



**Godoomal & another v National Environment Management Authority (NEMA) & 3 others; Vacuum Filler Limited & 6 others (Intended Interested Party) (Environment & Land Petition 47 of 2021) [2022] KEELC 14610 (KLR) (17 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14610 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND PETITION 47 OF 2021**  
**LL NAIKUNI, J**  
**OCTOBER 17, 2022**

**BETWEEN**

**CHANDAN JETHANAND GODOOMAL ..... 1<sup>ST</sup> PETITIONER**

**PREM JETHANAND GIDOOMAL ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 1<sup>ST</sup> RESPONDENT**

**MOMBASA COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**KENYA URBAN ROADS AUTHORITY (KURA) ..... 3<sup>RD</sup> RESPONDENT**

**DEPUTY COUNTY COMMISSIONER MOMBASA THRO' THE  
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL  
GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**VACUUM FILLER LIMITED ..... INTENDED INTERESTED PARTY**

**CHARLES KIOKO T/A. MAIZE LOGISTICS .... INTENDED INTERESTED  
PARTY**

**BEBETO CHALO T/A ELLY CAR WASH ..... INTENDED INTERESTED PARTY**

**KENNEDY MWANIA T/A SHALOM TUDOR KIOSK .... INTENDED  
INTERESTED PARTY**

**BREDA KILOI T/A TUKO LIVE ..... INTENDED INTERESTED PARTY**

**FATMA OMAR T/A. MASHALLA CAR WASH .... INTENDED INTERESTED  
PARTY**



RULING

**I. Introduction .**

1. A few Intended interested parties carrying out businesses on the suit land moved this honorable court through a notice of motion application dated August 5, 2022 for its determination. They brought the said application under the provisions of rules 3, 5 (d), 19 and 25 of the *Constitution of Kenya (protection of Rights and Fundamental and Freedom) Practice and Procedure Rules 2013*, (also referred to as “The Mutunga Rules”) articles 40, 50 and 159 (1) & (2) of the *Constitution of Kenya 2010*, sections 1A, 1B & 3A of the *Civil Procedure Act* cap 21.
2. This honorable court also wishes to point out that there was a site visit conducted on the October 6, 2022 in the presence of all the parties herein as per the orders granted on September 29, 2022. It is significant to discern that the court prepared a visitation report, which is attached herein as part of the ruling. Indeed, the said visitation may have a few implication to the ruling hereof.

**II. The case by the proposed/intended interested parties**

3. The proposed/intended interested parties herein through their application sought for the following orders:-
  - (a) Spent
  - (b) That this honorable court may be pleased to grant leave to the Intended interested parties to be joined.
  - (c) That this honorable court may be pleased to order stay of execution of the orders issued on July 27, 2022 in particular order (f) thereof directing the 3<sup>rd</sup> respondent to remove the Intended interested parties containers within 14 days pending hearing and determination of this application.
  - (d) That this honorable court may be pleased to order Stay of Execution of the orders issued on July 27, 2022 in particular orders (f) thereof directing the 3<sup>rd</sup> respondents to remove the interested parties containers within 14 days pending hearing and determination of this petition.
  - (e) That the honorable court may be pleased to set aside and/or vary orders issued on July 27, 2022 in particular order (f) thereof directing the 3<sup>rd</sup> respondent to remove the interested parties containers within 14 days.
  - (f) That costs of this application be provided for.
4. The said applications is premised on the grounds and testimonial facts, and averments made out under the 23 paragraphed supporting affidavit of Antony Murithi Nkatha sworn and dated on the August 5, 2022 and the ten (10) annexures marked as “AMN -1 to 10” annexed thereto.
5. The deponent averred that he was the Director of the 1<sup>st</sup> intended interested party with the full authority in form of a resolution marked “AMN – 1” to depone the matters herein on behalf of the 1<sup>st</sup> intended interested party. Additionally, he had the authority, he had the authority from the other intended interested parties to represent and act on their behalf vide the same annexed and marked as



“AMN - 2” of the annexures. He deponed that this honorable court issued orders in effect directing the 3<sup>rd</sup> respondent to remove the containers placed on the boundary wall of the petitioners property. He held that the petitioner filed an application seeking for the said orders without involving the Intended interested parties who were directly affected by the said orders and the same were obtained without having disclosed material facts to this honorable court. He argued that one of the Pertinent issues was that the petitioner herein have another dispute in this court being Miscellaneous Civil application No 332 of 2009 in which the issue of ownership of the suit propertied (Plots) Land Reference No Msa/block/IX/49 and Msa/block IX/50 are yet to be determined.

6. He further held that the petitioners also failed to disclose to this honorable court that the Intended interested party Legal placed the Container having obtained approval – Marked as AMN-5 from the 2<sup>nd</sup> respondent herein way back in the year 2016. Further, he informed court that the Intended interested parties also obtained approvals from the 1<sup>st</sup> respondent and a report issued to that effect. He further informed court that in the year 2017 the 2<sup>nd</sup> respondent had issued the 1<sup>st</sup> Intended interested party with Notice to remove the containers however upon conducting an evaluation of all the compliance documents the 2<sup>nd</sup> respondent indicated the 1<sup>st</sup> Intended interested party had complied by stamping thereon.
7. The deponent informed court that they had been paying the requisite licenses and rates to the 2<sup>nd</sup> respondent. They also received compliance letter from the 1<sup>st</sup> respondent hence all the operations of the Intended interested parties were legal contrary to the misinformation given to this honorable court that the containers were illegally placed. He asserted that the Intended interested parties were operating lawful businesses which were depended upon by other law abiding citizens as their source of income as employees of the Intended interested parties and they had heavily invested in the business known they had complied. He opined that the action by the petitioners were malicious as they failed to include the interested Intended parties herein in this suit knowing very well they were affected. They were only served with a notice of the 3<sup>rd</sup> respondent on August 2, 2022 making reference to this suit. He held that the petitioners were using this suit as guise to defeat the Intended interested party’s claim and interest in this suit and the interest of others who were also affected by the orders sought. He opined that the businesses of the Intended interested parties did not in any way affect the Environment or the petitioners having complied fully with all regulations and in any event the Intended interested party sought to be given a chance to defend themselves having fully complied with the requirements for the businesses.
8. His contention was that an order for the removal of the containers by the 3<sup>rd</sup> respondent would therefore amount to condemning the Intended interested parties unheard and denying them their constitutional rights to fair hearing and administrative action noting that they had followed all the protocols in setting up the business. Hence they could not be treated as illegal persons. Taking that there was an order for a site visit by court, the deponent urged court to stay the removal of the containers pending the said site visit and the hearing of the application by this honorable court.
9. He informed court that the removal of the containers would not be possible within 14 days taking that they were businesses with stock, fixtures filing employees and other investments. He informed that the containers never encroached onto the petitioners property neither did they encroach on the Pedestrian way nor caused any environmental or health risk. He urged for the application and the prayers sought to be allowed .



### III. The preliminary objection and the replying affidavit by the 1<sup>st</sup> 2<sup>nd</sup> petitioners.

10. On September 19, 2022, the law firm of Messrs Borona and for the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein filed a notice of preliminary objection dated even date. The objection was based on two (2) grounds as follows:-

- (a) The application was bad in law.
- (b) The intended interested party had no “Locus Standi” capacity to be joined.

In addition, on September 19, 2022 the 1<sup>st</sup> and 2<sup>nd</sup> petitioners filed an 18 paragraphed replying affidavit sworn by Prem Jethanand Gidimool dated even date. He deponed being the 2<sup>nd</sup> petitioner herein and confirmed that this court did issue orders on July 27, 2022 to the effect that the Intended interested parties do remove the containers encroaching the pedestrian pathway within 14 days. He held that there was no way he could have involved the Intended proposed interested parties to the suit as he did not know them as they were neither squatters nor his tenants, never sought his authority when they erected the said structures and containers along the boundary wall and that the responsibility to maintain the road reserve was a preserve for Kenya Urban Roads Authority (KURA) who were correctly sued as the 3<sup>rd</sup> respondents herein.

11. On the averments made under Paragraph 6 of the supporting affidavit was civil suit misleading in that the HCCC No 332 of 2009 was a claim based on Land Adverse Possession as against the petitioner. Besides, the petitioners were the legal owners of the two suit properties, while this petition here was concerned on the degradation and deplorable state of the environment in and around the suit properties based on the right to a clean and healthy environment quashed under article 70 of [Constitution of Kenya 2010](#). It's an issue of encroachment of the road reserve along the petitioner's property by the applicants which was a public interest matter and were not to be determined in HCCC No 332/2009. He held that the issuance of business permits by the 2<sup>nd</sup> respondents did not amount to approval to construct on a road reserve.

He averred that the alleged approvals obtained by the Intended interested party from the 1<sup>st</sup> respondent dated January 6, 2016 – marked as “AMN - 8” was a general letter for recommendation for provisions of a liquor license and not approval to construct or erect a structure on a road.

Indeed, he held the Notice by the 2<sup>nd</sup> respondent Marked “AMN - 9” confirmed that indeed the applicants were encroaching on a road reserve and the containers and structures remain illegally placed on a road reserve. He argued that they had failed to demonstrate they were necessary parties to this suit and that they had a legitimate claim to the road reserve they occupy.

He held that the containers and structures had encroached on the public pedestrian pathways posing a risk to the pedestrians and other users and that.

Finally, he contended that the application was only meant to scuttle their fair and expeditious hearing of the petition. It should be dismissed with costs.

### IV. Submissions.

12. On September 21, 2022 while all the parties were present in court directions were taken on the disposal of the notice of motion application dated August 5, 2022 by the Intended interested parties and the Preliminary Objection dated September 19, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> petitioner herein. It was directed that the parties file then replies and if possible skeletal submissions to be highlighted on September



27, 2022 and a ruling be delivered thereof. In the meantime on the October 6, 2022 a site visit was conducted and the report is attached as part of this ruling.

Indeed, on September 27, 2022 M/s. Kyalo Advocate for the Intended interested parties and Mr. Borona Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> petitioners were gracious enough to have deliberately highlighted all the issues of facts and law before this court. Pursuant to that court reserved a date for the ruling.

#### **A. The oral submissions by the proposed intended interested party.**

13. M/s Kyalo Advocate of the Law firm of Messrs. Marende Necheza & Co Advocate submitted that they were seeking for the orders of stay of execution of this court's orders delivered on July 27, 2022 in particular order (f) thereof directing the 3<sup>rd</sup> respondent to remove the interested parties containers from the site within a period of 14 days pending the hearing and determination of both the notice of motion and the petition by the petitioner.
14. She held that they were never made party to the petition yet they were adversely affected. The Counsel submitted that the applicants were seeking to be joined in the matter as they were the owners of the containers and carrying out a number of businesses on what the petitioners were calling boundary line between their land and the main road. The containers were not illegal as the Intended interested parties had already obtained approvals and licences from the relevant statutory bodies for instance NEMA and the County Government of Mombasa.
15. The Intended interested parties were employing many people and there a lot of investments on the ground. She argued that to order their removal would be a travesty of justice and be conducting them unheard. Furthermore, her contention was that it was impracticable to remove all these containers and structures, fixtures and stocks within a period of 14 days as ordered by court and also taking that the interested party were not a party to the petition in the first place. They were intensive businesses.
16. On the filed Preliminary objection by the petitioner claiming that they had no "Locus Standi" and nor annexed any title the Learned Counsel, responded by stating that they were not claiming ownership to the suit properties. She held that the petition by and large appeared to be one seeking reliefs for public interest but by the face of it was and ought to be an ordinary suit – brought for private purpose. I believe she meant the Doctrine of Constitutional Avoidance.

Finally, she argued that based on the principle of natural justice she urged the court to grant the prayers sought from the notice of motion application dated August 5, 2022 with costs. She also pleaded that the ruling awaits the planned site visit for October 6, 2022.

#### **B. The oral submissions by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners**

17. Mr. Borona Advocate of the Law Firm of Messrs. Borona Associates Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> petitioners while opposing the application orally submitted that the Intended Proposed interested parties had not submitted on the ownership of the containers nor had proof on ownership of the suit land.
18. The Learned Counsel argued that they were served with adequate notice for them to remove the containers from a public road by the County Government of Mombasa and KURA as they had encroached on the public road reserve but they had failed to heed.
19. The Learned Counsel contended that none of approvals produced by them were for the construction on the road reserve as they were for carrying out their businesses.



20. On the issues of being heard, the Learned Counsel stated that they had been heard through the filed pleadings. He emphatically submitted that they had no “Locus Standi” to be joined in the petition as the issues raised in the main petition were of Public interest as opposed to the matters of the containers and structures used for private business but illegally constructed on the road reserve. He averred that they ought to sue KURA who are legally mandated on the responsibility of public road reserve. He urged court to dismiss the notice of motion application dated August 5, 2022 by interested parties.

## V. Analysis and determination

21. I have read through the pleadings and considered the oral submission as reproduced herein. I have also factored the observation made and as contained in the site visit Report of October 6, 2022 attached herein, the provisions of the [Constitution of Kenya 2010](#) and statutes and relevant cited authorities on the subject matter. To arrive to an informed, reasonable, fair and just decision, I have condensed the subject matter into the following three (3) issues for determination. These are:-

- (a) Whether the Preliminary Objection dated 19<sup>th</sup> September, 2022 raised by the 1<sup>st</sup> and 2<sup>nd</sup> petitioner meets the required threshold of objection as set out in law and precedents thereof.
- (b) Whether the Proposed interested parties through the prayers sought in the filed notice of motion application dated August 5, 2022 need to be joined in this petition dated October 18, 2021 by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and should they be granted the relief sought herein.
- (c) Who will bear the costs of the notice of motion application dated August 5, 2022.

### **ISSUE No (a) Whether the Preliminary Objection dated September 19, 2022 raised by the 1<sup>st</sup> and 2<sup>nd</sup> petitioner meets the required threshold of objection as set out in law and precedents thereof.**

22. As indicated, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners through their Advocates, the esteemed Law firm of Borona & Associates Advocates raised Preliminary objection through a notice of preliminary objection dated September 19, 2022. 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 Limited 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”



23. This court has further referred to the decision of “*Attorney General & Another v Andrew Mwaura Gitbinji & another* [2016] eKLR:- which 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.

It is trite law that a Preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, it should be filed at the earliest opportunity in order to pave way for the smooth management and determination of the main dispute in a matter. The interested parties filed the objection on time. Essentially, the objection raises the following issues. These are:-

- (a) The application was bad in law.
- (b) The Intended interested party had no “Locus Standi” capacity to be joined.

24. The main issue by petitioner is that the Proposed interested party have no “*Locus Standi*” to be filing this case in that they failed to demonstrate being the legal owners of both the containers and the structures on the two (2) suit parcels of land hence they ought not to be joined in the petition as they have no legal surrounding interest nor would they add any value to assist this court in determining any question or issues of law and facts in the petition and eventually arriving at an informed and fair decision. The matters of “Locus Standi” – being legal capacity and appropriate interest in legal matters are weighty and legal issues which need to be critically assessed at all stages of proceedings. Hence for these reasons the court is fully satisfied that the preliminary objection meets the required standards set out herein though the same is will be dealt with in depth.

**Issue no (b) whether the proposed interested parties through the prayers sought in the filed notice of motion application dated August 5, 2022 need to be joined in this petition dated October 18, 2021 by the 1<sup>st</sup> and 2<sup>nd</sup> petitioner.**

24. 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*, hereinafter also referred to as “The Mutunga Rules”. The Rules were Gazetted on June 28, 2013 vide Legal Notice No 117. Nonetheless, 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 which the “Mutunga Rules”. 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.’

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’

25. Similarly, Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* states as follows:-

‘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.’

26. 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.

27. 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.

28. 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...”

29. 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.
30. 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.
31. 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....”
32. 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.'

33. 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 – Versus- 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.

34. The issue in this suit pertains property to which the Intended interested party stands to suffer extreme prejudice should the main petition filed by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein be heard and determined without them being joined in it. Arising from this averment, the honorable court based on the filed pleadings it discerns several observations. These are:-

Firstly, what has been referred to as the suit properties, clearly are registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein as being and claiming to be a road reserve, they were not able to produce supporting prima facie documents on land ownership as yet. From the conducted on the October 6, 2022 it is still not clear where the boundaries are between the land claimed by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and that claimed by the 3<sup>rd</sup> respondents herein. The 3<sup>rd</sup> respondent. Certainly there is no dispute over the ownership of the suit land and for the sake of making a determination in this application and eventually the petition, both the petitioners and the 3<sup>rd</sup> respondents need to make their stakes in the petition clearer. Attached herein is a copy of the Site Visit report for ease of reference:-

REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC PET NO 47 OF 2021

In The Matter Of: articleS 2(1), 3(1), 10, 19, 20(1), (2), (3), (a), (4), (a), (b), 21, 22(1) & (2)(c), 23(1), 24, 27, 28, 42, 43,70,165(3) (b), 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010.



IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION  
OF articleS 10,27,28,42,43 & 70

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE  
RULES, 2013

IN THE MATTER OF: PLOT No MSA/BLOCK/IX/49 & 50 ALONG TOM MBOYA  
AVENUE MOMBASA

BETWEEN

CHANDAN JETHANAND GODOOMAL.....1<sup>ST</sup> petitionER

PREM JETHANAND GIDOOMAL.....2<sup>ND</sup> petitionER

-VERSUS -

NATIONA ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA).....1<sup>ST</sup>  
respondent

MOMBASA COUNTY GOVERNMENT.....2<sup>ND</sup> respondent

KENYA URBAN ROADS AUTHORITY (KURA).....3<sup>RD</sup> respondent

DEPUTY COUNTY COMMISIONER MOMBASA thro'

THE MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....4<sup>TH</sup> respondent

-AND-

1. VACUUM FILLER LIMITED
2. CHARLES KIOKO T/A MAIZE LOGISITICS
3. BEBETO CHALO T/A ELLY CAR WASH
4. KENNEDY MWANIA T/A SHALOM TUDOR KIOSK
5. BREDA KILOI T/A TUKO LIVE
6. FATMA OMAR T/A MASHALLA CAR WASH
7. MAHAMUD AHMED MOHAMED.....INTENDED INTERESTED  
PARTY

A site visit report on the site visit held at Tudor Mwisho Was Magari area  
Mombasa held on 6<sup>TH</sup> Ocotber, 2022 At 3.15 Pm.

- I. The honorable court
  - a. Hon Justice LL Naikuni - ELC No 3
  - b. M/s Yumnah court Assistant
  - c. Mr Omar court Assistant
- II. The petitioners:



- a. Mr Borona – Advocate for the petitioner
  - b. Mr Daniel Mwangi – Legal Assistant
  - c. There were no petitioner Present
- III. The 1<sup>st</sup> respondent – Naional Land Commission
- a. M/s. Opio – The State Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents
  - b. Mr. Victor Obiko – The KURA Surveyor;
  - c. Deputy OCS Central Police
  - d. Mr. T. Mutugi holding brief for Mr. Daniel Kihiko for the 2<sup>nd</sup> respondent.
  - e. Mr. Ian Njoroge – Legal Assistant
- IV. Intended interested parties
- a. M/s. Kyalo Advocate for the Intended interested parties.
  - b. Mr. Antony Mureithi – Director “Vacuum Cleaner Limited”.
  - c. Mr. Babeto Kyalo – of a Car Wash.
  - d. M/s. Fatuma Omar – of a Car Wash.
  - e. Mrs. Brenda Kohoi – Tuko Life Investment – Car Wash.
  - f. Mr. Kennedy Mwanja – Shallom Shop.
  - g. Mr. Charles Kioko – Maze Logistics.
- II. The purpose

The purpose of the site visit was explained to all the parties present. Pursuant to a court directive made on September 29, 2022 and in view of the numerous activities reported to be taking place on the suit property founded along the Makupa road round about and the Tudor bus Terminus, also known as Tom Mboya street, It became imperative to conduct the site visit. We all agreed the KURA surveyor be a guide for purposes of this site visit. Each party to be at liberty to engage their own Private surveyor in future who will prepare reports to be filed in court for consideration.

The court is empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. In the given circumstance, court invoked the provisions of Order 18 Rule 11 of *Civil Procedure Rules 2010*, to wit:-

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

Ideally the site visit – the Locus in quo was with a view of gathering further evidence– of the alleged containers being on the road reserve



and the conducting of various businesses onto the suit land by the Intended interested parties to assist it in its decision making functions and/or process.

Suffice it to say, court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has endeavored to make some salient findings and perhaps some recommendations in order to expedite the hearing and final determination of the case.

## II. The procedure

It was explained that the team would commence by fully guided by the maps available – and under the guidance of the Land Surveyor by Kenya Urban Roads Authority. The KURA Surveyor had a Map, Co – ordinates and the Real time GPS. We all agreed that the KURA surveyor be the guide for purposes of this site visit. Each party to be at liberty to engage their own Private surveyor in future who would prepare reports to be filed in court for consideration. The team then move from one spot to the other within the suit land in sequential manner accompanied by the Security operatives. The said sketch maps are attached hereof for ease of reference.

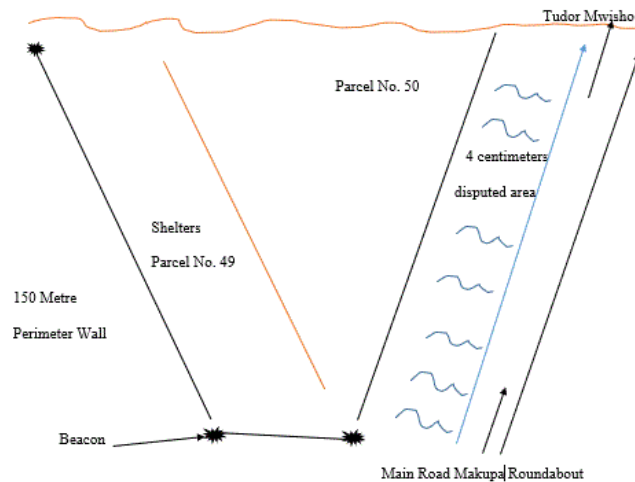
## III. The process, the inspection observation and the findings

One plot to the other and along the road reserved Led by the KURA Surveyor, the team conducted an intensive physical inspection. They were taken round the two (2) parcels Number MN/BLOCK IX/49 & 50 the following features were observed from the Site. These were: -

- a. The intended interested parties were mainly licenses carrying our several businesses on the suit land
- b. There were in existent two (2) parcels of land. They were surrounded by a 150 Meters by 100 Meters hexagon 5 feet high concrete perimeter wall around the parcels.
- c. In the middle of the surrounded area were:-Around 50 Semi permanent Swahili/Makuti – Iron sheet built shelters and over 200 squatters. There were a few scattered plantations of bananas, Pawpaw, swampy and marshy plantation, stagnant (storm water way) waters prone to mosquito breeding area/nests; huge heaps of dumping grounds – solid waste disposals. There were a few beacons at each corner. There stood a huge Boabab Tree next to the main Makupa round about and Tudor bus terminus tarmac



road known as Tom Mboya street. It's a very busy road full of loud hooting matatus to attract passengers.



- d. There were about 50 concrete electricity poles erected along the main road.
- e. There were 4 large metallic containers fixed on next to the main tarmac road and foot path. They were fabricated and converted to carry out the following business premises: -
  - i. Saloon Barber Shop;
  - ii. Cafeteria;
  - iii. Wine/Beer shop;
  - iv. Several Car Wash.
  - v. A Shoe shop.
  - vi. A Furniture shop.
  - vii. An Mpesa shop.
  - viii. An Electric Shop.
  - ix. A heap of firewood stand.

It was alleged that the containers were on what was described as “the road reserve”. This is subject to proof with empirical evidence.

- f. The KURA road measures 12 Metres – intended to be 24 Metres.
- g. There was a pedestrian walk pathway.

The suit land consists of close to a 500 Metres stretch – between the main Makupa road about and Tudor bus stop. It's in the middle. The other portion is for the County Government of Mombasa. We learnt that there has been a protracted land court case ELC No 332 of 2009. Even the legal ownership of the above two (2) parcels of land.



## VII. Conclusion

There being no other business the site visit ended at 4.30 P.M. the matter shall be mentioned in court on 12<sup>th</sup> October, 2022 when court will be delivering the ruling and further directions.

Signed And Dated At Mombasa This .....6<sup>th</sup> .....day Of .....  
october.....2022

Hon. Justice (mr) L.I Naikuni (judge),

Environment & Land Court At

Mombasa

The petition before this court is under the provisions of articles 42, 69 and 70 on degradation of the environment arising from dumping of solid and liquid waste on the suit land and the construction of structures within and around the property – violation and infringement of the right to clean and healthy environment. Under Paragraphs 29, 30, and 31 of the petition holds “*inter alia*”:-

Paragraph 29. That there is ongoing construction of unplanned structure that are cropping up in the above – mentioned premises contrary to the County Government Building By laws Regulations 252 (1) and the Physical Planning Act.Paragraph 30 That the haphazard nature in which these structures are being set up has brought rise to huge amounts of garbage and waste including attracting drug dealers and peddlers in the suit premises creating what is emerging as an environmental and security crisis to the security residents contrary to the Environmental Management and Coordination Act, 1999;Paragraph 31 That the unlicensed cooking enterprises are not bringing any income to the County Government (2<sup>nd</sup> respondent) in payment of Single Business Permit or Rates to the current land owners and they are not observing public health as per the County Government Health Act hence posing a real danger to the safety of city residents.

35. On quick reference to all the above pleadings by the petitioners, it plain and clear that they are making direct reference to the Intended interested parties as the cause to the breach, violation and threat t their fundamental rights on clean and healthy environment as stipulated under the provisions of articles 42 (a) and (b) and the enforcement under the provision of article 70 of the *Constitution of Kenya, 2010*. It then becomes difficult how this matter would be fairly adjudicated without benefitting from the evidence from these persons who have been adversely mentioned from these pleadings without being joined as a party to the said petition.

Secondly, from the pleadings and facts within the knowledge of court and the site visit there exists a suit on the ownership of the land pending before the ELC. (Mombasa) No OS 332/2021. The substratum of this case is that, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, as indicated herein are claiming to be the legal and registered owners while the applicants are claiming title by way of the Land Adverse Possession.

Thirdly, there is no doubt there exists a pathway between the petitioner’s parcels of land and the Tom Mboya Road from Makupa Police Station – roundabout. There is a concrete perimeter wall and what is called the boundary lines. There are close to 30 Metallic containers and other structures several businesses are being carried out including Baber, shop, wine, food restaurant, wood shop and so forth they are temporary structures in nature. From the visitation conducted, the honorable court noted that there was a wide pedestrian walk path. There is no risk posed at all thought the road reserve is under KURA – its not in use at the moment.

36. Fourthly, the structures are temporary and interested party are paying statutory dues to the County Government of Mombasa.



Fifthly, while I fully concur with the Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein to the effect that none of the interested party has been given any right or approval to build on the road reserve but they all seem to be claiming that they had a right to be carrying out their business there. Evidently, there are many metallic containers and several businesses with heavy stocks of goods being conducted there. They are operated by numerous employees. Indeed there are many other stalls from the end of the Plot where the Intended Proposed interested parties are upto the Tudor Bus Terminus under the County Government of Mombasa. Arising from all these observations made by court, prior to arriving at a final decision, in all fairness that its my discerned view that KURA – a State Corporation body needs furnish this court with a clearly and elaborate Project Implementation Plan, with all the usual details on activities, time frame, financial break down, inputs, survey Plans, Maps, approved designs and its impact to the Public on what they intend to do with the road. The said project report by KURA need to be produced in the pendency of these proceedings. In the meantime, it is just fair, reasonable and just for KURA to allow the Intended interested party to with stern pre – condition to continue operating and carrying out their businesses quietly and peacefully as Temporary Occupation Licences (TOL) so long as they strictly adhere with the laid - down environment degradation, public health and water and sanitation requirements as set out in Law.

37. I fully appreciate that the petitioners would like to have these containers hastily removed from the place as they are obstructive and simply like the garbage dumped on their land an eye sore, but let the court hear them first from their filed pleadings and then a final determination will be arrived at in due Course. Certainly, from the facts gathered they have not encroached at all on their land or at least no survey report has been produced to that effect.
38. Therefore, based on all these reasons herein and the legal reasoning adduced herein, there all justifiable and good cause to have the Intended/Proposed interested parties be joined in these proceedings whatsoever without much ado. Indeed, it goes without saying and in accordance to my own view that that they have adequate stake in it.

#### **ISSUE No (c) Who will bear the costs of the notice of motion application dated August 5, 2022.**

39. The issue of Costs is normally at the discretion of the honorable court. Costs mean the award that a party is granted after any legal action, proceeding or process in any litigation suit. The Law indicates that the Costs follow the events. By events, it means the results or outcome of the said legal action, proceeding or process in the litigation matter.

The upshot herein is that while the notice of the Preliminary Objection by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein partially succeeds, the notice of motion application by the Intended interested parties herein dated August 5, 2022 succeeds admitting and joining them as interested parties in the petition. However, being a suit of public interest, it's just fair that each party bears their own costs whatsoever.

#### **VI. Conclusion & disposition**

40. Consequently, after undertaking such an elaborate analysis of the framed issues hereof, this honorable court on preponderance of probability now proceeds to make the following orders: -
  - (a) THAT the notice of motion application dated August 5, 2022 by the Proposed interested parties be and is hereby found merited and hence allowed but arising from the Preliminary Objection dated September 19, 2022 by the petitioner on the fulfilment of the following two (2) conditions: \_
    - (i) There be prepared a full list of all the names of the interested parties and their interest on the boundary line/site.



- (ii) Each interested party to furnish this court with their licences and documents of businesses/trade within the next Seven (7) days.
- (b) THAT an order be and is hereby made that the interested parties herein within the next Fourteen (14) days of this ruling file and serve both their Notices of Appointment as interested parties and their pleadings to the main petition.
- (c) THAT an order be and is hereby made granting the petitioners and respondents leave within the next Fourteen (14) days from the day of this ruling to file any amended pleadings and further lists of documents.
- (d) THAT there be a stay of execution of the orders issued on July 27, 2022 in particular order No (f) directing 3<sup>rd</sup> respondent to remove the container belonging to the interested party within Fourteen (14) days from then pending the hearing and final determination of the main petition.
- (e) THAT for the expediency sake an order to accommodate the interested parties, there be an extension of further Fourteen (14) days to the timelines and directions taken on February 3, 2022 for purposes of hearing and finalizing the main petition. There shall be a mention date on November 29, 2022 for purposes of a 5 minutes each highlighting of the written submissions and taking a Judgment date to the main petition.
- (f). THAT the Judgment of the main petition to be delivered on February 27, 2023 or earlier by notice through the Microsoft Teams Virtual means.
- (f) THAT in the meantime and as additional information to assist this court arrive at an informed decision on the Main petition, the 3<sup>rd</sup> Defendant herein - the Kenya Urban Roads Authority (KURA) be and are hereby ordered to furnish this court within the next thirty (30) days with a comprehensive Project Plan – comprising of a Land Survey of the Land Report, Maps, Title and Approved Designs/Plan, time frame & budgetary estimates on what it intend and/or to use on the road reserve.
- (g) THAT each party to bear their own costs to the notice of motion application.

**RULING SIGNED, DELIVERED AND DATED AT MOMBASA ON THIS 17<sup>TH</sup> DAY OF OCTOBER 2022**

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

**ENVIRONMENT AND LAND COURT**

**MOMBASA**

**In the presence of:**

- a. Ms. Yumna & Mr. Omar - Court Assistants;
- b. Mr. Borona for the petitioner
- c. M/s. Kyalo for the Proposed/Intended interested parties

