Waiguru v Kihingo Village (Waridi Gardens) Limited; Kabiro & another (Interested Parties) (Civil Case 256 of 2019) [2023] KEELC 21476 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21476 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL CASE 256 OF 2019

OA ANGOTE, J

NOVEMBER 9, 2023

BETWEEN

ANNE MUMBI WAIGURU ..... PLAINTIFF

AND

KIHINGO VILLAGE (WARIDI GARDENS) LIMITED ..... DEFENDANT

AND

CHRIS KABIRO ..... INTERESTED PARTY

HON. JAMES NDUNG'U GETHENJI ..... INTERESTED PARTY

RULING

1. This Ruling is in respect of the 1st Interested Party's Notice of Motion dated 17th November, 2022. In the said application, the 1st Interested Party seeks the following orders:-

    a. That the Plaint herein dated 2nd August, 2019 be struck out with costs.

    b. That in the alternative, the Plaintiff/Respondent be ordered to deposit security for costs of KShs. 10,000,000/- pending the hearing and determination of the suit failure to which the suit herein be dismissed with costs.

    c. That in the alternative, the Plaint herein be struck out on the ground that it is against public policy as the same is tainted with illegality ex turpi causa.

    d. That costs be to the Defendant/Applicant.

2. The application is supported by the affidavit of the 1st Interested Party sworn on 17th November, 2022, who deponed that the the Plaint is scandalous, frivolous, vexatious and an abuse of the process of the court and that the cause of action arises out of an illegal transaction not enforceable by court, hence the proceedings are an exercise in futility.

3. It was deponed by the 1st Interested Party that the cause of action arises out of the sale of House No. 1D on L.R. No. 27754 (the suit property) by the Defendant to the Plaintiff during the subsistence of a court order restraining the sell and that it is in the interest of justice that it be struck out

4. The 1st Interested Party stated that the Defendant was aware of the Court order as it was issued in the presence of their Advocates after a protracted hearing; that the Plaintiff is presumed to be aware of the said order because the Ruling is available on the Kenya Law Website; that in Charles Mwangi vs Dhraj Popat (2005) eKLR, the court upheld the maxim that no court ought to enforce an illegal contract or allow itself to be used to enforce obligations arising from it and that it does not matter whether the Plaintiff has pleaded the illegality or not.

5. The 1st Interested Party deponed that it is apparent that the Plaintiff is a victim of an illegal transaction, even though the court cannot cover protect victims of illegal transactions; that since the case does not disclose a justifiable cause of action, the Court ought to direct the Plaintiff to deposit security for costs; that if the suit is dismissed with costs it will be difficult to recover costs because the Plaintiff has no known assets except this claim over the suit property and that it will be unrealistic to recover from her if she loses.

6. The 1st Interested Party explained that the order restraining the sale was given ex-parte on 31st May, 2012 and issued on 4th June, 2012 in Milimani HCCC No. 355 of 2012, Chris Kabiro t/a Kabiro Ndaiga & Company Advocates vs Kihingo Village (Waridi Gardens) Limited and that the order was confirmed by a Ruling delivered on 5th December, 2013 and it was in existence when the Plaintiff entered into the Lease Agreement dated 25th September, 2015.

7. According to the 1st Interested Party, consequently, no action can be founded or sustained out of the alleged alienation of the suit property as it was not available for alienation and that the suit therefore arises ex turpi causa and cannot be admitted by a court of law or be enforced by judicial mechanisms.

8. The application was opposed by the Plaintiff who filed a Preliminary Objection dated 21st November, 2022 claiming that the application is fatally incompetent and goes against the law as stated under Order 40 Rule 6 of the Civil Procedure Rules, and, that the application is made in bad faith and seeks to interfere with the Plaintiff's rights under Article 159 of *the Constitution* of Kenya.

9. In addition, the Plaintiff also filed a Replying Affidavit in which she deponed that the application is in bad faith and aimed at denying her the right to be heard in a matter where she invested over KShs. 40,687,170 as evidenced by the exorbitant security for costs demanded.

10. The Plaintiff deponed that on receiving the Orders in the above-captioned matter, the Defendant did nothing with them and the same lapsed by dint of Order 40 Rule 6, and are now ineffectual, meaning that they cannot be breached or contravened in any way and that the current suit was filed in 2019 during which time the 1st Interested Party had not prosecuted its said case and is only now raising the issue after filing the suit in collusion with the Defendant to defeat her claim.

11. It is the Plaintiff's case that she has been in possession and occupation of the suit property for 7 years and her legitimate right over the suit property has never been challenged; that she has developed the property and has been paying service charge for the same and that she will suffer irreparable harm and lose her right to fair hearing if this application is allowed.

12. It was deponed by the Plaintiff that in any event, the application is a knee-jerk reaction following her application to consolidate this suit with the said Milimani HCC 355 of 2012, Chris Kabiro t/a Kabiro Ndaiga & Company Advocates vs Kihingo Village (Waridi Gardens) Limited; that it is in the interest

of justice that the matter is heard and a final determination made on merit and that there is no breach of court orders on her part because she had no knowledge of the lapsed orders.

13. The Defendant's Director deponed that the Plaintiff has been an illegal tenant of the suit property on house No. 1D; that the Defendant has no knowledge of her; that the documents relied on by the Plaintiff in the suit acknowledge that the sale was illegal as it was executed during the pendency of an order prohibiting any kind of transaction relating to the suit property and that the said order was confirmed by the Ruling delivered on 5th December, 2013 and was registered as an encumbrance against the mother title on 25th February, 2014.

14. The Defendant's Director urged that the Plaint be struck out because it is based on an illegality, is frivolous, has no substance and would be a waste of the Court's time as it is vexatious and an abuse of the court process; that this court should not assist the Plaintiff in benefitting from her wrongdoing; that the Plaintiff has no chance of succeeding because she signed an illegal lease Agreement with one Ndung'u Gethenji and that she cannot seek to rely on it.

15. It was deponed that the suit is aimed at illegally acquiring the suit property and that the Plaint herein is a mere academic exercise meant to deny the Defendant judgment and prevent it from obtaining vacant possession of the suit property.

16. The Defendant stated that it was apprehensive that the Plaintiff may not be in a position to pay costs should the suit be unsuccessful; that the Plaintiff has failed to pay the rent that is due and owing since 2015 and that this failure to honour her financial obligations is proof that she is unreliable.

17. It is the Defendant's case that if the Plaintiff is not directed to pay security for costs, she will leave the Defendant unprotected; that the Plaintiff has not allayed the Defendant's fears by producing any financial records; that the security for costs will provide insurance for the huge amount the Defendant is using to defend the suit and that the Plaintiff never moved the court to set aside or vacate the injunction orders or the encumbrance placed on the suit property.

18. The 2nd Interested Party deponed that he has always been a CEO and Director of the Defendant Company alongside his late mother and two brothers, Robert Githenji and Gitahi Githenji, the deponent of the Defendant's Replying Affidavit and that he was surprised that the Defendant had taken a direction that is contrary to the Company's resolution of 5th February, 2020.

19. The 2nd Interested Party deponed that the Defendant has decided to support the 1st Interested Party's claim for the suit property, yet the Memorandum and Articles of Association require 3 directors to pass a resolution; that the 1st Interested Party forged his signature on an Agreement for Sale which forgery has been reported and was confirmed by a forensic document examiner and that he has embezzled the Company's funds.

20. It was deponed by the 2nd Interested Party that the 1st Interested Party filed HCCC No. 355 of 2012 where orders were issued for him to undertake an account of the Defendant but to date he is yet to comply with the said order and that the 1st Interested Party relinquished his claim on the suit property in the presence of their mother, her brother and senior members of the legal profession and never registered the order against the mother title.

21. That due to some underlying family disputes, it was deponed, the 1st Interested Party is now colluding with his brothers, the Directors of the Defendant, who have even instituted criminal proceedings against him; that the 1st Interested Party only presented a photocopy of the forged Agreement for Sale to the Defendant and not the original and that the 1st Interested Party's order expired by operation of law.

22. According to the 2nd Interested Party, the Defendant's denial of his authority to transact with the Plaintiff has exposed him to odium and disrespect; that he executed the Sale Agreement alongside his now deceased mother but his brothers and co-directors are not accusing her of lack of authority and that the decision to deny the validity of the agreement is reckless and untenable and was taken after the death of their mother.

23. In any event, it was deponed by the 2nd Interested Party, the sale of House 1D to the Plaintiff was based on money received and that KShs. 40,687,170/- was paid by the Plaintiff upon execution of the Sale Agreement and was used to pay some of the Defendant's creditors, legal fees, and the balance transferred to the Defendant's Management Company and companies that his brothers sit as directors.

24. The 2nd Interested Party deponed that the purported negation of his authority to transact with the Plaintiff post facto is malicious and exposes him to proceedings and that he stands to suffer irreparable loss if the matters herein are not interrogated to full conclusion and determination. The parties' advocates filed detailed submissions and authorities which I have considered.

Analysis and Determination

25. The court has carefully considered the application herein, the preliminary objection raised, the responses of the parties and the arguments that were made in the submissions of the parties and the authorities cited, and is of the opinion that the issues arising for determination are:

    a. Whether the order of injunction issued in June, 2012 and affirmed on 5th December, 2013 automatically lapsed after twelve months by operation of law.

    b. Whether an order for security for costs should be granted?

    c. Whether the suit should be struck out.

26. By way of a brief background, the Plaintiff herein filed this suit on 8th August, 2019 against the Defendant, praying for, inter alia, an order for specific performance of the Agreement dated 25th September, 2015. The 1st Interested Party, by a Notice of Motion dated 19th February, 2019, applied to this Court to be joined to the suit as an Interested Party. The application was allowed on 27th July, 2021.

27. Upon joinder, the 1st Interested Party filed the instant motion seeking that the Plaint be struck out on the ground that it arises out of an illegal transaction; that there is an interim order of the Court given in HCC No. 355 of 2012 issued on 4th June, 2012 that prohibits any dealing with the suit property and specifically House No. 1D and that the said order has been registered as an encumbrance on the mother title.

28. The 1st Interested Party thus claims that the Lease Agreement between the Defendant and the Plaintiff herein, having been executed on 25th September, 2015 during the pendency of the said orders is illegal, and for that reason, the Plaintiff cannot seek to rely on it. Further, that allowing the suit to stand is tantamount to allowing the Plaintiff to benefit from her wrongful actions.

29. The Plaintiff opposed the application by way of a Replying Affidavit and also filed a Notice of Preliminary Objection, in which she averred that the Orders relied on by the 1st Interested Party had expired by operation of law under Order 40 Rule 6 as at the time of making the Agreement.

30. It is now settled that a Preliminary Objection can only be raised on a point of law as was observed by the court in Mukisa Biscuit Manufacturing Company Ltd vs West end Distributors Ltd 1969 EA 696, where the principles were captured as follows:-

> " so far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..."

31. In Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others [2015] eKLR, the Supreme Court quoted with approval the case in Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A. 696 where the learned Judge observed that:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

32. A Preliminary Objection can only be properly taken where what is raised is a pure point of law. The first point of the Plaintiff's Preliminary Objection is that the application is fatally defective as it goes against Order 40 Rule 6 of the Civil Procedure Rules which provides as follows:

> " Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

33. The orders in question were issued ex-parte in June 2012 and affirmed by a ruling delivered on 5th December, 2013. It is the Plaintiff's submission that under Order 40 Rule 6, the orders expired by operation of law after 12 months, and that since the 1st Interested Party's application is grounded on the now expired orders, his application cannot stand. This view is shared by the 2nd Interested Party who supported the Preliminary Objection and opposed the application.

34. The 1st Interested Party argued that the expiry of the order could only be pronounced by a court, and that a party cannot decide unilaterally that an order has expired. It is his submission that under Order 40 Rule 7, a party needs to approach the court to vary, set aside or discharge the order.

35. Both the 1st Interested Party and the Plaintiff have cited the case of Barclays Bank of Kenya Limited vs Henry Ndungu Kinuthia & Another [2018] eKLR where the Court of Appeal stated thus:

> " A plain reading of order 40 rule 6 shows that the rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not lapse."

36. In Erick Kimingichi Wapang'ana & Another vs Equity Bank Limited & Another Civil Appeal No. 23 of 2015 [2015] eKLR, the Court of Appeal held that:

> " Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory

injunction, the same lapses if the suit in which it was made is not determined within twelve months "unless," as the Rule further provides, "for any sufficient reason the court orders otherwise." In this case there was no subsequent order extending the injunction. Having been issued on 11th October 2011, the injunction order therefore lapsed on 12th October 2012."

37. The court agrees with this position. The said Rule is couched in mandatory terms and therefore cannot be interpreted in any other way. The object of introducing Rule 6 in the 2010 Rules was meant to deal with the mischief where a party at whose instance a temporary injunction is granted goes to "sleep", enjoying the interim orders at the expense of the other party, which appears to be what the 1st Interested Party herein did.

38. It is not disputed that as at the time when the Defendant and the Plaintiff executed the Agreement in respect of House No. 1D, the interim Orders had been in place for over a year. Even if the court were to compute the time from 5th December, 2013 when the order was affirmed, still as at 25th September, 2015 when the Agreement was executed, the orders would still have been in existence for about 21 months, way above the prescribed period.

39. Looking at the interim orders that the Applicant is relying on, and the said Order 40 Rule 6 of the Civil Procedure Rules, 2010, the only conclusion that one could come to is that the orders had clearly lapsed by operation of law as at the date of the agreement between the Plaintiff and the Defendant was entered into. This court is not aware of any attempt made to have the orders extended by the court.

40. Consequently, the Plaintiff's suit cannot be struck out on the ground that the sale agreement between the Plaintiff and the Defendant was entered into during the existence of a valid court order prohibiting any dealings in the suit property.

41. The next issue to determine is whether the Plaintiff should deposit security for costs, and if not, whether the suit should be struck out. The law governing security for costs is set out under Order 26 of the Civil Procedure Rules which provides as follows:

> " 1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.
>
> 2. If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out the grounds of the defence together with a statement of the deponent's belief in the truth of the facts alleged.
>
> 3. Where it appears to the court that the substantial issue is which of two or more defendants is liable or what proportion of liability two or more defendants should bear no order for security for costs may be made.
>
> 4. In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court.
>
> 5.
>
> (1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.

(2) If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security.

6.

(1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting."

42. The justification for payment of security for costs was well explained in Johnson Muthama vs Minister of Justice and Constitutional Affairs and Others - Nairobi Petition No. 198 of 2011, where the High Court held as follows:

> " Provision of payment of costs by a party coming before the court does not in my view, violate any provision for *the constitution*. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so."

43. Additionally, in Patrick Ngeta Kimanzi vs Marcus Mutua Muluvi & 2 Others, High Court Election Petition No. 8 of 2013, the court expressed itself thus:

> " Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him."

44. The power to direct a party to deposit security for costs is a discretionary one. Therefore, in granting an order for payment of security for costs, the court ought to use its discretionary powers judiciously. The court in considering such an application must weigh two opposing interests.

45. On the one hand, the court is to ensure that it does not unnecessarily prevent a party who may indeed be aggrieved and have a suit with reasonable chances of success from exercising its right to be heard, and on the other hand, the court must secure the Defendant in the suit from the risk of having to incur costs which they might not be able to recover from the Plaintiff if the suit were to fail.

46. The considerations for grant of an order for security for costs were laid out by the Supreme Court in the case of Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others, CA No. 38 of 2013 [2014] eKLR in the following words:

> " In an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is

unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable."

47. The rule that an applicant needs to justify the need for an order for security for costs was also laid out in Joel K. Kibiwott & 4 Others vs Registered Trustees of The Monastry Our Lady of Victory [2009] eKLR where the court observed that an applicant for security of costs has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being unsuccessful.

48. What the Gatirau Peter Munya Case (supra) and the Joel Kibiwott Case (supra) underscore is that it is not enough to just allege that the Plaintiff is unable to pay costs. There is need to provide evidence of the Plaintiff's inability to pay the anticipated costs. And so, the court must be given sufficient reasons as to why it should direct a party to deposit security for costs.

49. In the instant application, the 1st Interested Party has averred that considering that the case does not disclose an iota of any justifiable course of action, then it is just and proper that the court direct the Plaintiff to deposit security for costs. The 1st Interested Party has also averred that the Plaintiff has no known assets except for this claim over the suit property, which he has termed untenable, and that since the suit has no chances of success, the court ought to direct her to deposit security for costs.

50. The 1st Interested Party's prayer is couched in terms that failure to deposit security would result in dismissal of the suit. It is clear that the prayer would indeed have the effect of going against the Plaintiff's right to access to justice and deny the Plaintiff an audience before this court.

51. For this court to exercise its discretion and grant such a prayer, the 1st Interested Party ought to have submitted sufficient and/or tangible evidence of the Plaintiff's inability to settle costs that would be awarded, if at all. There is no evidence provided of her alleged inability to settle costs that this court may award, and thus these remain but mere allegations which were not substantiated.

52. The Defendant supported the 1st Interested Party's prayer for deposit of security for costs. In its Replying Affidavit, the Defendant questions the Plaintiff's financial security due to the fact that she has failed to pay the rent of USD8000 a month since the year 2015. The Defendant adds that this failure of honour her financial obligations shows that the Plaintiff is unreliable.

53. In addition, the Defendant has averred that other than the Plaintiff's illegal claim to the suit property, the Plaintiff has no known assets and that her financial stability and wellness is not known to the Defendant or the 1st Interested Party, and that these two issues necessitate the need to grant the prayer for deposit of security for costs, failure to which the Defendant will be left unprotected.

54. It should be pointed out that a party's perceived lack of assets or finances is no reason to order that they deposit security for costs before they can have their day in court. Otherwise, then the less privileged in society would have a hard time accessing justice which would lend credence to the erroneous belief that justice in this country is for the mighty.

55. In Umar Chibachi Omurunga vs Wildfire Flowers Limited [2010] eKLR, Justice Ouko (as he then was) sitting in the High Court at Nakuru cited the code of Sir Dinshah Fardunji Mulla's book, Civil Procedure (India), KT 9th Edition, at page 996 as follows:

> " The mere fact that the appellant is poor or insolvent is no ground for demanding security for costs. Similarly, mere non-payment of the costs of the original suit is no ground for calling upon the appellant to furnish security under this rule unless his conduct be shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the order

of the court in respect of costs. But the court will, as a general rule, demand security for costs for a poor or insolvent appellant if it is proved to the satisfaction of the court that the appellant is not the real litigant, but a mere puppet in the hands of others who are well able to furnish security or if the merits of the case are plainly in favour of the respondent"

56. There is no doubt that the Plaintiff is the real litigant in this suit, and not a mere puppet. She is the one who entered into the Lease Agreement with the Defendant which is the subject matter of this suit. The Defendant and the 1st Interested Party have not denied that she is the real litigant in this suit. Therefore, that argument, even if it had been raised, would not stand.

57. The Defendant went further to depone that the Plaintiff has not allayed their fears by producing her financial records before this court as evidence that she will be able to settle costs should she lose the suit. This statement seems to shift the burden of proof on the issue to the Plaintiff.

58. It is the Defendant who wishes the court to believe that the Plaintiff is not able to meet her financial obligations, and under Section 107 of the *Evidence Act*, it is the Defendant who was to bear the burden of proof. It is self-defeating to expect the Plaintiff to produce evidence that will incriminate her.

59. The Plaintiff in their submissions questioned the fact that the application to strike out the Plaint, and for payment of security for costs came from an Interested Party, and whether that is legally tenable. Although this court has already made a determination on merit on the application, the question of whether an Interested Party who sought the leave of the court to be joined in the proceedings can file such an application in the first place should be answered.

60. The court in Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 Others Petition No. 12 of 2013 (2014) eKLR stated as follows:

> " A suit in Court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an 1st Interested Party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

61. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012 (The Mutunga Rules) defines an Interested Party as:

> " A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation."

62. In the Mumo Matemu Case (supra) the court defined an Interested Party as one who has a stake in the proceedings, though he or she may not be a party to the cause ab initio. An Interested Party is one who will be affected by the decision of the Court when it is made, either way, and feels that his or her interests will not be well articulated unless he himself appears in the proceedings, and champions his or her cause.

63. This court has considered the various cases where the courts underscored that the contest in a suit is between the Plaintiff and Defendant, and that if any other party has a claim over the subject matter, then such a party needs to apply for joinder as a Plaintiff or Defendant and not as an Interested Party. The 1st Interested Party herein clearly is not such a party to the suit, and so his participation in the suit is limited.

64. To further underscore the level of participation of an Interested Party in a suit, courts have held that the issues before a court in a suit should only be framed from the controversy between the principal parties. In Francis Karioki Muruatetu & Another vs Republic & 5 Others Petition No. 15 of 2015 as Consolidated with Petition No. 16 of 2015 [2016] eKLR, the Supreme Court held as follows:

> " Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court...Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An 1st Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an 1st Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court."

65. The Supreme Court reiterated this position in the case of Methodist Church in Kenya vs Mohammed Fugicha & 3 others [2019] eKLR where it held as follows:

> " Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An 1st Interested Party may not frame its own fresh issues or introduce new issues for determination by the Court."

66. All the authorities cited under this issue are from the Supreme Court and are binding on this court. From the foregoing, it is clear that the 1st Interested Party is participating in these proceedings as an Interested Party. He applied to be joined to this suit as an Interested Party. Although he had the option to choose to be joined as one of the primary parties, he chose not to.

67. As an Interested Party, he is legally incapable of filing an application for such substantive orders as striking out the Plaint or for orders of payment of security for costs, because he is not a substantive party in the suit. In any event, considering that no one sued him, and no substantive orders having been sought against him by the Plaintiff, he cannot seek for security for costs.

68. The upshot is that the Plaintiff's Preliminary Objection dated 21st November, 2022 is merited and is hereby allowed with costs. The 1st Interested Party's application dated 17th November, 2022 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH NOVEMBER, 2023.

O. A. ANGOTE

JUDGE