



Waithaka v Nairobi City County; Nairobi City County (Interested Party) (Environment and Land Miscellaneous Application E305 of 2024) [2025] KEELC 3925 (KLR) (19 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E305 OF 2024**

**CG MBOGO, J
MAY 19, 2025**

BETWEEN

JAMES MWANGI WAITHAKA APPLICANT

AND

NAIROBI CITY COUNTY RESPONDENT

AND

NAIROBI CITY COUNTY INTERESTED PARTY

RULING

1. The respondent/intended interested party filed the notice of preliminary objection dated 15th January, 2025, challenging the notice of motion dated 24th December, 2024 on the following grounds: -
 1. That the application for joinder of the Interested Party is fatally defective, improper and misconceived as it has been filed as a miscellaneous application instead of being made within the substantive suit, contrary to the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 which require application for joinder to be brought within the ongoing proceedings to which the joinder relates.
 2. That the application for joinder of the interested party is fatally defective and misconceived, as it contravenes the provisions of Order 1 Rule 14 of the Civil Procedure Rules, 2010 which requires that applications for joinder to be made before the delivery of judgment.
 3. That the application is an afterthought and an abuse of the court process, as it seeks to join the interested party after the court has already issued a judgment and decree contrary to the principles of finality of litigation.
 4. That the interested party's joinder at this stage is untenable, as the role of an interested party is limited to participation in active proceedings.



5. That the application is barred by the doctrine of res judicata under Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya as it seeks to reopen a matter that has been conclusively determined by the court.
 6. That the application is frivolous, vexatious and amounts to an abuse of the court process, warranting its dismissal with costs.
2. The notice of preliminary objection was canvassed by way of written submissions. The respondent/intended interested party filed its written submissions dated 24th February, 2025 where it raised three issues for determination as listed below: -
 - i. Whether the application is fatally defective for being filed as a miscellaneous application, instead of within the substantive suit.
 - ii. Whether the application is incompetent as it was made after judgment had already been entered.
 - iii. Whether the application is barred by the doctrine of res judicata.
 3. On the first issue, the respondent/intended interested party submitted that the application is fatally defective as it contravenes the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules. Reliance was placed in the case of *JMK v MWM & Another* [2015] eKLR.
 4. On the second issue, the respondent/intended interested party submitted that the application further contravenes the provisions of Order 1 Rule 14 of the Civil Procedure Rules which requires an application for joinder to be made before the delivery of the judgment. To buttress on this submission, the respondent/intended interested party relied on the case of *Lilian Wairimu Ngatho & Anor v Moki Savings Co-operative Society Limited & Another* (2014) KEHC 7224 (KLR). Further, it was submitted that the joinder at this stage is untenable as the role of an interested party is limited to participation in active proceedings.
 5. On the third issue, the respondent/intended interested party submitted that the application is barred by the doctrine of res judicata as the applicant has entered a consent judgment with another party, and he is now seeking to enjoin it after the judgment has been issued. Further, that any attempt to introduce a new party post judgment is an attempt to relitigate issues that have already been resolved violating the principle of finality of litigation.
 6. The applicant filed his written submissions dated 25th March, 2025. He submitted that upon being directed to pursue mediation in an attempt to settle the dispute filed in court vide ELC Case No. 425 of 2022, the court issued a decree by consent to the effect that it had referred the boundary issue to the department of survey at City Hall. He submitted that since effecting service of the decree upon the respondent/intended interested party, it had nothing on this issue and thus he wanted to cite the respondent/intended interested party for contempt.
 7. I have considered the preliminary objection and the written submissions filed by the respondent/intended interested party. The issue for determination is whether the preliminary objection has merit.
 8. Law, J.A. in *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors* (1969) EA 696 stated as follows: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea



of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”

9. Also, the case of John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR, it was held that: -

“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”

10. Further, Ojwang J (As he then was) in Oraro -vs- Mbaja (2005) KLR 141 where after quoting the statement of Law, JA. in the Mukisa Biscuits case (supra) went on to state that: -

“A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

11. From the above cited authorities, it is clear that for a preliminary objection to succeed, the same must consist of a pure point of law, with the facts not disputed by the opposing party. Also, a preliminary objection should possess the ability to dispose off the issue that is before court without going to trial and lastly, the same ought to stem from pleadings and not outside of that.

12. In applying the above principles to the circumstances of this case, the applicant filed the notice of motion dated 24th December, 2024, seeking that the respondent be included as an interested party in this matter. I have perused the application, and I note that the same is premised on the grounds that upon mediation, the court issued a decree by consent to the effect that it had referred the boundary issue to the department of survey at City Hall. The applicant in his affidavit deposed that since effecting service of the decree upon the respondent/intended interested party, it had nothing on this issue and thus he wanted to cite the respondent/intended interested party for contempt.

13. However, in doing so, the applicant sought joinder through a miscellaneous application, which in my view, may have triggered the instant objection.

14. Order 1 Rule 10(2) of the Civil Procedure Rules provides that:-

“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 decision whether or not to join a party in any proceedings is discretionary, and such an application may be brought at any stage of proceedings. Without delving further, and as I would agree with the respondent/intended interested party, such an application should at least be made within the same file.
16. However, in the instant objection, the respondent/ intended interested party raises other grounds challenging why it should not be enjoined in the proceedings. These are issues which this court cannot delve into at this stage as those arguments are best fit to be canvassed in the application for joinder as it contains issues of facts which are disputed.
17. From the above, the notice of preliminary objection dated 15th January, 2025 partially succeeds to the extent that the application for joinder is not properly before this court. In the interest of justice, I direct that the notice of motion dated 24th December, 2024 be filed in the proper file for the just determination of the issues arising therein. I make no orders as to costs.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 19TH DAY OF MAY, 2025.

HON. MBOGO C.G.

JUDGE

19/05/2025.

In the presence of:

Ms. Betty Cherono - Court assistant

Ms. Wangala for the Respondent – present

Applicant in person but absent

