



REPUBLIC OF KENYA



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**Mburu v Kariuki & 2 others (Environment & Land Case
E166 of 2020) [2022] KEELC 3323 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E166 OF 2020**

EK WABWOTO, J

JUNE 9, 2022

BETWEEN

PAUL NJUGUNA MBURU PLAINTIFF

AND

MELODY WANGOI KARIUKI 1ST DEFENDANT

FRANCIS NDEGWA MWANGI 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

RULING

1. In an application dated 25/02/2022, the Applicant sought for the following orders;
 - i) That the Honourable Attorney General be enjoined herein as the 4th Defendant.
 - ii) That this Honourable court be pleased to order the said 3rd Defendant and 4th Defendant to supply to the 1st and 2nd Defendants the files containing documents used to issue in the name of the 1st Defendant under the Road Traffic Accident, Certificates of titles in respect of the suit property the said L.R. No 14717, 14718 on 8th August 2012 including the following: -
 - i) The original application for allocation of plot No 14717,
 - ii) The original handwritten application for allocation of Plot No. 14718,
 - iii) Receipt issued to the 2nd Defendant on payment of Kshs 63,000/ = of each of the plot.



- iv) The Office copy of the receipt issued for payment to the government of Kshs 26,700/- and service fees for LR NO. 14717, 14718, 14728 and 14723 issued on 16th August 2011,
- v) The original title deed used to issue to the 2nd Defendant a certificate in respect of 14717.
- vi) The original deed plan cited to issue to the 2nd Defendants title in respect of 14718 on 8th August 2012.
- vii) The 2nd set of receipt dated 29th January 2014 issued on payment of Kshs 63,950 for each of the suit properties,
- viii) All the land rents demands issued to the 2nd Defendant between 2012 and 2022 in respect of L.R. No. 14717 and L.R. No. 14718,
- ix) Letter of confirmation dated 15th February confirming issuance of deed plans for among others L R No. 14717 and L.R. No 14718 and further that the same are authentic.
- x) Office copies of the letters of allotment issued to the 2nd Defendant on 5th June 1977
- xi) Any documents purporting to authorize the cancellation of the 2nd Defendant's certificates of title in respect to suit property and using his deed plans to be used to issue under the Registration of Titles Act and Land Titles Act purported Certificates of title in respect of the suit properties.
- xii) That the costs of this application be provided for.

2. The Application is premised on the grounds on the face of it and supported by the Affidavits sworn on 25th February 2022 and 8th April 2022 by Francis Ndegwa Mwangi.
3. The Application was opposed by the Plaintiff and the 3rd Defendant. In opposition to the same, the Plaintiff filed Grounds of Opposition dated 15th March 2022 while the 3rd Defendant filed a Replying Affidavit sworn by Chacha Maroa on 14th March 2022.
4. The court's directions were issued on 26th April 2022 directing the application to be canvassed by way of written submissions and a ruling to be issued in respect to the same.
5. The Applicants filed their written submissions dated 14th April 2022 by M/S Kamau Kuria & Company Advocates. The Applicants submitted that the Plaintiff had not responded to their application for provision of documents.
6. It was also argued that the Applicants' herein were enforcing their rights under Articles 22,23 and 35 of *the Constitution* of Kenya. Counsel contended that the affidavit of Chacha Maroa showed that the state was trying to acquire the Applicants properties through the back door which was contrary to the law. Counsel relied on the case of *Ramanop –Vs- Attorney General of Finland and Tobago* (2004) 1 Law Reports of the *Commonwealth and Gairy-Vs- Attorney General of Canada* (2001)4 Law reports of the commonwealth 670.
7. It was further submitted that the affidavit of Mr. Chacha Maroa failed to explain how the Commissioner of Land's came to issue letters of allotment in respect of the suit properties, also how



- he came to accept Kshs 63,750 for each plot, accepted fees and received the 1st Defendant's deed plan and came to issue land rent payment request to the 1st Defendant.
8. The Applicants Counsel concluded their written submission by urging the court to allow their application as prayed.
 9. The Plaintiff in opposing the application filed their written submissions dated 14th March 2022 through M/S Rapando & Odunga Advocates. Counsel submitted that the suit herein relates to a land ownership dispute between the Plaintiff and the 2nd Defendant and that the Chief Land Registrar who is the custodian of all land ownership records in Kenya was already a party to the pleadings and had even filed his response and hence there was no reason to enjoin the Attorney General to the same proceedings. Counsel referred the court to the case of Michael Kimani Thairu- Vs- Peter Kinyanjui Gedraph & Another (2015) eKLR, where the court declined to join the Attorney General and the National Land Commission as parties to the suit.
 10. In respect to the other prayer for provision of the documents relating to this suit, Counsel submitted that Article 35 of *the Constitution* is effectively enforced through the *Access to information Act* No. 31 of 2016 which lays out an elaborate framework and outlines the procedure that must be adhered to in applying for information, obtaining and challenging a public entity's decision refusing to provide the requested information.
 11. Counsel argued that the Chief Land Registrar had through the Replying Affidavit of Chacha Maroa deponed that the information and documents which were sought by the 2nd Defendant were neither genuine nor exist in Government records. Counsel contended that in the circumstances, the Chief Land Registrar cannot be compelled to produce any of the documents sought. The Plaintiffs' Counsel urged the court to dismiss the said application with costs.
 12. The 3rd Defendant equally opposed the said application and in doing so relied on the Replying Affidavit sworn by Chacha Marao. The 3rd Defendant also filed written submission dated 9th May 2022 through J. Motai Matunda Learned State Counsel.
 13. On the prayer for joinder of the Attorney General to the suit as a party, Counsel submitted that the same would serve no purpose since the Attorney General is ordinarily sued on behalf of the Government and once the 3rd Defendant was already a party to this case, it would serve no purpose to have the Attorney General. It was contended that if the Attorney General were to be enjoined to the proceedings, they would still rely on the same documentation provided by the 3rd Defendant in filling their Defence herein.
 14. On the production of documents by the 3rd Defendant, Counsel submitted that the 3rd Defendant in its affidavit had stated categorically and responded to the application for production of documents systematically. It was further submitted that no evidence has been adduced to prove that indeed the documents were received at the 3rd Defendant's Offices nor the Ministry of Land and Physical Planning. Counsel equally urged the court to dismiss the application with costs.
 15. I have considered the application and written submissions by the Counsel. The application seeks joinder of the Attorney General to the suit and also an order for the production of several documents deemed to be in custody of the 3rd Defendant. The Applicants also sought for another prayer in their written submissions, which prayer was not originally pleaded in their application. This was to the effect that the application be heard by oral evidence.



16. Order 1 Rule 10, (2) of the Civil Procedure Rules, which provision 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.”

The Black’s Law Dictionary defines “interested party” as:-

“A party who has a recognizable stake (and therefore standing) in a matter.”

17. The highest Court in Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR set out the broad principles to be considered in an application for joinder to proceedings:-

“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...”

18. Lenaola J. (as he then was) in David Nyekorach Matsanga and Another vs Philip Waki and 3 Others [2015] eKLR, said as follows:-

“The issue of enjoining a party as an Interested Party was addressed by the Supreme Court in Communications Commission of Kenya & 4 Others vs Royal Media Services Ltd. & 7 Others (2014) eKLR in the following words;

“An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is the 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 interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. A party could be enjoined in a matter for the reason that;

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;



- ii. Joinder to provide protection of the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to prevent a likely course of proliferated litigation.

....As was stated in Communication Commission of Kenya & Others (supra), a party adversely affected, would need to join proceedings filed by another to protect its interests and also to avoid proliferated litigation.”

19. On the ground that joinder can be permitted to allow a party to protect its right which would otherwise be adversely affected in law if absent, Mativo J. in *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR states:-

“The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.

A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights ...”

On the threshold to be reached by a party seeking joinder, the holding by Muriithi J. in *Benjamin K Kipkulei v County Government of Mombasa & Another* [2015] eKLR is useful:-

“....The test for joinder of a party as an interested party is not that the applicant must show a stake or interest that must prevail in the suit, as that is not possible before the full hearing of the matter; the applicant should demonstrate a legal interest that calls for hearing before a decision on the dispute before the court is adjudicated. In common judicial parlance, I would say that the applicant ought to show on ‘an arguable case’ basis that he has an interest recognized in the law and capable of protection. As a registered proprietor of the suit property upon public auction which is subject of challenge in these proceedings, the proposed party has an identifiable stake and legal interest in the property the subject of, and therefore an interest in, the proceedings before the Court.”

20. Essentially therefore, any person who, though not a party to proceedings pending in court, has an interest in the subject matter of such proceedings to the extent that they will be affected by the decision of the court whichever way the decision goes, then such person qualifies to be termed as an interested party and ought to be allowed to join such proceedings to protect his or her interests.
21. I have considered the Applicants averments that the Attorney General is the representative of the state and that he is the proper person to be sued to enforce the fundamental rights of the individual. However in the current suit the Chief Land Registrar is already a party to the suit and it would serve no purpose to enjoin the Attorney General who would merely rely on the information that has already been provided by the Chief Land Registrar. As such the said prayer is not merited and the same is declined.
22. On production of the documents listed at prayer 2 of the application, the Applicants contended that the 3rd Defendant are obliged to supply the same to them. However, the 3rd Defendant in a detailed affidavit sworn by Chacha Maroa deposed extensively how they do not have the said documents as requested since the same do not exist and are not genuine.



23. The Applicant's Counsel relied on Article 22,23 and 35 of *the constitution*. However, they did not show that they had complied with Section 8 (1) of the *Access to Information Act*.
24. If indeed the 3rd Defendant cannot trace the documents, then it would be futile to compel them to produce them, since court orders cannot be made in vain. In the circumstances, the said prayer also fails.
25. On the other order for having the application to be heard by way of oral evidence, it was indeed conceded that the same was made in their written submissions after directions as to the hearing and disposal of the application had been issued. This amounted to an ambush to the respondent and equally the same is not for granting.
26. I am therefore not satisfied that the applicants have demonstrated any merit in the application and for the reasons outlined, I decline to grant the orders sought in the application dated 25th February 2022. The same is dismissed with no orders as to costs.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF JUNE 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Rapando for the Plaintiff

Mr. Motari for 3rd Defendant.

N/A for the 1st and 2nd Defendant.

Court Assistant; Caroline

E. K. WABWOTO

JUDGE

