



Bororo v Arika & another; Arika (Interested Party) (Environment and Land Appeal 5 of 2021) [2022] KEELC 101 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELC 101 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 5 OF 2021**

JM ONYANGO, J

JUNE 2, 2022

BETWEEN

DAVID BORORO APPELLANT

AND

LENNOX GEORGE MOKAMBA 1ST RESPONDENT

EVANS MOSETI ARIKA 2ND RESPONDENT

AND

EVANS MOSETI ARIKA INTERESTED PARTY

RULING

1. What is before me is the Notice of Motion dated 18th February, 2022 filed by the Interested Party seeking to be joined to this Appeal as an Interested Party. The main ground on which the application is premised is that he bought a portion of land parcel number Nyaribari Chache/B/B/Boburia 1973 from the Respondent's late father, George Harun Mokamba and that the Respondent has refused to transfer the said title to the Interested Party.
2. The application is also based on the Applicant's Supporting Affidavit sworn on the 18th February, 2022 in which he depones that he was not aware of the suit in the Chief Magistrate's Court otherwise he would have applied to be joined to the suit.
3. He contends that he bought a portion of the suit property measuring 50 feet by 50 feet on 23.3.2000 from George Mokamba Harun who was the father of the Respondent. He depones that he subsequently took possession of the suit property but soon after the demise of the vendor, the Respondent chased him and the Appellant away for the land and demolished his structure.
4. He further depones that on 12.5.2000 and 12.2.2017 the Respondent gave his written commitment to transfer a portion of the suit property to the Interested Party, but he has failed to do so despite being



paid a further sum of Kshs.20,000. He prayed that he be joined to the Appeal to enable him propagate his claim together with the Appellant as their claims are similar.

5. The Respondent resisted the application through his Replying Affidavit sworn on the 16th March, 2022 in which he contends that the Applicant is a total stranger to him who has not demonstrated how would be affected by the decision of the court. He contends that he would be prejudiced if the Applicant is joined to the suit at the appellate stage as the Applicant had the opportunity to participate in the proceedings in the lower court if he so wished.
6. He further contends that the court cannot order a party to be joined to a concluded suit unless the judgment is set aside to allow for the participation of the party to be joined.
7. The application was disposed of by way of written submissions and both parties filed their submissions which I have considered.

Analysis and Determination

8. The only issue for determination is whether the Applicant should be joined to the Appeal as an Interested Party.

The law on joinder of parties is set out under the provisions of Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) which provides as follows:

“ 10 (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

9. The court therefore has a discretion to add a party whose presence is necessary to assist the court in adjudicating all the questions involved in the suit even in the absence of an application by either of the parties. The emphasis here is whether that party will enable the court adjudicate all the issues in the suit. See [Pius Mbugua Nguji & 2 others v Chief Land Registrar & 7 others](#) [2018] eKLR.
10. In the case of [Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General](#) (2017) eKLR the court held as follows:

“The elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:

- a. The intended interested party must have an identifiable stake
- b. Or legal interest
- c. Or duty in the proceedings

...A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally, that is by curtailing his legal rights. In determining whether or not an applicant has legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject matter of the action if those rights could be established. It is apparent that a party



claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit”

11. In the case of *JMK v MWW & Another* (2015) eKLR the Court of Appeal held thus:

This Court adopted the same approach in *Central Kenya Ltd. v. 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.”

12. 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. Sarkar’s Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings.

13. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our *Civil Procedure Rules*, in *Tang Gas Distributors Ltd v. Said & Others* [2014] E.A 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

14. Further, in the case of *Absolom Opini Mekenye v James Obegi* (2018) eKLR Mutungi J held as follows:

“In the present matter, the Plaintiff sought the joinder of the 1st, 2nd and 3rd Interested parties after the Court had heard the case and rendered judgment. A party under Order 1 Rule 10(2) of the *Civil Procedure Rules* can either be joined as a Plaintiff or Defendant. It is not difficult to appreciate why the rule makes that provision. If a party is being enjoined, it would be because either he is making a claim, in which case he would be a Plaintiff or because someone is making a demand against him and wants some relief from him in which case he would be enjoined as a Defendant. The rule has no provision for a party being enjoined as an interested party. What would be the role of such a party in the suit?”

15. Order 1 Rule 10(2) in my view envisages a situation where the suit has not been heard and determined and that is why it provides for joinder of a party either as a Plaintiff or Defendant or a party whose presence before the Court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. (Emphasis added) Where a judgment has been entered, it is my considered opinion that a party cannot be enjoined to the proceedings unless the judgment is either revived and/or set aside in such manner as to accommodate the participation of the enjoined party.

16. Similarly, in the case of *Moses Wachira v Niles Bruel & 3 Others* (2014) eKLR the Court held that:

“However assuming that the proposed interested party had a good title, the question that arises is whether or not it would have successfully applied to be enjoined as an interested party in the proceedings herein. Notably, the final judgment was delivered herein by



Okwengu J on 30th March 2011. That means that all the issues that had been placed before the Court had been determined as a finality. Any other issues touching on the said aircraft could only be brought under a fresh cause of action and this is of course provided that the same did not touch on the issues had been placed before the Court or those that were substantially in issue and finally determined. Essentially all doors were closed to any other parties in the proceedings herein after the judgment was delivered by Okwengu J. (emphasis supplied)”.

17. Back to the instant case, the Applicant seeks to be joined to the appeal after the issues between the Appellant and the Respondent have been determined by the subordinate court. The said judgment has not been reviewed in a manner that would accommodate his participation in the appeal. The appeal is in respect of the issues that were determined between the Respondent and the Appellant and there is no compelling reason why the Applicant should be joined to the appeal as he has the option of instituting a separate suit against the Respondent subject to the Limitation of Actions Act.
18. In premises of the foregoing, the application lacks merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF JUNE, 2022.

J.M ONYANGO

JUDGE

