



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO. 47 OF 2020 (O.S)

MISHACK KIBE MUIRURI.....1ST PLAINTIFF
JOHN NJOROGE GACHO.....2ND PLAINTIFF
FRANCIS KINUTHIA KIBE.....3RD PLAINTIFF
JULIUS KANYIRI WAMBUL.....4TH PLAINTIFF
MERCY MUGECI MBURU.....5TH PLAINTIFF

(suing on behalf of 850 others)

VERSUS

MURANG'A COUNTY GOVERNMENT.....1ST DEFENDANT
LAND REGISTRAR MURANG'A.....2ND DEFENDANT

AND

DELMONTE KENYA LIMITED.....PROPOSED INTERESTED PARTY/APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated **15th November 2021** by the proposed Interested Party/ Applicant seeking for orders that;

- 1. That this Honourable Court be pleased to review or set aside the Ruling and order given by the Honourable Lady Justice Kemei on 15th July 2021.***
- 2. That this Honourable Court be pleased to join Del Monte Kenya Limited as an Interested Party to this suit***
- 3. That the cause of this Application be in the cause.***

The Application is premised on the grounds that the Proposed Interested Party/Applicant has come across new and important

information which could not have been obtained at the time it made its first Application for joinder. That vide its Ruling delivered on **15th July 2021**, this Court (differently constituted) held that the proposed Interested party's argument that the Plaintiff's/Respondent's injunction was targeted at its property was speculative as the Land Reference Numbers referred to by the Plaintiffs were different from those of the properties it owned. That it has confirmed without a doubt that the parcels numbers cited by the Plaintiffs in this suit refer to part of Land Reference **No. 12157** which belongs to the Proposed Interested Party. Further that the Plaintiffs/Respondents have referred to the parcel Numbers used in the area survey map of **1956** and which is no longer in use. Further that in **1974** the Parcel Numbers referred to by the Plaintiffs were amalgamated and together with other parcels formed **L.R 12157**. That the initial Application was filed and heard before it could have enough time to gather all the necessary information and the aforementioned information has since come to light after the hearing and determination of the initial Application for joinder.

In his supporting Affidavit, **Harry Odondi** the Proposed Interested Party's legal officer averred that in the suit the Plaintiffs/Respondents had cited different land reference numbers from those of the proposed party's properties but gave a geographical description which could only refer to its properties. He averred that he has been informed by **Mr. Thuo** Advocate that he learnt from one **Ms. Wamucii** who works at the land registry that **L.R 9213/1 & 2** do not exist in Murang'a Land Registry. Further that the Proposed Interested Party through its Advocates has made attempts seeking suitable clarifications but the **1st & 2nd** Defendants have failed to respond to their letters.

It was contended that the Plaintiffs are attempting to enter **L.R 12157** that belongs to the Proposed Interested Party to continue with quarrying activities from where they left after the Court issued an injunction against them in Murang'a **ELC Appeal 25 of 2019**. That the Plaintiffs/Respondents have been referring to the area Survey Map of **1956** and which is no longer in use as in **1974** the Parcel Numbers referred to by the Plaintiffs were amalgamated and together with other references formed **L.R 12157** and the property is the same that was the subject of **Kandara MCL& E No. 26 of 2019**. He further averred that unless the proposed interested party is joined the Court may proceed to hear the Plaintiffs/Respondents injunction in his absence while in truth the suit is targeted at the Proposed Interested party. That the **1st** Defendant/Respondent has failed to oppose the suit and its lack of interest underscores the fact that the **1st** Defendant is aware that it does not own the suit property.

The Proposed Interested party through **Grishon Ng'ang'a Thuo** its Advocate filed a supplementary Affidavit sworn on **8th December 2021** and attached a formal order dated **15th July 2021**.

The **1st** Defendant/Respondent opposed the Application and filed grounds of opposition dated **8th December 2021** on the grounds that the Applicant has not introduced any new evidence which could not be found with due diligence, Applicant has not faulted the Ruling sought to be reviewed and has not satisfied to law to warrant review nor has it demonstrated proper interest to be enjoined.

In further opposing the Application, the Plaintiff/Respondent through the **1st** Plaintiff **Mishack Kibe Muiruri** swore a Replying Affidavit on **17th December 2021** and averred that the Applicant had the opportunity to address any issue from the time it filed its Application of **16th November 2021**. That the instant Application has been brought with no clear grounds regarding the Applicant's interest in the suit property as the only documents introduced are letters trying to inquire whether the suit land is the same as the one subject of **Murang'a ELC Appeal No. 25 of 2019** with no confirmation. That the substratum and issue raised in the instant Application are the same as the ones raised in the Application dated **16th June 2021** that has already been heard and determined. That the Applicant has admitted that it is not the registered owner of the suit land and thus it has no stake in the suit land hence need to be joined in the suit.

The proposed Interested party/ Applicant filed a further Supplementary Affidavit sworn by **Harry Odondi** who averred that the initial joinder Application was filed in urgency and it was determined swiftly and thus they did not have time to dig up relevant information which it has since managed to obtain. That it took immense effort to obtain documents linking the parcel numbers as former employees who had a better grasp had since left. That the suit properties are in the Applicant's possession and the same are currently under pineapple crop. That it is true that the Applicant has previously stated that it does not own the suit properties but that the same was strictly limited to the parcel of land owned and occupied by the **Ndoges** the Applicant's former director.

Further that bringing information that shows part of the suit property belong to the **Ndoges** they have confirmed of their own volition that they are claiming the Applicant's land and that there is no connection between the County Government's letter and the dispute herein.

The Application was canvassed with by way of written submission which the Court has carefully read and considered. The Court has also read and considered the Application, the Affidavits and the relevant provisions of law and finds that the issue for determination is *whether the Proposed Interested party is entitled to the Review orders sought*. The applicable law for review has been provided for under **section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. Section 80** of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved:

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 rule 1 sets out the grounds for review as follows:

“(1) 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 judgment to the court which passed the decree or made the order without unreasonable delay.”

Section **80** gives the Court the power of review while Order **45** sets out the rules. The rules restrict the grounds for review. The Proposed Interested Party has sought for review of the Court's Ruling on the grounds that it is in possession of new and important evidence as it has discovered that the Land Reference Numbers referred to in the Plaintiff's pleadings namely **L.R 9213/1 and 9213/2** referred to are derived from **1956** survey Plan for the area suit property is situate and that the same is no longer in use and in the current survey plan issued in **1974** and that is in use the suit property is Land Reference number **12157** which it owned. Was this then important and new evidence that was not within the Proposed Interested party's knowledge"

Review is limited to various grounds amongst them new and important evidence. The Court has perused the Ruling delivered by **Hon.Lady Justice J.G Kemei** in which the Court held that ;

“although I subscribe to a liberal approach to joinder of a party in a suit however in this case it is the finding of the Court that the Applicant has failed to demonstrate any of the grounds for joinder cited in paragraph 15 above. It therefore becomes difficult to determine the interest or stake of the proposed interested party in the matter based on the mere belief and speculation of the Applicant .”

Further under the said paragraph 15 the Court stated that ;

In this case the proposed interested party has informed the Court that it has cause to believe that the suit property in question belongs to it . That given the size of the and it can only be referring to the proposed interested party estates/plantation. That the Plaintiffs have in the past litigated over its properties without joinder

From the above paragraphs as cited from the Court's Ruling, it is not in doubt that the joinder of the Proposed Interested party was not allowed based on the fact that it had not satisfied the Court that it has sufficient interest over the suit property and it had only been speculating over the same. It is the Proposed Interested Party's contention that it was not able to get the proper information as it had to file the initial Application in a hurry. That it has since learnt that the disparity between the Plaintiffs/ Respondent's Land reference that they are referring to and the Land Reference it is referring to is based on the fact that they are using two different survey maps with the Plaintiff's/ Respondents using the survey map from **1956**, while the same is not in use as it was changed in the year **1974**. It has further contended that it learnt of the above when the Plaintiffs /Respondents tried to enter their land and they had a meeting. The said allegations by the proposed Interested Party have not been rebutted. Further the Court has

seen the letters written to the Defendants/ Respondents and to the Plaintiff's counsel seeking clarification on the same.

Having carefully perused the initial Application, I am satisfied that this was not information that was presented to Court. It is quite clear that the nexus between the land referenced numbers can only be established by a surveyor and at this point the Court is satisfied that new and important information has been presented before it and that the same was not within the knowledge of the applicant at the time the Ruling was being made. In the case of **Salad AwaleVs...Provincial Police Officer, Coast & 3 Others [2018] eKLR** the Court held that

34. However even if that was not absolutely the case, which I hold it is, the power of the court to order review is unfettered and the court has the power to order review for any sufficient reason not necessary for error or mistake apparent on the face of the record or discovery of new and important matter or evidence. I may only add that the power for review is one of those residual powers of the court that it exercises so that injustice is not seen to prevail just because the court had delivered itself and time to appeal has lapsed or one was never pursued. That is the character to be manifested by a court of law, at all times – to do justice and leave no disclosed harm brought to its attention without being remedied.

Having carefully considered the facts and the circumstances of this case, the Court finds and holds that there is new and important evidence that has been produced and there is sufficient reason to warrant the Court review the previous orders and allow the Proposed Interested party to be joined in the suit.

The Upshot of the above therefore is that the Court finds the Application merited and the same is allowed with costs being in the cause.

It is so ordered

Dated, Signed and Delivered virtually at Murang'a this 21st day of April 2022.

L. GACHERU

JUDGE

Delivered virtually

In the presence of

.....C/Ass

.....1st & 2nd Defendant

.....1st – 5th Plaintiff

L. GACHERU

JUDGE



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