



REPUBLIC OF KENYA



**KENYA LAW**  
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**Attorney General & 20 others v Emfil Limited & 416 others (Civil Appeal  
(Application) 14 of 2019) [2022] KECA 522 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KECA 522 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) 14 OF 2019**

**SG KAIRU, JA**

**MAY 6, 2022**

**BETWEEN**

**ATTORNEY GENERAL ..... APPELLANT**

**AND**

**MERCY W. MUTUNGA ..... 1<sup>ST</sup> APPLICANT**

**WEMBLEY INVESTMENTS LIMITED ..... 2<sup>ND</sup> APPLICANT**

**SAMUEL M. ARACHI ..... 3<sup>RD</sup> APPLICANT**

**FREDRICK K. MULANDI ..... 4<sup>TH</sup> APPLICANT**

**MARS ASSOCIATES LIMITED ..... 5<sup>TH</sup> APPLICANT**

**NZURI MAHALI LIMITED ..... 6<sup>TH</sup> APPLICANT**

**SABA MWANGA LIMITED ..... 7<sup>TH</sup> APPLICANT**

**M-MAISHA MEMA LIMITED ..... 8<sup>TH</sup> APPLICANT**

**MAFANIKIO LIMITED ..... 9<sup>TH</sup> APPLICANT**

**TAMU NDOTO LIMITED ..... 10<sup>TH</sup> APPLICANT**

**KUGEUKA LIMITED ..... 11<sup>TH</sup> APPLICANT**

**PWANI MAONI LIMITED ..... 12<sup>TH</sup> APPLICANT**

**JUA MAISHA LIMITED ..... 13<sup>TH</sup> APPLICANT**

**JENNIFER KAARIA ..... 14<sup>TH</sup> APPLICANT**

**NICHOLAS KAARIA ..... 15<sup>TH</sup> APPLICANT**

**LINDA KAARIA ..... 16<sup>TH</sup> APPLICANT**

**TIMOTHY KAARIA ..... 17<sup>TH</sup> APPLICANT**



EVANSON THUO ..... 18<sup>TH</sup> APPLICANT  
POLPANE PROPERTIES LIMITED ..... 19<sup>TH</sup> APPLICANT  
UNI-HOMES APARTMENT LIMITED ..... 20<sup>TH</sup> APPLICANT

AND

EMFIL LIMITED & 416 OTHERS ..... RESPONDENT

*(The Attorney General as the appellant was challenging a ruling of the Environment and Land Court at Mombasa in ELC Case No. 113 of 2015 (A. Omollo, J.) delivered on 20th July 2017 allowing applications by Emfil Limited, the 1st respondent in the appeal, to strike out defences.)*

## RULING

1. In their application dated 26<sup>th</sup> October 2021 filed through the firm of Musyoka-Annan & Co Advocates the twenty (20) applicants, namely, Mercy W. Mutunga, Wembley Investments Limited, Samuel M. Arachi, Fredrick K. Mulandi, Mars Associates Limited, Nzuri Mahali Limited, Saba Mwanga Limited, M-Maisha Mema Limited, Mafanikio Limited, Tamu Ndoto Limited, Kugeuka Limited, Pwani Maoni Limited, Jua Maisha Limited, Jennifer Kaaria, Nicholas Kaaria, Linda Kaaria, Timothy Kaaria, Evanson Thuo, Polpane Properties Limited, and Uni-Homes Apartment Limited, seek three main orders, namely that: this Honourable Court be  
  
pleased to discharge and/or vacate the ruling delivered on 20<sup>th</sup> July 2017 by the Honourable Lady Justice A. Omollo; that they be granted leave to file defences in the lower court; and that they be enjoined as a party to the suit and that they be allowed to defend the suit. The application was placed before me as a single judge on the basis that the applicants seek to be made parties to the appeal.
2. In the appeal in which the application is brought, the Attorney General as the appellant is challenging a ruling of the Environment and Land Court at Mombasa in ELC Case No. 113 of 2015 (A. Omollo, J.) delivered on 20<sup>th</sup> July 2017 allowing applications by Emfil Limited, the 1<sup>st</sup> respondent in the appeal, to strike out defences. The defences were struck out on grounds of frivolity and abuse of court process in light of earlier decisions of the High Court and of this Court to the effect that the issue of 1<sup>st</sup> respondent's title to the suit property had been settled with finality.
3. The ELC expressed that the defences by the defendants in that suit, who like the present applicants claim to have titles over the same property, were acquired after a judgment of the High Court in HCCC No. 181 of 2007 which declared such titles to be of no legal effect, that, that judgment was in rem, and therefore it was a clear case of striking out as there was "nothing to proceed for trial."
3. The applicants, who also claim to have titles over parcels of land within the suit property, complain that they were not informed or made parties to the proceedings below, that they are bona fide purchasers for value of the parcels of land within the property from the original allottees; that they were denied a chance to defend the suit contrary to the rules of natural justice.
3. In the supporting affidavit by one of the applicants, on behalf of the other 19 applicants, Mercy Wangari deposes that like the other applicants, she is registered owner of parcel number Kwale/Ramisi Kinondo S.S/96 which she purchased from an allottee Zuhura Abdalla Mwamaku having undertaken all due diligence; that the applicants got surprised that there is a ruling affecting them yet they were never served with any proceedings to enable them defend themselves; that "since their rights are being



infringed, it is as of right and a matter of justice that the applicants be allowed to be enjoined in the suit at the lower court in order to now sufficiently defend the suit.”; that the lives of the applicants who are on the parcels of land are at risk.

6. During the hearing of the application before me on 9<sup>th</sup> February 2022, parties were represented by learned counsel. Mr. Musyoka Annan appeared with Mr. Sigei for the applicants. Mr. Singh

Gitau appeared with Ms. Davey for Emfil Limited, the 2<sup>nd</sup> respondent in the appeal. Mr. J. Asige appeared for 157, 158, 161, 166 and 167 respondents in the appeal. Mr. Apollo Muinde

appeared for respondents’ numbers 12 142, 145, 147, 149, 154, 211, 215, 239, 241, 293, 306, 308, 318. Mr. Sigei also held brief for Ms. Langat for the Attorney General, the appellant.

6. Urging the application before me, Mr. Musyoka Annan, who was supported by Mr. Muinde, Mr. Asige and Mr. Sigei relied on his written submissions which he highlighted urging that the applicants are holders of titles of parcels of land within the suit property; that none of them were parties to the suit before the

lower court despite the fact that the 2<sup>nd</sup> respondent in that suit was seeking an order of eviction of the persons on the property and the suit therefore has a bearing on the applicants; that defences filed in the suit, including that of the Attorney General who lodged this appeal, were struck out; that being persons whose property rights under Article 40 of *the Constitution* are affected, and being directly affected within Rule 77 of the *Court of Appeal Rules*, they should be joined. The Supreme Court decision in CCK S.C. Petition No. 15 of 2014 was cited. It was submitted that all the applicants seek is an opportunity to be heard and no prejudice will be occasioned to the parties to the appeal.

8. Opposing the application, learned counsel Mr. Gitau Singh for the

2<sup>nd</sup> respondent referred to the replying affidavit of Vinaychandra Damodar Popat, a director of the 2<sup>nd</sup> respondent setting out in detail the background to the matter as well as his written submissions. Counsel submitted that this appeal is defective and the question of joinder in a defective appeal cannot arise; that this

appeal arises from judgment entered by the lower court on 20<sup>th</sup> July 2017 and the present appeal, was filed without leave of the Court; that the appeal by the Attorney General is against the few defendants who had filed defences in the lower court and they are the only ones who can claim to be adversely affected by the

judgment of 20<sup>th</sup> July 2017 the subject of the appeal; that the applicants never filed defences in the lower court and are therefore not adversely affected; that the main suit is still subsisting in the lower court and is pending formal proof with respect to those defendants who had not filed defences; that the matter before the lower court is still alive and that is where the applicants should apply to be joined; and that the 2<sup>nd</sup> respondent stands to suffer prejudice if the present application is allowed.

9. I have considered the application and the submissions. As already noted, the appeal arises from a ruling of the lower court that struck out the defences of the respondents on grounds of being frivolous and abuse of the process of the Court and entered judgment for the 2<sup>nd</sup> respondent.

9. The applicants are now before this Court seeking orders to

“discharge and/or vacate the ruling delivered on 20<sup>th</sup> July 2017” and for “leave to file defences in the lower court” as well as the prayer for the applicants to be enjoined as a parties to the suit in the lower court. The application is made under Articles 40, 50 and 159 of *the*



Constitution, Order 51 Rule 1 and 3 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act and all enabling provisions of the law.

9. It was pointed out that the suit in the lower court, to which the application was evidently directed, is live. On the face of the cited provisions and the prayers, there is merit in the submission by counsel for the 2<sup>nd</sup> respondent that it is to the lower court that the matters raised in the present application should be addressed. Considering the contention by the applicants that they are title holders in the suit property, it may well be that they may have a stake in the suit having regard to the principles enunciated by the Supreme Court of Kenya in the context of an application for joinder of an interested party in Communications Commission of Kenya and 4 others v Royal Media Services Limited & 7 Others Petition No. 15 of [2014] eKLR. See also Moses Wachira v Niels Bruel & 2 Others [2015] eKLR. That, however, is a matter for the lower court to consider, if moved.
12. As it is, there is no proper basis for ordering the applicants to be made parties to the appeal. I decline the applicants' application. The application is dismissed with costs to the 2<sup>nd</sup> respondent.

**Orders accordingly.**

***Dated and delivered at Mombasa this 6<sup>th</sup> day of May 2022.***

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

***I certify that this is a***

***true copy of the original.***

***Signed***

**DEPUTY REGISTRAR**

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