



Otieno & another v County Government of Homabay & 2 others; Ogutu & another (Interested Parties); Aroka & 6 others (Proposed Interested Parties) (Petition E004 of 2021) [2025] KEELC 78 (KLR) (20 January 2025) (Ruling)

Neutral citation: [2025] KEELC 78 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
PETITION E004 OF 2021
FO NYAGAKA, J
JANUARY 20, 2025
FORMERLY MIGORI PETITION E002 OF 2020**

BETWEEN

MICHAEL KOJO OTIENO 1ST PETITIONER

EVANCE OTIENO OLOO GOR 2ND PETITIONER

AND

COUNTY GOVERNMENT OF HOMABAY 1ST RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR LANDS, HOUSING,
PLANNING AND URBAN DEVELOPMENT 2ND RESPONDENT**

COUNTY INDUSTRIAL OFFICER 3RD RESPONDENT

AND

FELIX WAWILI OGUTU INTERESTED PARTY

JOHN OLOO OGUTU INTERESTED PARTY

AND

DOMINIC OSWAGO AROKA PROPOSED INTERESTED PARTY

JOSEPH ONYANGO AROKA PROPOSED INTERESTED PARTY

JULIUS OTIENO AROKA PROPOSED INTERESTED PARTY

MARTIN ONYANGO AROKA PROPOSED INTERESTED PARTY

KENNEDY OUMA AROKA PROPOSED INTERESTED PARTY

WILSON OKINYI AROKA PROPOSED INTERESTED PARTY

JOSEPH GOR AROKA PROPOSED INTERESTED PARTY



RULING

1. The legal profession needs a lot of soul searching in terms of training of practitioners in many respects, particularly, drafting of pleadings and abiding in the truth. The problem of poor drafting, which this court has consistently decried, bedevils the instant application. Without taking much time on this issue, this Court points out that it is prepared, though painstakingly, to excuse that defect in favour of doing substantive justice. However, it is my wish that something better were done!
2. Be that as it may, it is worth noting at this preliminary stage that in the original pleadings herein the Petitioners joined two Interested Parties whom they listed as the 1st and 2nd. On 19th October 2023 the parties who brought the instant application, and whom for good order the Court has listed as the 3rd to 9th Proposed Interested Parties brought the application while listing themselves as the 1st to 7th Interested Parties. Worrying more is that in the heading of the application they removed or did away with the 1st and 2nd Interested Parties. In essence they, suo moto, removed parties and added themselves as parties even before they would be granted an order for joinder. That kind of drafting is certainly poised to bring confusion in the pleadings herein, particularly in the amendment of the pleadings and description of parties, in the event that the instant application succeeds. Learned counsel and parties would do well to always study and draft pleadings properly and professionally before they file them.
3. That said, before me before Notice of Motion dated 16th October 2023. It was brought under certificate of urgency. The applicants cited Order 1 Rule 3 of the *Civil Procedure Rules*, Sections 3A, 1A and 1B of the *Civil Procedure Act*, and “all other enabling provisions of the law” as the legal basis for the application. They sought the following orders: -
 1. Spent
 2. That the interested parties herein be enjoined as parties in these proceedings for the interest of justice.
4. The application was based on seven (7) grounds. The first one was that one Vitalis Oguttu Aroka, deceased, was a brother to all interested parties (sic). The plaintiff’s claim is the same as that of the Interested Parties. The land in question belonged to the father of the plaintiff and the Interested Parties. Daniel Gor Aroka had three wives, namely, Magdalene Adongo Aroka, Domitila Okal Aroka and Pauline Auma Aroka, as the 1st, 2nd and 3rd third wives respectively. The interested parties stood to suffer a lot of loss if not enjoined. Refusal to enjoin the interested parties may lead to multiplicity of cases in courts and the application is fit to grant.
5. The application was supported by an Affidavit sworn by 1st proposed Interested Party, one Dominic Oswago Aroka on 16th October 2023. He deposed that he had the consent from all the other proposed Interested Parties to swear the Affidavit on that behalf. Their brother Vitalis Oguttu Aroka was the one who filed the matter on their behalf but he died, and upon his death they finally noticed that he did not include them in it. Upon the death of Vitalis Oguttu Aroka they came to learn that the land which their father donated to Ndhiwa Sub-County, now managed by the County Government of Homa Bay, had not included all the beneficiaries as is required by law. The parties agreed to file Succession proceedings. He annexed and marked as EXH 1 a copy of the order.
6. Their deceased father, Daniel Aroka had three wives whom he named as stated above in the grounds in support of the application. Vitalis Aguttu Aroka was a son to the 1st wife of Daniel Aroka (deceased). The deceased father had given in the Ndhiwa Sub-County Government of Homa Bay a portion of land



parcel number Kanyamwa/Kayambo/Kwamo/93 and named it Kanyamwa/Kayambo/Kwamo/136 for compensation to their brother, Vitalis Aroka who was following it but unfortunately died before being paid to subdivide it toward the three wives represented by all their children as shown by EXh 1. The deceased father remained the owner of parcel No. 93 for subdivision to the three houses. But the deceased Vitalis Aroka mismanaged it and in civil suit No. 22 of 2020 at Ndhiwa Law Courts the parties agreed to proceed with the Succession Cause. In the same manner, the family of Vitalis Aguttu Aroka was supposed to enjoin all the interested parties in this suit so that it moves smoothly. Since Felix Uguttu Aroka failed to enjoin the interested parties in the initial step they now sought to be enjoined as interested parties. The claim of the plaintiff (sic) was the same as that of the Interested Parties hence joining them was proper so that the suit be heard once rather than bringing in other suits of a similar nature.

7. The petitioners opposed the application through a Replying Affidavit sworn by the 1st Petitioner on 23rd January 2024. He deposed that in the Supporting Affidavit to the Petition he stated that the Petition was filed by them and not their brother who was the late Vitalis Oguttu Aroka as alluded by the proposed Interested Parties. Further, the parcel of land. In the question belonged to Vitalis Aroka as shown by the annexed documents, the Green Card and the Certificate of Official Search issued on 3rd August 2020, way before the Petition was filed on 19th October 2020, which documents confirm that the land was owned by Vitalis Oguttu Aroka. Also, as a 16th March 2020, Succession Cause No. E 8 of 2020 confirmed that Felix Wawili Oguttu was to be the administrator over the parcel of land mentioned.
8. He deposed the further that the application had not met the threshold in the case of *Francis Kariuki Muruatetu & another v. Republic & 5 others*, Petition No. 5 as consolidated with No. 16 of 2013 [2016] eKLR. He reproduced paragraph 37 of the decision, which lays down three conditions, which he summarized, for a successful applicant in an application for joinder of interested parties to meet. He also cited the Supreme Court case of *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 others* [2015] eKLR which basically brought out the same principles as the *Muruatetu case* (supra), and also, the case of *Skov Estate Limited & 5 others v. Agricultural Development Corporation and another* [2015] eKLR in which Justice Munyao emphasized that an applicant, in an application of this nature, ought to demonstrate that it was necessary that he or she be enjoined in the suit. Lastly, he deposed that the applicants ought to show that in addition to being affected, the reliefs sought or to be granted will not be fully decided upon in their absence. He prayed that the application be dismissed. With costs.

Submissions

9. The proposed Interested Parties filed their written submissions dated the 10th March 2024. After summarizing the application, they argued that they were necessary parties. They added that parties to matters fall into two categories, namely, necessary parties and proper parties. They contended that in the instant matter they were necessary parties. Further, in their absence, the Petition was not properly constituted and may be dismissed on that ground. They prayed that it be allowed.
10. The 1st and 2nd Petitioners filed their written submissions dated 13th May 2024. They summarized Order 1 Rule 10 of the *Civil Procedure Rules* and the three conditions it lays down for a one to be joined as an Interested Party. They relied on the case of *Kingori vs. Chege & 3 others* [2002] 2 KLR, 243. Th stated that a necessary party is one who was necessary to *the constitution* of the suit, without whom no decree can be passed. They contended that the Applicants were apprehensive that their joinder may be refused if it would lead into practical problems of handling the existing course of action together with the one. They relied on the case of *Lucy Nangari Ngigi & 128 others v. National Bank of Kenya Limited & another* [2015] eKLR; also, *Francis Kariuki Muruatetu* (supra); further, on *Habiba W.*



Ramadan & 7 others v. Mary Njeri Gitiba [2017] eKLR, Nairobi High Court ELC Case No. 119 of 2014; and Communications Commission of Kenya & 4 others v. Royal Media Services Limited & 7 others [2014] eKLR.

Issue, Analysis and Determination

11. This Court considered the application, the Replying Affidavit thereto, the submissions by the rival parties and the law. It is of the view that only two issues that commend themselves before it for determination. The first one is whether the application is merited. The second one is who to bear the costs thereof.
12. The procedural law on joinder of interested parties in matters flows from the provisions of Order 1 Rule 10 of the Civil Procedure Rules, 2010 as amended in 2020, as read with related provisions enacted subsequent thereto. It provides for addition of “a necessary” party. It provides that “The court may at any stage of the proceedings, either upon or without the application of either party...order 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.”
13. There is a no dearth of case law on the fact that an interested party can be joined to a suit, under the provisions of Order 1 Rule 10 of the Civil Procedure Rules. After the promulgation of the 2010 Constitution, the procedure relating to joinder of parties as such is firmly and clearly stipulated in the statutes and subsidiary legislation of the country. Its main source is the special procedure in Legal Notice No. 117 of 2013, Gazetted on 28th June, 2013 as The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (I refer to them as the Mutunga Rules, 2013).
14. In Rule 2 of the Rules, it defines 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 not be directly involved in the litigation.” The procedure on how that is to be done is provided for in Rule 7. Under Sub-rule 1 of Rule 7 it is provided that “A person, with leave of the Court, may make an oral or written application to be joined as an interested party.” In that respect it means a person desirous of being joined as an interested party has to move the court. If he chooses to do so, he ought to seek leave of the Court first and once granted it, he will be enjoined. While this is what the Applicants have done in the instant case, they already ‘brought’ themselves into the matter in two ways as stated in paragraph 2 above: they jumped the gun. One wonders why they made the application if it would be true that they be referred to as interested parties at this stage.
15. Be that as it may, the Supreme Court set out guidance on the requirements for successful application for joinder as an Interested Party. This was in the case of Francis Kariuki Muruatetu & Another v Republic & 5 Others, Petition 15 as consolidated with 16 of 2013 [2016] eKLR. In it the apex Court gave three principles to be followed. At paragraph 37 the Court state that the Applicant(s) must show:
 - (i) 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.
 - (ii) 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.



- (iii) 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.
16. In the instant matter, the Petitioners contended that the Applicants had not met the threshold as given in the case of *Francis Muruatetu (supra)*. They stated that the argument by the applicants that the land in issue belonged to their brother was flawed. Similarly, they stated that the Applicants had not given the submissions on the case they were to bring into the matter.
17. This Court needs not go into analyzing the contention between the applicants and the Petitioners regarding who owned the land or who filed the Petition and on whose behalf for those are matters best suited for determination when making findings on the merits of the Petition.
18. Additionally, as submitted by the Petitioners, the applicants have not demonstrated any prejudice they would suffer if they were not joined in this matter. They have not clearly outlined it. All that they say is that their case is the same as that of the Plaintiffs (sic). If that be so, then their interests are catered for by the presence of the Plaintiffs in this matter. There is nothing by them in terms of evidence to demonstrate that their joinder as interested parties will bring in any new issue not presented by the Petitioners. In any event, they have not clearly submitted or given submissions they intend to make before the Court and show the relevance of those submissions while showing that they are not a replica of what the other parties already before court shall make. On the contrary, what the proposed parties have clearly demonstrated is that their case, apart from being an addition of their names in the matter, shall be an exact replica of the Petitioners' case. For that reason, their application is not merited. I base my reasoning on the authorities cited by the Petitioners, being, the cases of *Lucy Nangari Ngigi & 128 others v. National Bank of Kenya Limited & another* [2015] eKLR; *Francis Kariuki Muruatetu (supra)*; *Habiba W. Ramadan & 7 others v. Mary Njeri Gitiba* [2017] eKLR, Nairobi High Court ELC Case No. 119 of 2014; *Communications Commission of Kenya & 4 others v. Royal Media Services Limited & 7 others* [2014] eKLR; and the Supreme Court case of *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 others* [2015] eKLR.
19. Further, in the *Judicial Service Commission -vs-Speaker of the National Assembly & Another* [2013] eKLR the court stated that:
- “...an interested party 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.”
20. It is this Court's view that while the Applicants contend that they have a stake in the matter, theirs is not a serious one: it is already subsumed in the Petitioners' claim. Furthermore, they are not non-partisan in the matter since they already have demonstrated that their case is as that of the Petitioners. The upshot is that the Application dated 16th October, 2023 is not merited. It is hereby dismissed with no order as to costs.
21. The matter shall be mentioned on 1st April 2025 for compliance directions under Order 11 Rule of the *Civil Procedure Rules*.
22. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 20TH DAY OF JANUARY, 2025.**



HON. DR. IUR. NYAGAKA

JUDGE

In the presence of,

1st and 2nd the Petitioners

Ms. Anyango Advocate for the Respondents

Sagwe Advocate for the Proposed Interested Parties

