



REPUBLIC OF KENYA



**KENYA LAW**  
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**Musyoka & 3 others v Kisangi & another (Environment and Land  
Appeal 3 of 2022) [2024] KEELC 5417 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5417 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL 3 OF 2022**

**LG KIMANI, J  
JULY 18, 2024**

**BETWEEN**

**DENNIS THUVA MUSYOKA ..... 1<sup>ST</sup> APPELLANT  
DAVIS MUUTU MUSYOKA ..... 2<sup>ND</sup> APPELLANT  
MARY KAVATA MUSYOKA ..... 3<sup>RD</sup> APPELLANT  
MARTHA MWENDE MUSYOKA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**MUMBE THUVA KISANGI ..... 1<sup>ST</sup> RESPONDENT  
VATA THUVA KISANGI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the Senior Principal Magistrate Hon.  
M. Kasera in Kitui Civil Case number ELC 7 of 2020 delivered on 7th July 2020)*

**JUDGMENT**

1. Before the Court is an appeal from the ruling and order of the Senior Principal Magistrate Hon. M. Kasera in Kitui Civil Case number ELC 7 of 2020. The Memorandum of Appeal dated 6<sup>th</sup> August 2020 sets forth the following grounds of appeal:
  1. That the Learned Trial Magistrate erred and misdirected herself in law and on the facts by failing to note that the respondent's suit as instituted without enjoining the Appellants was a scheme to perpetuate fraud.
  2. That the Learned Magistrate erred in law and on the facts by failing to re-open the case and allow the Appellants to ventilate their claims against the Respondent since it was the Appellants who were on the suit lands.



3. That the Learned Magistrate erred in law and on the facts by failing to make a finding that she had erroneously recorded substantive orders in a case when the matter was merely set down for mention.
2. The Appellant prays that the ruling of the trial court be quashed and set aside. They also pray that their application dated 16<sup>th</sup> June 2020 be allowed as prayed and the consent orders dated 12<sup>th</sup> March 2020 between the respondents be set aside.
3. The 1<sup>st</sup> respondent herein Mumba Thuva Kisangi, was the plaintiff before the trial court where she filed a plaint dated 5<sup>th</sup> December 2019. She claimed that through an agreement of sale dated 12<sup>th</sup> June 2018, she purchased the suit property Nzambani/Kyangwithya/425 from the 2<sup>nd</sup> respondent herein Vata Thuva Kisangi who was the defendant before the trial court for a consideration of Ksh.600,000/= She later realized that the suit property had been subdivided into six parcels without her knowledge and she placed a caution on the title. Further, in the year 2019, a trespasser invaded the suit property, cleared the land and began construction of a stone building. The plaintiff also realized the caution that she lodged on the title to the suit land had never been registered. She sought various orders against the defendant to wit; a permanent injunction from dealing with the six subdivisions of the suit land, a declaration that she is the owner of the land, an order of vacant possession and an order directing transfer documents of the suit land to the plaintiff's name.
4. A defence was fixed by the respondent stating that she held the suit land for the plaintiff's benefit. She confirmed having sold the land to her and was committed to finalizing the transaction. She also stated that members of her extended family, intending to dispossess her of her land and taking advantage of her old age illegally subdivided the suit land and created new title numbers Nzambani/Kyanika/4010 to 4015. She prayed that her interests in the land be protected. She conceded that the Court Registrar could sign all relevant papers to transfer the land to the plaintiff.
5. On 12<sup>th</sup> March 2020, a written consent signed by Counsels for the plaintiff and the defendant was filed in court and was adopted as an order of the court on the same date. The said consent provided that the land parcels Nzambani/Kyanika/4010-4015 be registered in the name of the Plaintiff Mumba Thuva Kisangi within 14 days of the date of the consent, the defendant do execute all relevant and necessary documents to effect this registration. In lieu of transfer by the defendant, the land registrar is to sign documents of transfer. Further, the restriction registered by the defendant against dealings in the suit land be discharged and the suit be marked as settled with no orders as to costs.
6. By a Notice of Motion dated 27<sup>th</sup> May 2020, the appellants herein filed an application before the trial court seeking the following orders;
  1. Spent
  2. That the court be pleased to suspend its orders dated 12.3.2020 pending the hearing and determination of this application *exparte*
  3. That the proposed transfer of land parcel numbers Nzambani/Kyanika4010/4011/4012/4013/4014 and 4015 be cancelled as the order thereof was obtained through fraud and misrepresentation.
  4. That the Honourable court orders issued on 12.3.2020 be reviewed, varied and/or set aside pending hearing and determination of the main suit
  5. That the applicants herein be ordered joined as parties to this case either as interested parties or as co-defendants and be allowed to defend the case



6. That further orders as to ends of justice may require to be made
7. The costs of this application be provided for.
7. The application was supported by the affidavit of the 1<sup>st</sup> appellant Dennis Thuva Musyoka where it was deponed that the applicants live on the suit parcels of land which are subdivisions of land parcel Nzambani/Kyanika/425 owned by the defendant Vata Thuva. They averred that the consent order filed in court was obtained through fraud, misrepresentation and trickery hatched by the plaintiff against the defendant to disinherit the applicants all of whom are the plaintiff's cousins and close relatives and are all beneficiaries of the defendant.
8. The applicants stated that failure to join them to the suit was a deliberate attempt by the plaintiff to cover the truth and perpetuate fraud and that they were not aware of the suit. They stated that the suit parcel of land was given to their father Joseph Musyoka Thuva (deceased) by the defendant and he moved his family of two wives to the land.
9. Counsel for the defendant filed a Notice of preliminary objection dated 16<sup>th</sup> June 2020 objecting to the said application on the following grounds;
  1. That the court Honourable Court is functus officio in this matter and has no jurisdiction to hear the application or issue any orders.
  2. The court file was closed by a positive order of the court and cannot be re-opened unless by a separate miscellaneous application by parties in the suit. The order closing the file has not been set aside, and no proceedings can be taken on a closed file.
  3. The applicants are not parties to the suit and cannot seek substantive orders.
  4. Order 1 of the Civil Procedure Rules does not recognize interested parties in civil litigation, and the rules do not stipulate any pleadings to be filed by interested parties. Parties are either Plaintiff, Defendant or third party.
10. The preliminary objection was heard by the trial court through written submissions. The court gave its ruling on 7<sup>th</sup> July 2020. The trial court found the applicants as having no right to join a suit that had already been closed by consent in which they were not a party and upheld the preliminary objection. Dissatisfied with the finding of the trial court, the appellants have filed the appeal herein.

### **Appellants' submissions**

11. Counsel for the Appellants gave a brief background of the suit property and submitted that the appellants and the 1<sup>st</sup> respondent herein are the grandchildren of the 2<sup>nd</sup> respondent and that the suit property Nzambani/Kyanika/425 was given to the appellants' late father. It was stated that the 2<sup>nd</sup> respondent was left on Land Parcel Mulango/Wikililye /330. The 1<sup>st</sup> respondent later fenced off the said land and threatened the other parties with charging them for trespass to bar the appellants' access to their grandmother who had begun the process of sub-dividing the suit land to give the grandchildren their respective shares. Further, the 1<sup>st</sup> respondent later worked on a fraudulent scheme for transfer of the suit property to her without the appellants' knowledge.
12. Once the appellants learned of the 1<sup>st</sup> Respondent's fraudulent scheme, they requested the land registrar to put a restriction on the suit land's title and the 2<sup>nd</sup> Respondent later on had the suit land subdivided amongst the appellants, retaining sub-division Nzambani/Kyanika/4010 for herself as agreed upon. The 1<sup>st</sup> Respondent then hatched a plan to sue the 2<sup>nd</sup> Respondent and recorded a



consent judgment. This also led to the appellants filing the application dated 27<sup>th</sup> May 2020 which was dismissed by the court and is the subject matter of this appeal.

13. The Appellants submit that they have met the threshold to be considered interested parties and relied on Order 1 Rule (2) of the Civil Procedure Rules and Rule 2 of Mutunga Rules and the following cases;  

Central Kenya Limited v Trst Bank and 4 others CA No.22 of 1998  
Human Rights Alliance v. Mmo Matemo and 5 others (2014) eKLR  
Joseph Njau Kingori vs Robert Maina Chege and 3 others (2002) eKLR.
14. The Appellants submit that before the subordinate court, they had demonstrated that they are in occupation of the subject properties being subdivided, which are family properties and the court ought to have allowed joinder.
15. In submitting whether the appellants should be joined as interested parties or as defendants, counsel relied on the criteria for joining an interested party as was given in the case of Francis Kariuki Muruatetu & Another vs Republic and 5 others (2016) eKLR. They submit that they have a serious stake and interest in the land as the legal owners who inherited the same from their father.
16. It is therefore the Appellants' submission that the ruling of the lower court ought to be quashed, the consent put in place by the Respondents be set aside and their application be allowed. They suggested that the resultant title numbers Nzambani/Kyanika/1410-1415 should be cancelled and ordered to revert to the name of the 2<sup>nd</sup> Respondent pending the hearing and determination of the primary suit after the joinder of the appellants.

#### **The Respondent's submissions.**

17. Counsel for the Respondent on the other hand relied on the Supreme Court case of Raila Odinga vs IEBC & 3 others (2013) eKLR where the learned Judges held that a court is functus officio when it has performed all its duties in a particular case and when its judgment or order has been perfected.
18. The respondent termed the appellants as outsiders because the suit property was registered originally in the name of the 2<sup>nd</sup> respondent who had the right to do with the property as she pleased. Counsel relied on the holding of the court in Teresia Kwamboka Mauti v. Ezekiel Nyaranga Mauti and 5 others (2022) eKLR.
19. Counsel for the respondents further submitted that if the appellants had any rights to the suit property should file a suit to enforce such rights. The respondents therefore submit that the application was rightfully dismissed by the trial court and that this appeal is unmeritorious in law and ought to be dismissed with costs.

#### **Analysis and Determination**

20. The role of an appellate court was stated in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the same was stated concerning the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”



21. The court notes that the 1<sup>st</sup> Respondent did not appear for the hearing of the appeal though she participated in the suit before the trial court where she was represented by the firm of Mati & Mati Advocates. The said law firm declined to receive documents on appeal claiming they had no instructions.
22. The 1<sup>st</sup> respondent's service was confirmed through the affidavit of service of Joseph N. David sworn on 21<sup>st</sup> May 2024.
23. The court has considered the grounds of appeal contained in the Memorandum of Appeal, the record of appeal and the submissions by Counsels for the parties. It is first noted that the ruling of the trial court dated 7<sup>th</sup> July 2020 subject matter of this appeal dealt with a Notice of Preliminary Objection dated 16<sup>th</sup> June 2020 filed by counsel for the 2<sup>nd</sup> defendant while objecting to the application dated 27<sup>th</sup> May 2020.
24. According to the Black's Law Dictionary, a Preliminary Objection is defined as being:

“In a case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
25. The court must thus decide whether the grounds raised in the preliminary objection fit the criteria set out in law.
26. The law therefore requires that a Preliminary Objection be brought only on a point of law and the court must decide the nature of a preliminary objection has been made clear in the now famous case of Mukisa Biscuit Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696 where Lord Charles Newbold P. held that a proper preliminary objection constitutes of pure points of law. The Learned Judge then elaborated that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
27. Ground 1 in the objection raises the question of whether the court was functus officio and in this court's view, this was indeed a point of law as it is a legal question. Hon. Dr Fred Nyagaka J discussed this in the case of *Mbita v Barasa & 2 others; Laborde & 10 others (Intended Defendant) (Environment & Land Case E004 of 2023)* [2023] KEELC 22168 (KLR) (13 December 2023) (Ruling) where he found that:

“The doctrine of functus officio is a jurisdictional bar on a court to have a second bite at the merits of a case.

It is therefore a legal principle that if successfully demonstrated disposes of a matter at a preliminary stage. To that extent, therefore, I find that the first limb satisfies the threshold required of Preliminary Objections.”



28. The 2<sup>nd</sup> and 3<sup>rd</sup> grounds are factual, and uncontested and do not require further ascertainment of facts as the trial court file shows that the file was indeed closed by a positive order of the court and the applicants were not parties to the suit. However, the question of whether the closed file was incapable of being reopened is a question of law.
29. Ground number 4 is also a point of law on the role of interested parties in civil litigation.
30. It is thus the court's view that the issues raised in the Preliminary Objection were legal issues that had the potential to determine the matters before the court conclusively depending on the finding of the court.

**Ground 2: THAT The Learned Magistrate erred in law and on the facts by failing to re-open the case and allow the appellants to ventilate their claims against the Respondent since it was the appellants who were on the suit lands.**

31. This court dealt with this ground of appeal in relation to the preliminary objection grounds 1 and 2. Counsel for the 1<sup>st</sup> respondent submitted that the trial court was functus officio and had no jurisdiction to hear the application or issue any orders. Counsel argued that the court file was closed by a positive order of the court and could not be re-opened unless by a separate miscellaneous application since the order closing the file had not been set aside. He concluded that no proceedings can be taken on a closed file.
32. Counsel for the appellants submitted that the plaintiff and defendant before the trial court admitted that the Appellants were in occupation of the suit land which they had subdivided and as such they should have been joined in the suit and/or the court ought to have joined them suo motto. They stated that failure to join them as parties to the suit was part of a scheme of fraud, misrepresentation and trickery against the defendant/2<sup>nd</sup> respondent
33. The trial court was of the view that the suit was closed when the parties filed a consent and the same was adopted by the court. The trial court further argued that the plaintiff and the proposed interested parties (appellants herein) got their claims under the defendant and that if the defendant was convinced that there was a wrong that had been carried out by the advocate on record then it was the defendant to apply to the court to enjoin the parties as co-defendants.
34. The trial court upheld the preliminary objection and found that the applicants had no right to join a suit that had already been closed by consent and that they were not a party. Dissatisfied with the finding of the trial court, the appellants have filed the appeal herein.
35. According to the Black's Law Dictionary 11<sup>th</sup> Edition, the term functus officio means "having performed his or her office (of an officer or official) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished"
36. The doctrine of functus officio was defined by the Court of Appeal in the case of *Telcom Kenya Ltd -Vs- John Ochanda* [2014]eKLR as follows:-

“Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon-

The general rule that the final decision of a Court cannot be re-opened derives from the decision of the English Court of Appeal in *re-St Nazaire Co*, (1879), 12 Ch. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”



37. In *Raila Odinga –Vs- IEBC & 3 Others Petition No. 5 Of 2013* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) Supreme Court also referred to the case of *Jersey Evening Post Limited –Vs- A. Thani* [2002]Jlr 542 at pg. 550 where the Court stated:-

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functions, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

38. The Supreme Court went on to hold as follows:

“It is a legal and constitutional obligation of any court, from the basic level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the court’s jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the court is satisfied and it declares as much. Even though, therefore, the court concluded the hearing of the petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the petition, remained uncompromised. The court therefore could, as it did, issue summons in the cause of its orders made during the pendency of the main hearing.”

39. The learned judges of the Court of Appeal in the case of *Telkom Kenya Limited vs John Ochanda* (Suing on his own behalf and on behalf of 996 Former employees of Telkom Kenya Limited) [2014]eKLR were of the following opinion:

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once a final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd Vs Ai Thani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functions, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

40. From the foregoing authorities, it is clear that for the court to determine that it is functus officio it must have performed all its duties and have no further authority or legal competence because its duties and functions have been fully accomplished. The court must also be satisfied that the judgement has been perfected. In the present case even though the suit was settled by consent, the court cannot be said to have performed all its duties and functions and perfected its judgment. In the court's view,



the proceedings had not been finally concluded since the decree had not been executed. In the court's view, the trial court was not barred from all engagement with the case just because it had pronounced judgment. Indeed, as stated above, the doctrine does not prevent a judicial change of mind even when a decision has been communicated to the parties. The court can envision many instances when it can rightfully hear applications filed after consent has been filed e.g. applications for execution, setting aside of judgment, applications for review of judgment, contempt of court etc. The court thus finds and holds that it is not correct to hold that the court cannot entertain any application in particular for the joinder of a party after recording a consent judgment.

**Ground 1: THAT the Learned Trial Magistrate erred and misdirected herself in law and on the facts by failing to note that the respondent's suit as instituted without enjoining the Appellants was a scheme to perpetuate fraud.**

41. The court of appeal in the case of Alton Homes Limited & another v Davis Nathan Chelogoi & 5 others [2020] eKLR held that a court may hear an application for the joinder of a party even when the judgment was already delivered. The court found that:

“As counsel for the appellants correctly submitted, the power of the court to order any person to be joined under Order 1 Rule 10(2) of the Civil Procedure Rules may be exercised "at any stage of the proceedings". Commenting on similar provisions of the Indian Code of Civil Procedure, the editors of Mulla, Code of Civil Procedure, 14th edition, vol. II state at page 863, that, "it is only when a suit or proceeding has been finally disposed of so that there is nothing more to be done that this rule becomes inapplicable.”

42. The Court has considered that the appellants indeed were not party to the suit, but sought to be joined through the application under consideration. As pointed out in the court of Appeal case of Alton Homes Limited & another (supra), a joinder of parties to a suit is permitted under Order 1 Rule 10 (2) of the Civil Procedure Rules (2010) which stipulates as follows:

“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 to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

43. This court has considered the provisions of Order 1 Rule 10 of the Civil Procedure Rules, 2010 as amended in 2020 as cited in the above case and finds that the law provides for a party to make an application for joinder as an interested party even when a consent order has been filed and adopted by the court and the court file has been marked as closed. As stated earlier, it can envision many instances when the court hears applications filed after consent has been filed e.g. applications for execution, setting aside of judgment, applications for review of judgment etc

44. .

45. The court further finds that an interested party can be joined to a suit at any stage of the proceedings if the court considers their presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.



46. This position was taken by the court of appeal in the case of David Kiptugen v Commissioner of Lands, Nairobi & 4 others [2016] eKLR when the court was considering the provisions of Rule 77 of the Court of Appeal Rules which states:

“An intended appellant shall, before or within seven days after lodging a notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be made ex-parte, within seven days of 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.” [Emphasis supplied]

47. The Court of Appeal found that a person directly affected by an order of the court can be joined even at the appeal stage;

“This Rule does not define the term “affected.” This Court has, however, defined that term in Centre for Rights Education and Awareness & Another v. John Harun Mwau & 5 Others, CA No. 74 of 2014 (CA). Referring to the cases of Kamlesh Pattni Vs Starwood Hotels and Resorts World Wide Inc. & 7 Others Civil Application No. NAI 330 of 2001 (UR 176/2001) and Commercial Bank of Africa Limited Vs Isaac Kamau Ndirangu, Civil Appeal No. 157 of 1991, (CA); [1992] eKLR this Court held that the person referred to in the Rule is, at least, one whose property rights are affected by the judgment appealed against and that he need not have been party to the superior court case to be served and allowed to participate in the appeal. In the Pattni case, a foreign judgment, which had been registered in Kenya, affected the property rights of the applicant therein. He was allowed to challenge the foreign judgment in the Court of Appeal. In the case of Commercial Bank of Africa, an auction sale in the exercise of a statutory power of sale under a charge was set aside in proceedings that excluded the auction purchaser. On appeal against that decision, the Court of Appeal, suo moto, allowed the auction purchaser to be heard in that appeal.”

48. The question then turns to whether in this case, the appellants qualified to be admitted as interested parties and/or as defendants. The trial court found that the plaintiff and the proposed interested parties (appellants herein) got their claims under the defendant and that if the defendant was convinced that there was a wrong that had been carried out by the advocate on record then it was the defendant to apply to the court to join the parties as co-defendants.

49. The court finds that the trial court was wrong in finding that there was no room for consideration of the appellants as interested parties and/or as defendants yet the law provides for such consideration so long as the party applying to be joined satisfies the criteria set out in law.

50. The Supreme Court determined the criteria to be used in determining whether an applicant qualifies to be admitted as an interested party stating that an interested party is one who has a stake in the proceedings. This was held in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where it was :

“In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling 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 joined 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 interested party’s stake and relevance in the proceedings?  
and
- (b) will the intended interested party suffer any prejudice if denied joinder?”

51. In the present case, the court finds that the trial court erred in dismissing the appellant’s Notice of Motion dated 27<sup>th</sup> May 2020 on the strength of the grounds set out in the Preliminary Objection dated 6<sup>th</sup> June 2020. The court further finds that the trial court ought to have proceeded to hear the said application on merit to determine whether or not the appellants qualified to be joined to the suit and the capacity they would hold in the suit if allowed to be joined. The trial court thus erred in upholding the preliminary objection which in this court’s view has no merit.
52. Considering that the dispute herein is a family dispute, the court directs each party to bear their own respective costs of the appeal.
53. Based on the foregoing reasons, the court makes the following determination;
  1. This appeal is hereby allowed.
  2. The ruling and order of the Senior Principal Magistrate Hon. M. Kasera in Kitui Civil Case number ELC 7 of 2020 delivered on 7<sup>th</sup> July 2020 be and is hereby quashed and/or set aside.
  3. The preliminary objection dated 16<sup>th</sup> June 2020 is hereby dismissed.
  4. The Appellant’s application dated 27<sup>th</sup> May 2020 is remitted to the trial court for hearing and determination on merit.
  5. Each party shall bear their respective costs of the appeal.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 18<sup>TH</sup> OF JULY, 2024.**

**HON. L. G. KIMANI**

**JUDGE**

**ENVIRONMENT AND LAND COURT KITUI**

Judgement read in open court and virtually in the presence of;

Musyoki - Court Assistant

M/S Kiama for the Appellant

No attendance for 1<sup>st</sup> Respondent



M. Kimuli for the 2<sup>nd</sup> Respondent

