



**Nzaro (t/a Smoky Land) v Kayaa & 3 others; Karisa & 2 others (Interested Parties)
(Environment & Land Case 25 of 2013) [2022] KEELC 3810 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 25 OF 2013**

**MAO ODENY, J
MAY 11, 2022**

BETWEEN

**JOSEPH NZARO PLAINTIFF
T/A SMOKY LAND**

AND

**BAHATI SALIM 1ST DEFENDANT
SALIM KAYAA 2ND DEFENDANT
MUTAWALI SALIM 3RD DEFENDANT
KIPIGO SALIM 4TH DEFENDANT**

AND

**BONIFACE KASHURU KARISA INTERESTED PARTY
YUSUF KENGA KARISA INTERESTED PARTY
FREDRICK KAINGU KARISA INTERESTED PARTY**

RULING

1. This ruling is in respect of a notice of motion dated February 10, 2021 by the proposed interested parties/applicants seeking the following orders:
 - a. That the court do grant leave to the interested party to join the proceedings in this suit pending the hearing and determination of this application.
 - b. That the honourable court be pleased to stay execution of the judgment and decree by Hon Justice O Olola delivered on July 25, 2019 pending of the hearing and determination of this application.



- c. That the orders made by the Hon Justice O Olola on July 25, 2019 be reviewed, varied and set aside.
 - d. That costs be in the cause.
2. The application is supported by the grounds on the face of the application as well as the supporting affidavit of Boniface Kashuru Karisa where he deponed that their late step mother Jumwa Mwarua Ndoro was the registered owner of all that parcel of land LR Number 1705/79 (original number 1705/43/17) located within Kilifi County who obtained the said suit property as a gift through being one of the donee of Mary Lily white the donor. That she left behind 7 children who have the right to inherit from the deceased estate.
 3. The applicant also deponed that their brother Kazungu Karisa Tsuma who is now deceased fraudulently transferred the suit property in his name without informing the family and illegally obtained a fraudulent Certificate of Title Number Cr 2xxx7.
 4. He further deponed that they were not able to be joined as parties to the suit as the case had a judgment date which was delivered on May 25, 2019 and was only able to obtain the copy through Kenya law Reports which judgment was entered in favor of the defendants without considering that the deceased Jumwa Mwarua Ndoro had 7 children who are still occupying the suit property where the defendants occupy as squatters and at risk of being evicted.

Applicant's Submissions

5. Counsel submitted that Order 45 rule 1 of the [Civil Procedure Rules](#) and section 80 of the [Civil Procedure Act](#) provides that the court has the power to review its own judgment and no prejudice will be occasioned to the defendants/ respondents if the said judgment was reviewed.
6. Counsel identified three issues for determination, first whether the honourable court should grant leave to the Interested parties to join the suit, whether the honourable court should issue and order of stay of execution of the judgment and decree by Hon Justice O Olola delivered on July 25, 2019 and finally, whether costs should be borne by the defendants/ respondents.
7. On the first issue counsel relied on Order 1 rule 14 and Order 42 rule 6 (2) of the [Civil Procedure Rules](#) which sets out the threshold for the grant of stay of execution
8. On whether the interested parties should be joined in the suit, counsel submitted that the defendants are squatters on the suit property and have been staying on the suit property with the knowledge that it belongs to the applicant's late mother.
9. Dr Khaminwa cited the case of *Communication Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* (2014) eKLR where the Supreme Court held that an interested party is one who has a stake in the proceedings, though he or she was not party to the case in the first instance. That 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/herself appears in the proceedings, and champions his or her cause.
10. Counsel further relied on the cases of *Meme v Republic* (2004) 1 EA 124 and [Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others](#) (2017) eKLR where the court extensively discussed the test to be applied in matters where parties apply to be joined as Interested parties.



11. It was counsel’s submission that joinder of interested parties is not of right but at the discretion of the court hence sufficient grounds must be laid before the court on the basis of the following elements; the personal interest or stake that the party has in the party has in the matter 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, 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 and 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. Counsel relied on case of *John Harun Mwau v Simone Haysom & 2 others; Attorney General & 2 others (Interested Parties)* [2021] eKLR.

Counsel urged the court to grant the application as prayed with costs

12. The respondents did not file submissions as had been directed by the court

Analysis and Determination.

13. The issues for determination are whether the interested parties should be granted leave to join this suit after judgment, whether stay of execution of the Judgment delivered on July 25, 2019 should be granted and whether this court should review, vary or set aside the orders the Judgment dated July 25, 2019.
14. On the first issue on joinder of parties, Order 1 Rule 10 (2) of the *Civil Procedure 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.”

15. The law provides that a party may be joined to proceedings at any stage as was held in the case of *David Kiptugen v Commissioner of Lands, Nairobi & 4 others* [2016] eKLR where the applicant filed an application before the Court of Appeal to be joined as an interested party to the appeal and for remission of the matter back to the trial court for hearing de novo. The court allowed that application and held that:

“We agree with Ms Kirui that whatever the outcome of the appeal, if the applicant is not joined in this appeal, he will be deprived of an opportunity to be heard on his claim to the ownership of the suit land. That will of course be unconstitutional and against the rules of natural justice.”

16. Conversely the Supreme Court in the case of *Communications Commission of Kenya & 4 others v Royal Media Services Limited* (2014) eKLR in declining a similar application for joinder of an interested party held that:

“The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal...

We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause.”



17. The applicant deponed that the intended interested parties' late step mother was the registered owner of the suit land and that their late brother fraudulently transferred the suit property in his name without informing the family and illegally obtained a fraudulent Certificate of Title Number Cr 2xxx7. That the property was later sold to one Joseph Nzaro who filed suit in Malindi ELC NO 25 of 2013 which suit was dismissed for lack of merit.
18. Further in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others*; Supreme Court Pet 15 and 16 of 2015, [2016] eKLR the Supreme Court (Rawal, DCJ & V-P; Ibrahim, Ojwang, Wanjala & Njoki, SCJJ) established the tests for joinder of interested parties 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:
- 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:
- i) 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.
 - ii) 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.
 - iii) 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.”
19. From the judgment and the supporting affidavit by the Intended Interested parties, it is evident that they were well aware of the existence of the suit and the fact that they said that Kazungu Karisa Tsuma had fraudulently transferred the suit land to the plaintiff. The evidence of DW1 is also to the effect that both the plaintiffs and the defendants in that suit had their homes on that land at the time the plaintiff bought the same from Kazungu. In their supporting affidavit, the Intended Interested parties have duly stated that they are still in occupation of the suit land and were therefore well aware of the existence of the present suit.
20. The applicants also sought for stay of execution of the judgment and decree. The court can only stay execution pending the hearing of an application inter partes or stay pending appeal. In this case the applicants were not parties to this suit and have urged the court to join them in the suit after judgment which application the court has found to have no merit.
21. Having found that the application for joinder lacks merit it follows that an application for stay of execution would fail as it cannot be granted in the absence of an appeal as was held in the case of *Teachers*



Service Commission v Kenya National Union of Teachers & 3 others Application No 16 of 2015 [2015] eKLR where the Supreme Court held;

“The general stand of the law, therefore, is that there will be a pending, or an intended appeal, as a basis for this court to entertain an application for stay of execution, or for grant of an injunction.”

22. The applicant’s having not established the stake that they have in this case, the court cannot consider the principles of setting aside or review of the judgment
23. I have considered the application, the submission by counsel and the relevant authorities and find that the application lacks merit and is therefore dismissed no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE

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

