Gatatha Farmers Company Limited v Chemtingei & 3 others; Kaitet Tea Estates (1977) Limited & another (Interested Parties) (Environment & Land Case 9 of 2023) [2024] KEELC 3299 (KLR) (22 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3299 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 9 OF 2023

FO NYAGAKA, J

APRIL 22, 2024

BETWEEN

GATATHA FARMERS COMPANY LIMITED ..... PLAINTIFF

AND

SIMATWA CHEMTINGEI ..... 1ST DEFENDANT

ODUORI CHONGORE ..... 2ND DEFENDANT

THE ESTATE OF OKIRO OKOYO ..... 3RD DEFENDANT

OTIENO OKIRO ..... 4TH DEFENDANT

AND

KAITET TEA ESTATES (1977) LIMITED ..... INTERESTED PARTY

ENDEBESS ESTATE PRIMARY SCHOOL ..... INTERESTED PARTY

RULING

A. INTRODUCTION

1. Before me is a Notice of Motion dated 27/10/2023 and filed under a Certificate of Urgency. It is brought under Sections 1, 1B, 3 & 3A of *Civil Procedure Act* , Order 1 Rules 1, 3, 6, 8 & 10, Order 2 Rules 5, 7, 9 & 11, Order 3 Rules 4 & 7, Order 4 Rule 4, Order 40 Rules 1, 2 & 3 and Order 51 Rules 1, 3, 10, 12, 14, 15 & 16 of the *Civil Procedure Rules* (2010) Articles 50, 162, 165, 259 (1) of the *Constitution* of Kenya, 2010, Section 6 of the *Judicature Act* Cap 8 Laws of Kenya, the *Constitution* of Kenya PART I - Rules 1, 2A, 3, 4, 5, 6, 7 & 8 (Protections of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 as read with the *Constitution* of Kenya PART II - Rules 4, 5, 6, 7, 8, 16, 17 & 18 (Procedure for Instituting Court Proceedings) Contravention of Rights and Fundamental

Freedoms provided in Legal Notice No.117 of 2013, and all other enabling provisions of the Law. It contains 12 prayers as reproduced below:

i. ...spent

ii. THAT an Order do issue compelling the recuessal (sic) of HON. Justice Dr. iur Fred Nyagaka Judge of the ELC at Kitale and directing ELC Suit NO. 9 of 2023 case file together with the instant application be transferred to Eldoret ELC for fair hearing and determination under Article 50 of the *Constitution* as read with Section 6 of the *Judicature Act* Cap 8 Laws of Kenya.

iii. THAT an Order do issue for review, re-evaluation, withdrawal and vacation of the whole ruling and orders of Hon. Dr. iur Fred Nyagaka Judge of the ELC at Kitale dated 23/10/2023 in that the court erred in fact and in law to misguide and mislead the 4th Defendant herein who is a layman and is diabetic and suffers from high blood pressure, is asthmatic, coughs a great deal and is partially blind and needs to be assisted and easily loses temper on the slightest provocation and needs to be substituted in this case by his elder brother the 3rd Interested Party herein Stephen Okoko Okoyo in the polygamous intestate estate of Okiro Okoyo -(Deceased).

iv. THAT an Order do issue for leave to enjoin parties liable on the same contract in this matter.

v. THAT an Order do issue giving leave for granting of prohibition Orders prohibiting the 2nd Interested Party herein Kaitet Tea Estates (1977) Limited whether by itself, agents, servants, associates, employees, family members or anybody claiming through its name from trespassing, interfering by entering, cultivating, planting, fencing, ploughing, harvesting, constructing, removing, damaging, alienating, wasting and/or in any manner or way whatsoever carrying out any agricultural or development activities in LR. Nos. 5710/2 and 6137 respectively in the areas held, occupied and used by the 1st, 2nd, 3rd, 4th Defendants/Respondents and the 2nd, 3rd, 4th and 5th Interested parties herein until further Orders.

vi. THAT an Order do issue compelling Hon. Dr. iur Fred Nyagaka Judge of the ELC at Kitale to recuse oneself from handling, hearing and determining this application for acting in bad faith in the application dated 18/09/2023 contrary to Section 6 of the *Judicature Act* by referring to litigants as quacks who are likely to take away the 4th Defendant's wife and children which unpalatable words are unprofessional, unconstitutional coming from a Judge of the High Court of Kenya with intent to disparage the character of an innocent litigant without any slightest provocation.

vii. THAT an Order do issue directing that the court file for the consolidated Kitale ELC LC No.9 of 2023 be moved to Eldoret ELC for fair hearing and determination by a neutral, impartial and non- partisan Judge in this matter.

viii. THAT an Order do issue compelling medical examination in this matter to establish the status of the 4th Defendant herein with the view to gauge his suitability to act in this case without assistance from his agents.

ix. THAT an Order do issue for authentication (sic) of the correctness and truthfulness of the forgery allegations made by the 4th Defendant against one Wilfred Ogutu in this matter which the court directed him to report the matter to the police for action by allowing the said Wilfred Ogutu to be heard in the opposition as guaranteed by the *constitution* rather than condemning him un-heard in violation of his Rights and Fundamental Freedoms in the Bill of Rights under Chapter 4 of the *Constitution* of Kenya 2010

x. THAT an Order do issue allowing the 3rd Interested Party herein Peter M. N. Simatwa to donate his specific Powers of Attorney to one Wilfred Ogutu who is the Executive Director of the Centre for Social Welfare, Justice & Governance - NGO and the 6th Interested Party herein to act on his behalf as the donee of the Specific Power of Attorney limited to this case in respect of LR Nos. 5710/2 and 6137 respectively

xi. THAT at the inter-parte hearing of the pending application for res judicata orders sought by the Applicant herein orders granted in terms of prayer (2) above be confirmed to operate till the hearing and determination of the application.

xii. THAT costs of this application be provided for.

B. THE APPLICATION

2. The Application was based on the grounds that this Court had demonstrated open bias towards the Respondents hence it may not deliver justice in the determination of this matter requiring. As such the learned Judge, Hon. Justice Dr. iur F. Nyagaka should recuse himself and transfer the file to an impartial or non- partisan and neutral judge; the judge has used unsavory words; he is rogue, arrogant, proud and behaves like a quack judge; he does not uphold, defend litigants and justice in all matters; he is less informed that civil society organizations have an important role to play in the judiciary under the provisions of the NGO Co-Ordination Act, 1990; he is fond of dismissing cases on legal technicalities rather than on merits and demerits of the case contrary to the provisions of the *Constitution*.

3. Further, that a court may review and evaluate an order upon the application of any party affected by the order for which in this matter the Ruling and orders issued on 23/10/2023; it may consolidate on application by any party several suits of applications on such terms as it may deem just; the party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court as is sought herein by the applicant; a court may review and re-evaluate its Rulings and orders from time to time on application of any party which is dissatisfied; the court shall pursue access to justice for all persons; that this matter has been in court corridors for over for over 40 years and that Applicant herein the 3rd Interested Party in this matter has a vowed to pursue justice in this matter to its logical end.

4. The Application is supported by affidavit sworn by Peter M.N Simatwa, sworn on 27/10/2023. In terms of the depositions in it, the Affidavit is a nothing more than the grounds in the Motion, copied and pasted. Thus, the Court needs not reproduce them but carefully and deeply considers them as factual evidence of the applicant on oath. To the Application are annexed documents unmarked and not commissioned. These are, a copy of a Certificate for Registration of an NGO called Centre for Social Welfare, Justice & Governance dated 06/11/2007, Staff Identity Card (ID) from the NGO referred to above, indicating Wilfred Ogutu as the Executive Director, a Power of Attorney dated 24/10/2023 and a receipt thereof from Ardhisasa.

5. The Application was opposed basing on the responses that the same was an exact replica of the first one sought to be withdrawn by Mr. Okiro, the 4th Respondent. The Interested party submitted that the application was an abuse of the process of the Court.

6. On 27/11/2023 the Applicant himself, one Peter Simatwa, filed a Notice of Preliminary Objection to the Application. It was dated the same date. Incidentally, the instant Application was his own. The grounds were that the instant suit was dismissed for want of prosecution on 16/01/2002 hence there was no suit pending. That once the suit was dismissed, the only was the matter would be opened was by way of appeal by the aggrieved party. The 4th Defendant's was defective in substance and law. That

to reopen the case would constitute res judicata. The only valid application was one dated 22/11/2023 and filed on 23/11/2023 by the 4th Defendant. One person may sue or defend in all matters.

7. That the 4th Defendant was sick, suffering high blood pressure, high temper and not best suited to bring this suit. The applicant has 40 years to win the case but did not because of is health status. The application should be struck out.

8. Mr. Peter Simatwa prosecuted his application on oath because apart from the prayers of joinder of him and an NGO purported to be associated with Mr. Ogutu as Interested Parties in the suit, his application was an exact replica in content with the one Mr. Okiro moved the court to withdraw.

9. His application was dated 27/10/2023 but filed on 23/11/2023. In his testimony he stated he did not know of Mr. Okiro's (the 4th Defendant's) illness, as written in the application. He never wrote about it in the application but was surprised that it was in the application. Further, Mr. Okiro had never told him about his illness. Regarding the prayer that the second Interested Party, Kaitet Tea Estates Limited be prohibited from interfering with the parcel of land, he said it was his prayer.

10. He admitted that on 18/9/2023 when, as was claimed in his application, the allegations that the learned judge used unsavory words against parties were made he was not a party to the case. The first time he applied to join in the instant case was on 23/11/2023 through the instant application. But when the ruling was read on 18/09/2023, he was online and wished to be called yet he was not because he had not applied to be enjoined hence the instant application. He testified further that date he heard the Court use the work "quack" although he does not understand or know English. He did not know or hear the court say such words as "taking wife and children" as written in his application.

11. Further, the application he filed was drawn by Mr. Ogutu, who read to him in Kiswahili the content he had written in English. Then he signed it. He did not instruct Mr. Ogutu to include himself as an Interested Party but rather as a person to represent him. He did not instruct him to pray for the Non-Governmental Organization (NGO) too to be enjoined as an Interested Party but as a person to represent him.

12. Upon the document being read to him he only signed it. He did not understand all that was written in the application. Mr. Ogutu included what he (the Applicant) had not instructed him to. But about the Power of Attorney, he signed it in favor of Mr. Ogutu and not the NGO. He donated the Power of Attorney to only Mr. Ogutu. He instructed Mr. Ogutu because he said he would argue the case for him. His further testimony was he did not know if the law would permit Mr. Ogutu to represent anyone as a lawyer.

13. Regarding recusal he said he did not support it. Instead, he wanted the learned judge to hear his application. All he wanted was for him to be enjoined in the case because it was the same as the one in which Mr. Okiro had sued the two companies, the Plaintiff and the 2nd Interested Party.

14. Upon cross-examination he insisted he wanted the judge to hear the case; at no time did he tell Mr. Ogutu that the judge should remove (sic) himself from the case. Again, he wanted the judge to hear the case. He admitted to signing the application after Mr. Ogutu had read to him the content in Kiswahili; he neither knew nor understand English nor did he know how to write. Lastly, on his part he knew Mr. Ogutu would represent him in the matter but did not know whether Mr. Ogutu was an advocate or not save that he told him he would represent him.

15. At cross-examination by Mr. Okiro stated he did not indicate in the application that Mr. Okiro was sick as written in the application. He denounced the content and reiterated the earlier content. He admitted that the case was related to the other one dismissed in 1978.

16. At further cross-examination he stated he was willing to be left out of the case if Mr. Okiro conducted it as he did before. But he again changed his mind to say he did not want to be left out of the case, hence the application for joinder.

17. Upon the applicant concluding the basis for his Application the Respondents opposed it on the ground that the applicant had no lous standi to pray for the orders sought. They argued that he was not a party to the suit; he could only pray for the orders only after being enjoined in matter yet he had not shown why he ought to be enjoined.

18. On his part, Mr. Okiro opposed the application relying on the grounds of opposition he filed on the 06/11/2023. They were simply that the application was incompetent and an abuse of the process of the Court. He said that in the suit it was the grandfather to Peter Simatwa, the applicant, who was a party and not the applicant. He gave the grandfather's name as Chemtigei while the other parties were Oduori Chongori and the Kaitet Estate. He submitted further that if the Applicant had issues over the land he should file a separate case.

19. Further, that the applicant should not pray that the suit be moved from Kitale ELC.

20. In his rejoinder, Mr. Simatwa prayed that the learned counsel who submitted in opposition to the application should not be allowed to oppose his application because the case was against Simatwa whom the applicant wanted to represent.

21. Then after the oral presentation of the background to the application the Applicant submitted on the application that he wished the judge to disqualify himself although he did not have a problem with the judge himself. Neither did the judge do anything wrong. It was his further submission that if Mr. Okiro was opposed to the application he should remove the name of the said grandfather Simatwa Chemtigei Cherutich from the instant case.

C. DETERMINATION

22. This Court has deeply read and considered the Application, the supporting affidavit and the submissions thereto. The following issues commend themselves for me for determination:

    i. Whether the learned judge herein should recuse himself

    ii. Whether a party may change the format or heading pleadings without leave of court.

    iii. Whether the Applicant is a party in this suit.

    iv. Whether the application for approval of the Power of Attorney is merited

    v. Who should bear the costs of this Application

23. This Court now sets to determine the issues sequentially.

    i. Whether the learned Judge herein should recuse himself

24. The issue of priority determination in the instant application is this first one since if the Court finds merit in it, it has to down its tools: it will not have both the legal and moral authority to consider any other issue. Thi is because it would constitute an injustice to parties if their issues are determined by a judge who is biased and partial or conflicted in a matter.

25. It has been a practice, and for good reason, that before assuming office, a judge takes oath to serve impartially, without fear, favor, and ill-will and protect, administer and defend the *constitution*. There

are two profound doctrines that attend to that: one a judge has to sit and, two, a litigant does not choose a judicial officer who is to listen to his case. The Supreme Court of Uganda in the case of UGANDA POLYBAGS LTD VS DEVELOPMENT FINANCE COMPANY LTD AND OTHERS [1999] 2 EA 337 held that litigants have no right to choose which judicial officer should hear and determine their cases since all judicial officers take oath to administer justice to all people impartially and without fear, favor, affection or ill-will.

26. To the extent that many of the prayers sought in the instant Application relate to matters or decisions made before the Applicant was a party in this sui, the prayers which concern those issues are absolutely made in in good faith. As is always said, every river has a source. The source of this application is a Ruling where this Court denied an unqualified person, namely one Wilfred Ogutu, to act as if he was an Advocate of the High Court of Kenya. Of court such a conduct is despicable of an unqualified person! Section 31 of the *Advocates Act*, chapter 16 of the Laws of Kenya expressly prohibit this. It would be a sad day for this Court to be the first one to encourage such conduct or breach of the law. It does not matter whichever way Mr. Ogutu approaches court, whether as an individual or through an NGO, leave alone the fact that such an entity has never submitted annual reports to the NGO Board in terms of Section 24 of the NGO Coordination Act since 2010, which is an offence that has been repeated annually for over 13 years. A wolf remains a wolf whether one clothes it in a sheep's skin or any other cloth.

27. This application is based on apprehension and imagination that this Court is biased rather than actual bias. A judge can recuse himself or herself where he/she has actual bias or where when the apprehension is viewed from the lens of a reasonable man it can be found that such perception is reasonable. The test of apprehension should be an objective and not subjective one.

28. This Court is of the opinion that the instant application is made to serve two purposes; one for forum shopping and two to tarnish the reputation of the judge and cause him psychological, mental and emotional pain. I hold that humble view because of the language used by the applicant in to describe me as a person in the Application. In the first place this is an individual who has never been a party in the instant matter, and I have never, to my knowledge, handled any matter relating to him. From the blues, and without mincing words, he used strong derogatory and abusive words against the person of the judge. But that is neither here nor there for me. I must stay on course and remain focused to the court of impartial delivery of justice.

29. Every time this Court sits, as judge in it I am guided, first, by the highest authority on heaven and earth: God the Father, Son and Holy Spirit who has given me opportunity to judge His people and he bids me to do so in righteousness. Second, the *Constitution*, my oath of office, the Bangalore of Principles on Judicial Conduct, and the Judicial Code of Conduct which require me to have integrity, impartiality, competence, independence and diligence. And I apply all laws of the land of Kenya impartially to each and every fact that is presented in dispute about it. To this end this Court believes that it has conducted itself as required and has no reason to recuse itself.

30. Allegations of fondness or otherwise in dismissing matters are nothing but conjecture and absolute unsubstantiated lies that come from someone who does not know this Court. In any event if it were so, there would be close to four hundred appeals to the Court of Appeal over matters that this Court has handled. The few appeals, if any, that exist from this to that higher Court are testament of Christ's own words, "you shall know them by their fruits" (Mathew 7:16).

31. Apart from making wild unsubstantiated sensational claims, the Applicant has not demonstrated in how this Court is biased I am. They are designed to blackmail this Court and it shall not buy into them.

32. In DPP VS CHARLES KIPROTICH TANUI & 2 OTHERS NAIROBI HC ANTI-CORRUPTION CRIMINAL REVISION NUMBER E003 OF 2024, my brother Justice Prof. (Dr.) Sifuna, held that:

> "24. Needless to say, recusal applications should not be used by litigants for intimidation, insubordination, blackmail, arm-twisting, capture the boxing of a judge into confirming with litigants whims; or for throwing him to into panic, subservience or dishonor, such ulterior motives if allowed have the undesirable consequence of chipping away on the authority, dignity, integrity and independence of courts".

33. This Court agrees with the learned judge. The Applicants having not tendered any evidence of bias from me, with tremendous respect decline their invitation for my recusal.

ii. Whether a party may change the format or heading pleadings without leave of court

34. It goes without saying that once pleadings are filed in Court a party can amend them without leave of the Court. It is trite, that while after the pleadings are closed no party can amend his pleading without the leave of the court, very wide powers are given to the court to allow any amendment which may be necessary, at whatever stage of the suit the application for amendment is made. It must, however, be remembered that voluntary amendment of one's own pleading after the statutory free time for amendment can, in no case, be claimed as a matter of right, but it is in the discretion of the court, which of course, is a judicial function not to be exercised arbitrarily and injudiciously.

35. The court has power to allow necessary amendments to pleadings at any stage, but the granting or refusal of an application for such leave the judge must consider a number of issues not limited to the interest of justice. He may consider if the same is frivolous, or made with delay, among others. Crabbe, JA, in the Court of Appeal for Eastern Africa, in Khan v Roshan [1965] EA 289, at p 297.

36. In this Application, the Applicant who is not a party, hence not yet on record has fundamentally amended the heading of the original pleading, he has equally removed and added other parties and he also prays that the court allows any other party who wants to amend their pleadings to do so. This is way after the close of pleadings, and without any leave. All I can say is that I see the hand of ill-advice in this move. That is why this Court still reminds any parties never to seek legal or any professional advice from a non-professional. How can a blind mand lead another blind one to the proper destination? Both will fall into a pit (Luke 6:39). The Holy Bible was not wrong at that.

37. I am of the view that in adversarial system like Kenya's, a party cannot amend the pleadings of the adverse party, as the Applicant purported to do herein. I have not reproduced the 'wrong' heading that ran into two pages, that the Applicant purported to introduce. This is unheard of. He further prayed that any party that wishes to amend his pleadings be allowed to do so. I respectively disagree. In the case of Josphat Oginda Sasia v Wycliffe Wabwile Kiiya [2022] eKLR I held that:

> "I have never heard of or come across an adversary rooting for the welfare of his foe, if I could use the imagery of war! Perhaps, where there is collusion and parties know where their sinister move will lead to. It is not possible for the Court to grant the prayer because an adverse party sought it, without any solicitation and foundation in law, for the other: the Plaintiff sought it on behalf of the Defendant. How could the Plaintiff make a prayer in favour of the Defendant? On whose bidding and under what law? It is inconceivable".

iii. Whether the Applicant is a party in this suit

38. The most disturbing part of this Application is the poor drafting of the same. This Court has decried the paucity of drafting of pleadings in the case of James Ndung'u Kero v Chief Land Registrar, Director Of Survey & Attorney General (Environment & Land Case E046 of 2021) [2022] KEELC 1446 (KLR) (16 February 2022) (Ruling). The instant application is one such irredeemably drafted pleading. Then the applicant added salt to the injury by arguing against his own applicant or blowing hot and cold in his submissions, including filing a preliminary objection against his own application. In the Objection he pleaded that the instant suit was concluded but he argues that his application is the only one that should stand or the Court should consider. In whose matter? Granted that his objection is merited, then does he have a matter which can stand on its own once the Court finds that instant suit was concluded?

39. The Applicant purported to amend the parties and introduced himself as the "3rd Interested Party". He did so without an order of the Court. He equally removed and added other parties. Then prayed that new parties whom he referred to as Mr. Wilfred Ogutu whom he described as the Executive Director of the Centre for Social Welfare, Justice & Governance an NGO, and another party he 'added' as the 6th Interested Party to act on his behalf as the donee of a Specific Power of Attorney.

40. To say the least, the Applicant's actions and craft in that proposal are nothing but confusing and novel in the practice of law. It will be fundamental to answer the following questions: who is an Interested Party? How does one become an Interested Party? And lastly what is the role of the Interested Party in a suit?

41. Rule 2 Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013 ('The Mutunga Rules') defines an Interested Party has defined 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.

42. The Supreme Court of Kenya in Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others (2014)eKLR (Supreme Court Petition No. 12 of 2013) at Paragraph 18, the Court had this to say about with reference to the term 'Interested Party',

> " .....an interested party is one who has a stake in 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".

43. Rule 7 Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ('The Mutunga Rules') gives the procedure that one follows in order to become an Interested Party. It states as follows;

> " 7(1) A person, with leave of the court, may make an oral or written application to be joined as an Interested Party.
>
> 7(2) A court may on its own motion join any Interested Party to the proceedings before it".

44. From the above it is clear that for one to be joined as an Interested Party in a suit he/she has to make application to be determined by the court using the parameters set out by the Supreme Court of Kenya

in Francis Karioko Muruatetu & another v R & 5 others (2016) eKLR at paragraph 37, the elements are as follows:

> "
>
> "(a) 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.
>
> (b)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.
>
> (c)Lastly, a party must, in its application, set out the case and/or submission 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".

45. The second way is; a court may on its own motion join any Interested Party to the proceedings before it. This is supported also by Order 1 Rule 10 (2) of the Civil Procedure which provides as follows:

> "(2). The court may at any stage of the proceedings, either upon or without the Application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the suit, be added".

46. The Applicant and the other two purported Interested Parties did not Apply to be joined as such before making any prayers in their favour, and neither did the court order them to be joined as of now. However, the Applicant has enjoined himself, made amendments and he is seeking a raft of other orders. Indeed surprising.

47. It should be clear to the Applicant that until a party has made an Application and his prayer is accepted or until the court joins him suo moto a party cannot participate meaningfully in court proceedings. But in this matter the Applicant "amended" the suit to "join" 4 Interested Parties, added two Defendants and removed 2 Defendants. This is irregular. This akin to inviting yourself to a person's house, making yourself comfortable, going up to the master's bedroom to take a nap.

48. In the case of HOPF v DIRECTOR OF SURVEY & 2 others; SAKAJA & 2 others (Interested Party) (Environment & Land Case 4 of 2021) [2022] KEELC 6 (KLR) (4 May 2022) (Ruling) this court held that, an application for joinder of an interested party may be made even at the appellate stage of the proceedings. The only condition to be met first is that the proceedings are still alive. The second point that the Court should take care of is that the proposed interested party should not use the procedure to institute a fresh suit, particularly if his application is made at the appellate stage. The suit this application is based on was dismissed for want of prosecution on 16/01/2002 hence there was no suit pending. This Application has no legs to support itself.

49. Even if the interested was properly on record, there limits on what an interested party can do. In Francis Karioko Muruatetu & Another v R & 5 others (Supreme Court Petition 15 & 16 of 2015 (Consolidated), (2016) eKLR, that;

> " Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the court. The determination of any matter will always have a direct effect on the primary/ principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us". [Emphasis are mine]

50. 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.'

51. In Samuel Kamau Macharia & another v DPP & 11 Others (Petition No. 9 (E011) of 2022) the Supreme Court of Kenya at Paragraph 13 stated;

> " Restating the words in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others, Civil Appeal No. 290 of 2012; (2013) eKLR that:
>
> 'A suit in court is a 'solen' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding parties to suits, and who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an Interested Party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.' At paragraph 14, the Supreme Court stated; 'Ultimately, we respectfully agree that the Petitioners, though interested parties before the superior courts below, cannot at this juncture, have overriding interests, above and beyond the primary parties or mutate from having a peripheral stake into central core parties complete with freshly and new formulated constitutional grounds that were not the issues determined by the court appealed from.'
>
> At paragraph 14, the Supreme Court stated; 'Ultimately, we respectfully agree that the Petitioners, though interested parties before the superior courts below, cannot at this juncture, have overriding interests, above and beyond the primary parties or mutate from having a peripheral stake into central core parties complete with freshly and new formulated constitutional grounds that were not the issues determined by the court appealed from."

52. In the case of SOCAF & Company Limited v John Maina Njoroge & 5 Others; Francis Ngau Musyoki (Interested Party) [2022] eKLR the court held that an interested will be at liberty to file written submissions before judgment is delivered in this matter which the court may consider. I am of the view that an Interested Party cannot seek to amend the pleadings neither can he/she seek order. It also goes without saying that any other substantive or interim prayers he made before being enjoined through an order of the Court are misconceived, premature and not capable of being granted.

iv. Whether the application for approval of the power of Attorney is merited

53. Picking up from the previous paragraph, this is one of those issues that the applicant sought prematurely. Nevertheless, I will consider the merits thereof and lay the matter to rest. One of the tenets

of fairing in Criminal cases as enshrined under Article 50(2)(g) of *the constitution* is the right to choose, and be represented by, an advocate, and to be informed of this right promptly.

54. The same right is not expressly provided for under the *Constitution* of Kenya for civil matters. I share the opinion of Ngugi J (as she then was) in the case of Tom Kusienya & Others v Kenya Railways Corporation & Others [2013] eKLR that the right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2) (a) of *the Constitution*.

55. The Advocates provides for provisions relating to the right to practice as an advocate. Section 9 provides that:

> " Subject to this Act, no person shall be qualified to act as an advocate unless- (emphasis are mine).
>
> (a) he has been admitted as an advocate; and
>
> (b) his name is for the time being on the Roll; and
>
> (c) he has in force a practising certificate".

56. Section 10 of the *Advocates Act* is quick to give exceptions on who can be entitled in connection with the duties of his office to act as an advocate, and shall not to that extent be deemed to be an unqualified person.

57. Section 31 of the *Advocates Act* provides:

> " Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction".

58. Section 83 of the Advocates was a saving clause for police prosecutors whom have since been replaced by prosecutors who are advocates.

59. I take judicial notice that there is a growing number of unqualified persons masquerading as Advocates in Kenya. This amounts to abuse of court processes. I can only hope that court, Judges and the entire legal fraternity can call for urgent and concerted efforts to arrest the criminal practice. There have been reports of unqualified busy bodies drafting conveyancing documents and other daring ones even appear in court and address court purporting to defend litigants under the guise of a power of attorney.

60. According to Black's Law Dictionary, an instrument titled: a "Power of Attorney" is defined to mean:

> " 1. An instrument granting someone authority to act as an agent or attorney-in-fact for the grantor. 2. The authority so granted; specify the legal ability to produce a change in legal relations by doing whatever acts are authorized."

61. In other words, a Power of Attorney is an instrument conferring authority by deed. The person conferring the authority is termed the donor of the power, and the recipient of the authority, the donee (see Halsbury's Law of England, 4th Edition Vol. 1, para 730, page 438.)

62. In this matter, Mr. Wilfred Ogutu Makodiango is said to have been the recipient of the Power of Attorney dated 24/10/2023 from Peter Musambi Ndiema. The Power of Attorney gives the done the following power(s):

> " The done is given specific Power of Attorney for the purposes of litigation in courts of law in Kenya to act on behalf of the donor only limited to the disputed KAITET TEA ESTATES (1977) LIMITED LAND IN LR LR NOS. 5710/2 & 6137 respectively in respect of KITALE HIGH COURT ELC LC NO. 9 OF 2023 (FORMERLY ELDORET HIGH COURT CIVIL SUIT NO. 113 OF 1987), KITALE ELC LAND CASE NO. 57 OF 2011 AND KITALE ELC LC NO. 36 OF 2013"

63. I have been called to determine whether to allow the Power of Attorney or to do otherwise. I will start by providing the legal basis of the Power of Attorney as provided for in our laws.

64. Order 9, rule 1 of the Civil Procedure Rules is on applications, appearances or acts in person, recognized agent or by advocate and it provides:

> "
>
> " 1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the by time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:
>
> Provided that-
>
> (a) any such appearance shall, if the court so directs, be made by the party in person;"

65. Order 9 rule 2 of the Civil Procedure Rules on the other hand describes categories of recognized agents to include:

> " a) Subject to approval by the court in any particular suit, persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of the parties;
>
> b. .....;
>
> c. .....;"

66. From the above, I discern that for one to act as an agent under the Power of the Attorney; he/she needs to hold a Power of Attorney and can only act subject to the approval of the court.

67. In the case of Jack J. Khanjira and Anor v Safaricom Ltd [2012] eKLR Mwongo J held as follows:

> " Clearly, the essential characteristic of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the court. The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it appears to me that when exercising their functions in court, they must periodically obtain the approval of the court to do such acts 0. It is for the court to oversee the scope and extent of the functions of a recognized agent, and to assure itself that they are not overstepping the

bounds of the law. In my view, it is not the fact of being an agent that renders a donee of a power as recognized; it is the extent or scope of their agency that is recognized. That is to say, a recognized agent can perform only that which he is recognized or authorized to do in law.

In this regard, I would go as far as to say that, for orderly representation in court, every appearance, act or application by a recognized agent should be subjected to the approval of the court as and when sought to be done." [Emphasis are mine]

68. For this court to fully understand and appreciate the scope of the mandate of a recognized agent acting under a Power of Attorney, it will be valuable for it to examine carefully of the instrument itself. In this matter the donor granted Mr. Wilfred Ogutu Makodiango powers:

....for the purposes of litigation in courts of law in Kenya to act on behalf of the donor only limited to the disputed KAITET TEA ESTATES (1977) LIMITED LAND IN LR LR NOS. 5710/2 & 6137 respectively in respect of KITALE HIGH COURT ELC LC NO. 9 OF 2023 (FORMERLY ELDORET HIGH COURT CIVIL SUIT NO. 113 OF 1987), KITALE ELC LAND CASE NO. 57 OF 2011 AND KITALE ELC LC NO. 36 OF 2013 [emphasis are mine]

69. The power of to act for someone is only available to advocates. This is a power only properly available to a person qualified as an advocate. A Power of Attorney is a written document in which an agent is given the authority to act on behalf of his principal in a specific situation, or to act on behalf of such principal in respect of all actions which the principal could perform himself or herself.

70. Order III Rule 1 of the Indian Code of Civil Procedure. Mulla on the Code of Civil Procedure, in a commentary or Order III Rule 1 states, states:

> " The right of audience in court, the right to address the court, the right to examine and cross examine witnesses are all parts of pleading and that is not included in the expression 'appearance application or act in or to any court.' The word 'act' in juxtaposition with the words 'appearance' and 'application' is used in a technical sense and not in its ordinary sense as being referable to any action by any party."

71. Litigation can entail making appearance(s), pleading, giving evidence or otherwise conducting the case. Unless used in a technical sense can only be done by a qualified advocate. I am not aware of any law that permits litigation through donee the Power of Attorney. There is none. A donee can only act as the donor since he/she is his agent but not in a professional sense. A donor of a Power of Attorney stands in the shoes of the donor but not in his shoes as a professional.

72. The *Advocates Act* is clear who can or cannot practice as an Advocate. Civil Procedure Rules being a subsidiary law cannot contradict plain and unambiguous terms of an Act of Parliament

73. This court or any other court cannot be used to sanitize actions of masqueraders preying unsuspecting litigants or colluding with potential clients to circumvent the clear and unambiguous prohibitions and restrictions under the *Advocates Act*, under the Power of Attorney.

74. The law on qualified persons to practice as Advocates is plain and clear. No agreement whatsoever vide a Power of Attorney can waive public law. Reference is made to the case of Swallow and Pearson (a firm) Middle Lesex County Council [1953] 1 ALL E.R. 580.

75. For one to become an Advocate of the High Court of Kenya, s/he has to pass his secondary school and get the required cut mark to join a university to study law. Thereafter, s/he joins the Kenya School of Law, sits and passes exams, undergo a six month pupillage. After that s/he petitions the Chief Justice to be admitted as an advocate. On admission day s/he takes an oath and signs the roll of Advocates.

With all that one is still not qualified to practice law. He or she has to take out a practice certificate for him to practice law. All these are safeguards for public good. Another rationale for only allowing Advocates to practice law is that in case any professional misconduct, a client can report to LSK and in some circumstances their names are struck off the roll of Advocates. What remedy do an innocent member of public when duped by a charlatan?

76. The Law Society of Kenya (LSK) and courts have to come out strongly and act decisively to weed out all the busy bodies who masquerade as advocates in our courts. They are eroding the sanctity of the legal profession. If both bodies in conjunction with investigative agencies do not move to stem this disease, the perpetrators will remain as a hindrance to access to justice, and history will judge us badly: that we left innocent parties to ravenous marauding creatures who mauled them badly fleecing them of hard-earned money for no professional services.

77. For reason of lack of training of quacks, people who hire them will always have substandard pleadings filed, and even if the quacks perfect their art or copy and paste very well drafted ones and even present arguments that outsmart those of many a learned friend, it which will endanger the success of cases. The court may not have the benefit of understanding the dispute well and solving it or if it does it takes much judicial time and the innocent party may not enjoy proper and efficient access of justice. The end product is, the courts shall be blamed for perceived corruption yet it is the paucity of pleadings that play the argument into the gallery. The list of the pitfalls is endless.

78. Lastly, on this topic, I borrow the reasoning of one learned judge from our region in the African continent. Justice Zulu of the Zambian Court, when confronted with similar circumstances, in the case of Killian Mwiinga (Suing as Attorney for Gregory Mainza) v Emmanuel Chama and Ors (2023 / HP/ 0505) [2023] ZMHC 13 (20 November 2023) had the following to say:

> 5. 16 If the courts were to allow the status quo to prevail, the results would be similar to the disorder and anarchy of allowing unqualified persons or misguided busy bodies to carry out clinical operations and procedures in hospitals and clinics, based on some rudimentary knowledge. Whereas, the disorder in hospitals would lead to untold mortalities of unimaginable scale, in the courts of law, it would lead to countless cases of abject irreparable injustice.

79. I have nothing useful to add to the above observation. I agree with the learned judge.

80. The Applicants have accused me for what they call lack of knowledge on matters of civil society organizations and the role they play in the judiciary under the provisions of the NGO CO-ORDINATION ACT, 1990. They strongly argue that the done is a CEO of an NGO that supports the less fortunate members of the society to access justice. How I wish what this Applicant knew what he was saying! Anyway, as Jesus said, “forgive them; for they know not what they do...” (Luke 23:34), so I say of this Applicant. And this Court confirms to him it is much aware of the role of NGOs in administration of justice. There are NGOs such as FIDA, Kituo Cha Sheria, Katiba Institute and others who offer pro bono services to the less fortunate in the society. Even when the NGO purported to be introduced in this matter existed and was allowed to be enjoined as a party or interested party it can only act through an advocate. All do their work by hiring qualified advocates and allocate them cases. They do not use CEOs or unqualified persons like the done here. One such example is when the learned counsel Willie Kimani Kinuthia met his death, he was an Advocate working with the International Justice Mission (IJM) an NGO that was offering pro bono services to and was representing Stephen Cheburet Morogo who was unable to afford an Advocate. Refer to Republic v Fredrick Ole Leliman & 4 others [2016] eKLR.

81. The aim of setting up National Legal Aid Service (NALEAP) in Kenya was to create awareness with the Kenyan public about legal aid; and provide legal advice and representation mainly to the poor, marginalized and vulnerable in the Kenyan society. As per Section 2 of the *Legal Aid Act*, among the people who offer the said services are; an advocate operating under the pro bono programme of the Law Society of Kenya or any other civil society organization or public benefit organization, a firm of Advocates. It is not just any other busy body.

82. Assuming for the purposes of argument that the Applicant wants "6 Interested Party" to represent the donor, then the "6th Interested Party" being an NGO can represent the donor by itself not through the donee. Section 12 (3) (a) of the *Non-Governmental Organizations Co-ordination Act* provides:

> " A registered Non-Governmental Organization shall by virtu e of such registration be a body corporate with perpetual succession capable in its name of-
>
> a. Suing and being sued."

83. It is for the above reasons that I conclude that the entire application is lost, that is to say, all the prayers are not granted, including the unsubstantiated and demeaning one of requesting for an order that Mr. Okiro goes for medical examination – surely, even if one differs with a person let him not go to the extent of entertaining and demonstrating such behavior against that other. We all need to live in a better society wherein values such as respect, dignity, justice and equality for all prevail.

v. Who should bear the costs of this Application?

84. Finally, on the issue of costs of the Application, it is the law, Section 27 of the *Civil Procedure Act*, Chapter 21 of Laws of Kenya, that costs follow the event. In Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others [2014] eKLR the Supreme Court analysed the law on costs and opined that the basic rule on attribution of costs is: costs follow the event. I dismiss this Application with orders that the costs of this Application be borne by the Applicant.

85. Orders accordingly.

Ruling dated, signed and delivered at Kitale in Open Court this 22nd day of April, 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE

In the presence of

Applicant, Peter M. Simatwa.....present

P. M. Kiura Advocate for Plaintiff.....Absent

Maiyo Advocate for Interested Party.....Absent

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