



**Karema & another v Authority & 2 others; Joseph Karanja Kanyi t/  
a Kanyi J. & Company Advocates (Interested Party) (Constitutional Petition  
24 of 2015) [2021] KEHC 233 (KLR) (10 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 233 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 24 OF 2015  
JM MATIVO, J  
NOVEMBER 10, 2021**

**BETWEEN**

**JOAN ZAWADI KAREMA ..... 1<sup>ST</sup> PETITIONER**

**RENSON JUMA THOYA (SUING AS MEMBER ELECTED TRUSTEES OF  
THE KENYA PORTS AUTHORITY) RETIREMENT BENEFITS SCHEME,  
2012 ..... 2<sup>ND</sup> PETITIONER**

**AND**

**BOARD OF DIRECTORS, KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
MANAGING DIRECTOR, KENYA PORTS AUTHORITY .... 2<sup>ND</sup> RESPONDENT  
GENERAL MANAGER, BOARD AND LEGAL SERVICES KENYA PORTS  
AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JOSEPH KARANJA KANYI T/A KANYI J. & COMPANY  
ADVOCATES ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 24<sup>th</sup> August 2021, Mr. Joseph Karanja Kanyi T/A Kanyi J. & Company Advocates (“the Applicant”) seeks to be enjoined in these proceedings as an Interested Party. He also prays for costs of the application to be in the cause.
2. The application is premised on the grounds that he acted as the advocate for one of the parties in the conveyancing transaction, the subject of these proceedings, and on 4<sup>th</sup> May, 2015, this court issued an order halting any transaction on the parcels. He states that the status quo prevailing as at the 4<sup>th</sup> May, 2015 was as earlier agreed upon by parties to the transaction.



3. He states that the transaction was ring fenced with valid professional and personal undertakings and irrespective of the said orders, the applicant has been sued in various matters to wit Nairobi No 16 of 2017, Mombasa Chief Magistrate’s Court Criminal Case No. 13 of 2019 among others. He states that it is in the interest of justice that the orders sought be allowed. Lastly, he states that equity does not suffer a wrong without a remedy. The application is supported by the annexed affidavit of applicant also dated 24<sup>th</sup> August 2021 and the annexures thereto.
4. Counsel for the Petitioner informed the court that he was not opposing the application, so he did not file any papers.
5. However, the Respondents’ counsel opposed the application. He filed grounds of opposition dated 27<sup>th</sup> October 2021 stating that the applicant by his own admission, confirms he was the advocate on record for Kikambala Development Company Limited, the Vendor of the subject properties. The Respondents state that the applicant has no personal interest in the transaction and he cannot be said to have any locus standi to justify his joinder to these proceedings, and that the joinder appears to be sought for the purposes of pursuing a commercial interest which is not permitted in matters of this nature.
6. The application was canvassed by way of written submissions. The applicants’ counsel cited *O’brian Bolei Kipsowe & 2 others v Simba Caetano Formula Limited & another; Groupe Renault Sa (Interested Party)*<sup>1</sup> in which the court cited previous decisions in support of the proposition that the court on its own power can join an interested party in proceedings. On the criteria for joinder, he cited *Elizabeth Nyambura Njuguna & another (suing as the Legal representatives of Njuguna Mwaura Mbogo) v E. K. Banks Limited & 2 others; Edward Kings Onyancha Maina (Interested Party)*<sup>2</sup> in which the court cited previous decisions which held: -

“ 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. Similarly in *t Meme v. Republic, [2004] 1 EA 124*, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

(Also cited is *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others*<sup>3</sup> which defined an interested Party as defined above).

7. The Respondents’ counsel submitted that the applicant seeks to be enjoined in these proceedings in his personal capacity yet neither he nor the vendor had any personal interest in the various parcels of land. He submitted that from the affidavit in support of the application, it is apparent that the applicant

<sup>1</sup> {2020} e KLR.

<sup>2</sup> {2019} e KLR.

<sup>3</sup> {2015} e KLR.



seeks to assert, on behalf of his client, contractual rights i.e. specific performance which falls outside the purview of this Petition. He submitted that the applicant has no locus standi to intervene because he was not the vendor nor does he have sufficient nexus or interest to justify his joinder. He relied on *Erick Wambua Muli & Topsurv Geosystems Ltd v Prime Bank Ltd*<sup>4</sup> and Godfrey Paul Okutoyi [suing on his on behalf and on behalf of and representing and for the benefit of all past and present customers of banking institution in Kenya v Habil Olaka – The Executive Director [Secretary] of the Kenya Bankers Central Bank of Kenya. He urged the court to dismiss the application with costs.

8. For starters, the Supreme Court of Kenya has severally laid down the applicable tests in applications for joinder. Article 163 (7) of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme court. The binding nature of the Supreme Court decisions under Article 163 (7) of the Constitution is absolute. Article 163 (7) is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court<sup>5</sup> and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.<sup>6</sup> (See also the Supreme Court decision in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*<sup>7</sup>).

9. In *Francis Kariuki Muruatetu & another v Republic & 5 others*, the Supreme Court defined an intervener and an interested party as defined in the Black’s Law Dictionary as follows: -

“Black’s Law Dictionary, 9th Edition, defines “intervener” as one “who voluntarily enters a pending lawsuit because of a personal stake in it.”

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

10. The Supreme Court was categorical that ‘enjoinment is not as of right’ and proceeded to lay down the basis upon which an application for joinder of an interested party is to be considered. It laid down the following considerations: -

- a. The personal interest or stake that a 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.
- b. 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.
- c. 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 others parties will be making before the Court.

11. The test is not according to or against the wishes of the applicant or any of the parties in the proceedings. It is whether the the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings and must satisfy the above considerations. In determining whether or not

<sup>4</sup> {2017} e KLR.

<sup>5</sup> [Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others {2017}eKLR](#)

<sup>6</sup> See [Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others {2015}eKLR](#) citing Sir Charles Newbold, P in *Dodhia vs National & Grindlays Bank Ltd & Another* {1970} E.A. 195

<sup>7</sup> [2015] e KLR.



an 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 are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.<sup>8</sup>

12. As was held by the Supreme Court in *Francis Kariuki Muruatetu & another v Republic & 5 others*, an applicant is required to demonstrate the personal interest or stake he has in the matter and must set it 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 must also be demonstrated to the satisfaction of the court and it must be clearly outlined and not something remote. Lastly, an applicant 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.
13. I have carefully read the prayers sought in the Petition. None of the prayers directly or indirectly affects the applicant. True, vide a Notice of Motion dated 30<sup>th</sup> April 2015, the Respondents sought orders which if they had been granted could have impacted on the applicant, but the said orders were not granted. Instead, the court granted an order maintaining the status quo on 4<sup>th</sup> May 2015. I do not see how the said order can affect the applicant who was not a party and is still not a party to the suit. Court orders only affect parties before the court, and as stated above, in the Petition, no orders are sought against the Petitioner.
14. One of the tests set the Supreme Court requires the applicant to set out his submissions and show that it is not a replication of what is before the court. Also, the applicant has not demonstrated that he has an identifiable stake in the subject matter before this court nor did he explain what prejudice he will suffer if the joinder is refused. In my considered view, this application does not meet the threshold for joinder of an interested party as set out in the authorities cited above. As stated above, he has not demonstrated the relevancy of the submissions or established that they are not merely a replication of what the other parties will be making before the court touching on the contested allegations.
15. In any event, as the Supreme Court, joinder is a matter of judicial discretion. The Black's Law Dictionary defines judicial discretion as: -

“The exercise of judgement by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right.”
16. Furthermore, the Longman Dictionary of Law defines discretion as “the right of an official, e.g a judge, to act in certain circumstances and within given limits and principles on the basis of his judgement and conscience” It also defines judicial discretion as “the power residing in the court, of deciding a question fairly where latitude of judgement is allowed.”
17. Jowitts Dictionary of English Law defines discretion as: - “Discretion is a man's own judgment as to what is best in a given case, as opposed to a rule governing all cases of a certain kind... So, a judge or court often has a discretion in making orders or imposing conditions on litigants,... Discretion however, is to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion.”

<sup>8</sup> See *Dollfus Mieg et Compagnie S.A.V. Bank of England*, 1950-2 All ER 605 at p. 611. See also: *Gokaldas Laximidas Tanna v. Store Rose Muyinza*, H.C.C.S No. 7076 of 1987 [1990 – 1991] KALR 21.



18. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable or where the applicant has unreasonably delayed in approaching the court. The applicant has been aware of these proceedings since 2015. He has referred to an order made in May 2015. He did not approach the court for the last 6 years. The reason given for the delay, i.e. the existence of other cases is not sufficient. It's not explained how the said cases prevented him from approaching the court. The applicant is guilty of inordinate delay. I find no reason to exercise discretion in his favour. Accordingly, the applicant's application dated 24<sup>th</sup> August 2021 is refused. The same is dismissed with no orders as to costs.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10<sup>TH</sup> DAY OF NOVEMBER 2021**

**JOHN M. MATIVO**

**JUDGE**

