Kenya Airways Limited v Shutu; Fondo (Legal representatives of the Estate of Charo Shutu Masha) (Intended Interested Party) (Environment & Land Case 10 of 2008) [2025] KEELC 1336 (KLR) (19 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1336 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 10 OF 2008

FM NJOROGE, J

MARCH 19, 2025

BETWEEN

KENYA AIRWAYS LIMITED ..... PLAINTIFF

AND

JAPHET NOTI CHARO SHUTU ..... DEFENDANT

AND

MASHA SHUTO FONDO (LEGAL REPRESENTATIVES OF THE ESTATE OF CHARO SHUTU MASHA) ..... INTENDED INTERESTED PARTY

RULING

1. The application for determination is dated 11/11/2024 and the orders sought were framed as follows: -

    1. .....Spent;

    2. .....Spent;

    3. .....Spent;

    4. .....Spent;

    5. That pending the hearing and determination of the main suit, upon the grant of the order for this suit to be heard de novo, an order be issued restraining the Plaintiff/respondent and the Defendant/respondent, whether by themselves, their agents, employees, or otherwise, from selling, transferring, charging, leasing, or in any other manner alienating or disposing of the suit property herein, specifically, the property known as L.R 5785 Malindi;

    6. That this honourable court be pleased to grant orders joining the intended interested parties/ applicants in the instant suit to wit Malindi ELC Suit No. 10 of 2008;

7. That there be a review of the judgment of this Court delivered on 14th March 2019 and the same be set aside and the suit be heard de novo;

8. That costs of this application be provided for.

2. The application, which has been brought under the provisions of section 1A, 1B, and 3A of the *Civil Procedure Act*; Order 1 rule 10 (2), Order 40 rule 1 and Order 45 rule 1 of the Civil Procedure Rules as well as Article 50 (1) of the *Constitution*, is premised on the grounds indicated therein and supported by the affidavits jointly sworn by the applicants on 12/11/2024 and 19/12/2024.

3. The Applicants averred that they are the legal representatives of the estate of Charo Shutu Masha whom they claimed is the legal owner of the property L.R 5785 within Plot M5 Malindi (the suit property) which was the subject of the main suit herein; that the Defendant did not have any legal capacity to represent the said estate and that he neither informed the family of the suit; the Applicants averred that they only became aware of the suit and judgment when some of the widows of the deceased visited the suit property and coincidentally witnessed the service of the notice to show cause.

4. The Applicants asserted that the suit property was fraudulently registered in the names of the Plaintiff and Defendant herein to the detriment of the estate. They claimed historical injustices and averred that some of the widows of the deceased still reside thereon. They exhibited copies of letters from the then Provincial Commissioner (dated 2/8/1994) and others from the then District Officer, Malindi (dated 29/12/1993 and 14/9/1993) said to recommend that the suit property be registered in favour of the deceased. The Applicants want this court to hear them since they claim that the initial parties failed to inform the court of the true position.

5. The Plaintiff opposed the application. It filed a replying affidavit sworn by Evans Gatobu on 28/11/2024. According to Mr. Gatobu, this court became functus officio upon issuance of judgment on 14/3/2019; that since there is a pending appeal at the Court of Appeal, the Applicants ought to seek joinder before that court. He added that the Applicants have neither established an identifiable stake in the suit property, nor any connection to the issues in this suit. The deponent asserted that the issue of allocation of the suit property was conclusively determined by the court and reopening the same would be res judicata.

6. Similarly, the Defendant filed a replying affidavit which he swore on 14/12/2024, stating that he agreed to settle his late father's widows at a different area in a more decent house, which he did, and took over the original homestead at the suit property.

Applicants' Submissions

7. Counsel for the Applicants identified two issues for determination; firstly, whether the Applicants should be joined in this matter and judgment set aside, secondly, whether a temporary injunction restraining the Respondents from disposing the suit property should be issued.

8. In relation to the first issue, counsel relied on the test established by the Court of Appeal in Merry Beach Limited v AG & 18 others [2018] eKLR, that is, joinder of parties post-judgment can only be permitted in exceptional circumstances, where adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issues in dispute. To counsel, the Applicants' position did fit the stated exceptions. Counsel further relied on the case of Republic v NLC & another; County Government of Kiambu (Proposed Interested Party); Mihiu (Ex-parte Applicant); and Jeremiah Mghanga Msafari v Millicent Zighe Mwachala & 3 Others [2021] eKLR.

9. Counsel asserted that the issue of res-judicata could not hold since the Applicants were not parties in the suit. He added that the doctrine of functus officio was also not absolute and is subject to recognized exceptions such as those in the present case.

10. To counsel, a party seeking joinder must not only show the injury suffered but that the injury is being unfairly visited upon him, as was held in Robert Githua Thuku v William Ole Nabala & 9 Others [2018] eKLR. Counsel argued that the Applicants have demonstrated the injury suffered by declaring the Plaintiff as the owner of the suit property. To counsel therefore, the Applicant has not only established a prima facie case but also shown the likelihood of infliction of irreparable damage if the orders sought are not granted.

The Plaintiff's Submissions

11. On his part, counsel for the Plaintiff raised four issues for determination. Firstly, whether the Applicants ought to be joined to this suit post judgment. Citing Order 1 Rule 10 (2) of the Civil Procedure Rules and the case of KAA v Mitu-bell Welfare Society & 2 others [2016] eKLR, which was appealed to the Supreme Court, counsel argued that the court can only allow joinder of a party before passing judgment; that one of the exceptional circumstances when a party can be joined post-judgment is when damages are yet to be assessed. To support this argument, counsel relied on the case of JMK v MWM & another [2015] eKLR. To counsel, since there was no order as to damages in this case, no assessment of damages is pending to warrant the court to allow the application for joinder at this stage.

12. Relying on the Merry Beach case (supra), counsel submitted that the other exception is when adverse orders have been issued against a party who was neither given notice of the suit nor heard on the dispute. Counsel argued that no adverse orders have been issued against the Applicants herein because they have no actionable interest and right to be in the suit. According to counsel, the evidence exhibited by the Applicants does not show that they have legal or beneficial interest in the suit property, but that they were in fact squatters on government land. To buttress this point, counsel cited the case of Robert Githua Thuku v William Ole Nabala [2018] KECA 137 (KLR); Samuel Matunde Muchina v Samuel Kiptoo Ruto & 9 others [2020] KEELC 1037 (KLR)

13. The second issue counsel addressed was whether the judgment should be reviewed and set aside. Relying on the Robert Githua Thuku case [supra], counsel argued that when the application for joinder fails, all the subsequent orders should equally fail. He added that the principles for review are well stated under Order 45 Rule 1 of the Civil Procedure Rules and restated by the Court of Appeal in KPLC Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR. To counsel, the Applicants' exhibits do not disclose any new evidence that was not within their knowledge and could have been produced by the Defendant. Further, there is no error on the face of the record. Counsel urged the court to be guided by the principles of review stated in Khalid & 16 others v AG & 2 Others [2020] KESC 30 (KLR) and equally dismiss the prayer for review.

14. The third issue was whether the suit should be heard de novo and if so, whether an order of injunction should be issued. Counsel submitted that the authority to grant a re-hearing is found under Order 45 rule 5, upon grant of an application for review. That power, so counsel argued, is discretionary even where a prayer for review is granted. In support, counsel relied on the case of Nelson Namaswa & 4 others v James Wanyama (Civil Case No. 8 of 1997) [2015] KEHC 5904 (KLR). To counsel, the application having failed to meet the threshold for granting the order for joinder and review, the prayer for re-hearing should thus be dismissed. Counsel further submitted that the Applicants have equally failed to establish the requirement for granting injunctions given in the case of Nguruman Limited

v Jan Bonde Nielsen, Herman Philipus Steyn alias Hermannus Phillipus Stey & Hedda Steyn [2014] KECA 606 (KLR).

15. Counsel's final issue was on costs and he urged the court to be guided by Section 27 of the *Civil Procedure Act* and the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR. He implored the court to award costs to the Plaintiff.

Analysis and Determination

16. The law provides for applications for joinder of parties in matters. Order 1 Rule 10 of the Civil Procedure Rules 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."

17. In Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & Another [2014] eKLR Judge Nyamweya held as follows:

> " The provisions of Order 1 Rule 10(2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in Black's Law Dictionary Ninth Edition at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.
>
> Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage".

18. Other decisions such as Jeremiah Mghanga Msafari v Millicent Zighe Mwachala & 3 others [2021] KEHC 13623 (KLR) have upheld the right to joinder as an interested party after judgment in justifiable circumstances. In that case the court cited a decision in Elton Homes vs Davis & others (2019) eKLR, in which a joinder application was allowed on the basis that the applicant was likely to be prejudiced by an agreement entered into by the parties to the suit without his involvement yet he was in occupation of the land subject matter of the suit, which was clearly against the principles in Article 50 of the *Constitution* on the right to be heard.

19. Both parties herein aptly submitted that before a party is enjoined in a matter, the court ought to satisfy itself that the proceedings are alive and only in exceptional and justifiable circumstances will joinder be considered post-judgment. One such exception is where a case has been determined and adverse orders have been issued against a party who was neither given notice of the case nor heard on the issue in dispute. Another circumstance is where the party intended to be joined is a necessary party for the

purpose of execution as was in the Carol Silcock Case where the transferee of land disposed of pendent lite was joined as an interested party so that orders of rectification of the title to the land could apply to take the land away from him.

20. The Applicants herein have sought to be joined as "Interested Parties" to the suit on behalf of the estate of Charo Shutu Masha, for the reason that the suit property was at all material times owned by the said deceased. An interested party is defined under Rule 2 of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as: -

> " ...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 be directly involved in the litigation;"

21. The Black's Law Dictionary defines an Interested Party as

> " a party who has a recognizable stake (and therefore standing) in the matter."

22. In Communications Commission of Kenya and 4 Others -v- Royal Media Services Limited & 7 Others Petition No. 15 OF [2014] eKLR, relying on its earlier decision in the Mumo Matemo case the Supreme Court, in defining who an "Interested Party" is, held as follows:

> " An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one 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 he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:
>
> (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
>
> (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
>
> (iii) Joinder to prevent a likely course of proliferated litigation.
>
> We ask ourselves the following questions:
>
> a) what is the intended party's state and relevance in the proceedings and
>
> b) will the intended interested party suffer any prejudice if denied joinder.?"

23. In Francis K. Muruatetu and another v. Republic & 5 others (2016) eKLR, the same 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."

24. To me, whether or not the orders of the impugned judgment delivered in this suit will adversely affect the Applicants is predicated on the issue of whether or not the applicants have an identifiable stake; if the Applicants have no identifiable stake, then they cannot be adversely affected by the judgment. Therefore, the question that arises is whether the Applicants have an identifiable stake in this suit.

25. Despite their application, the applicants are not contending that they are resident on the suit land; they do not state that they run the risk of eviction therefrom. The manner in which they narrated the fate of the widows of Charo Shutu Masha (deceased) in their supporting affidavit demonstrates that they have all along known what transpired regarding the land. Clearly, the widows are also not on the suit land. The widows on their part have not raised any issue. They appear to have gone along with the resettlement plan. It would appear that their discontent is with the arrangements for accommodation of the widows that were made in relation to the present suit. This is evident in paragraphs 14-20 of the supporting affidavit.

26. A perusal of the numerous letters exhibited by the Applicant reveal that the said deceased and his family lived on the Plot M5 for such a long time as squatters and the intervention of the then administrative offices was only in recognition of their plight and a recommendation was made to have the government consider his occupation thereon. The letter dated 26/6/1995 exhibited as KM-6 reveal that the deceased most likely settled on the Plot M5 after acquisition, meaning that by the time the deceased moved into the land, the same was government land. It is trite that prescriptive rights can not accrue in favour of a squatter on government land. In any case, the suit property herein is a portion of Plot M5 and the Applicant has not demonstrated that the deceased and his family occupied the whole of Plot M5.

27. From the foregoing analysis, this court's finding is that the Applicants have failed to establish an identifiable stake to warrant this Court's intervention at this stage. There is no justification for their joinder to the suit post judgment for any purpose. Moreover, it elicits a serious concern that the Defendant, who is undisputedly the deceased's son, never raised the allegations now being raised by the Applicants 6 years after the judgment.

28. Having declined the prayer for joinder, I see no basis to delve into the other prayers. Now they all automatically fail. The outcome is that the Notice of Motion dated 11/11/2024 lacks merit and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 19TH DAY OF MARCH 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI