



REPUBLIC OF KENYA



KENYA LAW
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**Kapoloni v Cabinet Secretary Ministry of Transport, Infrastructure, Housing,
Urban Development & Public Works & 3 others (Environment & Land
Petition 20 of 2022) [2022] KEELC 15174 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 20 OF 2022
NA MATHEKA, J
DECEMBER 6, 2022**

BETWEEN

JACKTON MANG'ENI KAPOLONI PETITIONER

AND

**CABINET SECRETARY MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS ... 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
KENYA PORTS AUTHORITY 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. The application is dated 19th May 2022 and is seeking the following orders;
 - a. This application be certified urgent, and a hearing date be assigned on priority.
 - b. Leave be granted for Memphis Limited to be enjoined in these proceedings as an Interested Party.
 - c. Upon grant of such leave, the Draft Response, Replying Affidavit and exhibits thereto be admitted as properly filed in these proceedings.
 - d. Costs herein be in the discretion of the Court.
2. The application is based on the following grounds that at paragraph 28 of the Petition, the Petitioner pleads that; Due to its illegal actions, the Board of Directors of the 3rd Respondent has exposed the public to unnecessary litigation and huge losses of public funds. A case in point is case involving Memphis Limited (where the public stands to lose a colossal sum of over Ksh. 700 Million. Several



disputes exists around the matter including: An arbitration matter between Memphis Limited and Kenya Ports Authority. Constitutional and Judicial Review Petition No 10. Of 2021 involving Caleb Ngwena & Another Vs Kenya Ports Authority & Memphis Limited. And High Court ELC Petition No E009 of 2021 between Caleb Ngwena & Another and Kenya Ports Authority & Memphis Limited.

3. The allegations of paragraph 28 reproduced above are again reiterated verbatim by the Petitioner at paragraph 8 of his Supporting Affidavit. The exhibits appended to the Petitioners Supporting Affidavit are all documents that relate to an Award in which Memphis Limited was the Claimant, and other pleadings filed in Court against the said Memphis Limited. The said exhibits also include pleadings in Petition No E009 of 2021 Caleb Ngwena & Another -vs- KPA & Memphis Limited. Although the Petition referred “abuse of Court process,” the Petitioner has not disclosed these facts before this Court. It is therefore prudent in the circumstances of this case to grant leave for the Intended Interested Party to be enjoined in these proceedings, and to fully participate therein. It will therefore both protect its interest in the matter, as well as enlightening the Court to reach a fair determination of the issues raised by the Petitioner and is supported by the affidavit of Henry Obuya Were.
4. The Petitioner opposed the application stating that the Petition does not disclose any cause of action against the Applicant. That no orders have been sought against them that pleadings filed by a non-party is an abuse of the court process.

This court has considered the application and the submissions therein. The provisions of *Order 1 Rule 10(2) and (4)* under which the application is brought provides as follows;

“(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.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise direct, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants”.

4. The court of Appeal in *Civicon Limited vs Kivuwatt Limited & 2 Others* (2015) eKLR stated that;

“the objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings”.
5. A more succinct test to be applied in answering the question of joinder was pronounced by the Court of Appeal in *Central Kenya Limited vs West Bank Ltd & Others*, CA No. 222 of 1998 as follows;

“the paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the question involved in the suit.”
6. The Court of Appeal in *Meme vs Republic* (2004) KLR 637 outlined the following circumstances which would warrant grant of leave to enjoin a party;
 - (i) Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings;



- (ii) Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
 - (iii) Where the joinder will prevent a likely course of proliferated litigation.”
7. In *Central Kenya Ltd vs Trust Bank Ltd & Others* CA No. 222 of 1998 the Court of Appeal held that;
- “ the paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit.”
8. Looking at the circumstances of this case paragraph 28 of the Petition, the Petitioner pleads that; Due to its illegal actions, the Board of Directors of the 3rd Respondent has exposed the public to unnecessary litigation and huge losses of public funds. A case in point is case involving Memphis Limited. The Petitioner goes on to give citation of the cases and annexed exhibits of the said proceedings. I find that the Applicant having been mentioned adversely is necessary for the effectual and complete adjudication of all the question involved in the suit even though the Petitioner states they have no cause of action against them. From the foregoing I find this application has merit and I grant the following orders;
- 1. Leave be granted for Memphis Limited to be enjoined in these proceedings as an Interested Party.
 - 2. The Draft Response, Replying Affidavit and exhibits thereto be admitted as properly filed in these proceedings.
 - 3. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF DECEMBER 2022.

N.A. MATHEKA

JUDGE

