



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bunei v Rutto & 2 others (Civil Case E004 of 2022)  
[2024] KEHC 8261 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8261 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE E004 OF 2022  
JRA WANANDA, J  
JULY 5, 2024**

**BETWEEN**

**EDDAH JEPCHUMBA BUNEI ..... PLAINTIFF**

**AND**

**JOSIAH KIPNGETICH RUTTO ..... 1<sup>ST</sup> DEFENDANT**

**MILKA CHEMUTAI ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**ELIJAH KIPRUTO BUIGUT (SUING THROUGH HIS ATTORNEY, CLARAH  
JEPLETING BUIGUIT) ..... INTENDED DEFENDANT**

**RULING**

1. The Plaintiff filed this suit vide the Plaint filed on 24/05/2022 through Messrs Kiproop Lusuria & Co. Advocates. The Plaintiff pleaded that herself and the 1<sup>st</sup> Defendant are a couple staying in their matrimonial home situated on the land parcel known as Nandi/Ndulele/384, that on or about 2/11/2021, the 1<sup>st</sup> Defendant brought his girlfriend, the 2<sup>nd</sup> Defendant, to the matrimonial home as the Plaintiff and the children were away in the United States of America and whom the 2<sup>nd</sup> Defendant has threatened to evict therefrom, that the house was jointly built by the Plaintiff and the 1<sup>st</sup> Defendant and that it has been their matrimonial home since they got married. For the said reasons, the Plaintiff is seeking Judgment that the Defendants be restrained by way of a permanent injunction from trespassing into the home or interfering with the Plaintiff's possession thereof.
2. The 1<sup>st</sup> Defendant filed his Statement of Defence on 20/07/2022 through Messrs D.K. Korir & Associates Advocates. The 2<sup>nd</sup> Defendant also filed her Statement of Defence on 20/07/2022 through Messrs Kibet Lemeto & Co. Advocates.



3. Now before the Court for determination is the Applicant-intended 3<sup>rd</sup> Defendant's Notice of Motion dated 18/10/2023 whereof he seeks the following orders:
  - i. That this Honourable Court pleased to grant leave to the Applicant to be enjoined as the 3<sup>rd</sup> Defendant in these proceedings.
  - ii. That the draft statement of defence and counterclaim be deemed as duly filed.
  - iii. That costs of this application be in the cause.
4. The Application is filed through Messrs Korir Kiplagat Advocates and premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by one Clarah Jepleting Buigut.
5. In the Affidavit, the deponent stated that she is the duly appointed Attorney of the Applicant pursuant to a duly registered Power of Attorney, that the Applicant is presently unwell and unable to conduct his day to day activities and due to such incapacity, is unable to conduct this matter in person, that the Plaintiff filed this suit seeking orders of injunction to restrain the Defendants from trespassing in the matrimonial home situated on land parcel No. Nandi/Ndulele/384 (hereinafter referred to as "the suit land") or interfering with the Plaintiff's possession thereof, that the Applicant is the registered owner of the suit land, that the house was constructed by the 1<sup>st</sup> Defendant sometime in the year 2020 for the benefit and occupation of his father (the Applicant), and the deponent, as a token of appreciation for educating and bringing him up, and that the Applicant and herself are in occupation of the house as their matrimonial home where they also live with their grandchildren.
6. She deponed further that in 2021, the 1<sup>st</sup> Defendant contracted the services of a foreman to improve the house and build an adjacent second house being an extension to the first one with better amenities owing to the deteriorating health of the Applicant and the number of relatives and visitors who come to visit and that the facelift and construction is nearing completion, that since the Plaintiff lays claim over the house as her matrimonial home and the Applicant who is the registered owner of the land and herself are in occupation thereof as their matrimonial home then a common question of fact or law exists between the parties, that in the circumstances, the Applicant is therefore a necessary party for the determination of the issues in dispute in this matter and his presence is necessary so as to enable the Court to effectively and completely adjudicate upon and settle all the questions involved.

### **Plaintiff's Replying Affidavit**

7. The Application is opposed vide the Replying Affidavit filed on 14/12/2023 and sworn by the Plaintiff who deponed that whereas she has no issue with the Applicant being joined as a party to this suit, she is opposed to him suing through his said alleged Attorney for the reason that the 1<sup>st</sup> Defendant in cohort with the said Attorney have colluded to give false testimony purporting it to be the evidence of the Applicant who is of sound mind and not suffering from any mental incapacity, and that the Medical Report exhibited in the Applicant's Supporting Affidavit alleging that Applicant is suffering from back pain and severe osteoarthritis does not show that the condition has affected his mental capacity.
8. She deponed further that taking into account the Chief Justice's practice directions embracing virtual Court sessions, litigants can now attend Court virtually and testify from wherever they are and that in the circumstances, the Applicant can testify without having to attend Court physically. She deponed further that there is therefore no need for the Attorney to testify on the Applicant's behalf when it is the same Attorney who has been interfering with the Plaintiff's and 1<sup>st</sup> Defendant's marital affairs.



### **Applicant-Intended 3<sup>rd</sup> Defendant's Further Affidavit**

9. The Attorney filed a Further Affidavit on 12/1/2024 wherein she deponed that the Applicant executed a Power of Attorney in favour of the Attorney donating to her powers to among others, institute, commence, prosecute or defend any action or suit in any of the Courts in Kenya in respect to his properties, including the suit land, that she is the spouse to the Applicant and they have been in a happy marriage for over 62 years hence she has earned the Applicant's trust and that this fact informed his decision to donate the Power of Attorney, that it is not true that their son, the 1<sup>st</sup> Defendant, and herself acted in cahoots to have the Attorney act herein for purposes of giving false testimony purporting to be the evidence of the Applicant, that the 1<sup>st</sup> Defendant is currently a resident of the United States of America and that he has always acted in the best interests of the Applicant by building him and herself a matrimonial home (the suit land), paying for their medical needs and meeting their subsistence needs, that she does not intend to give any false evidence and that his Advocate has explained to her the consequences of giving false testimony under oath, and that every witness who appears before a Court of law, including herself, is subjected to cross examination by the opposing Counsel to test its veracity and that the Court will ultimately make a decision as to whether a witness is lying or not.
10. She deponed further that the Applicant is currently suffering from physical incapacity which condition has been deteriorating and his doctor has been visiting him on a weekly basis, that according to the Medical Report exhibited to her Supporting Affidavit issued when the Applicant first sought medical attention, he was presented with low back pain and severe osteoarthritis of bilateral knees, as such what is represented by the Plaintiff as his current condition in her Replying Affidavit is misleading since the same was the initial complaint, that the current medical report gives the present condition of the Applicant as having developed stiffness of the right knee and that as a result, he cannot stand or walk because of excruciating pain, and that the Applicant complains of frequent abdominal pains and difficulty in relieving himself as he was diagnosed with diabetes.
11. She further deponed that the Plaintiff has been away in the United States of America for a period in excess of 8 years and she is therefore not able to appreciate or have a clear picture of the Applicant's medical condition presently hence her lack of sympathy, that the powers donated to her are not limited to only testifying but includes powers to appoint lawyers to file and/or defend any suit involving the Applicant in Court proceedings.
12. She contended that litigation does not only involve testifying but also visiting Advocate's chambers to give instructions on a regular basis, attending pre-trial interviews, getting briefs on the outcome of Court processes and recording, deponing and signing affidavits and statements, that due to incapacity and ill health on the part of Applicant who is now confined to a wheelchair, he is not able to conduct the foregoing activities in person and that is why he appointed the Attorney in respect to this matter, that the house the subject of this suit is the matrimonial home of the Applicant and herself which was built for them by the 1<sup>st</sup> Defendant during the time when the Plaintiff was away in the United States of America and as such they have an identifiable stake in this matter.

### **Hearing of the Application**

13. The Application was canvassed by way of written Submissions. The Applicant filed his submissions on 12/1/2024 while the Plaintiff, through her new Advocates, Messrs Nyambegera & Co. Advocates filed hers on 28/2/2024.



### **Applicant- Intended 3<sup>rd</sup> Defendant's Submissions**

14. In regard to joinder of the Applicant in these proceedings, Counsel submitted that the Applicant is a necessary party thereto. He cited Order 1 Rule 10 (2) of the Civil Procedure Rules and also the case of Meme Vs. Republic [2004] 1 124 and contended that the Applicant has satisfied the principles applicable, that the presence of the Applicant in the proceedings will result in the complete and effectual settlement of the questions involved herewith, that his participation will protect him from any adverse orders that might be issued which will affect his interests in the suit land since he is the registered owner thereof. He also cited the case of Eunice Wangui Mbogo & another Vs. Margaret Mbucu Mathuri (Sued as Administrator of Adriano Mathuri Ngondi) & 2 others [2022] eKLR
15. Counsel submitted further that there is sufficient basis and/or reasons for this Court to allow the Applicant to act in this suit through his authorized agent, that it is not in dispute that the Applicant duly appointed his spouse, Clarah Jepleting Buigut, as his Attorney pursuant to the duly registered Power of Attorney, and that the question of appearance of a recognized agent in Court is provided for under Order 9 Rule 1 and 2 of the Civil Procedure Rules. He argued that the Applicant is currently suffering from physical incapacity which has caused him to be confined to a wheelchair, and that as a result he cannot stand or walk.
16. Counsel further submitted that a perusal of the Plaintiff's Replying Affidavit shows that she is not opposed to the Applicant being joined to these proceedings, that what they are opposed to is her spouse and authorized agent acting on her behalf and the reasons given by the Plaintiff for such opposition is that the authorized agent will give false testimony. Counsel argued that it is the Court that will make the ultimate decision as to whether a witness is lying or not and as such, the reason advanced by the Plaintiff is not a plausible one and that furthermore, the Applicant's said authorized agent being his spouse, also has an interest in this matter since the house is also her matrimonial home.

### **Plaintiff's Submissions**

17. Counsel for the Plaintiff reiterated that the Plaintiff has no issue with the Applicant being joined as a party to this suit but is opposed to the Applicant suing through the Attorney for the reason that the 1<sup>st</sup> Defendant in cohort with the Attorney who intends to testify on behalf of the Applicant, have colluded to enable the Attorney attend Court for purposes of giving false testimony purporting it to be the evidence of the Applicant, that the Attorney has been interfering in the Plaintiff's and 1<sup>st</sup> Defendant's marriage by condoning the unlawful acts of the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant adultery and encouraging and/or allowing the 2<sup>nd</sup> Defendant to stay in the Plaintiff and 1<sup>st</sup> Defendant's matrimonial home despite the 1<sup>st</sup> Defendant being a legally married man.
18. He also reiterated that the Applicant is of sound mind and not suffering from any mental incapacity and that he can still attend Court virtually, that the Attorney has aided the 2<sup>nd</sup> Defendant in occupying the 1<sup>st</sup> Defendant and the Plaintiff's matrimonial home despite this Court having issued orders of status quo thus necessitating the Plaintiff to file contempt of Court proceedings against the 2<sup>nd</sup> Defendant vide the application pending herein. Counsel urged the Court not to allow the Attorney who has bad blood with the Plaintiff to testify on behalf of her husband as the common intention between the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant and the Attorney is to peddle falsehoods before this Court.
19. Counsel submitted that the risk of the Plaintiff losing her matrimonial home to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is too high if the Attorney is allowed to testify yet the 1<sup>st</sup> Defendant has threatened on several occasions to ensure that the Plaintiff and their children do not occupy the home, that it is therefore in the interest of justice, fair play and for purposes of avoidance of any further interference by the



Attorney that if it is necessary to bring on board the Applicant, then he should conduct this matter in person.

20. Counsel cited the case of *N W M v J M M & Another* [2017] eKLR in which, he submitted, a person suffering from more severe complications attended Court to verify the authenticity of his Power of Attorney and that the Court found that the subject does not suffer from any mental disorder. Guided by that case, Counsel argued that if a person of such serious medical conditions attended Court physically on his wheel chair, was cross examined and the Court found him to be mentally fit so as to understand the contents of the Power of Attorney, then the Applicant can equally attend Court virtually from his wheelchair, since he has no speech problems or mental incapacity as to testify on the facts relating to this matter.
21. On whether the draft Statement of Defence and Counterclaim ought to be deemed as properly filed, Counsel submitted that the Applicant did not submit or make any arguments to support this prayer, that there is no evidence of the same being admitted by this Court and being paid for as required by law, that this is an issue that will be decided upon the Court making a determination on whether the Applicant ought to be joined in these proceedings and upon payment of the requisite Court fees.

### Determination

22. Before I proceed further, I get the feeling that the issues raised in this matter may give rise to the debate whether the dispute herein is properly before this civil Court or whether the same belongs to the Environment and Land Court (ELC). This is because Article 162(2) of *the Constitution* of Kenya empowered Parliament to “establish Courts with the status of the High Court to hear and determine disputes relating to:
  - (a) employment and labour relations; and
  - (b) the environment and the use and occupation of, and title to, land.
23. Article 162(3) then authorized Parliament to “determine the jurisdiction and functions of the Courts contemplated in clause (2).” Pursuant to Article 162(3), Parliament enacted the *Environment and Land Court Act*, No. 18 of 2011, Section 13(1) which outlines the jurisdiction of the Environment and Land Court (ELC) as follows:
  - “(2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court [the ELC] shall have power to hear and determine disputes—
    - (a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - (e) any other dispute relating to environment and land.
  - (3) .....



24. Be that as it may, since no party raised the issue of jurisdiction, I will say no more about it for now. It is however very likely that the issue shall still arise at some stage of this suit. If and when it arises, the Court will deal with it.
25. Back to this matter, the issue for determination herein is “whether the intended 3<sup>rd</sup> Defendant-Applicant should be granted leave to join this suit and if so, whether he can do so through his appointed Attorney nominated pursuant to a Power of Attorney”.
26. Joinder of parties in civil cases is governed by Order 1 Rule 10(2) of the Civil Procedure Rules which states 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.

27. It must however be noted, as observed by Gikonyo J in the case of Lucy Nangari Ngigi & 128 Others v National Bank of Kenya Limited & Another (2015) eKLR, that joinder of parties would be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in joinder of parties would therefore be whether a common question of fact or law would arise between the existing and the intended parties.
28. In regard to a non-party applying to be joined in an existing suit, Odunga J (as he then was) in the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR stated as follows:

“In this case the application has been made by an intending party as either Plaintiff or Interested Party. Whereas there is nothing inherently objectionable in a person applying to be joined as an interested party in a pending suit, it is doubtful whether such a person joined as an interested party can transform the suit into one in which he becomes the principal claimant and seek substantive reliefs in the suit. In this case, it is clear that the Applicant intends to protect his rights in the suit property by contending that he was not served with the statutory notice. That in my view is a substantive claim that cannot be determined by the Applicant being joined as an interested party. As regards his joinder as a Plaintiff, as indicated above he may only be so joined by the court on own motion or by an application by either party. Nambuye, J (as she then was) in Kingori vs. Chege & 3 Others [2002] 2 KLR 243 held that:

“..... parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to *the constitution* of the suit without whom no decree at all can be passed. Therefore, in case of a defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. A proper party is one who has a designed



subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognisable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a defendant though no relief may be claimed against him provided his presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party... Order 1 rule 10 allows the Court to add a defendant on its own motion or upon application by either party either orally or formally by summons in chambers under Order 1 rule 22. Here the party has not moved on its own but has been moved by the intending party on its own formally. The use of the words “either party” denotes that the formal move has to be made by a party already participating in the proceedings and it would mean that an intending party cannot come on his own and choose which position he wants.” [Emphasis added].

Similarly, in this case none of the parties to the suit has sought to have the Applicant joined as a party to the suit. Accordingly, the Applicant cannot seek that he be joined as a Plaintiff to these proceedings.”

29. It is therefore clear from the foregoing that insofar as the Application for joinder of the Applicant as a 3<sup>rd</sup> Defendant to these proceedings has not been made by either the Plaintiff or the Defendants, nor suo motu by the Court, but has been made by the Applicant himself, a non-party, even if allowed, he cannot choose to so join as a Defendant. He can only come in as an “interested party”. Further, the Applicant even wants to file a Counterclaim in this existing suit. That cannot be allowed. To borrow the words of the authorities cited above, allowing him to do so will “transform the suit into one in which he becomes the principal claimant and seek substantive reliefs in the suit”. That cannot be proper procedure.
30. If the Applicant wishes to make claims against the Plaintiff and to seek reliefs against her, then his recourse is to file his own separate suit against the Plaintiff and subsequently, should he deem that the two suits raise similar or common factual points, apply and convince the Court that two suits ought to be consolidated. In this suit, the Applicant can only apply to be joined as an “interested party”, and not as an additional Defendant.
31. On the issue of joinder as an “interested party”, the Supreme Court in the case of *Trusted Society of Human Rights Alliance Vs. Mumo Matemu & 5 others*, Supreme Court Petition No. 12 2013, [2014 eKLR] held as follows:
  - “(17) Suffice it to say that while an Interested Party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.
  - (18) An Interested Party is one who has a stake in the proceedings, though he or she was not 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...”
32. On the same, the Black’s Law Dictionary, 9<sup>th</sup> Edition gives the definition of an “Interested Party” in the following terms:

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



33. For further comparison, Rule 25 of the Supreme Court Rules, 2012 provides as follows:
1. A person may at any time in any proceedings before the Court apply for leave to be joined as an Interested Party.
  2. An application under this rule shall include-
    - (a) a description of the Interested Party;
    - (b) any prejudice that the Interested Party would suffer if the intervention was denied; and
    - (c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties”.

34. Further, in the case of *Judicial Service Commission Vs. Speaker of the National Assembly & 8 others* [2014] eKLR a 5-Judge bench of the High Court commented on the definition of “Interested Party” as set out in the “*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013” commonly known as the Mutunga Rules in the following terms:

“Rule 2 of the Mutunga Rules defines an Interested Party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation.”

35. Similarly, the Supreme Court in *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated))* [2016] KESC 12 (KLR) also set out the principles to be considered where one seeks to be joined in proceedings as an Interested Party. The Court stated the following:

“ 37. ....

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.”

36. The Court observe further as follows:

“ 41. Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the Court. The determination of any matter



will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

42. Whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”
37. In the instant case, the Applicant wishes to join this suit but prays that the same be done by allowing his wife, to whom he has donated a Power of Attorney, to act on his behalf in the suit. The reason given for donating the Power of Attorney is that the Applicant is ailing and cannot also stand or walk or without suffering excruciating pain.
38. On her part, the Plaintiff has stated that she is not opposed to the Applicant being joined as a party to this suit but is opposed to the Applicant suing through the Attorney since according to her, it is all a collusion between the Attorney and the Defendants to facilitate the Attorney to give false testimony and purport it to be that of the Applicant. Secondly, the Plaintiff alleges that the Attorney, being the Plaintiff’s mother-in-law, is the same person who is and has been behind all the problems that arose in the marriage between the Plaintiff and the 1<sup>st</sup> Defendant including aiding the 2<sup>nd</sup> Defendant’s entry and interference in the marriage and also her occupation of their matrimonial home. Thirdly, the Plaintiff contends that the Applicant is not medically incapacitated to the extent that he cannot personally handle the matter or even attend Court virtually.
39. On whether Applicant has shown that he has an identifiable stake or legal interest or duty in these proceedings, it is clear that the subject matter forming the basis of the dispute herein is the property known as Nandi/Ndulele/384 (suit land) which both the Plaintiff and the Applicant lay claim to. Although no title deed or certificate of title has been produced by any party, the Applicant has exhibited a copy of an Official Search Report from the Ministry of Lands and which indicates that the Applicant is the registered owner thereof. Indeed, the allegation that the Applicant is the registered owner has not been challenged by any party. There is therefore no doubt that the Applicant has an identifiable stake or legal interest in the subject matter of the case herein. He therefore ought to be allowed to join the suit.
40. Regarding whether the Applicant’s case can be conducted on his behalf by his nominated Attorney (his wife Clarah Jepleting Buigut) appointed under a Power of Attorney, I am satisfied that sufficient basis has been demonstrated for this Court to allow the Applicant to act in this suit through the Attorney whom the Applicant appointed under the Power of Attorney dated 11/10/2023 and registered on 13/10/2023 as No. 3006. The validity or legality of the Power of Attorney has not been questioned and the Attorney has produced medical evidence indicating that the Applicant is currently suffering from physical incapacity which has confined him to the use of a wheelchair, and that as a result he cannot easily stand or walk. Although the Applicant’s alleged physical incapacity has been questioned, apart from mere verbal challenges, no documentary evidence has been produced to controvert those produced by the Attorney. In any case, a person has complete freedom to donate a Power of Attorney



to any other person to act on his behalf. As long as such Power of Attorney has been validly donated and the Donor is an adult of sound mental status, there would be no basis for curtailing that freedom in the absence of justifiable grounds.

41. I note that Counsel for the Plaintiff has relied heavily on the case of *N W M v J M M & Another* [2017] eKLR in regard to which he submitted that a person suffering from more severe complications was compelled to attend Court to verify the authenticity of his Power of Attorney and that the Court found that the subject did not suffer from any mental disorder. The reliance on that case is however misconceived. This is because that was a case filed under the *Mental Health Act*, and in which some members of a family applied for a declaration that their father was suffering from a mental illness rendering him incapable of managing his affairs. They alleged that while mentally unsound, some other members of the family had fraudulently procured an alleged Power of Attorney from him and which gave such donees the powers to manage his affairs to the detriment of the rest of the family members. The question of the validity of the Power of Attorney in that case was therefore a live issue which the Court had to determine, which is not the case here.
42. In the instant case, should the Attorney testify, she will be cross-examined and the veracity of her testimony will be tested. Ultimately, it is the Court that shall determine her credibility the truthfulness of her testimony. The Plaintiff cannot therefore abrogate upon herself the power to predict and foresee that the Attorney will give false testimony. That is a premature and far-fetched assertion which cannot be made at this stage.

#### **Final Orders**

43. In conclusion, I hereby rule and/or order as follows:
  - i. The Notice of Motion dated 18/10/2023 filed by the Applicant-intended 3<sup>rd</sup> Defendant, is partially allowed and only to the extent that the Applicant - Elijah Kipruto Buigut – is hereby granted leave and/or allowed to join this suit, not as a Defendant, but only as an Interested Party.
  - ii. The Applicant, as such Interested Party”, is granted leave to file and serve its pleadings within twenty-one (21) days from the date of this Ruling.
  - iii. The Plaintiff and the Defendants shall within twenty-one (21) days after being served with the Interested Party’s pleadings, file and serve their responses thereto.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 5<sup>TH</sup> DAY OF JULY 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

Delivered in the Presence of:

Mr. Lagat for the 1<sup>st</sup> Defendant and for intended 3<sup>rd</sup> Defendant

Ms. Omay for Mr. Nyambegera for Plaintiff

N/A for 2<sup>nd</sup> Defendant

Court Assistant: Brian Kimathi

