



Ahmed & 2 others v African Banking Corporation Limited & 8 others (Environment & Land Petition E004 of 2023) [2024] KEELC 4023 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4023 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION E004 OF 2023**

FM NJOROGE, J

MAY 2, 2024

BETWEEN

**ABDIRIZAK MAALIM AHMED 1ST PETITIONER
JABRI ABDULNASSIR SEIF 2ND PETITIONER
ANITA NYAMBURA 3RD PETITIONER**

AND

**AFRICAN BANKING CORPORATION LIMITED 1ST RESPONDENT
DENMAN PROPERTIES LIMITED 2ND RESPONDENT
THE COUNTY GOVERNMENT OF KILIFI 3RD RESPONDENT
THE COUNTY LANDS REGISTRAR 4TH RESPONDENT
THE CHIEF LAND REGISTRAR 5TH RESPONDENT
DIRECTOR OF LANDS 6TH RESPONDENT
THE CS LANDS, HOUSING AND URBAN DEVELOPMENT ... 7TH
RESPONDENT
THE HON ATTORNEY GENERAL 8TH RESPONDENT**

AND

MICHIRA MESSAH & CO ADVOCATES INTENDED RESPONDENT

RULING

1. The Petitioners, through the firm of G.P Mucai & Co. Advocates, instituted the present Petition challenging amongst other actions, the impeachment of their titles Kilifi/Jimba/337 and Kilifi/



Jimba/338 (the suit properties). According to the Petitioners, the said titles were impeached in another petition, to wit, Malindi ELC Petition No. 11 of 2012, in which they were never parties to and thus in contravention of their right to a fair hearing.

2. In response, the 2nd Respondent filed a notice of Preliminary Objection dated October 23, 2023 on the ground that the present petition is *res judicata* Malindi ELC Petition No. 11 of 2012 *Denman Properties Limited & 4 others v The Hon. Attorney General & 6 others and 36 Interested Parties* determined on May 8, 2015, and Malindi ELC Land Case No. 150 of 2014 *Denman Properties Limited v Abdirazak Maalim Ahmed, Jabri Abdunnassir Seif and Others* determined on June 18, 2015 in accordance to the former petition.
3. Before the notice of Preliminary Objection could be determined, the Petitioners filed a notice of motion application dated February 21, 2024, which is the subject of this ruling. The Petitioners sought the following orders: -
 1. Spent;
 2. That the honourable court be pleased to grant the 1st and 2nd Petitioners/applicants leave to enjoin the firm of Michira Messah & Co. Advocates, Nairobi Homes Plaza, Ground Floor, Opp. Old Malindi Law Courts, Po Box 5970 Malindi as a defendant (*sic*) in this petition;
 3. Spent;
 4. That the costs of this application be provided for.
4. The application is supported by the grounds on its face and in the supporting affidavit sworn by Josphat Omari Nyaruri on February 22, 2024. Josphat Omari Nyaruri, an Advocate practicing under the firm of G.P Mucai & Co. Advocates, stated that the 1st and 2nd Petitioners neither participated in any other proceedings regarding the aforementioned suit properties nor instructed the firm of Michira Messah and Company Advocates to represent them in any suit. He annexed copies of the said affidavits.
5. The application was unopposed and was canvassed by way of written submissions filed by the Petitioners. I have carefully considered those submissions and Order 5 rules 1 and 8 cited therein. The sole issue for determination is whether leave should be granted for the firm of Michira Messah & Co. Advocates to be joined as a defendant in this petition.

Analysis and Determination

6. The law on joining of parties is entrenched under Order 1 Rule 10(2) which provides that:

“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.”
7. Nambuye J, in *Joseph Njau Kingori v Robert Maina Chege & 3 others* [2002] eKLR enumerated four aspects to look at before joining a party to a suit to wit:
 - i. Is a necessary party?
 - ii. A proper party;



- iii. There is a relief flowing from him to the plaintiff; (emphasis mine)
 - iv. The ultimate order or decree cannot be enforced without his participation in the proceedings.
8. The Petitioners contend that in order to make a just determination on the preliminary objection raised herein, the intended respondent ought to be joined to these proceedings so as to rebut or otherwise ascertain the allegations that they never instructed the intended defendant in ELC Land Case No. 150 of 2014. The allegations raised by the Petitioners are of a serious nature and would in my view have a bearing on the Preliminary Objection raised and ultimately this Petition. Relevantly, the Respondents were not opposed to the application.
 9. However, the firm sought to be joined as party has no interest in the suit properties. There are other avenues of disposing of dispute between advocates and their clients if a claim is made that advocates acted without the client's instructions. There is no possibility that any relief would be obtained in these proceedings by the petitioners as against the law firm they seek to join to these proceedings and in the court's view, the requirement no (iii) listed in the *Joseph Njau Kingori case (supra)* has not been met. There is no clear indication as to how the proposed joinder would help the petitioners counter the preliminary objection. It can not be deciphered at this juncture what the firm sought to be joined would say in response to the allegation that it was not instructed. Perchance the firm denied the petitioner's claim and produces evidence much judicial time will have been wasted in the end. This court thinks it would be best if the issue of whether the petitioners had instructed the law firm or not was tried elsewhere and the outcome presented as evidence in this petition. Absent that, there is a possibility that the claims and counterclaims between advocate and counsel would, if the advocates were joined herein, take the centre stage in a forced trial-within-a-trial scenario and make the court detour from the real issue as to whether the petition is *res judicata* as claimed. Besides, the renowned position is that a preliminary objection does not require a long argument or ascertainment of facts to establish it and bearing that parameter in mind, the task of determining the preliminary objection is clearly cut out for the court whether the proposed joinder of the law firm into the present proceedings is allowed or not. And perchance they were joined (which this court will not allow) and admit the claim, there would be still one more case in respect of which the petitioners have not raised the defence that they had not instructed an advocate to represent them, that is, Malindi ELC Petition No. 11 of 2012 *Denman Properties Limited & 4 others v The Hon. Attorney General & 6 others and 36 Interested Parties*.
 10. The conclusion of the above analysis is that all factors considered militate against the proposed joinder; this court sees not a single manner in which granting the present application would avail the applicants. Consequently, the notice of motion application dated February 21, 2024 lacks merit and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 2ND DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

