



Chisenga & 3 others (Representing over 150 residents residing on LR No 176/IV/MN CR 27920) v Estate of Onesmus Nyamae Kyengo & 3 others; Mwanganda & 3 others (Applicant) (Environment & Land Case 94 of 2022) [2024] KEELC 3280 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3280 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 94 OF 2022

LL NAIKUNI, J

APRIL 4, 2024

BETWEEN

DAVID CHOME CHISENGA 1ST PLAINTIFF

NZINGO KATANA GOERICK KAZUNGU MZUNGU (MWAMBIRE) 2ND PLAINTIFF

ALI WAJANJI KABAYA 3RD PLAINTIFF

KATANA 7KAHINDI NGAMBO 4TH PLAINTIFF

REPRESENTING OVER 150 RESIDENTS RESIDING ON LR NO 176/IV/MN CR 27920

AND

ESTATE OF ONESMUS NYAMAE KYENGO 1ST DEFENDANT

LAND REGISTRAR, MOMBASA 2ND DEFENDANT

OFFICER IN CHARGE KIJIPWA POLICE STATION 3RD DEFENDANT

KILIFI COUNTY POLICE COMMANDER 4TH DEFENDANT

AND

GILBERT KANUNGU MWAGANDA APPLICANT

JUMWA KARISA MRYANI APPLICANT

JOSEPH NGALA MUNYOKI APPLICANT

JONATHAN KENGA KATANA APPLICANT



RULING

I. Introduction

1. The Ruling before this Honourable Court for its determination is in relation to a Notice of Motion application dated 4th October 2023 brought by the four (4) Intended Interested Parties/Applicants herein “Gilbert Kanungu Mwanganda, Jumwa Karisa Mryani, Josephat Ngala Munyoki and Jonathan Kenga Katana. The application is under the dint of the provisions of Sections 1A, 1B, 3A and 18 of the Civil Procedure Act, cap. 21 and Orders 1 Rule 10 (2) and 51 Rule 1 of the Civil Procedure Rules, 2010
2. Upon service, by way of opposing the application, the 1st Plaintiff – “David Chome Chisenga’ and the 1st Defendant herein, - “Daniel Katumo Nyamai’ – the duly appointed legal Administrator to the Estate of the late Onesmus Nyamai Kyengo filed their replies accordingly. The Honourable Court shall be dealing with the issues raised in depth at a later stage.

II. The case by the Intended Interested Parties/Applicants

3. The Intended Interested parties herein sought for the following orders:
 - a. The applicants Gilbert Kanungu Mwanganda, Jumwa Karisa Mryani, Josephat Ngala Munyoki and Jonathan Kenga Katana be enjoined as interested parties in these proceedings.
 - b. The cost of this application be provided for.
4. The application is premised on the grounds, testimonial facts and the averments founded under the seven (7) Paragraphed joint Supporting Affidavit duly executed and/or thumb printed by Gilbert Kanungu Mwanganda, Jumwa Karisa Mryani, Josephat Ngala Munyoki and Jonathan Kenga Katana and three (3) annexures annexed thereto marked as “GKM – 1 to 3” annexed thereto. The applicants averred as follows:-
 - a. They were interested in this matter.
 - b. The issue herein touched on land of which they resided on and currently were on the ground as per the report compiled by the Ministry of lands, Housing and Urban Development.
 - c. They deponed that there had been different correspondences over the years (7th November 2013, 19th November 2013 and 29th January 2014) from the Ministry of Lands, Housing and Urban Development and the National Land Commission on the occupation of the suit property. In the said correspondences the main issue was the establishment of the genuine occupants of the suit property and the nature of developments thereon.
 - d. They further claimed that there was an ongoing appeal case “CACCA E13 (Malindi) of 2020 Gilbert Kanungu Mwanganda & 6 others – Versus - Daniel Katumo Nyamai (suing as administrator for the estate of Onesimus Nyamai Kyengo).
 - e. The appeal is against the judgement of Olola J delivered on 18th September 2020 in ELC No. 183 of 2013. Further to that, the applicants deponed that they have been served with a Notice to show cause by the estate of Onesimus Nyamai Kyengo in Malindi ELC No. 183 of 2013 in contempt proceedings. The applicants stated that they had been served with a Notice to Show Cause by the said estate, where the matter is before J. Odeny at Malindi and sought their eviction.



- f. The suit property and that any order issued without their input would greatly prejudice them.
- g. The applicants swore an affidavit in support of the application dated 4th October 2023. The deponents argued that any court order issued herein would directly affect them hence the need to be enjoined herein and for them to be parties to the suit.

III. The responses by the 1st Plaintiff/Respondent

- 5. While opposing the application, the 1st Plaintiff/Respondent filed a 14 Paragraphed Replying Affidavit sworn on 25th October 2023 by David Chome Chisenga. He deponed as follows that:
 - a. The Intended Interested Parties had not met the requirements set out to be joined as Interested parties in the suit.
 - b. They did not by way of definition set out of an interested party by “the Supreme Court in Communications Commission of Kenya and 4 others – Versus - Royal Media Services Limited and 7 others Petition No. 15 of 2014.
 - c. He further deponed that the law on the joinder of interested parties was settled by “the Supreme Court in Francis Muruatetu and anor – Versus - Republic & 5 others (2016) eKLR.
 - d. As such the applicants had not demonstrated their personal interest in the matter and hence should not be joined herein as interested parties.
 - e. The deponent maintained that the suit properties being referred to by the applicants there were two different properties and should be treated as such herein.
 - f. The deponent argued that since the applicants have not demonstrated the prejudice to be suffered in the case of non joinder the same should not be allowed.
 - g. The application was misconceived and an abuse of the due process of the Court and thence they urged the court to disallow it with costs.

IV. The responses by the 1st Defendant/Respondent

- 6. The 1st Defendant/Respondent while also opposing the application filed a 13 Paragraphed Replying Affidavit sworn by Daniel Katumo Nyamai the Legal administrator of the estate of the late Onesmus Nyamai Kyengo together with two (2) annexures marked as “DKN – 1 & 2” annexed thereto. He deponed that:
 - a. The application was defective, incompetent and should be dismissed with costs.
 - b. The Applicants had not established any sufficient grounds for the granting of the orders sought.
 - c. He deponed that the grounds that ought to be considered by court in an application for joinder of an interested party as follows:-
 - i. The personal interest or stake that the Applicant had in the matter ought to be clearly identifiable and proximate enough and not merely peripheral.
 - ii. The prejudice to be suffered by the Intended Interested party in case of non - joinder had to be demonstrated to the satisfaction of the Court. It had to also be clearly outlined and not something remote.



- iii. A party's application had to set out the case and/or submissions it intended to make before the Court. The Party had to demonstrate the relevance of those submissions.
- iv. It should also demonstrate that those submissions were not merely a replication of what the other parties would be making before the Court.
- d. The deponent deponed that on 18th September 2020 the court in ELC (Malindi) No. 183 of 2013, held that the Applicants herein were trespassers and were directed to vacate all that parcel of land known as Plot No. 176/IV/MN CR No. 27920 within 90 days.
- e. In the premises there existed no interest in the suit property capable of being protected by the enjoinder of the Applicants in the present suit. In any event, the annexed report never conferred any proprietary rights to the Applicants.
- f. That further to the Judgement, there were ongoing contempt of court proceedings against the Applicants in Malindi ELC No. 183 of 2013.
- g. Further to that it was argued that the Applicants had not demonstrated why they can't pursue their interest in the alleged appeal filed before the Court of Appeal.
- h. The Applicants were said to be engaging in forum shopping to frustrate the deponent's quiet ownership of the suit property.
- i. The deponent maintained that the Applicants' occupation of the suit property despite the Judgement in Malindi ELC No. 183 of 2013 was causing him to suffer prejudice in that the Applicants and many others continued to illegally occupy the suit property contrary to the orders and Judgement of a similar court of competent Jurisdiction in ELC (Malindi) No. 183 of 2013.
- j. He urged the court to disallow the application as prayed.

V. The Submissions

7. On 1st February, 2024, while all parties were present in Court, directions were granted to the effect of disposing off the application by way of written Submissions. However, by the time of penning down this Ruling, it appears only the Applicants obliged. In that regard the Honourable Court will proceed to make a determination on the matter on merit and render its Ruling as scheduled on 4th April, 2024 thereof.

A. The Written Submissions by the Intended Interested Parties

8. The Learned Counsels for the Applicants, the Law firm of Messrs. Angeline Omollo & Associates Advocates filed their written submissions dated 8th March 2024. It was in support of their application. M/s. Omollo Advocate commenced the submission by stating that the subject matter touched on land which the Applicants resided on and were currently on the ground. To her this was in accordance to the report by the Ministry of Lands, Housing and Urban Development. She informed Court that there was an on going appeal at the Court of Appeal at Malindi – 013 of 2020.
9. According to the Learned Counsel, the Applicants had proved that they had a personal interest in the matter. In saying so, she relied in the Supreme Court case of "Francis Muruatetu and anor – Versus - Republic & 5 others (Supra). The Counsel submitted that the Applicants had been in uninterrupted, continuous and peaceful occupation of the suit property for more that 100 years. The suit herein touched land which the Applicants resided on as per the ground report compiled by the Ministry of



Lands and Housing and Urban Development. She held that the Applicants had been served with a Notice to show cause which sought to evict from the suit property. The Counsel reiterated that there was an ongoing suit at the Court of appeal Malindi between the 1st Defendant and the Applicants herein regarding the same property. To buttress on this point, she cited the case of:- “Leonard Kimeu Mwathi – Versus - Rukaria M’twerandu M’iringu and Nathaniel Kithinji Ikungu & 4 Others (2021) eKLR where Court held:

“A party claiming to be enjoined in proceedings must have an interest in the pending litigation.....”

10. The Learned Counsel submitted that any order issued in relation to this matter without the Applicants input would greatly prejudice them seeing that their families currently occupied the suit property and had been there for many years. In other words, they had an interest in the pending case as was discussed by “the Supreme Court in Communications Commission of Kenya and 4 others – Versus - Royal Media Services Limited (Supra). The Counsel contended that any order that will be issued herein without the applicants' input would greatly prejudice them. Counsel maintained that the applicants had a case they need to present before this court, which was that they are entitled to the suit property by adverse possession.
11. The court was urged to allow the application which had met the threshold set out in the Muruatetu case and enjoin the applicants as interested party in this matter.

VI. Analysis & Determination

12. I have keenly perused the application by the Intended Interested parties, the replies by the 1st Plaintiff/ Respondent, the 1st Defendant/Respondent, the written Submissions by the Applicant, the cited authorities by the parties, the provisions of *the Constitution* of Kenya, 2020 and the statutes.
13. To proceed further, the Honourable Court had condensed the subject matter into the following three (3) issues for its determination. These are:-
 - a). Whether the applications ought to be added herein as interested parties.
 - b). Whether the parties are entitled to the orders sought.
 - c). Who will bear the costs of the application

Issue No. a). Whether the applications ought to be added herein as interested parties.

14. Under this Sub – heading, the main substrata is on the joinder of parties. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rule, 2010. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute 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. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The



determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties. This is the test I shall apply in this case.

15. The guiding provision of law on enjoinder of an interested party is the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 which states:

“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”.

16. I wish to refer to several court decisions to this effect. To begin with, I cite the case “Pravin Bowry – Versus - John Ward and Another [2015] eKLR” the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The court referred to the Ugandan case of “Deported Asians Custodian Board – Versus - Jaffer Brothers Ltd [1999] 1 E.A. 55 (SCU)” where the court stated as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter.....

For a person to be joined on the ground that his presence in the suit is necessary for 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 avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of 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 that person.” (Emphasis by underline)

17. Additionally, the Court of Appeal in the case of:- “JMK – Versus - MWM & another [2015] eKLR” while speaking to the principle of joinder of a party in a proceeding noted as follows:

“This Court adopted the same approach in Central Kenya LTD - Versus - Trust Bank & 4 others, CA No. 222 of 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court...”



18. Further, the Court of Appeal in the case of “EG – Versus - Attorney General; David Kuria Mbote & 10 others (Interested Parties) [2021] eKLR” shedding more light on the application of this principle held as follows:

“(1) The core of the court’s power to join a party to any proceedings including at the appellate stage, as aptly discussed in Hamisi Yawa & 36,000 others – Versus - Tsangwa Ngala Chome & 19 others [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -

- i. The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.
- ii. The intended party’s presence would enable court to resolve all the matters in the dispute.
- iii. The intended party would suffer prejudice in case of non-joinder.
- iv. The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.”

19. Similarly, in the case of “Meme – Versus - Republic, [2004] 1 EA 124”, the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions: a) what is the intended party’s state and relevance in the proceedings and b) will the intended interested party suffer any prejudice if denied joinder.?”

20. Further, the principles objectives for joinder are enunciated in the case of “Joseph Njau Kingori – Versus - Robert Maina Chege & 3 others [2002] eKLR” that;

“..... that the guiding principles when an intending party is to be joined are as follows:

- (1) He must be a necessary party;
- (2) He must be a proper party;
- (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff;



- (4) The ultimate order or decree cannot be enforced without his presence in the matter;
- 5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.”

21. Although joinder as a party is not an automatic right, a party who is desirous to have a party enjoined in the suit can do so at any time in an ongoing proceeding through an application. The Court will then consider it and in its discretion decide on the suitability of such an addition. In making this determination the Court is accordingly guided by the principles set out in the cited authorities.
22. The Honourable Court wishes to make reference to the Supreme Court case of “Communications Commission of Kenya & 3 others – Versus - Royal Media Services Limited & 7 others [Supra] where it held that:-

“In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

Similarly, in the case of Meme – Versus - Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

23. The questions that the Supreme Court sought to answer in the above case were:-
 - (a) what is the intended interested party’s stake and relevance in the proceedings? and
 - (b) will the intended interested party suffer any prejudice if denied joinder?

Based on the doctrine of “Stare Decisis” it follows suit that this Honourable Court will also seek to answer the same question in the instance case.

Issue No. b). Whether the parties herein are entitled to the orders sought

24. Under this Sub – heading, the Honourable Court is concerned on whether the Applicants herein were entitled to be granted the orders prayed for from their application. From the instant suit, the Applicants have stated that their relevance in these proceedings stems from their occupation of Plot No. 176/IV/ MN CR No. 27920. They maintained that as per the ground report dated 29th January 2014 prepared by the Ministry of Lands, Housing and Urban Development, they were among the genuine occupants of the suit property with their cash crops, houses, graves and houses. The Applicants have further maintained that they have filed Malindi Court of Appeal Civil Appeal No. E13 of 2020 between the



- 1st Defendant and themselves. The said appeal, was filed by the Applicants herein, who are appealing against the Judgement of Justice Olola delivered on 18th September 2020 in Malindi ELC Case No. 183 of 2013 where the 1st Defendant had instituted a case against the applicants.
25. Both the 1st Plaintiff/Respondent and the 1st Defendant/ Respondent have vehemently opposed the enjoinder of the applicants and argued that they have no interest in the suit property that can be protected by their enjoinder in the present suit. The 1st Defendant contended that in Malindi ELC No. 183 of 2013, he sued the applicants among others for their eviction, where they raised a defence of being entitled to the suit by adverse possession. The court delivered its judgement on 18th September 2020 and found that the defendants (applicants herein) have never had a peaceful and uninterrupted possession of the suit property at any one time, as the registered owner made various attempts to evict them. The court found the defendants (applicants herein) to be trespassers with no claim whatsoever on the suit property. The court entered judgement against the defendants (applicants herein) and ordered a permanent injunction restraining them from dealing with the suit property as well as granting them 90 days to vacate from the suit property in default the Plaintiff (1st Defendant herein) be at liberty to evict them. Being dissatisfied with the said Judgment, the applicants herein have filed an appeal against the said judgment in Malindi Court of Appeal Civil Appeal No. E13 of 2020 which is pending before the appellant court.
26. The Applicants herein are five of the Defendants in Malindi ELC No. 183 of 2013, where Judgement was delivered against them as analyzed above. The Applicants are also the Appellants in Malindi Court of Appeal Civil Appeal No. E13 of 2020, where their appeal is ongoing before the appellant court. It is therefore evident that the applicants' interest in the suit property was decided by the court in Malindi ELC No. 183 of 2013. In the decision, the court found them as being trespassers on the 1st Defendant's suit property and ordered for their eviction. I have perused the said Judgement and noted that the evidence in support of this application is the same evidence that was presented before the court while making a claim for land adverse possession. For instant, the ground report which the applicants refer to in this application and marked as "GKM – 1" is the same one they have referred to in the said Judgement by DW - 6 and DW - 7 in support of their case.
27. The applicants argued that they are interested parties to this suit by virtue of their occupation of the suit property. Nevertheless, it is clear to this court that the judgement in Malindi ELC No. 183 of 2013 finalized the applicants claim on the suit property. Their claim for adverse possession was rejected, they were termed as trespassers to the suit property, a permanent injunction ordered against them as well as being ordered to vacate the suit property. Unless and until their appeal is heard and determined before by the appellant court, or least they get a temporary stay of the said judgement of the trial court, the applicants cannot be said to have any interest in the suit property that can be and should be protected by this court by their enjoinder as interested parties. If this court would be to hold otherwise it would be an attempt to sit on an appeal against the decision of a court of equal status in Malindi ELC No. 183 of 2013.
28. The Applicants have not demonstrated to the court how the ends of justice will be better served by enjoining them into this suit. Their fate was sealed in Malindi ELC No. 183 of 2013 and they claim to have instituted Malindi Court of Appeal Civil Appeal No. E13 of 2020 as an appeal against the said judgement. The applicants ought to pursue their claim in the said appeal before the Appellant court and await its final verdict. The proper forum for seeking their interest is pursuing their appeal at the Court of Appeal and not seek to be enjoined as interested parties in this suit. The court cannot exercise its discretion to enjoin the applicants, who want to be parties to the suit by disguising themselves as interested parties. The Applicants want a second bite of the litigation cherry to advance their claim of



adverse possession against the 1st Defendant/Respondent's suit property as they did in Malindi ELC No. 183 of 2013.

Issue No. c). Who will bear the costs of the application

- 29. It is now well settled that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of any legal action or proceedings in any litigation process. The proviso of Section 27 of the Civil Procedure Act, Cap. 21 holds that costs follow the event. By the event it means the result or out come of the said legal action.
- 30. From the instant case, the application by the Intended Interested Parties has not been successful. It follows that the 1st Plaintiff and the 1st Defendant who participated in the proceedings are entitled to costs.

Conclusion & Findings

- 31. It is the view of this court that the standards set in the consideration of whether the applicants should be enjoined as interested parties have not been established.
 - a. That the Notice of Motion application dated 4th October 2023 be and is hereby dismissed for lack of merit.
 - b. That costs awarded to the 1st Plaintiff/Respondent and 1st Defendant/Respondent.

It is so ordered accordingly

RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF APRIL 2024

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**HON. JUSTICE L.L NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Shisia Advocate holding brief for Mr. Mkanzi the 1st Plaintiff/Respondents.
- c. Mr. Kariuki Henry Advocate for the 1st Defendant/Respondent.
- d. M/s. Apiyo Advocate holding brief for M/s. Omollo Advocate for the Intended Interested Parties.

