Runya & 3 others v Mugo & 6 others (Environment & Land Case 17 of 2020 & Enviromental and Land Originating Summons 15 & 122 of 2021 (Consolidated)) [2024] KEELC 6225 (KLR) (23 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6225 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 17 OF 2020 & ENVIROMENTAL AND LAND ORIGINATING SUMMONS 15 & 122 OF 2021 (CONSOLIDATED)

LL NAIKUNI, J

SEPTEMBER 23, 2024

BETWEEN

FITINA RUNYA ..... 1ST PLAINTIFF

NG'OA MWACHOMBO ..... 2ND PLAINTIFF

CHARO FIKIRI ..... 3RD PLAINTIFF

YUSUF MWANGIRA ..... 4TH PLAINTIFF

AND

DAVID MUCHIRI MUGO ..... 1ST DEFENDANT

ATHMAN SWALEH ..... 2ND DEFENDANT

COUNTY COMMANDANT MOMBASA COUNTY ..... 3RD DEFENDANT

OCS BAMBURI POLICE STATION ..... 4TH DEFENDANT

DEPUTY COUNTY COMMISSIONER KISAUNI ..... 5TH DEFENDANT

OCS KIEMBENI POLICE STATION ..... 6TH DEFENDANT

OCPD KSAUNI ..... 7TH DEFENDANT

RULING

I. Introduction

1. This Honourable Court is tasked with the hearing and making a determination of the Notice of Motion application dated 6th May, 2024 filed by Intended Interested Parties herein. The application was brought under the provision of Article 50 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3A

of the *Civil Procedure Act* Cap. 21 and Order 9 Rule 9, Order 10 Rules 4, 5 6, 9, Order 50 Rules 1 and 22 Rule 22 (1) of the Civil Procedure Rules, 2010 of the Laws of Kenya.

2. Upon service of the Notice of Motion application, the 1st Defendant/Respondent responded through a Replying Affidavit sworn on 12th June, 2024. It is instructive to note that neither the Plaintiffs nor the other Defendants participate in this motion.

II. The Intended Interested Parties' case

3. The Applicants sought for the following orders;

    a. Spent.

    b. That Leave do issue to the Law firm of Messrs. Mkan & Co. Advocates be to come on record on behalf of the intended Interested Parties.

    c. That the Court be pleased to grant Orders stay of execution of the Judgment entered on 21st February 2024 pending hearing and determination of this application.

    d. That the Judgment delivered on 21st February 2024 against the Plaintiffs herein together with all consequential Orders be set aside and leave be granted to the applicants to be joined as interested parties in this suit and be allowed to prosecute their case.

    e. That upon the grant of prayer 2,3, and 4 hereof, leave do issue to the interested parties to file the necessary pleadings together with all the necessary documents and witness statements.

    f. That the cost of this Application to be in the cause.

4. The application by the Applicant is premised on the grounds, facts and testimony on the face of the application and further supported by the 16 paragraphed annexed affidavit of Lillian Sindi the Applicant's/ Intended interested party herein with one (1) annextures marked as "LS - 1". The Applicant averred that:-

    a. She had been authorized to swear this affidavit on her own behalf and on behalf of all interested parties and hence competent to swear this affidavit. He annexed a copy of the said authority and marked the same as "LS – 1" annexed thereto.

    b. She had been and still was a resident of Loma, Kiembeni area which is situated within the suit plots or property and she had a property therein and she had been residing thereon since the year 1998 and she knew almost all of the residents residing on the suit property.

    c. She knew that the Plaintiffs in this case currently did not reside or own any property on the suit property except the 1st Plaintiff.

    d. It was unfortunate that the Plaintiffs initiated a court case on a property where they did not reside or own property nor do they have interest thereon considering the fact the out of the said suit either way would not affect them.

    e. None of the Intended Interested Parties herein were ever informed or made aware of the existence of this case and had not been notified to either prosecute or defend the same.

    f. At the initial stages, the Plaintiffs applied on their claim for orders only in two plots as suit the property but later amended the same on their application dated 21st September 2020 to include all other plots where they (the intended interested parties) resided without their knowledge or consent which fact was not disclosed to this Honorable court.

g. The Plaintiffs had no legal right to proceed to institute a case on plots where they had no legal interest and to continue to prosecute a case based on issues that affect the said properties which action amount to defrauding or denying the intended interested parties their proprietary.

h. The Plaintiffs' action was done with malice and the same was intend that if Judgment was delivered in good faith against the Plaintiffs, then the outcome thereof would only affect the Interested Parties who were not parties to the suit and not the Plaintiffs.

i. The majority of the Intended Interested Parties had been residing on the suit property for over forty years. Indeed, they had lived and built houses thereon without any interference from party.

j. The fundamental duty of the court is to do justice between the parties present in court but it was proper or in turn that party involved on the subject matter should be accorded opportunity to be heard upon merits of the matter.

k. The Interested Parties had a good case against both the Defendants and the Plaintiffs as to the ownership of the suit properties which claim would go unheard unless they were allowed to join and present the same before this Honorable court.

l. It was in the interest of justice that the parties be joined to the suit and be allowed to be heard.

m. The affidavit was in support of the notice of Motion application.

III. The 1st Defendant's response

5. The 1st Defendant/ Respondent opposed the Application through a 12 paragraphed application sworn by David Muchiri Mugo, the 1st Defendant herein on 12th June, 2024 where the deponent averred that:-

a. On the onset the application was incompetent and bad in law and an abuse of court processes and should be struck out with cost to him because;

i. There was already a Judgement and this court was "functus officio" and cannot entertain the application.

ii. The purported interested parties had not yet been enjoined in this case hence could not purport to file a substantive application herein.

iii. The purported Interested Parties had not been mentioned and/or identified and the court cannot make ambiguous or blanket orders.

iv. The purported Interested Parties could not seek to stay and/or setting aside of the judgement herein because they were not parties to the same

v. The purported Interested Parties could not seek leave to prosecute this case because the same was already finalized and this is not their case.

vi. The purported Interested Parties could not seek to re - open the proceedings hearing by filing any pleadings when the matter was already finalized.

vii. There was already notice of appeal filed whereby and effectively moving this matter to a higher court (as per copy annexed marked "DMM -1") and "it is necessary for each lower tier to accept loyally.....the higher tier" as held in "Mwai *Kibaki – Versus - Daniel Toroitich Arap Moi, Civil Appeal Nos.172 & 173 of 1999*;(2008)2 KLR (EP)351;(2001)1EA 115".

viii. There was already a Judgement and the Law firm of Mkan & Co. advocates had not been granted leave to come on record hence could not purport to file a substantive application herein.

ix. The purported Interested Parties had no "Locus Standi" in this matter

b. The purported Interested Parties never annexed the purported authority referred in paragraph one of the supporting affidavit.

c. There was no evidence that the purported Interested Parties lived in the suit premises at all.

d. He had suffered a lot by denial of enjoyment of his properties in this suit and now that he had a Judgement in his favour but the squatters are hell bound to frustrate him and continue their unlawful and illegal occupation and use of his land and delay any enforcement of the Judgement which was what the purported Interested Parties in collusion with the Plaintiffs were doing in this case which was illegal and could not be allowed by this court.

e. Further he stated that the purported Interested Parties had unlawfully cheated and lied to this Court and withheld material facts namely that this was a representative suit where all the interested parties were represented and the Judgement in this case was fully biding on them.

f. Further in response he added that the purported Interested Parties had no right whatsoever to occupy his land and the same, if any amounts to trespass and violation of my right to own and enjoy his private property as guaranteed by the provision of Article 40 Constitution of the Kenya, 2010 which was unlawful and could not be allowed in law at all.

g. Further he had suffered and spent a lot of resources out of numerous litigations and counter applications including "MSA CMCC /ELC No. 201 of 2019, Safari Charo Ngao & Others – Versus - David Muchiri Mugo & Others, MSA CMCC /ELC No. 49 of 2020,Karungu Kiranga & Others – Versus - David Muchiri Mugo & Others, MSA ELC No. 17 of 2020, Fitina Runya & Others- Versus - David Muchiri Mugo & Others, etc. for over 5 years culminating in consolidation of them in this matter which had been finalized by the Judgement herein and litigation must come to an end.

h. Further he stated that application was untenable and the orders sought herein could not be granted because the purported Interested Parties admitted that they were trespassers with no clean hands therein hence guilty of equity and could not seek equity because this was a court of equity.

i. Considering the peculiar circumstances of this case and in the best interest of justice and Natural justice and equity and the law and *the Constitution* of Kenya, (2010) this application should be dismissed to uphold the Judgement herein to enable him enjoy the fruits of the same and protect his rights and interests in the suit property.

IV. Submissions

6. On 10th June, 2024 the Honourable Court in the presence of all the parties gave directions on the disposition of the Notice of Motion application dated 6th May, 2024 by way of written submission. Pursuant to that on 19th June, 2024 after the Honourable Court confirming compliance set the Judgment date on 31st July, 2024. Subsequently, it was delivered on 23rd September, 2024.

A. The Written Submissions by the Applicants

7. The Applicants through the Law firm of Messrs. Mkan and Co. Advocates filed their written submissions dated 25th July, 2024. Mr. Mkan Advocate submitted that the application before the Honourable Court brought by way of Notice of Motion dated 6th May, 2024 filed under a certificate of urgency seeking the above stipulated reliefs.

8. On the background of the matter, the Learned Counsel submitted that the case before the Honourable Court was for stay of execution pending the determination of an appeal against the Judgment delivered on 29th February, 2024. Orders sought and obtained by the Plaintiff were done without service effected upon the Applicants who were living or residing on the suit propertiesand any order awarded on this matter affects the Applicant yet the judgment was obtained without their input hence this application.

9. The purpose for the application for stay of execution of a Judgment according to the Learned Counsel was that an order for a stay of execution allowed a party to a suit to halt the proceedings of a Judgment and lodging a notice of appeal never automatically stop or stay the execution of a Judgment of a court and therefore an application must be made before the presiding court for orders to preserve the subject matter.

10. On the order to set aside Judgment the Learned Counsel argued that in considering whether or not to set aside a Judgment a Judge has to consider the matter in the light of the facts and circumstances of both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the Judgment if necessary.

11. The Learned Counsel relied on the following issues for determination:-

    a. Whether the applicants were necessary party to the suit

    b. Whether the plaintiffs ought to have joined the applicants to the suit

    c. Whether failing to join the applicant has caused injustice to the applicant

12. On the application before Court, the Learned Counsel contended that this matter was heard and determined without any notice being issued to the applicants or the intended parties being made aware of the same when in fact the Judgment adversely affected them. Therefore, the Applicant contended that the alleged action of parties involved in the matter may have conspired not to join the Applicant as parties to the suit since they did not reside on the suit property but the applicants had been residing on the suit property. The Applicant came to be aware of the existence of the suit when they were served with orders to vacate the suit's land.

13. On the Judgment was delivered on 21st February 2024 the Learned Counsel submitted that the applicants wished to be granted leave to file pleadings and participate in the suit. Although this was a Judgment that was delivered without the Applicant's input, it was, therefore, equivalent to interlocutory Judgment against the applicants and therefore the owner is on the Respondent to prove that the Applicant was duly served or why they were not served or joined to the suit.

14. It was further the submission of the Learned Counsel that its upon this Honorable Court to determine whether the Applicants were necessary parties to this suit and ought to have been joined as parties thereon and whether they would suffer prejudice if the court fails to join them. To set aside or not to set aside was a matter of the court's discretion and the court must be given sufficient ground to enable it to exercise its jurisdiction.

15. On whether the Court had discretionary power to set aside Judgment. The Learned Counsel submitted that Courts had unlimited discretionary power to set aside or vary Judgments with the main aim of being that justice should prevail and such discretion shall be exercised to avoid injustice or hardship resulting from accident, inadvertence, and excusable mistake or error. The prayers sought on the application before the court were prayers where the court was called upon to exercise its discretional powers and the principle guiding the exercise of desertion by the court or in other words for a court to exercise its discretionary power. In general, the exercise of discretion and independent Judgment involved comparison and the evaluation of possible causes of conduct and acting or deciding after the various possibilities have been considered.

16. On the Order, the Learned Counsel submitted that the discretion of the court to set aside or vary judgment was exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

17. The Learned Counsel averred that on the types of Judgment that the regular Judgment; this was well settled in the case of "Mwala – Versus - Kenya Bureau of Standards EALR (2001)1 EA 148".The Court stated that;

> " to all that I should add my views that a distinction is to be drawn between a regular and irregular judgment ex prate judgment, where the judgment sought to be set aside is a regular one then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter, where on the other hand the judgment sought to be set aside is irregular one, for instance, one obtained either where there is no proper service or any service at all of the summonses to enter an appearance or then there is a memorandum of appearance or defense on record but the same was inadvertently overlooked the same ought to be set aside not as matter of discretion but ex debit justiciae for a court should never countenance an irregular judgment on its record."

18. On leave to file defence, the Learned Counsel submitted that this was settled in the case of "Patel – Versus - E.A Handling Services Ltd 38 of 1998" and "Thayu Kamau Mukigi – Versus -Francis Kibaru Karanja (2013)eKLR". The court stated that:-

> " the second prayer of the defendant was that he be granted leave to file a defense and counterclaim. I will be guided by the principles elucidated in the case of "Tree Shade Ltd – Versus - Dobie CO. LTD CA 38/98 Where the court held that when an ex parte was lawfully entered the court should look at the draft defense if it contained a valid or reasonable defense."

19. In conclusion, the Learned Counsel contended that the Respondent had not stated or demonstrated that if the orders sought were granted then they would suffer any prejudice. The Respondent had not denied that the Applicants were not Interested Parties. Indeed, the fact that the Applicants were never served or notified of the existence of this suit and that the Applicants were adversely affected by the outcome of this suit.

20. It was the Learned Counsel's submission that the Applicants had duly complied with all the legal requirements to have orders sought be granted in his favor and therefore urged this Honorable Court to exercise its discretion in favor of the applicant and allow the application.

B. The Written Submissions by the 1st Defendant

21. The 1st Defendant through the Law firm of Messrs. Mutisya & Associates Advocates filed his written submissions dated 12th June, 2024. Mr. Mutisya Advocate averred that the 1st Defendant objected to the Notice of Motion application dated 6th May, 2024 by the purported Interested Parties and had filed a Replying Affidavit. That on the onset the application was incompetent and bad in law and an abuse of court processes and should be struck out with cost to him because;

    a. There was already a Judgement and this court was "functus officio" and could not entertain the application.

    b. The purported Interested Parties had not yet been enjoined in this case hence could not purport to file a substantive application herein.

    c. The purported Interested Parties had not been mentioned and/or identified and the court could not make ambiguous or blanket orders.

    d. The purported Interested Parties could not seek to stay and/or setting aside of the Judgement herein because they were not parties to the same.

    e. The purported Interested Parties could not seek leave to prosecute this case because the same is already finalized and this was not their case.

    f. The purported Interested Parties could not seek to re - open the proceedings hearing by filing any pleadings when the matter was already finalized.

    g. There was already notice of appeal filed whereby and effectively moving this matter to a higher court(as per copy annexed to the affidavit marked as "DMM -1") and "it is necessary for each lower tier to accept loyally.....the higher tier" as held in "Mwai Kibaki – Versus -Daniel Toroitich Arap Moi,Civil Appeal Nos.172&173 of 1999;(2008)2 KLR (EP)351;(2001)1 EA 115".

    h. There was already a Judgement and the Law firm of Messrs. Mkan & Co. advocates had not been granted leave to come on record hence cannot purport to file a substantive application herein.

    i. The purported Interested Parties had no "Locus Standi" in this matter

22. The purported Interested Parties never annexed the purported authority referred in paragraph one of the supporting affidavit. There was no evidence that the purported Interested Parties live in the suit premises at all. The 1st Defendant had suffered a lot by denial of enjoyment of his properties in this suit and now that 1st Defendant had a Judgement in his favour but the squatters were hell bound to frustrate him and continue their unlawful and illegal occupation and use of his land and delay any enforcement of the Judgement which was what the purported interested parties in collusion with the Plaintiffs were doing in this case which was illegal and could not be allowed by this court.

23. The Learned Counsel submitted further that the purported interested parties had unlawfully cheated and lied to this Court and withheld material facts namely that this was a representative suit where all the interested parties were represented and the judgement in this case is fully biding on them. In further response, the 1st Defendant added that the purported Interested Parties had no right whatsoever to occupy his land and the same, if any amounted to trespass and violation of his right to own and enjoy his private property as guaranteed by the provision of Article 40 of *the Constitution* of Kenya (2010), which was unlawful and could not be allowed in law at all.

24. The Learned Counsel argued that the 1st Defendant had suffered and spent a lot of resources out of numerous litigations and counter applications including MSA CMCC /ELC No. 201 of 2019,Safari Charo Ngao & Others-Vs. David Muchiri Mugo & others, MSA CMCC /ELC No. 49 of 2020, Karungu Kiranga & Others – Vs - David Muchiri Mugo & others, MSA ELC No. 17 of 2020, Fitina Runya & Others-Vs. David Muchiri Mugo & Others, etc for over 5 years culminating in consolidation of them in this matter which had been finalized by the Judgement herein and litigation must come to an end.

25. According to the Learned Counsel the application was untenable and the orders sought herein could not be granted because the purported Interested Parties admitted that they were trespassers with no clean hands therein hence guilty of equity and could not seek equity because this is a court of equity.

26. In conclusion the Learned Counsel averred that in considering the peculiar circumstances of this case and in the best interest of justice and Natural justice and equity and the law and *the constitution* (2010) this application should be dismissed to uphold the Judgement herein to enable him enjoy the fruits of the same and protect his rights and interests in the suit property.

V. Analysis and Determination

27. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statures. This case proceeded whereby the Plaintiffs gave evidence and produced several documents in support of their cases. It should be noted that the Defendants never filed a defence neither did they tender any evidence.

28. This Honourable Court will still examine the facts of the case and in order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has issues for its determination. These are:-

    a. Whether the Law firm of Messrs. MKAN & CO ADVOCATES can be granted leave to come on record for the intended interested parties after judgment has been delivered?

    b. Whether the Intended Interested Parties can be joined after the delivery of the judgment in this suit?

    c. Who will bear the Costs of Notice of Motion application dated 6th May, 2024?

Issue No. a). Whether the Law firm of Messrs. Mkan & Co Advocates can be granted leave to come on record for the intended interested parties after judgment has been delivered

29. Under this sub title, the Court will discuss whether leave can be granted to the Law firm of Messrs. Mkan & Co. Advocates to come on record for the Interested Parties. It will be noted that the Applicants brought the application under the provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010 amongst other orders. Order 9 Rule 9 and 10 of the Civil Procedure Rules provides:-

> Rule 9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> (a) Upon an application with notice to all the parties; or
>
> (b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

Rule 10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

30. Under the provision of Order 9 Rule 10 of the Rules, one may apply for such leave alongside other prayers in an application. In this instant case, the firm seeks leave to come on record for the intended interested parties. I have perused the applicant's application dated 6th May, 2024 amongst the prayers for setting aside of the judgment delivered on 21st February, 2024 and joinder; the Applicants also sought leave to have the Law firm of Messrs. Mkan & Co. Advocates come on record for the intended interested parties. For tis very reason and justification, the Honourable Court proceeds to grant leave as sought accordingly.

Issue No. b). Whether the Intended Interested Parties can be joined after the delivery of the judgment in this suit

31. Under this sub title, the Honourable Court will examine whether the Intended Interested parties can be joined in the suit after judgment has been delivered. Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 invokes an application for joinder provides 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."

32. In this present case the Intended Interested Parties seek joinder into the suit as parties after the Court had heard the case and rendered its judgment on 21st February, 2024. A party under Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 can either be joined as a Plaintiff and/or Defendant. It is not difficult to appreciate why the rule makes that provision. If a party is being enjoined, it would be because either he is making a claim, in which case he would be a Plaintiff or because someone is making a demand against him and wants some relief from him, in which case he would be enjoined as a Defendant. The rule has no provision for a party being enjoined as an Interested Party. What would be the role of such a party in the suit?

33. Order 1 Rule 10 (2) in the Court's view envisages a situation where the suit has not been heard and determined and that is why it provides for joinder of a party either as Plaintiff or Defendant or a party 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 (emphasis added). Where a judgment has been entered it is my considered opinion that a party cannot be enjoined to the proceedings unless the Judgment is either reviewed and/or set aside in a manner to accommodate the participation of the joined party.

34. The Court of Appeal in the case of "JMK – Versus - MWM & Another [2015] eKLR (Civil Appeal No. 15 of 2015 – Mombasa)" while considering the application of Order 1 Rule 10(2) of the Civil Procedure Rules stated thus:-

> " 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 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 Civil Procedure Rules in Tanga Gas Distributors Limited – Versus - Said & Others [2014] E. A 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 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 in applicable....."

35. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of "Kingori – Versus - Chege & 3 Others [2002] 2 KLR 243" where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

    1. He must be a necessary party.
    2. He must be a proper party.
    3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
    4. The ultimate order or decree cannot be enforced without his presence in the matter.
    5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

36. In the presence case, the Intended Interested parties at the time of applying for joinder judgment had already been entered. There has been no proof produced that the intended interested parties were aware of the said matter. It is trite that he who alleges must prove. See "Kipkebe Limited – Versus - Peterson Ondieki Tai(2016) eKLR" where the court held that he who asserts must prove his case. In a nut shell, I do agree that the intended interested Parties had no knowledge of the existence of the subject suit and therefore cannot be accused of squandering their opportunity to be heard.

37. Having held as above, I will now turn to the most contested issue on joinder. The Applicants have sought to set aside the Judgment and be joined as Interested Parties. Who is an interested party and at what stage can joinder of an interested party be entertained? According to the Black's Law Dictionary, 9th Edition a "Necessary Party" is defined as;

> " A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings"

38. The Black Law Dictionary, 9th Edition at page 1232 further defines an interested party as; "A party who has a recognizable stake (and therefore standing) in the matter". Whereas the *Civil Procedure Act*, Cap 21 is silent on the subject as to who is an "interested party", Order 41 Rule 5 of the Civil Procedure Rules 2010, does make a reference to the term "interested party" and states as follows;

> " The court may either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit."

39. Besides, reference to the word "Interested Party" can also be traced to *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, *Legal Notice No. 117 of 2013*, which defines an interested party as;

> " A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation"

40. In the case of:- "Kenya Medical Laboratory Technicians and Technologists Board & 6 others – Versus - Attorney General & 4 others [2017] eKLR", Mativo. J. explained circumstances when an Interested Party ought to be enjoined in a proceeding. He stated thus:-

> " A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty".

41. In the case of "Meme – Versus - 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."

42. From the above quoted provisions and the case laws, it is not correct for the Learned Counsel for the 1st Defendant to claim that there is no provision known in law that provides for an interested party more so after Judgment has been delivered. In the case of "Elton Homes – Versus - Davis & others (2019) eKLR", the court allowed joinder of an interested party after judgment had been entered between two principals without involving him yet he was in occupation of the property from which he was being evicted. The court recognized that the intended interest party had a constitutional right to be heard; The court observed that:-

> " *the constitution* of Kenya is very clear on the right to protection of ones property and the said property cannot be arbitrary(sic) be taken away from such an owner without being heard or accorded an opportunity to ventilate his case"

43. It is trite that joinder of an interested party is meant to safeguard parties who may otherwise be ignored or side lined by a malicious party/s with the sole purpose of disenfranchising a party's inalienable right of being heard before being condemned. Further, it is cost saving as it avoids multiple suits when one suit can solve the claim once and for all.

44. Further in the case of:- "Civicon Limited – Versus - Kivuwatt Limited and 2 Others [2015] eKLR" the court observed as follows:

> " Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.....from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial."

45. The 1st Defendant has opposed the application and sought to rely on the doctrine of 'functus officio' stating that the matter had already been heard and determined and therefore the court had no business entertaining the application for joinder by the intended interested parties. The Court of Appeal in "Telcom Kenya Ltd – Versus - John Ochanda [2014] eKLR" where it was held 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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of Chandler vs Alberta Association Of Architects [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
>
> "The general rule that a 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. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> a. Where there had been a slip in drawing it up, and,
>
> b. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"
>
> The Supreme Court in Raila Odinga v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in which the learned author stated;
>
> > ..."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...The [principle] is that once such a decision has been given, it is (subject to any right

of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

46. I dare say that 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 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 – Versus - 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 functus, 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."

47. The 1st Defendant has also contended that the Intended Interested Parties have no "locus standi" in this suit. In the case of "Law Society of Kenya – Versus - Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000", as follows:-

> " Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of Alfred Njau and Others -Vs- City Council of Nairobi [1982] KAR 229, the Court also held that:-
>
> > "the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

48. Therefore, locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence, party has no basis to claim anything before the Court. In the case of "Mumo Matemo - Versus - Trusted Society of Human Rights Alliance & 5 Others", the court stated that while the court should not sanction hurdles to access to justice by restricting the definition of locus standi, it should nevertheless not entertain litigation that is hypothetical, abstract or is an abuse of the judicial process.

49. I am clear in my mind that though this court has discretion to strike out an application or a suit that amounts to an abuse of the court process, that discretion should be cautiously and sparingly exercised in exceptional cases bearing in mind that every person has a right to access to justice and the court's core duty is to determine cases on their merits. In the case of "D. T. Dobie & Company Kenya Limited – Versus - Joseph Mbaria Machira & Another [1980] eKLR", the court stated as follows;

> " No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

50. Although the Court also notes from the application that the Intended interested parties claim beneficial proprietorship on the suit properties. The question that that court asks itself then would be it be in the interest on the parties especially the Intended Interested Parties to dismiss their claim

on a preliminary basis without granting them the right to be heard. As was held in the case of "Law Society of Kenya vs Commissioner of Lands & Others [supra]" for a person to have locus standi, they must have a sufficiency of interest in the subject matter. It is my finding that the Applicants' apparent interest as beneficiaries of the suit property is sufficient interest for them to seek for redress from this court. Therefore they have the requisite locus standi to bring this suit; and their suit is not vexatious or an abuse of the court process.

51. In the foregoing the application herein is for joinder and for setting aside of the judgment of this Court delivered on 21st February, 2024. It is the finding of this Court having opined itself as it has above that the Applicants are entitled to a hearing as interested parties with a stake in the suit property. Their claim cannot be dismissed prematurely by being denied the right of hearing. There is no greater prejudice in starting the case de novo than denying the appellant the right to be heard. However, the Honourable Court has also taken judicial notice and fully concurs with the Learned Counsel for the 1st Defendant that the Applicant has been engaged in what seems to be timeless litigation process over the same subject matter and perhaps the same parties an issue he felt some relief through the delivery of the Judgement. I fully abide by the legal maxim "Litigation must come to an end". But be that as it may, this being a Court of Justice, substantive justice ought to be served and hence there would be need to pay him some thrown away costs to sustain that balance and scale in the interest of all parties thereof. Accordingly, I find merit in the prayer to join the interested parties in the suit.

Issue No. c). Who will bear the Costs of the Notice of Motion application dated 6th May, 2024

52. The issue of Costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

53. The provision of Section 27 of the *Civil Procedure Act* grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows:-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

54. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

55. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by

Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

56. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In "Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR" the court noted that;

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

57. In this case, as this Honourable Court has opined above, the reserves the right not to award costs.

VI. Conclusion and Disposition

58. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities finds that the Intended Interested Parties have made their claim in the application. Thus, the Court proceeds to make the following specific orders:-

a. That the Notice of Motion application by the intended Interested Parties be and is hereby found to have merit and is hereby allowed.

b. That leave be and is hereby granted to the firm of Mkan & Co. Advocates to come on record on behalf of the Interested parties.

c. That this Honourable Court do and hereby issues an order setting aside the Judgment of this Court delivered on 21st February, 2024 and any consequential orders thereof.

d. That leave be and is hereby granted joining into the record of this court the Interested Parties.

e. That the Interested Parties are hereby granted leave to file the necessary pleadings together with all the necessary documents and witness statements within the next 21 days.

f. That the Interested Parties to pay the 1st Defendant a thrown away costs of Kenya Shillings Fifty Thousand (Kshs. 50, 000.00/=) Within the next 14 days from the date of the delivery of this Ruling hereof.

g. That the Plaintiffs and Defendants be and are hereby granted corresponding leave to file their responses within the next 14 days.

h. That the Honourable Court do and hereby orders that there shall be strict timeframes in the hearing and determination of this suit which should be concluded within 60 days with no room for adjournment.

i. That for the sake of expediency, the matter to be heard and finalized on 4th December, 2024 and Judgement delivered on 3rd February, 2025 thereof.

j. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2024.

.....

HON. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. Mr. Mkan Advocate for the Applicants.

c. No appearance for the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants.