



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KWALE
ELC CASE NO 4 OF 2021

(FORMERLY ELC 25 OF 2015 MSA)

SOCAF & COMPANY LIMITED.....PLAINTIFF

VERSUS

JOHN MAINA NJOROGE.....1ST DEFENDANT

SAMCHI TELECOMMUNICATIONS LIMITED.....2ND DEFENDANT

JAMII BORA BANK LIMITED.....3RD DEFENDANT

LAND REGISTRAR IN KWALE.....4TH DEFENDANT

THE HON ATTORNEY GENERAL.....5TH DEFENDANT

ABDALLA KOMBO ABDALLA.....6TH DEFENDANT

FRANCIS NGAU MUSYOKI..... INTERESTED PARTY

RULING

INTRODUCTION

1. The Plaintiff filed a Notice of Motion dated 31/5/2021 praying for the following orders;

- a. The defence and counterclaim of the Interested Party dated 27/2/2020 and filed on the 28/2/2020 be struck out and expunged from the court record.
- b. The costs of the suit and this application be awarded to the Plaintiff.

Background to the Suit

1.1 By way of background and for better understanding of the genesis of the application herein, this suit was commenced by way of Plaintiff and amended Plaintiff dated 22/10/2015. The subject matter is the ownership of the land parcel known as Kwale/Msambweni "A"/2927 [suit property]. The Plaintiff alleges that the land is registered and owned by them since the year 1979, initially held under freehold interest which was changed to leasehold. That they have been in possession since then, are in possession of original genuine leasehold title and as the absolute indefeasible owner is entitled to enjoy all the rights thereto without any hindrance. The Plaintiff alleges that the 1st, 2nd and 6th Defendants fraudulently acquired freehold title to the suit property in their respective names and had two separate fake/unlawfully obtained titles on the same property. It is further alleged that the 4th Defendant unlawfully made entries in the register. The property is charged to the 3rd Defendant by the 2nd Defendant which the Plaintiff claims is unenforceable.

1.2 The Plaintiff prays for judgement against the defendants among other orders as follows[Paraphrased];

- a. Declaration that the Plaintiff is lawfully registered as leasehold proprietor of the suit property under certificate of lease issued and dated 23/3/2001.
- b. Declaration that the 1st, 2nd, 3rd and 6th defendants acquired no lawful interest in the suit property from their registration of the same.
- c. An order for surrender of the original land certificate for the suit property and cancellation of the same as being null and void.
- d. An order for cancellation of all entries in the register for the suit property which are inconsistent with the Plaintiffs proprietorship as the freeholder owner of the land
- e. An order for reinstatement of the register of the suit property with the entry of the Plaintiff's name in the leasehold interest for 99 years from 23/3/2001.

1.3. The suit has been heard by My Brother Justice Yano where the Plaintiff, the defendants except the 4th and 5th Defendants had closed their respective cases. On 29/1/20 Interlocutory Judgement was entered in terms of the amended Plaint dated 22/10/2015 against the 1st and 6th Defendant subject to formal proof. The Court then fixed the matter for further defence hearing on 8/7/20 for the evidence of the 4th Defendant.

Application for joinder

1.4. On 14/1/2020 an application was made by the Interested Party herein Francis Ngau Musyoki seeking to be added as Defendant or Interested Party to the current proceedings. The said application was premised on the grounds that the Interested Party held equitable interest in the suit property having entered into a land sale agreement with the 1st Defendant where a total of Kshs 6 million was paid. That the suit property was a subject in ELC No 107 of 2014 where the Interested Party, 1st and 2nd defendants are parties.

ELC No. 107 of 2014

1.5 It is imperative at this juncture in view of paragraph 1.4 of this ruling, to expound on the said case. In that suit the Interested Party in the current suit ELC 25/2015 (Francis Ngau Musyoki) claim ownership of the same property Kwale/Msambweni "A"/2927. The Plaint shows that the Interested Party is the Plaintiff together with Margaret Mbulwa Ngau and Andrew Muia Musyoki Ngau. John Maina Njoroge the 1st Defendant in the current suit is named as the 8th Defendant in ELC 107 of 2014. It is alleged that John Maina Njoroge the 1st Defendant in the current suit fraudulently acquired title to the property Kwale/Msambweni "A"/2927 and around October 2012 entered into a sale agreement with the Interested Party (Francis Ngau Musyoki). *He alleges that the land was fraudulently transferred from him to one to one Abdalla Kombo Abdalla (the 6th Defendant in the current suit) who in turn sold the same to the 1st Defendant and who sold the same to Plaintiff all are parties in the current suit. ELC 107 has 20 Defendants which include the Land Registrar Kwale, John Maina Njoroge who are also Defendants in the current. The rest of the Defendants are advocates who took part on the various transactions pertaining to the land suit land including Kwale/Msambweni A 2894 which is also in issue in ELC 107 of 2014. Substantive allegations of fraud by the Defendants have been highlighted just like in the current Suit.*

1.6 The reliefs sought in ELC 107 of 2014 relevant to the suit property herein is among others; -

‘A determination of the authentic title deeds and Green Cards for the properties Kwale/Msambweni A 2894 and "A"/2927 with a mandatory order of rectification to the Land Registrar to register the title and interest of the two properties to the rightful owner as determined by the Honourable Court.’

There is also a claim for damages for lost opportunity. The Plaint in ELC 107/2014 is annexed to the supporting affidavit of Margaret Mbulwa Ngau dated 14th January 2020.

Disposition of the Application for joinder

1.7. The application dated 14/1/2020 for joinder was disposed of by consent of the parties on 29/1/2020 and adopted as an order of this court. The terms of the consent were as follows; -

- a. The applicant Francis Ngau Musyoki the 2nd Plaintiff in ELC No 107 of 2014 be enjoined in these proceedings as an Interested Party and shall be entitled to participate in this suit.
- b. The amended Plaint dated 22/10/2015 and filed on 30/10/2015 need not be further amended thereby.
- c. No order as to costs.

1.8. The following further orders were made by the Court during adoption of the above consent at the instance of learned counsels for the Interested Party and 3rd Defendants; -

- a. The Interested Party to be served with all the pleadings and documents by the Plaintiff.
- b. The Interested Party to photocopy the proceedings subject to court fees.
- c. The Interested Party to file their documents within 30 days.
- d. Interlocutory judgement entered against the 1st and 6th defendants who have failed to enter appearance and or file defence in terms of the amended Plaint dated 22/10/2015 subject to formal proof.

1.9. Following the consent, the Interested Party filed the said 'their documents', being Statement of Defence and Counterclaim dated 27/2/2020. It is this Defence and Counterclaim that has instigated the filing of the current application by the Plaintiff to have the same struck out

Plaintiff's Case.

2.0 The Plaintiffs application is premised upon grounds set out on its face and by a supporting affidavit and supplementary affidavit of **Ushwin Khanna** advocate sworn on the 29th of May 2021 and 12th July 2021 respectively.

2.1. The main grounds of the application are that the Interested Party having not been joined as a defendant in this suit cannot file the Defence and Counterclaim except with specific order of the court. The consent had been recorded with the understanding that the Interested Party was joining only as an Interested Party and not as a litigating party to file statement of defence and counterclaim.

2.2. Other grounds were that the Plaintiff is not a party in ELC 107 of 2014 and consequently all the reliefs claimed in the Counterclaim are misconceived. The contents of the Plaint in ELC 107 of 2014 are directly contradictory to the facts pleaded in Paragraphs 3 to 25 inclusive of the said Defence and Counterclaim and which are scandalous, frivolous, intended to prejudice or delay the fair trial of this suit. Further that a current official search at Kwale Country Registry shows the Plaintiff as the lawful registered owner.

2.3. It is also contended that the Interested Party 's replying affidavit had been filed out of time without leave of court and the same was received under protest for this reason as well as other reasons as shall become apparent in this ruling. It is noteworthy that during highlighting of submissions Learned Counsel Mr. Khanna abandoned the objection as to filing out of time.

Interested Party Case.

2.4. The application is opposed through a replying affidavit dated 23/6/2021, sworn by Mulwa Nduya, Advocate for the Interested Party. The prayers sought in the application dated 14/01/2020 and the terms of the Consent recorded herein and adopted as an order of this Court are reiterated.

It the Respondents case that; -

2.5 From the application dated 14/1/2020 and the terms of the consent order including the action of the Plaintiff in responding to the Defence & Counterclaim, it was clear that the intentions of the parties and the court was that the Interested Party would be entitled to substantially participate in this suit and file his documents without a need to further amend the Plaint or serve new summons. It was the Court which directed that there would be no need to amend the Plaint, ordered the Interested Party to file his documents, which they did. While highlighting submissions it was also argued that the consent was between the Plaintiff and the Interested Party and the rest of the parties did not object. The Plaintiffs contention that the Interested Party was to participate by court appearance was not evidenced in the consent nor the court proceedings.

2.6 There was no appeal against the consent order neither had it been set aside or reviewed.

2.7 The Defence and Counterclaim disclose reasonable defence, raises triable issues, and seeks to avoid duplicity of judgement since the ownership of the suit property was also in issue in ELC 107 of 2014. It would be sensible for the court to issue a joint judgement whereby the rights of all parties in both cases are determined.

2.8. The Interested Party was an innocent purchaser for value of the same plot and was entitled to ventilate his case, the Court has to pronounce itself on who was entitled to damages in view of the two competing claims and had a duty to see that justice is done.

Plaintiff/Applicant Submissions.

3. The Plaintiff filed its submissions on 3/8/2021, referred and relied upon its supplementary affidavit to the replying affidavit by the Interested Party sworn on 12/7/2021 and filed on 13/7/2021. Further reliance was placed on the 3rd defendant's submissions filed on 9/7/2021 which the Plaintiff/Applicant adopted and Order 2 Rule 15 of the Civil Procedure Rules 2010.

3.1 The Plaintiff relies on the Supreme Court Authority - **Petition No 14 Of 2014 Communications Commission of Kenya & 3 Others V. Royal Media Services Limited & 7 Others** and states that Rule 25 of the Supreme Court Rules 2012 makes provision for enjoining an Interested Party, whereas Order 1 of the Civil Procedure Rules 2010 had no such provision.

3.2 The Plaintiff referred to Paragraphs 27 and 28 of the above case , where the Supreme court made the following observations - *“that the court could not exercise its discretion to enjoin a party that disguises itself as an Interested Party , while in actual fact merely seeking to institute fresh cause’* and the same courts principle pronounced in the Mumo Matemu Trusted Society of Human Rights v Mumo Matemu (2014) eKLR) case that ‘ *A suit is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules under the Civil Procedure Code, regarding parties to suits, and who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an Interested Party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings’*. The Supreme Court proceeded to make a finding that the standards to be applied in considering whether or not the applicant should be enjoined as an Interested Party had not been met since the application was premised upon mere apprehension and speculation, that rights not yet crystallised, will be violated.

3.3 Based on the above Learned Counsel Mr. Khanna submitted the Interested Party is not a party to the present suit and had no locus standi to file any pleadings as he was already a Plaintiff in ELC No 107 of 2014. He also urged that the Interested Party presence cannot result in settlement of all questions involved in the proceedings but may adversely affect the rights of the Plaintiffs and more than likely to cause proliferated litigation by filing his pleadings to a suit where he is not a direct party.

3.4 Further Reference is made to **ELC No 705 of 2012 Luka Kipleilei Kotut Vs Joseph Chebii & Another (2013) eKLR** where it was held that a person who is not a defendant cannot simply walk into proceedings by filing a statement of defence, that it was improper for the Interested Party therein to have entered appearance and filed defence. It is submitted that the Interested Party herein had not been served with summons to enter appearance to entitle him file a defence under the provisions of Order 7 Rule 1, moreover he had already instituted separate proceedings where he has agitated his case and cannot have ‘two bites of one cherry’.

3.5 It is further urged that the Plaintiff and the Defendants herein would be gravely prejudiced, set back another 7 years since filing of the instant suit, if the Interested Party is allowed to ventilate his grievances through his pleadings. Moreover, Plaintiff and Defendants had closed their respective cases before joinder of the Interested Party.

Interested Party ’s Submissions

4. The Interested Party filed submissions dated 13th August 2021 and also placed reliance on the contents of the replying affidavit sworn by Mr. Mulwa Nduya which have already been summarised herein.

4.1 The provisions of **Order 1 Rule 10[2] and 10[4], Order 1 Rule 3,4 and 5 of the Civil Procedure Rules 2010** on joinder of parties were highlighted. It is submitted by Learned Counsel that the consent order was recorded based on these provisions allowing the Interested Party to participate in the suit. That the Interested Party had met the threshold of being enjoined in the suit, key being that he had a valid stake in the matter having entered into a sale agreement with the 1st Defendant over the suit property and his presence being necessary to assist in the full determination of the case. Other criteria is that he was a ‘proper Party’, relief flows from the respondent to the Plaintiff when the Respondents interest in the suit property is quietened by the ultimate decree of the court, the ultimate decree cannot be enforced without the presence of the Respondent. Various cases were relied upon being **Petition No 14 Of 2014 Communications Commission of Kenya & 3 Others V. Royal Media Services Limited & 7 Others where the court referred to the Mumo Matemu case, Meme Versus Republic [2014] 1EA 124, Sarah Jepwambok Versus Kibiwott Chepkuto & Another [2021] eKLR and LAFUND Versus Daniel Kasirimo Ole Muyaa [2018] eKLR.**

4.2. It is further urged that the Interested Party had duly sought the leave of court, the consent allowed him to do so and therefore had not filed documents without any legal basis. It was pointed that the case of **ELC 705 of 2012 Luka Kipleilei Kotut V. Joseph Chebii & Another [2013] eKLR** relied upon by the Plaintiff to censure the Respondents pleadings is not relevant since the Interested Party in those proceedings had filed its pleadings before approaching the court.

4.3. It is further contended that Civil Procedure Rules as well as the consent did not define and/or limit the Interested Party on the style of pleadings. The Respondent was expecting to proceed for trial herein for the court to weigh the evidence and determine the valid proprietor. Counsel invited the Court to evaluate whether the Respondent should have been added as a Defendant or Interested Party and urged that this court should find the rights and interests are in keeping with a defendant or Interested Party.

4.4. The Defence and counterclaim raised issues of the Interested Party having recognizable interests in the suit land and did not qualify to be struck out as spelt out under **Order 2 Rule 15[1] of The Civil Procedure Rules**. Reliance was placed on **Appeal No 31 Of 2018 Britam General Insurance Limited Versus Ukwale Agnes Ndungu [2019] eKLR**.

4.5. The Interested party also denies the Plaintiff/Applicant response to the Defence & Counterclaim herein, that Francis Musyoki had repudiated the sale agreement with the 1st Defendant John Maina Njoroge and therefore had no interest in the suit property. It is contended that the same was suspended pending determination of the authentic proprietor and not repudiated. Further that the Plaintiff had admitted to certain facts in the said response to Defence & Counterclaim herein.

Plaintiffs Reply to the Interested Party Submissions.

5.0 The Plaintiff also filed response dated 20th August 2021 to the Interested Party Submissions. He reiterated his submission as to who was entitled to file defence, that the Interested Party is bound by the consent and is to participate only by court attendances and to inform the court that he has a similar suit against some of the same Defendants herein. If it was intended that the Interested Party should file Defence, this would have been expressly stated in the consent order. Further the intention to restrict the Interested Party to only participate in the proceedings was clear in the agreement that the Amended Plaint need not be further amended. Under Order 1 Rule 10(4) a joinder of a Defendant as a party to this suit would have necessitated that the Plaint is amended. The said amended Plaint makes no reference to the Interested Party nor is there any claim made against the Interested Party and therefore no cause of action pleaded against the Interested.

5.1 Counsel also pointed that the law and authorities referred by the Interested Party must be consistent with and confined or limited to the said terms of the Consent. The authorities cited in para 38 to 44 of the Interested Party submission were irrelevant and could be distinguished for the reason that the Interested Party already ventilated his grievances in ELC 107 of 2014 and no prejudice will arise if the impugned pleadings herein are struck out. Further that the reasons set out in paragraphs 40 -45 of the Interested Party 's submissions are the same facts pleaded in ELC 104 of 2014 ad will enable the court effectually and completely adjudicate upon and settle all questions involved in that suit.

5.2 That there were no specific orders given by the Court for summons to enter appearance and for amendment of the Plaint as required under Order 1 Rule 3.

5.3. It is further submitted that the **LAPFUND Versus Daniel Kasirimo Ole Muyaa [2018] eKLR Joseph Ngali Kingori** case which set out the guiding principles when enjoining a party to a suit (outside the confines of the consent order), one such principle being that 'there must be a relief following from the Defendant to the Plaintiff'- in the instant case there is no relief flowing from the Interested Party to the Plaintiff or vice versa.

2nd Defendants Case.

5.4 The 2nd Defendant did not oppose the application.

3rd Defendants Submissions.

6. The 3rd Defendant filed its submissions on 9/7/2021 and stated that the power given to court to join parties to proceedings only considers Plaintiffs and Defendants and not interested parties in a suit commenced by way of Plaint. This submission was based on the case of **Doone Farms Ltd v Richard Soi & 4 others [2017] eKLR** and further in **Marigat Group Ranch & 3 Others v Wesley Chepkoimet & 19 others** both authorities highlight the provisions of **Order 1 Rule 3** and parties to a suit, the same is based on the fact that no provision of the law allows for a party to be joined into proceedings as an Interested Party.

6.1 Justice Sila Munyao's views in the case of **Marigat Group Ranch & 3 Others Vs. Wesley Chepkoimet & 19 Others (2014) eKLR** were emphasised by Counsel. Justice Munyao declined to allow joinder as defendant on the basis that where the Plaintiff has chosen to assert his rights against certain defendants and not others, the court should be slow in imposing other defendants upon him. That the contest in a suit is between Plaintiff and defendant and if any party claim over the subject matter, then such party needs to apply for joinder as Plaintiff or defendant and not as Interested Party. Further that doing so would be to also allow the introduction of a parallel claim in the nature of proposed counterclaim with new parties to it which would also unjustly and unnecessary muddle the Plaintiffs claim.

6.2 It was further submitted that both the Plaintiff and Defendant had prosecuted and closed their respective cases and the Interested Party was a stranger to the proceedings. The court was asked to expunge all documents filed by the Interested Party for him to commence his own suit.

ANALYSIS AND DETERMINATION

7. This Court has perused all the documents filed and placed before the court in respect of this application and the authorities cited by the respective parties in support of their submissions as well as the pleadings. I have considered the history and genesis of the Notice of Motion dated 31st May 2021 against the various issues emerging from arguments by the parties.

7.1 Let me state from the outset that in my view the main issues for determination is whether the Interested Party should participate in these proceedings by filing the Defence & Counterclaim; Whether there is any danger of conflicting judgements in the two suits herein and whether the prayers sought in the Notice of Motion dated 31st May 2020 should be granted.

7.2 Arguments have emerged on whether the Interested Party demonstrated sufficient grounds to be enjoined and participate in this suit and various authorities cited. This Court has also been invited by the Interested Party to evaluate whether the Interested Party should have been added as a Defendant or Interested Party. The provisions of **Order 1 Rule 10[2] and 10[4] , Order 1 Rule 3,4 and 5 Of the Civil Procedure Rules 2010** on joinder of parties were highlighted as having laid the legitimacy for the joinder of the Interested Party. These provisions have been the subject of extensive arguments by the parties as is evident herein. It is in this regard that I have chosen to draw my own analysis into these submissions.

7.3 Order 1 Rule 10 (2) and 10(4) of the Civil Procedure Rules 2010 as to substitution and addition of parties, read 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**, (emphasis mine) 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.

(4) Where a **defendant (emphasis mine) is** added or substituted, the Plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the Plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

7.4 My reading of the above provisions is that, while the court is given discretion in matters joinder of parties, it is limited to the extent that the Party should be a defendant or Plaintiff, thus the words ‘whether as Plaintiff or defendant’. The words ‘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’ must be read in tandem with the spirit of the said provisions. This is further buttressed by Rule 10(4) which only refers to a defendant. I have also noted the cases cited on joinder of one as an Interested Party where the confusion caused by emerging trends arising from a departure to these provisions have been pointed out and I associate with the said observations.

7.5 Rule 10(4) speaks for itself that the Plaintiff would have to be amended yet the parties proceeded to record the consent stipulating that the plaintiff was not going to be amended. This in my view goes to buttress the fact that parties intended to limit the Interested Party’s participation. Moreover Rule 10(4) only refers to a party joined as Defendant and not Interested Party. It is only an amendment that would have added a Defendant to make them a litigant in the proceedings as envisaged under the rules. I have noted the Interested Party submission that it was the court that directed that there would be no need to amend the Plaintiff and ordered the Interested Party to file his documents. I have perused this court proceedings of 29/01/2020 and I have not seen any record by the Court directing the above matters attributed to it. The record is silent. The Court from the facts only adopted the consent of the parties. I have also set out in this ruling the additional orders that were recorded by the court which were largely informed by the Counsels application to have copies of the pleadings and directions on parties who had not entered appearance.

7.6 Having stated the above, I still find that it is clear from the proceedings herein that the issue as to joinder was resolved by way of the consent recorded herein which was adopted as an order of the court. The issue as to whether the Interested Party ought to have been joined as a Defendant for purpose of the consent should not arise. In his application the Interested Party sought to be joined as a 6th (sic) Defendant or Interested Party. He then chose to be joined as Interested Party and he is therefore bound by this consent. The Consent is very clear that **Francis Ngau Musyoki** was to be added as an Interested Party. Guided by the case of **Board of Trustees National Social Security Fund v. Micheal Mwalo [2015] eKLR**, as was mentioned in **Leonida Ajiambo Mudibo V. Francis Okumu Olaka and Another [2021] eKLR**. *The court of Appeal stated as follows; -*

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

Parties were all along aware of the circumstances herein when recording the consent. This court will not interfere with the Consent herein nor sit on appeal on the said consent which was adopted as an order of the court by my brother Justice Yano.

7.7 I have agonised over the impugned Defence and what it would be relating to or responding to when the Plaintiff has not been amended to accommodate them as litigants or better still when no cause of action is pleaded against the Interested Party. This court attention has been drawn to various cases where the courts have underscored that the contest in a suit is between Plaintiff and Defendant and if any party claim over the subject matter, then such party needs to apply for joinder as Plaintiff or defendant and not as Interested Party. The Interested Party herein clearly is not a party to the suit. With regard to the Counterclaim, the Interested Party urges that there was a relief following from the Defendant to the Plaintiff’ thus the Counterclaim filed herein. In my view the relief in the instant case only flows from the 1st Defendant to the Plaintiff.

7.8 This court is guided further by an excerpt in the holding by the apex court in **Francis Karioko Muruatetu & Another V Republic & 5 Others [2016] eKLR** the court pronounced itself on the extent to which an Interested Party may participate in the proceedings as follows;

“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.

Therefore, in every case, 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”.

7.9 What is the nature of participation and what kind of documents were to be filed by the Interested Party in championing his cause. The Plaintiff Applicant urges that it was not the intention of the parties that the Interested Party would have filed the Defence and Counterclaim herein. The Interested Party on the other hand contends that the impugned pleadings is the only way he can champion his case, aid the court to effectually and completely adjudicate upon and settle all questions and moreover the Civil Procedure rules as well as the consent did not define and/or limit the Interested Party on the style of pleadings. I note that the parties in recording the consent and especially the Interested Party ought to have ensured that the intentions were clearly recorded for good order. However, the nature of the documents can still be inferred in my view from the Provisions relied upon herein to the extent that they refer to joinder of a party as a litigant despite the absence of an express definition.

7.10 The contents/facts as set out in the Plaints in respect of the two suits herein have already been set out earlier in this ruling together with the reliefs sought. The parties are also briefly set out and how they relate in both suits. The Plaintiff in the current suit

has acknowledged the existence of ELC No. 107 of 2014 and set out some facts thereto. The prayers sought by the Interested Party in the Counterclaim have already been set out and well-articulated in ELC 107 of 2014. I have also carefully studied the pleadings and I have no doubt in my mind that this suit will upon conclusion be able to settle the intricacies on the several transfers over the suit property, the allegations of fraud, the alleged illegal entries, ownership and several other issues for determination as raised in the pleadings. This is of course except the other suit property not in issue in the current suit. The issues for determination in the present suit will not be changed by the Interested Party's entry into the proceedings by way of the said Defence & Counterclaim – the issues for consideration will be as per the primary parties in the current suit. In arriving at this finding, this court has also considered the apprehension raised by the Interested Party on possibility of two conflicting judgements on the same suit property. Having noted that the reliefs sought are largely the same, it is possible to stay the proceedings in ELC 107 2014 and use ELC 185 of 2015 with regard to Plot No. Kwale/Msambweni "A"/2927 [suit property]. It is also noted that hearing of the current suit has progressed substantively, the Plaintiff and the several Defendants herein having testified and fully ventilated their case. I reserve further pronouncements on the proposal for stay to enable participation of the parties.

7.11 The other option would have been to consider consolidation which I note is also a matter that is not on the table in respect of the current application. However, it behoves the court to find a solution and not leave matters to guessing. The Plaintiff in the former case in addition to the suit property herein also has another property in issue and several other parties who are not parties to the instant case. I would in addition to the reasons set forth earlier in favor of the instant case proceeding as it is, be hesitant to order consolidation since it will complicate matters.

7.12 This Court is still left to grapple with the issue of what documents the Interested Party should file as way of his participation, in view of the subsisting consent. The Interested Party shall participate by attending the remainder part of the hearing as an observer and will be at liberty to file written submissions before judgement is delivered in this matter which the court may consider.

8.0 The upshot of the foregoing is that the prayers sought in the Notice of Motion dated 31/5/2021 should be granted and I proceed to make the following orders; -

1. The Notice of Motion dated 31/5/2021 is hereby allowed.
2. Costs shall follow the cause.

DELIVERED VIRTUALLY, DATED AND SIGNED ON THIS 25TH DAY OF OCTOBER, 2021

HON. LADY JUSTICE A.E DENA.

FOR PLAINTIFFS: Mr. Khanna H/B for Wanjiku Mohammed

FOR 1st DEFENDANT: N/A

2nd DEFENDANT: N/A

3rd DEFENDANT: Mr. Amani

4th & 5th DEFENDANT: N/A

6th DEFENDANT: N/A

INTERESTED PARTY: Mr. Musyimi H/B for Mulwa Nduya.

COURT ASSISTANT: Mwakina.