



**Ruda v County Government of Mombasa; M’bwana & another (Proposed Interested Parties); Kalama (Proposed Appellant) (Environment & Land Case 279 of 2016) [2022] KEELC 2535 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2535 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 279 OF 2016**

**LL NAIKUNI, J**

**JULY 5, 2022**

**BETWEEN**

**HARJI GOVIND RUDA ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... DEFENDANT**

**AND**

**MICHAEL THOYA M’BWANA ..... PROPOSED INTERESTED PARTY**

**ABDULLAHI ABDULRAHIM MOHAMED .. PROPOSED INTERESTED PARTY**

**AND**

**SAUMU NDUKU KALAMA ..... PROPOSED APPELLANT**

**RULING**

**I. Introduction**

1. For its determination before this Honorable Court is a Notice of Motion application 25<sup>th</sup> November 2021 filed by the Intended Interested Parties/Defendants. It is brought under the provisions of Articles 50(1) and 159 (2)(d) of *the Constitution* of Kenya, 2010 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010.

**The Interested Parties/Defendants’ case**

2. The Applicants herein seek to be enjoined in this suit as Interested Parties/Defendants. The Notice of Motion application by the Interested Parties/Defendants is founded on grounds, testimony and averments in the 6 Paragraphed Supporting Affidavit of Michael Thoya M’bwana, the 1<sup>st</sup> Interested Party/ Defendant sworn and dated on 25<sup>th</sup> November 2021 and the annexure marked as “MTM –



1”. He deponed that the proceedings and pleadings in this suit involve the encroachment of a road reserve by the Plaintiff as premised by the Enforcement Notice dated 13<sup>th</sup> July 2016. The proceedings and decision of the suit directly affect the Intended Interested Parties/Defendants as members of the public who utilize the encroachment/block road. The joinder of the Intended Interested Parties/Defendants in this suit would shed more light on the great prejudices the public suffer due to the illegal encroachment of the road reserve. The outcome of this suit directly affect the lives and livelihood of the Intended Interest Parties/ Defendants. They stated that no prejudice would be suffered by the Plaintiff if the Intended Interested Parties/Defendants were enjoined in this suit.

## II. The Plaintiff’s case

3. The application was opposed by the Plaintiff through a 6 Paragraphed Replying Affidavit dated 8<sup>th</sup> February 2022 and sworn by Harji Govind Ruda the Plaintiff, herein. He stated that he was the registered owner of all that parcel of land known as Plot No. MI/XXVI/866 situated on Mombasa Island and on which was built a block of residential rental flats. He deponed that the application for joinder was an afterthought. It was only meant to scuttle the fair and expeditious hearing of this suit as it was filed way back in 3<sup>rd</sup> October 2016. That the central issue in dispute was one of ownership of the subject plot aforementioned and the proposed interested party was not a necessary party to these proceedings as the suit was primarily a dispute regarding ownership between the Plaintiff and Defendant. He further deponed that the proposed interested party’s presence in these proceedings was not necessary to assist the court to effectively adjudicate upon and settle all questions involve and that the interested parties have not demonstrated with any clarity whatsoever what interest they have in the suit property save to allege that he utilizes the purportedly encroached block road. It was the Plaintiff’s averment that *the Constitution* of Kenya, fourth schedule, provided the County Government with wide powers to protect the public interest if the same was under any threat and no justifiable ground had been given by the proposed interested parties as to why they wished to usurp the Defendants constitutional and statutory mandate.
4. He deponed that it is trite law that for the Interested Party to be enjoined as a Defendant there ought to be a Plaintiff or Plaintiffs who were seeking such relief from such a Defendant and/or there was a Defendant who desired the Party to be enjoined as a Co-Defendant to enable them plead their defence. No such Application to that effect had been made either by the Plaintiff or Defendant to enjoin the Proposed Interested Parties. The Plaintiff further averred that the Applicant had not shown with any measure of clarity how he stood to be prejudiced by any orders that may be made regarding the Plaintiff’s suit property. That the enjoinder of the proposed interested party as a Defendant would only serve to obfuscate matters as he had failed to disclose how his being enjoined in the suit would assist the court in effectively adjudicating the issues in the main suit.
5. In the present suit, the Plaintiff vide a Plaint dated 3<sup>rd</sup> October 2016 and filed the same day stated that he was the registered owner of all parcel of land known as Mombasa/block XXVI/866 measuring approximately 0.0765 Hectares under a certificate of lease held for a revisable term of 99 years commencing on the 01/12/1995 and which certificate was issued on the 21/08/2009. After the acquisition, the Plaintiff obtained all lawful licenses and permissions to develop he suit property after paying all the requisite, due rates and charges with the latest rates payment request dated the 29<sup>th</sup> January, 2016 for the sum of Kenya Shillings Twenty Four Thousand Four Hundred & Eighty (Kshs. 24,480/-) having been duly settled. That subsequently through a public notice issued by the National Land Commission of their intent to review the Grants and Dispositions of the public land and the concerned parties invited to attend a public hearing to give their presentation and defend their mode of acquisition of their titles and or grants. The Plaintiff received *vide* an Enforcement Notice dated 13<sup>th</sup> July 2016, the Defendant’s County Director of Physical Planning informing him that the suit property



which comprises of a block of residential flats put up at a colossal cost was built on an alleged road reserve and that the Plaintiff is required to remove the existing building at his own cost before the expiry period which had been set for the 13<sup>th</sup> October 2016. The Plaintiff in the suit seeks for orders, inter alia:

- a) A declaration that the Plaintiff herein has a proper title to the suit property and that the same does not comprise of a road reserve.
- b) An order directed at the Defendant's relevant officer(s) to cancel and or revoke the Enforcement Notice dated 13<sup>th</sup> July, 2016.
- c) An order of injunction, barring the Defendant, either by herself, her officers, servants, employees and or any other persons acting under her directions and or Orders from either entering, demolishing, alienating and or in any other way interfering with the Plaintiff's peaceful possession and occupation of the suit property herein to wit plot No. MI/XXVI/866 and all the appurtenant thereto.
- d) Costs of the suit be borne by the Defendant.

### III. SUBMISSIONS

6. On 10<sup>th</sup> February 2022 while all parties were present in Court, the Honorable Court directed that the Notice of Motion be canvassed by way of written submissions. Pursuant to that they all complied and on 22<sup>nd</sup> March 2022 the ruling dated was reserved to be 31<sup>st</sup> May 2022.

#### A. The Interested Parties/Defendants' written submissions

7. On 1<sup>st</sup> March 2022, Learned Counsel for the Interested Parties/Defendants the law firm of Mwawasaa & Company Advocates filed their written submissions in support of the filed Notice of Motion. Mr. Mwanawasa Advocate submitted that the Interested Parties/Defendants are seeking to participate in this suit and the grounds are well set out in their application dated 25<sup>th</sup> November 2021.
8. The Learned Counsel submitted the Interested Parties/Defendants guided the Court on the case of "*Francis Kariuki Muruatetu & Another – Versus - Republic & 5 Others* (2016) eKLR where the learned judge stated that the following issues ought to be considered in an application for an interested party:
  - i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
  - ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
  - iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. it should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.
9. The Learned Counsel submitted that the arguments made in their application were clear that the issue was about a Public access road. The intended interested parties were members of the public as the interest is identifiable and proximate to the intended interests who use the road.



10. The Learned Counsel submitted that the prejudice they will suffer in case of non - joinder was that they would be denied a chance to participate in the determination of a matter which affects their right of Public access road which if right was denied would directly affect the Public.
11. The Learned Counsel submitted that the Interested Parties in the suit would bring out in this suit the real and actual prejudices faced by the public by blocking of the Access road by the Plaintiff. The Interested Parties would bring to the court the day to day challenges they would suffer due to blocking of the Access road. They were the users of the access road.
12. The Learned Counsel concluded that the Application be allowed and the Applicants be added as Interested Parties.

#### **B. The Plaintiff's Written submissions**

13. On 25<sup>th</sup> February 2022 the Learned Counsel for the Plaintiff filed his written submissions in opposition of the Notice of Motion application. The Learned Counsel submitted that the issue for determination was whether the Applicants had merited to be enjoined in the suit. He relied on the case of "[\*Sbirviling Supermarket Limited – Versus - Jimmy Ondicho Nyabuti & 2 Others\*](#) (2018) eKLR the court had the following to say:

“Whereas under the Civil Procedure Rules it is apparent that a party ought to be enjoined in proceedings either as a Plaintiff or a Defendant, the applicant in the instant matter merely applies to be enjoined as an interested party. The Civil Procedure Rules have no provision for a party to be enjoined as an interested party and thus an issue does arise as what role an interested party would play in a civil proceedings and what the nature of pleadings by such a party would be. In my view, a party in any civil proceedings before the court must either be a Plaintiff and/or a Defendant and thus for a party to be enjoined must either join the suit either as a Plaintiff and/or a Defendant. If a party is joined as a plaintiff, such a party of necessity must be seeking some form of relief from the defendant or some of the Defendants and if as a Defendant, there ought to be a Plaintiff or Plaintiffs who are seeking a relief from such a Defendant and/or there is a Defendant who desires the party to be enjoined as a co - Defendant to enable them to plead their defence. In other words, the Plaintiff in the suit and/or a defendant in the counterclaim in the suit must have sought orders which if granted would directly affect the interest of the applicant on the party sought to be enjoined by an already existing party. The Applicant must therefore demonstrate he has an interest in the subject matter of the suit and/or he stands to be affected by any orders that may be made in the suit regarding the subject matter. Alternatively, the applicant must show he is a necessary party and his presence in the suit is necessary to enable the court to effectually and completely adjudicate and settle all the issues in the suit. If the application is by an already existing party, the applicant must equally demonstrate how the person sought to be enjoined is interested in the suit and how he stands to be affected by any orders that the court may make in the matter.

14. The Learned Counsel submitted that in this instant Application the Applicant in his grounds for joinder was not claiming interest in PLOT NO. 866/XXVI/MI Kizingo the suit property. The Applicant therefore did not have an interest in the subject matter of the suit. Equally, he had not demonstrated how he stood to be affected by the orders that may be made by this Honourable Court regarding the suit property. The applicant claimed that his livelihood would be affected by the outcome of this suit but failed to demonstrate how exactly that would be the case. The Learned Counsel submitted that there was no reason from the face of the Applicants Application dated 25<sup>th</sup> November



2021 to warrant the Court to deem them as necessary parties for the reason that the purported issues of encroachment raised thereto were not new issues before this Court and which issues he submitted were well within the realm of the County Government, the Defendant, by dint of the fourth schedule of *the Constitution* of Kenya.

15. The Learned Counsel cited the case of “*Jacinta Wanjiru Mwengwa – Versus - Samwel Theuri & 3 Others* (2019) eKLR” the court clarified the principles to be considered for one to be enjoined as a Defendant:

“With regard to Order 1 Rule 10 (2), it will be noted that the court has discretion to order the name of a person to be removed from proceedings or to be added to the proceedings, either as Plaintiff or Defendant, or the joinder of a person whose presence the court feels is necessary for the determination of all questions in the suit. Now, the court will only enjoin a person as Defendant if the court feels that the Plaintiff has a claim against such person, and as I have explained above, you cannot be defendant if there is nothing that the Plaintiff has against you. Before giving the order to enjoin a person as Defendant, the court must thus be satisfied that the Plaintiff has a claim against such person, for you would not wish for a situation where a person is enjoined as defendant, but there is really nothing that the Plaintiff has against such person. It is the same thing where a person is enjoined as Plaintiff. The court must be satisfied that such person has a claim similar to what the existing Plaintiff has against the existing Defendant”.

The Learned Counsel submitted that in the instant suit it was not in dispute that the Plaintiff had no claim against the Applicant. The Learned Counsel invited the court to note that per the record, the Applicant as well, had no claim against the Plaintiff to merit their joinder to this suit as Defendants.

16. The Learned Counsel submitted the Applicants’ had not clearly demonstrated that the current suit before this Court affects them directly and that they were not necessary parties to this suit either as Defendants or Interested Parties. They relied on the case of “*Joseph Leboo & 2 Others – Versus - Director Kenya Forest Services & Another* (2013) eKLR, the court had the following to say regarding the joinder of one as a Defendant:

“Where there is an application for a person to be joined as Defendant, and the Plaintiff objects to such joinder, the court should even be more cautious before making an order for such joinder. It ought to be clear that the remedy sought by the Plaintiff in the proceedings, actually ought to be directed against the party sought to be enjoined, or that the remedy the Plaintiff seeks cannot be granted, or the proceedings cannot be properly conducted without the person sought to be enjoined being a party”.

The court then went to pronounce itself on the principles behind enjoining a party as an interested party, thus:-

“In my view, the joinder of a person as an interested party ought not to be as stringent as the joinder of a person as a Defendant. So long as a person can demonstrate that he has a legitimate interest in the subject matter, there is little reason to deny such person a joinder as an interested party. However, this does not mean that the test for joinder ought to be so low so that any busy-body can squeeze himself into a suit as an interested party. There should be a clear demonstration that the suit affects the person directly. If the test is too liberal, then courts will be inundated by numerous applications for joinder, for suits inevitably affect more than just the litigants. The applicant must in my view demonstrate a direct interest in the subject matter, or show that the questions in the suit cannot be determined adequately



without his input, even where he is not strictly Plaintiff or Defendant. An interested party is of course not a Plaintiff and neither is he a Defendant. He only has a direct interest in the subject matter of the suit.

17. The Learned Counsel concluded that their prayer was for this Honourable Court to find that that the Applicants' application dated 25<sup>th</sup> November 2021 unmerited and the same dismissed with costs to the Plaintiff.

#### IV. ANALYSIS AND DETERMINATION

18. I have read and considered the application herein, the affidavit in support, the responses the written submissions thereto by all the parties herein, the authorities cited and the relevant provisions of the law. The issues before me for determination are: -
- a. Whether the Applicants through the filed Notice of Motions application dated.....have demonstrated that they are a necessary party to the suit?
  - b. Whether the Applicant was entitled to the relief sought.
  - c. Who will bear the Costs of the application.

#### ISSUE No. a) Whether the Applicants through the filed Notice of Motions application dated.....have demonstrated that they are a necessary party to the suit?

19. The joinder of parties is the inclusion of a party or parties to a suit who have the same rights or against whom rights are claimed as co-Plaintiffs or co-Defendants. There are two other areas that joinder may apply which are joinder of causes of action and joinder of issues. An Applicant seeking to be enjoined to a suit must demonstrate that he is a necessary and proper party and that his presence is necessary to enable the Court to effectively and completely adjudicate and settle all the questions in the suit.

20. Black's Law Dictionary 9th Edition at page 1232 defines an interested party as:-

“a party who has a recognizable stake (and therefore standing) in a matter”.

21. The application is essentially based upon Order 1 Rule 10(2) of the Rules which stipulates as follows:

“(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”.

22. In the case of “Trusted Society of Human Rights Alliance – Versus - Mumo Matemo and 5 others (Supreme Court Petition no. 12 of 2013)” thus:-

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one 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 he himself or she herself appears in the proceedings and champions his or her cause...”.



23. In the case of “*Pravin Bowry – Versus - John Ward and Another* [2015] eKLR the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The court referred to the Ugandan case of *Deported Asians Custodian Board – Versus - Jaffer Brothers Limited* [1999] 1 E.A. 55 (SCU) where the court stated as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter...”

“For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a Defendant) to be joined as a Co - Defendant, where it is shown that the Defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person”. (Emphasis by underline)

24. The Courts have taken a liberal application to joinder of parties to a suit. In the case of “*Kingori – Versus - Chege* (2002) 2 KLR 243, Warsame J (as he then was) had this to say;

“In my view in deciding an application for joinder, the Court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit, however the Court must guard against the frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before Court for determination”.

25. While referring to the already cited case “*Muruatetu case* (*supra*), by the parties herein the Supreme Court while citing its decision in the *Mumo Matemu case* (*supra*) with approval laid down the principles which govern joinder of interested parties as follows:-

- (i) Personal interest and/or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is nearly peripheral.
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replica of what the other parties will be making before the court.

26. In all the above cases the Court was clear that the interested party must demonstrate; interest or stake in the suit; that he would be affected by the outcome of the suit; his presence was necessary to enable



the effectual and complete adjudication of the suit and that finally that the party's interest will only be articulated if allowed to in the proceedings.

**ISSUE No. b). Whether the Applicant was entitled to the relief sought.**

27. In the present suit, the Plaintiff vide a Plaint dated 3<sup>rd</sup> October 2016 and filed the same day stated that he was the registered owner of all parcel of land known as Mombasa/block XXVI/866 measuring approximately 0.0765 Hectares under a certificate of lease held for a revisable term of 99 years commencing on the 01<sup>st</sup> December, 1995 and which certificate was issued on the 21<sup>st</sup> August, 2009. After the acquisition, the Plaintiff obtained all lawful licenses and permissions to develop he suit property after paying all the requisite, due rates and charges with the latest rates payment request dated the 21<sup>st</sup> January, 2016 for the sum of Kshs 24,2480/- having been duly settled. That subsequently through a public notice issued by the National Land Commission of their intent to review the Grants and Dispositions of the public land and the concerned parties invited to attend a public hearing to give their presentation and defend their mode of acquisition of their titles and or grants. The Plaintiff received vide an Enforcement Notice dated 13<sup>th</sup> July 2016, the Defendant's County Director of Physical Planning informing him that the suit property which comprises of a block of residential flats put up at a colossal cost is built on an alleged road reserve and that the Plaintiff is required to remove the existing building at his own cost before the expiry period which had been set for the 13<sup>th</sup> October 2016. The Applicants therefore had not demonstrated that they had an interest in the subject matter of the suit and/or that they were liable to be affected by any order that the court may make at the conclusion of the trial.

**ISSUE No. c).Who will bear the Costs of the application.**

28. It is trite law that Costs of any action, cause of action or other litigation are a matter of the discretion of the Court or Judge. The proviso under the provision of Section 27 (1) of the Civil Procedure Act, 2010, that costs follow the event. In this case the events mean the results of the said litigation.
29. The instant case, the Notice of Motion application has been found to be unmeritorious and therefore the Honorable Court has proceeded to award costs of the application to the Plaintiff to be paid by the intended interested parties

**VI. Conclusion & Disposition**

30. In conclusion, I am not satisfied that the Applicants are a necessary party whose presence is necessary in order to determine and adjudicate all the issues in the present suit. Instead the enjoinder of the applicants as interested parties in the suit would merely serve to blur and confuse the issues for adjudication in the suit.
31. Although I subscribe to a liberal approach to joinder of a party in a suit however in this case it is the finding of the Court that the Applicants have failed to demonstrate any of the grounds for joinder cited in Paragraphs 25 and 26 above. It therefore becomes difficult to determine the interest or stake of the proposed interested party in the matter based on the mere belief and speculation of the Applicants.
32. The ultimate effect of all this are the following orders:-
- a) That the Notice of Motion application for joinder by the proposed interested parties dated 25<sup>th</sup> November 2021 be found to lack merit. Accordingly, it is dismissed with Costs.
  - b) That for expeditious sake, this matter to be heard and determined within the next One Hundred and Eighty (180) days from the date of this ruling. There will be a mention on 28<sup>th</sup>



September, 2022 for purposes of conducting a Pre – Trial session under Order 11 of the Civil Procedure Rules, 2010 and fixing a hearing date.

- c) That the Intended Interested Party to bear the costs of the application.

It is ordered accordingly.

**RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY OF JULY 2022.**

**HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT**

**MOMBASA**

**In the presence of: -**

- a. M/s. Yumnah Hassan, Court Assistant.
- b. Mr. Borona Advocate for the Plaintiff.
- c. No appearance for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.
- d. No appearance for the Intended Interested parties/ Defendant.

