



Musya & 3 others v Muviku & 4 others; Musili & 2 others (Proposed Interested Parties) (Being officials of Ausini Clan) (Environment & Land Case E003 of 2021) [2024] KEELC 3873 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E003 OF 2021**

LG KIMANI, J

APRIL 24, 2024

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 24, 25, 27, 40, 47, 48, 50, 159, 165, 258 AND 259 OF {{>/AKN/KE/ACT/2010/CONSTITUTION THE CONSTITUTION}} OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 10,19,20,21,22,23, 24, 25, 27,40,47, 48, 50(1) AND 165 OF {{>/AKN/KE/ACT/2010/CONSTITUTION THE CONSTITUTION}} OF KENYA, 2010 AND

IN THE MATTER OF SECTION 29(1)(B) OF THE {{>/AKN/KE/ACT/1968/35 LAND ADJUDICATION ACT}}, AND

IN THE MATTER OF SECTIONS 4 & 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF THE DOCTRINE OF REASONABLENESS

BETWEEN

**ROBERT MUTIE MUSYA 1ST PETITIONER
MUTINDA MUVIKU 2ND PETITIONER
MUTISYA MATI 3RD PETITIONER
HARRISON MWENGA MUSYOKA 4TH PETITIONER**

AND



DANIEL MUSYOKA MUVIKU 1ST RESPONDENT
THE DEPUTY COUNTY COMMISSIONER, KYUSO 2ND RESPONDENT
THE LAND ADJUDICATION OFFICER, KYUSO 3RD RESPONDENT
THE CHIEF LAND REGISTRAR 4TH RESPONDENT
THE ATTORNEY GENERAL 5TH RESPONDENT

AND

MATEI MUSILI PROPOSED INTERESTED PARTY
MUTHUI MUSYOKA PROPOSED INTERESTED PARTY
MWOVE KWOKO PROPOSED INTERESTED PARTY
BEING OFFICIALS OF AUSINI CLAN

RULING

1. This ruling is in respect to an application under Notice of Motion dated 11th July 2023 seeking the following orders:

SUBPARA 1.

Spent.

2. That an order do issue that Mateli Musili, Muthui Musyoka and Mwove Kwoko being officials of the AUSINI CLAN be joined as interested parties to this matter.
 3. THAT this Honorable Court be pleased to make any other orders fit in the circumstances of this case.
 4. **That the costs of the application be provided for.**
2. The grounds relied on are on the face of the application and in the supporting affidavit of Mateli Musili. The Applicants state that the Petitioners and the 1st Respondent are members of the Ausini clan headed by the proposed interested parties as elected officials. That they appeared before the proposed interested parties on 21st September 2013 and 20th July 2019 over adjudicating the suit properties and the Clan held in favour of the Petitioners, decisions which were disregarded during the adjudication process by the 2nd Respondent.
 3. The applicants claim that the suit properties are ancestral land and were initially held in common before the adjudication process in the Kimangao Section began. They state that their pleadings will aid the court in determining questions relating to Kamba customary land ownership. The applicants state that under the *Land Adjudication Act*, the Adjudication Committee is obligated to take into consideration customary land holding and the decisions of clan elders. That the current adjudication process has ignored communal land interests and customary law, especially on appeal rendering the adjudication process unjust. The applicants further stated that the clan was tasked with helping in the adjudication of the suit properties and acted as the Land Adjudication Committee.



4. Mr. Matei Musili on behalf of the applicants deposed that most adjudication decisions by the clan have continuously been reversed on appeal, owing to an outright corruption of the officials mandated to determine such disputes, rendering the entire adjudication process unjust.
5. He stated that there have been unending disputes in the Kimangao Adjudication Section which have caused social unrest among the members of the Ausini clan. The finality of the decision of the Minister has rendered most of the clan members landless since they lack the avenues to repossess their land. The applicants are of the view that it is in the interest of justice to allow the application as prayed and that their joinder will not cause any prejudice.

The 1st Respondent's Replying affidavit

6. The 1st Respondent, Daniel Musyoka Muviku swore an affidavit in opposition to the instant application, deposing that the suit land does not belong to his clan and is not ancestral land. He has no relation with the Respondents that would allow for sharing the suit land and the proposed interested parties are strangers to him.
7. He further deposed that if the Ausini clan were involved in the land adjudication process, they ought not to be involved with the matter herein as parties. The 1st Respondent denied that the dispute was heard and determined by the clan elders.
8. Describing the origin of the land dispute, the 1st Respondent states that the dispute herein was heard and determined by the Resident Magistrate's Court in Mwingi, the District Land Disputes Tribunal and the provincial appeals committee. It was also heard by the Principal Magistrates' at Kyuso case 28 of 2014 where judgment was entered in favour of the 1st Respondent and an injunction issued against the Petitioner herein.
9. The 1st Respondent stated that the proposed interested parties were seeking to add evidence through the backdoor when they had already presented their findings during the land adjudication process. His position is that the Ausini clan have no interest in the suit land since the Kamba customary laws do not apply once the adjudication process becomes complete.
10. The 1st Respondent also states that the clan's decision cannot supersede the court's decision and that the proposed interested parties have colluded with the petitioners in the matter to assist them in grabbing the land that he legally owned. His view is that the application is frivolous, and unmeritorious and has shown no good reason to join the proposed interest parties.

Applicants' written submissions

11. Counsel for the Applicants submitted that the Court has the discretion under Order 1 rule 10(2) of the Civil Procedure Rules to order the joinder of a party at any stage of proceedings. They quoted rule 2 of *the Constitution* of Kenya (Protection of rights and fundamental freedom) Practice and Procedure rules(2013) on the definition of an interested party and also relied on the Supreme Court case of Judicial Service Commission vs Speaker of the National Assembly & another(2013)eKLR and also the case of Francis Kariuki Muruatetu & another vs Republic & 5 others(2014)eKLR on the definition of an interested party.
12. The Applicants submit that they have sufficiently demonstrated in their application that they have a personal stake in the matter. The applicants' Counsel submitted that the suit land is under adjudication and title deeds have not been issued. The applicants claim that the clan's findings are important as they share a common ancestry with the parties to the petition and their position is solidified by Section 20 of the *Land Adjudication Act*. They deny that they intend to bring new evidence but insist that they



have an identifiable stake since the present petition goes beyond ownership of the suit parcels of land but challenges the Constitutionality of Section 29 of the [Land Adjudication Act](#).

13. The Applicants relied on the case of Joseph Kalenyan Cheboi & others vs William Suter & another(2014)eKLR where Munyao J acknowledged the weight of the findings of the clan elders. It is also submitted that the fate of Kamba customary conceptions have suffered since the enactment of the [Land Adjudication Act](#) and they wish to demonstrate the effect of Section 29(2)(b) of the [Land Adjudication Act](#) in so far as customary rights are concerned. They submit that this case qualifies as one where there can be intervention on public interest grounds as the criteria were laid down in the case of Kenya Medical Laboratory Technicians and Technologists Board & 4 others(2017)eKLR and submit that enjoining them will enable the court to appreciate the underlying customary law aspects that govern land before an area is declared an adjudication area.

1st Respondent's submissions

14. Counsel for the 1st Respondent submitted and reiterated the matters set out in the application and the supporting affidavit. He stated that the suit property does not belong to the Ausini clan and the fact that the parties are members of the same clan does not affect their legal rights to land ownership and the clan has no basis to interfere with these rights. Counsel submitted that the applicants have no legal right vested in the suit property.
15. That the clan leaders already aired their views during the committee stage and their interests were addressed. The 1st Respondent submits that the determination of ownership and interests in an adjudication area is left to the Adjudication officer whose powers are quasi-judicial.
16. The 1st Respondent cited the case of Hopf vs Director of Survey & 20 others (KEELC)6 KLR 4 May 2022 (ruling) where it was determined the principles to be followed to know whether the party is an interested party. His position is that the applicant has not proven a legal interest at stake but is showing partisan interest in the matter and that their absence will not affect the case since there are no issues that cannot be effectively adjudicated in their absence. The Counsel for the Respondent also relied on the cases of Speaker of National Assembly Vs. Karume (1992) eKLR and Matwangs Tea and Coffee Co. Ltd Vs Shakira Ltd & Another

Analysis and Determination

17. The Court has considered the application herein, the replying affidavit, the Counsel's submissions and the authorities cited. The rules governing the joinder of Interested Parties in a Constitutional petition are found in [the Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)

Rule 2 defines an “interested party”

“ means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;

18. Rule 7 provides for the procedure for joinder of the Interested party
 1. A person, with leave of the Court, may make an oral or written application to be joined as an interested party
 2. A court may on its own motion join any interested party to the proceedings before it



19. The Applicants relied on the holding in the Supreme Court case of *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR where it was stated:

“*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as “a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”. From the foregoing, it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings.... It is however a requirement that a person who intends to be joined to existing legal proceedings ought to show that he has “an identifiable stake or legal interest in the proceedings before the court.”

20. The Supreme Court in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR held as follows in a similar application:

“In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling 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 questions 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 interested party’s stake and relevance in the proceedings? and (b) will the intended interested party suffer any prejudice if denied joinder?”

21. The background to the Petition is that the Petitioners had cases arising out of the adjudication process over Land Parcel Nos. 2152, 2148, 2149, 2150, 2151, 2142, 2143, 2144, 2145, 2146, and 2404 within Kimangao Adjudication Section and Mivukoni Adjudication Section, Kyuso sub-county. The Petitioners have sought the following reliefs in the Petition:

- a. An order of certiorari do issue to remove and quash the decision made by the Deputy County Commissioner, Kyuso Sub-County, Kitui County in Minister’s Appeal Case Nos. 27, 28 and 270 of 2020 in regard to Land Parcels 2152, 2148, 2149, 2150, 2151, 2142, 2143, 2144, 2145,



2146, and 2404 within Kimangao Adjudication Section and Mivukoni Adjudication Section, Kyuso sub-county.

- b. A declaration that the Petitioners are entitled to be registered as the legitimate and beneficial owners of their ancestral land herein as originally demarcated to them as Land Parcels 2152, 2148, 2149, 2150, 2151, 2142, 2143, 2144, 2145, 2146, and 2404 respectively.
 - c. A permanent injunction be issued restraining the 4th Respondent by themselves, agents, servants, employees or otherwise howsoever from effecting registration and/or issuing Title Deeds in respect to the Parcels of Lands herein to the 1st Respondent and/or any other person other than the petitioners.
 - d. An order of injunction be issued compelling the 4th Respondent to register the Petitioners as the beneficial and legitimate owners of the subject ancestral land originally demarcated to them as Land Reference No. 2152, 2148, 2149, 2150, 2151, 2142, 2143, 2144, 2145, 2146, and 2404 respectively.
 - e. A declaration that Section 29(1)(b) of the [Land Adjudication Act](#) is inconsistent with Articles 10(2), 19, 20, 21, 22, 23, 24, 25, 27, 28, 40, 47, 48, 50, 159, 162, and 162 and 165(6) of [the Constitution](#) thus unconstitutional, null and void to the extent of the inconsistency.
22. The intended interested parties claim that their interest in being joined in this petition arises from the fact that the suit properties are ancestral land. They state that the clan was tasked with helping in the adjudication of the suit properties and acted as the Land Adjudication Committee. The Petitioners and the 1st Respondent appeared before the Ausini clan over the adjudication of the suit properties and the Clan held in favour of the Petitioners, decisions which were disregarded during the adjudication process by the 2nd Respondent.
23. The applicants state that under the [Land Adjudication Act](#), the Adjudication Committee is obligated to take into consideration customary land holding and the decisions of clan elders in arriving at decisions. That the current adjudication process has ignored communal land interests and customary law. They claim that their pleadings will aid the court in determining questions relating to Kamba customary land ownership.
24. The applicants complain that most adjudication decisions by the clan have continuously been reversed on appeal, owing to an outright corruption of the officials mandated to determine such disputes, rendering the entire adjudication process unjust. They state that there have been unending disputes in the Kimangao Adjudication Section which have caused social unrest among the members of the Ausini clan. The finality of the decision of the Minister under section 29 of the [Land Adjudication Act](#) has rendered most of the clan members landless since they lack the avenues to repossess their land.
25. In the court's view, the question for determination is whether the applicants have an identifiable stake, legal interest or duty in the proceedings before the court. Having considered the claim in the petition as set out above, the court is of the view that the applicants have an identifiable stake or legal interest or duty in the proceedings herein only to a limited extent as set out hereunder.
26. In the first instance, the court is of the view that the applicants do not have an interest in the ownership of the suit land for the reason that the applicants did not as a clan claim rights and/or interests in being adjudicated as owners of the suit parcels of land as provided under the [Land Adjudication Act](#). The preamble to the said Act states that it is "An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land and for purposes connected therewith and purposes incidental thereto"



27. Further, the clan and the applicants herein did not appear as parties to any of the dispute resolution processes to claim the suit parcels of land. They claim to have been called upon to adjudicate between the disputants to determine the owners of the suit parcels of land and to have been part of the adjudication committee.
28. In the court's view, anything that the applicants would have had to say concerning the determination of rights and interests in the suit parcels of land ought to have been stated during the said process noting that the *Land Adjudication Act* sets out an elaborate dispute resolution processes that parties ought to follow. It is noted that prayers (a) to (d) of the petition herein deal with the determination of ownership of the suit parcels of land with the Petitioners seeking to have the decision of the 2nd Respondent quashed and an order issued declaring them as the lawful owners of the suit parcels of land and having them registered as such.
29. The court finds that the applicants, as a clan whose membership consists of persons with land within an adjudication section have an identifiable stake or legal interest or duty in the proceedings before the court with regard to the prayer seeking a declaration that Section 29(1)(b) of the *Land Adjudication Act* is inconsistent with Articles 10(2), 19, 20, 21, 22, 23, 24, 25, 27, 28, 40, 47, 48, 50, 159, 162, and 162 and 165(6) of *the Constitution* thus unconstitutional, null and void to the extent of the inconsistency.
30. Further, the court finds that to the extent that the applicants seek to urge the court on issues that go beyond the dispute between the parties to this petition and seek a determination of the question of application of customary law and the place of decisions of clan elders in the determination of rights and interests within an adjudication section, the applicants have an interest in the present petition in light of the several provisions of the *Land Adjudication Act* set out herein;
31. Section 6 (1) provides for the appointment of the adjudication committee;

“In respect of each adjudication section, the adjudication officer, after consultation with the District Commissioner of the district within which the adjudication section lies, shall appoint not less than ten persons resident within the adjudication section to be the adjudication committee for that adjudication section”.
32. Section 20 provides for the functions of the Committee and the place of customary law stating that;

“The committee appointed for an adjudication section shall— adjudicate upon and decide in accordance with recognized customary law any question referred to it by the demarcation officer or the recording officer;”
33. In the present case, the applicants urge that the adjudication process ought to take into account the prevailing customary law rights and decisions of elders. The court has considered some reasons that may lead to a party being enjoined in a matter as were set out in the case of *Meme v. Republic*, [2004] 1 EA 124, and concluded that the presence of the applicants will enrich the debate and possibly result in a complete settlement of the issues raised in the proceedings herein since the issues raised by the proposed interested parties are of general concern when it comes to land adjudication.
34. Further, the court is persuaded that the rights of the applicant's members whose parcels of land are involved in the process of adjudication will be protected if the question of application of customary law in decisions relating to adjudication and the decisions of elders is heard and determined comprehensively.



35. It is further the court's view that the joinder of the applicants will prevent a likely course of proliferated litigation on the same issues noting that there have been various petitions filed challenging the constitutionality of Section 29 of the Land Adjudication Act. The said Section 29 and the finality clause thereunder provides that:

- “(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
- (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

36. The court notes that there is provision for people such as clan elders within the provisions of section 29 of the Act under Regulation 11(1) of the Land Adjudication Regulations(1970) which provides that:

“The District Commissioner of a district within which an adjudication area lies shall, upon the request of the adjudication officer, appoint for that adjudication area a panel of fifty assessors from which the Minister may appoint not less than three assessors to advise him on matters relating to customary land law during the hearing of an appeal under section 29 of the Act.”

37. The court has considered the 1st Respondent's objection to the application herein on the ground that the applicants claim that they were part of the adjudication committee and thus they cannot appear as parties to the present petition since this would raise a conflict of interest. However, it is noted that the petition herein is filed against the Deputy County Commissioner and the Land Adjudication Officer. These are officers who were involved in the dispute resolution process in the same way that the applicants may have at some point been involved in the resolution of the dispute between the parties herein.

38. Further, the court is persuaded that the role of an interested party in a petition is not entirely indifferent to the outcome of the proceedings in question and may not be said to be wholly non-partisan as is likely to urge the Court to make a determination favourable to his stake in the proceedings. This is in line with the findings of the Supreme Court in *Judicial Service Commission v Speaker of the National Assembly & another* (supra).

39. From the foregoing, the Court finds that the applicants have a right to contribute to the questions before the court and the Respondents will not suffer any prejudice by their participation.

40. The court finds that the application dated 11th July 2023 has merit and the same is hereby allowed in terms of prayer 2. Each party shall bear their own costs of the application.

Dated, signed and Delivered at Kitui this 24th day of April 2024

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI



The ruling read in open court and virtually in the presence of:

C/A Musyoki

Ms. Mwikali holding brief for the Applicants

No appearance for the Respondents

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