



Ethics and Anti-Corruption Commission v Tum (Administrator of The Estate of Nathaniel Kipkorir Tum) & another; Board of Management Kitale School Primary & another (Proposed Interested Parties) (Environment & Land Case E020 of 2023) [2024] KEELC 4250 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E020 OF 2023**

**FO NYAGAKA, J
MAY 15, 2024**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

EDWIN KIPCHIRCHIR TUM (ADMINISTRATOR OF THE ESTATE OF NATHANIEL KIPKORIR TUM) 1ST DEFENDANT

WILSON GACHANJA 2ND DEFENDANT

AND

BOARD OF MANAGEMENT KITALE SCHOOL PRIMARY PROPOSED INTERESTED PARTY

HON ATTORNEY GENERAL PROPOSED INTERESTED PARTY

RULING

1. While hearing arguments by learned counsel for both the Plaintiff and 1st Defendant on the 1st Defendant’s Preliminary Objection dated 12/01/2024 and filed on 15/01/2024, and his application dated and filed on even date, the Proposed Interested Parties, namely, the Board of Management - Kitale School Primary and the Attorney-General filed a Notice of Motion dated 26/02/2024. The application was brought under Article 47 of the *Constitution of Kenya*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 1 Rule 10(2) and Order 50 Rule 1 *Civil Procedure Rules*. It sought the following reliefs:-

1. That the Court be pleased to join the Board of Management - Kitale School Primary and the Attorney-General as Interested Parties.



2. Upon joinder, the Proposed Interested Parties herein be granted leave to file their responses and participate in this matter on merit.
3. That the costs of this Application be in the cause.
2. The application was supported on the grounds that the 1ST proposed interested party has a legitimate interest as the registered beneficial owner of all that parcel of land described and zoned by the town Plan for Kitale Municipality Approved Development Plan Ref. 10/72/7 dated 17/01/1974 designated and reserved for educational purposes. The subject matter being land parcel No. Kitale Municipality Block 12/236 (formerly Kitale Municipality Block 12/132) was irregularly, unlawfully and unprocedurally hived out of the 1st Proposed Interested Party's described in the Approved Development Plan (Ref. 10/72/7 stated above). Upon the irregular, unprocedural hiving off the parcel, it was allocated to the 1st Defendant one Nathaniel Kipkorir Tum in circumstances shrouded with fraud, irregularities, illegalities and improprieties.
3. The 1st Defendant and the 1st Proposed Interested party participated in proceedings before the Senate of Kenya concerning alleged illegal alienation of land belonging to the Kitale School Primary and it recommended in the end that the title issued to the 1st Defendant be cancelled and the land reverts to the Kitale Primary School.
4. The Proposed Interested Parties are unnecessary parties with a definite interest in the suit land and their joinder in the matter would enable the Court to effectively and completely adjudicate upon and settle all the matters in question by offering documentary and oral evidence to show whether the subject matter herein was properly and lawfully hived off from the land originally reserved for the 1st Proposed Interested Party, whether it was available for allocation and whether the 1st Defendant acquired legitimate Interest in the suit land. The bone of contention is whether land parcel No. Kitale Municipality Block 12/236 (formerly Kitale Municipality Block 12/132) is part of the larger land parcel measuring 55 Hectares which was reserved for the 1st Proposed Interested Party for educational purposes and therefore the said Interested Party is acritical player in the proceedings herein and stands prejudiced if the matter herein proceeded without its participation.
5. The 2nd Proposed Interested Party is necessary as the protector of the Rule of Law, public interest and public properties. The participation of the Interested Parties is therefore critical to ventilate all issues in respect of the acquisition and ownership of the subject property and aid the Court in full, fair, and just determination of all the issues in dispute. Neither the Plaintiff nor the Defendants stand to suffer any prejudice if the proposed interested parties are enjoined in the matter. But on the converse, they stand to suffer grave prejudice if they are not enjoined by being denied a chance to be heard on a matter of public interest as this. That it is in the public interest that the said proposed Interested Parties be enjoined and given chance to participate in the matter.
6. The Application was supported by the Affidavits of David Shimeme Luganda and Ben Barasa both sworn on 26/02/2024. He deponed that he was the Principal/Secretary of the Board of Management of the Kitale School Primary. He was aware that the School had 55 Hectares of land set aside and reserved for it vide the Kitale Municipality Approved Development Plan Ref No. 10/72/7 of 17/01/1974 and the suit land herein being Kitale Municipality Block 12/236 was hived off and allocated the 1st Defendant. He deponed that the 1st Proposed Interested Party had a legitimate interest as the registered owner or beneficial owner or allottee of all that parcel of land measuring 55 Hectares as per the Approved Development Plan above-mentioned. He annexed and marked as DSL 1 a copy of the Approved Plan.



7. Further, he repeated the contents of the grounds in support of the Application and went on to add that the Senate of Kenya recommended cancellation of the title registered in the name of the 1st Defendant. He annexed and marked as DSL 2 a copy of the Recommendation. He repeated that the 1st Proposed Interested Party intended to show that the re-planning of the Plan and showing that the parcel that finally became the suit land as open space was unprocedural and unlawful.
8. He deponed further that in the pleadings already filed in Court, the name of the 1st Proposed Interested Party was conspicuous and therefore it was in the interest of justice that the Proposed Interested Parties be afforded an opportunity to be heard. Further, that there had never been any litigation between the parties over the subject matter challenging the purported replanning and hiving off of the parcel of land as stated above, save for Kitale Judicial Review between the 1st Proposed Interested Party and the Commissioner of Lands in High Court Judicial Review No. 88 of 2011 which was dismissed on the ground that the relief sought could not be granted, and an appeal therefrom, being Eldoret CACA No. 1 of 2013 never succeeded either.
9. Lastly, he deponed that Section 41 of the *Limitation of Actions Act* insulates the instant suit that seeks recovery of public land.
10. One Mr. Ben Barasa also swore an Affidavit in support on 26/01/2024. He deposed that he had read the deposition of Mr. David Shimeme Luganda and his was similar and he supported it.
11. The 1st defendant opposed the application through Grounds of Opposition dated 06/03/2024. The first ground was that Order 1 Rule 10(2) of the *Civil Procedure Rules* does not permit joinder of a party to the instant proceedings as an interested party. Secondly, the term “interested party” is unknown to Civil Procedure Rules since a party could only be either a plaintiff, defendant or a third party. Three, the case of *Margaret Group Ranch & 3 Others v Wesley Chepkoimet & 19 Others* [2014] eKLR had proposed that he who asserts ownership over the suit property can only be enjoined as a plaintiff and not an interested party. Thus, the deposition by David Shimene Luganda in the supporting affidavit that the suit land belonged to the 1st proposed Interested party confirmed the position and it was also the same fact by the deposition of the affidavit of Ben Barasa. Lastly, Order 1 Rule 10(2) gives the court jurisdiction to join Proposed Interested Parties as plaintiffs even if they did not pray for such an order.
12. The application was disposed of by way of oral submissions. The applicant submitted that the question was whether joinder of a person as an interested party was allowed under the *Civil Procedure Rules*. Learned Counsel submitted that Order 1 Rule 10 of the Rules has been interpreted by a number of decisions. That phrase, “whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit” has been interpreted to mean those persons whose presence is necessary and these may be interested parties. He relied on the case of *Marigat Group Ranch & 3 Others v Wesley Chepkoiment & 19 Others* [2014] eKLR, where the court said that an Interested Party is one who may fit in the phrase above stated of a necessary party. He also relied on the case of *Joseph Lebo and 2 Others v Kenya, Director of Forest Services* eKLR to submit that it was therefore not correct to say that the Civil Procedure Rules provided for one to be enjoined as a plaintiff or defendants only.
13. In regard to the role of an Interested Party in a suit he submitted that contrary to the 1st defendant’s suggestion, an interested party is not just a bystander or observer. He is actively involved. He relied on the case of *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 Others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated))* [2016] KESC 12 (KLR) (Civ) (28 January 2016) (Ruling) where the Supreme Court



of Kenya gave the role of an interested party. His further submission was that in the instant case, it was appropriate to enjoin the Proposed interested parties.

14. He submitted that in the alternative, the court would order that the Proposed Interested Parties be enjoined as the 3rd and 4th defendants.
15. The 1st defendant submitted that it was not true that an interested party is a bystander. But guided by the case of *Marigat Group Ranch* (supra) specifically at paragraph 13, the contest is between the plaintiffs and the defendants and the interested parties should apply to be an joined as one of the two and not as interested parties. He submitted that the application showed that the applicants staged a claim to the land as shown in the supporting affidavits. Therefore, they should be joined as parties to the proceedings but as plaintiffs.
16. On their part the Plaintiff left it to the court to decide on the matter based on the argument by both the 1st defendant and the proposed interested parties.
17. I have considered the application, the submissions by the rival parties, together with the authorities cited. The question for determination is whether the Application is merited and if so, in what capacity the Proposed Interested Parties should be enjoined in the suit. Secondly, who is to bear the costs of this application.
18. On the first issue, the Proposed Interested Parties argue that the 1st defendant was allocated land being the suit land which initially was part of the larger parcel of land measuring 55 Hectares, which was reserved for the 1st Proposed Interested Party, a public body. Therefore, the land that was allocated was public land, the allocation was irregular, unlawful and procedural. On that the 1st Proposed Interested Party has a stake in it which it claims the Court should determine as between the Plaintiff and the Defendants on who the owner the property is. Further, that the issue will not be fully and effectively determined if the participation and presence of the Proposed Interested Parties as Interested Parties was not granted they would be prejudiced by being denied opportunity to be heard over the issue.
19. The claim by the plaintiff against the defendants is that the land in issue is public land which belongs to Kitale School, the 1st Proposed Interested Party yet it was registered in the name of the 1st defendant irregularly and illegally. Therefore, the title should be cancelled. It is upon that background that the Proposed Interested Parties apply to be enjoyed as interested parties in the matter.
20. The law on joinder of parties as either Interested Parties or Defendants or Plaintiffs or third Parties is settled. Order 1 Rule 10(2) of the *Civil Procedure Rules* provides for joinder of parties to the suit if they are necessary for purposes of determining the issues in controversy as between the parties already in the suit. Specifically, the Rule provides:-

“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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
21. Who is an Interested Party? Learned counsel for the 1st defendant, on the one hand, argues that the provision is to the effect that parties can only be joined to a suit or proceedings either as plaintiffs, defendants or third Parties and not Interested Parties. But on the other hand, the applicants argue that



the law provides for joinder of parties as interested parties. The plaintiff cited the case of Marigat Group Ranch (supra) where the learned judge stated paragraph 13 as follows:-

“It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it.”

22. Thus, the position of the 1st Defendant is that the law does not support joinder as interested parties. Well, to the extent that the contest of ownership, the learned judge was right in his finding that where the context is between a plaintiff and a defendant as to ownership of the property as between the two. Anyone who claimed the said property was free to enjoin as either plaintiffs or defendants. However, this Court is of the opinion that in some instances such as the instant case, one of the parties may not be claiming the same interest in the subject matter but urging the claim on behalf of another. In such a case the authority cited is distinguishable and different based on the facts of the instant case hence not applicable.

23. The Cambridge Dictionary (online) defines an interested party as “any of the people or organizations who may be affected by a situation.” The LexisNexis Website defines him/her as “any person (other than the claimant and defendant) who is directly affected by the claim.” In the Website it is clarified further that a person will be directly affected by the claim if he or she will be affected by the grant of a remedy in the proceedings. 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.”

24. The *Black's Law Dictionary* 9th Edition at Page 1232 defines an interested party as:

“A party who has a recognizable stake (and therefore standing) in the matter.” It also defines 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.”

25. 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.”

26. In relation to proceedings relating to rights and freedoms before this Court, there is a special procedure whose source is Legal Notice No. 117 of 2013. This was Gazetted on 28/06/2013 as The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (I refer to them as the Mutunga Rules, 2013). Rule 2 thereof defines an interested party.

27. The Supreme Court of Kenya has succinctly given the condition for one to be enjoined as an interested party. This was in the case of Francis Kariuki Muruatetu & Another v Republic & 5 Others, Petition



15 as consolidated with 16 of 2013 [2016] eKLR, where at paragraph 37 the Court state that the Applicant(s) 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.”

28. In *Joseph Njau Kingori vs. Robert Maina Chege & 3 Others* [2002] eKLR Nambuye J (as she then was), gave the guiding principles to be followed where there is an application to enjoin an intending interested party in a suit. They are that:-

“..... (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”.

29. Guided by the above definitions and decisions, it is my humble view that an interested party is one who is a necessary party in a contest which is between the parties who are either Plaintiffs or Defendants or Petitioners or Respondents as the case may be. The point is that my brother Munayo J did not, in the Marigat decision, rule out the presence of an Interested Party in civil procedure. This selective reading by learned counsel of both the law and the interpretations thereof is not proper and should stop. In the authority the learned judge stated as follows:-

“For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the catch words “whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit...”. It should be appreciated that an interested party is not strictly plaintiff or defendant.”

30. He stated further that:

“It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it”.

31. My understanding of the law is that the Applicants are perfectly in order to seek joinder in these proceedings as Interested Parties. The upshot is that Applicants have satisfied the criteria in the *Muruatetu case* (supra). They have staked their stake in the instant matter, the prejudice they would suffer which is that if they are excluded from the proceedings they would not be able to give evidence



to show that the suit land was initially the 1st Interested Party's and they have shown the submission they intend to make. Their application is hereby allowed as prayed. The Proposed Interested Parties are hereby enjoined as Interested Parties. It is directed that they file their pleadings and serve within fourteen (14) days and the other parties herein are allowed to amend their pleadings accordingly upon service, in accordance with the civil procedure timelines.

32. The Applicants will have costs of the instant application which shall be borne by the 1st Defendant.
33. This matter shall be mentioned on 13/06/2024 to confirm compliance with these orders.
34. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 15TH DAY OF MAY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

