



Jackreek Enterprises Limited v Mwadime & 2 others (Sued as the Officials of Chawia Ward Minerals Community Based Organization); Mkuki Ranch Ltd (Interested Party) (Environment & Land Case 240 of 2020) [2023] KEELC 16796 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16796 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 240 OF 2020
LL NAIKUNI, J
MARCH 27, 2023**

BETWEEN

JACKREEK ENTERPRISES LIMITED PLAINTIFF

AND

STEPHEN MWADIME 1ST DEFENDANT

AUSTIN BAKARI 2ND DEFENDANT

ANNRITA MWARURA 3RD DEFENDANT

**SUED AS THE OFFICIALS OF CHAWIA WARD MINERALS COMMUNITY
BASED ORGANIZATION**

AND

MKUKI RANCH LTD INTERESTED PARTY

RULING

I. Introduction

1. The application before this Honorable Court for hearing and determination is the Notice of Motion application dated 21st October, 2022. It was instituted under a certificate of urgency by the Interested Party/Applicant herein under the provisions of Order 51, Order 45 Rule 1 (a), (b) of the [Civil Procedure Rules](#), 2010 and Sections 1A, 1B, 3A and 80 of the [Civil Procedure Act](#), Cap. 21.



II. The Interested Party/Applicant's case

2. The Interested Party/Applicant sought for the following orders:-

- a. That pending the hearing and determination of this application, this Honorable Court be pleased to issue an injunction against the 1st, 2nd and 3rd Respondents, the Chawia Ward Minerals Community Based Organization (CBO) officials namely; Mathias Mwaiyu, Enock Kerim, Juliana Raymond, Austin Bakari, Annrita Marura, Martin Machongora, Stephen Mwandime, and/or their agents, servants, employees, assignees, nominees and/or any other person claiming through them be it any leasee, licensee or invitee from trespassing, committing waste, excavating, extracting digging, opening the ground in pursuit of any mineral deposits underlying therein beneath, the surface of LR. No. 12922 CR.No.30417 and/or dealing with the said parcel of land in any manner that may be prejudicial to the applicants right enshrined under Article 40 of the Constitution herein.
- b. That pending the hearing and determination of this application, the National Environmental Management Authority NEMA, be compelled by this Honourable Court to ensure that no mining or prospecting activities is undertaken by the Respondents or any other person on or within LR. No.12922 CR.No.30417 without the requisite National Environmental Assessment License.
- c. That pending the hearing and determination of this application, the Director of mines be compelled by this Honourable Court to ensure that no mining or prospecting activities is undertaken by the Respondents or any other person on or within LR.No.12922 CR. No. 30417 without the requisite prospecting licence, retention licence, a mining licence, prospecting permit, mining permit, and/or an artisanal permit.
- d. That pending the hearing and determination of this suit, this Honorable Court be pleased to issue an injunction against the 1,2nd and 3rd Respondents, the Chawia Ward Minerals Community Based Organization (CBO) officials namely; Mathias Mwaiyu, Enock Kerim, Juliana Raymond, Austin Bakari, Annrita Marura, Martin Machongora, Stephen Mwandime, and/or their agents, servants, employees, assignees, nominees and/or any other person claiming through them be it any leasee, licensee or invitee from trespassing, committing waste, excavating, extracting digging, opening the ground in pursuit of any mineral deposits underlying therein beneath, the surface of LR. No.12922 CR.No.30417 and/or dealing with the said parcel of land in any manner that may be prejudicial to the applicants right enshrined under Article 40 of the Constitution herein.
- e. That pending the hearing and determination of this suit, the National Environmental Management Authority NEMA, be compelled by this Honourable Court to ensure that no mining or prospecting activities is undertaken by the Respondents or any other person on or within LR. No. 12922 CR.No.30417 without the requisite National Environmental Assessment License.



- f. That pending the hearing and determination of this suit, the Director of mines be compelled by this Honourable Court to ensure that no mining or prospecting activities is undertaken by the Respondents or any other person on or within LR. No. 12922 CR.No.30417 without the requisite prospecting licence, retention licence, a mining licence, prospecting permit, mining permit, and/or an artisanal permit.
 - g. That the Officer Commanding Station OCS of Mwatate Police Station be served with this order, and upon service the said OCS does ensure immediate compliance.
 - h. That this Honourable Court be pleased to grant leave to the 2nd applicant herein to amend the Counter-claim.
 - i. That costs of this application be provided for.
3. The application by the Interested Party/Applicant was premised on the grounds, testimonial facts and averments founded on the 24 Paragraphed Supporting affidavit of Onesmi Mwabule Mwakio a representative of the Interested Party herein and the four (4) annexures marked as “OMM – 1 to 4” annexed thereto. The Applicant avers that:
- a. The Respondents who were the officials of Chawia Ward Minerals Community Based Organization had trespassed on the Applicant’s land and were committing serious high scale waste in their illegal pursuit for minerals deposited thereunder.
 - b. The Respondents had whatsoever no right or authority either apparent or ostensible one to enter into the Applicant’s land.
 - c. The Respondents were purporting to be in possession of a fake, invalid, in operational and unlawful consent dated 7th June 2014 purportedly granted onto them by the Applicant herein.
 - d. The director of the Applicant had Special Power of Attorney dated 19th February 2014.
 - e. In the said Power of Attorney one, Sisty W. Mwamburi was equally appointed as a Co - donee of the said powers, and that the power was to be exercised jointly and severally by all the donee to no exclusion of any party to the power.
 - f. Despitethe said power expressly providing that the power was to be exercised jointly and severally, the said co-donee, Sisty W. Mwamburi vide a letter dated 7th June 2014 purported to issue and/or grants a consent for purposes of mining to the Respondents herein.
 - g. Its upon the issuance of the said fraudulent consent that Respondents had trespassed the Applicants’ land and started to commit massive large-scale waste on the said parcel of land.
 - h. The Applicant herein was the registered proprietor of all that said parcel of land known as LR.NO.12922 CR. NO.30417. The Applicant had been paying all the statutory dues accruing therefrom and incidental thereto, including the land rated and rents.
 - i. The Respondents their agents, principals, invitees, licensees, lessees, nominees, assignees and/or servants were conducting the mining activities on the Applicant’s land without the mandatory statutory a mining license duly issued by the relevant mining ministry.



- j. There existed no written statutory consent issued by the Applicant herein that had been issued to the Respondents' herein which was a mandatory conditional precedent prior to the issuance of the mining license by the Ministry of Mining.
- k. By way of trespass to land, the Respondents herein had taken over the Applicant's land and they had installed a militia group on the said suit property which they were using to frustrate and harass the Applicants' efforts to repossess the said land and/or to preserve the suit property from any further waste.
- l. The Respondents, their agents and/or servants, were conducting mining or prospecting activities on or within LR. No. 12922 CR. No. 30417 the Applicant's Land herein without the requisite National Environmental Assessment License issued by the National Environmental Management Authority (hereinafter referred to as "The NEMA").
- m. The Respondents, their agents and/or servants are conducting mining or prospecting activities on or within LR. No. 12922 CR.No.30417 without the requisite prospecting licence, retention licence, a mining licence, prospecting permit, mining permit, and/or an artisanal permit.
- n. Under the provision of Section 6 of the *Mining Act* No. 12 of 2016, every mineral was the property of the Republic of Kenya and was vested in the National Government in trust for the people of Kenya and as such its against public policy for the Respondents herein to arbitrarily stealing and illegally carting away the natural resources deposited on the suit property without paying the statutory dues including the statutory taxes.
- o. The Applicant had taken measures through its resolution dated 19th September 2022 to protect its interests and rights enshrined under the provision of Article 40 of the *Constitution* of Kenya, 2010 and it had thus issued a notice to vacate from its land dated 19th September 2022 to the following trespassers:
 - i. Mathias Mwaiyu.
 - ii. Enock Kerim.
 - iii. Juliana Raymond.
 - iv. Austin Bakari.
 - v. Annrita Marura.
 - vi. Martin Machongora.
 - vii. Stephen Mwandime; and
 - viii. Chawia Minerals Community Based Organization.
- p. Despite issuing the Respondents with the said notice to vacate its property, the Respondents, their agents, servants, employees, nominees, licensees and/or invitees had refused, failed and/or neglected to heed to the said notice and they are continuing to commit further large - scale waste on the suit property and mining without a valid license.
- q. Since the Respondents were carrying out mining activities without the requisite mining license, it was thus imperative for this Honorable Court to grant leave to the Applicants herein to amend its Complaint and enjoin the Director of Mining as a substantive party to these proceedings.



- r. The Applicants had been made aware that Chawia Ward Minerals Community Based Organization(CBO) carried out an election on the 22nd December 2021 that returned the following individuals that is.
- i. Mathias Mwaiyu.
 - ii. Enock Kerim.
 - iii. Juliana Raymond.
 - iv. Austin Bakari.
 - v. Annrita Marura.
 - vi. Martin Machongora.
 - vii. Stephen Mwandime as the duly elected officials of Chawia Ward Minerals Community Based Organization (CBO) thus necessitating the need to amend the plaint so as to bring the suit in to conformity with the new reality and to include Chawia Minerals Community Based Organization as a substantial party as well.
- s. Following the new development, the Applicant would also seek leave to amend in the Plaint and include the Director of mining as a party to the suit.
- t. This application would not occasion any prejudice to the Respondents. It was in the interest of justice and fairness that the orders sought be granted as prayed. This Court was posed and seized with sufficient jurisdiction to grant the said prayers.

III. The Respondent's case

4. On 4th November, 2022, Stephen Mwandime, the chairperson of the respondents known as Chawia Ward Mineral Community Organization filed a 15 Paragraphed Replying Affidavit responding to the application and four (4) annexures marked as "SM – 1 to 4" annexed thereto. The Deponent averred that: -
- a. The application was fatally defective, incompetent an afterthought and an abuse of the court process.
 - b. Contrary to the averments by the applicant, on 17th June, 2014 the Interested Party/Applicant herein granted a mining and Prospecting Consent to the Respondents to prospect and carry out mining activities in the suit land marked as "SM – 1".
 - c. Upon getting the consent the Respondent applied to National Environment Management Authority for Environmental Impact Assessment Licence and were issued with a Licence.
 - d. On or about the 28th December, 2019 the Interested Party/Applicant issued a Notice to vacate letter dated 20th December, 2019 purporting that the Respondents had flouted some regulations.
 - e. On or about the year 2021 the Interested Party/Applicant through a proxy company with a view of ejecting the Respondents from the subject suit of land applied for Environmental Impact Assessment Licence but the same was rejected and/or turned down for reasons that the Respondents had already been issued by a licence.



- f. The Respondent had applied for a mining licence and had even paid for the same vide receipt Number 3659649.
- g. The Applicant had come to court with unclean hands in that, if at all the Respondent was illegally in the subject suit parcel, the question that needed to be answered was why wait until the year 2022 yet the Respondent had been carrying on mining activities since the year 2014.
- h. The application was made rather too late in the day. Thus, it was in the interest of Justice that they went into the hearing of the main suit rather than drag the matter with unnecessary applications.
- i. The application to amend the Plaint at this stage was meant to further frustrate the Respondent as this would mean that parties would have to amend their pleadings hence further delay the hearing and determination of this suit.
- j. There were interim orders in place which had been extended from time to time and the Respondent had never violated and or acted to contrary of the orders of the honorable Court.

IV. Submissions

- 5. On 7th October, 2022 while all parties were present in Court, they were directed to file their written submission as a way of disposing the said Notice of Motion application dated 21st October, 2021. However, it is instructive to note that none of the parties had filed their written submissions by the time the court retired to write the ruling hence the Court proceeded without them on record.

V. Analysis and Determination

- 6. I have carefully read and considered the pleadings herein, the relevant provisions of the Constitution of Kenya, 2010 and statutes made by the Learned Counsels. In order to arrive at an informed, reasonable and fair decision, the Honorable Court has framed the following three (3) issues for its determination. These are:-
 - a. Whether the Notice of Motion dated 21st October, 2022 by the Interested Party/Applicant meets threshold required of a temporary injunction under Order 40 Rules 1(a) of the Civil Procedures Rules, 2010.
 - b. Whether the Honorable Court should grant leave to the Interested Party/Applicant herein to amend the Counter - Claim?
 - c. Who bears the costs of the application dated 21st October, 2022?

Issue a). Whether the Notice of Motion dated 21st October, 2022 by the Interested Party/Applicant meets threshold required of a temporary injunction under Order 40 Rules 1(a) of the Civil Procedures Rules, 2010.

- 7. The application herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or



- b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
8. The principles applicable in an application for an injunction were laid out in the celebrated case of “*Giella v Cassman Brown & Co Ltd* (1973) EA 358, where it was stated:-
- “First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
9. The three pre - conditions set out in the *Giella* case (supra), need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “*Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR,
- “These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Limited v Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.
10. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in *MRAO Limited v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125,
- “So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”
11. In the instant case, it is not in dispute that the Interested Party/Applicant is the registered proprietor of the said parcel of land LR. NO.12922 CR. NO.30417. Further to this, it’s a fact that the Applicant has been paying all the statutory dues accruing therefrom and incidental thereto, including the land rated and rents. It is alleged that the Respondents who are the officials of Chawia Ward Minerals Community Based Organization have trespassed on the Applicant’s land and they are committing serious high scale waste in their illegal pursuit for minerals deposited thereunder. It is further alleged



- that the Respondents are purporting to be in possession of a fake, invalid, in operational and unlawful consent dated 7th June 2014 purportedly granted onto them by the Applicant herein. The allegation is that it is upon the issuance of the said fraudulent consent that Respondents have trespassed the applicants' land and started to commit massive large-scale waste on the said parcel of land.
12. The Respondent on the other hand contends that contrary to the averments by the Interested Party/Applicant, on 17th June, 2014 the Interested Party/Applicant herein granted a mining and Prospecting Consent – marked as “SM – 1” to the Respondents to prospect and carry out mining activities in the suit land. Upon getting the consent the Respondent applied to National Environment Management Authority for Environmental Impact Assessment Licence and were issued with a Licence. On or about the 28th December, 2019 the Interested Party/Applicant issued them with a Notice to vacate letter dated 20th December, 2019 purporting that the Respondents had flouted some regulations. The Respondents wrote back to the Interested Party/Applicant vide a letter dated 23rd December, 2019 addressing all the issues that were the subject of the Notice to Vacate. On or about the year 2021 the Interested Party/Applicant through a proxy company with a view of ejecting the Respondents from the subject suit of land applied for Environmental Impact Assessment Licence but the same was rejected and or turned down for reasons that the Respondents had already been issued by a licence. The Respondent contended that the Applicant had come to court with unclean hands in that, if at all the Respondent was illegally in the subject suit parcel, the question that needed to be answered was why wait until the year 2022 yet the Respondent had been carrying on mining activities since the year 2014.
13. In the case of “*Mbutbia v Jimba credit Corporation Limited* 988 KLR 1, the Court held that:-
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
14. Similarly, in the case of “*Edwin Kamau Muniu v Barclays Bank of Kenya Limited* the court held that:-
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
15. Regarding the first pre - condition, the Interested Party/Applicant has established that it is the lawful registered Proprietor of the sit Property but at the same time Court takes cognizance of a consent dated 7th June, 2014 as pertaining to the operation of the mining entered into by the parties but which is in high dispute. In the long run, and during the full trial, the Court will definitely need to critically scrutinize the terms and conditions upon which this Consent was entered by the parties entered. It is a “pari material” issue to be left hanging. In the meantime, I find that the Interested Party/Applicant has established that they have a prima facie case with a probability of success and hence need to be granted the orders as prayed.
16. With regards to the second limb of the Court of Appeal in *Nguruman Limited* (supra), held that,
- “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that



is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

17. On the issue whether the Interested Party/Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The judicial decision of the case of “*Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

18. Quite clearly, the Applicant would be able to be compensated through damages as he has shown the court that its rights to the suit property by the by the continuous occupation . He has therefore satisfied the second condition as laid down in Giella’s case. The Interested Party/Applicant shown from deeds that they are not interested anymore on sustaining this relationship with the Respondents. Despite having issued a Notice to vacate from the suit land it has accused them of trespassing on its land. As things stand right now, it has to demonstrated that irreparable injury will be occasioned to them if an order of temporary injunction is not granted.

19. Thirdly, the Interested Party have to demonstrate that the balance of convenience tilts in their favour. In the case of “*Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

20. In the case of: “*Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the Court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the



greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

21. The decision of “*Amir Suleiman v Amboseli Resort Limited* [2004] eKLR where the Learned Judge offered further elaboration on what is meant by “balance of convenience” and stated

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

22. Bearing this in mind, in the instant case, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the dispute between the parties. I have not also had the opportunity to interrogate the annexures to the Respondent’s Replying Affidavit.

23. In the case of:- ”*Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another* [2019] eKLR” where the court in deciding on an injunction application stated:-

“circumstances for consideration before granting a temporary injunction under Order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

24. As already informed by the Counsel for the Respondent, I am convinced that the orders the Interested Party/Applicant seeks had already been granted. Therefore, by granting the said orders as sought herein, the Court may just be extending the interim orders already issued before. Thus, I find that the balance of convenience tilts in favour of the Interested Party/Applicant and thus proceed to grant the injunctive orders as prayed.

Issue No. b). Whether the court should allow the application for amendment of the Counter Claim.

25. The general power to amend pleadings draws from the provision of Section 100 of the *Civil Procedure Act*, 2010. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and with leave of Court in line with criteria set out under the provision Order 8 Rule 3 of the Civil Procedure Rules.

26. Order 8 rule 5 of the *Civil Procedure Rules* provides as follows: -

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”



27. The Court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's *Precedents of Pleading*, 12th Edition, which provides as follows concerning amendment of pleadings:

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

28. Although, the Interested Party/Applicant never invoked the provisions of Order 8 Rules 3 of the *Civil Procedure Rules*, 2010 as stated above, they sought for leave to amend their Counter Claims as to capture the latest issues that had not been raised before. The Respondent has objected to the amendment solely on the ground the application to amend the Counter Claim at this stage was meant to further frustrate the Respondent as this would mean that parties would have to amend their pleadings hence further delay the hearing and determination of this suit. In my own view, and based on the provision of Article 159 (2) (d) of the *Constitution* of Kenya, 2010, I see no strong basis to deny the Interested Party/Applicant its fundamental right towards attaining justice in the long run. Therefore, I find that the prayer on the amendment is valid and the Applicant has proved its case.

ISSUE c). Who will bear the Costs of the application.

29. It is now well established that issues of costs are at the discretion of courts. Costs mean an award that a party is granted upon the conclusion of a legal action and/or proceedings of any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events, it means the results of a legal action (see the Court of Appeal cases of “*Rosemary Wambui Munene v Ibururu Dairy Co - operatives Societies Limited* (2014) eKLR; *Cecillia Karuru Ngayo v Barclays Bank of Kenya Limited* (2016) eKLR and in the Supreme Court case of: “*Jasbir Rai Singh Rai v Tacharlon Singh* (2014) eKLR)

30. In the instant case, the honorable Court finds that the Applicant has fulfilled the conditions set out under Order 40 Rule 1, of the *Civil Procedure Rules*, 2010 and this application has been allowed and hence costs shall abide the outcome of the suit.

VI. Conclusion & Disposition

31. In long analysis, the Honorable Court has carefully considered the notice of motion application by the interested party and finds that it has merit on preponderance of probability. Specifically, I order as follows:-

- a. That the Notice of Motion application dated 21st October, 2022 is deemed to have merit and hence it is allowed.
- b. That an order be and is hereby made for the Interested Party/Applicant granted leave of 14 days from the date of this Ruling to file and serve their amended Counter Claim and served upon the other parties in the suit.
- c. That upon service all the other parties be granted corresponding leave of seven 7 days to respond to the Amended Counter Claim thereafter.



d. That taking that the hearing of the matter has already commenced in earnest, any party to be at liberty to file and exchange any further documents they may deem necessary emanating from the Amended Counter – Claim and also to recall any witness for cross examination on any new issues under the provision of Order 18 rule 10 of the Civil Procedure Rules, 2010.

e. That the costs of this application shall be in the Cause.

32 It is so ordered accordingly

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF MARCH 2023.

HON. JUSTICE L. L. NAIKUNI, (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

a. M/s. Yumna, the Court Assistant.

b. No appearance for the Interested Party/ Applicant

c. No appearance for the 1st, 2nd, 3rd and 4th Respondents.

