



**Creekport Limited v National Land Commission; Kahia Transporters
Ltd (Intended Interested Party) (Environment & Land Petition
53 of 2019) [2022] KEELC 3357 (KLR) (9 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3357 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 53 OF 2019

LL NAIKUNI, J

MAY 9, 2022

**IN THE MATTER OF: THE COMPULSORY ACQUISITION
OF THE PETITIONER'S LAND PARCEL NO. MN/VI/4948**

IN THE MATTER OF: ARTICLES 40(3) (B) AND 64 OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: OF SECTION 128 OF THE LAND ACT NO. 6 OF 2012

IN THE MATTER OF: CONTRAVENTION OF THE RIGHT TO PROPERTY

BETWEEN

CREEKPORT LIMITED PETITIONER

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

KAHIA TRANSPORTERS LTD INTENDED INTERESTED PARTY

RULING

I. Introduction

1. What is before this honorable court for its determination is the notice of motion application dated November 1, 2021 filed by the intended interested party. It is brought under the dint of order 1 rule 10 of the *Civil procedure Rules, 2010* and sections 1, 1A, and 3A of the *Civil Procedure Act* cap 21 of the laws of Kenya.

II. The Intended Interested Party Case

2. The intended interested party through the above stated notice of motion application is seeking to be granted the orders of having an incorporated company under the provisions of the Companies Act



cap 486 of the laws of Kenya trading in the name and style of “Kahia Transporters Limited” be joined herein as an interested party to this proceedings and the costs of the said application. It is grounded on the facts, testimonies and averments of the nine (9) paragraphed supporting affidavit of one Osman Ahmed Kahia and four (4) annexures marked as “OAK -1 to 4” annexed thereto. He deposed being a director of the said company and hence duly authorized by its board of directors to make this affidavit on its behalf.

3. He averred that the intended interested party did institute a suit being ELC (Mombasa) No 405 of 2017 against the National Land Commission who was also the 1st respondent in the present suit and contemporaneously filed an application seeking for temporary prohibitory and inhibitory orders barring the 1st respondent from releasing any money towards the whole or part acquisition of several plots among them the subject plot. Indeed, he annexed a copy of the said court order marked as exhibit “OAK-1” dated November 8, 2017 and amended plaintiff dated April 6, 2018 for ease of reference by this honourable court hereof.
4. He deposed that in the said suit - ELC (Mombasa) No 405 of 2017, the honorable court went ahead to grant the prayers sought by the intended interested party and the said orders were still in force to date. Equally, he annexed a copy of the ruling delivered on January 25, 2021 marked as exhibit No “OAK-3”. He indicated and based on information by his Advocate on record that the Civil Suit ELC (Mbsa) No 405 of 2017 was still pending in court awaiting hearing and final determination. He further held that the Property subject matter in the present suit being plot No MN/VI/4948 was among the properties subject to the ELC No 405 of 2017 Mombasa and was next unto the plot for the intended interested party plot No MN/VI/5169 in accordance with the availed Topo Castral Survey marked as exhibit No “OAK-4”.
5. Hence according to deponent herein, in order to avoid a scenario where there would be conflicting orders being issued by this honourable court touching on the same property, it was imperative that the intended interested party were enjoined in the present suit for conclusive and effectual determination of the suit. Thus, in conclusion, they urged court to grant them the orders as prayed with costs.

II. The Petitioner’s Replying Affidavit

6. On December 7, 2021, the petitioners filed an eighteen (18) paragraphed replying affidavit sworn by one Joseph Mwella and dated on December 6, 2021. There were four (4) annexures marked as “JW – 1 to 4” annexed thereto. He averred that he was the duly appointed legal officer of the petitioner. He held that based on the advise by his advocates on record that the application by the intended interested party was incompetent and bad in law and that it was hopelessly out of time as this suit was at the verge of being finalized as it was only awaiting delivery of judgment by this honorable court at any time going forward. Therefore, they perceived such interlocutory application as being an epitome of contributing towards further delay of the matter and a travesty of justice to say the least.
7. He deposed that since the inception of this suit the advocates for the intended interested party had always been aware of the this suit. This was much so to the effect that upon making an attempt to be joined to this suit through an oral application, the then Justice Yano directed him to instead make a formal application if he had a legitimate claim. But unfortunately they failed to adhere with the court’s directions. He has waited until now when the suit’s pleadings were closed and the matter was set for mention on September 28, 2021 for confirmation of filing of written submissions to file the said application.
8. He emphasized that the interested party ought not be considered nor seek to be joined in this suit as they had been indolent guilty of inexcusable and inordinate refusal to sue and/or enjoin the petitioner



as a defendant on its suit ELC No 405 of 2017 Mombasa. He held and based on advise from his Advocates on record that the reasons preferred by the intended interested party to be joined in this suit very late in the day after the close of pleadings and submissions of arguments was devoid of any merit whatsoever. He stressed that it was plainly obvious to blackmail and deny the petitioner of its rightful enjoyment of the fruits of the judgment of this honorable court should it be delivered and/or founded in its favour.

9. He deposed further again based on advise from his advocates on record that the court order dated November 8, 2017 made in the Civil Suit No ELC (Mbsa) 405 of 2017 was incoherently faulty considering the fact that the petitioner was never a party to the said suit filed by the intended interested party against the 1st respondent in the said suit thereof. Yet the Infringement being complained of by the intended interested party in said suit gravely affected the petitioner's rights of compensation for the compulsory acquisition of its property plot No MN/VI/4838 by the National Government.
10. The deponent averred that the then Chairman of the National Land Commission, Prof Mohamed A Swazuri in his letter dated December 3, 2015 upheld the petitioner's title deed to its property subject to regularization contained therein. By the said letter, the intended interested party's property were never mentioned as being part of the regularization condition. Therefore, according to him, the property by the petitioner could not be part of what was complained of by the intended interested party in the suit ELC (Mbsa) No 405 of 2017 – they annexed a copy of the said letter marked as “JN -1” as an exhibit for ease of reference.
11. He deposed based on advise from his advocates that the advocates for the intended interested party were from way back on January 31, 2018 aware of the fact that the property for the petitioner was never part of the alleged boundary dispute with that of the interested party's property. This had been a fact which came to be confirmed by the then Chairman of the National Land Commission *vide* his letter of January 31, 2018.
12. He argued that the intended interested party came to this honorable court with unclean hands as they concealed from the honorable court information material and relevant to the determination of the said application including but not limited to a court consent orders in the ELC (Mbsa) No 405 of 2017 which lifted the previous order issued against the petitioner's property – the said consent order was born out of the consent letter dated December 13, 2017 addressed to the Deputy Registrar ELC. Court Mombasa which was executed by the Advocates for the petitioner and the intended interested party.
13. He held that all the facts and supporting documents pertaining to the property by the petitioner and their acquisition as opposed to the allegation by the intended interested party of the existence of a boundary dispute in the suit No ELC (Mbsa) No 405 of 2017 were all provided for in detail to Advocate of the intended interested party. Clearly, this demonstrated the very reason as to why the Intended Interested party was not entitled to be enjoined in this suit. He further asserted that the intended interested party was privy to a letter under reference No DCI/1B/LFIU/SEC/4/4/7/VOL. VII/64 dated April 14, 2021 addressed to the office of the Attorney General by one Mr John N Kariuki on behalf of the Director of Criminal Investigations that the properties by the intended interested party – MN/VI/5141, MN/VI/5153 and MN/VI/5154 respectively were all acquired through blatant fraud and/or illegalities since they all did overlap with plot Nos MN/VI/909 and MN/VI/910 respectively which were both private parcels of lands. Further the notice of motion application never raised any serious issues of conflicting judgment likely to occur as portrayed by the intended interested party. Indeed, he averred that was neither substantive, credible nor articulate reasons which had been adduced by the intended interested party on the prejudice they were likely to suffer should the judgment be delivered by this court in this suit. In the final analysis, he urged court to dismiss the application with costs.



III. Submissions

14. On November 2, 2021 while in the presence of all the parties, the honorable court directed that the notice of motion application dated November 1, 2021 be canvassed and disposed off by way of written submissions. Pursuant to that and upon full compliance by all the parties, the court reserved a ruling date accordingly.

A. The Intended Interested Party's Written Submissions

15. On January 13, 2022 the learned counsel for the intended interested party the law firm of Messrs Mogaka Omwenga & Mabeya Advocates filed their written submission dated December 20, 2021 in support of their notice of motion application dated November 1, 2021. Mr Omwenga Advocate submitted that their application sought "*inter alia*" their client to be joined in the suit as an interested party. The learned counsel held that from the filed petition, the petitioner was seeking for declaration orders for being entitled to just and fair payment of compensation from the 1st respondent for the use of land after having been compulsorily acquired for the public use - construction of the Standard Railway Line at a sum of Kenya shillings fourteen million four hundred and twenty thousand nine hundred and ninety five (Kshs 14,442,995/=) in interest and general damages. The compulsorily acquired land had a lot of overlap onto the land belonging to the interested party's land. These parcels of land had had protracted boundary disputes between the petitioner and the interested party. According to the counsel this orders being sought by the petitioner was very substantive in nature and once granted they would deprive the intended interested party of their right to compensation of its property leaving the applicant to suffer irreparable loss. He urged court to grant the intended interested party an opportunity to be heard to avoid their fundamental right to property and arbitrary deprivation of the same from being breached under the provisions of article 40 of the [Constitution of Kenya](#). Hence, according to the learned counsel, it was only fair and just to let the intended interested party be joined as a party to this suit which was only awaiting delivery of judgement thereof.
16. The learned counsel submitted that for an applicant to be enjoined in a suit a party had to establish a legal and factual nexus between the suit and his/her claim and/or entitlement. He argued that to be enjoined under the provision of order 1 rule 10 (2) the court had power to the addition or renewal of parties to a suit, including the addition of a person as a defendant. In that case the pleadings would have to be amended as it could be necessary. To buttress its point, they relied on the cases of [Samuel Mburu Gichanga v Peter Ndungu Kinuthia & 4 others](#) [2018] eKLR, [JMK v MWM & another](#) [2015] eKLR, and [Joseph Leboo & 2 others v Director of Forest Services & another](#) [2013] eKLR to the effect that for a court to allow a joinder of party, there ought to be ready and apparent clear cause of action against the proposed defendant based on the pleadings the plaintiff had presented. A party seeking to be enjoined must demonstrate. It may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions the questions involved in the suit. He argued that in the instant case, it was obvious that the remedy sought by the petitioner was actually directed against the 1st respondent however the intended interested party had not been awarded any compensation in spite of the fact that its property was adversely affected by the Standard Gauge Railway (SGR) line and road. He held that the court ought to hear whether the award entitled to the interested party being one of the land owner to the subject matter were being given to the petitioner or not. He contended that there were a lot of crucial material facts that had not been disclosed to this court by the petitioner to enable effective and efficient determination of the suit.
17. On the issue of whether the suit was *sub judice*, he relied on the provisions of section 6 of the [Civil Procedure Act](#), cap 21 and the case of [Republic v Registrar of Societies Kenya and 2 others](#) [2017] eKLR.



In this decision the court held that multiplicity of suits between the same parties and subject matter must be avoided at all costs as they tended to clog the wheels of justice, holding up resources that would be avoidable to fresh matters and creating and/or adding to the building of cases courts have to deal with. But be that as it may, the learned counsel held that in the instant case there existed protracted and unresolved boundary dispute, ownership and title dispute between the petitioner and the intended interested party herein and which could not be easily wished away. There were a number of cases already filed in court seeking remedy to the said issue. These are the ELC Petition No 9 of 2018, HCCC No 273 of 2017 and ELC No 405 of 2017. The prayers sought therein were for the declaration that the petitioner were the owners of the suit properties while in the instant case the Petitioner is seeking for more or less similar remedies. Hence, it was their contention that this matter ought to be stayed awaiting the outcome of the ELC (Mbsa) No 405 of 2017.

18. The learned counsel took the court through a myriad of cases which deliberated on with regard to the issue of joinder of parties and the importance in allowing such applications. These included:-

Nairobi Petition No 15 of 2015 consolidated with Petition No 16 of 2015 *Francis Kariuki Muruatetu & another v Republic & 5 others*,

Kisumu (ELC) JR No 4 of 2020 *Republic v Kisumu County Land Registrar & 2 others; Rose CA Nyaseme & another (Interested Parties)* [2021] eKLR;

Meme v Republic & another [2004] 1 KLR 637;

Kisii ELC No 224 of 2016 – *Joseph Onsumu & 2 others v Gideon Mokaya Kibagendi & 5 others; Kisii County Government (Proposed Interested Party/Applicant)* [2021] eKLR;

Thika ELC Case No 153 of 2017 – *Mary Njeri Kabundi v Christine Mithiri Mbugua & 2 others* [2020] eKLR; and,

Makueni ELC No 208 of 2017 *Eunice Nduku Kivelenge & Wavinya Kivelenge (Suing as the legal representatives of the Estate of Kivelenge Nzano) v Matenge Nthano Kivai; Fredrick Mutisya Kisilu (Interested Party/Applicant)* [2020] eKLR.

In conclusion, the learned counsel urged the honorable court to find and hold that the notice of motion application by applicant dated November 1, 2021 and filed on November 1, 2021 had merit and that the applicant ought to be joined as a party in the instant case. Further, they urged court to hold that the matter was sub-judice contrary to the provision of section 6 of the *Civil Procedure Act*, cap 21 and thus ought to be stayed until ELC Petition No 405 of 2017 had been heard and finally determined. They prayed for costs of the application.

B. The Petitioner's Written Submissions.

19. On January 28, 2022 the learned counsel for the petitioner the law firm of the Messrs AA Said & Co Advocates filed their written submissions dated January 28, 2022. Mr Ogendero Advocate strongly submitted in opposition of the Notice of Motion application dated November 1, 2021 filed by the intended interested party. He commenced by posing a few queries that led to the filing of this application by the intended interested party for joinder into the ELC Petition Nos 50 to 55 of 2019. The learned counsel recounted that, all this desire to be joined in this proceeding begun about three years earlier, in the year 2019, when the advocate for the intended interested party through an oral application, attempted to be enjoined. The honourable court declined but guided them to file a substantive formal application if they had any legitimate claim. Unfortunately, the applicant failed to do so. Clearly this was an afterthought way off at the time the pleadings had already been closed and was



just awaiting for judgment to be delivered by this court. He perceived malice, a recipe for a scandalous litigation and an abuse of due process precipitated by the intended interested party.

20. The learned counsel held that as already admitted by the applicant, the interested party are petitioners in the ELC No 405 of 2017 which was before this court but which they had failed to join the petitioner. He stated that on January 24, 2021 in both the ELC Court No 2 Mombasa and the ELC No 9 of 2018, court had ordered that all matters relating to the suit property lacked territorial jurisdiction to hear and determine. As such, it directed that all these cases including ELC Pet No 405 of 2018 ought to be heard by the Environment & Land Court at Kwale where the suit land was situated.
21. The learned counsel argued that the application by the applicant failed to meet the substantial and procedural threshold to warrant a joinder to this instant case. He submitted that it was quite evident that the application by the intended interested party merely showed that he had a cursory interest in the subject matter of litigation of which the applicant had an avenue under the ELC No 405 of 2017. According to him, the proper application for joinder would have been to join the petitioner in the instant case into the ELC No 405 of 2017 as a necessity to properly equip the parties and the court with an opportunity to fully determine their claim.
22. He argued that though the court had its discretion but it would also put into consideration several factors particularly where it had taken an amount of unexplained delay to comply with the directions of the court to be enjoined into the matter. It ought to be treated with abundant caution that they took three (3) years to do so. On all these issues, they relied on the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others*, Petition No 14 of 2014 [2014] eKLR and held that the intended interested party had not in any way demonstrated that his presence would result in a complete settlement of all the questions involved in the proceedings. The learned counsel stated so given that it was not a party in ELC No 405 of 2017 whereupon was having the same cause of action touching on boundary issues. The learned counsel also held that the intended interested party had failed to demonstrate that the petitioner in the instant case would not be adversely affected should this application be allowed.

The counsel held that the intended interested party had merely disguised itself as an interested party while in actual fact it was merely seeking to institute fresh cause of action, a case which had already been closed.
23. Finally on the issue of costs for the application the learned counsel argued that the ward of costs was not cast on stone but court had ultimate discretion. While applying that discretion, it could not only look at the outcome of the suit but also the circumstances of each case. Therefore, he submitted that on the strength of their submissions they implored upon the court to dismiss the application and grant the petitioner and the respondents herein with costs.

IV. Analysis and Determination

24. I have critically considered all the pleadings filed herein, the notice of motion application dated November 1, 2021 by the intended interested party the written submissions the myriad of the cited authorities and the relevant provisions of the law.

To be in a position to make a fair, just and informed decision, the honorable court has considered and framed the following three (3) salient issues for determination. These are:-

- a. Whether the notice of motion application dated November 1, 2021 by the intended Interested party herein meets the well-established threshold to be considered for a joinder of party to a suit.



- b. Whether the intended interested party is entitled to the prayers sought for joinder and sub - judice for stay of this suit under section 6 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya.
- c. Who will bear the costs for this proceedings herein.

Issue No (a) Whether The Notice Of Motion Application Dated November 1, 2021 By The Intended Interested Party Herein Meets The Well-established Threshold To Be Considered For A Joinder Of Party To A Suit

Brief Facts

25. Prior to proceeding further, the honourable court feels it imperative to recount on the brief facts to the case which are rather straight forward. based on the filed pleadings, the petitioner and the interested party herein are the absolute and legal proprietors to all those properties known as plot No 4838, 5169, MN/VI/909 and MV/VI/910 among others with all the indefeasible rights title and interest vested in them by law. From the face value these properties seem to be adjacent to each other. For such a long duration, there appears to be in existence some boundary dispute, ownership and other related dispute between the petition and the interested party over the said subject matter. As a result it has culminated into institution of several suits being ELC No 405 of 2017, No 9 of 2021 and the instant case among others. The situation was worsened by the Government upon it compulsorily acquiring some part of these parcels for public use being the construction of the Standard Gauge Line and pursuant to the provisions of the article 40 (1) (2) and (3) of the Constitution of Kenya. Indeed, the 1st respondent was at the verge of making the payments as compensation as provided for by law. Although the intended interested party is the petitioner in ELC No 405 of 2017, he also filed an application to be joined as an intended interested party in the instant case. He further wants this suit to be stayed awaiting the hearing of the ELC No 405/2017. They argue they would suffer prejudice on compensation if they were not granted an opportunity to be heard.
26. Juxtapose, on the other hand the petitioner has vehemently opposed the said notice of motion application on grounds that its afterthought being brought after a lapse of close to three years after the court had directed them to make a substantial formal application, hence it suspect and malicious. In any case they are coming to the matter too late in the day when the pleadings have already closed and the parties were at the stage of filing their written submissions and await for judgment on the ELC Petition No 50 to 53 of 2020. They do not see any value the interested party are coming to add in the mater apart from merely opening up fresh cause of action and hence delaying the matter even further yet their advocates had always been aware of the matter. That is adequate facts for now.
27. Now turning to the issues at hand under this sub - heading. The concept and substratum of joinder of parties is solely governed by the provisions of order 1 rules 1 to 25 of Civil Procedure Rules, 2010. The Black Law Dictionary 9th Edition defines

“interested party” as a party who has a recognizable stake and therefore a standing in a matter”

Similarly, under rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and procedures Rules, 2013 (hereinafter referred to as “the Mutunga Rules”) provides it thus:-

“.....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 directly involved in the litigationOne 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 himself or she herself appears in the proceedings and champions his or her cause

Also refer to the case of HCCC Civil Suit No 115 of 2019 - *John Harun Mwau v Simone Haysom & 2 others; Attorney General & 2 others (Interested Parties)* [2021] eKLR.

28. It is trite law that on the decision for joinder, court has discretionally power to do so. Which means it should be applied capriciously and judicially without any biases or abuse of the power. What to be considered for joinder are the following facts. Firstly, it is based on the principles of natural Justice – not to be condemned unheard and accorded an opportunity to be heard (principle of *audi alteram partem*).

Secondly, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transactions alleged to exist – whether jointly or severally or in the alternative or in the alternative where of such persons brought separate suits any common question of law of fact would arise – order 7 rule 9 of *Civil Procedure Rules, 2010*.

Suffice to say, a court even on its own motion (*suo moto*) add a party to the suit of such a party is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore joinder of parties is permitted by law and it can be done at any stage of the proceedings.

29. But, joinder of parties may be refused where such joinder would lead into practical problems of handling the existing cause of action together with the one of the party being joined, is unnecessary or will just occasion unnecessary costs on the parties in the suits – or just being a nuisance on rocking the boat from the bottom. In other words, joinder of parties would be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in joinder of parties would be a common question of fact or law would arise between the existing and the intended parties. (See *Lucy Nangari Ngigi & 128 others v National Bank of Kenya Limited & another* [2015] eKLR

30. The above illustrated legal litimus test on joinder is what I shall apply to the instant case. In consideration and application of all the facts stated here, this court strongly holds that although the petitioner/respondent has made such a strong opposition to the effect that the proposed interested party should not be joined in this proceedings and adduced numerous cogent reasons to that effect, this honourable court directs on its own motion – “suo moto” and by invoking the inherent powers (the overriding principles/oxygen rule) of this court vested on it under the provisions of sections 3 (1) and 13 (1) of the *Environment and Land Court Act*, No 19 of 2011; section 150 of the *Land Act*, No 6 of 2012 and section 101 of the *Land Registration Act*, No 3 of 2012 and article 159 (1) and (2) of the *Constitution of Kenya* feels it imperative to have the proposed interested party should be joined in the petition as a respondent.

31. By all means, its addition is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.

In the instant case, the intended interested party who has had a boundary dispute with the petitioner had always wanted to be joined in this matter. Indeed onthey made an oral application wanting to be joined. However this court directed them to file a substantive application for joinder. The grave mistake they committed was to take a quiet position until after three years when they came back in full



force through a notice of motion application. As the petitioner puts it this needs to be looked at with abundant caution. Is there malice or bad intention an abuse of the due process concerning to a matter when it is at the verge of awaiting for submissions and judgment date? The petitioner has also question as to why they never considered joining the petitioner in the ELC No 405/20-17 as a necessity to have the whole question tackled and settled once and for all. For these reasons, the honourable court is fully satisfied that the proposed interested party deserves to be joined in this proceedings thereof.

Issue No (b). Whether The Intended Interested Party Is Entitled To The Prayers Sought For Joinder And Sub - Judice For Stay Of This Suit Under Section 6 Of The Civil Procedure Act, Cap 21 Of The Laws Of Kenya

32. Under this sub – heading and based on the reasoning stated above, the honourable court is convinced that the proposed interested party is entitled to the orders sought from the filed application. In saying so, the honourable court has been informed that the petitioner and the proposed interested party were both the absolute owners to all that parcel of land known as plot Nos MN/VI/909 and MN/VI/910 and which were adjacent to each other. Indeed, from the submissions, the petitioner was seeking for orders for declaration that was entitled to just compensation for a sum of Kenya shillings fourteen million four fourty two thousand nine hundred and ninety five (Kshs 14,442,995/=) in interest and general damages. According to the proposed interested party, this orders being sought by the petitioner was very substantive in nature and once granted they would deprive the intended interested party of their right to compensation of its property leaving the applicant to suffer irreparable. He urged court to grant the intended interested party an opportunity to be heard to avoid their fundamental right to property and arbitrary deprivation of the same from being breached under the provisions of article 40 of the Constitution of Kenya hence it was only fair and just to let the intended interested party be joined as a party to the suit.
33. Indeed, this honourable court concurs with the submission by the intended interested party to the effect that it would be imperative to be joined in this matter for avoidance of obtaining conflicting decisions over the same subject matter likely to embarrass this court. The honourable court would wish to be addressed on the alleged consent order ostensibly duly executed by the parties herein on December 13, 2017 and its legal imports and implication or connotation at the time of delivering the judgment herein. Further, this court is still anxious on the matters arising from the letter under reference No DCI/1B/LFIU/SEC/4/4/7/VOL VII/64 dated April 14, 2021 addressed to the office of the Attorney General by one Mr John N Kariuki on behalf of the Director of Criminal Investigations that the properties by the Intended Interested Party – MN/VI/5141, MN/VI/5153 and MN/VI/5154 respectively were all acquired through blatant fraud and/or illegalities since they all did overlap with plot Nos MN/VI/909 and MN/VI/910 respectively which were both private lands.
34. The court finds it interesting that the petitioner has only opposed the interested party from coming to the suit based on matters of procedure and mainly the laches, delay it has taken in considering the courts direction, and the letter by the DCIO to the Attorney General that the land having been acquired fraudulently which are matters of facts to be proved in full trial. It does not deal so much on the substantive issues on the ownership and the boundary dispute of the land between the petitioner and the intended interested party.
35. On its own motion, the petitioner has reiterated numerous time the desire by the intended proposed party to be joined in the matter. In actual fact on such occasion in the year 2019, while making an oral application, court saw it fit to guide them to instead make a formal application rather than an oral one. Court may have perceived the need to decipher and appreciate their legitimate claim. It was unfortunate they never took up the olive branch offer as extended by court. Additionally, the



honourable court finds the suggestions by the petitioner that the proposed interested party should have considered applying to enjoin the petitioner in ELC No 405 is rather compromising on principles and core value, as one would ask them what is good for the goose is good for the gander – why not the vice versa. For these reasons and the all the cited laws hereof we see the need for the interest of justice, equity and conscience to consider allowing the notice of motion application dated November 1, 2022.

ISSUE No. (c): Who will bear the costs for this proceedings herein

36. It is trite law that costs is a discretionary issue. The provision of section 27 of the *Civil Procedure Act*, cap 21 and numerous decisions hold that Costs follow the events. In this case, the events mean the circumstances and the results of each case.

In the instant case, though the proposed interested party has succeeded in being joined in this petition, it is just, fair and equity that each party bears their own costs.

V. Conclusion and Disposition:-

37. Ultimately, after the indepth analysis of the above framed issues herein I now hereby wish to make the following directions/orders:-

- a. That the notice of motion application dated November 1, 2021 by the interested party be and is hereby allowed upon fulfillment of all the prerequisite conditions.
- b. That the intended interested party shall be joined as a 2nd respondent.
- c. That an order be and hereby grant the petitioner to file an amended Petition within the next seven (7) days of this ruling.
- d. That an order be and hereby grant the intended interested party files their replies to the petition within the next (14) days.
- e. That the petitioner be and is hereby granted liberty to file supplementary affidavit, any other documents and/or written submission within the next fourteen (14) days from the date of this ruling.
- f. That the 1st and 2nd respondents be and are hereby granted seven (7) days to file and serve their written submissions.
- g. That for expediency sake and interest of natural justice, equity and conscience, all the parties in this matter are henceforth barred from filing any further interlocutory applications whatsoever and await for the judgement to be delivered on June 22, 2022 by virtual means thereof.
- h. That an order be and is hereby made to the effect that this matter did not offend the doctrine of “sub – judice” to that of the existing suit – ELC (Mbsa) No 405 of 2017 contrary to the provision of section 6 of the *Civil Procedure Act*, cap 21.
- i. That each party to bear its own costs.

RULING READ, SIGNED AND DELIVERED AT IN COURT THIS 9TH DAY OF MAY, 2022.

HON JUSTICE LL NAIKUNI

(JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA



In the presence of:

Mr Willis Rabongo, court assistant.

Non attendance for the petitioner.

Non attendance for the respondents.

Mr Mayieka holding brief Mr Omwenga Advocates for the intended interested party.

