



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. E005 OF 2020

STEPHEN NDOLO (Suing on behalf of

Elizabeth Kamene Ndolo

C/O Mukami Njeru Company Limited).....PLAINTIFF

-VERSUS-

NOL TURESH LOITOKKITOK WATER

AND SANITATION COMPANY LTD.....DEFENDANT

AND

1. MUEMA KITULU

2. EMILY MWELU GATUGUTA

3. HON. MR. JUSTICE DANIEL MUSINGA

4. DAVID MUSEMBI KATIE

5. ALPHONCE MWENDWA (Suing on behalf of the estate of Jackson Kakunzu)

6. SAMUEL KYALO MUNYAE

7. PETER KANYASYA

8. MATHEW KYEVA MUTETI

9. MARIA MUTISO.....PROPOSED INTERESTED PARTIES

RULING

1. On the 1st December, 2020 the proposed interested parties filed the Notice of Motion application dated 30th November, 2020 seeking the following orders;

a) Spent.

b) That the Honourable court be pleased that the proposed interested parties, MUEMA KITULU, EMILY MWELU GATUGUTA, HON. MR. JUSTICE DANIEL MUSINGA, DAVID MUSEMBI KATIE, ALPHONCE MWENDWA, SAMUEL KYALO MUNYAE, PETER KANYASYA, MATHEW KYEVA MUTETI AND MARIA MUTISO, be enjoined as an interested parties herein.

c) That any orders granted prior to the hearing and determination of this application be discharged and/or set aside forthwith pending the inter parties hearing and determination of the application dated 27th November 2020.

d) That the costs of this application be provided for.

2. The application is predicated on the grounds on its face and is supported by the supporting and supplementary affidavits of Muema Kitulu, the 1st proposed interested party, sworn with the authority of the other proposed interested parties.
3. The application has been opposed by the Plaintiff vide his replying affidavit sworn on 20th January, 2021 and filed in court on 22nd January, 2021.
4. The Defendant did not oppose the application.
5. The application was canvassed by way of written submissions and by the time of writing this ruling, it is only the counsel for the proposed interested party who had filled hers.
6. The first proposed interested party has deposed in his supporting affidavit *inter alia* that on or about 19th March, 2018 they were issued with an order in Makueni ELC Suit No. 241 of 2017 (O.S) that they be registered as proprietors of all that 4.7 acres portion of the LR No. 1757/6 and that the Plaintiff appealed against the order in Civil Appeal No. 394 of 2018 but no stay orders were issued, that the 1st proposed interested party has been advised by his advocates on record, which information he believes to be true, that by filing this suit, the Plaintiff is hoping to deny the proposed interested parties quiet possession of their land without a hearing contrary to the rules of natural justice and the provisions of Fair Administrative Actions Act No. 4 of 2015 and as such, they ought to be enjoined as interested parties to the proceedings.
7. In response, the Plaintiff has deposed *inter alia* that the Defendant without any authority and/or consent unlawfully entered into the land of Elizabeth Kamene Ndolo and proceeded to connect, install and supply water to unknown people who had encroached on the land. He went on to depose that the Defendant installed and connected water metres in land I.R 70883/1 totaling to one thousand two hundred and ninety six hectares belonging to the Plaintiff. He deposed that the Judgement indicated by the interested parties has since been appealed against and is pending in court, that the act of the Defendant constitutes trespass and an infringement of the registered owner's right to peacefully own property and that the application by the interested parties to be enjoined in these proceedings is in bad faith aimed at perpetuating illegal activities on the Plaintiff's land and ought to be dismissed as their dispute with the Plaintiff is being heard in another court.
8. In rejoinder, the 1st proposed interested party has deposed in his supplementary affidavit that the proposed interested parties bought their respective parcels of land within the suit property LR/NO 1757/19 (formerly known as LR No. 1757/6) from Jerome Mwathi Kaumbulu who represented to them that he was the beneficial owner of 3000 acres to be excised from the suit property, that to these proceedings, all the proposed interested parties had entered into a valid water supply contract with the Defendant on or about June, 2005 and that it is important to note that there is a suit against the Defendant being Water Appeals Tribunal Appeal No. 7 of 2012 and also Kajiado ELC Misc E005 of 2020 where restraining orders were issued against the Defendant.
9. In their submissions, the counsel for the proposed interested parties framed three issues for determination namely;
 - i) Whether their application should be allowed as and against the Defendant;***
 - ii) Whether the 9 proposed interested parties may be enjoined to these proceedings; and***
 - iii) Whether this court may exercise its jurisdiction and discharge any ex-parte orders granted prior to this application being canvassed.***
10. With regard to the first issue, the counsel submitted that since the instant application is unopposed by the Defendant, it should be granted without much ado.
11. As for the second issue, the counsel submitted that the body rightly possessing jurisdiction to hear and determine the dispute herein is the Water Tribunal as is provided under Section 121 (b) of the Water Act. The counsel went on to submit that the proposed interested parties and the Defendant herein entered into a business contract on or about June, 2005 resulting in the services provided by the Defendant on the suit land and such, they should be given the opportunity to ventilate their concerns to the court. The counsel concluded by urging the court to set aside any order that may have been made ex parte.
12. I have read the application as well as the replying affidavit by the Plaintiff. I have also read the submissions filed by the counsel for the proposed interested parties and I am of the view that the only issue for determination is whether or not the proposed interested parties should be enjoined in this suit.
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 application of either party, and on such terms as may appear to the court to be just, order that the name of party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to be joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suits, be added.”
14. It is not in dispute that the proposed interested parties filed ELC Civil Suits numbers 233 of 2017 to 241 of 2017 against the Plaintiff herein and that the court entered judgement in their favour.

15. In the aforementioned judgement the court ruled inter alia that the proposed interested parties be registered as the proprietors of the portions of land that they occupy in LR No. 1757/19 (formerly LR No. 1756/6).

16. It is also not in dispute that arising from the aforementioned judgement, there is a pending Nairobi Civil Appeal No. 394 of 2018 and no stay orders were issued in the said appeal.

17. The proposed interested parties have demonstrated to this court that they have valid water supply contracts with the Defendant and that the dispute arising from the said contract was dealt with by the Water Appeal Board in No. 7 (WS) of 2012 and that the decision of the Water Appeal Board was adopted in Kajiado ELC Misc No. E005 of 2020.

18. The proposed interested parties have also raised the issue of this court's jurisdiction to hear and determine the instant suit. In my view, they ought to be granted the chance to ventilate on the same. They can only do so if they are enjoined in the suit.

19. Arising from the above, I am satisfied that the presence of the proposed interested parties before this court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all the questions involved in this suit and, therefore, they deserve to be added as parties.

20. Consequently, my finding is that the application has merits and I hereby proceed to issue the following orders;

1) That the proposed interested parties, Muema Kitulu, Emily Mwelu Gatuguta, Hon. Mr. Justice Daniel Musinga, David Musembi Katie, Alphonse Mwendwa, Samuel Kyalo Munyae, Peter Kanyasya, Mathew Kyeve Muteti and Maria Mutiso be enjoined as Defendants herein.

2) The Plaintiff is directed to amend the plaint to include the proposed interested parties and amend copies of summons and the plaint shall be served upon the new Defendants (proposed interested parties) as well the original Defendant.

3) Costs of the application are provided for.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 24TH DAY OF JUNE, 2021.

.....

HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi