



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 10 OF 2019

JOHN NDUNGU MWAURA

CHEPKONGA ARAP RUTO

ROBERT MWISANI on behalf of themselves and 18 others.....PLAINTIFFS

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT

RULING

1. By Notice of Motion dated 16th December 2019, Nakuru Water & Sanitation Services Limited seeks the following orders:

1. *THAT this honourable court be pleased to order/direct that the applicant/intended Interested Party herein be enjoined as an interested party or be added as a defendant in this suit upon such terms as the court thinks fit.*
2. *THAT if added as a defendant, the applicant be allowed to file its defence and all other relevant documents in compliance with order 11 of the Civil Procedure Rules.*
3. *THAT cost of this application be in the course (sic).*

2. The application is supported by an affidavit sworn by J.N. Gachathi, the managing director of the applicant. He deposed that the applicant is a limited liability company incorporated under the Companies Act and that the suit land herein was acquired by the defunct Municipal Council of Nakuru to be utilized for Nakuru Sewerage Scheme. He added that the applicant is currently in charge of the said sewerage works and also in possession of the suit property. He further deposed that the applicant has a direct stake in the suit property and will be affected by any orders made by the court in this matter.

3. Counsel for the defendant indicated to the court that the defendant does not oppose the application. On their part, Chepkonga Arap Ruto and Robert Lumadede, two of the plaintiffs who have been appearing in the matter, opposed the application. They filed a replying affidavit sworn on 13th January 2020 by Chepkonga Arap Ruto and another document titled "Reply Motion Notice". The replying affidavit dealt with the plaintiffs' dissatisfaction with this court's ruling delivered on 18th December 2019. I found nothing in it that responds to the present application. In the "Reply Motion Notice", the plaintiffs contended that the applicant herein is well represented in the suit by the defendant. They added that although they do not dispute the fact that the suit property is being utilized by the applicant, the applicant has not produced documents showing how it acquired the property. They added that the suit having been in court for 25 years, they do not have a budget for a new entity in the suit.

4. At the hearing of the application, counsel for the applicant referred the court to a witness statement of Ernest Amugune filed on behalf of the defendant in which the witness stated that the suit property was compulsorily acquired for purposes of sewerage works. He urged the court to allow the application and to order joinder as a defendant to enable the applicant to file a defence and to participate more actively in the matter.

5. The plaintiffs argued that the applicant should continue participating in the matter as a "silent party" the way it has always done under representation of the defendant. They added that it is too late for the applicant to join the matter.

6. I have considered the application, the pleadings filed and the submissions. The application is brought inter alia under **Order 1 Rule 10** of the **Civil Procedure Rules**. Sub-rule (2) thereof provides:

(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.

7. Also relevant to the application before the court is **Order 1 Rule 3** which provides:

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

8. The applicant seeks to join this suit as interested party or better still as an additional defendant. The Supreme Court gave the following guidelines for determining whether an applicant qualifies for admission as an interested party in **Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR:**

[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) 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...”

[23] Similarly, in the case of 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 questions 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.

[24] We ask ourselves the following questions: (a) what is the intended interested party's stake and relevance in the proceedings? and (b) will the intended interested party suffer any prejudice if denied joinder?

9. Judging from their response to the application, the plaintiffs indirectly acknowledge that the applicant is connected to the suit property and the dispute at hand. They admit that the suit property is being utilized by the applicant for purposes of sewerage services. As far as they are concerned the applicant which according to them was until incorporation a department of the defendant, is fully represented in the proceedings by the defendant. It's important to note that the plaintiffs seek judgment against the defendant for a permanent injunction restraining it and its agents from interfering in any manner with the suit property. If such orders are ultimately granted, the applicant will certainly be affected given its past and current relationship with the defendant. I am therefore satisfied that the applicant qualifies for admission as an interested party.

10. The applicant wants more; it wishes to alternatively be joined as an additional defendant. Joinder as a defendant is not as straight forward as that of interested party. Under **Order 1 Rule 3**, a person may be joined as a defendant if a right to relief in respect of the same act or transaction is alleged to exist against him. The plaintiffs herein have not pleaded any claim against the applicant. In fact, they are totally opposed to the applicant joining even as an interested party. Should the court in such circumstances impose an extra defendant on them and even force them to amend their plaint to accommodate the applicant? Even if the plaint were to be amended, what cause of action will the plaintiffs, who have already made it clear that they have no claim against the applicant, plead against it? I think the court should be slow to do such. Munyao J. observed as follows in **Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others [2014] eKLR:**

... Caution needs to be exercised when a party wants to join proceedings as defendant. This is because the court would not want to impose a party upon the plaintiff unless it will not be prudent to determine the matter without such party being defendant. But 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, for each person has a right to choose against whom to assert his claims against. ...

11. The applicant has made it clear that it wishes to participate in the matter more actively. That however is not the same as saying that it has a claim against the plaintiffs, which would necessitate it joining as a defendant and possibly mounting a counterclaim. In the presently obtaining circumstances, the applicant can achieve whatever active participation it requires by simply being an interested party. I see no valid reason to impose a new defendant on unwilling plaintiffs. I therefore do not find any merit in the plea for joinder as a defendant.

12. In view of the foregoing discourse, I make the following orders:

a) Nakuru Water & Sanitation Services Limited is hereby joined to this suit as an interested party.

b) The interested party to file and serve list of witnesses, witness statements, list of documents and to generally comply with Order 11 of the Civil Procedure Rules within seven days from the date of delivery of this ruling.

c) Costs in the cause.

Dated, signed and delivered in open court at Nakuru this 3rd day of February 2020.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for Interested party/applicant

No appearance by Mr Chepkonga Arap Ruto (plaintiff/respondent)

No appearance by Mr Robert Mwisani Lumadede (plaintiff/respondent)

No appearance for the defendant/respondent

Court Assistants: Beatrice & Lotkomoi