



**Mukono v Nyaga & another; Nyaga (Interested Party) (Civil Appeal
1 of 1998) [2023] KEHC 19090 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 1 OF 1998
LM NJUGUNA, J
JUNE 14, 2023**

BETWEEN

JEDIDAH NJUTHE MUKONO APPELLANT

AND

DAVID NJUE NYAGA 1ST APPLICANT

JAMES MUCHANGI NDWIGA 2ND APPLICANT

AND

DAVID NJUE NYAGA INTERESTED PARTY

RULING

1. The application before this court is dated March 15, 2023 wherein the applicants sought for orders as enumerated on the face of the application.
2. The application is premised on the grounds on its face and it's supported by the affidavit of David Njue Nyaga.
3. In a nutshell, the deponent states that the 1st applicant is the registered owner of land parcel No Kagaari/Weru/5151 and by virtue of the application dated February 25, 2022, the appellant sought to nullify the several parcels of land including but not limited to No Kagaari/Weru/5151 whose registered proprietor is the 1st applicant. That the 2nd applicant was belatedly served with the application dated February 25, 2022 and thus he did not have sufficient time to file a response and/or seek representation. Additionally, that the hearing proceeded virtually but the 2nd applicant did not hear the matter being called out so as to enable him seek leave to file a response.
4. The respondent in opposition filed a replying affidavit sworn on May 2, 2023 and wherein it was deponed that the applicants were duly served in time with the appellant's application dated February 25, 2022 but chose not to respond. That the applicants have severally been served with hearing notices



but have failed to appear in court. It was further deponed that the applicants are not beneficiaries of the estate of the deceased herein hence they have no stake in the instant proceedings. The appellant/respondent swore that she continues to suffer great loss and inconvenience as she is elderly and the instant cause is an old matter which ought not to be allowed to prolong in court any further.

5. The court gave directions that the application be canvassed by way of written submissions and only the applicant complied with the directions.
6. The applicant submitted that the respondent included all the registered owners who are adversely mentioned in the substantive application as respondents, save for the 1st applicant herein. That whether the omission was by design or inadvertent, this court was urged to remedy the same by allowing the prayers herein. This court was implored to consider the overriding question as to whether it would be in the interests of justice to drive away the 1st applicant from the seat of justice when adverse orders are being sought against him. That it is in the interest of justice that the 1st applicant be given a chance to ventilate his case; reference was made to articles 25(c) and 50 of the [Constitution](#) and the case of [In the matter of the Estate of John Mutio Mutua](#) [2019] eKLR. In reference to the 2nd applicant, it was submitted that he was belatedly served and for the reason that the hearing was done virtually, he was unable to address the court. It was submitted that no prejudice shall be occasioned to the respondent herein if the prayers sought herein are granted. Reliance was placed on the case [Nicholas Kiptoo Arap Korir Salat v Independence Electoral and Boundaries Commission & 6 others](#) [2013] eKLR. In the end, this court was urged to allow the prayers herein by the applicants.
7. I have carefully considered the application and the supporting affidavit, the replying affidavits, the submissions filed herein and the case law relied on by the respective parties. I find the issue for determination is whether the intended interested party and the 2nd applicant have sufficiently demonstrated to the court that they are deserving of the orders sought.
8. Rule 2 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) 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 be directly involved in the litigation.
9. Order 1 rule (10) (2) of the [Civil Procedure Rules](#) empowers the court, at any stage of the proceedings, upon 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 be enjoined for the court to effectively and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.
10. The threshold for joinder was set out in the case of [Francis Kariuki Muruatetu & another v Republic & 5 others](#) in petition 15 as consolidated with 16 of 2013 [2016] eKLR. The court held that the applicant must move the court by way of a formal application, enjoinder 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.

11. Similarly, in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu* [2014] eKLR, the Supreme Court held that:

“An interested party is one who has a stake in the proceedings, though he or she was not a 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 herself appears in the proceedings, and champion his or her cause.”

12. Therefore, joinder of parties is permitted by law and can be done at any stage of the proceedings; but joinder of parties may be refused where such joinder will lead to practical problems of handling the existing cause of action or will occasion unnecessary delay or costs on the parties in the suit.

13. Joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to, or totally different from existing cause of action or relief. The determining factor in joinder of parties is that common question of fact or law would arise between the existing and the intended parties. This is the test that was applied by F. Gikonyo J. in the case of *Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited and another* in which, the court was of the view that accordingly, to determine the real issues in dispute among all the parties, the intended respondents must be enjoined.

14. In my view, in deciding an application for joinder, the court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit. However, the court must guard against a frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before court for determination.

15. As the court held in *Judicial Service Commission v The Speaker of the National Assembly & another* petition No 518 of 2013:

“The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as “a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”.... He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings...”

16. The applicants have argued that 1st applicant is the registered owner of land parcel No Kagaari/Weru/5151 and by virtue of the application dated February 25, 2022, the appellant sought to nullify the several parcels of land including but not limited to No Kagaari/Weru/5151 whose registered proprietor is the 1st applicant. That the 2nd applicant was belatedly served with the application dated February 25, 2022 and thus did not have sufficient time to file a response and/or seek representation. Additionally, that the hearing proceededed virtually but the 2nd applicant did not hear the matter being called out so as to enable him seek leave to file a response.



17. In determining whether the applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what the constituents of the applicant's rights are, but rather in what would be the result on the subject matter of the action if those rights could be established.
18. The court has carefully perused the application herein and the orders sought and that the overriding question as to whether it would be in the interest of justice to drive away the applicants from the seat of justice when adverse orders are being sought against them. That it is in the interest of justice that the applicants be given a chance to ventilate their case hence fulfilling the provisions of articles 25(c) and 50 of the Constitution; and that no one should be condemned unheard.
19. From the above analysis, I am satisfied that the applicants have demonstrated a "legitimate interest" in the suit herein. The presence and participation of the 2nd applicant and the proposed interested party in these proceedings is thus necessary.
20. In the circumstances aforesaid, I hereby allow the application with no order as to costs.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

