



**Pemuga Auto Spares Limited v Kenya Road Services Limited & 5 others;
Nyambura & another (Interested Parties) (Environment and Land Case Civil
Suit 148 of 2009) [2022] KEELC 15493 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 15493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 148 OF 2009
LC KOMINGOI, J
JUNE 24, 2022**

BETWEEN

PEMUGA AUTO SPARES LIMITED PLAINTIFF

AND

KENYA ROAD SERVICES LIMITED 1ST DEFENDANT

BEDAN NJOROGE KAMAU 2ND DEFENDANT

JOHN KAGOTHO KAMAU 3RD DEFENDANT

TERRY WAMBUKU KARIYU 4TH DEFENDANT

ALFRED JUMA MALOBA 5TH DEFENDANT

FAMILY BANK LIMITED 6TH DEFENDANT

AND

ELIZABETH NYAMBURA INTERESTED PARTY

KIMANDU GICHOHI & CO. ADVOCATES INTERESTED PARTY

RULING

1. This is the notice of motion application dated July 30, 2021 brought by the 1st interested party.
2. It is brought pursuant to section 1A,1B,3A and 63(e) of the *Civil Procedure Rules*, cap 21 of the Laws of Kenya, order 1 rule 10(2) and order 51 rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law).
3. It seeks orders;



- a. Spent.
 - b. That this Honourable Court be pleased to strike out the name of the Applicant appearing in these proceedings as the 1st Interested Party. Thereafter, the Applicant be added as the 7th Defendant in the suit.
 - c. That upon grant of order (b) above, this Honourable Court be pleased to grant leave to the Applicant to file a defence and counterclaim to the Plaintiff's further amended plaint dated 20th March, 2015 and to file a claim against any of the co-Defendants.
 - d. That costs of this application be in the cause.
4. The application is based on grounds on its face and on the Applicant's supporting affidavit and supplementary affidavits sworn on 1st April 2022 and 18th November 2021. She deponed that the suit property belongs to the 1st Defendant herein, Kenya Roads Services Limited, which Company was originally owned by James Njenga Karume and Peter Kamau Njuguna (both deceased) with each of them holding 120(1/5) shares and 179(4/5) shares respectively.
 5. She further deponed that James Njenga Karume (deceased) later transferred his shares in the 1st Defendant to the 2nd Defendant and Peter Kamau Njuguna remained the majority shareholder till he died on 20th December 1996 thus his estate is the majority shareholder of the 1st Defendant as reflected in its annual returns for the year ending 1990, 1993 and 1995.
 6. She averred that she is the eldest daughter of Peter Kamau Njuguna and as such a dependent to the estate by virtue of section 29 of the *Law of Succession Act*, cap 160 and intends to protect the interest of the estate as well as the interest of her deceased sister Sandra Wanjiku Kamau. She added that the sale of the suit estate by her brother, the 2nd Defendant herein and her mother Beatrice Njeri Kamau to the Plaintiff and subsequently to the 4th Defendant was irregular.
 7. She pointed out that the suit property is part of the assets of her late father and should only have been dealt with in accordance with provisions of The *Law of Succession Act*. She further stated that the 2nd Defendant and her mother executed the sale agreement dated 9th August 2004 in their capacity as directors of the 1st Defendant and not as administrators of her late father's estate.
 8. She deponed that 2nd Defendant and her mother are not in a position to represent the best interest of her father's estate in this suit for the reasons that they are both involved in previous fraudulent sales involving the suit property and that their appointment as administrators of her late father's estate is contested in Civil Application No.E256 of 2021 which is pending before the court.
 9. She deponed that she is keen and desirous of seeking substantive orders in this suit and that she can only do so if she is made a substantive party and that her prayer is not peculiar as the 1st Defendant herein was once the 2nd Plaintiff.
 10. The application is opposed by the Plaintiff by way of the replying affidavit sworn by Peter Mukiri, one of its directors on March 16, 2022. He deponed that allowing the application will be prejudicial to the Plaintiff since three witnesses have already testified in support of the Plaintiff's case on the basis of the pleadings on record. The Applicant seeks to change the fundamental character of this suit. He faulted the Applicant for seeking to open a succession dispute which this court has no jurisdiction over. He further averred that the Applicant has no interest in the suit property as it was an asset of the 1st Defendant.



11. The application is also opposed by the 4th Defendant vide grounds of opposition dated March 21, 2022 stating that the Applicant has delayed to bring the application and that she makes no allegation of any infringement or violation of her rights.
12. The 5th Defendant also opposed the application by way of his replying affidavit sworn on July 30, 2021.
13. On the November 9, 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The 1st Interested Party's submissions

14. They are dated 7th April 2022. They addressed the following issue:-
 - a. Whether the 1st Interested Party's instant application has merit and if the name of the 1st Interested Party should be struck out as Interested Party and enjoined as the Defendant.
15. The 1st Interested Party argued that that the implicated administrators of his late father's estate are participating in this suit in their individual capacities and not as administrators of her father's estate thus it is prudent that she be made a substantive party since she is a beneficiary. She relied on order 1 rule 10(2) of the *Civil Procedure Rules* the case of *Lucy Nungari Ngigi & others v National Bank of Kenya Limited and another* [2015]e KLR and the case of *Horst Krumeich v Capital; Markets Authority & 2others Ex Parte Oriental Commercial Bank Limited*[2007]eKLR.

The Plaintiff's submissions

16. They are dated March 16, 2022. They addressed the following issues;
 - a. Whether the 1st interested party/applicant should have leave to change her status from that of an interested party to that of a defendant and plaintiff in a counterclaim this late and in the face of the grounds of objection set out in paragraph 3 of these submissions?
 - b. Who should pay costs?
17. Relying on the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court Civil Case No.464 of 2000, *Alferd Njau & others v City Council of Nairobi* (1982) KAR 229. Counsel submitted that the Applicant has no locus standi as the case which she is pleading concerns a succession dispute between her mother and siblings and under Article 162 (2) of *the Constitution*, this Court lacks Jurisdiction to adjudicate upon such matters as the interests of an estate of a deceased person vests in their legal representative/personal representative.
18. He pointed out that a grant of letters of administration in respect of the deceased's estate was issued to Beatrice Njeri Kamau, Bernard Njoroge and Anthony Njuguna Kamau and confirmed on 27th November 1998. The Applicant is not an administrator of the estate of her late father and she has not given any evidence to that effect that she was granted a limited grant ad litem to be able to properly defend the estate of her late father.
19. It was also his submission that the application is brought after a twelve (12) year delay and as such the law does not assist the indolent. Equity aids the vigilant and not those who slumber on their rights. He relied on the case of *Benjob Amalgamated Limited & Another v Kenya Commercial Bank Limited* [2014] eKLR and the East African Court of Justice Appeal Case No.2 of 2012, *Attorney General of Uganda & Another v Omar Owadh & 6 others* [2013]e KLR.



The 5th Defendant's submissions

20. They are dated 15th February 2022. They raised the following issues:-
- a. Whether the 1st Interested Party has the locus standi to defend/protect the estate of her deceased father in the suit;
 - b. Whether the Interested Party's application is defective.
21. The 5th Defendant submitted that the Applicant lacks locus standi as described in *Alfred Njau v City Council of Nairobi* [1983] KLR and *Juliab Adoyo Ongunga v Francis Kiberenge Abano* Migori Civil Appeal No.119 of 2015 since it is only personal representatives who have the capacity to file /defend a suit on behalf of the estate of the deceased. He relied on the case of *Mayfair Establishments Limited v Stephen Mbugua Kihanya* [2020] eKLR and the case of *Hao Shanko v Mohammed Uta Shanko* [2018] e KLR.
22. It was also his submission that the 1st Interested Party has always been a party to this suit since it was filed 12 years ago thus there was inordinate delay in bringing the application. He relied on the case of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & Another* [2014]e KLR and the case of *Joseph Mugambi v Republic* [2021]e KLR.
23. The 1st to 4th Defendants did not file any submissions.
24. I have considered the notice of motion and the affidavits in support. I have also considered the responses thereto, the written submissions and the authorities cited. The issue for determination is whether the Application is merited.
25. The 1st Interested Party seeks to be discharged and be enjoined as a Defendant. The law on joinder is order 1 rule 10 (2) of the *Civil Procedure Rules*. It provides:-
- “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.”
26. The 1st interested party claims to be interested in defending the estate of Peter Kamau Njenga (deceased) who was her father and the alleged majority shareholder of the 1st Defendant which owned the suit land. She has no legal capacity to bring a claim on behalf of the said estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person as set out under section 82 of the *Law of Succession Act*, cap 160 of the Laws of Kenya .
27. Three witnesses have testified in the plaintiff's case. If the application is allowed, the court would be imposing the 1st interested party upon the plaintiff as an additional defendant and allowing introduction of a parallel claim as the 1st interested party has sought to introduce a counterclaim. I find that allowing the application would greatly prejudice the plaintiff.



28. In *Zepbir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matagaro and Ezekiel Misango Mutisya* (2014) eKLR, the Court stated:

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

29. The 1st interested party has been a party in these proceedings for years. There is no basis to introduce a counterclaim at this stage.

30. In conclusion, I find no merit in this application and the same is dismissed with costs to the plaintiff and the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JUNE 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Ndungu holding brief for Dr. Kamau Kuria for the Plaintiff present

No appearance for the 1st – 3rd Defendants

No appearance for the 4th -6th Defendants

Ms Ndinda holding brief for Mr. Mbaabu for the Interested Party present

Mutisya – Court Assistant

