



REPUBLIC OF KENYA



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Mjomba v Mwabora; Mkalla & 9 others (Third party) (Environment and Land Appeal E002 of 2024) [2024] KEELC 1356 (KLR) (5 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1356 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E002 OF 2024**

**LL NAIKUNI, J
MARCH 5, 2024**

BETWEEN

OTHANIEL MJOMBA APPELLANT

AND

ROZILIN MWAE MWABORA RESPONDENT

AND

PATRICK MKALLA THIRD PARTY

FLORENCE MAUNA MWAGANJONI THIRD PARTY

RONALD KICHENGELA MWADEGHU THIRD PARTY

KILELE MWADEGHU THIRD PARTY

SULEIMAN MWERO THIRD PARTY

JULIET MRARI NYANGE THIRD PARTY

EDWARD MWAMODO THIRD PARTY

DAMARIS WAKALO THIRD PARTY

MICHAEL KALOMBI MKALA THIRD PARTY

JOSEPH GIBRAN MWANGANDA THIRD PARTY

JUDGMENT

I. Preliminaries

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by Othaniel Mjomba – the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 19th June 2023 and a 133 pages Record of Appeal dated 26th June, 2023 against Rozilin Mwae Mwabora, the



Respondent herein. In a nutshell, the appeal revolves around the interpretation by the lower court of its own orders herein as seen here below.

2. Precisely, the Appeal emanates from the Ruling of Honourable T. N. Sinkiyian (P.M) date 31st May, 2023 in “Voi ELC NO:E055 OF 2021: Rozilin Mwae Mwabora -Versus - Othaniel Mjomba declining and/or disallowing leave to issue a Third-Party notice for joinder into the suit - Patrick Mkalla, Florence Mauna Mwaganjoni, Ronald Kilele Mwadeghu, Kilele Mwadeghu, Suleiman Mwero, Juliet Mrari Nyange, Edward Mwamodo, Damaris Wakalo and Michael Kalombi Mkala. Based on the Affidavit of Service on record the Record of Appeal was properly served upon the Respondent.
3. On 11th October, 2023 the parties having fully complied with court’s direction it slated for highlighting the written submissions which the parties discharged effectively.

II. The Appellant’s case

4. The Appellant sought to be granted the following prayers:-
 - a. The Appeal herein be allowed with Costs.
 - b. The Ruling and Order dismissing the Defendant’s/Appellant’s Application for Joinder of the Third Parties with Costs be set aside and Judgment be entered for Joinder of the Third Parties pending the hearing and determination of the Main Suit.
 - c. The Order directing that Costs in the cause be set aside.
 - d. This Honourable Court do find that the Appellant’s Notice of Preliminary Objection as filed is merited and do give directions on its disposal on a priority basis.
5. From the filed Memorandum of Appeal, the Appellant averred as follows:-
 - a. That the Learned Trial Magistrate erred in law and fact in failing as a matter of priority to pronounce herself on the merits or otherwise of the Appellant’s Notice of Preliminary objection despite parties having taken directions that the said Application be determined concurrently with the Appellant’s Application for joinder of Third Parties contrary to settled legal precedents.
 - b. That the Learned Trial Magistrate erred in law and fact in failing to correctly interpret the Appellant’s Application for Joinder of the Third Parties as filed thereby arriving at a wrong decision.
 - c. That the Learned Trial Magistrate erred in fact and in law in dismissing the Appellant’s Application for joinder of the Third Parties with Costs despite the Respondent who entered appearance on behalf of the 5th, 6th, and 10th Third Parties having conceded that the said Third Parties were occupying the Suit Property with her authority.
 - d. That the Learned Trial Magistrate erred in law and in fact by considering in its Ruling the Respondent’s Replying Affidavit and Authority to Act on behalf of the 5th, 6th 7th and 10th Third Parties despite it being challenged by the Appellant in his Notice of Preliminary Objection.
 - e. That the Learned Trial Magistrate erred in law and in fact by allowing the Respondent’s Replying Affidavit which was filed outside the timelines and dismissing the Appellant’s Application for Joinder of Third Parties which expressly sought the leave of Court to be allowed to file and serve the said Application out of time.



- f. That the Learned Trial Magistrate erred in law and in fact by making a finding that the Third Parties are not in default as they have not been called upon to enter appearance thus dismissing the Appellant's Application for Joinder of Third Parties despite the Honourable Court having issued directions that indeed the Appellant does serve all the parties including the Third Parties which he did.
 - g. That the Learned Trial Magistrate misapprehended the evidence and took into account extraneous issues and so arrived at a decision that was erroneous and not sustainable in law.
 - h. That the trial Magistrate erred in law and fact by looking at the merits and demerits of the main suit at such an interlocutory stage of the suit.
6. From the filed pleadings, the brief facts of the Appeal are the Appellant/Applicant herein who is the Defendant in the Sub - ordinate Court in Voi Civil case "ELC (Voi) No: E055 of 2021: Rozilin Mwae Mwabora v Othaniel Mjomba" filed a Third - Parties Application that sought to join in the Suit - Patrick Mkalla, Florence Mauna Mwaganjoni, Ronald Kilele Mwadeghu, Kilele Mwadeghu, Suleiman Mwero, Juliet Mrari Nyange, Edward Mwamodo, Damaris Wakalo and Michael Kalombi Mkala as Third Parties in the Suit as seen between pages 36 to 45 of the Record of Appeal. Upon being served with the Application as directed by the Court, the 5th, 6th,7th and 10th intended Third Parties not only did they instruct the Respondent's Advocate to act for them but also filed a notice to act where they authorised to act for them subsequent to which the Respondent filed a Replying Affidavit on their behalf as evidenced between pages 127 to 133 of the Record of Appeal.
 7. Upon the Appellant being served with the Notice of Appointment, Replying Affidavit Appellant filed a Further Affidavit together with a Notice of Preliminary objection as are found between pages 45 to 81 of the Record of Appeal; Application for Joinder of the Third Parties and Notice of Preliminary Objection submissions as seen at Page 34 of the Record of Appeal and the matter was fixed for Ruling. When the Court rendered its Ruling, it not only dismissed the Appellant's Application for Joinder for the reason that it was served before leave was granted yet the trial Court had directed the Application be served but also that the trial Court made no determination of the Appellant's Notice of Preliminary Objection as seen in the trial Court's Ruling as found between pages 12 to 20 of the Record of Appeal.
 8. Being aggrieved by the ruling of Hon. T. N. Sinkiyian Principal Magistrate delivered at Voi on 31st May, 2023, the Appellant - Othaniel Mjomba hereby appealed to the Environment and Land Court against the whole of the said decision.

III. The Submissions

9. On 11th October, 2023, the Record of Appeal was admitted and directions given in the presence of all the parties. The Honourable Court directed that the said appeal be disposed of by way of written submissions with given stringent time lines. Pursuant to that the parties herein fully complied on 23rd January, 2024, the Honourable Court reserved a Judgment on 28th February, 2024. However, the date for the delivery of the Judgement was deferred to 5th March, 2024 whatsoever.

A. The Written Submission by the Appellant

10. On 26th January, 2024, the Learned Counsel for the Appellant, the Law firm of Messrs. Mjomba Mwawasi & Company Advocates filed their written submissions dated 6th November, 2023. Mr. Mwawasi Advocate commenced his submissions by providing the Court with the brief facts of the Appeal. He averred that the Appellant/Applicant herein who is the Defendant in the Sub - ordinate Court in civil case "ELC Voi No: E055 of 2021: Rozilin Mwae Mwabora – Versus - Othaniel Mjomba"



filed a Third-Parties Application that sought to join in the Suit the following parties namely, Patrick Mkalla, Florence Mauna Mwaganjoni, Ronald Kilele Mwadeghu, Kilele Mwadeghu, Suleiman Mwero, Juliet Mrari Nyange, Edward Mwamodo, Damaris Wakalo and Michael Kalombi Mkala as Third Parties in the Suit as seen between Pages 36 to 45 of the Record of Appeal.

11. Upon being served with the Application as directed by the Court, the 5th, 6th, 7th and 10th intended Third Parties not only instructed the Respondent's Advocate to act for them but also filed a notice where they authorised the Advocate to act for them. Subsequently, the Respondent's Advocate filed a Replying Affidavit on their behalf as evidenced between Pages 127 to 133 of the Record of Appeal. Upon the Appellant being served with the Notice of Appointment and the Replying Affidavit, the Appellant filed a Further Affidavit together with a Notice of Preliminary as are found between Pages 45 to 81 of the Record of Appeal.
12. The application for Joinder of the Third Parties and Notice of Preliminary Objection submissions are as seen at Page 34 of the Record of Appeal and the matter was fixed for Ruling. When the Court rendered its ruling, it not only dismissed the Appellant's Application for Joinder for the reason that it was served before leave was granted yet the trial Court had directed the Application be served. Further to that, the trial Court made no determination of the Appellant's Notice of Preliminary Objection as seen in the trial Court's Ruling as found between Pages 12 to 20 of the Record of Appeal.
13. The Learned Counsel submitted that being dissatisfied with the Ruling of the trial Court, the Appellant filed and served a Memorandum of Appeal as found at Pages 9 and 10 of the Record of Appeal which raised 8 Grounds of Appeal as stated herein above.
14. According to the Learned Counsel when the Appeal came up for directions, the parties agreed to dispose of the Appeal by way of written submissions. This is what forms the basis of these submissions. They opined that the Appeal as filed raised the following two (2) pertinent issues for determination by this Honourable Court.
15. Firstly, on whether the Appellant's appeal was merited. The Learned Counsel submitted that as had been rightly pointed out in Paragraph 6 of these submissions, the Appellant raised 8 Grounds of Appeal in her Memorandum of Appeal which is found at Pages 9 and 10 of the Record of Appeal. On grounds (a) to (d) of the Memorandum of Appeal was with regard to whether the Learned Trial Magistrate erred in law and fact in failing as a matter of priority to pronounce herself on the merits or otherwise of the Appellant's Notice of Preliminary Objection despite parties having taken directions that the said application be determined concurrently with the Appellant's application for joinder of third parties contrary to settled legal precedents. Further, on whether the Learned Trial Magistrate erred in law and in fact by considering in its ruling the Respondent's Replying Affidavit and authority to act on behalf of the 5th, 6th, 7th and 10th third parties despite it being challenged by the Appellant in his notice of Preliminary objection. The Learned Counsel averred that this being a first appeal, it is now settled law that the duty of the first appellate court is to review, re - analyse, re - evaluate the extracts on the record and then determine whether the conclusions reached by the Learned Trial Judicial Officer (s) were to stand or not and give reasons either way as was settled in "the locus classicus" case of "Selle & Another v Associated Motor Boat Co. Ltd. & Others [1968] EA 123".
16. In the instant case, it was the Learned Counsel's contention that the trial Magistrate erred in law and fact by failing as a matter of priority to pronounce herself on the merits or otherwise of the Appellant's Notice of Preliminary objection despite parties having taken directions that the said Application be determined concurrently with the Appellant's Application for joinder of Third Parties contrary to settled legal precedents. The Learned Counsel invited the Court to refer to page 34 of the Record of Appeal which was part of the trial Court's Proceedings which unequivocally captured the fact



that parties took directions to determine the Appellant's Notice of Preliminary Objection together with the Application for Joinder. In the circumstances, the only logical thing that the trial Court would have done because the Notice of Preliminary Objection was challenging the documents filed by the Respondents, which documents it subsequently relied upon, was first to determine the merit or otherwise of the preliminary objection as a matter of priority. This it failed to do. In order for this Honourable Court to be able to make a determination as to whether the trial Magistrate erred in law and fact in failing to properly consider and evaluate the entire evidence as placed on record by the parties, then it ought to keenly re - look and re - evaluate the Appellant's Application as filed and the Response it elicited from Respondents as it was to be found between Pages 36-81 of the Record of Appeal while the Respondents Notice of Appointment, Notice to act and Replying Affidavit were to be found between Pages 127-133 of the Record of Appeal.

17. The Counsel held that it was important for this Honourable Court to take note that the Appellant's Notice of Preliminary Objection was premised on two points of Law namely the provision of Order 1 Rule 17 of the Civil Procedure Rules, 2010 (as amended) and Section 9 of the Oaths and Statutory Declaration Rules/Act, Cap 15. On the other hand, the provision of Section 9 of the Oaths and Statutory Declaration Act, Cap 15 which provide that:

“.....all exhibits to Affidavits SHALL be securely sealed thereto under the seal of the Commissioner, and SHALL be marked with serial letters of identification...”

18. The Appellant's Notice of Preliminary Objection as filed invited the trial Court to make a determination as to whether the decision by a part of the intended third parties to authorize the Respondent (Plaintiff) to appear on their behalf and referring to a document that was not even annexed to the Replying Affidavit complied with the law hence could be relied upon by the Court. It was the Learned Counsel's submission that they never did and were to be struck out in limine. In support of this point the Learned Counsel invited this Honourable Court to be guided by the Appellant's submissions as found at Pages 82 to 126 of the Record of Appeal. Without having made any pronouncement as regards the Appellant's Notice of Preliminary Objection, the trial Court was under an obligation in the interest of justice not to consider the Respondent's documents which were under challenge. The trial Court's decision to consider the Respondent's documents which were under challenge resulted in a miscarriage of justice. Thus, the Appellant was before this Honourable Court to correct this miscarriage of justice.

19. To buttress on this legal position, the Learned Counsel urged the Honourable Court to be persuaded by the authority of:- “Omwenga Omache & Another v Zachary O. Ayieko & Others [2016] eKLR” where the Court held inter alia that:

“...although the point was not taken up by Plaintiffs the Court has a duty to uphold the sanctity of the record noting that this is a Court of record. Before the Court is a Replying Affidavit with annexures which are neither marked nor sealed with Commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This is a wake-up call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to Counsels or their assistant's lack of attention and due diligence...”

20. With regard to grounds (b) and (f) on whether the Learned Trial Magistrate erred the Appellant's application for joinder of the third parties. The Counsel posited that the said trial erred in law and



fact by making a decision of not having the third parties being called upon to enter appearance thus parties despite the Honourable court having issued directions that indeed the Appellant serves all the parties including the third parties which he did. The Learned Counsel submitted that the trial Court misapprehended the Appellant's Application for Joinder of the Third Parties hence arrived at a wrong decision. This Application which was found at Pages 34 to 44 of the Record of Appeal sought inter alia the following Orders as found at page 38 of the Record of Appeal:

- a. This Honourable Court be pleased to allow the Defendant to file this Application out of time and deem it as duly filed within time.
- b. This Honourable Court be pleased to grant the Defendant/Applicant leave to issue and serve a Third-Party Notice upon Patrick Mkalla, Florence Mauna Mwaganjoni, Ronald Kichengela Mwadeghu, Kilele Mwadeghu, Suleiman Mwero, Juliet Mrari Nyange, Edward Mwamodo, Damaris Wakalo, Michael Kalombi Mkala and Joseph Gibran Mwanganda as per the annexed Third-Party Notice marked as Annexure "A"

21. According to the Learned Counsel, a plain reading of Prayers 2 and 3 of the Appellant's Application showed that the Appellant had not only sought leave to file the Application out of time but also sought leave of the Court to be allowed to serve the third party notice to the third parties. The said prayers were granted by the trial Court as the Court on 12th October, 2022. The trial court directed that the Appellant to serve the third Party notice to the third parties. Indeed, the said service was confirmed by the Appellant's Advocate as seen on the trial Court's proceedings between Pages 30 and 31 of the Record of Appeal. Evidently, from the Court's proceedings, when the Court delivered its Ruling (at paragraph 33 of the Ruling) stated "inter alia: -

".....the Defendant here has misconstrued the process. The intended 3rd Parties cannot be in default as they have not been called to enter appearance. The Court is yet to grant leave for third party notice to issue against any of them. The Defendant to 1st demonstrate leave was warranted and the if he satisfies the Court then the appearance within certain timelines if they wish to challenge the Plaintiff's liability to the Defendant and to participate in directions sought under Prayer 4 of the Summons..."

In other words, the trial Court stated that it was dismissing the Appellant's Application for joinder of the third parties due to the fact that the third parties could not be in default as they had not been invited to enter appearance and that leave was not granted by the Court for the third parties to be served with the Application. To the Counsel, this was tantamount to the trial Court "Suo moto" back pedaling on its earlier directions and loading it over the shoulders of the Appellant which was illegal ab initio.

22. With reference to ground (c) on whether the Learned Trial Magistrate erred in for joinder of the third parties with costs despite the Respondent who entered appearance on behalf of the 5th, 6th, 7th and 10th third party having conceded that the said third parties were occupying the suit property with her authority. The Learned Counsel averred that the Respondent under the contents of Paragraphs 5 to 8 of her Replying Affidavit as found at page 132 of the Record of Appeal had admitted that the intended third parties were in the Suit Property occupy the Suit property with the authority either as her children, lessees or purchasers. It was important to note that no evidence had been proffered by the Respondent to support this claim. Hence it remained as mere hearsay. Even if assuming that some were her children as she alleged, the said children had attained the age of majority hence were distinct legal personalities. Thus the Respondent could not purport to assume responsibility on their



- behalf. Furthermore, the provision of Order 1 Rule 17 of the Civil Procedure Rules, 2010 as they had seen in these submissions earlier on was unequivocal that once a third party was served with the third-party notice, the third party must enter appearance. The claim herein was between the third party and the Defendant. Hence the Plaintiff could not act on their behalf.
23. With regard to ground (e) on whether the Learned Trial Magistrate erred in law and in fact by allowing the Respondent's Replying Affidavit which was filed outside the timelines and dismissing the appellant's application for joinder of third parties which expressly sought the leave of court to be allowed to file and serve the said application out of time. The Learned Counsel asserted that when a Court of law was arbitrating on a matter between parties, that Court sat as a neutral arbiter where it was supposed not to enter into the arena of the case. On the contrary, this Honourable Court entered into the arena and took sides with one of the parties in the dispute which was not in the best interest of justice.
 24. The trial Court at Paragraph 22 of its Ruling as found at Page 22 acknowledged that the Respondent filed her Replying Affidavit outside the timelines given by the Court without first seeking leave. This Replying Affidavit ought to have been struck out, and in support of this position, they relied on their detailed submissions which they filed on this issue as found at Pages 82 - 126 of the Record of Appeal. To the converse, as they had earlier submitted, the Appellant's Application sought leave of the Court to be filed out of time and also sought leave of the Court to serve it upon the third parties. Although the Court gave directions for its service, it went ahead to dismiss the Application purportedly for want of leave to serve. This was their respective submission, the trial Court dismissed the Appellant's Application without any reason or legal basis.
 25. Regarding ground (g) on whether the Learned Trial Magistrate misapprehended the evidence and took into account extraneous issues and so arrived at a decision that was erroneous and not sustainable in law. The Learned Counsel contended that in dispensing justice, the trial Court had the obligations of dispensing substantive justice without regard to technicalities. As evidenced by the arriving at an erroneous Ruling of the trial court which was found at pages 12 to 20 of the Record of Appeal that the trial Magistrate took into account extraneous issues while delivering the Ruling thus arrived at an erroneous decision not sustainable in law. Looking at paragraph 6 of the ruling where the trial Court was trying to differentiate between a further affidavit and a supplementary affidavit, the form of wording of the Affidavit did not in any way affect the substratum of the Application to make it necessary to differentiate which was the right wording of the Affidavit that was to be filed by the Appellant.
 26. Similarly, it was expressly seen from the Ruling the trial Court did not exercise its powers judiciously as it was apparent it interpreted the law in a very skewed manner to unjustifiably favour the Respondent. In particular at Paragraph 26 of the Ruling, the trial Court did side with the Appellant that statutory timelines are necessary in the administration of justice hence the Appellant had not shown reason why time should be enlarged for him to serve the third-party application. It was worth noting as earlier submitted that the trial Court never saw in problem in the Respondent filing her Replying Affidavit late as per the Court it did not prejudice the Appellant, the Court has not shown what prejudice the Respondent would suffer if the Appellant's third-party notice was allowed. To make it worse, this Ruling was delivered long after the Court had directed the Appellant to serve the Third-Party Application to all parties which he had already done. This makes the entire Ruling as delivered ambiguous as it does not tally with the Court Proceedings. This was a skewed application of the law by the trial Court to favour the Respondent.
 27. On ground (h) on whether the Learned Trial Magistrate erred in law and fact by looking at the merits and demerits of the main suit at an interlocutory stage of the suit. The Learned Counsel posited that



the trial Magistrate erred in law and fact by looking at the merits or otherwise of the Main Suit in an interlocutory Application hence arriving at an erroneous decision. The Learned Counsel invited this Honourable Court to refer to Paragraph 28 of the Ruling as found at page 18 of the Record of Appeal where the trial Court where at an interlocutory stage and without any evidence or cross examination of the witnesses the Court had taken the firm view that any Order issued against the Respondent would affect her children who were intended third parties. The trial Court also never gave out any direction about how the issue of liability between the Appellant and the other intended third parties who were not children of the Respondent would be resolved. This was a lacuna the Appellant asked this Honourable Court to unravel.

28. The Learned Counsel urged this Honourable Court to be persuaded by the Authority of:- “Humphrey Mbaka Nandi T/A Nyati Distillers Limited v Equity Bank (K) Limited & 2 Others [2018] eKLR” where the Court while faced with a similar circumstance held inter alia that:

“.....The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ supra)). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks is right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

On the other hand, if there is a point of law which merits a serious discussion, the court should be asked to proceed under order XIV rule 2. (Per Madan JA at page 9)..”

29. In conclusion, the Learned Counsel submitted that on who bears the costs. He stated that it was a general rule that costs followed the event. They prayed that this Honourable Court be pleased to allow the Appeal as filed with costs to the Appellant.

A. The Written Submissions by the Respondent

30. On 25th January, 2024, the Respondent through the law firm of Messrs. Mutinda & Wambura Nthiga Advocates filed their written submissions dated 20th November, 2023. Mr. Mutinda Advocate stated that before the Honourable Court for determination was the Appellant’s appeal filed vide a Memorandum of Appeal dated 19th June, 2023. In it the Appellant’s faulted the Trial Court’s Ruling dated 31st May, 2023 which disallowed his application filed and dated 11th October, 2022 seeking extension of time to issue third party notices upon the intended third parties herein.



31. On the issues and arguments, the Learned Counsel submitted that the Memorandum of Appeal raised eight (8) grounds of appeal. From a plain reading of the said grounds, only one (1) issue raised for determination by this Honourable court on the appeal required consideration to wit; on whether the trial court erred in dismissing the Appellant's application dated 11th October, 2022, the Learned Counsel argued that the issue that fell for determination before the trial court vide the application dated 11th October, 2022, was whether or not, to order the issuance of Third Party notices to the intended third parties as third parties in the suit before the trial court. In other words, all the other issues raised by the Appellant were inconsequential.
32. The above provision of the law spells out instances in which a third party could be joined into a suit. The Defendant must claim contribution or indemnity, or that he was entitled to a relief from the third party as claimed by the Plaintiff and that the issues falling for determination in the suit could not be fully determined without the third party. The Replying Affidavit sworn by the Respondent sworn on 31st January, 2022 (found between pages 127-133) of the Record of Appeal, clearly indicated that the 5th, 6th, 7th and 10th intended Third Parties were her relatives or persons living on the suit property with her permission. The 6th and 7th intended third parties were actually her children whose claim was through her.
33. Was there any claim that the Appellant had against the said intended third parties? The Learned Counsel submitted that none was demonstrated at the trial court. There was no demonstration and prove of the liability between the Defendant and the Intended Third Parties. To buttress on this point, the Counsel relied on the case of:- "KCB v Suntra Investment Bank Ltd [2015] eKLR", Gikonyo J stated thus;
- “a third party is enjoined in a suit at the instance of the Defendant after the court is satisfied there is a proper question to be determined as to liability of the Defendant and the third party. Such issues must be bona fide triable only between the Defendant and the third party and cannot be triable only between the Defendant and the Plaintiff.....”
34. According to the Learned Counsel, the Appellant Application never met the threshold stated above whatsoever. In fact, no demonstration was had as to what issues would be triable only between the Defendant and the Intended Third Parties in the event they were joined in the suit. Additionally, it must be noted that joining the Intended Third Parties herein was meant to unnecessarily delay the case and cause a multiplicity of issues. If at all the Appellant had any claim against the Intended Third Parties, he ought to have filed a separate suit against them for determination of such issues. The Appellant denied the allegations of trespass by the Plaintiff. Unless he admitted the trespass and stated that he occupied the suit land with the authority and/or permission of the Intended Third Parties, he had no claim whatsoever against them as they were in one way or another connected to the Plaintiff. Any orders made by the court in whatever way, will bind or apply to the Intended Third Parties.
35. The Learned Counsel submitted by the Appellant that the Intended Third Parties defaulted in entering appearance. The provision of Order 1 Rule 17 of the Civil Procedure Rules, 2010 was clear that, a party must enter appearance in the suit on or before the day specified in the notice. This meant that a Third Party Notice must be issued vide an order of the court. In this instance, no third party notice had been issued by the court. Directions were only issued directing the Appellant to serve the third parties with his applications seeking leave to issue the notices and granting the Intended Third Parties an opportunity to respond to that application. As such, the 5th, 6th, 7th and 10th Intended Third Parties appointed an Advocate to represent them in the application as the Intended Third Parties and not as



Third Parties. There having been no Third Party Notice issued, the issue of default under the provision of Order 1 Rule 17 of the Civil Procedure Rules, 2010 did not arise and was such moot.

36. To that end, the Learned Counsel humbly submitted that the trial court never erred in dismissing the Appellant's Application. They say so because Nambuye, J (as she then was) in "Kingori v Chege & 3 Others [2002] 2 KLR 243" held that:-

“.....parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to *the constitution* of the suit without whom no decree at all can be passed...”

37. The Learned Counsel asked the Court to consider the behavior of the Appellant herein of intentionally and by all means delaying the course of justice. The Appellant had as evidenced by the proceedings caused a delay in progression of the matter mainly through applications after applications. He at some point, made an application to add the same Intended Third Parties herein, as Defendants to the suit which application was withdrawn after a Replying Affidavit was filed by the Respondent stating she had no claim against the intended Defendants then.
38. In conclusion, the Learned Counsel submitted that it had not been demonstrated why this honorable court should depart from the findings of the honorable trial court. As such, the appeal herein lacked merit and should thus be dismissed with costs.

IV. Analysis and Determination

39. I have had a chance to critically assess all the pleadings filed in this Appeal being the 133 pages Record of Appeal and its contents, the Memorandum of Appeal by the Appellant, the written submissions, the Plethora of cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
40. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following three (3) salient issues for its determination. These are:-
- a. Whether the filed appeal by the Appellant being aggrieved by the Ruling delivered by the Lower Court on 31st May, 2023 has any merit whatsoever.
 - b. Whether the parties are entitled to the relief sought from the filed Appeal.
 - c. Who will bear the costs of the Appeal?

IssueNo. (a) Whether the filed appeal by the Appellant being aggrieved by the Ruling delivered by the Lower Court on 31st May, 2023 has any merit whatsoever.

41. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honorable Court in a preamble form the court wishes to make two assertions. First and foremost, on the re-evaluation of the evidence from trial court and secondly on the brief facts of this case. To begin with and as correctly put by the Learned Counsel for the Appellant, this is a first appeal and hence the Court has the legal mandate and task to re – analyse, re – evaluate, re – consider and re – assess all the evidence and the proceedings on record before the trial Court. In saying so, the Court is



guided by several Court decisions. These are:- the case of:- “Kenya Ports Authority v Kuston (Kenya Ltd, [2009] 2 EA 212” this Court stated as follows regarding the duty of first appellate court:-

“This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”

42. Similarly, in the case of “Peter v Sunday Post Limited 1958 E.A. 424” Sir Kenneth O’Connor P. rendered the applicable principles as follows:-

“It is a strong thing for an Appellate Court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion....”

Brief Facts:

43. From the filed pleadings, the brief facts of the Appeal are that the Appellant/Applicant herein who is the Defendant in the Sub - ordinate Court in civil case “ELC Voi No: E055 Of 2021: Rozilin Mwae Mwabora v Othaniel Mjomba” filed a Third-Party Application that sought to join in the Suit Patrick Mkalla, Florence Mauna Mwanjoni, Ronald Kilele Mwadeghu, Kilele Mwadeghu, Suleiman Mwero, Juliet Mrari Nyange, Edward Mwamodo, Damaris Wakalo and Michael Kalombi Mkala as Third Parties in the Suit as seen between pages 36 to 45 of the Record of Appeal. Upon being served with the Application as directed by the Court, the 5th, 6th, 7th and 10th intended Third Parties instructed the Respondent’s Advocate to act for them but also filed a notice to act where they authorized the Advocate to act for them subsequent to which the Respondent filed a Replying Affidavit on their behalf as evidenced between pages 127 to 133 of the Record of Appeal. Upon the Appellant being served with the Notice of Appointment, Replying Affidavit Appellant filed a Further Affidavit together with a Notice of Preliminary as are found between pages 45 to 81 of the Record of Appeal.
44. The Application for Joinder of the Third Parties and Notice of Preliminary Objection submissions as seen at Page 34 of the Record of Appeal and the matter was fixed for Ruling. When the Court rendered its ruling, it not only dismissed the Appellant’s Application for Joinder for the reason that it was served before leave was granted yet the trial Court had directed the Application be served and also that the trial Court made no determination of the Appellant’s Notice of Preliminary Objection as seen in the trial Court’s Ruling as found between pages 12 to 20 of the Record of Appeal. The Appellant was aggrieved by the outcome of the said Ruling. According to the Learned Counsel in the Appellant’s submissions, the trial Magistrate erred in law and fact by failing as a matter of priority to pronounce herself on the merits or otherwise of the Appellant’s Notice of Preliminary objection despite parties having taken directions that the said Application be determined concurrently with the Appellant’s Application for joinder of Third Parties contrary to settled legal precedents. The Learned Counsel invited the Court to refer to page 34 of the Record of Appeal which is part of the trial Court’s Proceedings which unequivocally captures the fact that parties took directions to determine the Appellant’s Notice of Preliminary Objection together with the Application for Joinder. In the circumstances, the only logical thing that the trial Court would have done because the Notice of Preliminary Objection was challenging the documents filed by the Respondents, which documents it subsequently relied upon, was first to determine the merit or otherwise of the preliminary objection as a matter of priority. This it failed to do. In order for this Honourable Court to be able to make a



determination as to whether the trial Magistrate erred in law and fact in failing to properly consider and evaluate the entire evidence as placed on record by the parties, then it ought to keenly relook and reevaluate the Appellant's Application as filed and the Response it elicited from Respondents as it is to be found between pages 36-81 of the Record of Appeal while the Respondents Notice of Appointment, Notice to act and Replying Affidavit are to be found between pages 127-133 of the Record of Appeal.

45. The Respondent who was the Plaintiff in the trial suit opposed the application through a replying affidavit for the joinder of the third parties. According to the Respondent the application to in a multiplicity of issues as the 3rd parties are rightfully within the Plaintiff's land. Respondent averred that 5th, 6th, 7th and 10th intended parties should not be joined as they are on the suit property through the Respondent. Nos. 6 and 7 are the Respondent's children. The suit property is inherited from the deceased husband of the Respondent. They claim the land through the Respondent. The 5th defendant in the Trial Court was on the property having been bought from the Respondent. That is adequate on the facts.
46. Now turning to the issues for the analysis of this sub heading. From the materials and records of appeal, it is my view that clearly the main bone of contention herein are two - prongs: -
- a. Whether the Notice of Preliminary objection by the Appellant is merited; and.
 - b. Whether the Application dated 11th October, 2022 for leave to allow the Appellant filed the said application out of time and whether the Court was pleased to grant the Defendant/Applicant leave to issue and serve a Third-Party Notice upon Patrick Mkalla, Florence Mauna Mwanganjoni, Ronald Kichengela Mwadeghu, Kilele Mwadeghu, Suleiman Mwero, Juliet Mrari Nyange, Edward Mwamodo, Damaris Wakalo, Michael Kalombi Mkala and Joseph Gibran Mwanganda as per the annexed Third-Party Notice marked as Annexure "A".
47. On whether the Notice of Preliminary objection by the Appellant is merited or not. The Appellant's Notice of Preliminary Objection was premised on two points of Law namely Order 1, Rule 17 of the Civil Procedure Rules, 2010 (as amended) and Section 9 of the Oaths and Statutory Declaration Rules/ Act, Cap 15. Order 1 Rule 17, provides as follows:-
- “If a person not a party to the suit who is served as mentioned in Rule 15 (hereinafter called the “third party”) desires to dispute the Plaintiff's claim in the suit as against the Defendant on whose behalf the notice has been given, or his own liability to the Defendant, the third party must enter appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained by consent or otherwise, and his own liability to contribute or indemnity, as the case may be, to the extent claimed in the third party notice: provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the court for leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit”
48. It is crucial here that the rules foresees a situation where the third party may wish to dispute the Plaintiff's claim against the Defendant. A question then arises in light of the above provision: How can the third party go about the task of disputing the Plaintiff's claim? The answer is simple in my view. Legally speaking, and as matter of procedure, all suits instituted by way of a Plaintiff are responded to either by way of filing a Defence or by filing both a Defence and a Counter - Claim. It appears to me that the third party chose the latter and therefore filed a Defence and a Counter - Claim. The law then



is clear. Under the provision of Order 1 Rule 15 (a) (b) and (c) of the Civil Procedure Rules, 2010 is relevant in delineating the range of issues that third party proceedings can cover.

49. Order 15 Rule 1 (a) (b) and (c) states as follows:

15 (1) Where a Defendant claims as against any other person not already a party to the suit (hereinafter called the third party) –

- a. That he is entitled to contribution or indemnity; or
- b. That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
- c. That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant and the third party or between any or either of them

50. The provision however does not prescribe the kind of action that the third party can take; it is only about what the Defendant can do. While the provision of Order 1 Rule 17 of the Civil Procedure Rules, 2010 on the other hand is all about what the third party can do and it is clear that he can enter appearance and, among other things, dispute the Plaintiff's claim. The court is saying that the third party can dispute such claim either by way of filing a defence or by filing a defence and counter-claim.

51. According to the Learned Counsel of the Appellant, the Appellant's Notice of Preliminary Objection as filed invited the trial Court to make a determination as to whether the decision by a part of the intended third parties to authorize the Respondent (Plaintiff) to appear on their behalf and referring to a document that was not even annexed to the Replying Affidavit complied with the law hence could be relied upon by the Court. It was the Learned Counsel's submission they did not and were to be struck out in limine. In support of this point the Learned Counsel invited this Honourable Court to be guided by the Appellant's submissions as found at pages 82-126 of the record of Appeal. Without having made any pronouncement as regards the Appellant's Notice of Preliminary Objection, the trial Court was under an obligation in the interest of justice not to consider the Respondent's documents which were under challenge. The trial Court's decision to consider the Respondent's documents which were under challenge resulted in a miscarriage of justice. The Appellant is before this Honourable Court to correct this miscarriage of justice.

52. To clearly unravel the issues herein, I beg to digress slightly. Clause 96 of "The Law Society of Kenya Code of Standards, 2016" defines conflict of interest as an interest which gives rise to a substantial risk that an Advocates representation to the client will be materially and adversely affected by the Advocates own interest or an Advocates duties to another client. Ideally and on the face of it, it is improper for a firm of Advocates to appear for the Plaintiff and the same firm to appear for the third party but there is no provision in law that a firm of Advocates cannot appear for the Plaintiff (Respondent) and third party and that the same firm cannot file documents on behalf of this same third party.

53. Conflict of interest can arise broadly where an Advocate acts for both parties in a conveyancing or commercial transaction or where an advocate is acting for two parties on the same side of the record in litigation. Conflict of interest is a matter of facts and not pure law. The conflict of interest must be clearly demonstrated by affidavit. It must be alleged and proved and cannot be raised as a preliminary objection. In this matter the Defendant has alleged conflict of interest but has not proved the same.



54. On the issue of the provision of Section 9 of the Oaths and Statutory Declaration Rules/Act, Cap 15 Laws of Kenya which provides that:-
- “...all exhibits to Affidavits SHALL be securely sealed thereto under the seal of the Commissioner, and SHALL be marked with serial letters of identification...”
55. While at this stage, I make reliance to the case cited by the Learned Counsel for the Appellant of “Omwenga Omache & Another v Zachary O. Ayieko & Others [2016] eKLR” where the Court held inter alia that:
- “.....although the point was not taken up by Plaintiffs the Court has a duty to uphold the sanctity of the record noting that this is a Court of record. Before the Court is a Replying Affidavit with annexures which are neither marked nor sealed with Commissioner’s stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the Replying Affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This is a wake-up call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to Counsels or their assistant’s lack of attention and due diligence...”
56. Hon. J. B Havelock J. (as he then was) in the case of “Fredrick Mwangi Nyaga v Garam Investments & Another [2013] eKLR” had occasion to consider the application of the above Rule 9 of the Oaths and Statutory Declarations Rules. The Judge in holding that an exhibit annexed to an affidavit which is not marked is for rejection cited with approval a ruling by Hayanga J. (as he then was) in the case of “Abraham Mwangi v S. O Omboo & Others HCCC No. 1511 of 2002” where the Judge had held thus:-
- “ Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That marks the affidavit incomplete and hence also rejected...”
57. I have gone through the said documents in the Response it elicited from Respondents as it is to be found between pages 36-81 of the Record of Appeal while the Respondents Notice of Appointment, Notice to act and Replying Affidavit are to be found between pages 127-133 of the Record of Appeal. From that thorough assessment, I see no conflict or no problem with the exhibits and the Replying Affidavit filed by the law firm of Messrs. Mutinda & Wambura Nthiga Advocates.
58. Having found that the grounds raised in the Preliminary objection dated 6th February, 2023 lacks merit, I hereby find the same unmerited.
59. On the issue of whether the Application dated 11th October, 2022 for leave to allow the Appellant filed the said application out of time and whether the Court was pleased to grant the Defendant/Applicant leave to issue and serve a Third-Party Notice upon Patrick Mkalla, Florence Mauna Mwaganjoni, Ronald Kichengela Mwadeghu, Kilele Mwadeghu, Suleiman Mwero, Juliet Mrari Nyange, Edward Mwamodo, Damaris Wakalo, Michael Kalombi Mkala and Joseph Gibran Mwanganda as per the



annexed Third-Party Notice marked as Annexure “A”,. The Honourable Trial Court rendered itself as follows:-

“.....The Defendant here has misconstrued the process. The intended 3rd parties cannot be in default as they have not been called to enter appearance. The court is yet to grant leave for 3rd party notice to issue against any of them. The Defendant needed 1st demonstrate leave is warranted and then if he satisfies court then the court would allow issuance of 3rd party notice and require the said person to enter appearance within certain timelines if they wish to challenge the Plaintiff’s suit or their liability to the Defendant and to participate in directions sought under prayer 4 of the summons....

34. The court finds no merit in the application for leave to issue 3rd Party Notice. The application is dismissed with costs to the Plaintiff. Costs of the application shall be costs in the cause.”

60. According to the Respondent, the issue that fell for determination before the trial court vide the application dated 11th October, 2022, was whether or not, to order the issuance of Third Party notices to the intended third parties as third parties in the suit before the trial court.

61. Regarding the first issue I have examined the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010 and it provides as follows:

“ 15. Notice to third and subsequent parties [Order 1, rule 15.]

(1) Where a Defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the Plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the Plaintiff and the Defendant and should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff and Defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.



- (3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed and served within fourteen days of leave, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the Plaintiff shall be served therewith.
- (4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in sub - rule (1), the provisions of this Order regulating the rights and procedure as between the Defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply Mutatis Mutandis, and the expressions “Third Party Notice” and “Third Party” shall respectively apply to and include every notice so issued and every person served with such notice.
- (5) Where a person served with a notice by a third party under sub - rule (4) makes such a claim as is mentioned in sub - rule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.”

62. Therefore, there is no dispute that the provision of Order 1 Rule 15 (c) of the Rules provides for an application for leave to issue a third party notice to be made by an ex parte application in chambers. The participation of the plaintiff is not necessary in the hearing of that application. The ruling delivered by the trial magistrate shows clearly that the plaintiff was involved in the application and that he opposed it. Thus, it is this Court’s view that the Appellant’s assertion is correct in that the entertaining by the trial court of the Plaintiff’s main issues and arguments at the hearing of the interlocutory application was improper and unsupported by the rules. These issues must be adjudicated during the full trial being the actual meaning of fair hearing under the Provision of Articles 25 (c) 47, and 50 (1) and (2) of *the Constitution* of Kenya, 2010.

63. The next issue relating to the trial court’s interpretation of the rule is whether the Trial Magistrate erred in holding that the issues between the Defendant and the proposed Third Party should be essentially interlinked with the issues between the Plaintiff and the Defendant. To react to that issue, a further perusal of the provision of Order 1 Rule 15 of the Rules is inevitable. The provision shows that the same provides for joinder of third parties not already party to the suit by a Defendant who considers that:

- a. he is entitled to contribution or indemnity from a proposed third party;
- b. he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same relief or remedy claimed by the Plaintiff;
- c. he is claiming that any question or issue relating to or connected with the subject matter of the suit is substantially the same question or issue arising between the Plaintiff and the Defendant and should properly be determined not only as between the Plaintiff and the Defendants but also as between the Plaintiff and the Defendant and the Third Party.



64. The aforementioned provision mandates the court to consider the pleadings and to give directions on whether there is a triable issue between the defendant and third party as to the liability of the third party and to establish the manner in which the dispute between the defendant and the 3rd party is to be tried. I do fully concur with the Learned Trial Court that the application for leave of the Court to issue a notice a third party notice was filed late. It should have been filed within 14 days after the close of pleadings. Reply to Defence and Counter - Claim was filed 22nd December, 2021 marking close of pleadings. Fourteen days thereafter is when leave should have been sought. The Defendant has not explained why he did not applied nor sought for the leave of Court until 11th October, 2022.
65. In saying this, I wish to rely on the case of:- “Kanake Peter v David Lemba Mbuli & 2 others [2018] eKLR” the court opined that:-
- “Where a third party makes an appearance under Order 1 Rule 22 of the Civil Procedure Rules as was the case of the 1st Third Party, the Defendant was supposed to apply for directions by way of summons. As it is at this point that the directions in the manner the matter may be determined is given. Prior to giving directions the Court must be satisfied that there is a proper question to be tried as to the liability of the Third Party before giving the method to be adopted by the Defendant and the Third Party whether it should be determined in the course of trial of the suit or otherwise.”
66. I further do agree with the trial court that the Defendant had sought for extension of time but was not in the category as any person who may be claiming the suit property through the Defendant. The suit would never be determined if any one linked to the Plaintiff and the Defendant was to be brought into the suit but he went ahead to stated that in fact he has in his application he has stated the said persons are relatives of the Plaintiff occupying with her permission.
67. Additionally, I cite the case of:- “Oceanfreight (EA) Ltd v Technomatic Ltd & Another”, where the Court held that:-
- “It is, in my opinion professionally expedient that the defendant should seek to enjoin the applicant herein, as a third party. This is because of the perceived connection between the applicant’s role in the said contract and the cause of action.”
- Court further stated “from the several authorities canvassed by counsel on both sides, it emerges, contrary to the applicant’s contentions, that joinder of third parties as may be prayed by Defendants, is not conceptually linked to contract as such; such joinder may be sought in connection with different causes of action was that, provided only that there exists a basis of liability of the third party to the defendant; and such a basis of liability can arise by operation of the law, in the light of the applicable facts and circumstances.”
68. I am also in agreement with the appellant’s submission that Order 1 Rule 15 of the Rules provides for several distinct scenarios which may require joinder of a third party and the paragraphs of that rule ought not be construed conjunctively. With all due respect, I take notice that the trial magistrate appears to have misdirected herself by confining the determination of that application only on the basis of whether there was interlinkage between the Plaintiff’s and Defendant’s claim on one hand and the Defendant’s and the proposed third party’s claim on the other. Therefore, it is in this court’s view that the mere mention in the third party joinder application of the Appellant’s need to join a third party to bear liability for contribution or indemnity and the providing of the ground upon which such proposed relief was sought to be claimed was sufficient basis upon which to grant the order



sought as long as the claim arose in relation to a subject matter of the suit between the Plaintiff and the Defendant.

69. In a nutshell, this Court has considered the pleadings and finds that there is a triable issue between the Defendant and third party as to the liability of the third party. There is also the establishment of the nexus between Plaintiff, Defendant and 3rd Parties, the manner in which the dispute between the Defendant and the 3rd parties is to be tried that necessitates the court to hear from all 3 Parties in full and final determination of the dispute. I do not see any prejudice to be suffered by the Respondent and, therefore, the application is not frivolous, vexatious and an abuse of the court process. In my own view, the claim by the Appellant against the Intended Third Parties raises triable issues which requires intensive adjudication and final determination by the trial Honourable court.

Issue No. (b). Whether the parties are entitled to the relief sought from the filed Appeal.

70. Under this sub-heading the court has already noted and concluded that the lower court delivered order on 31st May, 2023. I reiterate that it is this court's view that the provisions of Articles 25 (c), 47 and 50 (1) and (2) of *the Constitution* of Kenya, 2010 would play a greater role in this regard in that it provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The question would rather lie in the direction of whether it was fair in terms of both procedural law and substantive law to deny the Appellant the constitutional right to ventilate her grievance against the County in the same proceedings filed by the Respondent, yet her grievance with the County was in relation to the subject matter of that very suit. Taking a further look at the horizon, an onlooker may foresee potential injustice in future by way of the now avoidable need for ventilation of the res judicata doctrine, or worse still, the possible occurrence of the noxious mischief of multiplicity of suits. In this court's view, failure to join all the parties associated with the suit property on the ground who are directly or indirectly affected by the Respondent's suit is already grievous enough and the question arises as to whether justice can truly be done with only the present two parties litigating, but that is an issue for another day or for the parties to contemplate upon. Thus, I hold that the Appellant are entitled to the reliefs sought. Towards that end the appeal succeeds.

IssueNo (c) Who will bear the costs of the Appeal?

71. The issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The Proviso of the provision of Section 27 (1) of the *Civil procedure Act*, Cap. 21 provides that Costs follow the event whereby by events it means the result of the said process, legal action or proceedings. By the events, it means the result or outcome of the said legal action or proceedings.
72. In the instant case, I find that the Appeal has merit and is hereby allowed as prayed with costs of the appeal is entitled to the Appellant.

V. Conclusion and Disposition.

73. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant has merit and is hereby succeed. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof:-
- a. That the appeal filed through a Memorandum of Appeal dated 19th June, 2023 and a Record of Appeal dated 26th June, 2023 be and are hereby found to have merit and is allowed with costs.



- b. That the order and ruling delivered by Hon. T. N. Sinkiyian on 31st May, 2023 dismissing the application dated 11th October, 2022 be and is hereby set aside and it is hereby substituted with an order allowing the application dated 11th October, 2022.
- c. That consequently, a third party notice shall issue at the Appellant's instance to Patrick Mkalla, Florence Mauna Mwaganjoni, Ronald Kilele Mwacheghu, Kilele Mwacheghu, Suleiman Mwero, Juliet Mrari Nyange, Edward Mwamodo, Damaris Wakalo and Michael Kalombi Mkala under the provision of Order 1 rule 15 of the Civil Procedure Rules, 2010 and the sequential mechanisms expected under Order 1 Rule 15 to Order 1 Rule 22 of the Civil Procedure Rules, 2010 shall be effected as may be necessary to ensure the Appellant's proposed claim against the third party is brought before court.
- d. That the matter to be mentioned on 3rd April, 2024 before Deputy Registrar the Environment & Land Court at Voi for further direction on setting out the matter for proceedings and final determination.
- e. That the costs of both the application dated 11th October, 2022 in the trial court and of its appeal shall be awarded to the Appellant borne by the Respondent in this appeal who opposed both the application and the appeal.

It Is So Ordered Accordingly

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH OF MARCH 2024.

.....

HON. JUSTICE L.L. NAIKUNI

**ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement in the presence of

- a. M/s. Firdaus Mbula, the Court Assistant;**
- b. Mr. Mwawasi Advocate for the Appellant/Applicant.**
- c. M/s. Wambura Advocate for the Respondent.**

