

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E003 OF 2024

PETER KAMAU MWANGI:.....1ST PLAINTIFF/APPLICANT

JOSPHAT NYAKWARA:.....2ND PLAINTIFF

MAUREEN ONDIEKI:.....3RD PLAINTIFF

MICHAEL OKEYO CURTIS:.....4TH

PLAINTIFF

AND 100 OTHERS

VERSUS

ESTHER MUMBI KARANJA:.....1ST

DEFENDANT

MARGARET WAIRIMU WANGUNYU:::2ND DEFENDANT/RESPONDENT

STEVE ROGERS KOBADO T/A ROKOS

AND

MAPPING CONSULTANTS:.....INTENDED INTERESTED

PARTY

RULING

The application is dated 9th October 2024 and is brought under Article 159 of the Constitution of Kenya 2010, Order 1 Rule 10(2) of the Civil Procedure Rules 2010 and Sections 1A and 3A of the Civil Procedure Act seeking the following orders;

1. That the Honourable Court be pleased to grant leave to STEVE ROGERS KOBADO *t/a* ROKOS MAPPING CONSULTANTS to be enjoined as an Interested Party in this matter.
2. That the cost of this Application be in the cause.

It is supported by the sworn Affidavit of STEVE ROGERS KOBADO on the following grounds that the Intended Interested Party entered a service level agreement dated 9th October, 2019 with Ufunguo Court for sub-division of Land Reference Number 7340/104, situated in Utawala, Mavoko Municipality into one hundred and five (105) plots. That the Plaintiffs are members of Ufunguo Court whose committee entered an agreement with the Intended Interested Party. That the Intended Interested Party was paid a down payment for the survey fees and resultant Deed Plans/RIM for the 105 plots. That the Intended Interested Party after receiving the down payment proceeded and made various applications to the Survey of Kenya and Ministry of Lands for the successful conversion and subdivision of the property and issuance of individual titles. That the Intended Interested Party registered the titles at Machakos Land Registry and was issued with the 105 titles in the name of the 2nd Respondent. That Land Reference

Number 7340/104 is the property indicated by the Plaintiffs/Applicants in their application. That the Plaintiffs/Applicants have adversely mentioned the Intended Interested Party in their application hence the need to enjoin him as a party. That each member was required to pay Kenya shillings eighty nine thousand and forty eight shillings (Kshs. 89,048) to the Interested Party as subdivision and transfer of title fees. That fifty seven (57) of them have complied and have been issued with titles by the Intended Interested Party. That thirty seven (37) of them are yet to comply by paying the full survey and transfer fees, otherwise the Intended Interested Party is having the original title deeds in his custody in the name of the 2nd Respondent awaiting transfer to individual names after payment of the outstanding balance. That the Intended Interested Party placed a restriction on the thirty nine (39) parcels to protect his interest for the professional work he was contracted for and he is yet to be paid. That out of the thirty nine (39) two have already complied and titles issued to them in September, 2024, a month after the instant application had been filed. That if this application is not allowed, the Intended Interested Party will occasion substantial loss and hardship thereby suffering grave injustice. That no prejudice will be occasioned to any party as they will have an opportunity to defend themselves in the ensuing trial. That it is in the interest of justice that this application be allowed as prayed.

In the meantime, the 2nd Defendant raised a Preliminary Objection dated 15th January 2025 and applied that the entire cause be struck out with costs on the following grounds that;

- a. The instant suit offends the provisions of Section 7 of the Civil Procedure Rules 2010.
- b. That the Originating Summons herein are *res judicata* as the matters before this Court have already been determined in ELC. No. 386 of 2011 at the Environment and Land Court (ELC) at Milimani.
- c. That the entire suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process hence a good candidate for striking out with costs.

This court has considered the Preliminary Objection and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being;

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition has been made in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696 where the court held that;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of

preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

In the case of Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR the court outlined the scope and nature of preliminary objection as;

(i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way

for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the 2nd Defendant herein was properly brought before the court.

I have perused the court file and find that in an order by Justice J.A Mogeni the file ELC. No. 386 of 2011 at the Environment and Land Court (ELC) at Milimani was transferred to Machakos ELC due to territorial jurisdiction. Subsequently it was renamed Machakos ELC No. 3 of 2024. I find that it is hence the same file and the same case and I find that the suit cannot be res judicata. Any application touching on the matter and filed within Machakos ELC No 3 of 2024 touching on the matters in ELC. No. 386 of 2011 at the Environment and Land Court (ELC) Milimani cannot be deemed to be a separate file. The number has been changed merely for record keeping but the matter remains the same. I therefore find the preliminary objection is not merited and is dismissed with costs.

In the application above for joinder as to whether they ought to be enjoined in the suit as a defendant or an interested party, the Court is guided by Order 1 Rule 10(2) of the Civil Procedure Rules which states;

“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.”

The Supreme Court decision in *Communications Commission of Kenya and 4 Others vs Royal Media Services Limited & 7 Others* Petition No. 15 OF (2014) eKLR where the Court pronounced itself on who an Interested Party is and held as follows:

“In determining whether the applicant should be admitted into these proceedings as an interested party, we are guided by this Court’s decision 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. 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 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.

We ask ourselves the following questions:

a) what is the intended party's state and relevance in the proceedings and

b) will the intended interested party suffer any prejudice if denied joinder?"

It is therefore clear that the parties who should be made parties to a suit are persons who are necessary for a complete and effectual adjudication of disputes before the court.

The Applicant claims that he entered a service level agreement dated 9th October, 2019 with Ufunguo Court for sub-division of Land Reference Number 7340/104, situated in Utawala, Mavoko Municipality into one hundred and five (105) plots. That the Plaintiffs are members of Ufunguo Court whose committee entered an agreement with the Intended Interested Party. That he was paid a down payment for the survey fees and resultant Deed Plans/RIM for the 105 plots. That he registered the titles at Machakos Land Registry and was issued with the 105 titles in the name of the 2nd Respondent. That the Plaintiffs have adversely mentioned them in their application hence the need to enjoin him as a party. That fifty seven

(57) members have paid their fees and have been issued with titles by the Applicant. That thirty seven (37) of them are yet to comply by paying the full survey and transfer fees, otherwise the Applicant has the original title deeds in his custody in the name of the 2nd Respondent awaiting transfer to individual names after payment of the outstanding balance. That the Applicant placed a restriction on the thirty nine (39) parcels to protect his interest for the professional work he was contracted for and he is yet to be paid. That out of the thirty nine (39) two have already complied and titles issued to them in September, 2024, a month after the instant application had been filed. I find that the joinder of the Intended Interested Party is necessary to enable this court determine the real issues in dispute. He admits placing restrictions on the titles and being mentioned adversely. He holds the balance of the titles and I find he has a stake in the proceedings and is a necessary party in this matter. That the joinder of the Interested Parties will not occasion any prejudice upon the existing parties. I find this application has merit and grant the following orders;

1. That Applicant to be enjoined as an interested party in the proceedings.
2. Costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF
OCTOBER 2025.**

N.A. MATHEKA

JUDGE

ORIGINAL