



**Njuguna (Suing as the legal administratrix and personal representative of the Late Joel Njuguna Mbugua) & 4 others v SS Mehta & Sons Limited (Environment and Land Case Civil Suit 166 of 2018) [2023] KEELC 19934 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19934 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT AND LAND CASE CIVIL SUIT 166 OF 2018**  
**EK MAKORI, J**  
**SEPTEMBER 22, 2023**

**BETWEEN**

**MARY NJERI NJUGUNA (SUING AS THE LEGAL ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE LATE JOEL NJUGUNA MBUGUA) ..... 1<sup>ST</sup> PLAINTIFF**  
**RACHAEL WANJIKU KIMANI ..... 2<sup>ND</sup> PLAINTIFF**  
**KENNETH WAGEMA KIMANI (SUING AS THE LEGAL ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE WALTER NDUNGU KIMANI) ..... 3<sup>RD</sup> PLAINTIFF**  
**ROBERT MATEMO MBURU NGWIRI ..... 4<sup>TH</sup> PLAINTIFF**  
**EMLYN JAMES NGWIRI ..... 5<sup>TH</sup> PLAINTIFF**  
**AND**  
**SS MEHTA & SONS LIMITED ..... DEFENDANT**

**RULING**

1. The pending application for determination before this court is the proposed interested parties' application brought by way of notice of motion dated March 17, 2022. It seeks to have the interested parties joined as either interested parties or defendants in this suit. The application is brought under Order 51 of the [Civil Procedure Rules](#) and sections 1A, 1B, and 3A of the [Civil Procedure Act](#).
2. The application is opposed. The court directed that the application be canvassed by way of written submissions.
3. Significantly, the Intended interested parties contended that the defendant has been sued by the plaintiffs for wrongful and illegal extraction of sand on the suit property known as Plot M2 Malindi.



- That the suit property belongs to them. They are the ones who leased it out to the defendants having inherited it from their ancestors and have lived in the suit property since time immemorial.
4. The intended interested parties contended that they had already filed a suit ELC No E5 of 2021 (OS) where they sought 20 acres from the suit property by way of adverse possession.
  5. The defendants support the motion for joinder and propose that since the intended interested parties have already filed suit the same ought to be consolidated with the current suit so that all the issues raised in both suits are fully and finally heard and determined to avoid proliferation of suits. The defendant cites several authorities in support of its assertion being *AG v David Ndiu & 73 others* [2021] KESC 17 (KLR) (9 November 2021), *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* SC Petition (Application) No 12 of 2013, *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR and *Hope v Director of Survey & 2 others; Sakaja & others (Interested Party)* [2022] KEELC 6(KLR) (4 May 2022)(Ruling).
  6. On the other hand, the plaintiff contended that the joinder was misconceived. The applicants failed to cite the correct enabling provision for joinder being Order 1 rule 10 of the *Civil Procedure Rules* and the cited provisions have no relevance to the applicant's application dated March 17, 2023.
  7. The application has been opposed by the plaintiffs through the replying affidavit of Kenneth Wagama Kimani sworn on February 10, 2023. The plaintiff cited the case of *Japhet Muroko & another v Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR, where the court elucidated the legal principles to consider for joinder as an interested party as was stated by the Supreme Court in the case of *Francis Kariuki Muruatetu & anor. v Republic & 5 others* Petition No. 15 & 16 of 2016 [2016] eKLR.
  8. The plaintiff submitted that by applying the principles expounded in the quoted case, the applicants have not met the threshold for joinder in this matter and the application dated March 17, 2022 ought to be dismissed.
  9. By the amended plaint dated October 8, 2018, the plaintiffs have set out their case against the defendant and the plaintiffs primarily seek an award of general damages and exemplary/punitive damages against the defendant for the illegal activities of excavation of the plaintiff's land known as (L.R. NO. 2109 (M20/2) Malindi). The defendants filed a defence to the plaintiffs' claim. By the defence on record dated June 11, 2019, paragraph 3 thereof controverts the contents of paragraph 4 of the amended plaint (where the plaintiffs plead being owners of that parcel of land known as (L.R. 2109 (M20/2) Malindi) and the defendants averred in the said paragraph 3 of the defence that the suit land mentioned in the amended plaint (L.R. NO. 2109 (M20/2) Malindi) belonging to the plaintiffs is different from the land which the defendant got into an agreement with Karisa Mbui Maguu, Katana Mbui Maguu, Kazungu Kaingu which the defendants averred in their defence as being Plot No. M20 Quarry 5 MLD-KLF.
  10. The plaintiff contended that it is therefore clear from the defendant's defence that the land the defendant dealt with the interested parties is different from the land belonging to the plaintiffs. There is, therefore, no need to join the applicants in this suit as the defendant has pleaded in its defence that they dealt with the applicants on a different property not belonging to the plaintiff.
  11. That, the personal interest or stake that the party has in the matter must be set out in the application and the interest must be identifiable and must be proximate enough to stand apart from anything that is merely peripheral. The defendant has pleaded in its defence that it dealt with the interested parties on a different property known as plot no. M20 Quarry 5 MLD-KLF that the defendants have pleaded in their defence, is different from the plaintiffs' property (L.R. 2109 (M20/2) Malindi), and there is no identifiable interest to warrant joinder of the applicants in this matter.



12. That the set out applicable principles for joinder of a party require that the party must in his 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 those submissions are not merely a replication of what the other parties will be making before the court.
13. The plaintiff submitted that on the grounds of the said application, the applicants state the present suit involves land known as (L.R. 2109 (M20/2) Malindi), and therefore the applicants have no identifiable stake in the plaintiffs' present suit.
14. The short supporting affidavit of Kazungu Karisa fails to meet the principles set out for the joinder. The applicants have not demonstrated through the supporting affidavit what submissions they intend to make before the court and the relevance of those submissions.
15. I have considered the material placed before me in terms of affidavits and submissions what emerges for the consideration of this court is whether the applicants have met the threshold for joinder as interested parties or defendants in this suit. Moreover, whether this court can make any further orders given a pending application for consolidation of this suit with ELC No E5 OF 2021 (OS).
16. The parties have cited the relevant and germane authorities on what to consider before the joinder is allowed by the court.
17. In *Francis Kariuki Muruatetu & ano v Republic & 5 others* Petition No. 15 & 16 of 2016 [2016] eKLR the court held as follows on joinder:

20. The above principle was restated in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others* Petition No. 15 & 16 of 2016 [2016] eKLR, where the Supreme Court set out the principles applicable in considering the question of whether a person qualifies to be joined as an interested party as follows:

- (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:
- i. 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:
  - ii. 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.
  - iii. 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.
  - iv. 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.

18. In *Gladys Nduku Ntbuki v Letsbego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR Odunga J. held as follows on joinder:

“Order 1 rule 10(2) of the said Rules provides that:

“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.”

55. Although the parties herein could not resist the temptation to wade into the merits of the main application, the matter before me is simply whether to allow the application for the joinder of the interested party to these proceedings and whether the consequential order of amendment of the pleadings ought to be granted. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori v Chege & 3 others* [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

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 adjudicate upon and settle all questions involved in the suit.

56. In *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 it was held as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for the avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the



defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

57. In *Civicon Limited vs. Kivuwatt Limited and 2 others* [2015] eKLR the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, or inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances 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 the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial.”

19. The interested parties in this matter averred that the suit property (part of it - 20 acres to be precise), has been in their occupation since time immemorial. They have filed suit to be declared to have acquired it through the doctrine of adverse possession. They contended that they were the ones who leased out the same to the defendant for purposes of sand harvest. Therefore, at the end of the day when this matter is heard and determined the decree that may arise will directly affect them because they reside on that land.
20. The plaintiff on the other hand disputed the description of the property that it is not the one on issue in this matter. The defendant admitted it is the land in contestation in this suit and ELC No E5 OF 2021 (OS). That issue on the description of the property can come out at the trial.
21. Looking at the test for joinder, the intended interested parties to have shown that they are real and necessary parties in this suit having been the ones who entered an agreement with the defendant in the harvest of sand on the suit property. They have shown they are proper parties to be joined and their joinder will not be trifling. They have also shown that the orders the plaintiff may obtain from this court directed to the defendant will affect them. They have also further shown that any decree emanating from this court will directly affect them and may not be enforced without their participation. They have also shown that their presence will be necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. This is more so having disclosed they have another parallel suit with this one if not harmonized - will lead to multiplicity and proliferation of suits whose impact will be to slow the determination of the current suit.
22. Application dated March 17, 2022 is hereby allowed. The intended interested parties are hereby admitted to this proceeding. In addition, given the pending application for consolidation, directions be taken on the same in the presence of all parties. Costs in the cause.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 22ND DAY OF SEPTEMBER, 2023.**



**In the Presence of**

**Mr. Githinji for the Plaintiff**

**Mr. Marubu for the Applicants**

**Ms Nyamu holding brief for Gachau for the Defendant**

**Court Clerk: Happy**

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**E. K. MAKORI**

**JUDGE**

