



REPUBLIC OF KENYA



Maingi v Mbithi; Ngige & another (Proposed Interested Parties) (Environment & Land Case 192 of 2012) [2024] KEELC 6387 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6387 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 192 OF 2012
CA OCHIENG, J
SEPTEMBER 30, 2024**

BETWEEN

PIUS KINOI MAINGI PLAINTIFF

AND

WILSON KIVUVA MBITHI DEFENDANT

AND

PAUL RICHARD WAWERU NGIGE PROPOSED INTERESTED PARTY

FRANCIS NGIGE WAWERU PROPOSED INTERESTED PARTY

RULING

1. What is before Court for determination is the Proposed Interested Parties/Applicants' Notice of Motion Application dated the 16th October, 2023 brought pursuant to Sections 3A and 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The Applicants seek the following Orders:-
 1. Spent.
 2. That the proposed Interested Parties be enjoined in this suit.
 3. That Judgment delivered on 24th January, 2022 be reviewed, varied and or set aside by removing Land Parcel Numbers Mavoko Town/Block 3/5522 and Mavoko Town/Block 3/10917 from those to be transferred to the Plaintiff as ordered therein.
 4. That costs the Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Francis Ngige Waweru who explains that Judgment was entered in favour of the Plaintiff on 24th January, 2022



affecting various parcels of land. He avers that both his parcels of land being Mavoko Town/Block 3/5522 and the 1st proposed Interested Party's land parcel No. Mavoko Town/Block 3/10917 were mentioned in the impugned Judgment.

3. He claims together with the 1st Proposed Interested Party, they were ripped off ownership rights of their aforementioned parcels of land. He deposes that whereas the Plaintiff from his averments claimed six (6) acres out of Mavoko Town/Block 3/2087, he was handed over six (6) parcels of land measuring twenty two (22) acres. Further, that the instant Application discloses reasons for review, variation and or setting aside. He reiterates that, from the pleading, it was clear that the Plaintiff's claim against the Defendant was for six (6) acres which was to be excised from LR No. Mavoko Town Block 3/2087 and not all the resultant subdivisions. He reiterates that by the time the Plaintiff was filing the instant suit, two portions belonging to the proposed Interested Parties' had been transferred to them and hence if he had a claim against them, natural justice demands that they should have been named parties to the suit. Further, that unless the Orders sought are granted, they stand to lose their land without having been granted a chance of being heard. He reaffirms that the instant Application has been brought without undue delay.
4. The Plaintiff opposed the instant Application by filing a Replying Affidavit sworn by Pius Kinoi Maingi where he insists that the said Application is misconceived and does not disclose any probable cause. He contends that the only land which he claims is six acres out of Mavoko 3/2087 which he purchased from the owner and was registered in the names of Wilson Kivuvu Mbithi. He explains that parcel Nos. Mavoko Town Block 3/10914; 3/10915; 3/10916; 3/10917 and 3/5522 emanated from Mavoko 3/2087. He insists that he moved to the High Court through ELC Case 192/2012 and proved his case beyond doubt. He reiterates that the Applicants' seek to deny him justice. Further, that the Applicant filed Milimani ELC 1486/13 claiming the same issue which was dismissed for lack of merit.
5. The Applicants' filed a Further Affidavit sworn by FRANCIS NGIGE WAWERU, where he reiterated their averments as per the Supporting Affidavit and contended that there is nothing in the Plaintiff's response controverting their assertion that there is an error apparent on the record and sufficient reason to warrant review, variation and or setting aside of the Judgment of the court. He avers that the Plaintiff confirms he purchased six (6) acres which was to be excised out of land parcel number Mavoko Block 3/2087. Further, that this was his averment before court and finding in Milimani ELC Case No. 1486/13, which case he misrepresents, yet parties therein are clearly stated. He argues that the Plaintiff claims that, he is being denied justice yet he seeks to retain a total of 22 acres, out of which he only purchased 16 acres.
6. The Application was canvassed by way of written submissions.

Analysis and Determination

7. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and submissions, the following are the issues for determination:-
 - a. Whether the Applicants should be enjoined in these proceedings as Interested Parties.
 - b. Whether the Judgment delivered on 24th January, 2022 should be reviewed, varied and or set aside.

As to whether the Applicants should be enjoined in these proceedings as Interested Parties.

8. The Applicants have sought joinder in these proceedings as Interested Parties claiming they are the registered proprietors of Land Parcel Numbers Mavoko Town/Block 3/5522 and Mavoko Town/



Block 3/ 10917 which the Court in its Judgment, directed to be transferred to the Plaintiff. Further, that they were not party to these proceedings and were hence condemned unheard.

9. On joinder, Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) stipulates as follows:-

“(2) 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.”

10. [Black’s Law Dictionary, 9th Edition](#), defines an ‘Interested Party’ as “A party who has a recognizable stake (and therefore standing) in a matter”.

11. Further, in the case of [Trusted Society of Human Rights Alliance V Mumo Matemu & 5 Others](#) (2015) eKLR the Court defined an Interested Party as follows:-

“(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.”

12. I note the Applicants have annexed their respective Certificates of Title for land parcel numbers Mavoko Town/Block 3/5522 and Mavoko Town /Block 3/10917 respectively. Further, the Plaintiff/ Respondent has not denied that he only bought six (6) acres of land from the Defendant and yet the suit land measures twenty two (22) acres. Further, I note in the proceedings and impugned Judgment, the Applicants were not parties to these suit, which proceeded ex parte since the Defendant failed to appear in court to tender evidence. The Plaintiff has vehemently opposed joinder but noting that by the time this suit was filed the Applicants’ already had their respective titles to the suit land, it is my considered view that they indeed had a stake herein. It has emerged that the Plaintiff never informed court that the Applicants’ already had respective titles to their parcels of land at the point he filed his suit.

13. Based on the facts before me, while relying on the legal provisions I have quoted as well as associating myself with the decisions cited above which have set out the principles for joinder of an Interested Party, I find that the Applicants’ indeed meet the criteria for joinder as Interested Parties’ since they are registered proprietors of aforementioned parcels of land. Further, it is my considered view that the Applicants’ involvement in these proceedings was necessary as they are affected by the impugned Judgment delivered on the 24th January, 2022.

As to whether the judgement delivered on 24th January, 2022 should be reviewed, varied and or set aside.

14. The Interested Parties’ have sought for review, variation or setting aside of the Judgment delivered on 24th January, 2022. They claim to be owners of land parcel numbers Mavoko Town/Block 3/5522 and Mavoko Town/Block 3/10917 respectively. They aver that the Plaintiff failed to enjoin them in these proceedings yet they are affected by the impugned Judgment as they were condemned unheard.



15. From perusal of the Court record, I note this matter proceeded ex parte as none of the Defendants testified. Further, the Plaintiff has admitted that he is only entitled to six (6) acres of land out of the suit land, which actually measures twenty two (22) acres.
16. On setting aside a Judgment, in the case of *Shah v Mbogo and Another* [1967] EA 116 it was held that:-

“This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
17. Further, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J (as he then was) held that:-

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”
18. While in the case of *CMC Holdings Limited -vs- Nzioki* [2004] 1 KLR 173, it was held that:-

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”
19. It is trite that setting aside of Judgment is discretionary but the court has to consider sufficient cause proffered by the Applicant, before proceeding to do so. Based on the facts before me, I find that it was improper for the Interested Parties to be condemned unheard as they are registered proprietors of the two aforementioned parcels of land which also emanated from the suit land. In my view, failure to accord them a hearing is an error apparent on the face of record, which goes against the spirit set out in Article 50 of *the Constitution*. I opine that they have demonstrated sufficient cause and provided plausible reasons that warrant the setting aside of the impugned Judgment. Further, that they are indeed prejudiced by the said Judgment. In the foregoing, I will proceed to set aside the Judgment delivered on 24th January, 2020 in its entirety.
20. In the circumstances, I find the instant Notice of Motion Application merited and will allow it but grant costs to the Plaintiff.
21. I direct the Interested Parties to file and serve their respective Defences within twenty one (21) days from the date hereof.
22. I so order.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF SEPTEMBER, 2024

CHRISTINE OCHIENG

JUDGE



In the presence of:

Kimathi for Applicant

Plaintiff in person

No appearance for Defendant

Court Assistant – Simon/Ashley

