Satia & Partners & another v Sichangi & 7 others; Estate of Julius Mabusi Nandasaba alias Julius Wafula alias Julius Mabusi alias Jairus Wafula Represented by Benson Juma Mabusi & Mathews Simiyu Mabusi (Intended Interested Party) (Environment & Land Case 24 of 2021) [2024] KEELC 3324 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3324 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 24 OF 2021

FO NYAGAKA, J

APRIL 23, 2024

BETWEEN

RICHARD SATIA & PARTNERS ..... 1ST PLAINTIFF

WISLON WALUNYWA SIMWENYI (SUING AS THE LEGAL REPRESENTATIVE OF THE LATE JESTIMORE SIMWENYI) .... 2ND PLAINTIFF

AND

SAMSON SICHANGI ..... 1ST DEFENDANT

EMMANUEL .C. SICHANGI ..... 2ND DEFENDANT

RASMI WASILWA KICHOTI ..... 3RD DEFENDANT

MOHAMMED WEKESA ..... 4TH DEFENDANT

WILLIAM KIRWA ..... 5TH DEFENDANT

RONALD SICHANGI ..... 6TH DEFENDANT

NICK SICHANGI ..... 7TH DEFENDANT

JULIUS TIRIKOI ..... 8TH DEFENDANT

AND

ESTATE OF JULIUS MABUSI NANDASABA ALIAS JULIUS WAFULA ALIAS JULIUS MABUSI ALIAS JAIRUS WAFULA REPRESENTED BY BENSON JUMA MABUSI & MATHEWS SIMIYU MABUSI ..... INTENDED INTERESTED PARTY

RULING

1. When growing up I used to hear of fairy tales about animals and plants that eat themselves. I was quite fascinated and looked forward to coming across one and witness the process. Sad I have been through the years as I grew, knowing that such tales were indeed to keep children intrigued and glued to learning more about nature: which is a good thing, especially useful in this era of climate change. So, I learnt that self-cannibalism otherwise known as autophagy is extremely rare, if any. But as I grow older, wisdom keeps building and It informs me that possibly, and metaphorical at that, it is only man who out of greed and depravity of mind eats his own. This is the story of Richard Satia and Partners herein. The partnership (or partners), either out of lack of knowledge or due to greed as I have stated above is grinding itself live to destruction as they 'watch'. How I wish they focused on saving the little 'flesh' left, be resorting to Alternative Dispute Resolution on the dispute about the 'shares' they have and rest in peace!

2. Before me is a Chamber Summons Applications dated 04/12/2023. It is brought by an Intended Interested Parties, namely, the Estate of Julius Mabusi Nandasaba alias Julius Wafula alias Julius Mabusi alias Jairus Wafula represented by Benson Juma Mabusi and Mathew Simuyu Mabusi. It was brought under Article 159(2) of the *Constitution* as read with Section 3A and 63(e) of the *Civil Procedure Act* and Order 1 Rule 10(2) and 25 of the *Civil Procedure Rules* 2010. It sought the following prayers:-

    1. ...spent

    2. That this honorable Court grants leave to the intended interested party/ applicant herein to be enjoined as an interested party in this suit.

    3. ....spent

    4. That this Honourable Court grants any other orders that it may deem fit to grant in the interest of justice.

    5. That the costs of this Application be provided for.

3. The Application was based on the grounds that the Plaintiffs obtained judgment against the defendants and obtained an order allowing them to enter and demolish the structures on the suit property; the interested party/ applicant has a direct interest in the instant case; the intended interested party will be prejudiced in case they are not enjoined; the applicant had set out a case and or the submissions it intends to make are not a replication (sic) of what the other parties will be making before the Court; the Applicant is a necessary party in the instant case; the Applicant has a right to the suit property which is being threatened by the Respondents; the Respondents are strangers to the suit property; the Applicants will stand to suffer irreparable harm that will not be adequately compensated by way of damages; the balance of convenience tilts in favour of granting an injunction; the applicants have come to the Court with clean hands; the Court should do substantive justice and preserve the subject matter by the order of injunction.

4. The Application was supported by the Affidavit of one Mathew Simiyu Mabusi sworn on 04/12/2023. He deponed that he was one of the administrators of the estate of Julius Mabusi Nandasaba and was competent to swear the affidavit in that behalf. He annexed and marked as MSM-1(a) and (b) copies of the Grant of Letters of Administration Intestate and letter of authority. He repeated the grounds of the application in deposition form. He added that the Applicant was one of the registered proprietors

of the property known as LR. No. 5335/24 situate in Endebess Subcounty measuring 367 acres. He was currently in possession and occupation thereof as tenants in common in equal shares with four other lawfully registered proprietors of the suit property known as Richard Satia, Nyongesa Welikho, Jackson Siboko and Charles Wasike Jaino who all are dead (sic). The activities of the Respondents will block him from utilizing the property. He annexed and marked as MSM-2 a copy of the title deed.

5. He deposed that he knew well that the property had not been subdivided among the estates of the deceased registered proprietors. He stated further that the applicant would be prejudiced if it was not enjoined; he has a legitimate ownership of the property; the entry of the Respondents to his property would adversely affect its right to peaceful possession of the property; he had been advised that enjoinment would be done even in the appellate stage of a case and he had made a case for joinder as prayed.

6. The Decree holders/ Respondents opposed the application through a Replying Affidavit sworn by Wilson Walunywa Simwenyi on 16/01/2024. He deposed that the Applicants did not have any legally recognized rights, interest or stake in the suit land meriting their enjoinment. They had never been in occupation of the land since the inception of the instant suit in 1994. In Eldoret High Court Civil Suit No. 141 of 1991 and Nakuru Civil Appeal No. 164 of 1995 their father never participated since he had relinquished his shares. In Appeal No. 164 of 1995 the judges of Appeal whom he named as Akiwumi, Lakha and Bosire JJA analyzed the share holding of Julius Mabusi as a partner in the suit land, and they found that the said Julius Mabusi was never a partner since he failed to participate and give evidence on his purporting rights over the suit land. He annexed and marked as WWS-1 a copy of the judgment of the Court of Appeal.

7. He deponed that the applicants being strangers to the suit land had no recognizable stake and standing in the matter to warrant the grant of the orders sought. He deposed that the applicants were being used by the Defendants to frustrate the Plaintiffs from enjoying the fruits of their judgment.

8. In his Supplementary Affidavit sworn on 29/01/2024. He deponed that the statement about the fact that his later father never participated in Eldoret HCCC No. 141 of 1991 and Nakuru Civil Appeal No. 164 of 1995 for reason of relinquishing his shares was not substantiated because the issue never arose in the Civil Appeal. Further, that the appellant had not substantiated the nature and number of shares and the year they were relinquished and to whom that happened, and even the documents regarding that allegation. The failure to provide evidence about the relinquishing of shares was evidence that his father still had shares. It was a lie on oath that Julius Mabusi relinquished his shares was a lie on oath because the said Julius Mabusi died on 14/03/1978 before the Eldoret High Court matter was filed and his estate was never sued or summoned by the parties. He annexed and marked as MSM-1 a copy of the Death Certificate.

9. He swore further that the learned judges of Appeal never made any obiter that his late father never contributed any shares and this was a lie on oath. In any event Orbiter is not legally binding on parties. If the prayer was not granted the Respondents actions would constitute unjust enrichment. He knew that the entity Richard Satia and Partners was not a registered entity as the proprietor of parcel LR. No. 5335/24 that can sue or be sued in its own name. The said entity is being used by the 2nd Plaintiff to fraudulently acquire LR. No. 5335/24 which belongs to the five people named as Richard Satia, Nyongesa Welikho, Jackson Siboko and Charles Wasike Jaino all deceased.

10. He deposed that he had perused the Court file and found that all the deceased partners never gave authority in Eldoret High Court No. 141 of 1991 (formerly Civil Suit No. 73 of 1984) for filing the suit. He annexed and marked as MSM-2(a) and (b) the Amended Plaint and Judgment respectively. Further, the judgment in Eldoret HCC No. 141 of 1991 did not render the 2nd Plaintiff owner of LR.

No. 5335/24 at the expense of the five registered proprietors now deceased. He then deposed further that the five deceased persons where never parties in Eldoret HCC No. 141 of 1991.

11. He deposed further that if LR. No. 5335/24 was given to the 2nd Respondent this Court would be perpetuating an injustice and condemning the registered owners (now deceased) unheard contrary to Article 50(1) of the *Constitution* of Kenya which would then be a ground to petition this Court for another remedy. That Nakuru Civil Appeal No 164 of 1995 did not cancel the title of LR. No. No. 5335/24 which is still registered in the names of the five deceased. That if the 2nd Plaintiff was among the 8 partners as he alleged he would not be entitled to the entire parcel LR. No. 5335/24 but only his share. The 2nd Respondent had not disclosed his share of the suit land.

12. He deposed further that the 2nd Respondent had not challenged the authenticity of the title for LR. No 5335/24. His deposition was that he knew that the 2nd Respondent was not one of the partners owning the parcel of land in question. He discounted as pure speculation the statement by the Respondents that he was being used to frustrate the Plaintiffs from enjoying the fruits of their judgment since he believed he was one of the registered owners and he had the absolute right to parcel No. LR. 5335/24. Further, that he came to the realization in 2020 that the Richard Satia and partners did not include the Estate of the deceased Julius Mabusi as an owner. The Respondents had not come to Court with clean hands. He deposed that his enjoinment cannot be an appeal in the matter since he was not a party in the Eldoret High Court Case No. 141 of 1991 and Civil Appeal No. 164 of 1995.

13. He deponed further that he knew there was a caveat placed on the parcel No. LR. 5335/24 by the Government of Kenya on 09/06/1976 claiming absolute ownership of the property by virtue of taking possession under the Land Acquisition Act. He gave the Gazette Notices as 3304 and 3305 of 19/10/1974 and that the caveat was still in force and it prohibited further dealings on the property. He annexed and marked as MSM-3(a) and MSM-3(b) the copies of the Notice and caveat. He prayed for the grant of the payers sought.

14. The Application was disposed of by way of written submissions. The Applicant filed his submissions dated 29/01/2024 the same date. The Plaintiffs filed submissions on 06/02/2024. They were dated 31/01/2024. This Court has carefully read through the submissions and will consider them as it makes the determination of the application rather than summarizing them separately.

15. Before the Court could deliver this Ruling, the Applicants filed another application dated 03/04/2024 in which they sought a temporary injunction against the Respondents pending the determination of the instant Application. While this Court was taken aback as to how such a payer can be granted in a suit that is no longer pending, as contemplated under Order 40 Rule 1, this Court had to deal with the Application before this Ruling, and it acted in the interest of justice by granting the temporary order only limited to the portion of three quarters (3/4) of an acre that the Applicant claimed to be in occupation of on the subject parcel of land. Thus, by the deliver of this Ruling the Notice of Motion dated 03/04/2024 shall be spent, and the it shall be declared so. It means any orders emanating therefrom shall too be spent since the prayers were specifically limited to the delivery of this ruling.

16. I have considered the application dated 04/12/2023, the law and the rival submissions of the parties herein. The issues that commend themselves for determination are whether the payer for joinder of the intended interested party is merited, and who to bear the costs of the Application.

17. Starting with the first issue, the issue is whether the Estate of Julius Mabusi Nandasaba alias Julius Wafula alias Julius Mabusi alias Jairus Wafula represented by Benson Juma Mabusi and Mathew Simuyu Mabusi should be enjoined in this suit.

18. The law on joinder of an interested party is basically now settled. In the Kenya statutes, except in the *Supreme Court Act*, No. 7 of 2011, there is no definition of an Interested Party. The definition is repeated in the Supreme Court Rules of 2012 made under the Act.

19. In regard to legislation that establishes this and the sister superior courts of record and the subordinate ones there is none except the subsidiary legislation: the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, which this Court refers to as the "Mutunga Rules". They were Gazetted on 28th June, 2013 vide Legal Notice No. 117.

20. The wisdom of the Committee that made the Rules must have been to minimize the injustice that had for long before the promulgation of the 2010 Constitution permeated the justice system in Kenya by way of denying persons who had interest in judicial or tribunal proceedings, the right to be enjoined thereto through the bar of lack of *locus standi*.

21. It is common sense to expect that for one to be enjoined in proceedings, they have to be pending before the court, they have nothing to litigate about. A party may not be enjoined after the court is *functus officio* on an issue. In *Leonard Kimeu Mwanthi v Rukaria M'twerandu M'iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties)* [2021] eKLR, Justice L. Mbugua stated that "A party claiming to be enjoined in proceedings must have an interest in the pending litigation..."

22. In other words, the proceedings should still be alive in the court: they could be at the nascent or other stages but must be alive. In *Central Kenya Ltd. V. Trust Bank & 4 Others*, CA NO. 222 OF 1998 the Court, in discussing the issue of joinder of parties, held that:

> " We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (*supra*) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings... that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.". Thus, where litigation has come to an end or put in another way, the court has become *functus officio*, a person wishing to be enjoined to the proceedings will not succeed in his quest.

23. The meaning of (a court becoming) *functus officio* has been rendered in *Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* (2014) eKLR as follows:

> " The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit based decisional re-engagement with the case once final judgment has been entered and a decree there on issued....".

24. This means, as said elsewhere, that where a party seeks to alter the merits of the judgment of the court with issues that are sought to be introduced by the proposed interested party, the court will be extremely hesitant to venture into that 'mine' field. Thus, it will not grant the proposed party opportunity to be part of the long-gone proceedings because its purpose shall have been served.

25. Rule 2 of the *Mutunga Rules* defines an interested party as "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." It also gives the definition of a person to mean both a natural and juristic person. It does so by defining that person as "an individual, organization, company, association or any other body of persons whether incorporated or unincorporated."

26. The foundational basis for joinder is to the establishment of a link between the substratum or subject matter of the proceedings at hand and a direct interest by and prejudice to a person seeking leave of the court to be enjoined as an interested party.

27. Further definitions such as the one of *Cambridge Dictionary* (online) are that an interested party is "any of the people or organizations who may be affected by a situation", while the LexisNexis Website defines him as "any person (other than the claimant and defendant) who is directly affected by the claim." On his part, Bryan Garner in the *Black's Law Dictionary 9th Edition* at Page 1232 defines him as "A party who has a recognizable stake (and therefore standing) in the matter" while a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings."

28. In *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR, the High Court stated that the interested party "...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."

29. In *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, at Para 18, the Supreme Court defined the term as "...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."

30. The above definition has the same import and content as the definition in the *Supreme Court Act*, Act No. 7 of 2011 and the Rules made thereunder. Section 23 of the Act provides that:

> "(1) Any person entitled to join as a party or liable to be joined as a party in any proceedings before the Court may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party.
>
> "(2) An application under this Rule shall contain information on-
>
> (a) the identity of the person interested in the proceeding;
>
> (b) a description of that person's interest in the proceeding;
>
> (c) any prejudice that the person interested in the proceeding would suffer if the intervention were denied; and
>
> (d) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties"

31. Rule 25 of the *Supreme Court Rules*, 2012 then provides that:

> "(1) A person may at any time in any proceedings before the Court apply for leave to be joined as an interested party.
>
> "(2) An application under this rule shall include-

(a) a description of the interested party;

(b) any prejudice that the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties".

32. For one to be successful in an application of this nature, he has to bring it within the parameters of the law, of which the decision of *Joseph Njau Kingori vs. Robert Maina Chege & 3 others* [2002] eKLR as made by Nambuye J (as she then was) is instructive. The learned judge held:

" .....

(1) He must be a necessary party;

(2) He must be a proper party;

(3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff;

(4) The ultimate order or decree cannot be enforced without his presence in the matter;

(5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit".

33. The definitions and provisions sit well with the principles set out in paragraph 37 of the Supreme Court case of *Francis Karioki Muruatetu & Another v Republic & 5 Others*, Petition 15 as consolidated with 16 of 2013 [2016] eKLR where their Lordships held that an Applicant must show:

(i) 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.

(ii) 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.

(iii) 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.

34. Applying the above principles to the instant application herein, the Applicant moved the Court in a matter that is concluded: it is at the execution stage. The Court is already *funtus officio* on the issues of ownership of the suit land between the parties. Moreover, has not demonstrated the personal interest or stake which is direct and be clearly identifiable and must be proximate enough make him stand apart from anything that is merely peripheral. The issues that were before this Court prior to judgment were ownership of the property as between the Plaintiffs and the Defendants. They were not for determination as to who between the partners of the 1st Plaintiff was the rightful shareholder and to what extent. To raise such issues in a matter such as this would completely change the character of the

suit. In any event it involves bringing to this Court matters which it does not have jurisdiction to handle hence a futile exercise. Not direct stake is identifiable in this matter on the part of the applicants. In any event the annextures both parties referred to as copies of the decisions of the Eldoret High Court Civil Suit No. 141 of 1991 and Nakuru Civil Appeal No. 164 of 1995 both indicate that the issue of partnership shares lay before the two courts, why the applicants chose not to move that Court is a mystery. This Court will not interfere with the decisions of competent courts over the matter. In any event, I see no prejudice to be suffered by the intended interested party in case of non-joinder, and he did not specifically set out the case and/or submissions it intends to make before the Court,

35. For the above reasons the Application dated 04/12/2023 is without the slightest merit and is hereby dismissed with costs to the Respondents. That being so, the Application dated 03/04/2024 is to be marked as spent, subject to payment of costs of attendance thereon to the Respondents.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 23RD DAY OF APRIL, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE