



Afro Mark Solutions Limited v Land Registrar Kwale; Kahia Transporters Limited (Intended Interested Party) (Environment & Land Petition 15 of 2021) [2022] KEELC 4894 (KLR) (6 June 2022) (Ruling)

Neutral citation: [2022] KEELC 4894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 15 OF 2021**

**AE DENA, J
JUNE 6, 2022**

BETWEEN

AFRO MARK SOLUTIONS LIMITED PETITIONER

AND

LAND REGISTRAR KWALE RESPONDENT

AND

KAHIA TRANSPORTERS LIMITED INTENDED INTERESTED PARTY

RULING

1. The subject of this ruling is the Notice of Motion application dated February 15, 2021. The applicant mainly seeks for orders that Kahia Transporters Limited be joined in this petition as the 2nd defendant. The application is supported by affidavits sworn by Osman Ahmed Kahia sworn on February 15, 2021 and September 28, 2021. It is averred that the property which is the subject of this petition Title No 32095 belongs to the applicant Kahia Transporters Limited. That the same was legally acquired by the applicant and hence they should be allowed to defend the suit as 2nd defendants to allow all parties involved to participate. The applicant exhibited a copy of the Certificate of Title for plot no. 32095 lease and deed plan to previous owners who transferred Title No 32095 to the applicant.

The Response

2. The application is opposed by the Petitioner vide grounds of opposition filed on February 9, 2021. It is urged that the application is incompetent and incurably defective since the suit property No. 32095 referred to by the applicant is not the subject matter of this petition and that the applicant had not disclosed any interest. That the application has been brought too late in time and the proposed joinder 2nd respondent did not meet the threshold of a necessary party to these proceedings as set out in [Civicon](#)



Limited v Kivuwatt Ltd & 2 others [2015] eKLR. In addition, the petitioner also filed affidavit sworn on October 7, 2021 sworn by Abdullahi Billow Mohamed a director of the petitioner. It is averred that the applicant cannot insist on retention of a caution they did not lodge and should apply for their own caution through the requisite procedure provided in law and not through the back door in the current application.

3. The respondent, Land Registrar Kwale filed grounds of opposition dated March 24, 2022. It is contended the application is misconceived, frivolous, vexatious and an abuse of the process of the court as the title deed indicated by the applicant is different from the suit property herein. Reliance was placed on the affidavit filed on February 11, 2021 sworn by Kennedy Githunguri Njenga the Senior Deputy Director of Land Adjudication and Settlement and the County Land Management Coordinator in response to the petition. The deponent gives the descriptive aspect of the suit land and in accordance with section 5 of the *Land Adjudication Act*. It is averred that the land adjudication process was conducted properly and in accordance with the provisions of sections 6, 23,24 and 25 of the *Land Adjudication Act*. That the title deeds for the area were prepared after the adjudication process and a certificate of finality issued and the petitioner was a beneficiary of the adjudication and was issued with title No. Kwale/Maji Ya Chumvi/2. It was later discovered the dates of issue had errors and the titles were recalled for rectification which did not invalidate the adjudication process.

Submissions Of The Parties

Applicants submissions

4. The applicant filed its submissions on March 23, 2022. Mr. Asige representing the applicant pointed that it was sought to have the applicant enjoined pursuant to the provisions of rule 7[1] of the *[Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013*-The Mutunga Rules 2013 which state; -

7[1] a person may with the leave of the court, make an oral or written application to be joined as an interested party

7[2] a court may of its own motion join any interested party to the proceeding before it.

5. Counsel urged that it had been demonstrated that title No 32095 is the applicants property by way of the certificate of title confirming that the property is registered in the applicants name. That the topo cadastral survey report exhibited showed that land parcel No Kinango/Maji Ya Chumvi/2 was the suit property herein and had encroached/overlapped on the applicants parcel of land thus Title No 32095. According to Counsel any determination on the petition will directly affect and have an impact on the applicant's rights to ownership of its property. That the applicant was therefore entitled to be enjoined and be allowed to safeguard its property right. That the Mutunga rules overriding objective is to facilitate access of justice for all persons as required under article 48 of *the Constitution*. It was emphasized that this court has unfettered jurisdiction to allow the application as provided for under article 259[1] of *the Constitution*. The court was urged to allow the application as prayed with costs.

The Petitioners Submissions

6. The petitioner through Mr. Jengo advocate filed submissions on March 25, 2022. It is submitted that ownership of plot No. 32095 and CR 72836, the alleged overlap and or encroachment between title number 32095 and Kinango/Maji Ya Chumvi/2 are not pleaded at all in this petition which was centered on a restriction placed on the petitioner's land Kinango/Maji Ya Chumvi/2. The restriction had allegedly been placed without giving the petitioner a hearing and hence was in breach of provisions of the Fair Administrative Actions Act and article 47 of *the Constitution*.



7. It was contended that the issues intended to be raised in the petition by the applicant could not be adjudicated upon in a constitutional petition but through a suit commenced by plaintiff where evidence is tested in cross examination.
8. It was further submitted that the applicant had not satisfied the principles set out for a party to be enjoined in proceedings as an interested party as was set out in *Francis Kariokor Muruatetu & another v Republic & 5 others*. It was submitted that the applicant had not shown how removal of the restriction will affect its alleged ownership of the land or overlapping and encroachment on its parcel. That the issues raised in the application by the intended interested party are remote to the cause of action and not proximate to the issue of the restriction placed on the land. It was also submitted that the interested party cannot introduce new issues into a matter. That the issues must remain as set out in the petition and an interested party must restrain themselves in addressing issues as laid in the instant pleadings and not ventilate other issues. Reliance was placed on the *Muruatetu Case supra*. The court was urged to dismiss the application.

Respondents Submission

9. Mrs Waswa State Counsel appearing for the respondent relied on the grounds of opposition dated March 24, 2022 and the replying affidavit of Kennedy Githunguri Njenga the Senior Deputy Director of Land Adjudication and Settlement and the County Land Management Coordinator.

Analysis And Determination

10. I have considered the application, the responses and submissions of the parties and pleadings. The main issue for determination is whether the orders sought in the application should be granted.
11. I will first put matters into contest for a clear view of the background of this application. It is the petitioner's case that on December 17, 2018 the Land Registrar notified the petitioner of a restriction placed on the title Kinango/Maji Ya Chumvi/2 and also sought for surrender of the said title without the petitioner's knowledge or being heard also denying the petitioner the use of its land. That in so doing the Land Registrar had acted contrary to the provisions of the law on right to information, ownership of property and fair administrative action. The reliefs sought in the petition are for a declaration that the petitioner's rights under article 35, 40, 47 and 50 of *the Constitution* have been violated by the Land Registrar. The petitioner also seeks a declaration for removal of the restriction placed on title No Kinango/Maji Ya Chumvi/2, an order of certiorari quashing the Land Registrar's letter dated 17th December 2021 which placed the said restriction and lastly an order of mandamus compelling the Land Registrar to disclose information leading to lodging of the said restriction.
12. The application is brought under the provisions of Order 1 Rule 10 of the *Civil Procedure Rules 2010* and sections 1A, 1B and 3A and 6 of the *Civil Procedure Act*. However, from the plaintiff's submission the plaintiff also seeks to be joined as an interested party under rule 7(1) of the *Mutunga Rules*. I will therefore approach it from both perspectives to ensure a final determination on the issue of joinder.
13. Order 1 Rule 10 (2) of the *Civil Procedure Rules* provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant,



or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

14. The above provisions have also been explained further in *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matagaro & Ezekiel Misango Mutisya* [2014] eKLR, as follows; -

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.” (emphasis is mine).

15. In addition in the case of a defendant there must be a relief flowing from that defendant to the plaintiff and the ultimate order or decree cannot be enforced without his presence in the matter see.... *Peter Irungu Wainaina v Chege Njibia & others* [2018] eKLR while quoting Havelock J in the case of *Technomatic Limited T/A Promopack Company v Kenta Wine Agencies Limited & another* [2014] eKLR

16. Is the proposed 2nd defendant/respondent a necessary party to this suit in that its presence will assist the court to enable a complete determination of the issues in contest? The petitioner seeks a declaration for removal of the restriction placed on title No Kinango/Maji Ya Chumvi/2, an order of certiorari quashing the Land Registrar’s letter dated December 17, 2021 which placed the said restriction and lastly an order of mandamus compelling the Land Registrar to disclose information leading to lodging of the said restriction. The burden lies squarely on the shoulders of the Land Registrar Kwale County to explain how the said restriction was placed being the only person conferred with the powers under statute to place such restrictions on a title. I do not see how the applicant would help the court in explaining these unless the said applicant was the one who applied for the said restriction to be placed. No evidence has been placed before this court by the applicant in this regard. Moreover, the reliefs sought if granted are enforceable only as against the respondent land registrar who is properly the main respondent in the petition. It is my finding that the applicant is not a necessary party in this petition.

17. On the proposed joinder as interested party I will first look at the definition of who an interested party is. Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* defines an interested party thus; -

“Interested party” means 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’

At the outset drawing from by previous findings I find no duty in the proceedings that would attach to the proposed interested party in view of the fact that only the land registrar can explain and provide the information required.

18. The criteria for joining an interested party in a suit is enunciated in *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR cited by Mr. Jengo. The applicant must demonstrate their personal interest or stake which must be clearly identifiable, proximate enough, show proximate prejudice to be suffered in case of non-joinder and the applicants proposed submissions, their relevancy and that the same are not merely a replication of what the other parties will be making before the



court. Justice Munyao Sila expounded this further in *Skov Estate Limited & 5 others v Agricultural Development Corporation & another* [2015] eKLR when he stated as follows:-

19.

- a. “In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.
- b. In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.”

20. I’m persuaded and guided by the criteria set and as elaborated in the above case this court pondered over the nexus and how a determination in favor of the petitioner will affect the applicant. What I understand the applicant to be saying is that the suit property Kinango/Maji Ya Chumvi/2 has overlapped into the applicants plots No 32095 which he legally acquired more less becoming one and the same. In other words, Kinango/Maji Ya Chumvi/2 is just but a shadow if I may state so. A look at the petition herein confirms that the reliefs sought are not on ownership of the suit parcel or issues to do with its boundaries. The prayers are for removal of a restriction allegedly placed against the suit property without the petitioner’s knowledge or affording him a hearing before the same were lodged. It is alleged that the petitioner’s rights were infringed upon and more especially their right to information as to why the same was placed and the right to be heard before placement was effected. To me there are two titles and prima facie they cannot be said to be one suit land until otherwise fully determined. In my view the applicant has not demonstrated how removal of the said restriction would affect them and their ownership of their property as alleged. Moreover, procedures are available under the *Land Registration Act* for the applicant to protect their rights by lodging their own restriction.

21. The instant suit is a constitutional petition, it therefore begs the question as to whether the issues raised by the applicant satisfy the threshold of what constitutes a constitutional petition as per the principle established in the case of *Anarita Karimi Njeru v The Republic* [1979] eKLR which principle was later restated by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. Encroachment falls under the establishment of boundary disputes and so is overlapping, the same are provided for under land statutes and do not qualify to be resolved within a Constitutional petition. The same applies to issues of ownership where it has been held that



the such matters are best determined in suit commenced by way of plaint where the evidence can be tested by way of cross examination. I also agree with Mr. Jengo in this regard.

22. The upshot of foregoing is that I have found no justification to join the applicant either as respondent defendant in this suit or as a interested party. The application dated February 15, 2021 is `not merited and is therefore dismissed with costs to the petitioner.

DELIVERED AND DATED AT KWALE THIS 6TH DAY OF JUNE 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Jengo for the Petitioner

Mrs Waswa for the Respondent

Mr. Asige for the applicant

Mr. Denis Mwakina- Court Assistant.

