



**Republic v Kwale County Lands Registrar & another; Abshir & 2 others (Intended Interested Party) (Miscellaneous Judicial Review 11 of 2021) [2022] KEELC 13757 (KLR) (18 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13757 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
MISCELLANEOUS JUDICIAL REVIEW 11 OF 2021**

**LL NAIKUNI, J  
OCTOBER 18, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KWALE COUNTY LANDS REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**KWALE COUNTY LANDS SURVEYOR ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**DOMINIC COLLINS ZALO ..... INTENDED INTERESTED PARTY**

**ABSHIR ABDI ABSHIR ..... INTENDED INTERESTED PARTY**

**FRANCOLIN LIMITED ..... INTENDED INTERESTED PARTY**

**RULING**

**I. Preliminaries.**

1. The intended interested party, herein trading in the name and style of “Francolin Limited” moved this honorable court through a certificate of urgency and the notice of motion application both dated the March 8, 2022. It was brought under the dint of article 159 (2) (a) of Constitution of Kenya, 2010 section 1A, 1B, 3A & 6 of CPA, order 53 rule 6 of *CPR* by the intended interested party herein.

**Notice of Motion by the 1<sup>st</sup> Respondent**

2. The certificate of urgency sworn by Dominic Ogega Mwale, an advocate of the High Court of Kenya basing it on the grounds that the instant petition had a court date fixed for April 7, 2022. The intended interested party had no prior knowledge of the existence of the instant petition until a few days prior to February 10, 2022, on which date this matter was last before this honourable court. The delay by the



interested party to file its pleadings as directed by this honourable court is inadvertent and excusable as they were never served with the pleadings filed in this matter. The intended interested party's right to be heard on this petition is likely to be fettered should this petition be heard and determined without intended interested party being enjoined as such. The intended interested party stands to suffer extreme prejudice should this petition be heard and determined prior to the final determination of the court in Kwale ELC No 13 of 2021 (as consolidated with ELC (Mombasa) No 66 of 2017) which suit was filed prior to the petition herein.

3. The subject matter of the petition herein is also substantially in issue in Kwale ELC No 13 of 2021 in as far as the parcels of land referred to in Kwale ELC No 13 of 2021 comprise of either consolidations, amalgamations or subdivisions of parcels of land comprising the suit property herein. The orders sought in the instant petition are prerogative in nature and if granted, have the potential of adversely affecting all other interests having a claim on the suit property, including the just determination of the previously existing ELC (Kwale) No 13 of 2021. The doors to the corridors of justice ought not to be closed to the Intended interested party prior to affording them a right to be heard in this petition. Unless this honourable court intervenes and this application is heard on a priority basis, there is a likelihood that this petition may result in different determinations of the court over substantially the same subject matter. It is the interests of justice that the plaintiff/applicant be granted the relief's sorted in the notice of motion application annexed hereto.
4. The notice of motion application sought the following: -
  - a. Spent
  - b. Spent
  - c. The intended interested party be granted leave to file a preliminary objection to the petition as the subject matter of the instant suit is sub-judice on account of the existence of Mombasa ELC No 66 of 2017 and Kwale ELC No 13 of 2021 (formerly Mombasa ELC No 107 of 2017) which matters were consolidated into one matter on the December 8, 2021 by Hon Lady Justice Adraya Dena at the Kwale Environment and Land Court.
  - d. There be no orders as to costs in relation to this application.
5. The application is premised on the provision of article 159(2)(a) of the Constitution of Kenya 2010 and order 53 rule 6 of the Civil Procedure Rules, 2010, sections 1A, 1B, 3A and 6 of the Civil Procedure Act, cap 21. Its grounds are on the face of the application and an 11<sup>th</sup> paragraphed supporting affidavit with annexures sworn by Mary Ciumwari Mwaniki, dated March 8, 2022 and the 19<sup>th</sup> paragraphed supporting affidavit with annexures sworn by Dominic Ogega Mwale, dated March 8, 2022.

#### **Supporting Affidavit by Mary Ciumwari Mwaniki**

6. She deponed that she is the director and shareholder of the intended interested party proposed to be enjoined in this petition, duly authorized and competent to swear this affidavit. She deponed that the intended interested party was never served with the pleadings filed in this matter and thus had no prior knowledge of the existence of this petition until a few days prior to February 10, 2022, on which date this petition was last before this honourable court, making the delay by the intended interested party to file its pleadings as directed by this honourable court inadvertent.
7. She deponed that the no notice of the proceedings was issued to the intended interested party yet the *ex parte* applicants were aware of other properties and registered owners of the said properties all touching on the suit property herein. She annexed and marked a copy of a letter to the Chief Land Registrar referring to the said parcel as MCM 01 also noted as DC24 in the petitioners bundle of documents.



The intended interested party, having no prior knowledge of the petition herein, could not reasonably comply with this honourable court's time frame to file its pleadings in this matter.

8. She deponed that had the intended interested party been served with the petition filed herein by the *ex parte* applicants, it would have readily complied with the court's directives within the set time frame. The intended interested party stands to suffer extreme prejudice should this petition be heard and determined prior to the final determination of the court in ELC (Kwale) No 13 of 2021 (as consolidated with ELC (Mombasa) No 66 of 2017 which suit was filed prior to the petition herein, and in which the suit property herein is also substantially in issue in as far as the parcels of land referred to in Kwale ELC No 13 of 2021 comprise of either consolidations, amalgamations or subdivisions of the suit property and such parcels of land.
9. She deponed that the intended interested party is apprehensive that should the prerogative orders sought by the *ex parte* applicants in the instant petition be granted, such orders may potentially adversely affect all other interests having a claim on the suit property herein, including the just determination of the previously filed Kwale ELC No 13 of 2021. The ends of justice would be better served if this honourable court were to exercise its discretion in favour of the intended interested party's application to allow them to be enjoined in the petition as an interested party, and to file the proposed preliminary objection for consideration by this court.
10. She deponed that it would be a travesty to close the doors to the corridors of justice on the intended interested party prior to affording them a right to be heard in this petition. It is in the interests of justice that the intended interested party be granted the reliefs sought in the notice of motion application annexed hereto.

#### **Supporting Affidavit by Dominic Ogega Mwale**

11. He deponed that he is an advocate of the High Court of Kenya in conduct of legal matters relating to the intended interested party.
12. He deponed that the instant petition was filed by the *ex parte* applicants sometime in the month of August 2021 and has a judgment date set for April 7, 2022 before this honourable court. The intended interested party has filed before the Kwale Environment & Land Court a suit namely Kwale ELC No 13 of 2021 which was initially filed in Mombasa Environment & Land Court under the case number 107 of 2021 on June 18, 2021. He annexed a copy of the pleadings filed in Kwale ELC No 13 of 2021 marked as DOM 1.
13. He deponed that the said suit Kwale ELC No 13 of 2021 has been consolidated with Mombasa ELC No 66 of 2017 for hearing and determination by the Kwale Environment & Land Court. He annexed a copy of the pleadings filed in Mombasa ELC No 66 of 2017 and marked as DOM 2. The *ex parte* applicants have confirmed that they were aware of the existence of other properties and registered owners of the said properties affected by their petition but they elected to exclude them from this petition thereby concealing material facts from this honourable court.
14. He deponed that the intended interested party was never served with the pleadings filed in this matter and thus had no prior knowledge of the existence of this petition despite the *ex parte* applicants being aware of other prior parties touching on the suit property. The intended interested party having no prior knowledge of the petition herein, could not reasonably comply with this honourable court's time frame to file its pleadings in this matter, a state of affairs rendering the delay by the intended interested party to file its pleadings inadvertent.



15. He deponed that had the intended interested party been served with the petition herein, the *ex parte* applicants, it would have readily complied with the court's directives within the set time frame. No notice of this petition was issued to the intended interested party by the *ex parte* applicants, despite the latter being aware of other suits filed before the Kwale Environment and Land Court. The subject matter in Kwale ELC No 13 of 2021(as consolidated with Mombasa ELC No 66 of 2017) involves several parcels of land which are referenced in the instant petition namely Kwale/Funzi Island/234, Kwale/Funzi Island/235, Kwale/Funzi Island/236, Kwale/Funzi Island/365 and Kwale/Funzi Island/338.
16. He deponed that the instant petition concerns a parcel of land referred to as Kwale/Funzi Island/64 which is located in the exact same position as Kwale/Funzi Island/365 and the petitioner has also laid claim Kwale/Funzi Island/234, Kwale/Funzi Island/235, Kwale/Funzi Island/236 by dint of claiming a reduction of acreage from 22.3 ha to 18.23 ha on his title deed for Kwale/Funzi Island/64 and hence this petition concerns a matter that is substantially and significantly in issue in the prior suit Kwale ELC No 13 of 2021 (as consolidated with Mombasa ELC No 66 of 2017).
17. He deponed that the intended interested party stands to suffer extreme prejudice should this petition be heard and determined prior to the final determination at the court in Kwale ELC No 13 of 2021 (as consolidated with Mombasa ELC No 66 of 2017), which suit was filed prior to the petition herein, and in which the suit property herein is also substantially in issue in as far as the parcels of land referred to in Kwale ELC No 13 of 2021 comprise of either consolidations, amalgamations or subdivision of the suit property and such parcels of land.
18. He deponed that the ownership of the suit property is substantially and significantly in issue before the Kwale Environment and Land Court and has been pending determination by the court since 2017. There is a real and present danger that the issues that are affecting the suit property shall not be brought to the light of day and that justice shall be stifled should the present petition proceed to judgment and orders be issued by this honourable court prior the determination of Kwale ELC No 13 of 2021.
19. He deponed that the intended interested party is apprehensive that the prerogative orders sought by the *ex parte* applicants in the instant petition be granted, such orders may potentially adversely affect all other all other interests having a claim on the suit property herein, including the just determination of the previously filed Kwale ELC No 13 of 2021. The ends of justice would be better served if this honourable court were to exercise its discretion in favour of the intended interested party's application to allow them to be enjoined in the petition as an interested party, and to file the proposed preliminary objection for consideration for consideration by this court. He annexed a copy of the proposed preliminary objection and marked it DOM 3.
20. He deponed that the prior determination of this petition stands to open a Pandora's box of additional and lengthy litigation by several parties claiming an interest in the suit property due to the likelihood of a multiplicity of competing directions and orders from various judicial and quasi – judicial organs, which will only serve to delay and defeat the wheels of justice. It is in the interests of justice that the intended interested party be granted the reliefs sought in the notice of motion application annexed hereto.

### **Response to the Application dated 1<sup>st</sup> April, 2022**

21. Through a replying affidavit dated April 1, 2022, Dominic Collins Zalo deponed that he is one of the *ex parte* applicants and duly appointed attorney of the other *ex parte* applicant, Abshir Abdi Abshir, in all matters pertaining land title number Kwale/funzi Island/64 hence competent to swear the affidavit



- on behalf of the said Abshir Abdi Abshir as well as his. He attached a copy of the duly registered specific power of attorney as DCZ 1.
22. He deponed that he had seen, read, been explained to and understood the notice of motion application dated March 8, 2022 filed by the intended interested party in the matter and wished to respond in opposition to the same. He reiterated that the contents of the statutory statement dated August 18, 2021 and filed together with the chamber summons application and wish to further depose as hereinunder. The intended interested party has not satisfied the criteria to be enjoined in these proceedings for the reason that the said intended interested party has not demonstrated in its application its interest or stake in the property subject of the proceedings before this court i.e Kwale/funzi Island/64.
  23. He deponed that the 2<sup>nd</sup> *ex parte* application herein, Abshir Abdi Abshir, is the lawful and registered proprietor of the aforementioned parcel of land. A copy of the certificate of title was annexed to the judicial review application as DCZ 6. It is instructive to note that the same is not contested by the intended interested party. The intended interested party has also not demonstrated in its application what prejudice it stands to suffer if the orders sought before this court are granted, given that the orders sought do not touch on ownership of the subject property and the same is not in contest.
  24. He deponed that one of the orders sought in the present judicial review proceedings in an order of *mandamus* to issue compelling the respondent to effect a determination by the National Land Commission Historical Land Injustices Committee referenced NLC/HLI/435/2018 dated February 7, 2019 by inter alia amending the relevant land records including the Registry Index Map (RIM) to reflect the rightful proprietorship and acreage of all that piece of land known Kwale/funzi Island/64. The said determination by the National Land Commission Historical Land Injustices Committee that is subject to these proceedings has never been challenged let alone set aside or vacated. The intended interested party has not demonstrated that the said determination is subject to any challenge before any court.
  25. He deponed that the other substantive order sought is an order of *mandamus* to issue compelling the 1<sup>st</sup> respondent to cancel the purported restriction registered on December 1, 2020 purportedly emanating from Mombasa ELC miscellaneous cause No 35 of 2017 has already been cancelled. He attached a copy of the certificate of official search and marked is as DCZ 12. The intended interested party has also demonstrated in its application that its presence is necessary to enable this honourable court effectually and completely adjudicate on whether the public law remedies being sought as against the respondents are warranted.
  26. He deponed that instead the intended interested party is keen on muddling these proceedings and draw this honourable court into converting them from judicial review proceedings to a suit over ownership. He was advised by his counsel on record, which advise he believes that this honourable court sitting as a judicial review court cannot adjudicate over the ownership of Kwale/ Funzi Inslad/64, especially when there is a determination that has not been challenged and/or vacated and a certificate of title which has also not been challenged. If the intended interested party wants to litigate as to the ownership or otherwise of the subject suit property, the present forum is not the proper one. It is further instructive that nowhere in the pleadings annexed to the intended interested party's application has Kwale/funzi Island/64 being referred to nor have any prayers been sought as against it.
  27. He deponed that further, granted how significantly these judicial review proceedings have progressed and that judgment was scheduled to be delivered on April 7, 2022, the present application has been mad in bad faith geared towards scaling these proceedings and delaying the determination of the case. The intended interested party appeared before this honourable court on the February 10, 2022 when



he sought to have the intended interested party enjoined, the court directed he files an appropriate application for consideration. The said Mr Mwale was aware that judgment would be delivered on April 7, 2022 yet he filed the said application on March 15, 2022, over a month after the court directed that he could do so. This delay with respect to the stage these proceedings are in, is inordinate and unexplained. If the intended interested party was indeed interested in being enjoined, he would have moved this court with haste. The intended interested party is undeserving of the exercise of discretion in its favour given its delay in fulfilling this application after the court directed that it could do so.

28. He deponed that he believed that the intended interested party herein has failed to satisfy the criteria to be enjoined as an interested party and that this application is devoid of merit and should be rejected and dismissed with costs to the *ex parte* applicants herein.

### **Submissions**

29. On March 28, 2022 while all parties were present in court, direction were taken to the effect that the notice of motion application filed by the intended interested party dated March 8, 2022 be disposed off by way of written submission.

Pursuant to that all parties fully complied. Subsequently, the honorable court reserved a date for delivery of the ruling on notice.

### **B. The Written Submission by The Intended Interested Party**

30. On May 4, 2022 the learned counsels for the intended interested party herein the law firm of Messrs Mwale & Company Advocates filed their written submissions dated April 27, 2022 while in support of their own notice of motion application dated March 8, 2022 Mr Mwale, advocate submitted that he was away of all the pleadings filed herein by the ex-parte applicant and the reliefs sought thereof. In view of this the intended interested party was seeking for leave to be joined in the instant petition by the ex-parte applicant dated .....as an interested party and leave to file a preliminary objection in the said proceedings based on the following grounds:-

- (a) The intended interested party had never been served with the ex-parte applicants pleadings in this matter.
- (b) The intended interested party had taken steps to ensure its complaint with the court directions by seeking leave to file a preliminary objection to the petition.
- (c) They stood to suffer extreme prejudice should the petition be heard and determined prior to the final determination of the court in ELC (Kwale) No 13 of 2021 as the suit property as the suit property herein was also substantially in issue in that suit as well.
- (d) The orders sought in the petition are prerogative and if granted they would adversely affect all other interest on the suit land including the matters in ELC (Kwale) No 13/2021.
- (e) They need to be accorded the right to be heard.

The learned counsel submitted that the intended proposed interested party need be joined based on the principles of fair hearing under article 50 (1) and (2) of the *Constitution* of Kenya 2010 and rule 2 of *Constitution of Kenya Protection of Rights and Fundamental Practice and Procedure Rules 2013*.

31. They have filed the suit being ELC (Kwale) No 3 of 2021 in its own right claiming title to all that parcel of land known as land reference No Kwale/Funzi/Island/338. They are the current owners of land reference Kwale/Funzi Island/234, 235 and 236. To support his point, he relied on the decision



of “*Kenya Medical Laboratory Technicians and Technologists Board and 6 others v Attorney General & Others* (2017) eKLR and citing *John Harun Mwau v Simone Haysom & 2 others Attorney General*.”

32. The learned counsel’s contention was that the ex - parte applicant had all along had the knowledge of the fact that the other parties were registered owners of the sub-division, amalgamation or otherwise of his alleged property and ought to have sought out and served those parties once the court invited any interested party to appear before it.

He urged that it was self-evident that the interest of the intended interested party were already being trampled on by the application of the NLC determination and that further injury was likely if the present petition was allowed to proceed without allowing for the admission of the intended interested party.

The learned counsel argued that the ex-parte applicant had raised numerous contestations against the intended interested party which could not rightfully be addressed until leave was granted to the intended interested party to be joined. They had cast aspersions on the intended interested party which as it were the intended interested party could not address them effectively.

31. The counsel emphasized that the intended interested party had a claim over all that property known as Kwale/Funzi Island/338 an issue this court may not consider without first granting the intended interested party audience and leave to produce and substantiate its claims.

He held that the intended interested party had demonstrated that it had a legal stake which was identifiable and therefore they should be admitted to these proceedings.

31. Additionally, and as a final aspect the learned counsel submitted that the ex - parte applicants would not suffer any prejudice by having the intended interested party admitted to these proceedings under the following grounds: -

- a. The ex - parte applicant were the current registered proprietors of all that parcel of land known as land reference No Kwale/Funzi Island/64 by dint of determination and recommendation of the NLC. He argued that while arriving at that decision NLC neither summoned the current registered proprietors of the various affected properties nor the parties against whom Mr Mwatende Hamisi laid his claim. NLC never accorded parties a fair hearing.
- b. The current status quo greatly favored the ex- parte applicant as they had rightfully pointed out in their replying affidavit dated April 1, 2022 that there was no suit based on the ownership of land reference No Kwale/Funzi Island/64 nor any orders sought on the said parcel of land. From the petition, the petitioner are seeking to be allocated a significant increase in the size of land – measuring 4.07ha which would have to come from somewhere – most likely from the adjacent parcels – being land reference No Kwale/Funzi Island/64. But he will not be denied the enjoyment of his property that he was currently registered as proprietor.

31. In conclusion the learned counsel urged court to consider the application and the orders sought by the intended interested party so that the court may acquit itself on the full facts and information of the case.

## **B. The Written Submissions by the Ex - Parte Applicant**

36. On May 10, 2022, the learned counsel for the ex - parte applicant herein, the law firm of Messrs Mbugua Ng’ang’a & Company Advocates filed their written submissions dated May 10, 2022 and filed in court on the even date. Mr Orenge advocate submitted that they were opposing the notice of motion application by the intended interested party dated March 8, 2022. From the outset the learned counsel the intended interested party did not satisfy the criteria to be joined in the present judicial review



proceedings hence the instant application was misconceived and an abuse of the court due process and therefore should be dismissed for the following reasons:-

37. Firstly, the present proceedings was judicial review seeking to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents – who are public authorities to effect the determination of the National Land Commission Historical Land Injustices Committee dated February 7, 2019 by amending the relevant land records including the registry index map (RIM) to reflect the rightful proprietorship and acreage of all that parcel of Land Known as land reference number Kwale/funzi Island/24. He argued that in essence the very nature of these judicial review proceedings was that the ex-parte applicants sought for public law remedies against these public authorities – that was the very nature of the judicial review proceedings. To support his point on what judicial review entailed, he held it was “a constitutional supervision of public authorities involving a challenge to the legal validity of the decision .... means through which the courts supervise the actions of decision of administration bodies or tribunals. The counsel relied on the decision of “*Republic v Kenya Revenue Authority Commissioner Ex - Parte Key Corp Real advisory Ltd* (2019) eKLR and *Humphrey Makokha Nyongesa & another v Communication Authority of Kenya & 2 others* (2018) eKLR
38. He urged court not to lose sight of the nature of the proceedings before is as it exercised its discretion. The learned counsel in his submissions and relying on several authorities being ”*Mary Njeri Kabunchi v Christine Muthiri Mbugua & 2 others* (2020) eKLR, *Communication Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* (2014) eKLR and “*SKOV Estate Limited & 5 others v Agricultural Development Corporation & another*. Spelt out what test, land down guide and requirement for court to consider while dealing with application for joinder interested party to suits. These were summarized as being:-
- a. An interested party in one who has a stake in the proceedings through he or she was not party to the cause.
  - b. One who would be affected by the decision of court when it is made either way.
  - c. He/she feels would be able to adequately articulate issues unless himself or herself appears in the proceedings to champion the cause.
  - d. His presence will result in the complete settlement of all the questions involved in the proceedings.
  - e. It provides protection for the rights of a party who would otherwise be adversely affected in law.
  - f. It prevents a likely course of proliferated litigation.
39. Secondly, based on the above authorities and legal position the learned counsel. Contention was that the intended proposed interested party failed to satisfy these criterial on the following grounds:
- a. The 2<sup>nd</sup> ex-parte applicant herein was the lawful and registered of all that parcel of land known as land reference No Kwale/Funzi Island/64. The intended interested party are not challenging the validity of the title or ownership.
  - b. The interested party hold they have an interest and claim so at that parcel No Kwale/Funzi Island 338 which is part of the judicial review. But they have not shown any proof such a copy of title to demonstrate or substantiate its interest and hence theirs is mere allegations.
  - c. They have also failed to demonstrate that their presence would be necessary to enable the court competently adjudicate and settle the question and/or issues of these proceedings – the main question here being whether the respondents should be compelled to effect the NLC



determination as statutory obligated having refused to do so. He wonders whether the presence of the intended interested party would assist the court determining this question taking that the said decision has not been challenged, set aside or varied.

- d. The intended interested party had not demonstrated that its presence was necessary to enable the court effectively and completely determine the question and/or issues in this matter they were mere busy bodies to spectate or confuse the issues in the matter.
40. He submitted that the intended interested parties were only keen on meddling these proceedings and draw court converting the proceedings from judicial review proceedings to a suit over ownership – the same was done in bad faith geared towards protracting the proceedings and defeating the expeditious its disposal.

Citing the decision of “*Republic v Salaries & Remuneration Commission Ex - Parte Parliamentary Service Commission & 4 others* (2018) eKLR – he noted the decision whether or not to from a party was an exercise of discretion of court.

Finally, he submitted that the intended interested party would suffer any prejudice if they were denied the orders for joinder – as it had failed to demonstrate how they would be adversely affected.

If anything it was the ex-parte applicant who stood to suffer immensely prejudice if the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not compelled to perform statutory obligation in effecting a determination that had not been challenged and/or set aside or vacated. He urged court to dismiss the notice of motion application filed by the intended proposed interested party with costs.

#### **Analysis and Determination.**

41. I have carefully read and put into account all the filed pleadings, the written submissions by the parties, the authorities relied on and the relevant provisions of the *Constitution* of Kenya, 2010, the appropriate and enabling laws with regard to the applications filed in this court.
42. In order to arrive at an informed, just, reasonable and fair decision, I have framed the following four (4) salient issues for determination. These are:-
- a. Whether the notice of motion application dated March 8, 2022 is merited?
  - b. Whether the intended interested party should be granted leave to be joined in this petition as an interested party?
  - c. Whether the intended interested party should be granted leave to file a preliminary objection to the petition as the subject matter of the instant suit is sub - judice?
  - d. Who will bear the costs of the application.

#### **Issue No. a). Whether the Notice of Motion application dated 8<sup>th</sup> March 2022 is merited?**

43. 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 the provisions of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, “The Mutunga Rules”. 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.
44. The starting point in determining this application is the definition of an interested party. Who is such a person? It is noteworthy that there is no definition of an interested party in any of the parent enactments in Kenya except in the *Supreme Court Act*, No. 7 of 2011. It is given also in the *Supreme*



Court Rules of 2012 made under the Act as they provide for the practice in that apex court. I will turn to these provisions shortly. In regard to legislation that creates the other courts below the Supreme Court, there is none that has the term but there is only one definition thereof that has been captured in subsidiary legislation: The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which I will hereafter refer to as the “Mutunga Rules”. The rules were gazetted on June 28, 2013 *vide* legal notice No 117. It would appear that the wisdom of the committee that made the rules was to minimize the injustice that had, for long before the promulgation of the 2010 Constitution, permeated the justice system in Kenya by way of denying persons who had interest in judicial or tribunal proceedings, the right to be enjoined thereto through the bar of lack of *locus standi*. An interested party has been defined as:

‘a party who has recognizable stake and therefore a standing in a matter.’

45. While the Civil Procedure Act, cap 21 is silent on the concept of “interested party”, order 41 rule 5 of the Civil Procedure Rules 2010, make a reference to the term “interested party” and states;  
‘The court either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit’
46. Similarly, rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 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 be directly involved in the litigation.’
47. The rules further at part II clause 7 provides that, a person with leave of the court may make an oral or written application to be joined as an interested party or the court, on its own motion, may also join an interested party to the proceedings before it.
48. There are factors to be considered by court in reaching its discretionary decision to confirm joinder, adding or striking out a party in a suit should be guided by the following factors:
  - a. Whether the joinder/non-joinder will assist the court in the effective and effectual determination of all questions arising in the suit.
  - b. Whether the party sought to be joined or removed has any identifiable stake, legal interest or duty in the proceedings.
  - c. Whether the joinder/non-joinder is likely to prejudice the said party.
49. The above position was stated in the case of ”Justin Kithinji Nderi & 2 others v Director of Public Prosecutions & another; Njiiru Micheni Nthiga (interested party) [2020] eKLR where the court relied on the case of “SKOV Estate Limited & 5 others v Agricultural Development Corporation & another where the J. Munyao held that;

“ 18. In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in



a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant...”

50. 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 if 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.
51. Order 1 rule 10 (2) of the *Civil Procedure Rules* states that;
- 2) “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.
52. In the case of ”*Habiba W Ramadhan & 7 others v Mary Njeri Gitiba* (2017) eKLR; Nairobi High Court ELC Case No 119 of 2014 the court stated as follows:-
- “As already observed by the court, under order 1 rule 10(2) the court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute....”
53. In the case of ”*Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR “the Supreme Court of Kenya held that:-
- “(22) In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court’s ruling 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...”



(23) 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 questions 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.'

54. 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 the case of “*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 interested 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.

55. The issue in this suit pertains property to which the intended interested party stands to suffer extreme prejudice should the petition be heard and determined prior to the final determination of the court in Kwale ELC No 13 of 2021 as consolidated with Mombasa ELC No 66 of 2017 which suit was filed before the present petition. The parcels referred to in Kwale ELC No 13 of 2021 comprise of either consolidations, amalgamations or subdivision of the suit property and such parcels of land. The intended interested party is apprehensive that should the prerogative orders sought by the *ex parte* applicants in the instant petition be granted, such orders may potentially adversely affect all other interests having a claim on the suit property herein, including the just determination of the previously filed suit.

**Issue No. b - Whether the Intended Interested Party should be granted leave to be enjoined in this Petition as an Interested Party?**

56. There is a difference between the meaning, process and act of joining a party to a suit whether as plaintiff or defendant from that of joining an interested party to an existing suit. The former is the only one governed by most of the first part of order 1 rule 10(2) of the *Civil Procedure Rules, 2010*. At the relevant part the sub-rule provides that:

“The court may at any stage of the proceedings, either upon or without the application of either party,...order 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.”

57. The principles that guide our courts when exercising jurisdiction to grant orders of joinder are well settled. A party seeking an order of joinder is required to demonstrate an identifiable interest or stake in the proceedings. The Supreme Court of Kenya emphasized this principle in the case of “[\*Francis Kariuki Muruatetu & another v Republic & 5 others\*](#) [2016]eKLR; petition No 15 of 2016 by outlining the following criteria:
- a. 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.
  - b. 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.
  - c. Lastly, a party must, in its application, set out the case and/or submission 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.
58. Secondly, the court is vested with powers to suo motto join, as a party, any person who it considers to be a necessary party for the effectual and complete settlement of the questions in the dispute before it. The provision of order 1 rule 10(2) of the *Civil Procedure Rules* contains the following framework in this regard:
- “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”.
59. From the foregoing, it is definite that an interested party is a person or a legal entity that is would be directly affected by the decision of a case either determined before a tribunal or a court of law especially if it is determined in favour of the adversary.

**ISSUE No. c) Whether the parties are entitled to the relief Sought.**

60. Having already determined above in issue 1 that the intended interested party do have a vested interest in the suit property, the applicant has demonstrated an identifiable interest or stake in these proceedings. The above circumstances, in my view, render the applicant a necessary party for the effectual and complete adjudication and settlement of the key questions in this dispute. I will, in the circumstances, admit the applicant as an interested party. the applicants herein to be joined as interested parties in this suit. As to whether they decide to participate in the proceedings fully (as prayer 3 is crafted by the applicants) or not it is not a matter of the court to order or enforce. It is up to them. Similarly, subsequent filing of pleadings and documents by the parties is dependent on many factors which are not open to the court to assess compliance thereof at this stage. But in the interest of justice I have granted the prayer that aptly fits the occasion. That is why it is in bold above, lest someone misunderstands the end result of the application that was before me. Even so, I have noted above that



enjoinment of parties to proceedings can be ordered at any stage before the court becomes *functus officio*.

61. I am satisfied that the proposed interested parties have met the threshold set out in the case of “*Muruatetu case* (supra). In considering whether or not to allow the prayers sought, this court is clothed with the powers to consider whether the prayers are couched in the manner that they would, if granted, give the proper result and finding of the court. This is my finding for the second issue.

#### **ISSUE No. d) Whether the Intended Interested Party should be granted leave to file a Preliminary Objection to the Petition**

62. Lastly, the next issue is whether or not the applicants have set out their case which it intends make before the court and shown that their case is not replica of what other parties have before the court. They thus allege having interests in the suit land. Their ownership of the parcels they occupy, if any and if proved to be true, is not subsumed in the rights of the parties in the suit. This is a case set out clearly.
63. I have noted that the case is at the preliminary stage. It has neither been heard nor have parties complied with order 11 (so to say, the pleadings have not been closed). The issue of whether a party is to raise an objection is entirely at their own volition and choice. No court has the mandate or any inclination to guide a party on which and when to raise any objection on a matter of law. The only rider and guided by the now famous case of “*Mukisa Biscuits* (supra).....any preliminary objection should be on pure matters of pure law and not facts. Thus, the court shall wait for the objection to be raised then deal with it at that stage. Its still pre – mature to comment on it.

#### **ISSUE No. Who bears the Costs of the Application.**

64. The upshot is having determined and admitted the intended interested party. It is no longer an issue that the application has been determined as successful. Costs always follow the event unless otherwise explained. In the instant case, it is inevitable that they do. I therefore grant the applicants the costs of the instant application.

#### **V. Conclusion & Determination**

65. In conclusion, therefore, having keenly and elaborately cause an indepth analysis of all the framed issues herein, the honorable court in the interest of justice, proceed to grant the following orders:-
- a. That the notice of motion application dated the March 8, 2022 by the intended interested party herein be and is hereby found to be merited and hence allowed.
  - b. That an order be and is hereby made directing the applicant to file and serve both a notice of appointment as an interested party and its pleadings within the next fifteen (15) days of this ruling hereof.
  - c. That an order be and is hereby made granting all the other parties corresponding leave within the next fifteen (15) days from the date of this ruling to file any amended pleadings, further lists of documents together with copies attached thereof, lists of witnesses and the witness statements if necessary thereof.
  - d. That for expediency sake, the matter to be mentioned on November 7, 2022 before the Environment & Land Court at Kwale the honorable court with the geographical jurisdiction being the geographical place where the suit properties in these proceedings are situated for purposes of compliance, pre – trial, fixing a hearing date and taking any other further



appropriate directions/orders that the honorable court will deem fit and suitable to grant accordingly.

- e. That the costs of the application be awarded to the applicant.

It is so ordered accordingly.

**RULING IS DELIVERED, SIGNED & DATED AT MOMBASA THIS 18<sup>TH</sup> DAY OF OCTOBER 2022.**

**HON. JUSTICE (MR) L.L NAIKUNI, JUDGE  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

In the presence of:-

- a. M/s. Yumnah & Mr. Omara the Court Assistants.
- b. Mr. Orengo Advocates for the Ex - Parte Applicants.
- c. Non Appearance for the 1<sup>st</sup> Respondent
- d. Non Appearance for the 2<sup>nd</sup> Respondent
- e. Mr. Mwale Advocates for the Interested Parties

