



REPUBLIC OF KENYA



Ali v Famau; Omar (Proposed Interested Party) (Environment and Land Appeal 39 of 2021) [2023] KEELC 17794 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 39 OF 2021**

LL NAIKUNI, J

MAY 18, 2023

(FORMERLY MSA H.C. CIVIL APPEAL NO. 27 OF 2016)

BETWEEN

NASSIM ATHMAN ALI APPELLANT

AND

SWALEH MOHAMED FAMAU RESPONDENT

AND

AHMED OMAR PROPOSED INTERESTED PARTY

RULING

I. Introduction

1. The ruling before this Honorable Court for its determination is the Notice of Motion application dated 30th August, 2022 by, Mr. Swaleh Mohammed Famau, the Respondent/Applicant herein. It is brought under the dint of Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21.
2. Upon service, the Appellant and the Proposed Necessary Party filed their responses accordingly.

II. The Respondent/Applicant's case.

3. The Respondent/Applicant herein sought for the following orders:-
 - a. Spent.
 - b. The proposed necessary party/affected party is joined in these proceedings for the effectual determination of the matter in dispute in this appeal.
 - c. In the interim, an order do issue to maintain the status quo ante and thereby preserve the Respondent's structure on plot No. 62/Mkomani Squatter Settlement Scheme (part of



original plot No.67/319) of Section 1MN, by barring the Appellant or any one claiming under her, including Mr. Ahmed Omar, the Proposed Interested Party, the Proposed Interested Party, from demolishing or otherwise dealing with the Respondent's structure aforesaid, until the hearing and determination of this application, "inter partes", and ultimately the disposal of this appeal now pending hearing before court.

- d. Directions on filing and service of pleadings by the newly added Necessary party are given.
 - e. Costs are provided for.
4. The Application is based on the grounds, testimonial facts and the averments the 11 Paragraphed Supporting Affidavit of Swaleh Mohamed Famau sworn on 30th August, 2022 together with four (4) annexures marked as "A"; "B", "C" and "D" annexed thereof. He averred as follows:-
- a. The said Mr. Ahmed Omar who was the Proposed Necessary Party had re - established beacons which stood on all that parcel of land known as Plot No. 62/Mkomani Squatter Settlement Scheme (part of original plot No.67/319) of Section 1MN (Hereinafter known as "The Suit Property") without due regard of the fact that the matter of ownership of it was still under litigation. He could not have the audacity of laying his money on the suit land, or brought at his expense County Government officials to show them the structures on the suit land on 18th August, 2022 unless he had acquired or was in the process of acquiring the land from the Appellant.
 - b. The said Ahmed Omar had on several occasions threatened to come with a bulldozer and physically demolish the structure of the Deponent. He had no reason to doubt him as he had intimidated police to inaction despite his report of probable offences committed against him.
 - c. He had moved the Appellate court to strike out the appeal for inaction on the part of the Appellant and if he succeeded, the Appellant suit would stand dismissed, as the order of the Sub - ordinate court of 10th February, 2016 would be restored.
 - d. It would appear the Appellant had lost interest in the Appeal as she may have sold the suit land to the said Ahmed Omar. Otherwise, she could have done something towards prosecuting her appeal from 21st May, 2021 when this appeal was transferred to the Environment and Land Court (Appellate).
 - e. If Ahmed Omar succeeded in demolishing his late wife's structure he would have succeeded in recovering possession for the Appellant without due process. The appeal process would also be rendered nugatory.
 - f. He adopted as part of his affidavit all the grounds set out on the face of the motion for relief filed herewith as if they were reproduced herewith under oath.
 - g. Upon carrying out an official search at the Land's Registry, the proprietor of the Plot Msa/ Mkomani/62 was still registered in the names of Nassim Athuman Ali. This begged the question; why was the said proposed necessary party trespassing upon the land? This could only be so if the Proposed Necessary Party had purchased the plot from the Appellant, who could not pass good title being that the property was still under litigation.



The responses by the Appellant

5. The Appellant through a 10 Paragraphed Replying Affidavit sworn by NASSIM ATHUMAN ALI and dated 20th September, 2022 together with one (1) annexure marked as “NAA – 1” annexed hereto. It was in opposition of the application dated 30th August, 2022 by the Respondent/Applicant herein.
6. The Deponent stated as follows that:
 - a. In response to paragraph 2 of the supporting affidavit, the Appeal challenging the Magistrate’s ruling on the Preliminary Objection was yet to be determined as the Court had indicated that the ruling shall be delivered on notice.
 - b. He was not aware of the ruling delivered on 25th May 2021 annexed and marked as “NAAA – 1 “ to the Application which was served upon them on 26th August 2022.
 - c. The delay or non-action in this matter was occasioned by knowledge that the Court was yet to deliver the ruling.
 - d. He was interested and committed to prosecuting his appeal to its logical conclusion. It was in the interest of justice that he was given time to prosecute the Appeal, which he would promptly do.
 - e. His delay in the matter may be compensated in award of costs.
 - f. The subject matter was land which was very crucial and important to every person and if the appeal was struck out, that would mean loss of the land which would leave him helpless as he would not be able to approach any other authority to seek rights of his land.
7. The Appellant also responded to the application through a Replying Affidavit dated 2nd November, 2022 where he deponed that:
 - a. In reply to the contents of Paragraphs 2, 3, 4 & 5 of the supporting affidavit he stated that, the alleged claim by the Respondent was total different from the subject matter in this suit, a fact which he had already engaged the police.
 - b. In reply to the averments made under Paragraphs 6, 7 and 8 of the supporting affidavit, he stated that Respondent’s averments of the likely outcome of his Appeal herein was misplaced speculation which carried no weight and had no bearing on whether or not the Intended Necessary Party should be enjoined.
 - c. In replying to the averment of Paragraph 10 of the Supporting affidavit, he stated that the Respondent confirmed that the proprietor of Plot NO. MSA/MKOMANI/62 was still in his names and thus the proper person to be sued or defend the case.
 - d. The admission by the Respondent/Applicant herein that the title was still in his name implies that the intended joinder of the Interested Party had no substance to add to the present suit because, any claim against him was equal against him and therefore the Applicant has not proved any grounds to warrant this Court to admit the Intended Necessary Party.

IV. The response of the Proposed necessary party

8. The Proposed Necessary Party responded to the Application through filing a 17 Paragraphed Replying Affidavit sworn by Ahmed Omar and dated 12th October, 2022. He deponed that:



- a. The Notice of Motion Application and the Affidavit therein had been specifically worded to divert this Court's attention from dealing with the real issue that was the Appeal between the Appellant and the Respondent/Applicant.
- b. He was a stranger to the proceedings herein as he had never dealt with the suit property either before or during the pendency of these proceedings, whether in the Civil Suit - RMCC NO.1503 OF 2015 or H.C. CIV.APP. NO. 27 OF 2016.
- c. The process of re-establishing beacons of a property did not connote and should not be construed by this Honorable Court to mean ownership and/or process of acquiring ownership over the suit property.
- d. Further to the content Paragraph 6 above, he neither a County Government official nor was he involved in the workings of County Government officials with regards to re-establishment of beacons on the suit property.
- e. Under the contents Paragraph 4 of the Affidavit was specifically coined to portray him in bad light as he had no control over the operations of the police to whom the Respondent allegedly reported to and had taken no action against his complaint.
- f. Further and in addition to the contents of Paragraph 8 of the Replying Affidavit, the Respondent felt aggrieved by the inaction or otherwise indolence of the police officers to whom he had reported to and/or lodged his complaint with against him, he should have reported the inaction with the Independent Police Oversight Authority (IPOA) instead of lodging this misconceived and ill - advised application.
- g. He was aware that the Respondent lodged a complaint against him with Nyalı Police Station as he was summoned on 6th September, 2022 by the Directorate of Criminal Investigations.
- h. Despite all this, there was no criminal charges had been preferred against him. He admitted contents of paragraph 6 of the Affidavit and should not be dragged into matters between the Appellant and the Respondent that do not concern him.
- i. In response to paragraph 7 of the Supporting affidavit, he had never been involved in and or concerned with the prosecution and/or lack of prosecution of Civil Appeal No. 27 of 2016- Nassim Athmani Ali – Versus - Swaleh Mohamed Famau, to which he had never been a party.
- j. The Respondent herein was intentionally misleading this Honourable Court as he was not an agent of the Appellant with regards to recovery of the suit property and or defeating whether claiming the Respondent has over the suit property.
- k. The exhibit annexed to Paragraph 10 of the Affidavit and labelled as "D" being a copy of the official search conducted on 30th August, 2022, clearly confirmed that the owner of the suit property was NASSIM ATHMAN ALI, the Appellant herein.
- l. It was in the interest of justice that the Application by the Respondent/Applicant herein be dismissed with costs forthwith and the Appeal set down for Hearing at the Court's earliest convenience.

V. The Supplementary Affidavit by the Respondent/Applicant

9. The Applicant responded to the Affidavits by the Proposed Necessary Party and the Appellant through a Supplementary Affidavit filed on 18th October, 2022 where he deposed that:



- a. Following the filing of his application dated 5th September, 2022, he was served with a letter by the CEC Member for Land, Planning, Housing and Urban Renewal dated 14th September, 2022 condemning and pinned on his house on plot 62/Mkomani Squatter Settlement Scheme.
- b. His Advocates on record immediately wrote to the CEC, Land, Planning, Housing & Urban Renewal, noting to forward all necessary papers and explanations as stated out in the Advocate's letter of 19th September, 2022.
- c. On 22nd September, 2022, after service of his advocates said complaint to the CEC Lands County Government of Mombasa, the same Chief Executive wrote back to him letter Ref: No.BI/120/62 (O.N. 67/319/2022) suspending/ cancelling Enforcement Notice issued earlier to Alykhan Karmali, as they had learnt that the structure and the land on which it stood had a court dispute.
- d. The Affidavit was made to introduce these three documents and vehemently deny all the averments in Mr. Ahmed Omar's incompetent affidavit, filed in reply to his application on 12th October, 2022.

VI. Submissions

10. On 16th November, 2022 the Honourable Court in the presence of all parties directed that the application be canvassed by way of written submissions. It granted them 14 days each to file their written submissions. Pursuant to that, all parties complied and a ruling date was set for the 16th March, 2023 or on Notice accordingly.

A. The Written Submissions by Applicant

11. On 18th October, 2022, The Learned Counsel for the Respondent/Applicant through the Law firm of Messrs. Stephen (Aka Suleiman) Macharia Kimani Advocate, filed written submission dated 17th October, 2022. Mr. SM Kimani Advocates commenced by submitting that the application before the Honorable Court was brought under the provisions of Sections 1A and 3A of the [Civil Procedure Act](#), Cap. 21. It was seeking for an Order to:
 - a. Join Mr. Ahmed Omar in these proceedings, for effectual and complete determination of the issues and matter in dispute in this appeal; and, in the interim,
 - b. To make and issue an order to maintain status quo ante and thereby preserve the respondent's deceased wife's structure on plot 62/Mkomani Squatter Settlement Scheme (part of Original No. 67/319) of section I Mainland North, and,
 - c. Issue consequential directions on filing and service of pleadings by the newly added party.
 1. The Learned Counsel argued that the Application was predicated on the fact that the Respondent's deceased wife had a house on the above-mentioned plot. There was a case filed against the Respondent by one Nassim Athuman in Mombasa RMCC No. 1503/2015 regarding the said house which was dismissed on 10th February, 2016. The Plaintiff (now the Appellant) preferred an appeal in Mombasa H.C. Civil Appeal No. 27 of 2016. When the appeal was canvassed by way of written submissions before Lady Justice Njoki Mwangi, she held that the High Court had no jurisdiction to deal and referred the appeal to the ELC, Appellate side, for hearing and final disposal.



2. The Learned Counsel informed Court that on 18th August, 2022, the Proposed Necessary/Interested Party - Mr. Ahmed Omar visited the said house on Plot 62/ Mkomani Squatter Settlement Scheme (part of Original No. 67/319) of Section I Mainland North and undertook the re - establishment of beacons of the land on which sat on the Appellant's, as well as the Respondent's wife's house. He threatened to come back later to bulldoze and demolish the Respondent's wife's structure as he had reportedly acquired the Appellant's structure and the entire suit land. The Respondent complained to the police, Nyali Police Station about these threats but Mr. Ahmed Omar had been gloating that police at Nyali Police Station could not do anything to him as he had done no wrong. Indeed, this unpleasant and evasive attitude was repeated in his affidavit in reply, in which incidentally he did not admit or deny that he had purchased or was in the process of purchasing the suit land from the Appellant, nor had he denied that he visited the suit land and undertook re-establishment survey as well as made ominous threats that he would return with a bulldozer to pull down the respondent's wife's house on the suit land. He arrogantly feigned ignorance and prides in causing the Respondent mental anguish, and needless costs in seeking preservative justice from court.
 3. The Learned Counsel submitted that similarly, the Appellant in her Replying Affidavit filed on 21st September, 2022 never admitted or deny that she had sold her interests, if any, in the suit land, to the said Ahmed Omar; nor had she commenced on the alleged re-establishment survey complained of by the Respondent, or the ominous threats to demolish the Respondent's wife's house, made on the face of the application and the Respondent's supporting affidavit as well as the supplementary affidavit filed after service of the last affidavit in reply. Instead, the Appellant pleaded ignorance about the order of the High Court transferring this appeal from the High Court to the ELC (appellant side) and urged that she be allowed to prosecute her appeal. Needless to state, the Respondent filed and served on 25th August, 2022 an application to dismiss the transferred appeal, which application was set for hearing on 10th November, 2022.
 4. The Learned Counsel submitted that the issues for determination gleaned from the application and the three (3) affidavits alluded to above, are:
 - a. Was the Environment & Land Court (ELC) clothed with jurisdiction to add a Respondent to an appeal, whereas such a person was not a party in the lower court?
 - b. If issue (a) was answered in the affirmative, what pleadings should such an added party file?
 - c. What interim relief or orders should issue "ex debito justitiae" on the Respondent's application?
16. On the jurisdiction to add or join a person on appeal, the Learned Counsel contended that addition of a necessary party, or an interested party on appeal, like joining or substitution of a person as a Plaintiff or Defendant in a suit before the court of original jurisdiction, was envisaged both under the provision of Order 1 Rules 8 and 10 and Order 42 Rule 22, with power of the court of original jurisdiction and the appellate court to adjourn hearing to facilitate amendment and service of amended pleadings in original action, and the joining of the interested parties/persons as respondent(s), in the case of an appeal; and generally under the inherent jurisdiction of court. It was of course instructive that the



person to be joined as a Respondent on appeal must have been “...any person who was a party in the court from whose decree the appeal is preferred...”

17. The Learned Counsel averred that because of the above stricture in Rule 22 of Order 42 cited above, the present application was brought under the provision Sections 3A and 1A of the Civil Procedure Act (CPA), invoking the inherent jurisdiction of court. In the main, this was done because if the Court had power to join as a Respondent, or an Interested Party, a person who was a party in the court below, it followed axiomaticly and under rules of interpretation of statute law that it has powers to join on appeal a person who was not a party before the court below, in the interests of justice, or to serve the ends of justice, if the presence of such a person was necessary for the effectual and complete determination of the appeal. Examples abound, especially in representative and execution proceedings, where the court could and was empowered to join a person for effectual and complete determination of the issues in dispute, or to make orders to bind a party or parties who were not persons to the suit in the court of original jurisdiction: -

- I). Order 1 Rule 8: provides for representative suits, sanction of court and the right of an unnamed party to apply to be made a full party to such a suit.
- i. The provision of Order 1 Rule 10 of CPR: At any stage of the proceedings either upon or without an application, the court may on such terms as appear just to it, order struck out a name of a person improperly joined, or to be added a person who might or ought to have been joined in the first place, or whose presence is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.
- a. Both the provisions of Section 37 of CPA and as read with Section 45 of the Law of Succession Act. Cap. 160 'intermeddlers' could be joined post Judgement for purposes of executing against them.
- b. The provisions of Section 37 of CPA and Order 24 Rule 10 of the Civil Procedure Rules, 2010: - Execution could issue against a 'legal representative' of a deceased person, yet he/she was not a party in the original suit.
- c. Provision of Section 92 of CPA: -execution may issue against a 'surety' to the extent of his personal liability, and in such event such a surety is deemed a party within the meaning of Section 34 of the CPA.
- d. Provision of Section 79 of CPA:-a pauper(s) who had sued or defended or participated as a pauper in any civil proceedings may not be made a party on appeal, and may not even appeal as of right, except with leave of the court from which he sought to appeal, or (if such leave was refused by such court), unless special leave had been first obtained from the court before whom the appeal was to be heard.
- e. The provision of Section 78 (1) of CPA:-the Appellate court has power (subject as it performed as nearly as may be, the same duties as were conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
- f. Under the principles in the case of “Moon – Versus - Atherton (1972) EWCA Civ J0414-1, a party may be a full party in which case he or she was named on the face of the pleadings and therefore liable on an order of costs; or he may be represented by others, i.e.in the case of a representative suit, a few named



individuals acting for a group of interests, in which case the unnamed parties though ultimately bound by the decree of court, were not full parties and not subject to an order on costs.

g. The provision of Rule 75 (1), of the Court of Appeal Rules (CoAR) provide:-

“Any person who desires to appeal to the Court of Appeal shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court”.

The scheme of the provisions cited above demonstrates that:

- i) The Environment & Land Court (ELC) sitting as an Appellate Court had power to add as a 'Respondent' a person who albeit a party in the Court of original jurisdiction, had not been named in the appeal (Order 42 Rule 22).
- ii. That in Execution Proceeding, a person who was not a party in the Court of original jurisdiction could, once a grant was issued in his name or an appointment made under an instrument or deed, be joined as a 'legal representative' or an executor; or where a person had dealt with the assets of a deceased's estate, may be joined as an 'intermeddler', for purposes of execution and actualizing a decree, and the proceedings in which such an intermeddler or legal representative or executor was joined need not be the original action.
- iii. A pauper, suing or defending as such, could and may only appeal with leave of the court of original jurisdiction, failing which, with leave of the Appellate Court to which an appeal was preferred.
- iv. The Environment & Land Court (ELC) in exercise of its appellate jurisdiction shall perform the same duties as were conferred by the Act on Court of original jurisdiction in respect of suits instituted therein.
- v. The Court of Appeal could and never entertains an appeal from any person, regardless of their participation as parties in the court of original jurisdiction.
- h. The Learned Counsel averred that the vagueness from the cited provisions showed that the 1st Appellate Court (i.e., ELC) has power to add as a Respondent a person not named in the first appeal, provided he/she was a party in the court of first instance. On the other hand, the Court of Appeal could entertain an appeal from 'any person', whether (or not) such a person was a party in the Court of original jurisdiction, or the 1st Appellate court. The Court was invited to invoke the rule on "Construction Most Agreeable to Justice and Reason", with the corresponding rule on 'presumption against intending what is inconvenient or unreasonable', to resolve this incongruous situation in the provision of Order 42 Rule, 22, CPR, Rule 75 of the Court of Appeal Rules and Section 78 of the CPA (see Chapter 8, Maxwell on Interpretation of Statutes, 11th Edition, pp.183-200).



- i. Just to advance the argument a level higher, the Learned Counsel submitted that, the trial court from who's ruling the appeal was first preferred had a duty and power to ensure the correct parties were before it. If during the pendency of the case the Plaintiff (now Appellant) had sold her interest in the house with or without suit land, or transferred her decree to Mr. Ahmed Omar, the Court of Original jurisdiction could have had the power and duty to join the said Ahmed Omar "ex - debito justitiae", either as an 'intermeddler' or a person likely to be directly affected by the execution of the decree.
- j. Automatically therefore the ELC, which is now seized of this appeal, has jurisdiction to determine if the said Mr. Ahmed Omar was a necessary or sufficiently interested party, so that he ought to be joined in this appeal "ex - debito justitiae". This interpretation of the law sought to obviate the vagueness in law which may lead to absurdity or arbitrariness, if the literal interpretation of the 'vague' of the provisions of Order 42 Rule 22, Rule 75 of Court of Appeal Rules; and to give effect to Section 78 (2) of the CPA was adopted. He noted that some 'vagueness' in the law was bad. Indeed, he cited one writer, Jeffrey Goldsworthy, in his book – "Parliamentary Sovereignty, 2010 Ed., has written thus at page 64: "In addition, some vagueness in the law is often necessary if the law is not to be irrational and arbitrary".
- k. The Learned Counsel argued that in the present circumstances, our law was that a person who was a party in the Court of original jurisdiction, but whose name was for any reason omitted on appeal, could be added as a Respondent by order of the first appellate court. According to the Counsel, the intention was clear. No man should be condemned unheard, and multiplicity of suits must be always avoided. His contention was that this rule buttressed, on appeal, the wide discretion conferred on Courts of Original jurisdiction under the provision of Order 1, Civil Procedure Rules (CPR), to add or to subtract a party from a suit at any stage for the effectual and complete determination of the issues in dispute before court.
- l. The Court of Appeal rule quoted above refers to "any person..." This was a deliberate enactment. It was also testimony to the fact that "any person" could lodge a notice of appeal against a decision with which he was aggrieved, regardless of whether he participated as a full party in court of original jurisdiction, or on first appeal. By example, the Counsel demonstrated through this illustration. "if "A" sued two Defendants "B" and "C" in the Sub - Ordinate court, and "B", being aggrieved by a decree in favour of "A" appeals to the ELC (Appellate side), naming only "A" as the Respondent, and no application or order was made under the provision of Order 42 Rule 22, "C" could upon determination of the appeal by the Environment & Land Court (ELC), file and serve notice of appeal intimating intention to appeal to the Court of Appeal as "any person" under Rule 75 (1) of the Court of



Appeal Rules, without seeking leave of either from the first appellate court (i.e. ELC) or the Court of Appeal.

- m. The Learned Counsel asserted that in Rule 75, like Order 42 Rule 22, is worded with sufficient vagueness to avoid irrational and or arbitrary results of preventing an aggrieved party from taking an appeal from a Judgement which affected him. The court is invited to read Rule 22 of Order 42 and section 78 (1) & (2) in the same way to clear the apparent vagueness, which as observed by Jeffrey Goldsmith in his above quoted book, was often necessary if the law was not to be irrational or even arbitrary.
- n. The Learned Counsel submitted that they also cited the provision of Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21 in support of their plea. By adding Ahmed Omar as a Respondent in the pending appeal, he would have a chance to explain what interest he had in the suit land; why he had been undertaking re-establishment survey and laying beacons on the suit land; and what relationship he had with the Appellant, which their respective affidavits in reply have with circumspection suppressed and avoided to comment on. If the court agreed with the Respondent/Applicant herein that it has jurisdiction at any stage of the appeal to add a party whose presence before it as a Respondent or Appellant appeared viable and necessary for the effectual and complete determination of the real issue(s) in dispute on the appeal, it was invited to hold that the new party's affidavit in reply to this application was the response to the Appellant's appeal. He may then be heard on appeal as a Respondent with right to address the court and be subject to any order of costs. This course would render it unnecessary for the Respondent to file a separate suit, against Ahmed Omar. It would also make Ahmed Omar submit to the jurisdiction of court and liable to obey such orders as may be made in this appeal, to maintain the status quo ante to prevent a demolition of the structure on the suit land belonging to the wife of the Respondent/Applicant. This would also uphold the integrity of the court's proceedings and prevent Mr. Ahmed Omar from pulling the carpet under the feet of the court, and the Respondent/Applicant.
- o. In conclusion, the Learned Counsel urged the Court to made the following orders:
 - i. That the court admits and joins Mr. Ahmed Omar as a Respondent.
 - ii. That the Court directs him to plead as he pleases, within a limited time, to the appeal and any other application pending hearing before this court; and
 - iii. That the Court grants Mr. Ahmed Omar leave, to participate in these proceedings, and be subject to any decree, including an order on costs of the appeal, and the applications.



- iv. That in the interim, all parties ought to maintain status quo ante to preserve the structures on plot 62/Mkomani Squatter Settlement Scheme (Original No.67/319) of section I Mainland North until the hearing and determination of this appeal, or earlier determination of the respondent's pending application to strike out the appeal for inaction for over a year.

B. The Written Submission the Proposed Necessary Party

18. On 2nd November, 2022, the Proposed Necessary Party through the Law firm of Messrs. Wairimu Mureithi & Associates Advocates filed their written submissions dated 1st November, 2022. Mr. Ng'ang'a Advocate commenced his submission by informing the Honorable Court that the Appellant herein preferred the Appeal before this Appellate Court arising from him being dissatisfied with the decision and the orders by the Sub – ordinate Court issued on 26th January, 2016 by Hon. Njagi, Senior Principal Magistrate emanating from 'the Civil Suit number 1503 of 2015 - Nassim Humani Ali – Versus - Swaleh Mohamed Famau', dismissing the entire suit by the Plaintiff (now the Appellant) with costs awarded to the Defendant (now the Respondent), the deponent herein. The Appellant further moved the High Court vide "HCCC Civil appeal number 27 of 2016 - Nassim Athmani – Versus - Swaleh Mohamed Famau, which Appeal was transferred to the Environment and Land Court by Hon. Justice Njoki Mwangi for lack of jurisdiction to handle the said Appeal.
19. The Learned Counsel submitted that the Applicant herein sought to drag the Proposed necessary party into the quarrel between the Appellant and the Respondent reasons that the Proposed necessary party allegedly threatened to visit the parcel of land with a bulldozer to physically recover possession of the suit property by demolishing the Respondent/Applicant's late wife's structure. The Applicant further sought to have this Honorable Court issue orders to the effect that:
 - i. Spent.
 - ii. The Proposed Necessary Party/affected party is joined in these proceedings for the effectual determination of the matter in dispute in this appeal.
 - iii. In the interim, an order does issue to maintain the status quo ante and thereby preserve the respondent's structure on plot No. 62/Mkomani Squatter Settlement Scheme (part of original plot No.67/319) of Section 1MN, by barring the appellant or any one claiming under her, including Mr. Ahmed Omar, the proposed interested party, the proposed interested party, from demolishing or otherwise dealing with the respondent's structure aforesaid, until the hearing and determination of this application, inter partes, and ultimately the disposal of this appeal now pending hearing before court.
 - iv. That directions on filing and service of pleadings by the newly added necessary party are given.
 - v. Costs are provided for.
20. The Learned Counsel averred that it was a fact not in contention, which had been pleaded by the Proposed necessary party and further supported by the copy of the official search annexed to the Respondent/Applicant's Supporting Affidavit and marked as "D", that the Proposed necessary party was not the registered owner nor was he a beneficial owner of the suit property or him to allegedly recover possession of the suit property. The Proposed necessary party shall demonstrate in these submissions that the following issues were for determination:
 - a. Whether the Proposed necessary party should be enjoin in this suit.



- b. What conferred ownership of land.
- c. Who should pay costs, if any.
21. On the issue of whether the Proposed necessary party should be enjoin in this suit, the Learned Counsel argued that in the Ruling of “Maureen Onsongo – Versus - EOH Limited an EOH/Copy Cat Limited Company [2021] eKLR, Hon. Dr. Jacob Gakeri, Judge stated that:-
- “ 16. In Apex International Limited and Anglo Leasing and Finance International Finance Ltd – Versus - Kenya Anti - Corruption Commission (2012) eKLR, the Court quoted the words of Mukhtar I. of the Supreme Court of Nigeria in Goodwill and Trust Investment Ltd – Versus - Will and Bush Ltd (2011) LCN/B820 (SC) as follows:-
- “It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the Court, the Court lacks jurisdiction to hear the suit and where the Court purports to excise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”
22. To support his argument further, the Counsel referred Court to the Black’s Law Dictionary, 9th Edition which defines a “Necessary Party” as being:
- “A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.”
23. Additionally, the Counsel cited the Supreme Court of India in “Baluram – Versus - P. Chellathangam & Ors on 10 December, 2014 defined both a “necessary party” and “proper party.” It stated as follows:
- “A ‘necessary party’ is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a ‘necessary party’ is not impleaded, the suit itself is liable to be dismissed. A ‘proper party’ is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made.”
24. The Learned Counsel’s contention was that in Kenya, different Courts had come to the finding that the purpose of introducing a party to a suit was to facilitate the adjudication of the matter and/or bring to light the pertinent issues in the suit. This legal position was discussed in the decision of in the Case of:- “Werrot and Company Ltd & Others – Versus - Andrew Douglas Gregory & Others [1998] eKLR as quoted in the Ruling of Hon. Justice Nzioki wa Makau in “Boniface Omondi – Versus - Mathare Youth Sports Association & another [2021] eKLR, where he stated:-
- “For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding



in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

25. In the instant case, the proposed necessary party had no role to play in the previous suit in the Sub - ordinate court, the Appeal was filed in the High Court, Civil division nor in the instant Appeal nor in the previous proceedings. The Respondent/Applicant had also failed to prove what capacity and/ or role that the Proposed Necessary Party would play in the matter. Was the Proposed Necessary Party supposed to take up the role of the Appellant, the Respondent or the Interested party to the Appeal? The current Appeal was for determination of ownership of the suit property, which ownership could be confirmed vide the Certificate of official search dated 30th August, 2022 and marked as “D” in the Respondent’s Supporting Affidavit.
26. The Learned Counsel submitted that equally, the Respondent’s application to have the Proposed Necessary Party enjoined in the current appeal failed as there existed no relief against the said Proposed Necessary party in the matter as the subject of the suit was on ownership of the suit property which was primarily between the Appellant and the Respondent and this Honorable Court would surely make an effective decree in the absence of the Proposed Necessary party as he was neither the current registered owner nor challenging the ownership of the suit property.
27. The Learned Counsel asserted that the Courts in Kenya have further coined a test to be satisfied for a person to be enjoined in a suit. Hon. Justice S. Chitembwe in his ruling in the case of:- “John Harun Mwau – Versus - Simone Haysom & 2 others; Attorney General & 2 others (Interested Parties) [2021] eKLR quoted the words of Hon. Mativo J. in the case of:- “Kenya Medical Laboratory Technicians and Technologists Board & 6 others – Versus - Attorney General & 4 others [2017] eKLR where it was held that:-

“The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the Petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the Petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.

In determining whether or not an Applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the Applicant’s rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.

It is a mandate of the court that as far as possible all matters in controversy between the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided. In this regard, it would be appropriate and in the interest of justice that all matters touching and concerning the subject matter of the suit in the case at hand be determined finally and completely to avoid litigating over the same matters again.”

Reliance has also been placed on the Muruatetu Case, where the Supreme Court of Kenya outlined the requisite elements to being joined as an interested party to a suit when it held thus;

“[37]From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:



One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

28. The Learned Counsel submitted that similarly, Hon. Justice Chitembwe quoted the case of:- “Meme – Versus - Republic, [2004] 1 EA124, where the High Court observed that a party could be enjoined in a matter for the reasons that:-

- a. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- b. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- c. Joinder to prevent a likely course of proliferated litigation.

29. The Learned Counsel argued that in the instant case, the cause of action was between the Appellant and the Respondent herein. It was one that related to an appeal emanating from the decision of the Sub – ordinate Court in RMCC suit no. 1503 of 2015 - Nassim Athman Ali – Versus - Swaleh Mohamed Famau”, where the Plaintiff (Now the Appellant) had moved the Court for among other orders, vacant possession, a matter in which the “proposed necessary party” was not a party to. The Appellant dissatisfied with the decision of Hon. Njagi, moved the High Court in “High Court Civil Appeal no. 27 of 2016 - Nassim Athman Ali - Versus - Swaleh Mohamed Famau. In both matters, the proposed necessary party was neither a party nor concerned with the suit property herein. It is the proposed necessary party’s humble submission that this Court be guided by the holding of Hon. Justice Nzioki wa Makau in the case: “Boniface Omondi – Versus - Mathare Youth Sports Association & another [2021] eKLR and find that the appeal as filed raises no right to some relief against the proposed necessary party and to quote:-

“.....the parties who are necessary for the adjudication of the dispute are what is deemed a necessary party. The pleadings do not reveal a right to some relief against the 2nd Respondent and it is possible to pass an effective decree in the absence of the 2nd Respondent. As no specific allegation is made in the memorandum of claim against the 2nd Respondent his name ought to be struck out as he is not a necessary party to the suit and from material before the Court may at best be a witness.....”



30. The purpose of introducing a party to a suit was to facilitate the adjudication of the matter and/or bring to light the pertinent issues in the suit. This position was discussed in the decision of Hon. F. Gikonyo, J. in the case of “Zephir Holdings Ltd – Versus - Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya (2014) eKLR, as quoted by Hon. Justice Nyakundi in the case: “Local Building and Construction Limited – Versus - Institute of the Blessed Virgin Mary Loreto Msongari & 2 others [2019] eKLR;

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a Plaintiff or Defendant under Order 1 Rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order “Suo moto” for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

31. The Learned Counsel’s contention was that the Proposed necessary party was neither a party to the matter before the Sub - ordinate court, the civil Appeal nor the current Appeal and the Respondent/ Applicant herein only sought to introduce the proposed necessary party in order to delay the prosecution of the present Appeal. As such, the Proposed Necessary Party should not be enjoined in this Appeal as he was not a proper party to this Appeal and this Honorable Court should set down the Appeal for Hearing at the earliest convenience with the proposed necessary party not being dragged into the issues of the Appellant and the Respondent.

32. On the issue of the ownership of the land, the Learned Counsel submitted that the ownership of land in Kenya was proven by way of issuance of a Certificate of title in the name of the proprietor, for freehold properties and a Certificate of Lease, for leasehold properties. He cited the provision of Section 26 of the [Land Registration Act](#), No. 3 of 2012 specifically provides that:-

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –
 - a) On the ground of fraud or misrepresentation to which the person is proved to be a party;
 - b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

33. Further to this, the Learned Counsel averred that both a Certificate of title and Certificate of official search were conclusive proof of ownership and conclusive evidence of proprietorship as was held by the Learned Judges E. O. Obaga, K. Bor and B.M. Eboso of the Environment and Land Court sitting in Nairobi had the following to state in ELC REFERENCE NO.1 OF 2018-“National Land Commission – Versus - Afrison Export Import Limited & 10 others;

“A search on any title at the land registry is very important before one can act on it. The search indicates the owner(s) of a particular property and any encumbrances or other relevant



entries registered against that land. Once a search is issued by the Lands Office, it should be conclusive evidence of proprietorship in light of the fact that our title registration system is based on the Torrens System of registration.”

34. The Learned Counsel asserted that in the instant case, ownership was not disputed as the same was confirmed vide the official search conducted by the Respondent/Applicant on the 30th day of August, 2022 and marked as “D” in the Respondent’s Supporting Affidavit, that the suit property was owned by the Appellant. Therefore, it was thus the proposed necessary party’s humble submission to this Honorable Court that he was not involved in any way with the suit property; neither challenging the ownership nor claiming ownership.

35. On who should pay the costs if any, the Learned Counsel submitted that the provision of Section 27 of the *Civil Procedure Act*, Cap. 21, Laws of Kenya, vested upon the Court or the Judge adjudicating a matter discretionary powers to issue orders as to the costs of a suit. The Learned Counsel held that this position was buttressed in the case: “Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others (2013) eKLR which cited with approval the words of Murray C J in the case of “Levben Products – Versus - Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227 that:

“It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

36. Further, the Halsbury’s Laws of England, 4th Edition (Re-issue), (2010), Vol.10 at paragraph 16,notes that:

“.....those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”

37. As contemplated by Section 27 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, specifically the proviso for sub-section 1, costs must follow the event unless the Court has good reasons to decide otherwise and to quote;

“Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

38. The import of the above quoted proviso is that the successful party is entitled to costs for the suit unless the party is guilty of some misconduct during the trial and/or the Court has good reason to deny the successful party such costs. The House of Lords in the case of “Reid, Hewitt & Co – Versus - Joseph, AIR 1918 Cal 717 and Myres – Versus - Defries (1880) 5 Ex D 180, stated that:-

“The expression ‘costs shall follow the event’ means that the party, who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action,



the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.”

39. The Learned Counsel stated that the even herein was the question whether the proposed necessary party was indeed necessary for the adjudication of the present Appeal. Going by the fact that the Proposed Necessary party had not been involved in the previous suits between the Appellant and the Respondent/Applicant, he should not be dragged into the issues of the Appellant and the Respondent/Applicant herein and as such, he ought not to be enjoined in this suit. As such, it was only just and fair that the application by the Respondent was dismissed and this Honorable Court did exercise its discretion and awards costs to the Proposed Necessary party for being dragged into issues that did not concern him.

C. The Written Submissions by the Appellants

40. On 22nd November, 2022 the Appellant through the Law firm of Messrs. Khatib and Company Advocates filed their written submissions dated 21st November, 2022. M/s. Omondi Advocate commenced by stating that the submissions were made on behalf of the Appellant in respect of the Respondent’s Application dated 30th August 2022 seeking inter alia”:-, “an order to enjoin the intended Interested Party to this suit”.
41. The Learned Counsel submitted that the Application by the Respondent/Applicant herein was premised on several grounds contained in the sworn affidavit of Mohamed Famau that the intended Interested Party was a necessary Party to this suit. The Application was opposed by the Appellant through the Replying Affidavit dated 2nd November 2022 and also opposed by the intended necessary Party through Replying Affidavit dated 12th October 2022.
42. On the issue of whether the Respondent’s application dated 30th August, 2022 had established grounds for enjoining the Proposed Necessary party to this suit, the Learned Counsel submitted that there was a plethora of Court’s Judgments in respect of addition of parties to suits. In the case of:- “Kirigori – Versus - Chege & 3 Others (2002) eKLR, the Court held that for a party to be enjoined in a suit, he must:-
- “ 1. He must be a necessary party.
 2. He must be a proper party.
 3. The ultimate order or decree cannot be enforced without his presence in the matter.
 4. His presence in the matter is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit.”
43. The Learned Counsel relied on the case of: “Boniface Omondi – Versus - Mathera Youth Sports Association (2021) eKLR, the Court reduced the requirements to enjoin a necessary party to two (2) as follows:-
- “ 1. There must be a right to some relief against such a party of the matter involved in the proceedings in question.
 2. It should not be possible to pass an effective decree in the absence of such a party.”



44. The Learned Counsel argued that the suit was now an appeal. It commenced with the lower Court CMCC No. 1503 of 2015 whereby the Appellant was seeking for vacant possession of Plot No.MSA/Mkomani/62, the suit property herein whereby the lower Court delivered a Judgment against the Appellant who then filed the instant Appeal. In those proceedings, the Respondent did not seek to enjoin the intended Necessary Party who was already on the suit property. In the instant Application, the grounds proffered were that the Intended Necessary Party is on the suit property and is interfering with the state of the suit property in some ways.
45. The Learned Counsel submitted that in his replying affidavit, the intended Necessary Party deposed that he has never dealt with the suit property during and or before the commencement of the suit and added that the suit property is currently registered in the names of the Appellant in this matter and attached was an official search annexed as “D” at the contents of Paragraph 15 of the Affidavit. This was also echoed in the Replying affidavit sworn by the Appellant herein. It follows therefore that going by the 1st conditions set by Honorable Justice Nzioka wa Makau in the case of: “Boniface Omondi – Versus - Mathare Youth Sports Association (ibid) (Supra) there was no right or relief sought from the Intended Necessary Party because the only right sought in the suit was an issue of ownership which was premised on a title which was already registered in the Appellant’s name.
46. The Learned Counsel argued that the 2nd condition set by the Honourable Judge in the above quoted case, whether there could be any effective Judgment passed in the absence of the intended necessary party. The decree to be delivered was in respect of “who owns the suit property”. Its execution would be sustaining the title deed as it was or an order of registering the suit property to the names of the Respondent in either way, the Decree can be effectively be executed without the involvement of the intended necessary party.
47. The Learned Counsel cited the case of: “Civicon Limited – Versus - Kiyuwatt Limited & 2 Others (2015) eKLR where the Court observed thus:-
- “It may be concluded that being a discretionary order, the Court may allow the joinder of a party as a defendant in a suit on the general principles set out in Order 1 Rule 10 (2) being in mind the unique circumstance of each case with regard to the necessity of the party in the determination of the subject matter of the suit. Any direct prejudice likely to be suffered by the party and practicability of the execution of the Orders sought in the suit”.
48. The Learned Counsel concluded that it was their humble submissions that the Respondent’s Application dated 30th August, 2022 is devoid of merit. The same should be dismissed with costs at the earliest time.

VII. Analysis and Determination

49. I have keenly read and considered the Notice of Motion Application dated 30th August, 2022 and the annexures thereto, the responses, the rival submissions, the plethora of authorities filed by the various parties herein - the Respondent/Applicant, the Appellant and the Proposed Necessary Party, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes. Further, in order to reach an informed, reasonable, fair and just decision on this case, I have taken crystalized the subject matter into the following three (3) salient issues for determination. These are:-
- a. Whether the Notice of Motion application dated 30th August, 2022 by the Respondent/Applicant has any merit.
 - b. Whether the party are entitled to the reliefs sought from the filed application.



- c. Who will bear the Costs of the application.

Issue No. a). Whether the Notice of Motion application dated 30th August, 2022 by the Respondent/Applicant has any merit.

50. Under this sub – heading, the main issues to be tackled by Court are two pronged, mainly whether to join the Proposed Necessary party into this matter and also to grant the orders of status quo of the suit land pending the hearing and determination of the appeal. Thus, for ease of analysis, the Honorable Court will be dealing with each of these issues separately. Firstly, matters of joiner of parties are governed by the provisions of Order 1 of the Civil Procedure Rules, 2010. Order 1 Rule 10 (2) states 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 or settle all questions involved in the suit, be added.”

51. In the instant case, the Respondent/Applicant herein sought to join the Proposed Necessary Party – Mr. Ahmed Omar to the suit for the reason that he was a part to the land dispute existing between him and the Appellant involving the suit property. The Applicant averred that, although Mr. Omar was never a party in the Sub – Ordinate Court proceedings nor this appeal, by adding him as a Respondent in the pending appeal, he would have a chance to explain what interest he had in the suit land, and the reason he had been undertaking re-establishment survey and laying beacons on the suit land; and what relationship he had with the Appellant, which from their respective filed affidavits in reply had with circumspection suppressed and avoided to comment on. According to the Learned Counsel for the Respondent/Applicant, he vehemently argues that through “the principles of Vagueness of Law” in particular the provision of Rule 75, 78 (1) and (2) of the Appellate Court Rules, read together with Section 45 of the Laws of Succession, Order 42 Rule 22, they were worded with sufficient vagueness to avoid irrational and or arbitrary results of preventing an aggrieved party from taking an appeal from a Judgement which affected him. The court was invited to read these provisions of the Law in the same way to clear the apparent vagueness, which as observed by Jeffrey Goldsmith in his above quoted book, was often necessary if the law was not to be irrational or even arbitrary. To him, there were all justifiable reasons based on the principles of natural Justice and doctrine of inter meddling with the property of the deceased’s estate to have the Proposed Necessary Party joined in the pending appeal. Of course this legal position was strongly opposed to the hilt by the Appellant and the Proposed Necessary party.
52. Resultantly, and based on these logical proposition the Honorable Court wishes to make its findings accordingly. It is trite law that he who alleges must prove. The provision of Sections 107 and 109 of the *Evidence Act*, Cap. 80 places the burden of proof of any fact on the person who wishes to rely on the same. As stated above, its critical to decipher the meaning, and scope of the terms “a necessary party” as opposed to “Interested Party” to a suit. I am compelled to refer to the case of “Amon – Versus - Raphael Tuck & Sons Ltd (1956) 1 All ER 273, cited in the case of:- “Pizza Harvest Limited – Versus - Felix Midigo [2013] eKLR” sought to establish who a necessary party is. Devlin, J held at p. 286 - 287:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question



involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

53. Additionally, and coupled from the two cases cited by the Learned Counsel for the Proposed Necessary Party and Appellant herein of “Apex International Limited and Anglo Leasing and Finance International Finance Ltd and Boniface Omondi – Vers Mathare Yuth Sports Association (Supra), I cite the case of: “Joseph Njau Kingori – Versus - Robert Maina Chege & 3 others [2002] eKLR Nambuye J (as she then was), gave the guiding principles to be followed where there is an application to enjoin an intending interested party in a suit. They are that:

“..... (1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit”. The features given by Justice Nambuye fuse into the definitions given. The definitions and provisions sit well with the principles that were set out by the Supreme Court in the Muruatetu Case (referred to below) regarding the what a party has to satisfy in order for him to be enjoined as an interested party in any proceedings.

54. These two terminologies are very distinct and separate. For clarity purposes, this Honorable Court refers to the case of “Baluram – Versus - P. Chellathangam & Ors on 10 December, 2014 where the Supreme Court of India defined both a “necessary party” and “proper party.” It stated as follows:

“A ‘necessary party’ is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a ‘necessary party’ is not impleaded, the suit itself is liable to be dismissed. A ‘proper party’ is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made.”

55. In my own view, and arising from these elaborate definitions by Superior Courts there is a difference between the meaning, process and act of joining a party to a suit whether as a Plaintiff or Defendant from that of joining an Interested Party to an existing suit. The former is the only one governed by most of the first part of Order 1 Rule 10(2) of the Civil Procedure Rules. At the relevant part the Sub-rule provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either party,...order 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.”



56. It is this court's opinion that the term "addition" herein referred to relates to only to where the court issues an order to have that person included as a Plaintiff or Defendant. This is because an interpretation of the phrase when read disjunctively imports the idea. In that case, a party can apply for leave to add such persons whose presence will be vital in order to determine effectually the real issues in controversy. But the part of the provision that extends to cover the enjoinder of persons as interested parties is the last part of the phrase thereof that states ".....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." This phrase gives the court a wide path to including persons as interested parties in suits. Moreover, the learned authors of "Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), making reference to Order 1 Rule 10 (2) of the Indian Civil Procedure which is similar in all fours with Kenya's, state that:-

"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties." The Court of Appeal has agreed with this interpretation in the case of JMK – Versus - MWM & another [2015] eKLR. This has also been followed by the persuasive authority of Temple Point Resort Limited – Versus - Accredo A G & 5 others [2018] eKLR."

57. The phrase is (to be) governed by a special procedure whose legal stem is the Mutunga Rules of 2013. Were the two processes similar, there would have been no need to give the definition of an Interested Party in Rule 2 and the procedure in the provision in Rule 7 of the said Rules to amplify how a Proposed Necessary Party can be brought into proceedings.

58. The three conditions for finding the Proposed Necessary Party to be enjoined in the proceedings are:

- a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- b. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- c. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

Issue No. b). Whether the party are entitled to the reliefs sought from the application.

59. Under this sub heading, the Honorable Court now wishes to apply the above stated elaborate principles on the concept of "Proposed Necessary Party" and "Interested Party" to the instant case being the substratum of the filed application by the Respondent /Applicant herein. The main question to ponder is whether the Respondent/Applicant has met the above stated conditions. First, as already posed herein above, the Honorable Court needs to determine whether the Proposed Necessary Party has a direct interest or stake in these proceedings herein and Secondly, whether there would be need to preserve the property pending the hearing and determination of the pending appeal.

60. To begin with, from the surrounding facts and inferences of this matter, it is not in dispute that this matter in over the ownership of the suit property meted between the Appellant and the Respondent herein. The said dispute caused the institution and the hearing of the case over the matter before the



sub – ordinate Court to a point of delivery of Judgement in favour of the Respondent/Applicant. It as result of the said Judgement that this appeal was preferred by the Appellant who felt aggrieved by it. From the very onset, it's instructive to note that the Proposed Necessary Party was never a party to the said proceedings nor the filed appeal. Based on the exhibit marked as “D” by the Respondent/Applicant, he holds that the property is registered in the names of the Appellant. Thus, it is my strong opinion that the Respondent/Applicant has not demonstrated either through any empirical evidence or otherwise shown this Honorable Court how the Proposed Intended Necessary Party will contribute to and/or value addition to this suit and his identifiable stake in these proceedings. The Respondent/Applicant has not proved how the Proposed Necessary Party would directly affected by the decision of a case either determined before a tribunal or a court of law especially if it is determined in favour of the adversary. It is not a surprise whereby while ably and eloquently making his submission the Learned Counsel seem to be admitting based on “the Principle of Vagueness” of the Law cited for failure to allow the concept of “proposed Necessary Party”. The Court sees no relief against the Proposed Necessary party flowing from either the Appellant nor the Respondent/Applicant. At least none has been shown to Court by the Applicant.

61. Perhaps, should they feel adversely affected by some undisclosed role or action by the Proposed Necessary Party, the Respondent/Applicant may consider instituting a separate legal action against him but certainly on by joining him in this matter. I reiterate that this Honorable Court is not satisfied that the Respondent/Applicant has made put a case and met the threshold set out in the Muruatetu case (supra) for the proposed necessary party to be enjoined as a party in this suit. On that front, the application must fail.
62. Being an appeal where the ownership of the suit property is the integral part of the suit, its critical that the same is preserved pending the hearing and final determination of the appeal. On the contrary, any interference in any manner be it alienation, sub – division, leasing or charging would declare the appeal nugatory and otiose. For these reasons, therefore, the Honorable Court finds the prayer on having the status quo be maintained over the suit property extremely reasonable and justifiable. Strictly, to that extent the application succeeds.

Issue No. c). Who is bear the costs of the application?

63. It is well established that Costs is at the discretion of the Court. Costs mean the award granted to a party at the conclusion of any legal action or proceedings of any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 costs follow the events. By events it means the result of the legal action and/or proceedings of the litigation. See the cases of “Reid, Hewitt & Co – Versus - Joseph, AIR 1918 Cal 717 and Myres – Versus - Defries (1880) 5 Ex D 180 (Supra), the Court of Appeal cases of “Kenya Sugar Board – Versus - Ndungu Gathini (2013) eKLR; Cecilia Karuru Ngayu – Barclays Bank of Kenya & Ano. (2016), eKLR and the Supreme Court case of: “Jabir Rai Singh – Versus – Tarchalan Singh (2014) eKLR” where the Court held:

“ the basic rule on attribution of costs is that costs follow the event.....its is well recognized that the principles costs follow the events is not to be used to penalize the losing party rather. It is for compensating the successful party for the trouble taken in presenting or defending the case.

64. In the instant case the Respondent/Applicants have only partly succeeded in prosecuting their application. For this reason, the Appellant and the Proposed Necessary Party are entitled to the Costs of the application for the major role they played of defending themselves in the proceedings.



VI. Conclusion and Disposition

65. Ultimately, upon conducting such an elaborate analysis of the framed issues herein, the Honorable Court proceeds to make the following orders:-
- a. That the Notice of Motion Application dated 30th August, 2022 by the Respondent/Applicant be and is partly allowed only the extent of the granting Prayer number (c) of an order to maintaining Status Quo pending the hearing and determination of the Appeal.
 - b. That otherwise, the Prayers (a), (b), (d) and (c) of the application be and are found to be devoid of merit and hence hereby dismissed with costs.
 - c. That for expediency sake, the Appeal should be heard and disposed off within the next One Hundred and Eighty (180) days from 23rd October, 2023. There be a mention on 21st June, 2023 for purposes of taking directions of the Appeal under the provision of Order 42 Rules, 11, 16 and 18 of the Civil Procedure Rules, 2010.
 - d. That in the meantime, the status quo to be maintained pending the hearing and final determination of the impugned Appeal.
 - e. That Costs to be awarded to the Proposed Necessary Party and the Appellant to be borne by the Respondent/Applicant.

It is so ordered accordingly.

RULING IS DELIVERED, THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF MAY 2023.

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HON. JUSTICE L.L NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT,
MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Yumna – the Court Assistant.
- b. No appearance for the Appellant.
- c. M/s. Waithera Kimani Advocate holding brief for Mr. S. M Kimani Advocates for the Respondent
- d. No appearance for the Proposed Necessary Party

