



**Mangi v Wanjiru & 9 others; Bedford (Intended Interested Party) (Environment & Land Case 86 of 2022) [2023] KEELC 21999 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 21999 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 86 OF 2022  
LL NAIKUNI, J  
DECEMBER 5, 2023**

**BETWEEN**

**STEPHEN MANGI ..... APPLICANT**

**AND**

**LYDIA WANJIRU ..... 1<sup>ST</sup> RESPONDENT**

**MBURU NJUE ..... 2<sup>ND</sup> RESPONDENT**

**ALEX KINYUA ..... 3<sup>RD</sup> RESPONDENT**

**HELLEN MUTHONI ..... 4<sup>TH</sup> RESPONDENT**

**EUNICE KIVUVA ..... 5<sup>TH</sup> RESPONDENT**

**JANE WANGECHI ..... 6<sup>TH</sup> RESPONDENT**

**EVALYNE MUKASI ..... 7<sup>TH</sup> RESPONDENT**

**REGINA MUTHONI ..... 8<sup>TH</sup> RESPONDENT**

**RAPHAEL KAIMENYI ..... 9<sup>TH</sup> RESPONDENT**

**SHALOM MIRACLE CHURCH ..... 10<sup>TH</sup> RESPONDENT**

**AND**

**DAVID KIRIMI BEDFORD ..... INTENDED INTERESTED PARTY**

**RULING**

1. The Ruling of this Honorable Court for its hearing and determination is the Notice of Motion application dated 16<sup>th</sup> September, 2022 brought under a certificate of urgency by the Intended Interested Party/Applicant, David Kirimi Bedford. It is premised under the provisions of Order 1 Rule



10 (2) of the Civil Procedure Rules and Sections 1,1A,1B,3 and 3A of the Civil Procedure Act Cap 21. At the same time, the Court is moved to deal with the Notice of Preliminary Objection by the said Intended Interested Party dated 2<sup>nd</sup> December, 2022 and filed on the same day.

2. Upon effecting service, and while opposing the aforesaid application, the Applicant/Respondent filed their replies in form of a Replying Affidavit dated 7<sup>th</sup> October, 2022.

### **The Intended Interested Party/Applicant's case**

3. The Intended Interested Party/Applicant seeks for the following orders:-
  - a. Spent.
  - b. That the Intended Interested Party herein, David Kirimi Bedford be joined in this suit as an Interested Party forthwith before the inter partes hearing of the Plaintiff's Application dated 4<sup>th</sup> August, 2022.
  - c. That the costs of this application be provided for.
4. The application by the Applicant is based on the grounds, the testimonial facts and the averments made out under the 17 Paragraphed annexed Supporting Affidavit of David Kirimi Bedford the Applicant herein together with eight (8) annexures marked as "DK – 1 to 8" annexed hereto. The Applicant avers that:
  - a. He entered into a lease agreement with the Applicant/Respondent dated 11<sup>th</sup> September, 2013 for a term of 3 years in respect of that parcel of land known as Kilifi/5054/11 situated in Kilifi (hereinafter referred to as "The Suit Land").
  - b. Pursuant thereto, he erected structures on the said property among them thirteen (13) shops and a shelter that was used as a church all popularly known as House No. 3872 which run by the 10<sup>th</sup> Respondent.
  - c. The Respondent/Sub - Tenants herein were therefore his tenants in the said shops and Church and they had been paying rent to him through his agents Messrs. Elegant Investments.
  - d. The Applicant and himself had been extending the lease from time to time on terms agreed upon by themselves.
  - e. The Applicant/Respondent however issued him with a Notice to Terminate Tenancy dated 22<sup>nd</sup> September, 2020 seeking to terminate the tenancy with effect from 31<sup>st</sup> December, 2020. A copy was annexed hereto and marked as "DK - 1".
  - f. They however engaged in negotiations and amicably resolved to compromise the said Notice. A copy of the agreement to that effect was annexed hereto and marked "DK - 2".
  - g. They agreed to extend his lease for a further period of 3 years with effect from 1<sup>st</sup> January, 2021 to January, 2024. This was a fact which was admitted by the Applicant/Respondent in his Further Affidavit sworn on 18<sup>th</sup> May, 2021 which was annexed hereto and marked as "DK - 3".
  - h. He thereafter continued to pay rent to the Applicant/Respondent which he had been accepting as evidenced by the payment schedule a copy of which was annexed hereto and marked as "DK -4".
  - i. In breach of their agreement, the Applicant/Respondent issued the Respondent/Sub - Tenants herein the six (6) months' Notice of Vacation herein and demanded that the tenants



therein pay rent directly to him. A copy of the said Notice was annexed hereto and marked “DK-5”.

- j. Pursuant thereto, the Respondent/Sub - Tenants file the application in court dated 3<sup>rd</sup> March, 2021 against him and the Applicant/Respondent herein challenging the notices of termination of their tenancy and the Tribunal ordered that all rent be deposited at the tribunal pending the determination of the matter.
- k. The Tribunal delivered its Ruling on 29<sup>th</sup> July, 2021, which was annexed hereto and marked as “DK - 6”.
- l. After the said Ruling, he proceeded to make an application for the release of the rental proceeds deposited with the Tribunal (Garnishee herein) to him which application was disallowed and the Tribunal directed that the matter do proceed to full hearing. A copy of the letter requesting for the certified ruling and the response from the Tribunal were annexed hereto and marked as “DK - 7” and “DK - 8” respectively.
- m. He contended that he was the lawful lessee of the suit premises and therefore the Applicant/Respondent had no legal basis to issue Notices of Vacation to the Respondent/Sub - Tenants and/or any justification to seek to have the rent deposited with the Tribunal released to him.
- n. Given that the subject matter of the suit was similar to that in Business Premises Rent Tribunal Case No. 250 of 2020, it was necessary for him to be enjoined to this proceedings as his presence before the Court was necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit.

### **III. The Notice of Preliminary Objection by the Intended Interested Party**

- 5. The Intended Interested Party raised a preliminary objection dated 2<sup>nd</sup> December, 2022 to the suit herein as filed and contended that the same should be struck out with costs on the following grounds:-
  - a. The application to act and appearance of Christine Makungu Mukangi in this suit on behalf of the Applicant/Landlord contravened the provisions of Order 9 Rule 2(a) of the Civil Procedure Rules, 2010.
  - b. The Suit was “Res- Sub judice” as it offended the provisions of Section 6 of the [Civil Procedure Act](#), 2010 as there was another pending suit concerning the same parties and the same subject matter namely Mombasa BPRT Case No. 250 of 2020 before the Business Premises Rent Tribunal.
- 6. The Preliminary objection was supported by an affidavit dated the same day where the Intended Interested Party averred as follows:
  - a. He entered into a Lease Agreement with the Applicant/Respondent dated 11<sup>th</sup> September, 2013 for a term of 3 years in respect of that parcel of the suit land.
  - b. Pursuant thereto, he erected structures on the said property among them thirteen (13) shops and a shelter that is used as a church all popularly known as House No. 3872 which run by the 10<sup>th</sup> Respondent.
  - c. The Respondent/Sub - Tenants herein were therefore his tenants in the said shops and Church and they had been paying rent to me through his agents Messrs. Elegant Investments.
  - d. The Applicant and himself had been extending the lease from time to time on terms agreed upon by themselves.



- e. The Applicant/Respondent however issued him with a Notice to Terminate Tenancy dated 22<sup>nd</sup> September, 2020 seeking to terminate the tenancy with effect from 31<sup>st</sup> December, 2020. A copy was annexed hereto and marked as “DK - 1”.
- f. They however engaged in negotiations and amicably resolved to compromise the said Notice. A copy of the agreement to that effect was annexed hereto and marked as “DK - 2”.
- g. They agreed to extend his lease for a further period of 3 years with effect from 1<sup>st</sup> January, 2021 to January, 2024. This was a fact which was admitted by the Applicant/Respondent in his Further Affidavit sworn on 18<sup>th</sup> May, 2021 which was annexed hereto and marked as “DK - 3”.
- h. In breach of their agreement and despite the existence of a valid lease between them, the Applicant/Landlord issued the Respondent/Sub - Tenants herein with six (6) months’ Notice of Vacation and demanded that the tenants therein pay rent directly to him.
- i. Pursuant thereto, Respondent/Sub - Tenants filed the application in court dated 3<sup>rd</sup> March, 2021 against himself and the Applicant/Landlord herein challenging the notices of termination of their tenancy and the Tribunal ordered that all rent be deposited at the tribunal pending the determination of the matter.
- j. He contended that he was the lawful lessee of the suit premises and therefore the Applicant/Landlord has no legal basis to issue Notices of Vacation to the Respondent/Subtenants unless and until his lease has been lawfully terminated.
- k. The Applicant/Landlord’s actions were therefore tantamount to interference with his peaceful enjoyment of the subject premises and he is not entitled to the orders that he sought.
- l. The lease agreement clearly provided that he could carry out any business or trade of any kind in the structures that he had erected on the subject premises, letting out those structures to the Respondent/tenants was squarely within the terms of the said lease agreement.
- m. Further, the Applicant/Landlord had for over 10 years been aware that the subject premises were let out to the Respondent/Sub - Tenants, his allegations that subleasing the premises was against the terms of the lease agreement was therefore baseless and an afterthought.
- n. The facts/issues in this suit were directly and substantially before the Business Premises Rent Tribunal in Mombasa BPRT Case No. 250 of 2020 between the same parties and hence this suit ought to be stayed pending the determination of the tribunal case.
- o. The prayers sought by the Applicant/Landlord in the nature of garnishee nisi and for release of the rent by the “garnishee” are untenable and misplaced and ought to be declined.
- p. The Affidavit was in opposition to the Applicant/Landlord’s application dated 4<sup>th</sup> August, 2022.

#### **IV. The Applicant/Respondent’s case**

7. On 7<sup>th</sup> October, 2022, the Applicant/Respondent filed 17 Paragraphed Replying Affidavit sworn on the same day by the Steven Kahindi Mangi, in opposition of the application and together with annexures marked as “SKM”. He deponed that: -
  - a. The Applicant admitted the contents of Paragraph 1 of the Intended Interested Party Affidavit.



- b. The Applicant denied in toto the contents of Paragraphs 3 and 4 and averred that subject to the lease agreement dated 11<sup>th</sup> September 2013 the Applicant signed a lease agreement with the Intended Interested Party which terms stipulated that the Intended Interested Party would build a structure to conduct any business but not sub - let the said premises.
- c. Further in response to Paragraphs 3 and 4, the sub - letting of the said premises constitute breaching of the lease agreement. The Applicant averred that the Intended Interested party did not consult nor inform him of the said sub - letting and the Respondents/Sub - Tenants were strangers to the Applicant.
- d. The Applicant admitted the contents of Paragraphs 5 and 6 of the Affidavit to the extent that the Applicant and the Intended Interested Party did renew the Lease agreement dated 11<sup>th</sup> September 2013 vide two addendums dated 23<sup>rd</sup> November 2015 and 13<sup>th</sup> May 2019 respectively. That further the Applicant did issue the Intended Interested Party with a termination notice dated 22<sup>nd</sup> September 2020. Annexed hereto was the addendum dated 23<sup>rd</sup> November 2015 and 13<sup>th</sup> May 2019, marked and produced as “Exhibit SKM - 1a and SKM - 1b”.
- e. The Applicant denied the contents of Paragraph 7 and averred that there were no negotiations to compromise the said Notice and that the annexed agreement was only in regard to two shops that had been built by the Applicant herein and occupied by the Intended Interested Party without their consent and therefore the Intended Interested Party agreed to move out of the said two shops occupied illegally.
- f. In response to Paragraph 8 of Affidavit the Applicant admitted to the extended lease agreement only to the extent that the same was effected as from 1<sup>st</sup> January 2022 to 31<sup>st</sup> December 2023 and not as stated by the Intended Interested Party. That Further the lease was only extended with an agreement that the Intended Interested Party would not sublet nor breach any terms of the Lease agreement.
- g. In response to Paragraph 9 of Affidavit, the intended Interested Party had come to this Honourable Court with unclean hands and continued to perform inequities against the Applicant herein. That further the Intended Interested Party had always been in breach of terms of payment of the rental income which ought to be paid bi-annually as per the lease agreement however he had always and continued paying the rental income as he pleased.
- h. Further in response to Paragraph 9 the Applicant herein issued the Notice to terminate majorly due to the partial payments that were made by the Intended Interested party and the renewal of the lease agreement dated 2<sup>nd</sup> December 2020 was only extended with a promise not to breach terms of payment. However, the Intended Interested Party had not made any payment as from 1<sup>st</sup> January 2021. Annexed hereto were copies of records of the said payments marked and produced as “Exhibit SKM – 2”.
- i. In response to Paragraph 10 the Applicant admitted the contents thereto to the extent that the Notices of Vacation were issued to the Sub - Tenants who were unknown to the Applicant and illegally in the premises and he even allowed them to stay in the premises for six months on humanitarian grounds. That further the Applicant only asked the tenants to pay the rent because they were occupying his premises in which he was the registered proprietor.
- j. In response to Paragraph 11 the Applicant averred that he had never entered into a tenancy agreement with the sold tenants and reiterated the contents of Paragraph 4 of the Affidavit of



the Intended Interested Party where he alleges that they are his tenants, that further the tenants were strangers to himself for they believed the Intended Interested Party was the registered proprietor a fact that was untrue. And under no circumstances was there an agreement on sub - letting of the said premises.

- k. In response to Paragraphs 12 and 13 the Applicant averred that the tenants continued to occupy and enjoy a premises in which there had been no agreement between themselves and the registered proprietor and further the rental income should be paid to the registered proprietor of the said premises.
- l. In response to Paragraph 14 the Applicant was a stranger to the contents of the said averments and further averred that there had been no lease agreement executed by the Applicant and intended interested party that allowed the Intended Interested Party to sub - let the said premises. That further the monies should be paid to the Applicant for he was the registered proprietor of the said parcel of land.
- m. In response to Paragraph 15, the Applicant averred that the Intended Interested Party had no “locus standi” in this matter for he was neither the registered proprietor of the parcel of land nor had he provided proof to show that he had been allowed to sub - let the said premises.
- n. He prayed that this Honourable Court disallows the Application dated 16<sup>th</sup> September, 2022.

## **V. Submissions**

- 8. On 5<sup>th</sup> December, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 16<sup>th</sup> September, 2022 and the Preliminary Objection dated 2<sup>nd</sup> December, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that, by the time the Court was proceeding to pen down this Ruling, only the Intended Interested party/ Applicant had obliged. Thus, a ruling was to be delivered on merit on Notice by Court accordingly.

### **A. The Written Submissions by the Intended Interested Party**

- 9. On 19<sup>th</sup> October, 2022 the Intended Interested Party through the Law firm of Messrs. Waithera Ngigi & Company Advocates filed their written submissions dated the same day. M/s. Ngigi Advocate commenced the submission by providing the Honourable court with a brief introduction and facts of the case. She stated that the Applicant/Landlord filed this suit by way of a Plaint dated 4<sup>th</sup> August, 2022 against the Respondent/Sub - Tenants herein primarily seeking their eviction from the suit premises. Together with the said Plaint, the Applicant/Landlord filed a Notice of Motion application dated 4<sup>th</sup> August, 2022 seeking inter alia the eviction of the Respondent/Sub - Tenants from the suit premises and for release to himself of the rent deposited in the BPRT Tribunal in BPRT Case No. 250 of 2020.
- 10. Upon learning of the existence of this suit, the Intended Interested Party filed the Notice of Motion application dated 16<sup>th</sup> September, 2022 seeking the orders as stated hereinabove.  
  
The Application was supported by the Supporting Affidavit of the Intended Interested Further Affidavit sworn on 18<sup>th</sup> October, 2022 and filed in court on the same day. The Applicant/Landlord opposed the said application through a Replying Affidavit sworn on 7<sup>th</sup> October, 2022 and filed in court in the same day.
- 11. The Learned Counsel raised on the following three (3) issues for the Court’s determination namely:-  
  
Firstly, whether the Respondent/Sub - Tenants were lawfully on the suit premises.



Secondly, in what capacity or under what authority were the Respondent/Sub - Tenants on the suit premises.

Thirdly, did the Applicant/Landlord have the right to evict the Respondent /Sub - Tenants from the suit premises.

12. On the legal analysis of the issues, the Learned Counsel submitted that it was evident from the parties' affidavits and pleadings that the Respondent/Sub - Tenants had leased the suit premises from the Intended Interested Party. In Paragraph 8 of the Supporting Affidavit of the Intended Interested Party, he had stated that the Applicant/Landlord extended his lease over the suit premises for a period of 3 years vide a Lease Agreement dated 2<sup>nd</sup> December, 2020. The said Lease Agreement appears on page 15 of the Intended Interested Party annexures. The lease indicated that it expired on 31<sup>st</sup> December, 2023. This fact had been admitted by the Applicant/Landlord on paragraph 8 of his Replying Affidavit.
13. The Learned Counsel submitted that the above proved the existence of a valid lease between the Applicant/Landlord and the Intended Interested Party. The Applicant/Landlord had not shown any evidence of termination of the lease agreement dated 2<sup>nd</sup> December, 2020. The notices of termination exhibited by the Applicant/Landlord were in respect of previous lease agreements and were overtaken by the events or were effectively compromised upon the parties entering into a fresh lease agreement.
14. The provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 in regard to joinder 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 and settle all questions involved in the suit, be added.”
15. The Intended Interested Party had demonstrated that he had a lawful interest in the suit premises, he would definitely be affected by the orders sought by the Applicant/Landlord.
16. Therefore, the Learned Counsel submitted that for this Honourable Court to effectually determine whether or not the Respondent/Sub - Tenants were lawfully on the suit premises, it had to determine whether or not there was a valid lease agreement between the Applicant/Landlord and the Intended Interested Party. The Applicant/Landlord had also alleged breach of the terms of the lease agreement dated 2<sup>nd</sup> December, 2022 on the part of the Intended Interested Party, this could not be determined without joining the Intended Interested Party into these proceedings.
17. The Learned Counsel submitted that this Honourable Court could not effectively and conclusively adjudicate on all the matters in question in this suit without the presence of the Intended Interested Party in these proceedings.
18. To buttress on this points, the Learned Counsel relied on the case of “Mohan Galot – Versus - Walter Omosa Nyakundi & 21 others; Pravin Galot & 2 others (Proposed Interested Party) [2020] eKLR” in which the court cited with approval case of “Moses\_Wachira – Versu - Niels Bruel & 2 Others [2015] eKLR” wherein the Court quoted the Supreme Court decision in “Communications Commission



of Kenya And 4 Others – Versus - Royal Media Services Limited & 7 Others Petition No. 15 OF [2014]eKLR ” where the Court pronounced itself on who an Interested Party is and held as follows:

“In determining whether the applicant should be admitted into these proceedings as an interested party, we are guided by this Court’s decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

” “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.?”

19. The Learned Counsel concluded by urging the Honourable Court to find that the Intended Interested Party had demonstrated that he was a necessary party and whose presence before this Honourable court is crucial. Therefore, they prayed that the application herein be allowed and costs be provided for.

## **VI. Analysis and Determination**

20. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has framed the following three (3) issues for its determination.

- a. Whether the Notice of Preliminary Objection dated 2<sup>nd</sup> December, 2022 is merited based on law and precedents?
- b. Whether the Notice of Motion application dated 16<sup>th</sup> September, 2022 meets threshold required for the enjoinder of an intended interested Party under Order 1 Rule 10(2) of the Civil Procedures Rules, 2010.
- c. Who will bear the Costs of Notice of Motion application 16<sup>th</sup> September, 2022 and the Notice of Preliminary Objection dated 2<sup>nd</sup> December, 2022.



**ISSUE a). Whether the Notice of Preliminary Objection dated 2<sup>nd</sup> December, 2022 is merited based on law and Precedents**

21. Under this Sub – heading, the threshold of a preliminary objection was set in the case of: “Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors Limited [1969] E.A 696 relied on by the Respondent herein. In the case the Court held that:-

“...a Preliminary Objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

22. The Court further held that:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

23. From the foregoing decision, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion. Being a point of law a preliminary objection can be raised at any point of the proceedings. Legally speaking, therefore the preliminary objection raised herein by the Intended Interested party passes as one that is based on pure law.

24. The intended Interested Party herein have alleged that the application to act and appearance of Christine Makungu Mukangi in this suit on behalf of the Applicant/Landlord contravenes the provisions of Order 9 Rule 2(a) of the Civil Procedure Rules, 2010 and the suit is “Res Sub - Judice” as it offends the provisions of Section 6 of the *Civil Procedure Act*, 2010 as there is another pending suit concerning the same parties and the same subject matter namely Mombasa BPRT Case No. 250 of 2020 before the Business Premises Rent Tribunal.

25. Thus, I now turn to the first issue on the preliminary objection. The provision of Order 9 Rule 1 Civil Procedure Rules is in following terms:-

“[Order 9, Rule 1.] Applications, appearances or acts in person, recognized agent or by advocate.

1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the by time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that—



- a. any such appearance shall, if the court so directs, be made by the party in person;”
26. The provision of Order 9 Rule 2 of the Civil Procedure Rules, 2010 on the other hand describes categories of recognized agents to include:
- “a) Subject to approval by the court in any particular suit, persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of the parties;
- b. ....;
- c. ....;”
27. Under this Rule, there are two prerequisites. Firstly, the recognized agent should hold a Power of Attorney, and secondly, can only act subject to the approval of the court. Fortunately, the proper construction of the above provision is not an unexamined question. Mwongo J. grappled with the proper application of the provision of Order 9 Rule 2 of the Civil Procedure Rules, 2010 in the case of:- “Jack J. Khanjira and Anor – Versus - Safaricom Limited [2012] eKLR”. In that case a suit had already been filed by the two Plaintiffs when one of them appointed an Attorney to act as his recognized agent. An objection was raised to the effect, inter alia, that the Power of Attorney held by the agent could not confer on the donee, as an unqualified person the right to act as an advocate, thereby overriding the provisions of Section 85 of the Advocates Act. Although the objection related to the scope of authority of a Donee who is otherwise unqualified to act as an advocate, the court’s consideration of the matter before it has many parallels with the case before us.
28. I am persuaded as Mwongo J. was that the starting point in interpreting the provision of Order 9 Rule 2 of the Civil Procedure Rule, 2010 is to consider the provision of Order 9 Rule 1 which limits the scope of the recognized agent to application, act or appearance authorized by law to be done by a party “except where otherwise expressly provided for by any law for the time being in force...” Also of significance to the matter before me is the proviso to Order 9 Rule (1) which states that:
- “Provided that –
- a. Any such appearance shall, if the court so directs, be made by the party in person...”
29. The above proviso is in tandem with the provision of Order 9 Rule 2 (a) Civil Procedure Rules, 2010. A recognized agent makes application, appears or acts, subject to the approval of the court. This provision cannot be read to mean that the Power of Attorney itself (as suggested by the Respondent) ought to be approved by the court, even though such Power of Attorney may of necessity be reviewed by the court while dealing with the question of whether or not to approve the donee’s application for purposes of acting in the suit.
30. In this regard, this Honourable Court further quotes Mwongo J’s reasoning as to why this prior approval is necessary:
- “Clearly, the essential characteristic of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the court.



The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it appears to me that when exercising their functions in court, they must periodically obtain the approval of the court to do such acts. It is for the court to oversee the scope and extent of the functions of a recognized agent, and to assure itself that they are not overstepping the bounds of the law. In my view, it is not the fact of being an agent that renders a donee of a power as recognized; it is the extent or scope of their agency that is recognized. That is to say, a recognized agent can perform only that which he is recognized or authorized to do in law.

In this regard, I would go as far as to say that, for orderly representation in court, every appearance, act or application by a recognized agent should be subjected to the approval of the court as and when sought to be done.”

31. In this present case, the Donee to the Power of Attorney filed a notice to produce on behalf of the real Applicant. This is a practice that has gained currency in our courts until now. Mwongo J’s decision as reinforced by Mulla on Civil Procedure 12<sup>th</sup> Edition (Commentary on Indian equivalent of Order 9 Rule 1 of the Civil Procedure Rules) raises serious questions as to whether the scope of the recognized agent is limited directly by the technical wording of Order 9 Rule 1 and 2 to exclude filing of suits among acts that an agent can perform, or whether such agent is at liberty to do any and every kind of act, including filing pleadings, giving evidence, cross-examining witnesses etc.
32. The foregoing issue was not canvassed before me and there is not sufficient material to enable me draw any conclusions. Be that as it may, the wording of Order 9 rule 1 and 2 of the Civil Procedure Rules leaves no doubt that the court has wide discretion in determining whether or not to allow an agent to appear or do any act in a suit. That discretionary power must be invoked by way of an application and is exercised judicially. No party should presume to act or appear before the court merely on the basis of the power of attorney without first obtaining the court’s approval, howsoever sought. Christine Makungu Mukangi believed herself properly authorized by the Power of Attorney alone to act on behalf of the donor. That was an erroneous understanding of the rules.
33. For these reasons, therefore, I fully agree with the contention with Intended Interested Party that the Donee under a Power of Attorney cannot act without first seeking the court’s approval. As to the consequence of default by a Donee in seeking such approval, I would not go as far as concluding that an act, appearance or application would be rendered fatally defective. Rather than the impugned application, appearance etc would have been irregularly done. In a proper case, the court might invoke its discretion under proviso (a) of Order 9 Rule 1 of the Civil Procedure Rules, 2010 by directing the actual party to appear or act in person rather than strike out the impugned process. Each case must be considered within its own circumstances. This Honourable Court’s approval was all more necessary. Therefore this ground of the Preliminary objection be and is hereby sustained.
34. On the issue of whether the suit was “Res Sub – Judice” as it offends the provisions of Section 6 of the *Civil Procedure Act*, 2010 as there is another pending suit concerning the same parties and the same subject matter namely Mombasa BPRT Case No. 250 of 2020 before the Business Premises Rent Tribunal. This Honourable Court notes that it is not in dispute that there is another matter BPRT Case No. 250 of 2020 which is before the Tribunal and the Applicant/ Landlord is aware of the existence as well.



35. The issue of “Sub Judice” is provided for by the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 which states that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

36. Indeed, according to the Reference before the Tribunal is for distress of rent. It is contended that the Applicant, Intended Interested Party have actually sought the intervention of the Business Premises Rent Tribunal on the dispute regarding their tenancy. The point is that there is already in existence proceedings involving the dispute herein between the parties herein before a competent statutory tribunal. The Parties are entitled to appear before the said tribunal as parties with genuine concerns and grievances: see Lord Denning in “Attorney General of Gambia – Versus - Njie [1961]2 All E R 504”. I would find, as I do, that there is already an alternate forum and procedure where the Parties grievances can be proportionately adjudicated without disproportionate expenditure. The tribunal is best placed to adjudicate the matter with the possibility that the tribunal’s determination may invite an appeal to this court.

37. Furthermore, the Applicant has started garnishee proceedings in this Honourable Court. A party who has obtained judgment should be entitled to reap the fruits of his labour by enforcing the judgment of the Court. The enforcement must be in accordance with the law. Judgment creditor means any person for the time being entitled to enforce a judgment while a judgment debtor is a person liable under a judgment. A debt becomes a Judgment debt when it has been pronounced upon by a Court of law as held in the case of:- “Ekwunife – Versus - Wayne (W.A) Ltd (1989) 5 NWLR (Pt. 122) 422 at 446”.

38. Ideally, garnishee proceedings is a process of enforcing a money judgment by the seizure or attachment of the debts due or accruing to the Judgment Debtor which forms part of its available property. See the case of:- “UBN PLC – Versus - Boney Marcus Ind. Ltd (2005)13 NWLR (Pt. 943) 654 at 666 and Citizens Int’l Bank – Versus - SCOA (Nig) Limited (2006) 18 NWLR (Pt. 1011) 332 at 346”. The Judgment Debtor, the Judgment Creditor and the garnishee(s) are generally the parties to a garnishee proceeding.

39. The garnishee must be indebted to the Judgment Debtor or have custody of the Judgment Debtor’s money. It is only a debt that is due or accruing to the Judgment Debtor at the time of the garnishee proceeding that is attachable. This means that where a debt is due and payable by installments, garnishee proceedings can only be issued against the installment due. It is important to establish that the Judgment - Debtor has an immediate legal right to money in the custody of the garnishee.

40. I take note this in this particular case, the matter has not been concluded in the Tribunal and the monies the Applicant seeks to be given to him were only submitted to the tribunal as a deposit while the tribunal hears the suit.

41. Therefore, in the result, I proceed to once more uphold the on ground two of the preliminary objection dated 2<sup>nd</sup> December, 2022.

ISSUE No.



- b). Whether the Notice of Motion dated 16<sup>th</sup> September, 2022 meets threshold required for the joinder of an intended interested Party under Order 1 Rule 10(2) of the Civil Procedures Rules, 2010.

42. Under this Sub – heading, the main issue is on joinder of parties. The legal position on joinder of parties is stipulated under Order 1 Rule 10 (2) of the Civil Procedure Rules which 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.”.

43. From the legal provision, a party can seek to be joined in a suit not only as a plaintiff or defendant but also as an interested party when their presence before the court is necessary to enable the court effectually and completely determine all questions in the suit. The Applicant seeks to be joined as an Interested Party and according to him, his presence is necessary before the court to enable him represent the interests of the suit property of which he claims to be the registered legal lessee.

44. Under the Black’s Law Dictionary, 11<sup>th</sup> Edition at page 1351 an Interested Party is defined as “a party who has a recognizable stake (and therefore standing) in a matter”.

45. Further the Supreme Court defined an Interested Party in the case of “Communications Commission of Kenya & 4 Others – Versus - Royal Media Services Limited & 7 Others (Supra)” where they cited with authority the case of “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & 5 others: Civil Appeal No. 290 of 2012”, which stated:

“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.”

46. The Applicant seeks to be joined in the suit as an interested party that on determining the alleged breach of the terms of the lease agreement dated 2<sup>nd</sup> December, 2020 on the part of the Intended Interested Party, which cannot be determined without joining the Intended Interested Party into these proceedings. It is evident from the parties’ affidavits and pleadings that the Respondent/subtenants have leased the suit premises from the Intended Interested Party. In paragraph 8 of the Supporting Affidavit of the Intended Interested Party, he has stated that the Applicant/Landlord extended his lease over the suit premises for a period of 3 years vide a Lease Agreement dated 2<sup>nd</sup> December, 2020. The said Lease Agreement appears on page 15 of the Intended Interested Party annexures. The lease indicates that it expires on 31<sup>st</sup> December, 2023. This fact has been admitted by the Applicant/Landlord on paragraph 8 of his Replying Affidavit.

47. The role and place of an interested party was well articulated in the case of “Marigat Group Ranch & 3 others – Versus - Wesley Chepkoiment& 19 others [2014] eKLR” where the court held the view that:-

“For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the catch words “whose presence before the court may be



necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit...”.

48. In the same case the court relied with approval on the case of: “Joseph Leboo – Versus - Director, Kenya Forest Service & Others (Eldoret ELC No 273 of 2013), wherein the following appears:

“It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it.....

“It follows therefore that applications seeking to join proceedings as interested parties ought to be handled with caution so that a person does not come to a suit, disguised as an interested party, while all along he/she wishes to agitate rights of his/her own over the subject matter of the suit.”

49. The Applicant in this suit instituted Garnishee proceedings against his tenants for rent recovery subject to Mombasa BPRT 250 OF 2020. he role of an interested party as discussed in the above case is not of one who seeks to agitate his right over a subject matter but one who has a close connection to it and seeking any rights over it. For this reason I find the Application before the Honourable Court has merit and the Intended Interested Party should be joined in this suit as the Interested Party.

ISSUE No.

- c). Who will bear the Costs of Notice of Motion application 16<sup>th</sup> September, 2022 and the Notice of Preliminary Objection dated 2<sup>nd</sup> December, 2022.

50. On the issue of Costs, I have well stated in previous precedence and most especially in the case of:- “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR” that:-

“ 58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7<sup>th</sup> December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21<sup>st</sup> December, 2021.”

51. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In this case, as Court finds that the costs of the application and the preliminary objection should be in the cause.



## VII. Conclusion & Disposition

52. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 16<sup>th</sup> September, 2022 is found to have merit and is hereby allowed in its entirety.
  - b. That the Notice of Preliminary Objection dated 2<sup>nd</sup> December, 2022 is found to have merit hence it be and is hereby upheld though without striking out the suit.
  - c. That in view of the forgoing, under the provision of Section 18 Rules 1 (a) and (2) of the Civil Procedure Act, Cap. 21, I do hereby direct and order that this suit to be transferred to the Business Premises Rent Tribunal to be determined alongside BPRT cases No. 250 of 2020.
  - d. That the matter to be placed before the Executive Officer of the BPRT on 10<sup>th</sup> January, 2024 for taking an appropriate Mention date before Chairman/Person of the BPRT for further directions in the presence of all the parties herein.
  - e. That the cost of The Notice of Motion application dated 16<sup>th</sup> September, 2022 and the Notice of Preliminary objection dated 2<sup>nd</sup> December, 2022 will be in the cause.

It is so ordered accordingly.

**RULING DELIVERED VIA EMAIL AS PER THE NOTICES DISPATCHED TO ALL THE PARTIES SIGNED AND DATED AT MOMBASA THIS .....5<sup>TH</sup> .....DAY OF ..... DECEMBER.....2023.**

**HON. JUSTICE L.L. NAIKUNI (MR.)**

**ENVIRONMENT AND LAND COURT AT MOMBASA.**

