



Ng’ati Farmers Co-operative Society v Attorney General & 7 others; Wachira & 126 others (Interested Party); Gitundu & 68 others (Applicant) (Environment and Land Case Judicial Review Application E004 of 2021) [2023] KEELC 19875 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19875 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E004 OF 2021
FM NJOROGE, J
SEPTEMBER 20, 2023

BETWEEN

NG’ATI FARMERS CO-OPERATIVE SOCIETY APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY PLC 2ND RESPONDENT

COUNTY COMMISSIONER NAKURU COUNTY 3RD RESPONDENT

LAND REGISTRAR NAIVASHA 4TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION 5TH RESPONDENT

COMMISSIONER OF CO-OPERATIVES 6TH RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION 7TH RESPONDENT

COUNTY GOVERNOR OF NAKURU 8TH RESPONDENT

AND

NDIRANGU WACHIRA & 126 OTHERS INTERESTED PARTY

AND

PHILIP GITUNDU & 68 OTHERS APPLICANT



RULING

1. This ruling is in respect of the applicants' Notice of Motion application dated April 28, 2023 which is expressed to be brought under Order 1 Rule 10(2), Order 51 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act where they sought the following prayers:
 1. Spent
 2. That this honorable court be pleased to join the proposed interested parties/applicants listed in PG(ii) as interested parties/applicants in this matter.
2. The application is supported by the affidavit of Philip Gitundu. The grounds on the face of the application and the supporting affidavit are that the intended interested parties/applicants are shareholders of Ng'ati Co-operative Society; that they balloted for and are entitled to 5.5 acres each out of LR 8398/2; that the intended interested parties had paid survey fees of Kshs. 8,000/= each; that despite balloting and making the necessary payments, Ng'ati Co-operative Society purported to sell the entire parcel of land to KenGen; that the said sale was illegal because the consent of the shareholders was not sought; that the National Land Commission was not consulted; that the suit property was not available for sale; that they have been unjustly deprived of the suit property; that their application has been brought in good faith and no prejudice will be occasioned to any of the parties in the suit if they are joined.
3. In response to the application, the 2nd respondent filed grounds of opposition dated 9/06/2023 on June 12, 2023 which are as follows:
 1. That the application is frivolous, incompetent, bad in law and ought to be struck out, by reasons: -
 - a. The affidavit of Philip Gatundu dated the April 28, 2023 and sworn on the same day, does not purport to be under the authority in terms of Section 28 of the Co-operative Society Act (Cap 490) Laws of Kenya.
 - b 1. PG (i) which purports to be a copy of the purported minutes does not provide sufficient particulars, and is not dated.
 2. In addition, the venue of the purported meeting is not disclosed.
 - c. The list marked as PG (ii), which purports to be of the proposed interested members:-
 - i. Has no date entries.
 - ii. It is not verified to be the true record held by the original applicants (Ng'ati farmers' co-operative Society Limited and/or the Sixth Respondent (Commissioner of Co-operatives))
 - d. The application omits, for participation herein, the third respondent, the sixth respondent and the eighth respondent.
 2. That a dispute between members of a co-operative society with the co-operative, its officials or amongst themselves; the proper forum is the co-operative tribunal.
 3. That this court has no jurisdiction to adjudicate on this matter, as the body corporate involved is guided by the by-laws of the society, under the Co-operative Societies Act.



4. That the institution of proceedings in this court is, therefore, premature as the proper avenue for resolution in this regard has not been sought.
 5. That Section 76 of the *Co-operative Societies Act* (Cap 490) Laws of Kenya, provides for settlement of this type of matter, which the proposed interested parties/applicants have neglected to follow.
 6. That consequent upon grounds 1, 2, 3, 4 and 5 above, by a preliminary objection, notice of which is hereby given, the Notice of Motion be struck out, or dismissed with costs.
 7. That the query by the purported interested parties has served to delay the expeditious resolution of the matter between the appropriate parties.
 8. That in any event application is an abuse of court process.
 9. As may be contained in the affidavit, or affidavits, to be lodged hereafter with leave of court.
 10. Such further, or other grounds, as by the leave of court may be argued.
 11. Costs to the second respondent, all circumstances taken into account.
4. No other party filed a response to the application.

Submissions

5. The applicants filed their submissions dated 3/07/2023 on August 1, 2023 while the 2nd respondent filed its submissions dated August 18, 2023 on August 21, 2023.
6. The applicants in their submissions identified the following issues for determination; whether this court should join the proposed interested parties in these proceedings; whether the application is frivolous, incompetent, bad in law and ought to be struck out for offending Section 28 of the *Co-operative Societies Act*, whether the application is frivolous, incompetent, bad in law and ought to be struck out as it offends Section 76 of the *Co-operative Society Act* and who should pay the costs of the application.
7. On the first issue, the applicants relied on Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the case of *Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 others* [2014] eKLR and reiterated that they are members of Ng'ati Farmers Co-operative Society and are entitled to portions of LR 8398/2 which was sold to the 2nd respondent without their input. They also submit that their interest will not be articulated unless they are joined to the suit.
8. With regard to the second issue, the applicants submit that they are seeking to be joined to the suit in their personal capacities and not as representatives of the Co-Operative Society and since Ng'ati Farmers Co-operative Society is not opposed to their application, the respondents will not be prejudiced in any way if their application is allowed.
9. On the third issue, the applicants relied on Section 76 of the Co-operative Society Act and submitted that the nature of their claim does not fall within the realm of the said section as it does not involve any disputes between the members of Ng'ati Farmers Co-operative Society. The applicants also rely on Article 47 of *the Constitution*, the case of *Republic v Commissioner of Co-operative Development & 2 others Ex Parte Joseph K. Samoei & 19 Others* [2020] eKLR and submit that the reliefs that they are seeking can only be granted by this court and not by the Co-operative Tribunal. The applicants concluded their submissions by seeking that their application be allowed as prayed.



10. The 2nd respondent in its submissions identified two issues for determination; whether the proposed interested parties should be enjoined as interested parties in the proceedings herein and whether this court has the jurisdiction to hear this matter.
11. With regard to the 1st issue, the 2nd respondent relied on the cases of *Francis K. Muruatetu and another v Republic & 5 others* [2016] eKLR, *Skov Estate Limited & 5 Others v Agricultural Development Corporation & another* [2015] eKLR, Section 28 of the *Co-operative Societies Act* and reiterated that the deponent does not have the authority to participate in suits and other legal proceedings brought in the name of the society. The 2nd respondent also submitted that the deponent has not exhibited a share certificate, a receipt in his name or a ballot number in his name to show that he is a shareholder.
12. The 2nd respondent then reiterated the contents of its grounds of opposition and submitted that the issues raised by the applicants are identical to the issues raised in the substantive application filed by Ng'ati Farmers Co-operative Society. The 2nd respondent further submitted that the applicants have not sufficiently demonstrated the prejudice they will suffer if the orders sought are not granted. The 2nd respondent concluded its submissions on this issue by stating that the applicants have not met the threshold required for them to be joined to this suit as interested parties.
13. On the issue of jurisdiction, the 2nd respondent relied on the cases of *Samuel Kamau Macharia vs KCB & 2 Others* [2012] eKLR, *The Owners of the Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Ltd* [1989] KLR, Section 76 (1) and (2) of the *Co-operative Societies Act* and submitted that the alleged dispute between the applicants and Ng'ati Farmers Co-operative Society Ltd should be resolved by the Co-operative Tribunal and not by the present proceedings. The 2nd respondent concluded its submissions by seeking that the applicants' application be dismissed with costs.

Analysis and determination

14. After considering the application, the grounds of opposition and the submissions, the only issue that arises for determination is whether the applicants should be joined to the present suit as interested parties.
15. Order 1 Rule 10(2) of the *Civil Procedure Rules* provides as follows:
 - “(2) 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. The applicants are seeking to be joined to the suit as interested parties on the ground that they are shareholders of the Ng'ati Farmers Co-operative Society. They allege that they balloted for and are entitled to 5.5 acres of LR 8398/2 which Ng'ati Co-operative Society has sold to Kengen without their consent. The 2nd respondent opposed their application to be joined to the suit on the ground that a dispute between members of a co-operative society and a co-operative ought to be determined by the Co-Operatives Tribunal and this court did not therefore have jurisdiction to determine the matter.
17. The applicants have annexed to their application a resolution that allows Philip Gatundu to prosecute their grievances in court together a list of 68 people. Receipts issued by Ng'ati Farmers Co-operatives Society Limited are annexed together with ballots for various plots. It is my view that the applicants



have demonstrated that they are shareholders of Ng’ati farmers Co-operative Society through their annextures.

18. The Supreme Court in the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR held as follows:

“(22) 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...”

(23) Similarly, in the case of *Meme v. 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.”

(24) We ask ourselves the following questions: (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?”

19. Similarly, the Supreme Court in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR also held as follows:

“(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.



iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

20. From the above authorities, the applicants have to demonstrate that they have a stake in the subject matter before the court, they have to show that they will be affected by the decision of the court and their interest would not be well articulated in their absence from the proceedings. I will therefore first address the issue of whether the applicants have demonstrated that they have a stake in the proceedings. The applicants allege that they are entitled to portions of LR 8398/2 which had been allegedly sold to KenGen by Ng’ati Farmers’ Co-operative Society. KenGen, the 2nd respondent opposed the applicants’ application on the ground that the applicants are members of a co-operative and they should have their dispute determined by the Co-operatives Tribunal. For the court to consider whether the applicants have a stake in the proceedings, it has to consider the pleadings filed in this matter.

21. Ng’ati Farmers’ Co-operative Society commenced the present proceedings by filing the Chamber Summons application dated April 20, 2021 where it sought for leave to commence Judicial Review Proceedings. The court on May 24, 2021 granted the plaintiff the said leave and ordered it to file the Notice of Motion application within 21 days. On June 21, 2021, counsel for the plaintiff indicated that it had filed the Notice of Motion application. A perusal of the court record indicates that the application said to be filed is not on the court record. The court in the case of Republic v County Government of Machakos & another Ex-parte Benard Kiala [2016] held as follows:

“20. Once the 21 days provided by Order 53 Rule (1) of the Civil Procedure Rules, 2010 for filing of the notice of motion expired, the leave granted to commence these proceedings lapsed. There was therefore no need for the respondents to file the application dated 23rd June, 2016 seeking to dismiss these judicial review proceedings. Their application is therefore superfluous but in order to assure them this matter is as dead as a dodo, I declare that these judicial review proceedings ceased to exist when the Applicant failed to file the substantive notice of motion within 21 days from the date of grant of leave on 6th February, 2015.”

22. As aforementioned, from the court record there is no evidence of the filing of the substantive Notice of Motion application. This would therefore mean that the judicial review proceedings ceased to exist once the 21 days lapsed as was held in Republic v County Government of Machakos & another Ex-parte Benard Kiala (supra) cited. Consequently, there are no proceedings for the applicants to be joined to and the applicant’s application dated April 28, 2023 lacks merit and is therefore dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 20TH DAY OF SEPTEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

