



**Mueke & another (Suing as the Administrators of Simeon Mueke Maingi – Deceased) v
Mulwa & 3 others; Vito Auto Spares Limited & 2 others (Interested Parties) (Environment
& Land Case 301 of 2009) [2024] KEELC 5985 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5985 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 301 OF 2009
A NYUKURI, J
SEPTEMBER 18, 2024**

BETWEEN

**WAYUA MUEKE 1ST PLAINTIFF
REGINAH KAMENE KARIMI 2ND PLAINTIFF
SUIING AS THE ADMINISTRATORS OF SIMEON MUEKE MAINGI –
DECEASED**

AND

**SABETJ KANUNGUI MULWA 1ST DEFENDANT
WILLY MUTISYA MULWA 2ND DEFENDANT
SIMON MAKAU MULWA (DEFENDING AS THE ADMINISTRATORS OF
STEPHEN MULWA ILIVI - DECEASED) 3RD DEFENDANT
THE LAND REGISTRAR - MACHAKOS DISTRICT 4TH DEFENDANT**

AND

**VITO AUTO SPARES LIMITED INTERESTED PARTY
RICHARD MUTAVI MATATA T/A RM MATATA AND
COMPANY INTERESTED PARTY
JACKSON KIMEU KAKONZI INTERESTED PARTY**



RULING

Introduction

1. This ruling is in respect of two applications. The first application is dated 2nd September 2022 filed by R. M. Matata & Company Advocates seeking to join Richard Mutavi Matata T/A Ms. R. M. Matata & Company Advocates as interested party to these proceedings and an order to declare the consent dated 12th May 2014 as null and void. The second application is dated 24th November 2022 filed by Jackson Kimeu Kakonzi, seeking to be joined to these proceedings as an interested party and for review, and setting aside of the consent order dated 22nd May 2014.

Application dated 2nd September 2022

2. In the application dated 2nd September 2022, R. M. Matata & Company Advocates sought the following orders;
 - a. That this Honourable Court be pleased to grant leave to the applicant herein Ms. Richard Mutavi Matata T/A MS Richard Mutavi Matata & Company Advocates be joined as an interested party.
 - b. That upon granting prayer 1 herein, this Honourable Court be pleased to declare all the proceedings herein and in particular the consent apparently drawn on the 12th day of May 2014 and purporting to involve the applicant's law firm as appearing for and acting for one Stephen Mulwa Ilivi (Deceased) or any other person in the matter as null and void.
 - c. That there be no orders as to costs save for the filing and execution of this application.
3. The application is supported by the affidavit sworn by Richard Mutavi Matata on 2nd September 2022. The applicant's case is that Stephen Mulwa Ilivi (now deceased) the defendant never appointed the firm of R. M. Matata to act for him in this matter and that the said firm never negotiated or executed the consent filed herein dated 12th May 2014. He stated that the consent was signed by one Jackson Kimeu Kakonzi, an advocate who was not employed in the firm of R. M. Matata & Company Advocates and who had been struck off the Roll of Advocates on 11th June 2007 and on 14th February 2008 respectively, and that the forgery was reported to police. He also stated that as per the proceedings herein, on 21st March 2019 he was summoned by this court and he appeared and testified in this matter to the effect that he did not sign the consent filed. He attached the consent; his statement; DCI report and letter from DCI.
4. The application was opposed. Wayua Mueke, the 1st plaintiff swore a replying affidavit dated 11th November 2022, opposing the application. She stated that the subject matter of the suit are six parcels of land which were acquired jointly by the parties in the suit, although registered in the defendant's name in trust for the deceased plaintiff. That the parties sold one of the properties and jointly shared the proceeds thereof but that the defendant intended to defraud the deceased plaintiff of the properties by deciding to secretly sell the same, prompting the deceased plaintiff to file this suit and obtain injunctive orders.
5. She further stated that subsequently the deceased plaintiff and deceased defendant negotiated and entered into a consent which was adopted as judgment of the court. She stated that the defendant kept on changing advocates and at the time of consent, it was the firm of R. M. Matata that was on record. She stated that the defendant had attempted to recant the consent of 12th May 2014 and that the matter



was heard by way of viva voce evidence and a ruling delivered on 27th January 2017 whereof judgment was entered as per the consent.

6. She asserted that the defendant filed application dated 19th March 2018 for review and setting aside of the judgment and the applicant herein Mr. Richard Mutavi Matata of R. M. Matata & Company Advocates was summoned by the court, he filed an affidavit alleging he was never on record for the defendant and therefore he was cross examined and upon hearing him, the court made a ruling on 31st January 2020 dismissing his allegations.
7. She maintained that as the application by Mr. Richard Mutavi Matata is based on the same facts, the same is res judicata. She stated that there was an outright collusion between Mr. Richard Mutavi Matata and his clients, the defendants herein to circumvent the consent judgment. She stated that the applicant cannot be joined to this case after the judgment. She stated that the applicant has an ulterior motive as he filed application and fixed it for hearing on 25th October 2022 and failed to serve so that the same can be allowed but the plaintiff counsel by chance saw the matter on the cause list. She urged the court to dismiss the application. The plaintiff also filed a notice of preliminary objection dated 30th November 2022 arguing that the application offended Section 7 of the *Civil Procedure Act* as Mr. Richard Mutavi Matata was heard orally on 21st March 2019 and a ruling delivered on 31st January 2020 and no appeal has been preferred against that ruling.
8. Victoria Agbaje, the Director of Vito Auto Spares Ltd, the interested party herein filed a replying affidavit dated 20th December 2022, in response to the application. She stated that she purchased parcel LR. No. Mavoko Town Block 2/110 from Stephen Mulwa Ilivi (deceased) vide a sale agreement dated 30th September 2009 at Kshs. 41,990,000/-, and that at the time of the transaction, she was not aware of the consent entered into herein. She stated that the plaintiff was delaying the succession matter in the High Court at Machakos. She complained that she had an advocate who was representing her but who never mentioned the proceedings herein.
9. The interested party's director stated that the consent entered into touches on the property she purchased and that her lack of participation herein highly prejudices her interest. She stated that the consent was fraudulently obtained.

Application dated 24th November 2022

10. In the application dated 24th November 2022, Jackson Kimeu Kakonzi sought the following orders;
 - a. That this Honourable Court be pleased to grant leave to the applicant herein, JACKSON KIMEU KAKONZI be jointed as interested party in these proceedings.
 - b. That upon the applicant herein being granted prayer No. 1 above, this Honourable Court be pleased to review, and set aside the ruling and orders issued on 27th January 2017 insofar as the said ruling adopted the orders set out in the consent letter dated 12th May 2014.
 - c. That there be no order as to costs.
11. The application is supported by the affidavit sworn by the applicant and filed on 24th November 2022. The applicant's case is that he was admitted as an Advocate of the High Court of Kenya on 12th January 1979 and continued to practice until 2006 when he was struck off the Roll of Advocates and has never practiced ever since.
12. He stated that the 1st defendant herein Sabeth Kanungui Mulwa is his relative and his close friend. He alleged that in May 2014, the 1st defendant informed him that he had a case at Milimani Law Courts and that a Mr. Wambua of R. M. Matata & Company Advocates had agreed to take over the case from



the firm of Ngolya Advocates. Further that Mr. Wambua had informed him that he will send a Mr. Paul Kilonzo advocate to hold brief in Nairobi whenever necessary. He stated that he knew Mr. Wambua who was an office manager in the office of R. M. Matata Advocates.

13. He further stated that in early May 2014, the late Stephen Ilivi requested him to accompany him to the office of Mutunga Muindi Advocates where he was supposed to be his witness in regard to negotiations between him and the late Simeon Mueke Maingi, the deceased plaintiff. That they met the deceased plaintiff with his witness and that a Mr. Paul Kilonzo Advocate had been sent by Mr. Wambua to represent the firm of R. M. Matata & Company Advocates. He insisted that he only attended that meeting as a witness and not as an advocate. That at the meeting, it was agreed that the parties will agree and reduce their agreement in writing. That Mr. Muindi was to draft the agreement and allow the litigants and their witnesses sign but that he later learnt that Mr. Muindi never drew the agreement but instead drew a consent, instead, which amounted to a misrepresentation of facts leading to the consent judgment.
14. He lamented that Mr. Muindi was all along aware that he was merely a witness of the late Stephen Mulwa Ilivi and that when it was decided by the court that viva voce evidence would be taken, Mr. Muindi was under duty to summon him to appear in court and that failure to do so amounts to an infringement of his Constitutional right to a fair administrative action because he had evidence that would have helped the court to effectively and completely adjudicate upon and settle the issues herein.
15. The application was opposed. Wayua Mueke the 1st plaintiff filed a replying affidavit dated 8th March 2023. She stated that the fact that the application dated 24th November 2022 was served on 1st March 2023 long after the hearing date of 21st February 2023 had passed demonstrated lack of sincerity on the party of the applicant. She argued that although the applicant sought to be joined to these proceedings as interested party, he had not informed court his interest in the seven suit properties; as he does not claim ownership thereof. She stated that she knows Mr. Jackson Kimeu Kakonzi who is the 1st defendant's relative and is therefore being used by the 1st defendant to frustrate the finalization of this matter. That the prayer sought for setting aside judgment was also made by the 1st defendant and a ruling dismissing the same made by this court on 31st January 2020. He stated that the 1st defendant is using the applicant herein to appeal the ruling of 31st January 2020 and hence the application is res judicata.
16. She stated that the applicant confirmed being present in the meeting of 12th May 2014 together with an advocate from R. M. Matata and the deceased defendant Mr. Stephen Mulwa Ilivi and that he is only lying when he says no agreement was reached, which confirms the court's ruling of 27th January 2017. She maintained that failure by the 1st defendant Mr. Stephen Mulwa Ilivi to call Jackson Kimeu Kakonzi as his witness during the hearing on 16th March 2015 was within his rights as a litigant and a witness cannot insist that he should have been called. She stated that the applicant had not told court which of his Constitutional rights had been violated. She urged the court to dismiss a ruling dated 27th January 2017; and a ruling dated 31st January 2020.
17. In a rejoinder, Jackson Kimeu Kakonzi filed a further affidavit dated 6th April 2023. He stated that he had now obtained a photocopy of a statement by Boniface Mwanzia Muindi which confirms that he was Mr. Stephen Ilivi's brother in law. He stated that he has no proprietary interest in the suit property and that his interest is breach of trust by Mr. Muindi who filed a consent which was not accompanied by an agreement signed by the parties to the suit and their witnesses and that the consent was obtained by concealment of material facts. He attached a statement by Mr. Muindi.



18. Victoria Agbaje the director of the interested party filed a replying affidavit dated 12th April 2023 supporting the application. She stated that she purchased LR. No. Mavoko Town Block 2/110 from the late Stephen Mulwa Ilivi by agreement dated 20th September 2009 at Kshs. 41,990,000/- and that at the time of their transaction, she was not aware of the consent. She stated that her previous advocate never mentioned to her about this suit and that she should be allowed to participate in these proceedings because the consent is prejudicial to her interests.
19. She maintained that the consent was fraudulently obtained and that she was aware of Milimani HCC No. 238 of 2011 where she sued Stephen Mulwa Ilivi. She supported the prayer for joining Mr. Jackson Kimeu Kakonzi to these proceedings and that she was not aware of meetings between the parties herein.
20. Both applications were disposed by way of written submissions. On record are submissions filed by the plaintiffs on 25th May 2023; submissions by the interested party herein filed on 10th July 2023 and submissions filed by R. M. Matata & Company Advocates on 28th July 2023 all of which this court has duly considered.

Analysis and determination

21. The court has carefully considered the two application, the respective responses thereto and the parties' submissions. The issues that arise are;
 - a. Whether the prayer for setting aside the consent judgment in both applications are res judicata.
 - b. Whether the applicants ought to be jointed to these proceedings as interested parties.
22. Section 7 of the *Civil Procedure Act* provides for the doctrine of res judicata and bars a court from trying a suit or an issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or their privies in a competent court and which decision was final.
23. Therefore to prove res judicata, an applicant must demonstrate a previous decision regarding the same issue as that in the current suit; the parties should be the same; the previous decision must have been made by a competent court and the decision should have been a final decision.
24. The two applications before court raise the issue of whether the consent dated 12th May 2014 should be set aside on the basis that the same was not signed by Mr. Matata advocate; and Mr. Kakonzi lacked capacity to execute the consent, having been struck off the Roll of Advocates.
25. In this case, the 1st defendant filed an application dated 19th March 2018 seeking to set aside the judgment and the consent dated 12th May 2014. The 1st defendant argued that Jackson Kimeu Kakonzi who signed the consent had no legal capacity to do so as he had been struck off the Roll of Advocates on 11th June 2007, and that Mr. Matata advocate had filed an affidavit denying the signature on the consent, arguing that the consent was unlawful and that the 1st defendant never instructed R. M. Matata Advocates. Mr. Matata gave evidence in regard to the same.
26. Upon hearing both sides, the court dismissed the application vide its ruling of 31st January 2020. That ruling has not been set aside or appealed against. I therefore, the issue as to whether the consent of 12th May 2014 should be set aside on the basis that it was not signed by the firm of R. M. Matata Advocates and that Mr. Jackson Kimeu Kakonzi was an advocate who had been struck of the roll hence lacking capacity to act as an advocate was heard on merit and determined with finality and therefore res judicata.



27. Regarding joinder of Mr. Matata and Mr. Kakonzi, there is no previous application by the two persons seeking joinder to this suit as interested parties and therefore, I find and hold that the question of whether or not the two should be joined to this suit as interested parties is not res judicata.
28. Order 1 Rule 10 (2) of the Civil Procedure Act provides for joinder to a suit 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.
29. Therefore where a party's presence in a suit is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in a suit, such party may be added to such proceedings.
30. The Black's Law Dictionary defines interested party as follows;
A party who has a recognizable stake (and therefore standing) in a matter.
31. Therefore any person seeking to be joined to a proceeding as an interested party must demonstrate a recognizable stake in the issues before court, and not just some sort of interest in the proceedings.
32. In the case of Communications Commission of Kenya & 4 Others v Royal Media Services Limited & 7 Others [2014] eKLR, it was held 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.
33. 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;
1. Joinder of a person because his presence will result in the complete settlement of all the questions involved in these proceedings;
 2. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
 3. Joinder to prevent a likely cause of proliferated litigation we ask ourselves the following questions;
 - a. What is the intended party's state and relevance in the proceedings and
 - b. Will the intended interested party suffer any prejudice if denied joinder?
34. In this matter, Mr. Richard Mutavi Matata has sought to be joined to these proceedings as interested party. There is no pending suit herein as the same was determined. The determined suit herein related to proprietary rights in the suit property. Mr. Richard Mutavi Matata has not claimed any interest in the suit property. His only reason for joinder is that he did not sign the consent.
35. Clearly, Mr. Richard Mutavi Matata has no recognizable stake in this matter. This court heard his evidence and position regarding the consent dated 12th May 2014 and upon considering the same made its ruling on 31st January 2020 and declined the 1st defendant's prayer to set aside the consent judgment



adopted on 27th January 2017. The status of Mr. Richard Mutavi Matata, remains that of a witness and a witness however relevant or important their evidence is, remains a witness and cannot be elevated to a party in a suit where they have no recognizable stake or claim. In this case, Mr. Richard Matata was heard by the court and cross examined by several advocates on the evidence he has now put in his supporting affidavit. As a witness, his role remains honoring summons and giving his testimony. What happens in this suit after the testimony remains a matter between the parties and if the parties are not satisfied with the court's position on the evidence adduced, they are free to appeal or seek review as the case may be.

36. As Mr. Matata did not disclose any recognizable interest in these proceedings I find and hold that his prayer for joinder has no merit and is rejected.
37. Although Mr. Kakonzi sought for joinder as interested party, he has confirmed in his affidavit that he has no proprietary interest or claim over the suit properties, and that he is only seeking assistance because Mr. Muindi Advocate breached his trust. Clearly, Mr. Kakonzi has missed the point. Mr. Muindi is not a party in this matter, and has no claim herein. If Mr. Kakonzi has a complaint against Mr. Muindi, he cannot raise it in these proceedings in which the suit was determined in 2017. He can file suit against Mr. Muindi if he is aggrieved by the latter's conduct because the dispute herein was between Simeon Mueke Maingi and Stephen Mulwa Ilivi and that dispute was adjudicated upon and a final decision made by this court.
38. Mr. Kakonzi complained that he was not summoned to give evidence in court and therefore his Constitutional rights to a fair administrative action have been violated. First, this argument is untenable because, a witness has no Constitutional right to give evidence in any case where he is not a party. If the parties and the court choose not to summon him a witness cannot insist on a right to testify in a suit. In addition, even if a person's testimony were needed in a suit, that does not elevate them to a party in the suit where they have no recognizable stake. Mr. Kakonzi did not give the specific Constitutional right violated. Although he stated that his rights to fair administrative action had been violated, there was no decision made against him that he can be termed as an administrative action. It is the 1st defendant, his own close friend and relative, who would have needed him to give his testimony because apparently it seeks to protect the latter's interest and therefore the 1st defendant ought to have summoned him if he was a necessary witness. At this point, his testimony is not required because the same is being brought about 5 years after entry of judgment and it is surprising that his own close friend and relative, the 1st defendant did not deem it necessary to call his evidence yet he insists that he wants to testify, in a case where it is apparent that he is mourning more than the bereaved.
39. Therefore this court finds that Mr. Jackson Kimeu Kakonzi has no recognizable stake in this matter and his prayer for joinder is declined.
40. The upshot is that the applications dated 2nd September 2022 and 24th November 2022 are both without merit and the same are hereby dismissed with costs to the plaintiffs.
41. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Muindi for plaintiffs/respondents



Mr. Kilonzo holding brief for Mr. Kyalo for intended interested parties

Ms. Agbaje Victoria in person being the interested party

Matata – Intended interested party/applicant

