



**Singh v Kenya Ports Authority & 3 others (Environment and Land Constitutional
Petition E027 of 2022) [2023] KEELC 20832 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20832 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E027 OF 2022

LL NAIKUNI, J

OCTOBER 12, 2023

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLES 10,19,20,23,40,47,162,165
AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 13 OF THE
ENVIRONMENT AND LAND COURT ACT, 2012

AND

IN THE MATTER OF: SECTIONS 107, 111, 112, 113, 115 AND 117 OF THE LAND ACT, 2012

AND

IN THE MATTER OF: CONTRAVENTION OF THE BILL OF RIGHTS
UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

BALJEET SINGH PETITIONER

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 3RD RESPONDENT

KENYA RAILWAYS CORPORATION 4TH RESPONDENT



RULING

i. Introduction

1. The 1st Respondent herein, Kenya Ports Authority moved this Honorable Court for the hearing and determination of their Chamber Summons application dated 20th April, 2023. It was brought under a Certificate of urgency and the dint of the provisions of Section 3 of the *Environment and Land Court Act*, 2011; Sections 1A, 1B, 3A, 63 (e) 100 of the *Civil Procedure Act*, Cap. 21 and Order 1 Rule 10(2) (4)8(25) and Order 8 Rule 3 of the Civil Procedure Rules 2010.
2. Upon service, the Petitioner herein filed a Replying affidavit on 16th May, 2023 dated 15th May, 2023 opposing the said application accordingly.

ii. The 1st Respondent/Applicant's case

3. The 1st Respondent sought for the following orders: -
 - a. Spent.
 - b. That the Honourable Court be pleased to order the addition of Kenya Railways Corporation and Kenya National Highways Authority as the 3rd and 4th Respondents respectively in the Petition herein.
 - c. That the Honourable Court be pleased to deem the draft 1st Respondent's Amended Response to the Petition dated 17th April, 2023 and annexed herewith as duly filed and served upon payment of the requisite Court fees.
 - d. That the Honourable Court be pleased to grant leave to the parties herein to amend National Highways Authority as the 3rd and 4th Respondents respectively to this Petition.
 - e. That the Honourable Court be pleased to issue further or other orders and/or directions as it may deem fit to grant to serve the ends of justice for the parties herein.
 - f. That costs of this application be provided for.
4. The application by the 1st Respondent/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 30 Paragraphed Supporting Affidavit of John Chau Mwangi sworn and dated 15th March, 2023 with three (3) annexure marked "KPA – 1 to 3". The 1st Respondent/Applicant averred that:
 - i. The Petitioner is the registered owner of the parcel of land known as Plot Number MN/VI/2444["suit property"].
 - ii. On or about the years 2008 and 2011, the 1st Respondent, other State agencies and stakeholders undertook measures to implement the Mombasa Port Development Project (Hereinafter referred to as "MPDP project") to expand and increase the Port of Mombasa container handling capacity.
 - iii. The Kenya National Highways Authority (hereinafter referred to as "KeNHA") was charged with the construction of the access roads of the MPDP project such as the Port Access Road to Kipevu West Container Terminal which affected the portion of the suit property.



- iv. At around the same time, Kenya Railways Corporation (Hereinafter referred to as “Kenya Railways”) was also implementing the Mombasa-Nairobi Standard Gauge Railway project (Hereinafter referred to as the “SGR project”).
- v. In planning for the MPDP and SGR projects, Kenya Railways requested KeNHA to revise the initial design for the MPDP project to put up further construction ancillary to the SGR project.
- vi. Accordingly, on various instances and as recent as the year 2019, the 2nd Respondent published numerous Gazette Notices on behalf of Kenya Railways and KeNHA pursuant to the provisions of the *Land Act*, 2012 and the Land Acquisition Act Cap.295 Laws of Kenya [Now Repealed]. Some of the said Gazette Notices were published for purposes of intention to acquire, others for inquiry into compensation and while others for deletion from gazette ment of the portion of the suit property. The copies of numerous Gazette Notices published by the 2nd Respondent in respect to the suit property annexed and marked as ‘KPA – 1’.
- vii. However, the proposed revision of the initial design of the MPDP project was vetoed by the project consultants, who reverted to its initial design with several adjustments to mitigate the number of projects affected persons entitled to compensation.
- viii. Consequently, several of the affected landowners including the Petitioner herein were inadvertently omitted from the KeNHA and Kenya Railways compensation programmes.
- ix. At the time of the foregoing, the 1st Respondent had already finalized payment of the claims for compensations of the project-affected persons for the main component of the MPDP project being the construction of a new container terminal. Thus, any emerging claims of compensation were unforeseen and not budgeted for by the 1st Respondent.
- x. In addition, there was no transfer or handover of claims for compensation from the KeNHA led to many affected landowners such as the Petitioner herein being omitted from the aforesaid compensation programme of the 1st Respondent.
- xi. The various persons whose plots were affected brought claims for compensation to the 1st Respondent who subsequently undertook a joint survey of the MPDP project area involving the said project-affected persons, KeNHA and the Government Surveyor,
- xii. From the joint survey, a portion of the suit property measuring approximately 0.7254 acres was identified amongst other plots as having been partially affected by the MPDP project.
- xiii. Subsequently, the 1st Respondent through its parent Ministry requested the 2nd Respondent to commence and progress the compulsory acquisition process over the portion of the suit property and payment of compensation thereof to the Petitioner. A copy of the 1st Respondent’s letter dated 20th January, 2021 to its parent Ministry and the 2nd Respondent’s letter dated 29th June, 2022 to the 1st Respondent annexed and marked as KPA – 2.
- xiv. The process of compulsory acquisition is ordinarily undertaken by the 2nd Respondent, who is obliged to ensure that all the procedures related to compulsory acquisition of the portion of the suit property are complied with.
- xv. However, for the 2nd Respondent to effectively carried out an expeditious and conclusive compulsory acquisition process of the portion of the suit property, it was necessary for all these State agencies to be integrated into the process so as alleviate future recurrence of claims of compensation arising from the now complete MPDP and the SGR projects.



- xvi. As it could be gleaned from the pleadings and evidence tendered in the Petition, the Petitioner sought several money prayers from the 1st Respondent, a State agency fully funded by the taxpayers and entirely dependant on policy and direction of the National Government.
- xvii. Guided by the principles of management of public finances as provided under Article 201 of *the Constitution* and as read together with Section 3 of the *Public Finance Management Act*, 2012 there was need to be open, accountable, prudent and responsible use of public funds in the payment of out all outstanding claims of compensation arising from the implementation of the MPDP and SGR projects in order to avert recurring claims of compensation in future.
- xviii. Conveniently, the three lead implementing State agencies of the MPDP and SGR projects were all under the auspices of the Ministry of Roads and Transport. Without a specified budget from the Ministry for settling the emergent claims, the 2nd Respondent in liaison with the State agencies need to ascertain how the Petitioner and other similarly affected landowners receive just compensation for acquisition of their land.
- xix. The integration of the State agencies in the compulsory acquisition process of the portion of the suit property is key, especially noting the admissions by the Petitioner at paragraphs 6,9 and 18 of the Further Affidavit of Baljeet Singh dated 22nd February, 2023. The Petitioner admitted that indeed there was no Gazette Notice issued on behalf of the 1st Respondent by the 2nd Respondent in respect of the suit property and that he was not compensated under the then KeNHA compensation programme and that as a result, the Petitioner had been chasing Respondent continue to derive benefit from the access road built on the Petitioner's land, projects, there was a possibility that Kenya Railways and KeNHA may be reasonably affected by the litigation between the parties herein as the State agencies have been extensively mentioned in the pleadings and evidence filed by the parties before the Court.
- xx. More particularly, bearing in mind the roles played by Kenya Railways and KeNHA in the implementation of the aforesaid projects, the presence of the State agencies was necessary for their contribution to the award of compensation to the Petitioner as it may be determined by the 2nd Respondent in accordance with the provisions of the *Land Act*, 2012.
- xxi. In the premises, it was therefore apparent that the presence of Kenya Railways and KeNHA was necessary in the Petition herein to enable the Court to effectively and conclusively adjudicate upon and determine all questions involved in this suit.
- xxii. The 1st Respondent therefore prayed for the Court to add Kenya Railways and KeNHA as the 3rd and 4th Respondents to this Petition in terms of the draft Amended Response to the Petition annexed herewith. Consequently, with the addition of Kenya Railways and KeNHA as parties, it was necessary for the 1st Respondent to amend its Response and the other parties herein may wish to amend their pleadings. A copy of the draft amended response to the Petition was annexed and marked as "KPA – 3".
- xxiii. Unless Kenya Railways and KeNHA were added as parties to this Petition, there was a possibility that the Court may not pass an effective decree and that the 1st Respondent may suffer undue hardship and prejudice in implementing and/or adhering to the eventual orders of the Court to the detriment and dissatisfaction of all the parties herein. It may also leave room for double compensation over the same parcel of land. Additionally, it would deny the 1st Respondent the opportunity to obtain contribution from the other state agencies that were involved in the project.



- xxiv. The Court has unfettered discretion at any stage of the proceedings in the Petition herein to add Kenya Railways and KeNHA as parties so as to grant the said parties their unalienable right to be heard and further to enable resolution of the dispute herein in the presence of all necessary parties without any further protraction and multiplicity of proceedings or proliferated litigation arising out of similar cause of action.
- xxv. No prejudice shall be suffered by the parties herein as the addition of Kenya Railways and KeNHA as parties to this suit was necessary and shall enable the Court to completely and effectually determine all questions involved in the suit herein in finality.
- xxvi. It is therefore in the interest of justice and public policy for Kenya Railways and KeNHA be joined in the proceedings herein as the 3rd and 4th Respondents respectively so as to enable the Court to foster its overriding objective to facilitate the just, expeditious and fair resolution of the suit herein on merits and in the presence of all necessary parties.

iii. The response by the Petitioner/Respondent

5. The Petitioner filed a 36 Paragraphed Replying Affidavit sworn by BALJEET SINGH, the Defendant herein sworn on 15th May, 2023 in opposition of the application together with four (4) annexures marked as “BS - 1 to 4” annexed thereof. He stated as follows: -
 - a. He opposed the Application in toto as it was a delaying tactic by the Respondents to delay this suit in court.
 - b. The intended 3rd Respondent and 4th Respondent gazetted and degazetted his property from their intended compulsory acquisition. (Annexed and marked “BS -1A to D” were copies of the gazette notices).
 - c. He instructed his Advocate on record to file “Petition No. E009 of 2023 (Baljeet Singh – Versus - Kenya Railways Corporation, National Land Commission & The Land Registrar Mombasa)” and “Petition No. E010 of 2023 (Baljeet Singh – Versus - Kenya National Highways Authority & National Land Commission & The Land Registrar Mombasa)”. (Annexed and marked “BS - 2A to B” are copies of the filed petitions).
 - d. In Petition No. E009 of 2023 & Petition No. E010 of 2023, the 1st and 3rd Respondents were not parties to this instant Petition, and neither was the 1st Respondent herein a party to the other Petitions. The issues of law and fact raised in the instant Petition never related to the other petitions in any way.
 - e. The matters sought to be raised by the joinder and the amendments could not be properly considered in the existing case, and that was why he instructed his advocate on record to file Petition No. E009 of 2023 and Petition No. E010 of 2023.
 - f. He contended that the issues in the instant Petition being Petition No. E027 of 2022, Petition No. E009 of 2023 and Petition No. E010 of 2023 are fundamentally different and could not be conveniently tried together.
 - g. The cause of action that he had against the Respondents herein was for encroachment on his property, unlawful acquisition of his property, unpaid compensation for usage of his property amongst others.
 - h. That civil case “the Petition No. E010 of 2023 between Baljeet Singh -Versus- Kenya National Highways Authority & National Land Commission and the Land Registrar Mombasa sought



amongst other prayers lifting of encumbrances placed against his property by Kenya National Highways Authority.

- i. He had also separately sued the 4th intended Respondent vide “Petition No. E009 of 2023 Baljeet Singh – Versus - Kenya Railways Corporation, National Land Commission and the Land Registrar Mombasa.
- j. The cause of action in Petition No. E009 of 2023 against the intended 3rd Respondent and Petition No. E010 of 2023 against the intended 4th Respondent was removal of encumbrances from his parcel of land known as MN/VI/2444 which does not relate to the cause of action in the instant suit (Petition No.27 of 2022).
- k. In this instant suit, he had sued the Respondents for unlawfully occupying his property and constructing on it without following the due process and compensation. Other suits against the 3rd and 4th Intended Respondents were for lifting of encumbrances lodged against his property. The area currently occupied by the 1st Respondent was 0.1020 hectares as per the survey report as per the survey report and google earth photograph. (Annexed and marked “BS - 3” was a copy of the google earth photograph).
- l. He averred that it was not true that the 1st Respondent herein had occupied 0.7254 hectares of his property as alleged in paragraph 12 of the application, as the same would mean that they had taken almost half of his property which was not the case as shown in the survey report and google earth sketch photo. (Annexed and marked “BS - 4” is a copy of the google earth photograph).
- m. The area previously gazetted and degazetted by Kenya National Highway Authority was 0.0735 hectares. (refer to annexure marked “BS-1A—B” above)
- n. The area previously gazetted and degazetted by Kenya Railways Corporation was 0.7260 hectares. (refer to annexure marked “BS-1C-D” above)
- o. He had a right under *the Constitution* of Kenya 2010 to seek remedy in court against any person or entity who had infringed on his rights.
- p. The 1st Respondent was an entity with capacity to sue and be sued in its name, and as such, he had sued the 1st Respondent in its own capacity for the infringement of his rights.
- q. The 1st Respondent was the one currently in use of his property, having erected a fence and constructed a road through his property without compensating him. Unlike the 1st Respondent’s allegations that he was seeking multiple compensation, the separate suits border on different causes of action and seek separate remedies.
- r. The issue of contribution by the intended 3rd and 4th Respondents in the instant Suit was an internal issue that never required the court’s intervention, and therefore allowing the 1st Respondent’s Application herein would result in issues in dispute being clouded and would frustrate the just determination of the suits. The 1st Respondent’s application was an abuse of court process aimed at complicating and misleading the court in this suit.
- s. Further, the joinder of the 3rd and 4th intended Respondents would introduce a measure of confusion which would prejudice a fair trial of the suits. By joining the 3rd and 4th intended Respondents, the 1st Respondent sought to hide behind the intended 3rd and 4th Respondents and come up with blame games aimed at delaying justice to him.



- t. The 1st Respondent had admitted that he is the registered owner of the suit property and that they had constructed a road on his property. The 1st Respondent had not explained why it had not compensated him for more than 10 years now for unlawfully occupying his land, yet it was benefiting from his property. From the court records, it was evident that the 1st Respondent had not been another. At some point, the 1st Respondent informed court that they were in the put its house in order.
- u. The 1st Respondent had not proved how it would suffer if the suit proceeds as it was without the joinder of the 3rd and 4th Intended Respondents. He was currently suffering from the illegal actions of the 1st and 2nd Respondents herein. The 1st Respondent's application was in bad faith and tainted with dirty hands, as it had suggested to pay him and now it had turned back and started blaming others.
- v. Allowing the 1st Respondent's application would not only amount to a misjoinder, but also an abuse of the process of the court and a waste of judicial time. For this reason he believed that the Application lacked merit and was bad in law and thus ought to be dismissed with costs.

iv. Submissions

- 6. On 21st June, 2023 while all the parties were present in Court, they were directed to have the Chamber summons application dated 20th April, 2023 be disposed of by way of written submissions. Subsequently, all the parties complied. Pursuant to that on 25th July, 2023 a ruling date was reserved on Notice by Court accordingly.

a) The Written Submissions by the 1st Respondent/Applicant

- 7. The Learned Counsels for the 1st Respondents – the law firm of Messrs Munyao, Muthama and Kashindi Advocate filed their written submissions dated 20th June, 2023. Mr. Amakobe Advocate commenced his submissions by providing Court with a brief introduction and background of the matter of the Chamber Summons application dated 20.4.2023 seeking the orders as set out there. He relied on the Supporting Affidavit of John Chau Mwangi sworn on 18.4.2023 and the annexures thereto. He held that the Intended 4th Respondent was not opposed to the Chamber Summons application and despite of service being effected, the 2nd and 3rd Intended Respondents had not filed any responses whatsoever.
- 8. Flowing from the foregoing the Learned Counsel submitted on the following three (3) issues fell for determination. These were: -
- 9. Firstly, he held that the intended 3rd and 4th Respondents were necessary parties for the complete and effected determination of all questions in the Petition herein. To the Counsel, this was due to their involvement as the lead inquiring agencies of the Mombasa Port Development Project and the Mombasa –Nairobi Standard Gauge Railway Project whose implementation affected portion of the Petitioner's land. To support his argument, he referred Court to the Provisions of Order 1 Rule 3 of the Civil Procedure Rules 2010 – which held that all persons may be joined as Defendants against whom any right to relief arising out of the same act of transaction was alleged to exist, if separate suits were brought against such persons any common question of law of fact would arise. While the Provisions of Order 1 Rule 10 (2) of the Rules was instructive on the guiding Principles of Substitution and addition of parties to a suit. To buttress this point the counsel relied on the decisions of Joseph Njau Kingori –



versus- Robert Maina Chege & 3 others (2002) eKLR on the Provisions of Order 1 Rule 10(2) where court held

“When the above Principles are applied to the facts of these applications it is clear that the guiding principles when an Intending Party is to be joined are as follows:-

- i. He must be a necessary part.
- ii. He must be a proper party
- iii. In the case of a Defendant there must be a relief flowing from the Defendant to the Plaintiff.
- iv. The ultimate order of decree cannot be enforced without his presence in the matter.
- v. His presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

And further the Court of Appeal in the case of “Cuncon Limited –versus- Kivuwatts Limited & 2 Others (2015) eKLR observed as follows: -

“From the foregoing, it may be concluded that being and discretionary order, the Court may allow the joinder Party as a Defendant in a suit based on the general principles set out in Order 1 Rule 10(2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit in the event that the Plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit and the interest need not be the kind that must succeed at the end of the trial.”

10. Thus, the Counsel argued that there existed unique circumstances in the Petition which made it necessary to add the Intended 3rd and 4th Respondents necessary for the conclusive determination of compensation payable to the Petitioner. Indeed, the 2nd Respondent had on various occasions published Gazette Notices on behalf of the Intended 3rd and 4th Respondents in respect of the suit property – the Intended 3rd and 4th Respondents together with the 1st Respondent were lead acquiring agencies in implementing the MPDP and SGR projects which were already complete and in use. None of the Gazette Notices were published on behalf of the 1st Respondent. There were many issues on the compensation payable where the Intended 3rd and 4th Respondents were involved and they need to be joined in order to provide court with more relevant information which will assist it in arriving at an informed and effect decision in the long run. He held that there was a relief flowing from the Intended 3rd and 4th Respondents to the Petitioner herein and that the eventual decree of the court could not be enforced without the presence of the Intended 3rd and 4th Respondents in the matter.
11. Secondly, the Learned Counsel the Petitioner could not suffer prejudice if the Chamber Summons application 1st Respondent was allowed. To justify this the Counsel upheld the fact that it was not in dispute the Petitioner was to be compensated for the acquisition of a portion of the suit land and also that there was delay in the payment of compensation. He held the process of the compulsory acquisition process was underway under the steward ship of the 2nd Respondents. Further the Petitioner was entitled to just compensation as required by the Provisions of Law section 117



of Land Act 2012. For these reason, the Petitioner shall not suffer no prejudice which could not be compensated by an award for costs if the application herein was allowed as prayed.

12. Finally, the Learned Counsel's Submitted that the 1st Respondent was entitled to the reliefs sought from the Chamber Summons application. His argument was there was complication that arose the planning of MPDR and SGR projects, it was necessary for all these state agencies to be integrated into the compulsory acquisition process of the portions of the suit land in order to assist the 2nd Respondent to hasten the process and arrive at just compensation payable to the Petitioner.

In conclusion he argued that the application was partially overtaken by events and thus prayed the court to allow the orders as prayed with costs.

b) The Written Submissions by the Petitioner/Respondent

13. The Petitioner through the Law firm of Messrs of Wandai Matheka & Company filed their written submissions dated 10th July, 2023 while opposing the Notice of Motion application dated 20th April, 2023 by the 1st Respondent. Mr. Wandai Advocate commenced the submission by providing a brief introduction of the application. He stated that it sought to have the Kenya National Highways Authority and the Kenya Railways to be joined as parties in this matter. The Learned Counsel argued that the application was peculiar on the grounds that these parties had never declared any interest in the suit nor sought to be joined as parties. The Counsel held that the Petitioner/Respondent was only claiming for compensation for the suit property – Land Registration No. MN/VI/24444 whereas the 1st Respondent/Applicant was claiming contributions from the state agencies that were allegedly involved in the project. According to him therefore the Proposed Intended Parties would only muddy the proceedings. Their addition was not only an abuse of the due process but also not to the interest of Justice.
14. The Counsel argued that the application was in bad faith as all along the 1st Respondent had indicated to court they were willing to settle the matter amicably and were only awaiting for the new Government to settle down administration. But they later on decided to file this application. He held that the Government should be allowed to proceed to determine the suit in its merit the cause of action being unlawful occupation, encroachment and the use of the Petitioner's personal property by the 1st Respondent. He informed court that in year 2012 the 1st Respondent without publishing a notice of intention to acquire the suit property for the construction of the Mombasa Port Area Road Development Project and Container Terminal it's been 7 years since project was uncompleted and being used but no award nor payment have been made in terms of compensation.
15. For the determination of the opposition to the application, the Petitioner/Applicant raised the following two (2) issues. These were:-

Firstly, whether it was merited to form these two parties. According to the counsel the joiner of the two was not merited. The Kenya National Highway Authority had never showed any interest in the matter. The Petitioner had no claim against them. He averred that the case against Kenya Railways Corporation was that they remove the encumbrances from the suit property. To buttress his argument he relied on the decisions of "Julius Meme – Versus- Republic and Another (2004) eKLR Misc. Criminal App. No. 495 of 2003 where Court held:-

- 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 pre-empt a likely cause of proliferated litigation
16. He averred that there was no cause of action against these parties who were not in occupation, using or encroached on the suit property, further the prayer for award for compulsory acquisition was not applicable herein. In any case the 1st Respondent was not entitled to any contribution or indemnity from the Kenya Railways Corporation. Besides, the two parties were independent Constitutional Authorities established by specific statutes and hence then Constitution mandate were provided for. They are independent and not subject to directions or controls by any person or authority which included the 1st Respondent herein – contrary to the Provisions of Article 260 and 249 (2) of [the Constitution](#) of Kenya 2010 and Sections 3 of the [Kenya Roads Act](#), 2007.
17. Secondly, the Counsel queried whether the Proposed Interested Parties had any stake and/or identifiable legal interest in the subject dispute to warrant joinder of parties to the suit. His contention was that the Petitioner/Respondent cause of action was for payment of compensation money an award arising from compulsory acquisition of the suit property. He further averred that, the Petitioner other claim was to have Kenya Railways Corporation remove encumbrances from the suit land. To him the issue of constitution by two parties was an internal issue that never required the courts intervention and hence the prayers from this application would only be clouding the matter. Besides, has they been interested they would have Commenced appropriate suits in line with the law. In any event the decision of the court would not affect them in any manner. These parties have no stake or identifiable legal interest as the matters were purely on payment or compensation for the compulsory acquisition of the suit property which are important ingredients for one to be granted the orders for joinder.
18. Finally, while opposing the prayer for the amendment of the Petitioner by the 1st Respondent, the Learned Counsel's contention was that the application was made in bad faith, as all along the 1st Respondent had been indicating the possibilities to have the mater settled amicably once the Government Administration had settled but changed its stance later on. To buttress his point the Learned Counsel relied on the decisions of "Joseph Ochieng and 2 others trading as Acquiline Agencies –versus- First National Bank of Chicago (1995) eKLR and Nbi. HCR Civil No. 2715 of 1987 – Lakhamshi Ktumji Shah and Another – Versus Ajay Shanlil Shah and 2 others (1020) eKLR where it was held:-
- i. The application should be made timely.
 - ii. The application should be made in good faith.
 - iii. The court must ensure there is no new or inconsistent cause of action
 - iv. That no injustice will be occasional to the other party.

Hence in conclusion he prayed for the application to be dismissed with costs to the Petitioner/ Respondents.

v. Analysis & Determination.

19. I have carefully read and considered the pleadings herein by the Petitioner and the 1st Respondent, the myriad of cases cited herein by parties, the relevant provisions of [the Constitution](#) of Kenya, 2010 and statutes.
20. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-



- a. Whether the Chambers Summons applications dated 20th April, 2023 by the 1st Respondents herein seeking for the Intended 3rd and 4th Respondents to be enjoined as parties in this instant Petition meets the laid - down standards of joinder and thus has any merit
- b. Whether the Chamber Summons application dated 20th April, 2023 by the 1st Respondent herein seeking for orders of the amendment of the pleadings has merit and ought to be entertained?
- c. Who will bear the Costs of Notice of Motion application 15th March, 2023.

Issue No. a). Whether the Chambers Summons applications dated 20th April, 2023 by the 1st Respondents herein seeking for the Intended 3rd and 4th Respondents to be enjoined as parties in this instant Petition meets the laid - down standards of joinder and thus has any merit.

21. The main substratum of this motion is on joinder of parties and thus the amendment of the pleadings thereof. The law on joinder of parties for Constitutional petitions is set forth in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 referred to as the Mutunga Rules. The provision of under Rule 5 (a), (b), (c), (d) and (e) of the Rules makes provision for addition, joinder, substitution and striking out of parties. This Rule is very similar to the provision of Order 1, Rule 10 of the Civil Procedure Rules, 2010. Rule 5 provides as follows:

The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

- (a) Where the Petitioner is in doubt as to the persons from whom redress should be sought, the Petitioner may join two or more respondents in order that the question as to which of the Respondent is liable, and to what extent, may be determined as between all parties.
 - (b) A Petition shall not be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every proceeding deal with the matter in dispute.
 - (d) 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 just—
 - i. order that the name of any party improperly joined, be struck out; and
 - ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
 - (e) Where a Respondent is added or substituted, the Petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the Petition shall be served on the new Respondent and, if the court thinks, fit on the original Respondents.
22. In deciding of who is the appropriate respondent the Mutunga Rules provide as follows under Rule 2:

“Respondent” means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;



23. 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...”

24. The case of the Court of Appeal - “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: -

- a. 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.
- b. The intended party’s presence would enable court to resolve all the matters in the dispute.
- c. The intended party would suffer prejudice in case of non-joinder.
- d. 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.”

25. 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.?"

26. 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.
27. The 1st Respondent/Applicant through its chamber summons application seeks to have the intended 3rd and 4th Respondents enjoined as the integration of the State agencies in the compulsory acquisition process of the portion of the suit property. The various persons whose plots were affected brought claims for compensation to the 1st Respondent who substantially undertook a joint survey of the MPDP project area involving the said project – affected persons, KeNHA and the Government Surveyor. I fully concur with the Learned Counsel's argument that the intended 3rd and 4th Respondents were necessary parties for the conclusive determination of the Petition herein due to their involvement as the lead acquiring agencies of the MPDP and the Mombasa – Nairobi Standard Gauge Railway Project whose implementation affected portion of the suit land belong to the Petitioner.
28. Additionally, I have noted that these agencies were key, especially noting the admissions by the Petitioner at Paragraphs 6, 9 and 18 of the Further Affidavit of Baljeet Singh dated 22nd February, 2023. The Petitioner admits that indeed there was no Gazette Notice issued on behalf of the 1st Respondent by the 2nd Respondent in respect of the suit property. Indeed, the notices were published on behalf of the Intended 3rd and 4th Respondents who together with the 1st Respondent were lead acquiring agencies in implementing the MPDP and SGR projects which were already complete and in use. The reason as to why there was no intention to acquire the portion of the suit property was published on behalf of the 1st Respondent had been well explained at Paragraphs 8 and 13 of the Supporting Affidavit of John Chau Mwangi dated 15th May, 2023. Indeed, that fact that he was not yet compensated under the then KeNHA compensation programme and that as a result, the Petitioner has been chasing the Respondent continue to derive benefit from the access road built on the Petitioner's land, projects, there is a possibility that Kenya Railways and KeNHA may be reasonably affected by the litigation between the parties herein as the State agencies have been extensively mentioned in the pleadings and evidence filed by the parties before the Court.
29. The Petitioner on the other hand contended that he instructed his advocate on record to file – “Petition No. E009 of 2023 (Baljeet Singh VS Kenya Railways Corporation, National Land Commission & The Land Registrar Mombasa) and Petition No. E010 of 2023 (Baljeet Singh – Versus - Kenya National Highways Authority & National Land Commission & The Land Registrar Mombasa). And in Petition No. E009 of 2023 & Petition No. E010 of 2023, the 1st and 3rd Respondents are not parties to this instant Petition, and neither is the 1st Respondent herein a party to the other petitions. The matters sought to be raised by the joinder and the amendments cannot be properly considered in the existing case.
30. 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.”

31. The Honourable Court agrees with the 1st Respondent that enjoinder will assist this court complete settlement of all questions that may be lingering between the four (4) parties. This is in line with the provisions of the law, the Mutunga Rules and the authorities cited. The application has been made late being that the Petition was filed on 14th July, 2022 but there have been no proceedings so far, I therefore find merit in the prayer to enjoin the 3rd Intended Respondent, Kenya National Highway Authority and 4th Intended Respondent Kenya Railways Authority.

Issue No. b). Whether the Chamber Summons application dated 20th April, 2023 seeking for orders of amendment of pleadings has merit and ought to be entertained.

32. Under this Sub heading, the Honourable Court will deliberate on the legal rationale on amendment of pleadings. Amendment of pleadings are anchored on the provisions of Rule 18 of the Mutunga Rules. It states:-

“A party that wishes to amend its pleadings at any stage of the proceedings may do so with leave of the Court”

Likewise, the provision of Order 8 Rule 3 of the Civil Procedure Rules, 2010 which provides:-

“(3) An amendment to correct the name of a party may be allowed under sub rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.”

33. Further Order 8 Rule (1) and (5) of the Civil Procedure Rules which provides as follows:-

“1. Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such as it may direct, allow any party to amend his pleadings.

5. An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.....”



34. The principles for consideration in an application for amendment of pleadings are set out in Court of Appeal decision of “Ochieng and Others – Versus - First National Bank of Chicago Civil Appeal Number 147 of 1991”. They are as follows:
- a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b. the amendments should be timeously applied for;
 - c. power to amend can be exercised by the court at any stage of the proceedings;
 - d. that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;(emphasis is more)
 - e. the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
35. The Court wishes to refer to the case of:- In the case of “Bramwell, LJ in Tildesley – Versus - Harper (1878), 10 Ch.D. at p.296” stated as under:
- “My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”
36. Further in the case of:- “Eastern Bakery – Versus - Castelino, (1958) E.A.461 (U.) at p.462” it was stated thus:
- “It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”
37. This Order gives the court the mandate to allow amendment of pleadings at any stage of the proceedings on such terms that may be just. Having set out the law relating to amendment of pleadings, it is now important to apply the said principles to the present suit.
38. The 1st Respondent prayed for the Honourable Court to add KeNHA and Kenya Railways Corporation as the 3rd and 4th Respondents respectively in terms of the draft Amended Response to the Petition. Consequently, with the addition of Kenya Railways and KeNHA as parties, it is necessary for the 1st Respondent to amend its Response and the other parties herein may wish to amend their pleadings. Parties are at liberty to choose the necessary parties in a suit where they claim certain reliefs arising from a transaction or a wrong committed. A party cannot force a Petitioner to sue persons that they do not have a claim against as if the case is dismissed then the party must bear the burden of paying costs.
39. That is a reason why before a party files a suit in court, he/she must be sure of the party to have a duel with. You do not start battles on all fronts hoping to settle on one person. You must be sure of the Party you want to sue. In this case the Petitioner oppose the amendment because as previous stated in this ruling, they do not have a claim against the 3rd and 4th Respondent in this petition as he has filed other Petitions where he seeks compensation against the intended Respondents.



40. In the case of “Rubina Ahmed & 3 others – Versus - Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR” the Court of Appeal while dismissing an appeal relied on Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, which stated the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”. [Emphasis added].

41. The 1st Respondent has argued that this there is a possibility that Kenya Railways Corporation and KeNHA may be reasonably affected by the litigation between the parties herein as the State agencies have been extensively mentioned in the pleadings and evidence filed by the parties before the Court.

42. In the forgoing, I find that it will be in the interest of justice, equity and conscience to allow the prayer on the amendment of the Response to the Petition by the 1st Respondent.

Issue No. b). Who will bear the Costs of Notice of Motion application 15th March, 2023.

43. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. According to “the Judicial Hints on Civil Procedure 2nd Edition (Nbi Law Africa” 2011 Page 94 holds:-

“Costs are (awarded at) the unfettered discretion of the Court subject to such conditions and limitations as may be prescribed and to the provision of any law for the time being in force but they must follow the event unless Court has good reason to order otherwise”

This position was well founded in the decisions of Supreme Court “Jasbir Rai Singh – Versus Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

44. In the instant case, although the Respondent has been the successful party and hence ordinarily entitled to have the costs, taking the matter is still proceeding on, I direct the same to be in the cause.

vi. Conclusion & Disposition

45. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience.

46. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

a. That the Notice of Motion application dated 20th April, 2023 is found to have merit hence it be and is hereby allowed in its entirety.



- b. That the Kenya National Highway Authority and the Kenya Railways Corporation are hereby joined as the 3rd and 4th Respondent⁶ respectively.
- c. That the 1st Respondent be and is hereby granted 14 days leave to amend its Response to the Petition.
- d. That the annexed Amended Response to Petition be deemed duly filed on payment of requisite court fees.
- e. That the 3rd and 4th Respondents to file their response to the Petition within 14 days.
- f. That the Petitioner be and is hereby granted corresponding leave to amend his Petition, file and serve his reply to the Response by the Respondents within 14 days after service.
- g. That the matter be mentioned on 6th February, 2024 to confirm compliance and further directions on the disposal of the Petition hereof.
- h. That the cost of this application to abide the outcome of the main Petition.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 12TH DAY OF OCTOBER 2023.

.....

HON. JUSTICE L. L. NAIKUNI, (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Wandai Advocate for the Petitioner/Respondent.
- c. Mr. Amakobe for the 1st Respondent/Applicant.

RULING: ELC CONST. PET. NO. E027 OF 2022 Page 11 of 11 HON. LL NAIKUINI (JUDGE)

