



**Conservation Alliance of Kenya & 3 others v National Land Commission & 2 others;
Ministry of Tourism and Wildlife & 7 others (Interested Parties) (Constitutional Petition
E32 & E33 of 2021 (Consolidated)) [2023] KEELC 17805 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17805 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CONSTITUTIONAL PETITION E32 & E33 OF 2021 (CONSOLIDATED)

MAO ODENY, J

JUNE 9, 2023

IN THE MATTER OF ARTICLES 22(1) (2) AND 258 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 40, 69, 70 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT 2011

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF THE COMPULSORY ACQUISITION OF KIPINI
WILDLIFE AND BOTANICAL CONSERVANCY BY KENYA DEFENCE FORCES**

BETWEEN

CONSERVATION ALLIANCE OF KENYA 1ST PETITIONER

RAABIA HAWA 2ND PETITIONER

SWALEH MOHAMED SALEH 3RD PETITIONER

AWADH SALEH SAID 4TH PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT



CABINET SECRETARY MINISTRY OF DEFENCE 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

AND

MINISTRY OF TOURISM AND WILDLIFE INTERESTED PARTY
KENYA WILDLIFE CONSERANCIES ASSOCIATION INTERESTED PARTY
KENYA WILDLIFE SERVICE INTERESTED PARTY
KENYA FORESTRY SERVICE INTERESTED PARTY
CONSERVATION ALLIANCE OF KENYA INTERESTED PARTY
MINISTRY OF ENVIRONMENT AND FORESTRY INTERESTED PARTY
NAIROBI RANCHING COMPANY INTERESTED PARTY
KIPINI WILDLIFE BOTANICAL CONSERVANCY TRUST INTERESTED
PARTY

RULING

1. This ruling is in respect of a Notice of Motion dated January 14, 2022 and September 27, 2022 respectively by the intended 7th and 8th Interested Parties seeking joinder as interested parties to this petition.
2. The applications are supported by the affidavits of Omar Sherman, for the 7th Interested Party and Sari Sherman for the 8th Interested Party.
3. Omar Sherman, a director at the Intended 7th Interested Party Company, deposed that the proceedings herein involve properties Chaka/Kipini/Block Number 1/1-1/10 and Witu/Witu Block 1/1 to 1/17 located in Witu and Kipini localities all registered in the name of the Intended 7th Interested Party.
4. That since the Intended 7th Interested Party has no objection to the Respondents acquiring the suit properties, and since the main objective of the present suit is to stop the Respondents from the process of compulsory acquisition, it was necessary for the Intended 7th Interested Party to be represented herein to clarify some misrepresentations in the Petitioners' pleadings. According to him, the due process for compulsory acquisition had been followed and none of the interested parties herein or the public had been subjected to any illegality.
5. On the part of Sari Sherman, a trustee and the secretary of the Intended 8th Interested Party, deposed that the Intended 8th Interested Party being the conservancy that manages and operates the conservancy housed under the suit properties, was best placed to explain the effect the acquisition will have on the ecosystem thus a necessary party to the present proceedings.
6. The Petitioners opposed the application dated January 14, 2022. They filed grounds of opposition dated February 9, 2022 arguing that the application offended the provisions of the *Civil Procedure Act* and Rules, 2010 and that there was no resolution approving the application or appointing the firm of Nzamsa Sankale and Company Advocates to act for the Intended 7th Interested Party.
7. In addition, the 4th Petitioner filed a Replying Affidavit sworn on June 8, 2022 stating that he was also a director, chairman and majority shareholder of the Intended 7th Interested Party. He deposed



that he filed the present suit together with the 3rd Petitioner, on his own behalf and in the interest of the beneficiaries of the estate of one Mohamed Saleh Said respectively, and on behalf of the general public because Omar Sherman frustrated all the efforts to file the petition on behalf of the Company. According to him, Omar was the only member of the company misleading the Respondents as to the company's position on compulsory acquisition.

8. The 1st and 2nd Petitioners opposed the two applications and filed a Replying Affidavit sworn on November 29, 2022 by Steve Itela, the 1st Petitioner's CEO, who deposed that both Omar Sherman and Sari Sherman had no authority to act on behalf of the Intended Interested Parties and that their interests were personal. According to him, the two deponents' position was not the true position of the Intended Interested Parties.

Intended 7th Interested Party's Submissions

9. Counsel for the Intended 7th Interested Party submitted that the rules relating to joinder of parties under Order 1 Rule 10(2) are that a party had to show its stake in the proceedings and a party opposing such joinder demonstrate that it is not necessary that an applicant be joined. Counsel relied on the definition of an interested party in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu and 5 others* [2014] eKLR.
10. Counsel submitted that the Applicant is the registered owner of the suit property, and that they have a stake in the suit herein for the following reason: that the property was leased to Kipini Wildlife and Botanical Conservancy Trust.
11. Counsel submitted that the Petitioners in Petition 32 and 33 are challenging the acquisition of land belonging to the Applicant herein and that a common misconception by all Petitioners is that the entire property that is up for acquisition by the National Land Commission which is not the case.
12. It was counsel's submission that the National Land Commission is only acquiring about 30,000 Acres of land while the entire Conservancy is 72, 000 Hectares meaning that the wildlife will not be disturbed at all. Further that these facts among many others can only be placed before this court if the Intended Interested party is allowed to come on record. It will also be important for the Company to clearly state its position on the acquisition and whether it is opposed to the said acquisition or not.
13. Counsel argued that a company being a legal entity could only act through its directors and failure to demonstrate that Omar was not acting in the best interest of the company, there was no reason not to allow the application for joinder. Counsel further submitted that having demonstrated the company's stake in these proceedings, their application should be allowed.
14. Counsel further submitted that the matter before this court is a simple Application for joinder and a valid objection would have been to challenge the rationale of the coming onboard of the intended interested party. The Application herein has been filed and supported by an Affidavit of A shareholder/ director of the Applicant Company, Nairobi Ranching and that there is nothing that has been placed before this Court to show that the instructing director had no authority to instruct an Advocate to represent the interest of the company in this Petition.
15. Counsel relied on the cases of *Francis Kariuki Muruatetu and another v Republic and 5 others* [2016] eKLR; *Judicial Service Commissions v Speaker of the National Assembly and 8 others* [2014] eKLR; and *Sammy Kanyi Kareithi v Barclays Bank of Kenya and 2 others; Ross Xavier Whithey* [2021] eKLR.



1st and 2nd Petitioners' submissions

16. Counsel submitted that the application does not meet the threshold for joinder of interested parties and that the application is fatally defective. Counsel cited Article 22 (2) of the [Constitution of Kenya, 2010](#) (CoK) which provides that one can file a suit on behalf of another only where the other person cannot act in their own name. Rule 2 of the [Constitution of Kenya \(Protection of Rights And Fundamental Freedoms\) Practice And Procedure Rules, 2013](#) defines a person to include an individual, organization, company, association, or any other body of persons whether incorporated or unincorporated.
17. Counsel further submitted that the Applications as filed imply that the Interested Parties cannot act in their own name and that commencement of an action on behalf of a limited liability company must be authorized by a resolution of the said company and in the case of a trust, resolution of trustees and relied on the cases of *Shawaese Limited & another vs. Planes Gino* (2012) eKLR. High Court at Malindi. Civil Case No. 183 of 2011). Further in *Bugerere Coffee Growers Ltd vs, Sebaduka and Another* (1970) E.A at Pg 147 (cited in the case of *David Kiptum Yator & 2 others suing as Leaders of the Sengwer Community v Attorney General & 5 others* [2106] eKLR) where the court held that when companies authorize the commencement of legal proceedings a resolution have to be passed either at a company or board of directors meeting and recorded in the minutes.
18. Counsel added that by virtue of Clause 5 of the Intended 8th Interested Party's Trust Deed, the power to act on behalf of the Trust was only in majority of the trustees. Since the application was filed by one trustee out of the six, it did not represent the position of the majority.
19. Counsel submitted that the dispute between the directors and shareholders necessitated the 3rd and 4th Petitioners to institute the Petition in their own names. Therefore, the position averred by the said Omar was an individual one and not the Company's position. Counsel urged the Court to dismiss the applications.

Analysis and Determination

20. The issue for determination is whether the proposed Interested Parties have met the threshold for joinder to this petition. What is there stake in this petition
21. Order 1 Rule 10(2) 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 and settle all questions involved in the suit, be added.

22. The [Black Law Dictionary](#) 9th Edition defines "Interested Party" as "a party who has a recognizable stake and therefore a standing in a matter". Similarly, Rule 2 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedom\) Practice and procedures Rules 2013](#) (the Mutunga Rules) provides: -

“...a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not directly involved in the litigationOne who will be affected by the decision of the court when it is made either way.



Such a person feels that his or her interest will not be well articulated unless himself or she herself appears in the proceedings and champions his or her cause ...”

23. In the case of *Skov Estate Limited & 5 others v Agricultural Development Corporation & another* [2015] eKLR the court held on joinder of an Interested Party 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.

24. A party seeking to be joined as an Interested Party must demonstrate that the interest goes beyond just being affected by the judgment and must further show that his or her presence will be necessary to assist the court in dealing with the issues in the suit which affect them once and for all and without the necessity of multiplicity of suits on the same subject matter.

25. It is also trite that the court has a discretion on the decision to allow or refuse an application for joinder which should be exercised judiciously as was held in the case of *Izera Enterprises Limited –v- Image Font Limited; Sagalla Ranchers Limited (Proposed Interested Party)* (Environment & Land Case 113 of 2021) [2022] KEELC 12585 (KLR), Naikuni J held;-

“What to be considered for joinder are the following facts. Firstly, it is based on the principles of natural Justice – not to be condemned unheard and accorded an opportunity to be heard (principle of audi alteram partem).

Secondly, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transactions alleged to exist – whether jointly or severally or in the alternative or in the alternative where of such persons brought separate suits any common question of law of fact would arise – order 7 rule 9 of Civil Procedure Rules, 2010...

But, joinder of parties may be refused where such joinder would lead into practical problems of handling the existing cause of action together with the one of the party being joined, is unnecessary or will just occasion unnecessary costs on the parties in the suits – or just being a nuisance on rocking the boat from the bottom. In other words, joinder of parties would be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in joinder of parties would be a common question of fact or law would arise between the existing and the intended parties. (See *Lucy Nangari Ngigi & 128 others v National Bank of Kenya Limited & another* (2015) eKLR”

26. It is not disputed that the suit properties are registered in the name of the Intended 7th Interested Party and it also appears that there is a misunderstanding concerning the acquisition, among the directors of the Intended 7th Interested Party, necessitating the 3rd and 4th Petitioners to file the present suit in their own capacities as opposed to and on behalf of the Intended 7th Interested Party Company. It is apparent therefore that there are divergent views as far as the Company is concerned.



27. The fact that the proposed 7th Interested party is the registered proprietors of the suit land and the fact that there are disagreements between the directors of the company, is a more reason why the joinder should be allowed to iron out all the issues of acquisition and compulsory acquisition.
28. The fact that a party is joined into a suit does not automatically give him/her leeway or a walk in the park, they must meet the threshold for proof under the law and procedures. The issues whether the parties are authorized vide company resolution or trustee will be dealt with during the hearing. If they do not meet these thresholds, then they will still be struck out.
29. This is an application for joinder of parties and each case should be dealt with according to the circumstances of the case. I find that the applications have merit and are therefore allowed. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF JUNE 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

