



**Wanyonyi v Mauko; Mahaya (Aggrieved Party) (Civil Case
78 of 2005) [2023] KEELC 381 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 381 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CIVIL CASE 78 OF 2005
BN OLAO, J
JANUARY 24, 2023**

BETWEEN

BENARD WAMALWA WANYONYI PLAINTIFF

AND

SYLVESTER MUNYASI MAUKO ALIAS FESTO DEFENDANT

AND

VINCENT SAKWA MAHAYA AGGRIEVED PARTY

RULING

1. This court delivered its judgment in this dispute involving the land parcel No East Bukusu/West Sangolo/724 between Benard Wamalwa Wanyonyi (the plaintiff herein) and Festo Mauko (the defendant herein) on November 14, 2019. The following disposal orders were issued:
 1. The plaintiff's claim is dismissed.
 2. The defendant's counter claim is allowed and a declaration is issued that he is entitled to 14 acres out of the resultant sub-divisions of the original land parcel No East Bukusu/West Sang'alo/724 including the suit land which is held in trust for the Estate of the late Mauko Khatoro.
 3. The trust is hereby determined and the plaintiff shall, within 30 days of this judgment, execute all the relevant transfer documents to facilitate that registration in the name of the defendant and in default, the Deputy Registrar shall do so.
 4. The defendant is entitled to costs of the dismissed plaint and the counter-claim.
2. A decree thereafter followed and execution proceedings commenced.



3. I now have for determination a Notice of Motion dated May 10, 2022 and filed by Vincent Sakwa Mahaya (the Applicant/Interested Party) predicated under the provisions of articles 48 and 50 (1) of *the Constitution*, section 80 of the *Civil Procedure Act*, order 22 rule 22 and order 45 rule 1 of the *Civil Procedure Rules* in which he seeks the following orders:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to enjoin the aggrieved party/intended Interested party or in such other capacity as the Honourable Court may deem fit and the law firm of Maina & Macharia Advocates LLP be granted leave to represent him.
 4. That the proceedings judgment and subsequent decree dated December 14, 2019 and issued on September 7, 2020 be reviewed, set aside and/or vacated ex-debito justitiae.
 5. That the costs of this application be provided for.
4. The application is supported by the Applicant/Intended Interested party's affidavit and premised on the grounds set out therein.
5. The gravamen of the application is that following this Court's judgment, the defendant is entitled to 14 acres out of the resultant sub-division of the land parcel No East Bukusu/West Sang'alo/724 and the Land Registrar Bungoma has already addressed to him a letter dated April 26, 2022 requiring him to surrender the title deed for the land parcel No East Bukusu/West Sang'alo/3038 which is registered in his names within 14 days. That should he fail to do so, the Land Registrar will dispense with such surrender vide a Gazette Notice and proceed to transfer and register the land parcel No East Bukusu/West Sang'alo/3038 in the name of the defendant with the resultant effect that the Applicant/Intended Interested Party's proprietary rights in that parcel of land will be infringed yet he was not given an opportunity to be heard in these proceedings as required by the rules of Natural Justice and the Audi Alteram Partem principle. That the proceedings and judgment in this matter are flawed because all the relevant and Interested Parties were not enjoined in this suit. That the plaintiff and the defendant were fully aware of the Applicant/Intended Interested Party's registration and proprietorship of the land parcel No East Bukusu/West Sang'alo/3038 but intentionally concealed that fact from this Court. That since the judgment affects the Applicant/Intended Interested Party's right and the rules of Natural Justice demands that no person should be condemned un-heard while Order 45 of the Civil Procedure Rules allows a non-party to institute review proceedings, this application should be allowed as the Applicant/Intended Interested Party has an identifiable stake and he will suffer serious and substantial loss should the application not be granted and the defendant as decree holder proceed with execution. That he has approached this Court without unnecessary delay having only become aware of the adverse orders issued against him when he received the letter by the Land Registrar addressed to him on April 26, 2022.
6. Annexed to the application are the following documents:
 1. Copy of the judgment delivered on November 14, 2019.
 2. Copy of the letter addressed to Applicant/Intended Interested party and two (2) others by the Land Registrar Bungoma requiring them to surrender title deeds for the land parcel No East Bukusu/West Sang'alo/3038 and 3041.
 3. Copy of the title deed to the land parcel No East Bukusu/West Sang'alo/3038 registered in the name of the Applicant/Intended Interested Party on June 6, 2018.



4. Memorandum of sale between the plaintiff and the Applicant/Intended Interested Party in respect of the land parcel No East Bukusu/West Sang'alo/3038 dated May 24, 2018.
5. Orders issued by Asati J on May 17, 2022.
7. The application is opposed by the defendant who, by way of his replying affidavit dated July 5, 2022 he has deponed, inter alia that this application is simply filed to deny him from enjoying the fruits of the judgment. That the plaintiff and Intended Interested Party (Applicant) were both aware that the land parcel No East Bukusu/West Sang'alo/3038 was the subject of this litigation and there was a restraining order. That the transfer of the said land was solely meant to defeat his claim and at no time during the hearing of this case did the plaintiff ever disclose to the Court that he had transferred the land parcel No East Bukusu/West Sang'alo/3038 to the Applicant. This Court has already found that the registration of the plaintiff as owner of the land parcel No East Bukusu/West Sang'alo/724 as well as the subsequent sub-division was tainted with fraud and therefore the plaintiff did not pass a good title to the Applicant who has not preferred any appeal against the judgment and from the facts, the transfer of the land parcel No East Bukusu/West Sang'alo/3038 was irregular, fraudulent and unlawful and the County surveyor Bungoma has already visited the site and advised that the said title ought to be cancelled and it is in that respect that the letter dated April 26, 2021 has been addressed to the Applicant.
8. Annexed to the replying affidavit are the following documents:
 1. Order dated March 31, 2010 issued in Bungoma Chief Magistrate's Court Civil Case No 570 of 2009.
 2. Certificate of official search in respect of the land parcel No East Bukusu/West Sang'alo/3038 showing that it was registered in the name of the plaintiff on June 3, 2004.
 3. Green card in respect to the land parcel No East Bukusu/West Sang'alo/3038 showing that it was transferred to the Applicant on June 6, 2018.
9. The plaintiff did not file any response to the application.
10. When the application was placed before Asati J on May 17, 2022, she directed that it be canvassed by way of written submissions to be filed on or before June 16, 2022. Meanwhile, the judge granted an order staying execution of the judgment pending the hearing and determination of this application.
11. Submissions were subsequently filed both by Mr Macharia instructed by the firm of Maina & Macharia Advocates for the Applicant and by Mr Murunga instructed by the firm of J. O. Makali Advocates for the defendant. As stated above, the plaintiff did not file any response to the application and therefore his counsel Mr J. B. Otsiula did not file any submissions.
12. I have considered the application, the rival affidavits and the submissions by counsel.
13. I consider the following to be the issues that call for my determination in this application:
 1. Whether the Applicant has the requisite locus standi to file this application.
 2. Whether the Applicant has a stake in the subject matter in dispute.
 3. What orders should this Court make.
14. The Applicant seeks orders that the judgment delivered on November 14, 2019 and the subsequent decree be reviewed, set-aside and/or be vacated ex-debito justitiae.



15. The term “locus standi,” was defined in *Alfred Njau & 5 others -v- City Council of Nairobi* 1983 KLR as follows:

“The term locus standi means a right to appear in Court and, conversely, as is started in Jowitt’s Dictionary Of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

Whether or not the Applicant has the requisite locus standi in these proceedings turns, in my view, on whether he has any identifiable interest in the land parcel No East Bukusu/West Sanga’lo/3038. In support of his application, the Applicant annexed a copy of the title deed issued in his name on June 6, 2018 in respect to the land parcel No East Bukusu/West Sang’alo/3038 together with an agreement executed between him and the plaintiff on May 21, 2018. It is common ground that the land parcel No East Bukusu/West Sang’alo/3038 is among the sub-divisions of the land parcel No East Bukusu/West Sang’alo/724 which this Court has already decided that the plaintiff holds 14 acres thereof in trust for the defendant. It is also common ground that the Applicant was not a party to this suit. In my judgment in this dispute which only involved the plaintiff and the defendant, this Court after dismissing the plaintiff’s case entered judgment in favour of the defendant as follows in paragraph 2:

“The defendant’s counter-claim is allowed and a declaration is issued that he is entitled to 14 acres out of the resultant sub-division of the original land parcel No East Bukusu/West Sang’alo/724 including the suit land which is held in trust for the Estate of the late Mauko Khatoro.”

16. The Applicant has approached this court as an Interested Party. Such a party was described by the Supreme Court of Kenya in the case of *Francis Kariuki Muruatetu & Another -v- R & Kenya National Commission of Human Rights & Others* 2016 eKLR as:

“... one who has a stake in the proceedings, though he or she was not a 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.”

17. As a party who holds the title to one of the resultant sub-division of the land parcel No East Bukusu/West Sang’alo/724, there can be no doubt that the Applicant has an identifiable stake in the subject of this suit. It must be remembered that article 40 of the *Constitution* protects the right to property while article 50 guarantees the right to a fair hearing. Therefore, irrespective of how the Applicant may have obtained the title to the land parcel No East Bukusu/West Sanga’lo/3038, the Rules of Natural Justice demand that he ought to have been heard before any adverse orders are made with respect to that land. I have no doubt in my mind therefore that the Applicant has the locus standi to approach this Court for any appropriate remedy with regard to the land parcel No East Bukusu/West Sang’alo/3038 to which he holds a title. How he obtained the title should then be a matter to be determined in a hearing of which he has knowledge as is required vide the Audi-alteram Partem principle which dictates that no person should be condemned unheard.
18. Having said so, the Applicant has approached this Court seeking review, setting aside and/or vacation of the judgment herein ex-debito justitiae. Before I address that issue, I must find, which I hereby do, that having determined that the Applicant has the requisite locus standi, it follows that the leave must be granted, which I hereby do, to the firm of Maina & Macharia Advocates LLP to come on record and represent him.



19. With regard to setting aside of the judgment herein, the applicant was not a party to the proceedings. In my view, the remedy for setting aside a judgment presupposes that the person approaching the Court for such a remedy was a party in the proceedings but due to failure of service upon him or due to his non-appearance having been served, the judgment was enlisted against him ex-parte. I say so because order 10 of the [Civil Procedure Rules](#) is headed:

“Consequence of non-appearance, default of defence and failure to serve.”

The provisions then goes on to enumerate how judgment can be entered against a defendant who does not file a defence. Order 10 Rule 11 then provides that:

“Where judgment has been entered under this order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

20. Order 12 of the [Civil Procedure Rules](#) on the other hand is headed thus:

“Hearing and consequence of non-attendance.”

It provides for the consequences where a party does not attend court during the hearing. Under Order 12 Rule 1, it is provided that:

“If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, neither party attends, the Court may dismiss the suit.” Emphasis mine.

Order 12 rule 7 of the [Civil Procedure Rules](#) then states that:“Where under this order judgment has been entered or the suit has been dismissed, the Court, on application may set aside or vary the judgment or order upon such terms as may be just!

It seems to me that the remedy of setting aside a judgment can only be available to one who was a party but who, for one reason or another did not file any pleadings, nor attend the Court during the hearing. I am doubtful if such a remedy can be available to a person, such as the Applicant herein, who was not a party to the proceedings right from the start when they were initiated.

21. The Applicant herein is however entitled to approach this Court for a review of the judgment herein that is because, Order 45 Rule (11) of the Civil Procedure Rules provides that:

“Any person considering himself aggrieved –

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the Court which passed the decree or made the order without unreasonable delay.” Emphasis mine.



22. In *Accredo Ag & others -v- Stefano Uccelli & another* Ca Civil Appeal No 36 of 2015 [2017 eKLR], the Court stated thus:

“Our understanding of order 45 is that it has two distinct parts and accords locus standi in review application to two distinct persons. Under sub-rule (1) thereof, the review application may be brought by ‘any person considering himself aggrieved’ and under sub-rule (2), by ‘a party who is not appealing from the decree or order.’ Consequently, Order 45 recognizes that review may be sought either by, a non-party or by a party to the proceedings”.

The court went on to add that:

“While some may argue that recognition of applications for review instigated by non-parties opens the flood gates to interference by busy bodies, it is to be remembered that the person aggrieved is required to meet certain conditions. Under sub-rule (1)(b), the aggrieved person instituting such review must satisfy the Court that:

- a. There has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or
- b. There is some mistake or error apparent on the face of the record, or
- c. There exists sufficient reason to review the decree/order

In short, he has to prove that although he may be a non-party, he is no busy body and that the decision he seeks to have reviewed affects his cognizable rights.” Emphasis mine.

As I have already stated above, this Court’s judgment sought to be reviewed by the Applicant made orders with regard to the land parcel No East Bukusu/West Sang’alo/724 and its’ resultant subdivisions which include the land parcel No East Bukusu/West Sang’alo/3038 which is registered in the Applicant’s name. He was not a party to this suit but following the said judgment, the Land Registrar Bungoma addressed him a letter dated April 26, 2022 directing him to surrender his title deed for cancellation. Clearly, he cannot be a busy body and although this Court has already made a determination on the title to the land parcel No East Bukusu/West/Sang’alo/3038 amongst others, the power of review enables this Court for, amongst other grounds, “sufficient reason,” to review its judgment.

23. In opposing the application, the defendant has deponed as follows in paragraph 17 of his replying affidavit:

17. “That I know of my own knowledge that both the Applicant and the Plaintiff herein were aware that the land parcel No E. Bukusu/West Sangalo/3038 was the subject matter of proceedings before this honourable Court but nevertheless went ahead to transact on the aforesaid land whilst aware of the existence of an order restraining him from interfering with the suit property.”

From the record herein, however, while it is true that a caution had been lodged on the original title No East Bukusu/West Sanga’lo/724 by the defendant on October 21, 2004 claiming a beneficiary interest therein, the certificate of search issued on April 26, 2013 in respect to the land parcel No East Bukusu/West Sang’alo/3038 had no inhibitions, cautions nor restrictions lodged against the title. The Applicant was therefore entitled to believe, as he has deponed in paragraph 6 of his supporting



affidavit, that he had done “due diligence’ through the search and he could not therefore have known that the land parcel No East Bukusu/West Sang’alo/3038 “was embroiled in an ownership dispute in the instant suit.”

24. Judgment having already been delivered in this case, the other issue for consideration is whether in fact the applicant can be enjoined in these proceedings. Counsel for the defendant has submitted that it is too late to enjoin the Applicant herein. This is how counsel has put it at page 2 of his submissions:

“It is our humble submission that since the plaintiff’s registration as the proprietor of LR No East Bukusu/West Sang’alo/724 and the subsequent sub-divisions was (sic) declared to have been obtained through fraud, there will be nothing capable of being heard as the substratum has been cancelled therefore the plaintiff did not pass a good title to the Applicant herein.”

It is correct, as submitted by counsel for the defendant, that this Court has already made a finding that the plaintiff held the land parcel No East Bukusu/West Sang’alo/724 and its resultant sub-divisions which include the land parcel No East Bukusu/West Sang’alo/3038 in trust for the defendant. However, Order 1 Rule 10(2) of the Civil Procedure Rules provides that:

“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.”
Emphasis mine.

It is clear from the above that a person can be joined in proceedings “at any stage”. While some Courts have held that a court becomes functus officio once it has delivered judgment – see *Kenya Airports Authority -v- Mitu-bell Welfare Society & Others* 2016 eKLR, the predominant view now seems to be that there are some circumstances where a person can be joined even after judgment. In *Mercy Beach Ltd -v- The Attorney General & Others* 2018 eKLR, the Court of Appeal stated that:

“However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse order have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. In joining such a party, a Court would also have to set aside the judgment entered to give him/her an opportunity to be heard.”

In *Rose Wakanyi Karanja & Others -v- Geoffrey Chege Kirundi & Another (everton Coal Enterprise Ltd – proposed Interested Party)* C.A. Civil Appeal No 172 of 2010 (2020 eKLR), the same Court held a similar view. Guided by the above precedents, it is obvious to this Court that the applicant can be enjoined in these proceedings even though a judgment has already been delivered. And in circumstances such as obtain in this case where the Applicant holds a title to the land parcel No East Bukusu/West Sang’alo/3038 yet that proprietary right has been affected by this judgment in which he was not a party, it is in the interest of justice that he be enjoined. This will “effectually and completely” enable the Court to adjudicate upon and settle all issues involved in this dispute over the land parcel No East Bukusu/West Sang’alo/724 and all the resultant sub-divisions including land parcel No East Bukusu/West Sang’alo/3038. It will also prevent any likely cause of proliferated litigation by persons whose rights to any of those parcels of land could be adversely affected by this judgment. It is not lost to this Court that in the cause of this judgment I observed that another parcel of land being East



Bukusu/West Sang'alo/3041 was registered in the name of a person who was not a party in this case. And therefore in order to protect that person's interest, I made the following order at page 22:

“I also note from the Certificates of Searches produced herein that whereas parcels No East Bukusu/West Sang'alo/3038-3039 and 3040 are registered in the plaintiff's name, parcel No East Bukusu/West Sang'alo/3041 is now registered in the names of one Shadrack Wamalwa who was not a party in these proceedings. That registration was done on May 12, 2005 and shall not be affected by this judgment. I could not trace the certificate of search in respect of land parcel no East Bukusu/West Sang'alo/3037 so it is not clear whether it is still registered in the names of the plaintiff.”

The above order was made deliberately to protect whatever interest Shadrack Wamalwa has in the land parcel No East Bukusu/West Sang'alo/3041. And I use the words “whatever interests” advisedly because as is now clear from the defendant's replying affidavit at paragraphs 17, 18 and 19, the transfer of the land parcel No East Bukusu/West Sang'alo/3038 may have been done deliberately to defeat his interest in that land. In my view, it is in the interest of the defendant that the judgment be reviewed to enable him mount his own claim to the various sub-divisions of the original land parcel No East Bukusu/West/Sang'alo/724 because as is now clear, some of those sub-divisions may have been transferred to other persons who are not parties to this suit in order to defeat whatever judgment the defendant may obtain as per his counter-claim. It is also not lost to this Court that the plaintiff has not filed any response to this application and therefore, this Court must find that there is merit in the following averments in paragraphs 17 and 18 of the defendant's replying affidavit:

17. “That I know of my own knowledge that both the applicant and the plaintiff herein were aware that land parcel No East Bukusu/West Sang'alo/3038 was the subject matter of proceedings before this Honourable Court but nevertheless went ahead to transact on the aforesaid land whilst aware of the existence of an order restraining him from interfering with the suit property.”
18. “That I know of my own knowledge that the plaintiff's act of transferring the land parcel No East Bukusu/West Sang'alo/3038 to the applicant herein was solely to defeat my claim so that any judgment issued in my favour will be rendered not only academic but superfluous.”

The fact that these serious averments were not rebutted by the plaintiff clearly demonstrate that he was determined to ensure that any judgment obtained by the defendant is frustrated. It is also noteworthy that the land parcel No East Bukusu/West Sang'alo/724 was sub-divided notwithstanding that the Applicant had lodged a caution thereon on October 21, 2004 and which has not been removed even as at the time of this ruling.

25. Also of relevance in this application is that by his letter dated April 20, 2022, the Land Registrar Bungoma not only called for the surrender of the title deeds to the land parcel No East Bukusu/Sang'alo/3038 for purposes of implementing this judgment but also called for the surrender of title to the land parcel No East Bukusu/Sang'alo/3041 which is apparently in the name of one Mathasi Wanyonyi Khototo who was also not a party in this case. As at the time of this judgment, that parcel of land was registered in the name of Shadrack Wamalwa as per the certificate of search filed together with the original defence dated September 14, 2005. This Court is not even sure in whose names the land parcel No East Bukusu/West Sang'alo/3038 is currently registered. There is sufficient reason to vacate this court's judgment delivered on November 14, 2019 so that all the persons who have a stake in the various parcels of land carved out of the original land parcel No East Bukusu/West Sang'alo/724 can be brought on board in this litigation. Failure to do so will only mean that every other person who has acquired ownership of any parcel of land being a sub-division of the original land parcel No East



Bukusu/West Sang'alo/724 will approach this Court seeking orders of review of the judgment herein. That will not only be untidy but will also be an extravagant use of both this Court's resources and also an unnecessary expense on the parties.

26. The Applicant has also approached this Court without unreasonable delay. In paragraph 20 of his supporting affidavit, he has deponed that he only became aware of this Court's judgment when he received the letter from the Land Registrar Bungoma dated April 26, 2022 which directed him to his surrender the title deed to the land parcel No East Bukusu/West Sang'alo/3038. This application was filed some fourteen (14) days later on May 11, 2022 which I do not consider to be an unreasonable delay.
27. Having considered all the above, I am persuaded that the applicant is entitled to the orders sought in his Notice of Motion dated May 10, 2022. I also allow it in the following terms:
 1. The Applicant is enjoined in these proceedings as an Interested party and the firm of Maina & Macharia Advocates is granted leave to represent him.
 2. The judgment dated November 14, 2019 and the subsequent decree are reviewed and vacated forthwith.
 3. Either of the parties shall be at liberty to move this Court in any manner they deem fit or file any other action as may be necessary.
 4. Meanwhile and to preserve the subject matter herein pending the determination of this and any other suits, the Land Registrar Bungoma is hereby directed to forthwith place an order of inhibition on the land parcels No East Bukusu/west Sang'alo/3037, 3038, 3039, 3040 pending the hearing and determination of this and any other suits in which the said titles shall be in dispute or until any other orders of this Court.
 5. The plaintiff shall meet the Applicant's costs of this application.

BOAZ N. OLAO

JUDGE

24TH JANUARY 2023

Ruling dated, signed and delivered by way of electronic mail at BUSIA ELC on this 24th day of January 2023.

Explanation Notes:

This ruling was due on 6th October 2022 a dated which had been given to the parties before my transfer to BUSIA from BUNGOMA on 3rd October 2022. The delay was investable in the circumstances and is regretted.

BOAZ N. OLAO

JUDGE

24TH JANUARY 2023

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