



**Republic v District Land Registrar Kilifi Lands Office; Kombo & another (Exparte Applicants);
Denman Properties Limited (Interested Party) (Environment and Land Court Judicial
Review Application E6 of 2021) [2023] KEELC 17562 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17562 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND COURT JUDICIAL REVIEW APPLICATION E6 OF 2021
EK MAKORI, J
MAY 18, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

DISTRICT LAND REGISTRAR KILIFI LANDS OFFICE RESPONDENT

AND

ATHMAN RAMADHAN KOMBO EXPARTE APPLICANT

ABUBAKAR MICHAEL KAZUNGU EXPARTE APPLICANT

AND

DENMAN PROPERTIES LIMITED INTERESTED PARTY

RULING

1. By a Notice of Motion application dated the July 27, 2022 and filed in court on the even date pursuant to the provisions of Order 45 Rule 1 & 2, Order 51 Rule (1) and Order 53 Rule 3 (2) of the [Civil Procedure Rules](#); Section 3A and 80 of the [Civil Procedure Act](#), Cap 21 - Denman Properties Limited, the interested party herein seeks the following reliefs from this court:
 - a. Spent
 - b. Pending the hearing and determination of this application, this court do order stay of execution of the Ruling and Order made by this court on the June 28, 2022.
 - c. This court does review, vary and/or set aside the Ruling and Order made by this court on the June 28, 2022.



- d. Costs of this application be provided for.
2. The application is supported by the affidavit sworn by M/s Sophia Abdillahi Chacha, Director and Shareholder of the applicant Company, on the July 27, 2022 and filed in court on the even date.
 3. On the September 20, 2022, the 1st ex parte /respondent filed his replying affidavit that he swore on the September 19, 2022 in response to the application.
 4. The respondent has taken issue with the joinder of the interested parties on grounds that M/s Sophia Abdillahi has not displayed a Board Resolution by the applicant Company to allow her ventilate the interested party's case before this court, that the interested party has not sought leave for joinder before filing any pleadings or averments in this matter and that review of the orders in place is not germane under the circumstances, because this court is functus officio having rendered its decision.
 5. The court directed that parties file written submissions on the issues raised.
 6. The respondent submits that the applicant/interested party is not properly on record before this court since it did not participate in the proceedings prior to this application. Furthermore, the applicant/interested party did not seek leave to be formally joined as a party in these proceedings. That a scrutiny of the instant application reveals that the applicant/interested party has not made any prayer seeking to be joined in the suit or at all. That Order 1 Rule 10(2) of the Civil Procedure Rules gives this court the discretion to join or have the name of a party struck out on its own motion or upon application of a party to the suit. The court is urged to find that the applicant/interested party is not properly before this court since it was not a party to the suit and that it did not seek leave to be joined in these proceedings.
 7. In this regard, the case of *Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya* [2014] eKLR is cited where Gikonyo J disallowed a party from participating in the proceedings without first seeking leave to be joined and applying for drastic orders.
 8. Whether the application is incompetent having been supported by an affidavit sworn by a deponent without any authorization and/or resolution of the interested party - which is a limited liability concern, thereby offending the provisions of the *Companies Act*, the respondent submits that the application dated July 27, 2022 was supported by an affidavit deposed by M/s Sophia Abdillahi Chacha who purported to be a Director and Shareholder of the interested party but has not adduced any document to prove these allegations. The deponent of the supporting affidavit is a natural person whereas the interested party herein is a limited liability Company and no documentary evidence has been presented before this court to show the relationship (if any) between the interested party/applicant and the deponent herein.
 9. The respondent further avers that the affidavit of M/s Sophia Abdillahi Chacha was filed in contravention of Order 4 Rule 4 of the Civil Procedure Rules, which stipulates that an officer of the Company duly authorized under the seal of the Company, to act on its behalf, shall swear where a plaintiff is a corporation the verifying affidavit.
 10. The respondent asserts that at the time of filing this application, there was no resolution filed to show that the company had authorized the deponent M/s Sophia Abdillahi Chacha to swear affidavit on its behalf.
 11. Whether the applicant has made out a case for review of the Ruling and or Order delivered on June 28, 2022, the respondent is of the view that the application is anchored on Section 80 of the *Civil Procedure Act* as well as Order 45 Rule 1 of the Civil Procedure Rules. That provision of the law, refers



- to review by a person who was already a party to the suit and it has already been demonstrated that the applicant/interested party was not such party and cannot therefore apply and seek the orders sought.
12. That Order 45 of the Civil Procedure Rules sets the grounds upon which a review may be granted and it is submitted that none of those grounds is available to the applicant/interested party as enunciated in the case *National Bank of Kenya V Ndungu Njau [1997] eKLR*, where the Court of Appeal expressed itself concerning instances where review may be granted, that a review may be granted whenever the court considers that it is necessary to correct an error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor, can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a Statute or other provision of the law cannot be a ground for review. Since the applicant was not a party to the said suit in the first place, Order 45 of the Civil Procedure Rules cannot come to the aid of the applicant.
 13. The applicant/interested party opines that M/s Sophia Abdillahi Chacha who is a Shareholder and Director of the applicant and, was duly authorized and thus competent to swear. That a resolution by the Board of Directors of a Company may be filed at any time before the suit is fixed for hearing, as there is no requirement that the same be filed at the same time as the suit. Its absence is not fatal to the suit. Ong’udi J affirmed this position in the case of Joseph Kipngetch Korir v Litein Tea Factory Limited & Another [2016] eKLR.
 14. The applicant is of the view that any Director, who is authorised to act on behalf of the Company, unless the contrary is shown, has the powers of the Board to act on behalf of that Company. This position was affirmed by the *Court of Appeal in Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR*.
 15. Whether the applicant is properly before this court, it is submitted that, whereas the ex parte applicant in this suit is well aware of the fact that the applicant in the instant application is the registered proprietor of the suit property and that the applicant was to be directly affected by the orders sought by the ex parte applicant, the ex parte applicant clandestinely and in utter contravention of the provisions of Articles 25 (c), 40 (1), 47 and 50 of the *Constitution* of Kenya, 2010 and Order 53 Rule 3 (2) of the Civil Procedure Rules, deliberately concealed and/or suppressed this material fact from this court and also failed to effect service of their judicial review application on the applicant.
 16. Order 53 of the Civil Procedure Rules, does not provide for joinder of parties. With respect to judicial review proceedings, a party may be joined under Rule 3 (4) if it is demonstrated that he is a necessary party to, or is likely to be directly affected by the outcome of the proceedings. It is submitted that the applicant being the registered proprietor of the suit property, it is a proper party to appear in these proceedings. It is humbly submitted that the applicant is properly before this court.
 17. Quoting several past decisions by this court, for example the question on the legality of the determination by the National Land Commission as contained in the Gazette Notice herein was determined by Olola J on the June 17, 2020 in Malindi ELC Judicial Review Application No 1 of 2019. The applicant/ interested party is of the view that matters raised in the current suit have already been decided fully and finally, this suit offends the doctrine of re judicata, and the orders in place cannot stand and that this court has no jurisdiction than to down tools.
 18. The issues that stand for the determination of this court is whether the applicant is properly joined in this matter, whether the applicant’s deposition is proper on record and whether this court should review the Ruling/Orders in place issued by this court on June 28, 2022.



19. From the record, the orders subject to the review application were issued ex parte by this court and without the benefit of the materials and averments as we now have from the applicant. The orders were issued in default of attendance of those persons the ex parte applicant thought were relevant excluding the applicant herein.
20. The orders have a serious ramification to the extent that the Land Registrar Kilifi has been compelled by orders of Mandamus to register the ex parte applicants as the registered owners of the suit property to the detriment of the whole world including the applicant/ interested party who claims to be the proper and rightful registered owner of the land in question.
21. Joinder of parties in ordinary civil suits is as guided under Order 1 Rule 10(2) of the Civil Procedure Rules, which gives this court the discretion either to order for joinder or have the name of a party struck out of proceedings on its own motion or upon application of a party to the suit. It provides 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.'
22. The test for joinder of an interested party in proceedings has been affirmed in several cases by the Superior Courts for example in the case of *Francis K Muruatetu and Another V Republic & 5 Others [2016] eKLR*, the Supreme Court set out identifiable key elements for consideration in an application for joinder as an interested party as follows:
 - 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 submission 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.'
23. In *Skov Estate Limited & 5 others v Agricultural Development Corporation & Another [2015] eKLR* Munyao J in dealing with the issue of an interested party seeking to be joined in a suit stated as follows:

' In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in



the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.

In other words, there needs to be a demonstration that the interest of the person goes further than 'merely being affected' by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.'

24. The ex parte applicant /respondent think that the applicant /Interested Party in this application, cannot benefited by joinder in these proceedings for failure to apply to be joined first in the current proceeding before seeking any other further orders as held in *Zephir Holdings Limited V Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya* [2014] eKLR where Gikonyo J held:

' Upon a thorough perusal of the court record, it is apparent that the 1st Interested party did not seek the leave of the court to be enjoined in this suit. The application before court does not in itself have a prayer for his joinder or that of the 2nd interested party, as parties to the suit. Further the court did not order suo moto for the joinder of either the 1st or the 2nd interested party. It is my considered view therefore that the 1st Interested party is not properly before the court. He ought to have sought the leave of court to be enjoined in the suit first before moving on a spree for other far reaching orders.

25. On the other hand the applicant thinks that the ex parte applicant/respondent is guilty of material none disclosure well knowing that the orders sought in the nature of Mandamus will automatically affect it since they have been litigating in other matters which have been settled and that it came to this court pursuant to Order 53 Rules 3 (2) and (6) of the Civil Procedure Rules and need not apply to be joined because it is the truly interested party in the matter, being the current registered owner of the suit property which is well in the knowledge of the respondent herein who ought to have served it in the first place. Order 53 Rules 3 (2) and (6) of the Civil Procedure Rules states as follows:

- (2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.
- (6) On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.'

26. A marked difference has to be drawn in the procedures adopted in the ordinary civil matters and judicial review ones. Whereas in the other normal civil matters a party needs to seek leave from the court to



be joined in the proceedings, as enunciated in the authorities as quoted by counsel for the respondent above, that is not the case in judicial review matters - Musyoka J draws the difference in the case of *Republic V Director of Public Prosecutions Ex parte Patrick Lihanda & 2 Others [2022] eKLR* in this manner:

' It was stated in *Welamondi vs The Chairman, Electoral Commission of Kenya [2002] 1 KLR 486 (Ringera J)* and *Ndete v Chairman Land Disputes Tribunal and another [2002] 1 KLR 392 (Ringera J)*, regarding judicial review proceedings, that they are sui generis, created by their own independent legislation, which confers special jurisdiction with respect to those proceedings. Being a special procedure sets it apart from ordinary civil proceedings, and the provisions of the *Civil Procedure Act*, Cap 21, Laws of Kenya, and the Civil Procedure Rules do not apply or cannot be invoked. So, according to *Welamondi vs The Chairman, Electoral Commission of Kenya [2002] 1 KLR 486 (Ringera J)* and *Ndete v Chairman Land Disputes Tribunal and another [2002] 1 KLR 392 (Ringera J)*, one has to look inwards into Order 53, to establish whether it does allow for joinder of parties, in the manner proposed by the applicants.

8. I agree totally with the position stated in *Welamondi vs The Chairman, Electoral Commission of Kenya [2002] 1 KLR 486 (Ringera J)* and *Ndete v Chairman Land Disputes Tribunal and another [2002] 1 KLR 392 (Ringera J)*. The mere location of Order 53 within the Civil Procedure Rules does not make the proceedings it provides for subject to the substance of the *Civil Procedure Act* and the other provisions of the Civil Procedure Rules. The substantive law for it is the *Law Reform Act*, Cap 26, Laws of Kenya, which, imports the law applicable to judicial review in England. The relevant provisions are in sections 8 and 9 of the *Law Reform Act*, which state as follows:'

27. On joinder of an interested party to the proceedings the judge proceeded to state as follows:

' So, I have perused through Order 53 of the Civil Procedure Rules. It does not provide for making of applications by parties who wish to be added to the proceedings, but it does, at Rule 4, allow the High Court to have persons who, in its opinion, ought to have been served, served, and it may adjourn the proceedings to allow such service. Order 53 Rule 4 provides as follows:

If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

10. The position stated in that provision is that the High Court has power, where it forms an opinion that there is a person or entity who or which ought to have been served, because the proceedings affect him or it, or may affect him or it, or his or its input into the matter may be relevant to the proceedings, to order service of the judicial review papers on them. The provisions do not require their joinder as such. It merely requires that they be served with the papers, and that would suffice to make them parties to the proceedings, who would then acquire a right to be heard.'



28. I am totally persuaded by the holding of Musyoka J on the manner the court ought to proceed in joinder of party in judicial review applications. The party needs to be served by the person seeking judicial review orders or the court itself reckons that the party has a stake in the matter or a party who thinks he is likely to be affected by the outcome of the proceedings brings it to the attention of the court by joining in the proceedings and states that the outcome is likely to affect him.
29. The applicant/ interested party has approached this court and expressed that the orders issued herein ex parte ought not to have been issued in the first place without its service. It is the registered owner of the land in question the subject herein and that it has the greatest stake, which is well within the knowledge of the respondent who concealed material facts to this court before the orders in place were issued.
30. I am satisfied that the applicant having shown the stake it has in the outcome of this proceedings, is a truly proper party to be joined and is properly on record.
31. This then takes me to the next issue as to whether the Ruling/Orders issued by this court on June 28, 2022 ought to be disturbed and or set aside. The respondent thinks not. The applicant on the other hand contends that if the orders remain intact, it will cause injustice on it. The applicant states that there has been litigation over the same subject matter well within the knowledge of the respondent with the last one being Malindi ELC Judicial Review Application No 1 of 2019, in which Olola J dealt with the same issue on the Gazette Notice by the National Land Commission - subject of the judicial review herein and fully and finally settled that it ought to be quashed and that if the orders here remain intact, it will run contra the doctrine of res judicata and set a path for confusing and recipe for disorder where the two protagonists hold two conflicting orders over the same subject matter from coordinate courts.
32. The orders of this court were issued in default of attendance of the parties the respondent had served – that is the District Land Registrar Kilifi excluding the applicant herein. There was no hearing on the merits. The material and evidence placed before this court by the applicant was not available. It is new material within the four corners of Order 45 of the Civil Procedure on review, which this court needs to consider to avoid a chaotic situation in the implementation of the same on those charged with the duty to do so.
33. The orders will be set aside ex debito justitiae. It will be in the interest of justice and cannot be refused in view of the disclosure by the applicant. Equality of arms demands so, in order to place the two protagonists on equal pedestal. The pendulum has to swing back by recalling those orders.
34. On the issue of the affidavit deposed by M/s Sophia Abdillahi Chacha as lacking the Board resolution, I associate myself with the reasoning and holding by Ong’undi J in Joseph Kipngetch Korir V Litein Tea Factory Limited & another [2016] eKLR where she held as follows:

’ Before taking the drastic action advocated for by the Plaintiff this court must be alive to the overriding objectives of the *Civil Procedure Act* set out in Section 1A and B of the said Act. In the case of Kenya Agricultural Research Institute (KARI) V Farah Ali, Chairman Isahakia self-help group (sued on his own behalf and on behalf of members of the group) and Anor. NKR HCCC No 23 of 2011 Wendoh, J had this to say;

’In the case of Trust Bank Ltd V Amalo Co Ltd (2009) KLR 63 where the Applicant’s documents were expunged from the record by the Court and the appellant was denied the right to be heard in the application because of lack of diligence in the matter, the Court of Appeal while allowing the appeal held;



- '(1) the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and those errors should not necessarily deter a litigant from the pursuits of his right.
- (2) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.'

Wendoh J further stated as follows in the same case above;

' In the instant case, this Court would be reluctant to strike out a suit just because an authority under seal has not been filed. This is because the Plaintiff can be allowed time within which the authority can be filed failing which the court can then take that drastic action of striking out the pleadings.'

35. The Board Resolution in this matter allowing M/s Sophia Abdillahi Chacha to represent the applicant and swear the affidavit in support can always be obtained later the applicant having joined the proceedings recently.
36. The upshot is that the application dated July 27, 2022 is allowed in this manner:
 - i. Pending the rehearing and determination of the current suit, this court do and hereby order stay of execution of the Ruling and or Orders of this court made on the June 28, 2022.
 - ii. This court does hereby issue orders of review and or, varies and or sets aside the Ruling and or Orders made on the June 28, 2022 to the extent that the orders are vacated and the judicial review application herein be heard on merit.
 - iii. Parties to take directions forthwith on the disposal of the judicial review application on merit.
 - iv. Costs in the cause.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 18TH DAY OF MAY 2023.

E. K. MAKORI

Judge

In the Presence of: -

Mr. Binyenya for the Interested Party

Court Clerk: Happy

In the Absence of:

Mr. Adede for the ex parte applicants

