



Anjarwalla & another (As Executors of the Estate of Saifuddin Karimbhai Anjarwalla & 2 others) v Attorney General & 2 others & another; Molu (Interested Party) (Environment & Land Petition 34 of 2021) [2022] KEELC 15453 (KLR) (9 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15453 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 34 OF 2021
LL NAIKUNI, J
DECEMBER 9, 2022

BETWEEN

ATIQU SAIFUDDIN ANJARWALLA 1ST PETITIONER

HAYATI SAIFUDDIN ANJARWALLA 2ND PETITIONER

**AS EXECUTORS OF THE ESTATE OF SAIFUDDIN KARIMBHAI
ANJARWALLA & 2 OTHERS**

AND

THE ATTORNEY GENERAL & 2 OTHERS RESPONDENT

AND

2. COUNTY GOVERNMENT OF MOMBASA PROPOSED RESPONDENT

AND

SULTANALI PYARALI MOLU INTERESTED PARTY

RULING

I. Brief Background

1. The 2nd proposed interested party, the County Government of Mombasa, moved this honorable court through filing a notice of motion application dated the May 5, 2022 for its determination. The application was brought under the provisions of articles 3, 10, 20, 21, 22, 24, 25, 48, 50 and 159 of the [Constitution of Kenya, 2010](#), sections 1A, 1B, 3A, 63 and 80 of the [Civil Procedure Act](#), cap 21 laws of Kenya, section 9 of the [Office of the County Attorney Act](#), order 51 rule 1 of the [Civil Procedure Rules, 2010](#) rules 3(2), 3(4), 3(8) and 7 of the [Constitution of Kenya \(Protection of rights and fundamental freedoms\) Practice and Procedure Rules, 2013](#).



II. The 2nd Proposed Interested Party's Case

2. The 2nd interested party sought for the following orders:
 - a. Spent;
 - b. That the applicant, County Government of Mombasa be granted leave to be enjoined in these proceedings and the parties mentioned in paragraphs 26 and 27 of the petition.
 - c. That the intended respondent be granted leave to file any and all necessary documents within such time as may be directed by the honourable court in response to the Petition.
3. The application is based on the grounds, testimonial facts and the averments made out under the sixteen (16) paragraphed supporting affidavit of Jimmy Waliula, the acting County Attorney of the County Government of Mombasa. He deposes that the application has been made in the interest of the public and in pursuance to section 9 of the Office of the County Attorney Act. The petition touches in interests of hundreds of thousands of Mombasa residents as the property in question harbors a school, a mosque and business enterprises who pay rates and take out licenses. The petitioners have not paid rates over the parcel of land and recovery of rates by the County Government of Mombasa had already been initiated by issuance of notices to rates defaulters.
4. He further deposed that the County Government of Mombasa is in charge of land survey, mapping and planning as per the fourth schedule of the Constitution of Kenya, 2010 and shall lose a lot of revenue and the socio- economic rights of the residents of Mombasa shall be infringed. The petitioners never enjoined any of the interested parties mentioned in the petition and the County Government of Mombasa thus the need for this application. The suit parcel of land belongs to the County Government of Mombasa and this information can only be availed to court by the County Government of Mombasa thus the need to be enjoined as a respondent in this petition.
5. He deposed that fair hearing entails all parties affected either directly or indirectly be given a fair share of representation and being able to air their grievances before this honourable court. It was clear that the applicant has averred that the suit property belongs to the County Government of Mombasa and they are not parties of this suit thus not able to defend their claim.
6. He averred that the application herein has brought without any inordinate delay and it is in the interest of justice and fairness that the application be heard on priority basis and the orders sought granted and that there will be no prejudice occasioned upon the petitioner should the application be allowed, it would be of greater importance shifts in favour of the general public.

III. The Replying Affidavit by the Petitioners

7. On May 19, 2022, while opposing this application by the applicant, the petitioners filed a nine (9) paragraphed replying affidavit sworn by Atiq Saifuddin Anjarwalla on May 18, 2022. He deposed that he was a long standing Advocate of the High Court of Kenya, the Managing Partner of the law firm of Messrs Anjarwalla, Collins & Haidermota Legal Consultants based in Dubai and one of the representative of the Estate of Saifuddin Karimbhai Anjarwalla hence competent to swear this affidavit.
8. He informed court that he was one of the petitioners in these proceedings and had the authority of his co – petitioners to make the deposition contained in this affidavit.
9. Based on the advice from his advocates on record, he deposed that the notice of motion application dated May 5, 2022 and the supporting affidavit filed by the proposed interested party was misconceived,



unmerited and an abuse of the due process of court and ought to be dismissed with costs for the following grounds:-

- a. There are no adverse orders being sought from the filed petition against the 2nd proposed interested party or any other third party whatsoever. None of the orders will affect them. The petition was simply a constitutional claim against the Attorney General.
 - b. The 2nd proposed interested party had not produced any evidence to support allegation that the suit property belonged to it. He held that he who alleged ought to prove it.
 - c. It was not true that the petitioners had averred that the property belonged to the 2nd proposed interested party as claimed. This would be a contradiction as the petitioner were actually claiming to be the owners to the suit property.
10. He deposed that the issue of the outstanding land rates owing to the 2nd proposed interested party if any would not be ventilated through this petition as a constitution petition was the wrong forum to address such a claim. He argued that should there be such a genuine claim then filing a civil suit was the appropriate suit.
11. The 2nd proposed interested party had no single or identifiable stake or legal interest in the petition to qualify being admitted as an Interested party. He argued that the application was filed out the stipulated timelines granted by court and therefore by that stand alone point, the application ought to be dismissed. He urged for the court to dismiss this application with costs as the applicants were mere busy bodies, and meddlesome interlopers.

IV. Issues For Determination

12. The honorable court has carefully assessed the filed pleadings and the relevant provisions of the [Constitution of Kenya, 2010](#) and the statutes. Indeed, there are only two (2) issues for determination by this honorable court. These are:-
- a. Whether the applicant/intended interested party meets the fundamental standards to be joined in this suit.
 - b. Who will bear the costs of the application?

V. Analysis And Determination

Issue No (a). Whether The Applicant/intended Interested Party Meets The Fundamental Standards To Be Joined In This Suit

13. 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, 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 is 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.’

14. 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’

15. 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.’

16. 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.

17. 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.

18. 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...”

19. 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 of 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.
20. As indicated above, further the law on joinder of parties is also set out under the provisions of order 1 rule 10 (2) of the [Civil Procedure Rules](#) which provides as follows:-
 - “ 10 The court may at any stage of the proceedings, either upon or without the
(2) 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.”
21. The court therefore has a discretion to enjoin a party whose presence is necessary to assist the court in adjudicating all the questions involved in the suit even in the absence of an application by either of the parties. The emphasis is placed here on whether that party will enable the court to adjudicate all the questions and issues in the said suit as was decided in the case of [Pius Mbugua Ngugi & 2 others v Chief Land Registrar & 7 others](#) [2018] eKLR. In order to do this, it is important for the court to critically evaluate the pleadings and discern the issues that need to be determined accordingly.
22. From the filed petition dated June 14, 2021, the petitioners herein have averred that the Government of Kenya owned the suit property which the ownership to the same property was now being claimed by the County Government of Mombasa. Among the reliefs sought by the petitioners are *inter alia*:-
 - “A declaration that by issuing a title deed to third parties over the property known as Mombasa/ Block XXI/469, the respondents have violated the petitioners’ and/or the Proprietors in common’s right to property guaranteed by article 40 of the [Constitution of Kenya](#)”.
23. The counsel for the intended interested party/applicant averred that the applicant was interested in assisting the court to determine the suit in a just and expeditious manner as well as protecting the future of the public facilities located in the suit property and the interests of the public in general. On this



point, this honorable court wishes to refer to the case of *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General* [2017] eKLR where the court held as follows:

“The elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:

- a) The intended interested party must have an identifiable stake
- b) Or legal interest
- c) Or duty in the proceedings

...A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally, that is by curtailing his legal rights. In determining whether or not an applicant has legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit”

24. Undoubtedly, at the core of this suit is the ownership of the suit property. It is instructive to note there exist two public utilities in form of educational institutions namely - Serani Primary School and Serani High School which are mentioned by the petitioner as being in the said suit property. Certainly, before the honorable court may proceed to make any determination on whether any constitutional rights of the petitioners have been infringed, violated, denied or threatened by the respondent, the court discerns that it will be extremely critical and imperative that fundamentally the issue of ownership of the suit property is determined as a matter of first priority. Even though the petitioner contends that the suit property is private property, it is not in dispute that the suit plot was initially known owned by the Government of Kenya and now under the auspices of the County Government of Mombasa. That being the case, it goes without saying that, and without prejudice to the petitioner’s case, the said property was at some point public land vested in the intended interested party in line with the provision of article 162 (2) of the *Constitution of Kenya 2010*. It is for these very reason that, court strongly feels and is satisfied that the intended interested party/applicant would be extremely instrumental in assisting the court fully understand and comprehend on all the questions and the issues pertaining to this matter and in particular under what circumstances how the suit property was converted from public land to private property. Even though the Attorney General has the duty to protect the public interest, the said duty is not exclusive to the Attorney General. Other relevant parties including but not limited to the County Government of Mombasa, the intended interested party/applicant herein.
25. To support itself on this legal reasoning, the honorable court has referred to the case of *Nasela and Mukakaik Limited v Urban Roads Authority & 3 others* [2017] eKLR the court cited the case of *Departed Asians Property Custodian Board v Jaffer Brothers Limited* (1999) EA 55 (SCU) which was cited with approval in the case of *Pravin Bowry v John Ward & another* where the court stated as follows:

“For a person to be joined on the grounds that his presence in the suit is necessary for the effectual and complete settlement of all questions in the suit, one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit would legally affect the interests of that person and that it is desirable, for the avoidance of multiplicity of suits to have such a person joined so that he is bound by the decision of



the court in this suit. Alternatively, a person qualifies (on application by a defendant) to be joined as a co - defendant where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind the person”

26. In allowing the County Government of Kitui to be joined as an interested party the court observed as follows:

“.....I have said enough to show that the applicant’s application to be enjoined as a defendant in this suit has no merit. I do appreciate however, that the road construction in dispute is being undertaken within the jurisdiction of the applicant and for that reason, although the applicant may have no legal interest in the dispute over the construction of the said road, it has a general interest in the outcome of the case due to the nature of the dispute. For that reason, I would allow the applicant to participate in the proceedings as an interested party rather than as a defendant.”

27. The application of these legal principles in the instant case, the intended interested party/applicant applied to be joined in this matter as either an respondent. Considering the fact that the suit property is within the jurisdiction of the intended interest party/applicant and was originally vested in the applicant, they definitely have a stake in it. It is my view that under the current constitutional dispensation, parties should not be denied access to justice and have court administer justice without under regard to procedural technicalities as provided for under the provisions of articles 48 and 159 (2) (d) of the *Constitution of Kenya, 2010*. The court takes cognizance that the respondent was capable and had the liberty of filing a separate suit from this one, but this would lead to multiplicity of suits and be inconsistent with the overriding objectives founded under sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, cap 21 which is to facilitate a just, expeditious and proportionate resolution of disputes. For these very reasons, this court is fully persuaded that the application by the Intended interested party/applicant have all the basis to be joined in this proceedings as a respondent.

Issue No (b). Who Will Be The Costs Of The Application

28. The issue of costs is discretionary. Costs is the award that is granted to a party at the conclusion of any process, proceedings and legal action in any litigation. The provision of section 27 (1) provides that costs follow the event. By event herein it means the outcome of any process, proceedings and legal action.

29. In the instant case, although the intended interested party /applicant has been successful in the prosecution of its application, the costs will be in the cause since the main suit is yet to be heard and determined.

VI. Conclusion And Disposal

30. Ultimately, from the above detailed analysis of facts and law prefacing of facts and law pertaining to this application I find the notice of motion application dated May 5, 2022 by the intended respondent is with merit and should be and is hereby allowed with costs but upon the fulfillment of the following pre-conditions: -

- a. That the notice of motion application dated May 5, 2022 is meritorious and hence be and is hereby allowed.



- b. That an order directing the petitioner leave of court of 21 days to amend the petition herein to include, the County Government of Mombasa as the 2nd respondent in this petition and effect service upon them.
- c. That thereafter the County Government of Mombasa, the 2nd respondent be and are leave of court of twenty one (21) days to file and serve all its necessary documents accordingly.
- d. That upon service, the petitioner and the 1st interested party be and is hereby granted 14 days corresponding leave to file and serve further affidavits and documents in response to the new issues raised by the 2nd respondent.
- e. That for expeditious sake the main petition to be heard and disposed off within the next one hundred and eighty (180) days from this date. There be a mention date on March 1, 2023 for taking direction on how to dispose off the matter – either by way of affidavits and/or adducing of viva voce evidence.
- f. That the costs of the application shall be in the cause.

31. It is so ordered accordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF DECEMBER, 2022.

HON MR JUSTICE LL NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT AT MOMBASA

In the presence of:

- b. M/s Yumna, court assistant.
- c. M/s Onesmus Advocate for the petitioner.
- d. M/s Kiti Advocate holding brief for Mr Makuto Advocate for the respondents.
- e. M/s Katsiya Advocate for the 1st interested party.
- f. No appearance for the 2nd proposed interested party.

