



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, SICHALE, & ODEK & J.J.A)**

**CIVIL APPEAL (APPLICATION ) NO 404 OF 2017**

**BETWEEN**

**ELIZABETH NYAMBURA NJUGUNA**

**FRANCIS KAMAU NJUGUNA (suing as the Legal representatives of**

**NJUGUNA MWAURA MBOGO.....APPELLANT**

**AND**

**E. K. BANKS LIMITED.....1<sup>ST</sup> RESPONDENT**

**JUMAA FARMERS COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**ENDAO COMPANY LIMITED.....3<sup>RD</sup> RESPONDENT**

**EDWARD KINGS ONYANCHA MAINA.....INTERESTED PARTY**

*(Being an application for joinder orders and joining the 1<sup>st</sup> interested party for further orders of the High Court of Kenya at Nairobi (Eboso, J.) dated 6<sup>th</sup> October, 2017*

**in**

**CIVIL SUIT NO. 935 OF 2018**

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**RULING OF THE COURT**

The applicant, **Edwards Kings Onyancha Maina**, filed a Notice of Motion dated 24<sup>th</sup> May 2018. In the main, the applicant sought to be enjoined in Civil Appeal No. 404 of 2017 pending in this court. The parties in the appeal are **Elizabeth Nyambura Njuguna** and **Francis Kamau Njuguna** (as legal representatives of **Njuguna Mwaura Mbogo**) as the appellants and **E. K. Banks Limited** as the respondent. A brief background to this matter is that the late **Njuguna Mwaura Mbogo** (the deceased) filed Nairobi HCC No. 935 of 2001 against **E.K. Banks Ltd.** (the **Bank**) and sought judgment against the **Bank** for adverse possession. The **Bank** did not appear and judgment was entered in favor of the deceased. Upon the demise of the deceased, **Elizabeth Nyambura Njuguna** (the deceased's widow) and **Francis Kamau Njuguna** (the deceased's son) were appointed as his administrators. Subsequently in an application dated 4th April 2014 by the **Bank** the following orders were granted:

**“(a) Elizabeth Nyambura Njuguna and Francis Kamau Njuguna are hereby substituted as plaintiff in place of the late Njuguna Mwaura Mbogo.**

**(b) The suit herein shall be deemed as revived by dint of the substitution herein.**

**(c) Costs of the application shall be in the cause.”**

The appellants (in the appeal) were dissatisfied with the said outcome and filed a memorandum of appeal dated 4<sup>th</sup> December 2017. The said appeal is still pending in this court and the applicant's motion is made during the pendency of the appeal.

In the applicant's motion dated 25<sup>th</sup> May 2018, **Elizabeth Nyambura and Francis Kamau Njuguna** are listed as the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively, the **Bankis** named as the 1<sup>st</sup> respondent, **Jumaa Farmers Company Limited** is named as the 2<sup>nd</sup> respondent and **Endao Company Limited** is listed as the 3<sup>rd</sup> respondent.

In the motion the applicant sought the following orders;

- “1. **The applicant be enjoined as the interested party forthwith for further orders.**
2. **The appellant be compelled to serve the record of appeal upon the applicant consequent to the enjoinder orders.**
3. **The applicant file his written submissions before the 8<sup>th</sup> day of August 2018.**
4. **The costs of the instant application be provided for.”**

The applicant's motion is supported by his affidavit sworn on 23<sup>rd</sup> May 2018 in which he deposed *inter alia*, that he is a “**fully paid up shareholder in Jumaa Farmers Company Limited**”.

The applicant swore a further supporting affidavit dated 10<sup>th</sup> December 2018 and annexed therein a share certificate dated 20<sup>th</sup> July 2007 issued in his name. In paragraph 7 thereof he deposed “**That I am applying for joinder orders exclusively on own personal capacity as the shareholder in Jumaa Farmers Company Ltd.**”

The 1<sup>st</sup> and 2<sup>nd</sup> appellant opposed the motion vide a replying affidavit sworn by **Francis Kamau Njuguna** on 8<sup>th</sup> August 2018. He deposed that his co-administrator **Elizabeth Nyambura Njuguna** died on 5<sup>th</sup> November 2016; that in an application dated 3<sup>rd</sup> October 2013 **Jumaa Farmers Co. Ltd** sought to be enjoined in HCC No. 935 of 2001 (O.S.) and that this application was dismissed on 29<sup>th</sup> January 2014; that the applicant herein became a shareholder in **Jumaa Farmers Company Ltd** on 9<sup>th</sup> January 2018 long after HCC No. 935 of 2001 had been determined and finally, that the applicant lacks *locus standi*.

It would appear that the **Bank** did not file any response to the applicant's motion. Be that as it may, on 17<sup>th</sup> December 2018 the motion came before us for plenary hearing. **Mr. Waiganjo** was present for the appellants, whilst **Mr.**

**Onyancha**, the applicant appeared in person. There was however, no representation from the firm of **Osundwaand Co.** for the Bank in spite of service of hearing notice upon them on 24<sup>th</sup> September 2018.

In urging the motion, **Mr. Onyancha** relied on his written submissions filed on 17<sup>th</sup> December 2018. He contended that he was a fully paid up shareholder of **Jumaa Farmers Company Ltd.** which bought LR. No. 10581 measuring 542 acres; that the purchase price, a sum of Ksh. 500000/- was paid vide receipt No. 108362 to **M/s Kaplan Stratton Advocates**; that the late **Njuguna Mwaura Mbogo** (deceased) was the treasurer of **Jumaa Farmers Company Ltd**; that the deceased tendered his resignation as treasurer on 16<sup>th</sup> May 2003 and thereafter claimed that the suit land was his; that the deceased was amongst the 2000 members of **Jumaa Farmers Company Limited** and that he is desirous of challenging the vesting order that illegally vested the land in the deceased.

In opposing the appeal, **Mr. Waiganjo** highlighted the appellant's submissions filed on 10<sup>th</sup> August 2018. It was counsel's submissions that there is a valid judgment in respect of the suit land entered in favour of the deceased in 2003 (HCC No. 935 of 2001); that **Jumaa Farmers Company Ltd.** vide an application dated 3<sup>rd</sup> October 2003 sought to be enjoined in HCCC No. 935 of 2001 and the said application was dismissed on 29<sup>th</sup> January 2004; that **Jumaa Farmers Company Ltd** filed a second application dated 6<sup>th</sup> February 2004 seeking several orders including a restraining order against the deceased but this application was again dismissed on 31<sup>st</sup> March 2004; that **Jumaa Farmers Company Ltd** is a separate legal entity from the applicant and finally, that the applicant has not satisfied the requirements to be enjoined as an interested party. For this proposition counsel relied on this court's decision of **MOSES WACHIRA VS. NIELS BRUEL & 2 OTHERS [2015] eKLR** wherein the Supreme Court decision in **COMMUNICATIONS COMMISSION OF KENYA AND 4 OTHERS VS ROYAL MEDIA SERVICES LIMITED & 7 OTHERS PETITION NO. 15 OF [2014] eKLR** pronounced itself on who an interested party is.

We have considered the record, the rival and oral written submissions the authorities cited and the law. The applicant herein states that he was a member of **Jumaa Farmers Company Ltd.** He annexed two share certificates as proof of the ownership. He also annexed a receipt dated 26<sup>th</sup> October 1977 showing payment of Ksh. 500, 000 to **M/S Kaplan & Stratton Advocates** being deposit on account for “**...price of shares AMPIRA Estate Limited**”. The applicant also annexed a sale agreement dated 22<sup>nd</sup> October 1977 between **Jumaa Farmers Company Limited** and “**AMPIRA ESTATE LR. 10581 SOLAI.**” He also annexed a Memorandum & Articles of Association and certificate of incorporation of **Jumaa Farmers Company Ltd.** dated 16<sup>th</sup> October, 1975. If this be the case, **Jumaa Farmers Company Ltd** has its own corporate status and is different and distinct from its shareholders (see **SOLOMON VS. A. SOLOMON & CO. LTD [1897] AC 22**). It may well be that the applicant's interests in respect of his shareholding in **Jumaa Farmers Company Ltd** have been infringed but is it not for him to litigate on behalf of **Jumaa Farmers Company Ltd.** Further, it is not lost to us that **Jumaa Farmers Company Ltd** had filed an application dated 3<sup>rd</sup> October, 2003 to be enjoined in HCC No. 935 of 2001. This application was rejected on 29<sup>th</sup> January, 2014. No appeal was preferred against the refusal to enjoin **Jumaa Farmers Company Ltd.** If we were to allow this application, the effect would be reopening the dismissed application by the **Jumaa Farmers Company Ltd** through the back door.

Secondly, in **MOSES WACHIRA VS NIELS BRUEL & 2 OTHERS**(supra) the court quoted the Supreme Court in **COMMUNICATIONS COMMISSION OF KENYA & 4 OTHERS VS. ROYAL MEDIA SERVICES LIMITED & 7 OTHERS** (supra) wherein the Supreme Court pronounced itself on who an interested party is and held as follows:

**“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court’s decision 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 question 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 party’s state and relevance in the proceedings and b) will the intended interested party suffer any prejudice if denied joinder.?”**

The applicant has come before us asking to be enjoined in the appeal in his own capacity as a shareholder of **Jumaa Farmers Company Ltd**. As stated above, **Jumaa Farmers Company Ltd** has corporate status and it litigated on behalf of the applicant. It lost in its bid to be enjoined. The applicant seeks to be enjoined in spite of the dismissal of the joinder application by **Jumaa Farmers Company Ltd**, where he is a shareholder. In our view, **Jumaa Farmers Company Ltd** having lost the application for joinder, it is not open to the individual shareholders to want to distance themselves from the Company and litigate on their own behalf. We find no merit in this application. It is hereby dismissed with costs to the appellants. As the **Bank** did not take part in these proceedings, they shall not get any costs.

**Dated and delivered at Nairobi 22<sup>nd</sup> day of March, 2019.**

**E.M.GITHINJI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**