



**M'imwenda & another v Mire (Civil Appeal (Application)  
3 of 2019) [2024] KECA 1257 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1257 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 3 OF 2019  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**EVANGELINE KAUNGU M'IMWENDA ..... APPLICANT**

**AND**

**FRIDAH MAKANDI NTEERE (SUING AS THE PERSONAL  
REPRESENTATIVE OF JAPHET NTEERE MWENDWA -  
DECEASED) ..... APPELLANT**

**AND**

**FATUMA MOHAMUD MOHAMMED MIRE ..... RESPONDENT**

*(Being an application for joinder pending the hearing and determination of  
an appeal from the judgment and decree of the Environment and Land Court  
at Meru (E. Cherono, J.) dated 31st October, 2018 ELC Cause No. 260 of 2016)*

**RULING**

**Background**

1. Before us is a Notice of Motion dated 4th August, 2022 by Evangeline Kaungu M'Imwenda (the applicant) expressed to be brought under Order 1 Rule 10(2) of the [Civil Procedure Rules](#) and Section 3 and 3(a) of the [Civil Procedure Act](#). It seeks orders in the main:
  - i) That this Court be pleased to enjoin (sic) the applicant, Evangeline Kaungu M'Imwenda as an Interested Party herein;
  - ii) that the Court be pleased to stay the eviction of the applicant from Plot No. 7918/75 Isiolo Township (the suit property) pending the hearing and determination of the instant application;



iii) That costs be provided for.

Fridah Makandi Nteere the personal representative of Japhet Nteere Mwendwa is the appellant herein.

Fatuma Mohamud Mohammed Mire is the respondent herein.

2. The application is premised on the grounds, inter alia that the suit property is registered in the names of the applicant's husband, M'Mwendwa M'Mwithiga (the deceased) who died on 24th July, 1993;  
that the Environment and Land Court (ELC) delivered a judgment in respect of the estate of the deceased relating to the suit property without involving the applicant who is his widow; that the applicant is, therefore, a necessary party in the appeal as any outcome of the appeal will affect her directly; that a stay of execution of the decree in the ELC is necessary to maintain the status quo pending the determination of this application and the substantive appeal; and that the respondent will not be prejudiced if a stay is granted as the applicant has occupied the suit property to date. Further, that if the orders sought are not granted to the applicant, she will lose her inheritance.
3. The application is supported by the applicant's affidavit in which she deposes that Japhet Nteere Mwendwa (Japhet) who died on 15th September, 2019 was her son; that he was wrongly sued in the ELC by the respondent who sought orders that he hands over the suit property to her while he was neither the owner nor the administrator of the estate of the deceased; that she is the rightful administrator of the estate of the deceased, the proprietor of the suit property and the respondent should therefore have dealt with her and not her son, Japheth; and that the suit property is still registered in the name of the deceased and not the respondent.
4. The applicant further deposed that she filed Succession Cause No. 46 of 2022 Meru Chief Magistrate's Court to enable her inherit the suit property and other properties belonging to the deceased; that she is in full control and possession of the suit property which she developed during the lifetime of the deceased and to-date; that she will therefore be directly affected by the outcome of the appeal in respect of the suit property and is therefore an extremely necessary party in the appeal;  
that she had filed a suit No. E002/2022 at Isiolo ELC which was dismissed on the ground that it was res judicata in view of Meru ELC No. 260 of 2016 as her son, Japhet was a party in that suit as a defendant; and that in the circumstances, she can only vent her interests in respect of the suit property in this Court.
5. The applicant urged this Court to allow the application for joinder for the sake of protecting her deceased husband's estate; that her son, Japhet is deceased and she should be joined to support his claim and the appeal; that the respondent has already obtained eviction orders against her from the suit property; that she is apprehensive that execution will proceed which will render the instant application nugatory; that it is therefore necessary to stop execution; that the respondent will not be prejudiced in any manner as she is not in possession of the suit property; that she will suffer prejudice if execution proceeds as she depends on the proceeds of the suit property which is her only source of income; and that she is an old lady of 85 years of age. The applicant urged us to allow the application in the interests of fairness and justice.

### Submissions

6. The application was disposed of by way of written submissions with brief oral highlights. At the hearing of the application, learned counsel, Mr. Kimathi Kiaria was on record for the applicant. Learned counsel Mr. Karanja was on record for the appellant while learned counsel Mr. Kariuki was on record for the respondent.



7. Mr. Kimathi informed the Court that he wished to rely on his written submissions. Mr. Kimathi submitted that the applicant is a necessary party being the widow of the registered owner of the suit property.

Counsel asserted that as any decision of this Court will affect the applicant it is fit and proper that she be enjoined to enable her participate in the appeal.

8. Counsel further submitted that the applicant is the rightful administrator of the estate of her deceased husband and has already obtained letters of administration ad litem to enable her file suit or be joined in the appeal as the rightful party to protect the interests of the estate of her deceased husband.

9. Counsel further submitted that the issue for determination by this Court is whether the applicant should be joined in this case as an interested party. Counsel relied on *Blacks Law Dictionary*, 9th Edition at page 1232 which defines an Interested Party as:

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

10. Counsel relied on the decision of the Supreme Court in *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others*, Supreme Court Petition No. 12 of 2013, [2014] eKLR where the Court held that:

“...an interested party is one who has a stake in the proceedings, though he or she was not a 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...”

11. Counsel further relied on the case of *John Harun Mwau vs Simone Hayson & 2 Others; Attorney General & 2 Others (IP)* [2021] eKLR, the case of *Meme v Republic* [2004] I EA 124 where the High Court observed that a party could be joined 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 proceeding;
- (ii) Joinder to provide protection for the right of a party who would otherwise be adversely affected in law; and
- (iii) Joinder to prevent a likely course of proliferated litigation.”

12. Counsel further submitted that the respondent has already obtained orders to evict the applicant from the suit property. Counsel urged this Court to allow the application. Mr. Karanja, learned counsel for the appellant informed the Court that he does not oppose the application for joinder.

13. Counsel for the respondent opposed the application for joinder and had filed written submissions. Counsel submitted that the threshold for joinder was spelt out by this Court in the case of *Civicom Limited vs Kivuwatt Limited and 2 Others* [2015] eKLR where it was observed that:

...From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff



should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

14. Counsel submitted that the applicant has not satisfied the threshold set out in the Civicon Limited case for the reasons that: the applicant despite all along being aware of the suit and testifying as a witness has never sought to be joined as a party; that the applicant instead proffered her own parallel suit being Isiolo ELC Case No. 260 of 2016 where she sued the respondent over the same subject matter; and that the applicant’s suit was dismissed on 4th July, 2022 and thereafter she lodged a notice of appeal dated 14th July, 2022 but has failed to pursue the same to date.
15. Counsel submitted that in light of the above, the instant application is an afterthought and a failed attempt to pursue her appeal against the decision in Isiolo ELC Case No. E002 of 2022 through the back door; that the fact that the applicant was aware of this suit to the extent of participating herein as a witness and still failed to seek to be joined then, clearly reveals the applicant’s ill intention to appeal through the back door.
16. Counsel asserted that the applicant has failed to demonstrate that she is a necessary party herein; that she already settled on instituting her own parallel case; that the applicant has failed to demonstrate how the ends of justice would be better served if she is enjoined herein; and that the applicant is dishonest and only seeks to pursue an appeal through the back door.
17. Counsel relied on the decision of the Supreme Court in the case of *Communications Commission of Kenya & 4 Others vs. Royal Media Services Limited* which declined an application for joinder of an interested party and held:

“The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal...

We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause...”
18. Counsel invited this Court to arrive at the conclusion that the applicant has not satisfied the threshold to be joined herein as an interested party and proceed to dismiss the instant application with costs to the respondent.

## Determination

19. We have considered the application, submissions made on behalf of the parties, the authorities cited and the law. The instant application seeks joinder of the applicant in the appeal and also seeks a stay of execution of the decision and orders of the ELC delivered on 31st October, 2018. For the sake of good order, we shall deal with the issue of joinder as this will determine whether the applicant will be party to any further proceedings in respect of this matter.
20. As stated by this Court in *Mbaruk Abdalla Suleiman & 5 others v Mombasa Cement Limited & 5 others* [2018] eKLR:

“The essence of allowing joinder of a party to any proceedings is for the court to achieve the ultimate goal of rendering conclusive determination of the real issues in controversy.”

See: *JMK vs MWM & another* [2015] eKLR.



21. This Court in *Civicon Limited v Kivu Watt Limited and 2 others* (*supra*) stated as follows:

“...the power of the court to add a party to a suit is wide and discretionary, the overriding consideration being whether he has an interest in the suit. The question is whether the right of a person may be affected if he is not added as a party. Generally, in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided. Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings...we may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

22. This Court in *Yawa & 35001 Others vs Chome (suing as the administrator of the Estate of Mumba Chome Ngala) (deceased) and 19 Others* (Civil Application No. 100 of 2018) KECA 35 KLR stated as follows:

“The rationale behind the joinder of any party to proceedings is to have on board a necessary party for purposes of determining the real issues in dispute. Perhaps, this is reason behind the general guiding principle that joinder of a party like amendment of pleadings, should be freely allowed and at any stage of the proceedings, provided that it will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

23. This Court in the same ruling went on to lay down the criteria for joinder in the following terms:

“In as much as an application by a party to be joined to any proceedings should not be restricted, there are criteria to be met by the party intending to be joined. The criteria which are in no way exhaustive include:

- 1) The applicant must demonstrate that it would be desirable for him/her to be added as a new party and that his/her presence would enable court to resolve all the matters in the dispute.
- 2) The joinder will not prejudice the other parties.
- 3) The joinder will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.”

24. Applying the above principles to the instant application – has the applicant made out a case to warrant her joinder in the appeal against the impugned judgment or any other applications or proceedings? From the record, the crux of the appeal is the ownership and entitlement of the suit property. The respondent claims ownership of the suit property. Counsel for the applicant contended that the applicant is in occupation and to be entitled to the suit property. Further, that the suit property is registered in the name of the applicant’s deceased husband, Julius M’Imwendwa M’Mwithiga and that the applicant has obtained letters of administration ad litem for the purposes of pursuing this matter. In the circumstances, we find that the participation of the applicant is integral in the determination of the appeal.



25. This Court in *Mbaki & Others vs Macharia & Another* [2005] 2 EA 206, stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

26. By parity of reasoning, we find that as the applicant is a person who is likely to be affected by the outcome of the appeal, she therefore has a right to be heard as dictated by the rules of natural justice.

27. Further, as held in this Court’s decision of *David Kiptugen vs. Commissioner of Lands, Nairobi & 4 Others* [2016] eKLR, declining the orders sought would deprive the applicant the opportunity to be heard on her claim over the suit property. Needless to say, this would be contrary to the rules of natural justice and unconstitutional.

28. The upshot is that the Notice of Motion dated 4th August, 2022 has merit and is hereby allowed. Leave is granted to the applicant to file and serve any necessary pleadings in Civil Appeal (Application) No. 3 of 2019 and Civil Appeal No. 3 of 2019 within twenty-one (21) days from the date hereof. The appellant and the respondent have corresponding leave to file a reply within twenty-one (21) days from the date of service.

29. Costs of this application shall abide by the outcome of Civil Appeal No. 3 of 2019.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....  
**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

