



REPUBLIC OF KENYA



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**Muongano Wa Wanavijiji Akiba Mashinani Trust v Kihui & 3
others; Waweru & 5 others (Interested Parties) (Civil Application
E279 of 2022) [2023] KECA 946 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 946 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E279 OF 2022
HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA
JULY 28, 2023**

BETWEEN

MUUNGANO WA WANAVIJJI AKIBA MASHINANI TRUST APPLICANT

AND

MARY NDUTA KIHUI 1ST RESPONDENT

KATHIRA NOOR H. BILE 2ND RESPONDENT

JOSEPH MWANGI 3RD RESPONDENT

ROBERT OKWOYO MIRONGA 4TH RESPONDENT

AND

JOHN MBATIA WAWERU INTERESTED PARTY

CECILIA WANJIRU KIBE INTERESTED PARTY

JACINTA WAKINA NJUE INTERESTED PARTY

THOMAS D GITHINJI INTERESTED PARTY

GULA FADHILI YUSUF INTERESTED PARTY

**SISAL GREENFIELD HOUSING CO-OPERATIVE SOCIETY
LIMITED INTERESTED PARTY**

(Application for an order for joinder of Sisal Greenfield Housing Co-Operative Society Limited as an Interested Party to the Civil Application No. E250 of 2022 and the intended appeal against the judgment of the ELC Court at Nairobi (O.A. Angote, J.) delivered on 5th May 2022 in Environment and Land Court in ELC Number 1112 of 2013)



RULING

1. What is before us for determination is an application dated August 2, 2022 which was amended on the same date, brought under rules 5(2) (b), 31, 33, 43, 44, 49, and 79 of the [Court of Appeal Rules](#), sections 3A & 3B of the [Appellate Jurisdiction Act](#) and Article 50(1) of the [Constitution](#), seeking: that the applicant/proposed interested party, Sisal Greenfield Housing Co- Operative Society Limited, be enjoined to Civil Application No E250 of 2022 and the intended appeal as an interested party; that an order do issue that title deeds to the Suit Properties known as L R 7109/88, Nairobi and L R 7109/89, Nairobi be deposited with the Registrar of this Court pending the hearing and determination of the referenced appeal; that in the alternative this Court be pleased to grant a temporary proprietary injunction restraining both the respondents and/or their assignees, lessees, agents, servants, representatives, employees or any other person from sale, transfer, gifting, any disposition or dealing with of any of the suit properties known as L.R 7109/88, Nairobi and L R 7109/89, Nairobi in any manner whatsoever pending the hearing and determination of the referenced appeal; that this Court grants a mandatory injunction to compel the respondents/plaintiffs to deposit all income generated from all activities upon the suit property pending the hearing and determination of the referenced appeal; and that costs of this application abide the outcome of the referenced appeal.
2. The application is supported by the affidavits sworn on August 2, 2022 by Joseph Karaja and Cecilia Wanjiru, the interim Chairman and Secretary respectively of the applicant. They contend that the suit property forms a trust property with two thousand two hundred and twenty one (2221) beneficiaries, being an implied trust between the applicant's members and the appellant; that the applicant represents 1590 of the 2221 members and the four respondents do not represent all the beneficiaries of the trust formed between the appellant and the interested party; that in the absence of any elections within appellant for the last ten years, the four respondents represent only 33% of the equitable beneficial interest of the membership of the interested party in the suit properties.
3. According to the applicant, the respondents admitted to owing a sum of Kshs 23,532,016.32 to the appellant. It is the case of the applicant therefore, that the intended appeal is arguable and if successful, it shall be rendered nugatory as the respondents will have appropriated the entire suit properties to potential third parties if the Court does not take into possession the title documents. The applicant will also suffer irreparable and unquantifiable harm as it stands to lose about 66% of the purchase price which it tabulates at Kshs 72,073,963. The applicant posits that the respondents have already commenced execution proceedings against the appellant, being the transfer of the suit properties into their individual names and if the transfer is effected and the respondents dispose of the properties, they (respondents) will not be able to repay or restore the value of the suit properties as a result of which the applicant will lose the substantial sum or its members proprietary interest in the suit property. It argues that it has tried negotiating with the respondents with a view to settling the dispute out of court but the meetings always end up in violence; and that if the orders sought are not granted, the appeal will be rendered nugatory and an academic exercise.
4. The application is opposed by the 1st respondent vide a replying affidavit sworn on August 16, 2022. He terms the application an abuse of the court process in that, the applicant had previously filed a similar application dated October 26, 2020 before the Environment and Land Court (ELC) which was dismissed on February 11, 2021. The applicant never appealed the ruling dismissing the application, and as such, it is binding on it which then renders the instant application *res judicata*. Furthermore, in the ruling, ELC held that the application was *res judicata* by virtue of a similar application having been filed by the officials of the applicant which was dismissed on November 14, 2014. It is also



contended that the applicant having been registered on August 14, 2019 cannot claim any lawful legitimate interest in the subject matter of the suit or appeal when in fact the suit in ELC commenced on September 18, 2013. We were urged to dismiss the application with costs.

5. The application was opposed by the 1st interested party vide a replying affidavit sworn on August 19, 2022. He deposes that he is the Chairman of the applicant, yet he was not consulted about the alleged meeting that ousted him; that consequently, the minutes of that meeting were null and void, additionally, the meeting was attended by members who were not committee members; the applicant failed to appeal the judgment from the trial court, nor the ruling dismissing its application seeking its joinder in the trial court proceedings; that it was the appellant who was advising them (interested parties) what applications to file in court, but they later realized that it used to work in cohorts with the applicant to their detriment. He also urged us to dismiss the application.
6. In a rejoinder to respondents' replying affidavit, the applicant filed further affidavits sworn by Cecilia Wanjiru, its Treasurer, on August 26, 2022, Joseph Karanja, its interim Chairman, sworn on August 23, 2022, Gulu Yusuf, its Secretary and the 5th interested party, sworn on August 26, 2022. The content of the respective affidavits is similar to that in the 1st interested party's replying affidavit. They basically depose that that the respondents have lied to the court in that no meeting was called to discuss either the judgement or rulings of the ELC, more specifically, whether the decisions were to be challenged.
7. When the matter came up before us for hearing on February 13, 2023, learned counsel, Mr Ong'amo holding brief for Mr Bryant appeared for the applicant, learned counsel, Mr Magee appeared for the respondent and Mr. John Mbatia appeared in person on behalf of the interested parties. Parties relied on written submissions.
8. Mr Ong'amo argued that Section 7 of the [Civil Procedure Act](#) provides that for a matter to be *res judicata*, it must be between the same parties and deal with similar issues that are already litigated. He distinguished the instant application with the application in the trial court, submitting that in the latter, the applicant sought to be enjoined as a defendant and not as an interested party. While emphasizing that the application is merited, counsel argued that the applicant represents more than 60% of the rightful owners to the suit properties, and any order which the Court would issue would directly affect them. Furthermore, the respondents have not demonstrated what prejudice they would suffer if the application was allowed. To the contrary, the applicant would be a necessary party to the proceedings as, through its members, it will provide crucial information which will be in the interest of justice.
9. Mr Magee argued that the application was *res judicata* and the appellant has yet to file a substantive appeal a year after judgment, that under Rule 83 of the [Court of Appeal Rules](#), the application has no legs to stand on and should be dismissed with costs.
10. On his part, Mr Mbatia submitted that he was satisfied with the trial court's ruling on the application dated October 26, 2020.
11. In a quick rebuttal, Mr Ong'amo stated that the delay in filing the appeal was due to the inability to get certified copies of the proceedings. Again, as at the time the trial court's ruling of November 14, 2014 was delivered, it (applicant) was yet to come into being as it was incorporated in 2019; and, in the application giving rise to the ruling dated February 11, 2021, it sought to be enjoined as a defendant and not as an interested party, thus, the application was not *res judicata*.
12. We have considered the application, the responses, the respective submissions and the law. The issues that crystalize for determination are threefold. The first is whether the interested party should be enjoined to these proceedings; the second is whether an injunction should be issued against the



respondents; and the third is whether an order should issue for deposit of the title documents of the suit property with the court.

13. On the first issue, the applicant contended that rule 79 of the [Court of Appeal Rules](#), under which this application is brought, does not define the word ‘affected’ so as to bring it into conformity with who an affected party to an appeal is. The argument was fronted based on the premise that it seeks joinder as an interested party by virtue that it would be affected by any orders that the Court would issue. The relevant part of the rule 79 is sub-rule (1) which states that:

An intended appellant shall, before or within seven days after lodging a notice of appeal under rule 77, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days of lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.

14. We agree that Rule 79(1) does not define the word “affected.” However, this Court defined the word in the case of [Centre for Rights Education and Awareness & Another v John Harun Mwau & 5 Others](#), CA No 74 of 2014 (CA). Referring to the cases of [Kamlesh Pattni v Starwood Hotels and Resorts World Wide Inc & 7 Others](#) Civil Application No Nai 330 of 2001 (UR 176/2001) and [Commercial Bank of Africa Limited v Isaac Kamau Ndirangu](#), Civil Appeal No 157 of 1991, (CA); [1992] eKLR, the Court held that:

“The person referred to in the Rule is, at least, one whose property rights are affected by the judgment appealed against and that he need not have been party to the superior court case to be served and allowed to participate in the appeal.”

15. The Supreme Court in [Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others](#) [2014] eKLR at paragraphs 18 of the ruling did define an interested party as follows: -

“Consequently, 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.”

16. Of note is that the [Court of Appeal Rules](#) provides for joinder of persons affected by the appeal and does not have any provision for joinder of interested party, but given the Supreme Court definition in the afore cited case, such a person would be covered by Rule 79 as an affected person. Joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. The court should however exercise such discretion under defined parameters, being that it must be satisfied that: -

- a. The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.
- b. The intended party’s presence would enable court to resolve all the matters in the dispute.
- c. The intended party would suffer prejudice in case of non-joinder.
- d. The joinder of the intended party 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.



17. While the applicant may be said to have a personal interest in the matter, we are of the view that the interest it has is not clearly identifiable and its presence in the proceedings would, instead, only convolute the intended appeal with unnecessary matters that are peripheral to the issues requiring determination. This we gleaned from the pleadings filed by the parties. They show that the interested parties are parties in the suit in their capacity as leaders of the applicant. Allowing the applicant to join the appeal would infer that the applicant will be represented by two different factions who are on different sides. What this again means is that, the applicant cannot introduce its own issues into the proceedings of the principal parties. This principle was stated by the *Supreme Court in Francis Karioko Muruatetu & another v Republic & 5 others* [2016] eKLR as follows:

“(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”

18. We are also of the view that the applicant’s interest will be well articulated and represented by the appellant, being that the applicant is in support of the appellant’s position, with a further similarity that they share the same advocate, learned counsel, Mr Bryant. We are persuaded that the only benefactor from the inclusion of the applicant to the intended appeal would be the appellant whose sole reason for seeking the enjoinder is to get an order of injunction against the respondents and an order for deposit of the title documents to the suit property with the Court. We cannot help but note that these are the same prayers in the appellant’s application in Civil Application No E250 of 2022. In our view, this application is merely an ingenious approach by the appellant to delay execution of the ELC’s Judgment.

19. That aside, the respondents opposed the application on account that the same was *res judicata*, contending that the applicant had filed two similar applications in the ELC which were dismissed. The applicant did not bring this assertion to the Court’s attention, nor did it challenge the respondents’ claim. Instead, it merely contended that the ELC’s ruling dated November 14, 2014 was as a result of an application filed by the applicant’s leaders in their personal capacity while the ruling dated February 11, 2021 was initiated by the applicant who sought joinder as a defendant and not as an interested party; and that the two applications were different and distinct from the instant application.

20. The respondent in the replying affidavit annexed the ruling dated February 11, 2021, and none of the parties provided us with the ruling dated November 14, 2014. The only reference to it we could find was that it was mentioned in passing in the former ruling.

21. What constitutes *res judicata* is well defined by section 7 of the *Civil Procedure* as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.



Explanation.— The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

(1) Explanation.— For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation.— The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

(3) Explanation.— A matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation.— Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

(5) Explanation.— Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

22. This Court in the case of *William Koross v Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR, espoused the principles of the doctrine of *res judicata* as follows:

“The philosophy behind the principle of *res judicata* is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

Speaking for the bench on the principles that underlie *res judicata*, Y V Chandrachud J in the Indian Supreme Court case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 stated, and we agree;

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”

23. In reference to the application by the applicant dated October 26, 2020 which was dismissed by the ruling dated February 11, 2021, the contention that the application as filed was not similar to the instant application on account that the applicant sought to be enjoined as a defendant and not as an interested party, is nothing more than its counsel splitting hair. We say so because, the issues raised by the parties therein remain the same. The fact that at one point the applicant sought joinder as an interested party and at another as a defendant, does not negate the fact that a court of competent jurisdiction dismissed these applications and no appeal was preferred against those decisions. There can be no other finding other than that the application herein is *res judicata*.



- 24. In conclusion, we find and hold that the applicant has manifested its partisan support for the appellant, and it would be improper for it to be enjoined as an interested party. For this reason, we find the application is not only res judicata, but also an abuse of the court process.
- 25. In regards to the other prayers, having held that the applicant has not met the threshold for joinder as an affected party, it then lacks the locus to seek any of the other prayers.
- 26. In the upshot, we find that the applicant’s application dated August 2, 2022 lacks merit and the same is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

J.M. MATIVO

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

