



Mutune (Suing as the Personal Representative of Paul Mutune Mutiso - Deceased) v Khatri & 3 others (t/a Belpont Auctioneers); Khatri & 2 others (Proposed Interested Parties) (Environment & Land Case 167 of 2018) [2025] KEELC 3997 (KLR) (20 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 167 OF 2018**

**AY KOROSS, J
MAY 20, 2025**

BETWEEN

**RUTH KOKI MUTUNE (SUING AS THE PERSONAL REPRESENTATIVE OF
PAUL MUTUNE MUTISO - DECEASED) PLAINTIFF**

AND

**SHASHIKANT J KHATRI 1ST DEFENDANT
KENYA COMMERCIAL BANK LIMITED 2ND DEFENDANT
NAVINCHADRA J KHATRI 3RD DEFENDANT
JONATHAN MUEMA MAINGI 4TH DEFENDANT
T/A BELPONT AUCTIONEERS**

AND

**GEETA SHASHIKANT KHATRI PROPOSED INTERESTED PARTY
BHAVESH KHATRI PROPOSED INTERESTED PARTY
KETAN KHATRI PROPOSED INTERESTED PARTY**

RULING

1. This ruling seeks to determine the notice of motion dated 28/10/2024 that the plaintiff filed. Some of the prayers sought are spent, and the remaining prayers for determination are: -
 - a. That this honourable court be pleased to join the proposed interested parties as parties to this suit.



- b. That this honourable court be pleased to issue injunction orders against the defendants and the proposed interested parties whether by themselves, their agents, servants, assigns or any other person/entity claiming authority from the defendants and the proposed interested parties from interfering with the plaintiff's quiet possession over land parcel Masii/Emui/683 and/or disposing, meddling and/or altering the substratum thereof pending the hearing and determination of the suit.
 - c. Costs of the motion be in the cause.
 2. The motion is supported by the grounds set out on the body thereof and the supporting affidavit sworn on the instant date by Ruth Koki Mutune, who is one of the deceased's plaintiff's legal representatives.
 3. In a brief summation of the grounds and depositions, she asserted that during the pendency of these proceedings, the 2nd and 3rd defendants died and the suit against them abated on 1/11/2022. This necessitated them to institute citation proceedings against the beneficiaries of the 2nd defendant's estate.
 4. She further averred that the beneficiaries of the said estates have increased the activities on the suit property, including drilling a borehole on the suit property. According to her, this has made her apprehensive and weary that the substratum of these proceedings will be compromised before the completion of the case unless this court intervenes by granting the reliefs sought.

1st defendant's case

5. The 4th defendant did not respond to the motion, but the 1st defendant opposed the motion by filing grounds of opposition dated 11/12/2024. It raised the following summarised substantive grounds;
 - a. The motion was frivolous, an abuse of the court process, and lacked merit.
 - b. The suit against the 2nd and 3rd defendants had abated and had not been revived.
 - c. Orders cannot be issued against a deceased person.
 - d. The plaintiff's allegations were unsubstantiated, and the motive for filing the motion was suspicious.

Proposed interested parties' case

6. These parties opposed the motion through the affidavit of Ketan Khatri sworn on 31/10/2024.
7. He stated, the motion was unmeritorious, made in bad faith, an abuse of the court process, intended to delay the conclusion of the matter, the motion and suit did not disclose a cause of action against either of the proposed interested parties (IPs); and
8. The plaintiff was untruthful as Masii/Emui/683 ("suit property") had been in actual and physical use and occupation of the 2nd and 3rd defendants as registered owners for over 15 years; and
9. The plaintiff had withheld from this court information that the attempt to have the proposed IPs take up this suit by citing them was dismissed in a citation case filed against the 2nd and 3rd proposed IPs, being CMCC Citation Cause NO. 55 OF 2022, and the intended joinder was intended to rope them into these proceedings through the back door.

Parties' submissions

10. With the exception of the 4th defendant, all parties' counsels filed written submissions with those of the law firms of M/ss. Nzei & Co. Advocates for the plaintiff dated 12/02/2025, B.M. Mung'ata &



Co. Advocates for the 1st defendant dated 3/02/2025, and Mulyungi & Mulyungi Associates for the proposed IPs dated 1/04/2025. All these well-written submissions have been considered by this court.

Issues for Determination, Analysis and Determination

11. Having carefully considered the motion, its grounds, affidavits, grounds of opposition and parties' rival submissions, the following issues commend themselves for determination: -
 - a. Whether the proposed IPs should be joined to these proceedings.
 - b. Whether the plaintiff has met the legal threshold to warrant the grant of injunctive orders.
12. These issues shall shortly be handled in a chronological order.

a. Whether the proposed IPs should be joined to these proceedings.

13. Order 1 Rule 10(2) of the Civil Procedure Rules (CPR) has largely been interpreted to mean that the party who ought to be joined or added to civil proceedings as a party to the suit either as a defendant, plaintiff or interested party whose presence in the proceedings would be necessary to assist the court determine the matter effectually and completely should be joined to the proceedings.

14. This proviso states 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.”

15. The Black's Law Dictionary, 11th Edn, page 1351 has defined an interested party in the following terms: -

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

16. The meaning of this definition was resounded in the Supreme Court of Kenya's decision of *Trusted Society of Human Rights Alliance v Matemo & 5 others* [2014] KESC 32 (KLR) in the following words: -

“3. An interested party was one who had a stake in the proceedings, though they were not initially a party to the cause. Such a person felt that their interest would not be well articulated unless they personally appeared in the proceedings, and championed their cause.”

17. When considering a motion for joinder, the court exercises judicious discretion which is anchored on law and reason and therefore, this court adopts the guiding principles established in *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* [2016] KESC 12 (KLR) in the following words: -

“37. From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the



Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements: 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. 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. 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.”

18. In the circumstances of this case, the suit against the 2nd and 3rd defendants abated by operation of law, to wit Order 4 (3) of the Civil Procedure Rules (CPR), which when read together with Order 4 (1) thereof states that where the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit and such application has to be made within one year. Failure of which, the suit abates.
19. The suit against the 2nd and 3rd defendant has abated and was marked as such by this court on 1/11/2022. This court is aware that the plaintiff has filed an application dated 24/02/2023 for a revival of the abated suit. Without going much into its merits, one issue stands out: who represents these deceased defendants’ estates?
20. The plaintiff has argued that joinder of the IPs is necessary for the determination of the dispute and that, as beneficiaries of these deceased defendants, the proposed IPs should be joined herein.
21. The proposed IPs counsel has argued that there is a legal framework that governs joinder of these beneficiaries to the proceedings, but not in the manner proposed by the plaintiff.
22. This court concurs with the arguments of the proposed IPs counsel for reasons that Order 42 does not envisage representation of deceased parties by any other means other than persons who have obtained a full grant or a limited grant, or as the case maybe, as envisaged under the provisions of the [*Law of Succession Act*](#).
23. Once armed with such a grant from the probate court, an applicant has to move this court under Order 24 of the CPR for substitution of a deceased person and if the suit had abated as the case herein, the plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal.
24. The Court of Appeal decision in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] KECA 544 (KLR) stated that the provisions of Order 24 must be construed by reading it wholesomely and sequentially.
25. The plaintiff is well aware of the process of substitution and the legal standing of the administrators of the estate of the deceased defendants, and their relevance to this suit.
26. This is so because the plaintiff instituted citation proceedings against the 3rd proposed IP in Machakos Citation Cause No. 55 of 2023, which was dismissed. Given the provisions of Order 24 of the CPR, this court finds this relief for joinder is misplaced.



b. Whether the plaintiff has met the legal threshold to warrant the grant of injunctive orders.

27. Order 40 Rule 1 of the Civil Procedure Rules confers this court with jurisdiction to grant an injunctive relief by stating as follows: -

“Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

28. Although this court exercises discretion in considering applications for injunctive relief, it exercises judicious discretion based on the law, material and evidence.

29. Utmost, an applicant has to meet the threshold of the 3 tests, which are inter alia, establish a prima facie case; demonstrate irreparable injury, and that the balance of convenience tilts in her favour.

30. The tests for the grant of temporary injunction were well settled in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, which were similarly restated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR in the following words: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

31. When determining an interlocutory application such as the one before this court, the court has to be careful not to prejudice a party by making conclusive findings of fact or law on substantive issues that are the preserve of trial as was stated by Ringera, J (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002.

32. The 1st test to establish is whether the plaintiff has a prima facie case, and the definition of the term was defined by the Court of Appeal decision of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR as follows: -

“In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but



the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

33. In this case, the plaintiff has questioned how the statutory power of sale was conducted over the suit property that eventually led to its registration in the deceased 2nd defendant's name on 28/07/2009.
34. Though it was asserted that the deceased plaintiff had lived on the suit property for over 50 years, there was no evidence to substantiate this, such as photographs of existing houses, structures or crops on the suit property.
35. In contrast, they availed photographs demonstrating that the proposed IPs were conducting activities on the suit property. In the circumstances, this court finds the plaintiff has not demonstrated a prima facie case and hence, this court need not say more.
36. For the above findings and reasons, the notice of motion dated 28/10/2024 is hereby dismissed with costs being in the cause.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 20TH DAY OF MAY, 2025.

HON. A. Y. KOROSS

JUDGE

20.05.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr Mundia holding brief for Mr B.M. Nzei for applicant.

Mr Kivui holding brief for M/s Mutuku for 1st defendant

M/s Musau holding brief for Mr Mulyungu for 2nd and 3rd defendants

Ms Kanja- Court Assistant

