



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 24 OF 2020

ALEXANDER MAKAU & 23 OTHERS.....PLAINTIFFS

VERSUS

DAVID MUTUKU & 20 OTHERS.....DEFENDANTS

AND

NGWATANIO PHASE FOUR ASSOCIATION.....PROPOSED INTERESTED PARTY

RULING

1. This Ruling is in respect of the Proposed Interested Party's Application dated 8th February, 2021 in which it has prayed for the following orders:

a. That this Honourable court do issue orders enjoining Ngwatanio Phase Four Association, the Applicant herein to appear as an Interested Party in this suit Machakos ELC No. 34 of 2020.

b. That this Honourable court directs that the pleadings be amended in the manner reflecting the joinder as hereinabove ordered.

c. That the costs of the Application be provided for.

2. The Application is supported by the Affidavit of the Proposed Interested Party's Chairman who deponed that the Proposed Interested Party is a registered entity; that it is an umbrella body formulated to advance and enforce matters of common interest pertaining to land owned by its members and that it has a membership of more than 1,200 families.

3. According to the Proposed Interested Party's Chairman, he only learnt of the existence of these proceedings and the Ruling that was due on 19th February, 2021 a few days ago; that seven of the Applicant's members are Defendants; that once this court issues orders in this matter, the members of the Proposed Interested Party will be affected by its decision and that there have been intimidations and arbitrary criminal charges in respect of the Proposed Interested Party's members to frustrate their legitimate claim over the suit land.

4. In response, the Plaintiff's advocate deponed that the Proposed Interested Party has not placed any material before the court to demonstrate the nature of its interest, if any, in the suit property; that the Plaintiffs have filed genuine Certificates of Title showing that they are the bona fide owners of the suit property and that it will be a waste of judicial time to enjoin the Proposed Interested Party.

5. It was deponed that the Proposed Interested Party's Chairman has admitted that some of their members are Defendants in this suit; that the said Defendants have filed a counter claim; that the Proposed Interested Party was registered on 16th October, 2020, well over seven months after the suit had been filed and that the Proposed Interested Party's Chairman has not annexed on his Affidavit a list of its members.

6. The Proposed Interested Party's Advocate submitted that in 1994, the majority of the members of the Association were allocated the suit property by the government; that due to the laxity from the then Commissioner of Lands, the members of the Proposed Interested party were not issued with titles and that the members of the Proposed Interested Party have been in possession of the suit property for more than 20 years.

7. It was submitted that the Proposed Interested Party meets the criteria for its inclusion in the suit property as an Interested Party and that the Application should be allowed. The Plaintiffs' advocate did not file submissions.

8. This suit was commenced by way of a Plaint dated 9th March, 2020. In the Plaint, the Plaintiffs averred that they are the registered proprietors of several parcels of land (which have been stipulated in the Plaint) and that they have been unable to develop the suit properties owing to the violent actions of the Defendants.

9. The Plaintiffs have sought for numerous declaratory orders, including a declaration that the Defendants' occupation of the suit properties is illegal; a permanent injunction restraining the Defendants from trespassing on the suit properties and an order of eviction as against the Defendants.

10. The Defendants filed a Defence and Counter claim. In the meantime, the Proposed Interested Party is seeking to be enjoined in the suit as an Interested Party on the ground that its members were allocated the land by the government in 1994 and that they have been in occupation of the land since then.

11. The law governing joinder of parties is **Order 1 Rule (10) (2) of the Civil Procedure Rules. Order 1 Rule 10 (2)** empowers the court, at any stage of the proceedings, upon an Application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

12. In *Sarkar's Code of Civil Procedure (11th Edition Reprint, 2011. Vol. 1, page 887)*, the authors stated as follows:

“The Section (on joinder) should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

13. The Court of Appeal of Tanzania, in *Tanga Gas Distributors Ltd vs Said & Others (2014) E.A 448*, while considering the equivalent of our **Order 1 Rule 10(2) of the Civil Procedure Rules** stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceedings has been fully disposed off and there is nothing more to be done that the rule becomes inapplicable and that a party can be added even at the appellate stage. This position was adopted by the Court of Appeal in *J M K vs M W M (2015) eKLR*.

14. For a party to be so enjoined, his presence must be necessary in determining the matter. Hence, the Applicants have to show that they have a stake in the proceedings and that their presence will help the court determine the issues at hand. The mere mention of the term “Interested Party” does not entitle them to be enjoined as parties to the proceedings.

15. The Proposed Interested Party's position is that it was registered as an Association to advance and enforce matters of common interest pertaining to land owned by its members and that it has a membership of more than 1,200 families.

16. Although this suit was filed on 13th March, 2020, the Proposed Interested Party was registered as a Society on 16th October, 2020. That being the case, the Proposed Interested Party cannot purport to have a claim, either as a legal entity or an unincorporated body in respect of the suit property. The Association was not constituted as at the time the Plaintiffs sued the Defendants and cannot purport to have any interest in the suit property.

17. Furthermore, the Proposed Interested Party has not disclosed to this court who its members or officials are. Indeed, without the said disclosure, the Plaintiffs will be dealing with an amorphous body whose identity is neither known to them nor the court.

18. The failure to identify the registered officials of the Proposed Interested Party makes the Application for joinder a non-starter considering that an Association registered under the Societies Act cannot sue or be sued in its name. It is only the *bona fide* officials of a Society that can sue and be sued on behalf of the Society.

19. For those reasons, it is my finding that the Application dated 8th February, 2021 is unmeritorious. The Application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 15TH DAY OF OCTOBER, 2021

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Ngolya for the Plaintiff

Ms. Katile for Nyamweya for the Defendant

Mr. Gitume for the Proposed Interested Party

Court Assistant – John Okumu