Kimwarey & 2 others v Kimwarey; Tanui & another (Interested Parties) (Environment and Land Case 101 of 2015) [2026] KEELC 2469 (KLR) (16 April 2026) (Ruling)

Neutral citation: [2026] KEELC 2469 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CASE 101 OF 2015

CK YANO, J

APRIL 16, 2026

BETWEEN

BENARD KIPTUM KIMWAREY .... 1ST PLAINTIFF

AMY JERUTO LAGAT .... 2ND PLAINTIFF

PRIS JEPKOECH KIMWAREY .... 3RD PLAINTIFF

AND

PHILLIP KIPKEMBOI KIMWAREY .... DEFENDANT

AND

PAULINA CHERUTO TANUI .... INTERESTED PARTY

CAROLINE KIMWAREY .... INTERESTED PARTY

RULING

1. The Intended Interested Parties/Applicants filed a Notice of Motion Application dated 10th December, 2025 seeking the following orders: -i. That the Applicants be joined as Interested Parties to these proceedings.ii. That upon joinder, the Applicants be granted leave to file their pleadings, witness statements and documents relating to their interest in TARAKWA/LAINGUSE BLOCK 3 (KERIO)/210.iii. That costs of this application be in the cause.
2. The application is premised on 6 grounds on the face thereof and on the applicants' Supporting Affidavit jointly sworn on even date.
3. The 1st applicant deponed that she is the lawful wife of the defendant.
4. It is her claim that the parcel of land known as Tarakwa/Lainguse Block 3 (Kerio)/210 (hereinafter referred to as the suit land) belonged to her grandmother in-law, Gogo Tarkok Kimwarey.

5. That sometimes in the year 1988, the said Gogo Tarkok allocated 10 acres of the suit land to her and her husband, the defendant herein, for their settlement and development.

6. She therefore contends that since the year 1988, they have lived continuously on the 10 acres of land, developed her matrimonial home and raised all her children on the said parcel of land.

7. It is her claim that during mediation process, the defendant allegedly accepted 2 acres contrary to the original family allocation of 10 acres, a fact which she contends is unfair and unlawful.

8. She further deponed that the defendant regularly makes decisions concerning the suit land without involving her despite the same being their matrimonial property.

9. The 2nd applicant, who is the biological sister of the defendant, also deponed that they have lived on a portion of the suit land measuring 10 acres even before the death of Gogo Tarkok.

10. She averred that she was present when Gogo Tarkok allocated 10 acres of the suit land to the 1st applicant and the defendant while she was given a portion measuring 4 acres.

11. She maintained that the history, use and distribution of the suit land directly affects her as a member of the Kimwarey family lineage and it is therefore proper to allow her to participate in the proceedings in order to protect her interest in the family allocation.

12. The applicants did aver that they have a direct, legal and beneficial interest in the suit land in dispute and if the case proceeds to conclusion without their participation, then their rights will be gravely prejudiced and the subsequent decision may permanently affect their homes and occupation.

13. In the end, they maintained that it is fair and just that they be enjoined as Interested Parties pursuant to the provisions of Order 1 Rule10(2) of the Civil Procedure Rules and thus urged the court to allow the application as sought.

14. The application was opposed. The plaintiffs/respondents filed a Replying Affidavit dated 2nd February, 2026, sworn by 1st plaintiff/respondent on his own behalf and on behalf of his co-plaintiffs.

15. He dismissed the present application as having been brought in bad faith, as an afterthought with the sole intention of frustrating and/or delaying the matter substantially and thus urged the court to dismiss the same with costs.

16. It is his claim that the application has been filed too late in the day. That all parties have testified and closed their respective cases and the matter is now pending for judgment.

17. He further averred that the 2nd applicant, Caroline Kimwarey testified as a witness on behalf of the defendant and was marked as DW3. That she duly tendered her testimony and at no point did she raise the issues she is raising in the present application.

18. He maintained that the matter has been in court since the year 2015 and the applicants have been aware of the ongoing proceedings for the past 11 years.

19. With regards to the 1st applicant, Pauline Cheruto, he admitted that she was the wife of the defendant. He however stated that she had been aware of the proceedings and in addition, her claim in respect to the suit land was explained in her affidavit and which was addressed by the defendant.

20. He further deponed that the present application was filed after the mediation session wherein they all agreed in principle to have the dispute settled.

21. In the end, it was his contention that there is no basis whatsoever to allow the present application and which on the contrary would be prejudicial to all parties.

22. He therefore urged the court to dismiss the application in the interest of justice and allow the matter to be concluded as agreed in the Mediation Settlement Agreement.

23. The present application was canvassed by way of written submissions. The intended Interested Parties/Applicants filed their submissions dated 25.02.2026 while the plaintiffs/respondents filed their submissions dated 17.03.2026 together with authorities, which I have read and duly considered in arriving at my decision as hereunder.

Analysis and Determination:

24. I have carefully considered the Application and the grounds therein, the Supporting Affidavit and the annexures thereto, the replying affidavit in response to the application as well as the rival submissions in totality.

25. Consequently, it is my considered view that the issues arising for determination are as follows: -

    i. Whether the applicants herein can be enjoined in the proceedings as interested parties.

    iii. Whether the present application is merited.

    iv. Who shall bear the costs of the present Application.

26. The above issues for determination having been duly identified, I will now proceed to discuss the same as hereunder.

Whether the applicants herein can be enjoined in the proceedings as interested parties;

27. At the center of this application is the issue of joinder of the applicants into the suit and/or proceedings as interested parties.

28. The applicants aver that they were rightfully allocated a portion of the suit land measuring approx. 10 acres by their late grandmother in the year 1988, where they have lived continuously and even developed their matrimonial home.

29. It is their claim that the defendant is making unilateral decision without involving them despite the same being their matrimonial property, including accepting a portion of the land measuring 2 acres instead of the 10 acres.

30. They maintain that they have a direct legal, beneficial interest on the suit land and if the case proceeds to conclusion without their involvement, then they will be gravely prejudiced and risk losing their homes and occupation.

31. The plaintiffs/respondents on the other hand did aver that the application had been made late in the day. That all parties have testified, adduced their evidence and closed their respective cases and the suit is only pending for judgment. They therefore contend that the application is a delaying tactic made in bad faith.

32. It is their claim that the 2nd applicant, Caroline Kimwarey, was a defence witness and was marked as DW3. That she duly tendered her testimony but failed to raise the issues being raised in the present application.

33. Further, it is the plaintiffs/respondents' claim that the 1st applicant, who is the wife of the defendant, was fully aware of the proceedings but failed to file the present application at the earliest opportunity.

34. In addition, it is their contention that the 1st applicant's claim in respect to the suit land was explained in her affidavit and was addressed by the defendant. The plaintiffs/respondents thus maintain that allowing the present application would be prejudicial to them.

35. Order 1 Rule 10(2) allows the joinder of a party to the proceedings before a court. The order provides as follows: -

> (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. (emphasis added)

36. From the above provision, it is clear that a party may be enjoined in a suit at any stage of the proceedings before judgment is pronounced. An applicant will not be barred from making an application for joinder simply because all the parties to the suit have already testified, tendered evidence and even closed their respective cases. However, this court is called upon exercise extreme caution in exercising its discretion in determining the application of this nature.

37. The Supreme Court in the case of Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) [2016] KESC 12 (KLR) at paragraph 37 held as follows: -

> " From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:
>
> One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:
>
> 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.
>
> 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.
>
> 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."

38. The question that therefore follows is whether the applicants/intended interested parties have satisfactorily met the criteria/threshold for joinder as outlined in the Supreme Court decision above.

39. I have duly considered the rival claims by both the applicants and respondents. I have looked at the testimony of DW1, the defendant herein as well as his witness statement dated 27.01.2016 and his counter-claim in totality. From his testimony, it is the defendant's claim that he was allocated a

portion of the suit land measuring 10 acres by his late grandmother Gogo Tarkok Kimwarey, whom he maintained was the rightful beneficial and lawful owner thereto before the said allocation.

40. With regard to the 1st applicant, who is the defendant's wife and whose claim is mainly that the suit land is matrimonial property, it is my considered opinion that her interests in respect to the suit land were well articulated by the defendant herein.

41. Moreover, what is in dispute is the ownership of the suit land. Both the 1st applicant and the defendant aver that the suit land was allocated to them by their late grandmother, Gogo Tarkok Kimwarey. Thus, the 1st applicant's claim is essentially going to be a replication/repetition of the defendant's claim and what he already stated and may in turn not introduce any new information.

42. In the case of Technomatic Limited T/A Promopack Company vs Kenya Wine Agencies Limited & Another (2014) eKLR the court while dealing with the issue of joinder stated as follows: -

> " It is clear that the guiding principles when an intending party is to be joined are as follows: he must be a necessary party, he must be a proper party, in the case of a defendant, there must be a relief flowing from that defendant to the plaintiff, the ultimate order or decree cannot be enforced without his presence in the matter, his presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit."

43. Guided by the above decision, it is my considered opinion that the 1st applicant is neither a necessary party nor a proper party. There is no relief flowing directly from her to the plaintiff neither can it be said that the ultimate decree or order cannot be enforced without her presence in the matter. The interests and claims of the 1st applicant in relation to the suit land are similar to the defendant's rights, claim and interest over the suit land.

44. I do also confirm that the 2nd applicant did testify for the defence and was marked as DW3 in support of the defendant's case. From a cursory look at her testimony and her witness statement dated 26.01.2016, it is my view that prior to that, she had an opportunity to present her claim and demonstrate her beneficial interest in respect to the suit land but she failed to do so. To the contrary, it was her claim that she left the suit land over 20 years ago, and only came to testify in support of the defendant's case.

45. Consequently, it is the finding of this court that the applicants have not met the threshold to warrant being enjoined into the proceedings herein as interested parties.

46. The Court of Appeal in the case of JMM vs. GNJ (2023) KECA 99 (KLR) held, inter alia: -

> " Judicial discretion then is the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law. Every discretion be it judicial and judicious must be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. There is no hard and fast rule as to the exercise of judicial discretion by a court because if it happens then, discretion will become fettered."

47. In view of the foregoing, this court is unable to exercise its discretion in favor of the applicants for the reason that they have not sufficiently demonstrated that they are a necessary or proper parties or the prejudice they are likely to suffer in the event of non-joinder.

Whether the present application is merited;

48. In view of the findings in issue No. (i) above, this court finds that the present application is not merited and the applicants are therefore not entitled to the grant of reliefs sought therein.

Who shall bear the costs of the present Application;

49. The general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act*, unless the court is satisfied otherwise.

50. However, in view of the circumstances of the present case and application, where the parties herein are all blood relatives, it is the finding of this court that each party will bear their own costs of the present application.

Conclusion:

51. The upshot of the above is that the present application vide the Notice of Motion dated 21st November, 2025 is not merited and is hereby dismissed. Each party to bear their own costs of the application.

52. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF APRIL, 2026.

HON. C.K. YANO

JUDGE

Ruling delivered in the presence of: -

Ms. Kipseii for the Plaintiffs.

Ms. Lihanda holding brief for Mr. Chemwok for the Defendants.

Court Assistant – Laban