



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 50 OF 2019

KELVIN MUTUA & 197 OTHERS.....PLAINTIFFS/RESPONDENTS

VERSUS

ATHI WATER SERVICE BOARD.....DEFENDANT/RESPONDENT

AND

KATELEMBO ATHIANI MUPUTI FARMING & RANCHING

CO-OPERATIVE SOCIETY LIMITED.....INTENDED INTERESTED PARTY/APPLICANT

RULING

1. This Ruling relates to the Application dated 13th March, 2020 in which the Interested Party/Applicant is seeking for the following orders:
 - a. Spent.
 - b. That the Applicant be granted leave to join the proceedings as Interested Party and be put at liberty to file her response to the Plaintiff.
 - c. That the costs of this Application be in the cause.
2. The Application is supported by the Affidavit of Wilson Masila Muema, the Chairman of the Management Committee of the Intended Interested Party.
3. The deponent averred that the Intended Interested Party was registered under the Co-operative Societies Act (Cap 490) on 16th June, 1971; that the Intended Interested Party acquired Land Reference Number 10253 (*original number 4997/2*) on 9th February, 1972; and that it is from Land Reference Number 10253 that the Intended Interested Party allocated plots to members upon sub-division.
4. The Intended Interested Party's Chairman deponed that about 127 acres of the land that the Intended Interested Party allocated to members is subject to the land acquisition process, which is the subject of the instant suit; that it is the Intended Interested Party which has the record of the genuine allottees of the suit land and further that the orders to be granted in this suit are likely to effect the Intended Interested Party and her members.
5. It was deponed that in order for the Intended Interested Party to safeguard the interests of her genuine members, it should be enjoined as an Interested Party in the suit.
6. The Application was opposed vide a Replying Affidavit sworn by Daniel Nthiani, who is one of the Plaintiffs in the suit, who deponed that the deponent of the Applicant's Affidavit is not the chairperson of the Applicant; that the suit was brought individually and not as a Cooperative Society; that there were complaints on how the allotment of the land belonging to Katelembo Ranching Society was done and that the Applicant cannot claim to have kept proper records of the Society.
7. It was deponed by the Plaintiffs' representative that the 198 Plaintiffs who instituted the suit are in occupation of the suit land and had developed the same and that the issue for determination by the court is not ownership of land but compensation as per the requirements of the law relating to compulsory acquisition.

8. The Plaintiffs' representative deponed that the Applicant has no interest in the suit land; that the Applicant's presence was not necessary in determining the matter; that the Intended Interested Party would not be affected by the decision of the court on the question of whether or not the Plaintiffs should be compensated for the land and that the court should dismiss the Application. The Application was not opposed by the Defendant

9. The Application was canvassed vide written submissions. According to counsel for the Applicant, the issue for determination is whether the Applicant has any sufficient interest in the case or whether the decision of the court is likely to affect it.

10. Learned counsel for the Applicant cited the case of *Shirvling Supermarket Limited vs. Jimmy Ondicho Nyabuti & 2 others [2018] eKLR*, where the court rendered itself as follows:

“The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”

11. The Applicant's counsel submitted that it is the Applicant who allocated the land parcels of land in question, and therefore has sufficient interest in the outcome of the suit; that there are genuine concerns about the ownership of some of the plots and that the issue of ownership of the suit property by some of the Plaintiffs is a subject in Machakos ELC Petition No. 276 of 2017 which is pending before this court.

12. According to counsel, the Applicant, as the custodian of the register of the members owning the suit property, is a necessary party to these proceedings. Counsel submitted that to avoid a situation where some people benefit from plots that do not belong to them, the Interested Party should be joined in the suit so as to avail documentation to show how the suit property was allocated.

13. In response, counsel for the Plaintiffs/Respondents submitted that the Applicant's presence is not necessary. Reliance was placed on the case of *Judicial Service Commission vs. Speaker of the National Assembly & Another (2013) eKLR* where an Interested Party was defined as a person with a legal and identifiable interest in the case and that the Applicant has not proven that it is a necessary party in the suit.

14. I have considered the Application, the submissions by counsels and the cited authorities.

15. This suit was commenced by 198 Plaintiffs by way of a Complaint dated 11th May, 2019. In the Complaint, the Plaintiffs averred that at all material times, they were the owners of the vast land in Katelembo area, in Machakos County; that they have developed the said parcels of land and that sometimes in the year 2017, the Defendant conducted a feasibility study in respect to their land for the construction of the Miwongo Dam without involving them.

16. The Plaintiffs averred in the Complaint that on 20th March, 2018, the Defendant caused to be published a report titled '*Machakos Water and Sanitation Design and Build Project*' and that on 2nd November, 2018, the Defendant awarded to a contractor a tender for the construction of Muwongoni Dam.

17. It is the Plaintiffs' case that the Defendant has not compensated them for their land; that they have no other place to go in the event they are evicted from the suit property and that a permanent injunction should issue restraining the Defendant from occupying the suit property.

18. The elements to be considered before allowing an Interested Party in a suit were considered in the case of *Shirvling Supermarket Limited vs. Jimmy Ondicho Nyabuti & 2 others [2018] eKLR*, where the court held as follows:

“The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”

19. Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows:

“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.”

20. For the Proposed Interested Party to be enjoined in this suit, his presence must be necessary to enable the court effectually and completely adjudicate and settle all questions involved in the suit. Hence, the Applicant has to show that he has a stake in the proceedings and that his presence will help determine the issues at hand.

21. The Black's Law Dictionary 9th Edition, defines an “Interested Party” as;

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

22. The Black's Law Dictionary, 9th Edition defines a "Necessary Party" as being:

"A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings"

23. The Intended Interested Party is seeking to be enjoined in this suit on the ground that it is the original owner of the suit property and that having allocated to its members the suit property, it is the only one that can identify the rightful beneficiaries of the suit land.

24. The Intended Interested Party annexed on its Application the Grant for L.R. No. 10253 that was issued under the Registration of Titles Ordinance to Charlotte Maud Macleod measuring 1,146 acres on 17th October, 1962. The said Grant shows that the entire land was transferred to the Intended Interested Party on 9th February, 1972.

25. The Plaintiffs have not denied that the suit property forms part of the land known as L.R. No. 10253 which the Intended Interested Party acquired in 1972. Indeed, the Plaintiffs have not denied that they acquired the suit property by virtue of being either members of the Intended Interested Party or having purchased the same from the said members.

26. Indeed, in their Affidavit, the Plaintiffs' representative has deponed as follows:

"...I wish to state that there have been a lot of complaints on how the allotment of the Katelembo Ranching Society was done. These matters are under investigations and the applicant cannot purport to keep proper records when owners of the land are affected."

27. From the above deposition, the Plaintiffs have admitted that firstly, the suit land was allocated to individuals by the Intended Interested Party and that the allotment of the land to the members has been controversial. That being the case, the presence of the Intended Interested Party in these proceedings is necessary.

28. I say so because the issue of the people who are entitled to the suit property, and by extension compensation by the Defendant, will have to be determined first before the court can delve into the issue of the payable amount. In the circumstances, the records that are kept by the Intended Interested Party, whether doctored or not, will be material in this suit.

29. Considering that the Intended Interested Party is closely connected to the issue of ownership of the suit property, and in view of the fact that the Plaintiffs do not have individual Title Deeds in their names, the joinder of the Intended Interested Party in this suit is necessary to enable this court effectually and completely adjudicate over the questions that will arise during the hearing.

30. For those reasons, I allow the Intended Interested Party's Application dated 13th March, 2020 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE