its member as it waited for the said land to be registered in its name. I opine that the Plaintiff ought to have considered these reasons before conceding to the Application for joinder. It is worth noting that despite accepting joinder of the Interested Party to the proceedings herein, the Plaintiff did not immediately apply to set aside the impugned orders, but only did so, after the Interested Party had filed its Defence including Documents of which, she also filed a reply to Defence on 22nd November, 2022.

14. In the case of *Flora Wasike v. Destimo Wamboko* (1982 -1988)1 KAR 625, it was observed that:-

“It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

15. Further, in the case of *Brooke Bond Liebig v. Mallya* 1975 E.A. 266, it was held that:-

“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”

16. Insofar as there was no express prayer by the Interested Party to file Pleadings, but since the parties allowed it, to join the proceedings herein, I opine that, it was right for the court to exercise its inherent power and make orders on filing of pleadings. The provisions of Sections 80 of *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, set out the criteria, on when a party can seek a review/setting aside of an order, which to me has not been proved by the Plaintiff. It seems the Plaintiff is aggrieved with the court for exercising its inherent powers, so as to fulfil the overriding objectives, to ensure expeditious disposal of this case as stipulated in Section 3A of the *Civil Procedure Act, Environment and Land Court Act* as well as Article 50 of *the Constitution*.

17. Based on the facts as presented while associating myself with the decisions quoted, I beg to disagree with the Plaintiff and aver that this Court has inherent powers that it can invoke suo motu in relation to matters not raised in litigation between the parties, even in circumstances governed by rules of court. Further, by accepting the Interested Party to join the proceedings by consent, it then implied that the Interested Party is expected to file pleadings or documents whether it sought to do so, expressly or not. I opine that if the Plaintiff was uncomfortable with the orders as granted, she should have immediately sought for review of the same instead of filing a Defence and accepting to proceed for pretrial conference, then change her mind.

18. In the foregoing, I find the instant Application unmerited and will dismiss it.

19. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Munyao for Applicant

Ochieng for Interested Party holding brief for Njogo for Respondent



Court Assistant – Simon/Ashley

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