



**Unity 45 Housing Co-operative Society Limited v Kamuyu & 3 others (As Chairman, Secretary, Treasurer & Patron of Maili Saba Mwingenye Youth Self Help Group); Awuor Suing on Behalf of Dorice Auma Owuor & 2 others (Interested Parties) (Environment & Land Case 994 of 2014) [2024] KEELC 4972 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4972 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 994 OF 2014**

**LN MBUGUA, J**

**JUNE 24, 2024**

**BETWEEN**

**UNITY 45 HOUSING CO-OPERATIVE SOCIETY LIMITED ..... PLAINTIFF**

**AND**

**KORI KAMUYU ..... 1<sup>ST</sup> DEFENDANT**

**PETER NGULU KIMULI ..... 2<sup>ND</sup> DEFENDANT**

**SAMMY KAMANDE ..... 3<sup>RD</sup> DEFENDANT**

**PETER MWAGA ..... 4<sup>TH</sup> DEFENDANT**

**AS CHAIRMAN, SECRETARY, TREASURER & PATRON OF MAILI SABA  
MWENGENYE YOUTH SELF HELP GROUP**

**AND**

**GEOFFREY JUMA AWUOR SUING ON BEHALF OF DORICE AUMA  
OWUOR ..... INTERESTED PARTY**

**TIMOTHY MWEMA KIBANGA ..... INTERESTED PARTY**

**JOSHUA NZAU MUTHUSI ..... INTERESTED PARTY**

**RULING**

1. On 8.2.2024, this court entered judgment for the Plaintiff and ordered any person in occupation of parcel LR No. 11531/9 to vacate the said land within 30 days of the judgment. Subsequently, two applications have been filed, one by the Defendants and the 2<sup>nd</sup> Interested Party dated 15.2.2024 seeking a stay of execution of the aforementioned judgment pending appeal, while the other one dated



22.2.2024 has been brought forth by two Intended Interested Parties. This ruling relates to the two applications.

#### **Application dated 22.2.2024**

2. Vide the Notice of Motion dated 22.2.2024, the two Intended Interested Parties seek leave to be enjoined in the suit, and that the judgment delivered herein on 8.2.2024 be set aside for the case to start afresh. The application is premised on grounds on its face and on the 1<sup>st</sup> Intended Interested Party's supporting affidavit sworn on 22.2.2024 and a further affidavit sworn on 20.5.2024. She avers that in the year 2011, she purchased Plot No. 270 measuring 277 by 183 from the Defendant and took possession thereof.
3. That she subsequently commenced construction of her private school namely St John Junior School Njiru completing it in the year 2018 and incorporated the 2<sup>nd</sup> Intended Interested Party as proprietor of the school. She contends that she was not aware of this suit until 14.2.2024 when some officials of the defendant informed her about the case.
4. She argues that the judgment of 8.2.2024 is prejudicial as this court has ordered for her eviction coupled with demolition of her school and if executed, it will not only occasion colossal financial loss to the Intended Interested Parties, but will also adversely prejudice their proprietary and equitable interests in the suit property.
5. The deponent avers that the certificate of ownership dated 22.2.2022, issued by the Defendants is a re-issue after the original certificate issued in 2011 was misplaced.
6. The application is opposed by the Plaintiff vide the replying affidavit sworn on 6.5.2024 by Peter Mburu Kamau. He avers that Plot No. 270 does not exist, pointing out that the Intended Interested Parties have attached a certificate of ownership dated 22.2.2022 from the Defendants which has no correlation to the suit property.
7. He avers that the application lacks merit as the applicants seek to be enjoined in a suit where they claim interest from the Defendants, yet the later owns nothing.
8. He also avers that the suit property has been the subject of numerous court cases including HC ELC No. 353 of 2009 where the court invited the public to be enjoined and therefore the Intended Interested Parties cannot feign ignorance of the existence of the suit.
9. The application was canvassed by way of written submissions. In their submissions dated 30.5.2024, the applicants (Intended Interested Parties) aver that they have a stake in these proceedings, in that they have been in physical occupation of the suit property. To this end, the cases of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2014] eKLR as well as *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR were proffered.
10. The case of *Alton Homes Limited v Davis Nathan Chelogoi & 5 others* [2020] eKLR, was cited to submit that an application for joinder can be filed at any stage of the proceedings including after judgment where execution has not commenced.
11. On the prayer to set aside the judgment, the applicants aver that the provisions of Order 45 of the Civil Procedure Rules empower this court with the requisite jurisdiction to set aside its orders, adding that the judgment of 8.2.2024 should be set aside as it was issued in breach of the rules of natural justice and it contradicts Article 50 of *the Constitution*. To this end, the cases of *David Oloo Onyango v Attorney*



General [1987] eKLR, *Kiai Mbaki & 2 Others v Gichuhi Macharia & Another* [2005] eKLR, as well as the case of *JMK v MWM & Another* [2015] eKLR were cited.

12. In opposition, the Plaintiffs filed submissions dated 4.6.2024 in which they reiterated the contents of the replying affidavit sworn on 6.5.2024. They argue that the applicant's claim is based on nothing as the court found that the Defendants do not own the suit land.
13. They argue that one who has no title cannot pass anything. They rely on the cases of *Margaret Mukami Macharia (Administrator of the Estate of Esther Wangu Macharia) v Jessie Maina Gitau* [2022] eKLR as well as the case of *Muati Serem & 3 others (Environment and Land Appeal E002 of 2023 [2024] KEELC 4149 (KLR) (16 May 2024) Judgment*.
14. The issues for determination in the application of the Intended Interested Parties are; Whether the applicants have met the threshold to be enjoined as Interested Parties and whether they have made a case for setting aside/reviewing this court's judgment of 8.2.2024.
15. The provisions of Order 1 Rule 10 of the Civil Procedure Rules gives this court discretion to enjoin a party whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions in the suit. The threshold for one to be enjoined as an Interested Party is well captured in the case of *Francis Karioki Muruatetu and Another v Republic & 5 Others* [2016] eKLR.
16. In *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya* [2014] eKLR, the court described a proper party as;  

“A party whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.”
17. The claim of the Intended Interested Parties is that they occupy the suit property. However, the defendants herein had defended the suit on behalf of its 160 members allegedly occupying the suit land. Going by the contents of paragraph 2 of the supporting affidavit of the 1<sup>st</sup> Intended Interested Party dated 22.2.2024, the applicants' claim is derived from the defendants. The court has already made its finding that all those occupying the suit land should vacate the said land since “the defendants and the Interested Parties had no legal basis for being on the suit property”. In light of the aforementioned pronouncement, I find no basis to warrant the exercise of the courts discretion in favour of the Intended Interested Parties to have them joined in these proceedings.
18. Moreover, it is worthy to note that this is a concluded matter as judgment was delivered way back on 8.2.2024. The Intended Interested Parties desire that they be given an opportunity to be heard. The question begging for an answer is; “How will the Intended Interested parties articulate their alleged proprietary and equitable interests in their status as Interested Parties, their evidence would be based on what pleadings; In essence, what would be the parametres of their participation in the suit?!”
19. In the case of *Francis Karioki Muruatetu and Another v Republic & 5 Others* [2016] eKLR, the Supreme Court of Kenya while dismissing an application for joinder by Katiba Institute as an Interested Party stated that “ the issues to be determined by the court will always remain the issues as presented by the principle parties”. Also see *SCOK Methodist Church in Kenya v Mohamed Fugicha & 3 Others* [2019] eKLR.



20. In *Joseph Leboo & 2 others v Director Kenya Forest Services & another* [2013] eKLR, Munyao J had this to say in regard to the status of an Interested Party.

“His position in the suit is ambiguous, nebulous and undefined by the rules. He is like a mutt, an animal that can clearly be seen as belonging to a specific species, but which belongs to no single organizationally recognized breed. But there is no question that an Interested Party is not the actual litigant; as I have stated before, he is neither plaintiff nor defendant. If he wants actual remedies, then he ought to be enjoined as a party or he ought to file his own suit”. Emphasize added.”

21. The issues framed by the principle parties herein related to ownership as well as occupation of the suit land, of which the court has rendered its decision on the same. This court cannot revisit the said issues all over again when the parameters of participation by the applicants herein are ambiguous. It follows that their quest for joinder fails and there is hence no basis to warrant the setting aside the judgment.

22. The net effect is that the application dated 22.2.2024 is found to be unmerited, the same is hereby dismissed with costs to the plaintiff.

#### **The application dated 15.2.2024**

23. The above application was brought forth by the defendants and the 2<sup>nd</sup> Interested Party seeking orders of stay of execution of the judgment delivered on 8.2.2024. Vide the supporting affidavit of one Kori Kamuyu sworn on 15.2.2024, the applicants aver that they were dissatisfied with the said judgment, and have filed a Notice of Appeal. They have also prepared a draft memorandum of appeal.

24. They contend that they stand to suffer substantial and irreparable loss if they are evicted from the suit land as they have no alternative residencies.

25. The application is opposed by the plaintiffs vide grounds of opposition dated 22.4.2024. It is contended that the application is incompetent and does not meet the threshold set out by the law for this court to exercise its discretion in favour of the applicants. It is further argued that this court is functus officio having rendered judgment in the matter.

26. The application was canvassed by way of written submissions. The defendants and the 2<sup>nd</sup> Interested Party filed submissions dated 26.4. 2024, where they contend that they have met the requirements set out under Order 42 Rule 6 (2) of the Civil Procedure Rules. They rely on the cases of *Peter Nakupang Lowar v Nautu Lowar* [2022] eKLR, *Kenafric Matches Ltd v Match Masters Ltd & Another* [2021] eKLR as well as the case of *Gathua v Nyarogo & 2 others* [2024] KEELC 1678 (KLR).

27. In opposition, the Plaintiffs filed submissions dated 3.6. 2024 in which they argue that the Applicants have not made out a case for stay of execution of judgment pending appeal. It is submitted that substantial loss cannot be claimed on the basis of occupation only, that an Applicant must also move to prove that the ownership of the land can change on appeal, adding that they have a right to enjoy the fruits of their judgment.

28. The Plaintiffs have proffered the cases of *Charles Wahome Gethi v Angela Wairimu Gethi* [2008] eKLR, *Mary Njeri & Nichasio Kabunyi Ngirigacha v Samue Chomba* [2020] eKLR as well as *Charles Kariuki Njuri v Francis Kimaru Rwara (Suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased))* [2020] eKLR.

29. The issue for determination is whether the Defendants and the 2<sup>nd</sup> Interested Party have met the threshold for grant of stay of execution pending appeal; See Order 42 Rule 6 of the Civil Procedure



Rules. The aforementioned rules are however not limiting as courts are now enjoined to give effect to the overriding objective in interpretation of any provisions and can therefore consider other factors, including the greater sense of justice.

30. In the case of *Gachanja Mundia v Francis Muriira Alias Francis Muthika & Another* [2016] eKLR, it was held thus;

“There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

31. Having considered the law and guiding authorities, I find that the application for stay was brought timeously. The Defendants and the 2<sup>nd</sup> Interested Party are exercising their right of appeal thus they have demonstrated sufficient cause. It is however not the place of this court to interrogate whether the appeal would be rendered nugatory if an order of stay is not granted.

32. Noting that the dispute has been in the corridors of justice for a period of over 15 years, balancing the interests of the protagonists and considering that the judgment herein was delivered more than 4 months ago on 8.2.2024, the court will grant a conditional stay for a period of 3 months.

33. In the end, the application dated 15.4.2024 is allowed on condition that the period of Stay Of Execution is 3 months. The defendants and the 2<sup>nd</sup> Interested Party are condemned to pay costs of the application to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

**Mbichire for Plaintiff**

**Tebino for Proposed 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties**

**Court assistant: Eddel**

