



**Njuguna (Suing as the Legal Administrator and Personal Representative of the Estate of the Late Joel Njuguna Mbuga) & 4 others v S.S. Mehta & Sons Limited; Maguo & 3 others (Interested Parties) (Environment and Land Case 166 of 2018) [2024] KEELC 5134 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5134 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE 166 OF 2018**

**EK MAKORI, J  
JULY 11, 2024**

**BETWEEN**

**MARY NJERI NJUGUNA (SUING AS THE LEGAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOEL NJUGUNA MBUGA) ..... 1<sup>ST</sup> PLAINTIFF**  
**RACHAEL WANJIKU KIMANI ..... 2<sup>ND</sup> PLAINTIFF**  
**KENNETH WAGEMA KIMANI ..... 3<sup>RD</sup> PLAINTIFF**  
**ROBERT MATEMO MBURU GWIRI ..... 4<sup>TH</sup> PLAINTIFF**  
**EMLYN JAMES NGWIRI ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**S.S. MEHTA & SONS LIMITED ..... DEFENDANT**

**AND**

**KARISA MBUI MAGUO ..... INTERESTED PARTY**  
**KATANA MBUI MAGUO ..... INTERESTED PARTY**  
**KAZUNGU KARISA ..... INTERESTED PARTY**  
**NZINGO KAZUNGU KAINGU ..... INTERESTED PARTY**

**RULING**

1. The Court is currently seized with the interested parties’ application, as per the Notice of Motion dated 21st February 2024. This application seeks to amend the defence and introduce a counterclaim filed by the interested parties.



2. The parties, in a display of thoroughness and respect for the process, were directed to present their arguments through written submissions. They have duly complied with this directive
3. The issues I frame for this Court's determination carry significant weight. The key questions are whether leave should be granted to amend the defence by the interested parties and introduce a counterclaim and who should bear the costs of the application.
4. Learned counsels for the parties have made significant efforts and cited various authorities to guide the Court in disposing of the application. Their contributions, which are of immense value, are greatly appreciated.
5. The applicant avers that the interested parties are here to articulate and plead their case to give this Court perspective in the suit. The applicants submit that they are well within their right to file documents.
6. The applicants assert, with confidence, that the provisions of the Civil Procedure Rules are explicit in Sub-Rule 2 of Order 2 Rule 15, which states that a party must make an application and adduce evidence that cannot be sought through a replying affidavit.
7. The respondents aver that the interested parties applied to consolidate this suit with ELC Case No. E5 of 2021 (O. S) by application dated 18<sup>th</sup> August 2023. The plaintiffs opposed this application for consolidation through a replying Affidavit sworn by Kenneth Wagemu Kimani, deposed on 25<sup>th</sup> September 2023. By a well-considered ruling delivered on 7<sup>th</sup> December 2023, this Court dismissed the application for consolidation because the two causes of action in the two matters differ. No appeal was preferred against the ruling of this Court delivered on 7<sup>th</sup> December 2023. As confirmed by the court record, no Notice of Appeal was filed against the decision. By the application dated 21<sup>st</sup> February 2024, the interested parties seek to grossly abuse the Court process to introduce the issue of adverse possession that is the subject of ELC Case No. E5 of 2021 (O.S), this Court rejected the same.
8. I have considered the warring submissions. By a ruling dated 7<sup>th</sup> December 2023 in dismissing the consolidation of this matter with ELC Case No. E5 of 2021 (O.S), the Court stated as follows:

“The causes of action in the two matters are different. In the present suit, the plaintiff seeks an award of damages and other monetary compensation exemplary /punitive because of the defendant's acts of wastage and trespass on the plaintiff's land parcel No. LR 2019 (M 202/2) Malindi. The plaintiff contends to be the registered landowner. While ELC Case No. E5 of 2021 O.S., the plaintiffs are seeking adverse possession allegedly of 20 acres out of a parcel known as Plot No. M20/2. The rights of the plaintiffs seeking adverse possession have not crystallized. Title impeachment will be the core issue in ELC Case No—E5 of 2021 O.S. Mixing the two will convolute issues and let the two files run parallel.

The upshot is that the application dated 17<sup>th</sup> March 2022 is dismissed with costs.”
9. By bringing the instant application, the interested parties are introducing an adverse possession claim that this Court already ruled ought to be heard in ELC Case No. E5 of 2021 (O. S). It is an appeal through the back door. It represents an abuse of the Court process. It is against this Court's policy on Active Case Management.
10. The upshot is that the application dated 21<sup>st</sup> February 2024 is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 11<sup>TH</sup> DAY OF JULY 2024.**



**E. K. MAKORI**

**JUDGE**

**In the Presence of: -**

Ms. Marubu, for the Interested Parties

Mr. Githinji, for the plaintiffs

Ms. Nyamu, for the defendants

Happy: Court Assistant

