



**Mulu v Deputy County Commissioner Nzambani Sub-County & another;
Musembi (Interested Party) (Environment and Land Judicial Review Miscellaneous
Application E001 of 2022) [2023] KEELC 703 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 703 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E001 OF 2022**

LG KIMANI, J

FEBRUARY 2, 2023

BETWEEN

FADHILI WAMBUA MULU APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER NZAMBANI SUB-COUNTY 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

ENDRICO KATUTU MUSEMBI INTERESTED PARTY

RULING

1. The court gave directions on 29th June, 2022 that the preliminary objection dated 22nd February, 2022 and Notice of Motion dated 31st January, 2022 would be heard by way of written submissions. Counsel filed written submissions with the ex parte applicant filing his on 3rd August, 2022, the Respondents on 6th October, 2022 and interested party on 11th October, 2022.
2. The preliminary objection is based on the following grounds:
 - a. The application is bad in law and improperly before the court.
 - b. The subject parcel of land number Nzambani/Kyanika/330 is registered in the name of Thomas Kitenge (now deceased) and his estate is pending final distribution in Kitui H.c. Succession Cause No. 7 of 2017.
 - c. The application be dismissed with costs to the Interested Party.



3. It is noted that the interested party has claimed that he is improperly joined in this suit for the reason that he is not the administrator of the estate of the deceased Thomas Kitenge but only a beneficiary. He states that the ex parte applicant erred in joining him as a party to this suit instead of joining the administrators of the estate of Thomas Kitenge (deceased) who is said to be registered as owner of the suit parcel of land Nzambani/Kyavuka/330. It is also stated that the issues raised in this suit would have been best advanced in the succession cause and not in a separate suit as it is stated that the estate is pending final distribution.
4. I have considered the objection and determined that the preliminary objection ought to be determined before hearing and determination of the notice of motion dated 31st January 2022. My view is guided by the provisions of Order 53 of the Civil Procedure Rules and in particular Rule 3 – 6 as relate to the right to be heard by persons directly affected by judicial review proceedings. The said provisions state as hereunder;

[Order 53, rule 3.] Application to be by notice of motion. 3.

- (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.
- (2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.
- (3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.
- (4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct. [Order 53, rule 4] Statements and affidavits. 4.
 - (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement. (2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter



arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

- (3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.

[Order 53, rule 5.] Applicant to have right to begin. 5. On the hearing of any such motion as aforesaid, the applicant shall have the right to begin.

[Order 53, rule 6.] Right to be heard in opposition.

6. On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the opposition High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.

5. The proceedings herein show that the deceased Thomas Kitenge was awarded by the 1st Respondent the suit parcel of land Nzambani/Kyanika/330 through appeal to the Minister number 1699 of 1986. His estate would therefore be directly affected by any decision made that relates to the said land. Under the provisions of order 53 rule 3 (2) and (3) the administrators of the said estate ought to have been served with the notice of motion herein and an affidavit of service filed before the notice of motion was set down for hearing.
6. . Further, Order 53 rule 3 (4) places an obligation on the court that if on the hearing of the motion the Court is of the opinion that any person who ought to have been served therewith has not been served, the Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.
7. Again the right to be heard is emphasized under rule 6 where the right to be heard is extended to any person who desires to be heard in opposition to the motion and appears to the opposition Court to be a proper person to be heard shall be heard.
8. . In my view the question of whether or not the estate of the deceased ought to have been a party to this suit ought not to have been raised as a preliminary objection but as an issue during the time of taking directions on the hearing of the suit. In that event inquiries should have been made and information given by all parties as to the existence of any persons who are likely to be directly affected by the decision of this court and/or persons who are likely to be interested in being heard in opposition to the application herein and who the court may decide on whether or not they are a proper person to be heard.
9. In view of the foregoing I order that the notice of preliminary objection be and is hereby dismissed and the following directions are given;
- A) That the notice of motion dated January 31, 2022 together with the accompanying documents be served on the administrators of the estate of Thomas Kitenge (deceased) and any other



persons that may be directly affected by the decision of the court within 21 days from the date hereof and an affidavit of service be filed in court.

- B) That the matter be listed for further directions on hearing of the suit herein March 1, 2023.
- C) Each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT KITUI THIS 2ND DAY OF FEBRUARY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court in the presence of-

Musyoki Court Assistant

Maritim Advocate for the Ex Parte Applicant

No attendance for the Respondents

Endrico Katutu Musembi Interested Party in person

