



**Izera Enterprises Limited v Image Font Limited; Sagalla Ranchers Limited (Proposed Interested Party) (Environment & Land Case 113 of 2021) [2022] KEELC 12585 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 12585 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 113 OF 2021**

**LL NAIKUNI, J**

**APRIL 28, 2022**

**BETWEEN**

**IZERA ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**IMAGE FONT LIMITED ..... DEFENDANT**

**AND**

**SAGALLA RANCHERS LIMITED ..... PROPOSED INTERESTED PARTY**

**RULING**

**I. Introduction**

1. What is before this honorable court for its determination are two (2) notice of motion applications dated October 29, 2021 by the plaintiff/applicant brought to court under the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act* cap 21 order 8 rule 3 (3), 5 and 8 of the *Civil Procedure Rules 2010*, article 59 of the *Constitution*, it seeks for the following orders:-

- (a) That the plaintiffs be granted leave to amend the plaint in the manner shown on the annexed proposed amended plaint and the same be deemed as having been filed.
- (b) That costs be in the cause.

The second application is the notice of motion application dated November 9, 2021 filed by the intended interested party brought under the provisions of sections 3A of the *Civil Procedure Act* order 1 rule 10 (2), order 51 rule 1 of the *Civil Procedure Rules 2010* seeking to have the intended interested party – the Sagalla Ranchers be joined as a party to this proceedings.

2. While the above was still pending on December 16, 2021 the plaintiff/applicant filed a notice or preliminary objection and further notice preliminary objection dated January 14, 2022, on January



22, 2022 this honorable court directed that all the notice of motion applications and the preliminary objection to be dealt simultaneously and concurrently for ease of expediency disposal of the suit.

## **II.The Notice Of Motion Application Dated October 29, 2021.**

3. As indicated the notice of motion application dated October 29, 2021 is premised on the testimonies, grounds and facts of the nine (9) paragraphed supporting affidavit of Gitonga Wambugu Kariuki sworn and dated October 29, 2021 and one annexature marked as “WGK -1” annexed hereto. He deponed that he was one of the directors of the plaintiff herein and was fully conversant with the matters giving rise to this application hence competent to swear this affidavit. He stated that when the plaint was filed, it was expressly indicated therein that the plaintiff was going to supply further and better particulars of the damages it had suffered and was still suffering as a result of the defendant having entered the suit property and carried out acts of wastage thereon. The plaintiff had received full particular of the same.
4. He deponed that there were also other indicated matters that had a bearing and were relevant to the issues by the plaintiff in this matter which matter required to be pleased and brought to the attention of the court, in view of this and the strict time lines that the court gave to the parties on September 30, 2021 the plaintiff had an amended plaint on October 13, 2021 together with the necessary witness statements and copies of documents which had also been served on the defendant. He held that upon being granted the orders, the defendant would naturally have the right to file its amended defendant and hence this application would not prejudice any party. In the long run, he observed that the notice of motion application once granted all the issues in controversy between the parties were fully and finally heard and determined.

## **III.The Grounds of Opposition.**

5. On November 12, 2021 the defendant/respondent through the law firm of Messrs. Njuguna, Kahari & Kiai Advocates filed their grounds of opposition opposing the filing of the notice of motion application dated October 29, 2021 for amendment of the plaint mainly on grounds that the notice of motion application offended the provisions of order 2 rule 6 (1) of the *Civil Procedure Rules* 2010 as completely and substantially raised a new cause of action and they are immaterial for the determination of the real question in issue.
6. They held that on July 5, 2021 the plaintiff/applicant filed the present suit *vide* the plaint dated July 5, 2021, on October 13, 2021 which was over three (3) months later and after pleadings had closed the plaintiff/applicant herein filed and served an amended plaint dated October 12, 2021 without leave of this honorable court. He argued that on November 20, 2021 over a month later, the plaintiff/applicant filed the present notice of motion application dated October 29, 2021 seeking *inter-alia* for leave to amend the plaintiff.

## **IV. The Notice Of Motion Application Dated 9<sup>th</sup> November, 2021.**

7. On November 9, 2021 the proposed interested party through the law firm of Messrs. Kurgat, Kabara Odongo & Alakonya Advocate LLP filed a notice of motion application dated on even date seeking to be joined in the suit. The said application was premised by the facts, averments and testimony of seventeen (17) paragraphed supporting affidavit of Raphael Lelewa Mbinga and one annexature marked as “RLM – 1” being a copy of a plaint in the Voi civil suit No 86 of 2014 (formerly Mombasa civil case No 86 of 2014) annexed thereto. The deponent deposed that he was a male adult of sound mind and disposition and one of the directors of the interested party herein hence competent to swear this



affidavit. He stated that the interested proposed party was the duly registered and absolute owner to the suit land and that it had never transferred it to the plaintiff.

8. He stated that the director of the plaintiff, one Gitonga Wambugu Kariuki with connivance of Wilmot Mwadilo and Patrick Mbinga who presented themselves as directors of the interested party and fraudulently registered the plaintiff as the owner of the property vide an instrument of transfer dated November 2, 2012. He stated that the interested party entered into two (2) sale agreements dated September 5, 2009 and September 9, 2009 with the plaintiff for the sale of part of the suit property. According to him the transfer of the ownership to the property was to be effected only upon the plaintiff paying the full purchase price and having a duly executed transfer documents by the interested party through legitimate directors. He admitted that the plaintiff paid part of the purchase price amounting to Kenya shillings one hundred and fifteen million four hundred and eighty thousand (Kshs 115, 480, 000.00) and after making the partial payments, the plaintiff obtained freezing orders against the interested party's account held at the Kenya Commercial Bank hence the interested party could not access and/or utilize the money due to it to date.
9. He deponed that the plaintiff still has an outstanding balance to pay being a sum of Kenya shillings thirty one million, six hundred and fifty thousand (Kshs 31, 650, 000.00) and hence the reason they are challenging the entire alleged transfer effected without due completion as required by law. He averred that the plaintiff was only incorporated in the year 2010 and yet it purported to have obtained a certificate of lease to the property running from May 1, 1972 for a term of 45 years which was an impossibility in totality after the crooked transfer. Accordingly, he averred that the plaintiff had no good title to transfer to anyone including the defendant herein.
10. He informed court that all these issues of ownership, the payments and breach of contracts were the subject matter in the Voi High Court civil case numbers 1 of 2018 (formerly Mombasa civil case No 86 of 2014). He prayed for the orders sought in this application to be allowed with costs.

## **V. Submissions**

11. As indicated hereof, on November 30, 2011 while all the parties were present in court, it was directed that the two (2) notice of motion applications dated October 29, 2021 by the plaintiff for amendment of pleadings, the one dated November 9, 2021 for leave to join the intended proposed party and the notices of the preliminary objections be disposed off by way of written submissions.

Pursuant to that all the parties obliged and a ruling date was reserved accordingly.

### **A. The plaintiff's written submissions.**

12. On November 26, 2021 the learned counsel for the plaintiff the law firm of Messrs Gikandi and Co Advocates filed their written submissions with regard to their notice of motion application dated October 29, 2021. Additionally, on January 18, 2022 they filed another set of submissions with regard to the notice of motion application dated November 9, 2021 by the proposed interested party and its preliminary objection dated December 6, 2021 and a further preliminary objection dated January 14, 2022.
13. Mr Gikandi Advocate on the two (2) issues and started by citing the provisions of order 8 rule 5 of the [Civil procedure Rules 2010](#) whereby court may at any stage of the proceedings on such terms as to costs or otherwise as may be just allow any party to amend his pleadings. He relied on the cases of "[Diamond](#)



Trust Bank v Tchui Data limited & 3 Others (2006) eKLR Msa ELC No 275 of 2016. Samera Aziz v Douglas Mwangi Muteru & others and Suleiman v Karasha (1989) eKLR whereby court held that:-

“As a general rule, however late the amendment is sought to be made, it should be allowed, it should be allowed if made in good faith provided costs can compensate the other side”

14. He held that courts were generally liberal in allowing applications to amend unless it was shown that there would be prejudice to the other parties. He argued that if the other party pleaded and proved that by amendment they would suffer prejudice that could not be compensated by costs. In that case court would then refuse and/or decline to grant the orders for amendment. But this case the defendant never filed any responses to the notice of motion application. The learned counsel submitted that what they had argued showed judicial discretion in this case to be in favour of the plaintiff. He contended that the amendment sought was necessary to fully determine the issues in dispute and did not cause any discernible prejudice to the defendant that is incapable of monetary compensation. They prayed for the notice of motion application dated to be allowed with costs.

## **VI. The Notice of Preliminary Objection dated 6<sup>th</sup> December, 2021 and January 14, 2022.**

15. On January 18, 2022, the learned counsel for the plaintiff the law firm of Messrs Gikandi & Company Advocates filed their written submissions in relations to the two (2) notices of preliminary objections against and/or opposing the notice of motion application dated November 9, 2021 by the proposed intended interested party.

Mr Gikandi, advocate submitted that the application seeking for the orders to have an entity known as “the Sagalla Ranches Limited” be allowed to join these proceedings as an interested party was unfounded and without basis. He advanced the argument by holding that none of the provisions of the Civil Procedure Rules 2010 and the Environment and Land Court Act provided for a party to be joined in a proceeding pending in the Environment and Land Court as an interested parties may only be joined as either plaintiff or defendant or 3<sup>rd</sup> parties – this was intended to avoid of such persons intending to join to make specific claims and specific relief from the court. In the instant case the application has not indicated the position it intends to take with regard to the suit filed herein. Therefore in the given circumstances, the learned counsel argued that this court had no jurisdiction to grant the prayers sought. He relied on the case of “Motor Vessel Lillian “S” v Caltex Oil Co ltd and Samuel Macharia Kamau v Kenya Commercial Bank and others (2012) eKLR.

16. He held that the applicant already had an interest over the subject matter in another pending case being Voi High Court (Mombasa) No 86 of 2014 – “Sagalla Ranchers v Wilmont Mwadilo & Raphael Mbinga” - where the plaintiff is described as Sagalla Ranchers Ltd. He felt there were a distention between legal entities known as “the Sagalla Ranchers Limited” and “Sagalla Ranchers Limited.”
17. Further, he held that the deponent – Raphael Lelewa Mbinga had not attained any authority not resolution made by the board of directors to file this application on behalf of the company. The Sagalla Ranchers Limited hence making the application incompetent and improper on the aspect they relied on the decision of “the Kenya Commercial Bank v Stage Coach Management Limited’.
18. Finally, the learned counsel held that the applicant had conceded such material facts such as the existence of the civil suit – HCCC (Mombasa) No 86 of 2014 and tell the’ court the status of this case, the reason to be joined in this suit. While completely abandoning that old case. In other words he argued he came to this court without clean hands as their intention is to merely create confusion and muddle up the clear issues existing between the plaintiff and the defendant herein. Hence they urged



court to allow the preliminary objection and dismiss the notice of motion dated November 9, 2021 by the proposed intended interested party with costs.

## **B.The Defendant’s Written Submissions**

19. On January 20, 2022, the learned counsel for defendant the law firm of Messrs Njuguna Kahari & Kiai and Company Advocates file their written submissions dated January 17, 2022 opposing the notice of motion application dated October 29, 2021 by the plaintiff/applicant Mr Njuguna submitted that they were relying on their filed grounds of opposition dated November 12, 2021 stating that the said notice of motion application offended the provisions of order 2 rule 6 (1) of the [Civil Procedure Rules](#) 2010 as it completely and substantially raised a new cause of action and they were immaterial for the determination of the real question in issue, he argued that the plaintiff/applicant filed the said application on October 13, 2021 over three months later filing the suit on July 5, 2021 and after pleadings had closed the plaintiff/applicant herein filed and served an amended plaint dated October 12, 2021 without seeking and obtaining the leave of court and hence the notice of motion application dated October 29, 2021 is defective and lacks merit. He relied on the case of “[Anne Noti Jefwa Kayaa v David Njau Kungu and another](#) (2019) eKLR and ought to be struck out with costs.
20. Additionally, the proposed amendments raised new facts inconsistent with the original plaint and it seeks new relief aimed at altering the entire cause of action in this matter contrary to the provisions of order 2 rule 6(1) of the [Civil procedure Rules](#) 2010. The learned counsel submitted that the proposed amendments were immaterial and useless as they would not constitute issues that would aid in the determination of the real questions in controversy between the plaintiff and the defendant – the proposed amendments were falseful, inadmissible and tantamount to perjury as the suit property the subject matter of this suit did not belong to the applicant. He relied on the cases of “[Joseph Ochieng & 2 others v First National Bank of Chicago](#) (1995) and [Evans Njenga Murithi v Continental Developers Limited](#) 2019. He argued that the application was brought late and flies in the face of this courts clear orders of September 30, 2021 that this suit beset down for full trial on a priority basis within ninety (90) days from the said date which time has already since lapsed. He relied on the case of “[Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) (2014) eKLR. The amendments are an afterthought as the plaintiff were all along aware of the existence of these issues, and that were not brought in good faith but rather to complicate the suit and further delay its determination of the matter to the detriment if the defendant/respondent contrary to the overriding objectives which provided for expeditious disposal of suits. That one cause of action cannot be substituted with another cause of action by way of amendment. The application seeks to introduce over forty (40) new paragraphs that contain facts that were well within the plaintiff’s knowledge at the time of filing the original plaint.
21. Finally, he submitted that by filing and serving the amended plaint on October 13, 2021 without leave and then subsequently filing an application on November 1, 2021 seeking leave to file the said amended plaint was tantamount to moving the court to recognize and remedy an illegality. He urged court to dismiss the said notice of motion application dated October 29, 2021 with costs.

## **C. The Proposed Intended Interested party Written Submissions**

22. On February 24, 2022 the learned counsel for the proposed/intended interested party the law firm of Messrs Kurgat, Kabara Odongo & Alakonya Advocate LLP KKOAA Advocates LLP filed their written submissions dated January 31, 2022. Mr Kurgat advocate submitted that the was responding to the two (2) notices of preliminary objection dated December 16, 2021 and a further one dated January 14, 2022 respectively by the plaintiff/applicant. He argued that they were vague an affront of the law and ambiguous. He submitted by way of providing a background, he invited the honorable court to decide



a dispute between the plaintiff and the defendant concerning the transfer of land reference No 12177, a property that belonged to the proposed interested party. He stated that this was sufficient proof that the proposed interested party has stake in this proceedings it was an issue raised would indeed be a subject of the ELC which this court would transfer the matter without a problem.

23. The learned counsel argued that the preliminary objection raised two issues:- firstly, on jurisdiction whereby he stated this court had jurisdiction to hear and determine the application to have the proposed intended party be joined in the suit under the provision of section 3A of *Civil Procedure Act* which required court to hear and dispose suits expediency and get a cost affordable to the parties. Additionally, the provisions of order 1 rule 10 (2) of *Civil Procedure Rules* 2010 article 159 (2) (a) of the *Constitution* and rule 7 of the *High Court (Procedure and Practice Rules (the Mutunga Rules))* succinctly provided for persons be joined as parties. Hence the argument by the plaintiff was ambiguous and never raised any clear issue of pure law for consideration, it was an afterthought introduced after the plaintiff discovered that the grounds cited in the preliminary objection of December 16, 2021 were fatally defective for being bad in law.

Secondly the learned counsel held that the preliminary objection stated the party was no-suited – lacked “*locus standi*”. they relied on the case of “*Francis Kariuki Muruatetu & another v Republic & 5 others* (2016) eKLR and *Trusted Society of Human Rights Alliance v Munio Matemu* (2014) eKLR, *Cyprian Andama v Director of public Prosecution & another* (2018) eKLR” where courts held that the joinder of a party to proceedings as an interested party was at the discretion of the court.

## VII. Analysis and Determination

24. Having read and considered all the pleadings, the filed written submissions, authorities with regard to the notice of motion application dated October 29, 2021 and the two (2) notices of the preliminary objection dated December 16, 2021 and January 14, 2022 by the plaintiff and the notice of motion application dated November 9, 2021 by the proposed interested party, I now proceed to condense all the salient issues into the following four (4) sub areas for determination as follows:-
- a) Whether the notices of preliminary objection dated December 16, 2021 and February 14, 2022 meet the fundamental principles of a preliminary objection based on law and precedent.
  - (b) Whether the notice of motion application dated October 29, 2021 by the plaintiff is justifiable for the amendment of the filed plaint?
  - (c) Whether the notice of motion application dated November 9, 2021 by the intended interested party ought to be considered as joinder in these proceedings.
  - (d) Who will bear the costs of the proceedings.

### **ISSUE No. 1: Whether the notices of preliminary objection dated December 16, 2021 and February 14, 2022 meet the fundamental principles of a preliminary objection based on law and precedent.**

25. According to the *Black Law Dictionary* a preliminary objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited* [1969] EA 696. Where Lord Charles



Newbold P. held that a proper preliminary objection constitutes a pure points of law. The learned judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

26. I wish to cite the case of *Attorney General & another v Andrew Mwaura Gitbinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection inter alia:-
- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
  - (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
  - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
27. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the plaintiff on whether this court has jurisdiction to deal with the application filed by the proposed interested party on joinder and that the intended proposed party – trading in the style and names of either “the Sagalla Company Limited” or “Sagalla Company Limited” are non – suited for lack of proper legal capacity to sue or be joinder due to lack of a company resolutions which is a requirement under the provision of order 4 rules 1 (4) and order 4 rules 4 rule 4 of the *Civil Procedure Rules, 2010* are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. Indeed, under this sub-heading on the one hand, while the court fully concurs with the position taken by the proposed interested party on its objection on the jurisdiction of the ELC with regard to hearing the notice of motion dated November 9, 2021 on joinder under the specific provisions of law. For these reasons, therefore, I find that the objection raised by the plaintiff was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to *Mukisa Biscuits Manufacturing Co Limited* (supra). Applying the above test, the matters raised by the 1<sup>st</sup> respondent in their preliminary question are clearly pure points of law that I shall proceed to consider them and determine them accordingly. Upon making all the considerations this honorable court fully concurs with the arguments by the proposed interested party that the two (2) notices of preliminary objection dated December 16, 2021 and January 14, 2022 only proceeds to meet the basic threshold of a preliminary objection and hence they are dismissed in entirety.



**Issue No. 2. Whether the notice of motion application dated October 29, 2021 by the plaintiff is justifiable for to cause the amendment of the filed plaint?**

28. The legal principles on amendment of pleadings are provided for under order 8 rules 1,2 and 3 of the [Civil Procedure Rules, 2010](#). Before the close of pleadings, the leave of court is not required as opposed to when there has been closure of pleadings. The principles upon which a court acts in an application to amend pleadings before/during trial are well settled and succinctly stated in several cases. These includes the case of “*Eastern Bakery v Castelino* (1958) EA 461 (U) at page 462 and civil case No 7 of 2017, [St Patrick’s Hills School Limited v Bank of Africa Kenya Limited](#)” eKLR (2018) where courts held, *inter alia*:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice to be if the other side can be compensated by costs....”

29. The same was later on buttressed by Bramwell, LJ in “*Tildesley v Harper*” (1878), 10 Ch D at page 296 stated as under:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise...”

It is clear that from the above principles which I endeavor to import to this case that an amendment of pleadings in general should be allowed before the final judgement is delivered. Pursuant to the above position, this court agrees with the plaintiff/applicant and it concurrently follows, the power to amend pleadings is discretionary. In that case the court must act judicially in the exercise of its discretion within the ambit of the principles of natural justice. The court has already decided and granted leave to join the proposed defendant in the suit hence an amendment of the plaint is inevitably vital and of cardinal importance for the purposes of determining the real question in controversy between the parties.

30. In any case as stated by the plaintiff/applicant, the instant plaintiff’s suit and the relief sought against 139 other defendants expressly pleaded in the plaint would directly and adversely affect the proposed defendant. The court notes that the instant suit is still at its hearing stage and the pleadings had not closed hence the application was bona fide, timeously brought and meritorious as the amendment will not be introducing a new cause of action which is substantially different from the already existing one not offending order 8 rule 3(5) of the [Civil Procedure Rules, 2010](#). Besides, the court will allow the 40<sup>th</sup> defendants corresponding leave and the opportunity to respond to the amendment if they so wished to do. Thus, under this sub – heading the application for the plaintiff/applicant succeeds.

31. Based on the robust analysis done herein, the honorable court is satisfied that the leave sought and the proposed amendment sought by plaintiff is justifiable and hence allowed in all fairness the defendant will also be granted leave to file an amended defence should they deem it necessary.

**Issue No. 3: Whether the notice of motion application dated November 9, 2021 by the intended interested party ought to be considered as joinder in these proceedings.**

32. The concept and substratum of joinder of parties is solely governed by the provisions of order 1 rules 1 to 25 of [Civil Procedure Rules, 2010](#) and which I must admit the parties herein , particularly the learned



counsel for the proposed defendant, who came under order 1 rule 10 of the [Civil Procedures Rules, 2010](#) have elaborately dealt with great admiration.

The [Black Law Dictionary 9<sup>th</sup> Edition](#) defines “interested party” as a party who has a recognizable stake and therefore a standing in a matter”

Similarly, under rule 2 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedom\) Practice and procedures Rules 2013](#) (the Mutunga Rules) provides it thus:-

“.....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 directly involved in the litigation ....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 himself or she herself appears in the proceedings and champions his or her cause .....

Also refer to the case of HCCC civil suit No 115 of 2019 - *John Harun Mwau v Simeone Haysom & 2 others, AG* (2021) eKLR.

33. It is trite law that on the decision for joinder, court has discretionally power to do so. Which means it should be applied capriciously and judicially without any biases or abuse of the power. 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](#).

Suffice to say, a court even on its own motion (*suo moto*) can add a party to the suit of such a party is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore joinder of parties is permitted by law and it can be done at any stage of the proceedings.

34. 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

The above illustrated legal litimus test on joinder is what I shall apply to the instant case. In consideration and application of all the facts stated here, this court strongly holds that the proposed intended intereted party has not made a strong demonstration to be joined in the instant case. The court has not seen that need for them added as a party to the suit is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. While arriving at this rather difficult decision, the court has not been persuaded with any empirical documentary evidence as such for the following reasons.



35. Firstly, the proposed interested party have stressed that they were the legal and registered owners to the suit land. This is an extremely important legal issue. However, they have not annexed anything to proof that serious assertions on the ownership to the suit land such as certificate of the title deed.

Secondly, it appears and indeed from their annexature marked as “RLM – one” being a copy of a plaint of pending civil suit – Voi HCCC No 1 of 2018 (formerly Mombasa civil suit No 86 of 2014) there are clear indication that there exists a very convoluted feud among the directors of the proposed interested party which from paragraph 5 of the plaint states describes one Mr Gitonga Wambugu Kariuki as one of the directors of the proposed interested party company; issues of owners of the suit land and so forth which can be handled there.

36. Thirdly, the deponent has made too many blanket statements in his affidavit without any supporting particulars or proof. For instance he should have at least annexed copies of the said instrument of the transfer of the land dated November 2, 2012, the two sale agreements dated September 5, 2009 and September 9, 2009, the evidence of the part payment for a sum of Kenya shillings one fifteen million four eighty thousand (Kshs 115, 480, 000.00) paid by the plaintiff and so forth. The window is still open for them to explore the opportunity – perhaps the proposed interested party may consider being witnesses in this proceedings rather than a party or join the plaintiff in the civil case pending at Voi High Court or better still transfer that case before this court due to issues of jurisdiction and so forth.

Fourthly, the legal dispute between the plaintiff and the defendant is graphically clear based on the breach of the contract from a sale of the suit land. The court sees no value that the proposed interested party will come to add in the add suit on being joined as neither the plaintiff nor defendant. It will not be necessary for these issues of evidence and facts pertaining to the suit will be critically tackled during a full trial and determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. In any case, this is not a fresh matter and therefore taking that an application for joinder may cause unnecessary delay and costs to the litigants should this application be considered.

37. Finally, the legal identity of the proposed interested party is critical in this matter for instance the honorable court would have wished to see a copies of the certificate of incorporation of the company, a copy of CR-12 form showing the directors of the company and even the resolution to file this application giving the deponent authority. Its trite law and I fully concur with the plaintiff to the effect that a resolution nor the common seal of the company is paramount. I rely on the authority cited by the plaintiff learned counsel of “ *Kenya Commercial Bank v Stage Coach Management Limited* (2014) eKLR. Where the court held:-

“The Upshot of these consideration is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with cost .....in dismissing the suit, that when the companies authorize the commercial of legal proceedings, a resolution or resolution have to be passed either at a company or board of directors meeting and recorded in the minutes”

38. For these reasons, therefore, and taking that the court has to an extend allowed the preliminary objection, the notice of motion application dated November 9, 2021 by the proposed interested party to be joined in these proceedings cannot succeed to that effect.



### **VIII. Conclusion and Disposition.**

39. Based on the above indepth analysis of the framed issues this honorable court now proceeds to make the following determination. These are:-

- (a) That the notice of preliminary objection dated December 16, 2021 and February 14, 2022 be allowed only to the extent that the proposed interested party has failed to provide a resolution of the board to file this application dated November 9, 2021 and dismissed on grounds that the ELC has no jurisdiction.
- (b) That the honorable court grants the plaintiff leave to file and serve amended plaint within the next fourteen (14) days and the defendant granted 7 days thereafter to file and serve the amended statement of defence.
- (c) That the notice of motion application dated November 9, 2021 by the proposed interested party be and is hereby dismissed for lack of merit with no orders to costs.
- (d) That for the sake of expediency and based on this court's orders of September 30, 2021 that this matter be heard on priority basis within ninety (90) days from that time its directed that this matter be now fixed for full trial on June 10, 2022 whereby all parties ought to have fully complied with the provisions of order 11 of the Civil procedure Rules 2010 on case management.
- (e) That all parties to be at liberty to file any further documents within the next 21 days from this date.
- (f) That each party to bear its own costs.

It is so ordered accordingly

**DATED, DELIVERED, SIGNED AND READ IN OPEN COURT AT MOMBASA THIS 28<sup>TH</sup> DAY OF APRIL 2022.**

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

**ENVIRONMENT & LAND COURT**

**AT MOMBASA**

In presence of:-

M/s. Yumna, Court Assistant.

Mr. Gikandi Advocate for the Plaintiff.

M/s. Gitau holding brief for Advocate for the Defendant.

Mr. Kurgat Advocate for the Proposed Intended Interested Party.

