



**Machakos Wattlebark Co-operative v Cooperative Bank of Kenya Limited & another;
Machakos Cooperative Union & 8 others (Intended Interested Party) (Environment
& Land Petition 28 of 2015) [2025] KEELC 794 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 28 OF 2015
AY KOROSS, J
FEBRUARY 25, 2025**

BETWEEN

MACHAKOS WATTLEBARK CO-OPERATIVE PETITIONER

AND

COOPERATIVE BANK OF KENYA LIMITED 1ST RESPONDENT

KONZA INVESTMENT LIMITED 2ND RESPONDENT

AND

MACHAKOS COOPERATIVE UNION INTENDED INTERESTED PARTY

RAPHAEL MUIA INTENDED INTERESTED PARTY

JONATHAN MUSYOKI INTENDED INTERESTED PARTY

STEPHEN NZAU INTENDED INTERESTED PARTY

SOLOMON NDUNDA KISOVI INTENDED INTERESTED PARTY

MUTHAISU MUTUA INTENDED INTERESTED PARTY

STEPHEN NZAU INTENDED INTERESTED PARTY

KIOKO KISENGA INTENDED INTERESTED PARTY

JONES WAMBUA MUTHUKU INTENDED INTERESTED PARTY



RULING

Petitioner's case

1. This ruling seeks to determine the notice of motion dated 8/05/2023 filed by the petitioner and 1st interested party (IP). It seeks several reliefs from this court some of which are spent and the residual prayers for determination are: -
 - a. Leave be granted to the law firm of Musee Manyolo & Associates Advocates to come on record as advocates of the petitioner in place of the firm of B.M.Mungata & Co. Advocates.
 - b. The Hon. Court does set aside the proceeding, judgment and decree dated 3/02/2022 and all consequential orders therein.
 - c. The intended 1st IP be joined as 2nd petitioner while the intended 2nd to 9th IPs be joined as 3rd to 9th respondents.
 - d. The annexed amended petition be deemed as duly filed and served upon the respondents.
 - e. Leave be granted to the petitioners for them to file and adduce new evidence.
 - f. Costs of motion be borne by the respondents.
2. The motion is supported by the grounds set out on the body thereof and the supporting affidavit of Martin Kyalo Malila (Malila) who is described as the Chief Executive Officer (CEO) of the intended 1st IP.
3. In brief, it is contended the IPs were never joined to the proceedings despite the intended 1st IP being the petitioner's guarantor and the other IPs being the petitioner's agents with fiduciary duties. Additionally, these IPs had key information on transactions leading to the sale of LR 1706/Konza IR 6609 (suit property).
4. According to Malila, the petitioner was the 1st intended IP's member and the auction contravened Section 19 of the Limitation of Actions Act and the 1st respondent and 3rd to 9th intended IPs had colluded to have the suit property used as collateral for a loan or create a fictitious loan which was never credited into the petitioners account.
5. He asserts that in an attempt to conceal the fraud, the 3rd- 5th intended IPs had declined to hand over accounts to the petitioner.

1st respondent's case

6. By the law firm of M/s. LJA Associates LLP, the 1st respondent's business banker Dennis Mwombe with its authority filed a replying affidavit sworn on 17/01/2023. It appears this date was erroneous and it was meant to be the year 2024.
7. In summary, he states the motion is frivolous, bad in law and bereft of merit. Further, Malila did not have the authority to swear an affidavit on behalf of the petitioner as the intended 1st IP was a distinct legal entity from the petitioner.
8. Additionally, he avers an authority has to be issued by the petitioner allowing the incoming counsel to come on record and a consent ought to have been issued by the outgoing advocate. He contends there has been an inordinate delay in filing the instant motion and litigation should come to an end.



9. He asserts the petitioner was granted an opportunity to amend his petition and must have been alive of relevant parties to the proceedings. Further, the petitioner was the sole owner of the suit property and the relations between them were of a principal debtor and bank and that the 1st intended IP was merely an IP.
10. According to him, the court was functus officio and the avenues available were an appeal and review and urged the court to dismiss the motion with costs.

1st intended IP's further affidavit

11. In response to the 1st respondent's affidavit, Malila filed a further affidavit deposed on 15/02/2024. He asserts as CEO, he had the authority to swear affidavits on behalf of the intended 1st IP.
12. Moreover, he asserts his incoming counsel did not need to seek consent as the incoming law firm only needed to comply with Order 9 Rules 1 and 5 of the Civil Procedure Rules (CPR).
13. It was his argument the motion before the court was for a review of the court's judgment and new evidence had been tendered showing the auction contravened Section 19 of the [Limitation of Actions Act](#). The other parties did not participate in these proceedings.

Parties' submissions

14. Despite the court giving specific directions on 25/10/2023 for counsels to file written submissions of not more than 5 pages, in defiance of the court order, Mr. Manyolo filed 18-page submissions dated 20/06/2024 whereas the 1st respondent's law firm on record filed 7-pager submissions which were dated 25/11/2024.
15. Being guided by the Supreme Court of Kenya decision of *Okoti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others* [2023] KESC 69 (KLR), I hereby strike out these submissions. The 2nd respondent and other intended IPs did not file written submissions.

Preliminary issues

16. The court has made certain irregular observations on the motion. The motion has been moved by both the petitioner and the 1st intended interested parties yet in suits, both parties play distinct roles.
17. In my humble view, certain substantive reliefs are not available to an IP yet the motion has been filed by the petitioner and an intended IP. If one reads the 1st IP's affidavits, it becomes evident the petitioner did not file any affidavits to advance reliefs that only it as a party to a suit, can enjoy.
18. The Supreme Court of Kenya's decision of *Trusted Society of Human Rights Alliance v Matemo & 5 others* [2014] KESC 32 (KLR) weighed in on this issue when it stated that the adjudicative process is solely owned by the parties to a suit.
19. Further, the motion seeks to set aside the judgment of the court without laying a basis whatsoever as to why it seeks so.
20. Having placed reliance on Order 12 Rule 7 of the Civil Procedure Rules (CPR), the petitioner was expected to advance grounds such as that the suit was dismissed for want of prosecution but this was not forthcoming. In any case, the suit was heard on merits.
21. Furthermore, although reliance has been placed on Section 80 of the [Civil Procedure Act](#) (CPA) and Order 45 Rule 1 of the CPR, the grounds in support of the motion are silent on grounds for review



of the judgment. In *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal stated: -

“On an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought.”

22. I Having addressed the preliminary issues, I shall now address the substantive issues for determination.

Issues for determination.

23. I have carefully considered the motion, its grounds and affidavits and the following issues arise for resolution: -

- a. Whether a further amended petition can be amended post-judgment.
- b. Whether the intended interested parties can be joined to the proceedings post-judgment.
- c. Whether Musee Manyolo & Associates Advocates should be granted leave to come on record as advocates of the petitioner.
- d. What orders should be issued including an order as to costs?

Analysis and Determination

24. These issues will be dealt with chronologically.

Whether a further amended petition can be amended post-judgment.

25. Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules allows parties to amend their pleadings at any stage of the proceedings but leave of the court has to be sought. The question that suffices is whether this can be conducted post-judgment.

26. The essence of amendments is to allow the court to deal with all issues in controversy between parties and have all the matters in dispute litigated on merits.

27. It is settled law that amendment of pleadings can be conducted at any stage of the proceedings for as long as judgment has not been rendered. The Court of Appeal in *Kenya Commercial Bank Limited V Nicholas Ombija* [2009] KECA 228 (KLR) stated: -

“Until judgment is finally delivered, the proceedings are very much alive, entitling any party to even apply for amendment of pleadings before judgment.

See also Court of Appeal decision of *JMK v MWM & MFS* [2015] KECA 524 (KLR)”

28. Consequently and being guided by this decision, I must conclude in the negative and find that the further amended petition cannot be amended post-judgment.

Whether the intended interested parties can be joined to the proceedings post-judgment.

29. Rule 5 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules allows joinder, substitution or striking out of parties.

30. Of significance is that a petition cannot be defeated just because of the misjoinder or non-joinder of parties.



31. Moreover, the court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner.
32. In this case, it appears the intended IP is unsure if it wants to be joined as an IP or co-petitioner. This court will be asking itself whether this joinder can be conducted post-judgment.
33. When faced with a similar issue, the Court of Appeal in *JMK v MWM & MFS* [2015] KECA 524 (KLR) when dealing with the then Order 1 Rule (10)(2) of the Civil Procedure Rules which is similar to Rule 5 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules stated an amendment or joinder of parties can only be conducted where proceedings are still pending in court.
34. The relevant extract of this decision states: -

“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. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in *Tang Gas Distributors Ltd V. Said & Others* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; 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.”
35. Having looked at the further amended pleadings on record, it is not lost to this court that the issues in dispute were between the petitioner and respondents and the dispute has been resolved by the judgment of this court.
36. Therefore, I must find there being no pending proceedings as judgment has been rendered, the intended IPs cannot be made parties to the suit.

Whether Musee Manyolo & Associates Advocates should be granted leave to come on record as advocates of the petitioner.

37. Order 9 Rule 9 of the Civil Procedure Rules captures the post-judgment process where an advocate or party seeks to come on record in place of an advocate who was previously on record. This provision provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”



38. This proviso does not impede a litigant from choosing an advocate of its choice and the mischief of this legal provision is to cure instances of a litigant circumventing paying the legal fees of an advocate who was previously on record and also to inform the court and parties of such change.
39. However, it outlines procedures to be adhered to and if a party seeks to change Advocates, post-judgment, the first scenario is that the incoming advocate or litigant who now wants to act in person must make a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person.
40. In the alternate scenario, the incoming advocate or litigant in person, has to obtain the written consent of the previous advocate on record, file the consent in court, and then seek leave to come on record.
41. It ensues that having filed the motion and served the outgoing law firm of M/s. B.M. Mungata & Co. Advocates, the petitioner has complied with the legal requirements and nothing impedes it from being granted this relief. I find the relief merited.
42. Before I deal with the last issue, I must state it is my observation that the petitioner has filed the instant motion with the guise of re-opening its case hoping it will fill gaps and this court will not accept such a request.
43. It is my view, that since it has had its day in court, litigation must come to an end. If it is aggrieved by the decision of the court, it can lodge an appeal.
44. Ultimately and in dealing with issue (d), it is trite law costs follow the event and I award costs to the 1st respondent which shall be borne by the petitioner. I hereby issue the following disposal orders: -
 - a. Leave is hereby granted to the law firm of Musee Manyolo & Associates Advocates to come on record as advocates of the petitioner.
 - b. Costs are awarded to the 1st respondent which shall be borne by the petitioner.
 - c. This file is hereby effectively marked as closed.

Orders accordingly.

DATED AT MACHAKOS THIS 25TH DAY OF FEBRUARY, 2025

HON A. Y. KOROSS

JUDGE

25.02.2025

DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

In the presence of;

Mr. Manyolo for the Petitioner and 1st Interested Party

Mr Orwenyo for 1st Respondent

M/s Ngubau for Mr. Mutia for 9th Interested Party

Ms Kanja- Court Assistant

