



**Wafula (Derivatively on Behalf of Trans Nzoia Investment Company Limited) v Walubengo & 6 others; Trans Nzoia Investment Co. Ltd (Affected Party); K. & 6 others (Interested Parties) (Environment & Land Case 74 of 2019) [2024] KEELC 6383 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6383 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ENVIRONMENT & LAND CASE 74 OF 2019**  
**FO NYAGAKA, J**  
**SEPTEMBER 27, 2024**

**BETWEEN**

**PASCAL WAFULA (DERIVATIVELY ON BEHALF OF TRANS NZOIA INVESTMENT COMPANY LIMITED) ..... PLAINTIFF**

**AND**

**RONALD SAWENJA WALUBENGO ..... 1<sup>ST</sup> DEFENDANT**

**PAUL SIMIYU WEKESA ..... 2<sup>ND</sup> DEFENDANT**

**GEORGE IMBERA LUDISI ..... 3<sup>RD</sup> DEFENDANT**

**KALORI ISOSO ..... 4<sup>TH</sup> DEFENDANT**

**MUNDEBE INVESTMENT COMPANY LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**VIPUL RATILAL DODHIA ..... 6<sup>TH</sup> DEFENDANT**

**CHERANGANI INVESTMENTS COMPANY LIMITED ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**TRANS NZOIA INVESTMENT CO. LTD ..... AFFECTED PARTY**

**AND**

**JOSHUA MARUTI K. .... INTERESTED PARTY**

**JOHN W. MARUTI ..... INTERESTED PARTY**

**WYCLIFF W. WASIKE ..... INTERESTED PARTY**

**PROTUS W. WEKESA ..... INTERESTED PARTY**

**ROWLAND B. WAYONGO ..... INTERESTED PARTY**

**WEJEJE KELEKETI ..... INTERESTED PARTY**



**RULING**

1. The seven (7) Intended Interested Parties filed a Notice of Motion dated 23/04/2024. They brought it under Sections 1A and 3A of the Civil Procedure Act, Order 1 Rules 8(3) and 10(2) of the Civil Procedure Rules 2010 and all other enabling prohibitions of the law. They sought the following Orders:-
  - a. That the Intended Interested Party (sic) herein be granted leave to join this suit, where necessary, file documents, tender evidence and participate in the proceedings herein.
  - b. That the hearing of this suit may proceed from where it reached and when the intended parties are joined.
  - c. Any other relief as the honorable court may deem fit and just to grant in the circumstances of this application.
  - d. The cost of this application be provided for.
2. The application was based on six (6) grounds. The first one was that the Plaintiff had brought this suit which, by the time of filing the application, was set down for hearing on the 25/04/2024. The Intended Interested Parties surprisingly learnt that the suit herein had been filed and was already heard in part. The proposed Interested Parties were registered shareholders of the Affected Party, being Trans Nzoia Investment Company Limited. They wished to be enjoined in the suit by virtue of being shareholders of the Affected Party. They stood to suffer prejudice and irreparable loss if they were not enjoined. The court had unfettered discretion to allow the instant application.
3. The application was supported by the affidavit of the 1<sup>st</sup> Intended Interested Party, one Joshua Maruti, which he swore on 23/04/2024. He stated that he was the 1<sup>st</sup> Interested Party and duly authorized on behalf of the other Interested Parties to swear the affidavit. He repeated the contents of the grounds in support of the application. He added that the Proposed Interested Parties were shareholders of the Affected Party. He annexed and marked as 1(a), (b), (c), (d), (e), (f) and (g) copies of Share Certificates. He deposed further that the interest of justice demanded that they participate in the suit not only because they were Shareholders but to avoid a multiplicity of cases they may file with similar issues and therefore wished to have an opportunity to be heard. Further, they were willing to abide by any order this court would grant so that they be allowed to ventilate their grievances. Also, he deposed that no prejudice would be suffered by the Respondents if the application was allowed to proceed, and the application was made without undue delay.
4. The Application was opposed by the Plaintiff who filed a Replying Affidavit on 29/05/2024 and the 6<sup>th</sup> and 7<sup>th</sup> Defendants through their sworn on 27/05/2024 and filed on 29/05/2024.
5. The Plaintiff deposed that the claim was brought by a minority Shareholder and it was only a derivative action against the Defendants on behalf of the Affected Party and not for any direct for the minority shareholders. The claim against the Defendants was entirely for the benefit of the Affected Party company. The claim against the Defendants was not, in any way, a threat to the Affected Company to require the intervention of Interested Parties. Further, the Interested Party concept was not supported by law regarding a derivative action under Company Law.



6. The role of an interested party was to protect the rights of individuals who must show that they are interested in the matter by having a specific stake in the litigation. The Applicants had not demonstrated any individual rights and stake in this instant suit. The Proposed Interested Parties had failed to give the rationale for their proposed intervention in the proceedings. In view of the absence of any direct claim against the Defendants the decision of the Court is not in any way likely to impact on the rights of the Proposed Interested Parties. The application was therefore bad in law, ill-conceived and unmerited and should be disallowed.
7. The 6<sup>th</sup> and 7<sup>th</sup> Defendants responded to the application through the Affidavit sworn by the 6<sup>th</sup> Defendant as stated above. He deposed that the application was made in bad faith and a mere afterthought intended to waste judicial time. The parties sought to be enjoined were not necessary parties for the just and effectual determination of the matter. The Intended Interested Parties had not demonstrated the role they would play in deciding the matter. None of the parties had a claim against the Intended Interested Parties or any remedy sought against them to warrant their participation. The matter was already part-heard pending for defence hearing, and for the Parties to be enjoined at that stage, it would only serve to delay the case. No prejudice would be suffered by the said applicants if the orders were refused as the issues could still be determined without their presence in the matter and any of the parties would call them as witnesses if there was a need to clarify any issues giving rise to the eventual determination of the suit.
8. At this point it is important to give the background of the Application.

### **Background**

9. The initial Plaintiff filed this suit against the Defendants on 19/12/2019. He sought a number of reliefs amongst which were that there be issued a declaration that the Trans Nzoia Investment Company Limited, the Affected Party, is the rightful owner of the parcel of land known as LR. No. 2116/29/V, also known as Kitale Hotel, which measures 0.625 Hectares; a further declaration that the transfer of the said property on 17/04/1996 to the 5<sup>th</sup> Defendant, Mundebe Investment Company Limited, was fraudulent null and void; that the sale and transfer of the said property on 04/09/2002 by the 5<sup>th</sup> Defendant to the 7<sup>th</sup> Defendant, Cherangani Investment Company Limited was unlawful and void, a further declaration that the 7<sup>th</sup> Defendant holds the said property in trust for the Affected Party, an order that the 7<sup>th</sup> Defendant does transfer the said property to the Affected party and that the 6<sup>th</sup> and 7<sup>th</sup> Defendants hand over possession of the property to the Affected Party and in default the 6<sup>th</sup> and 7<sup>th</sup> Defendants and their agents, associates and servants and workers be evicted from the property, and an inquiry into mesne profits from 07/07/1995 when the suit property was leased to one Vipul Dodhia until judgment. He also sought the costs of the suit.
10. In the course of time the initial Plaintiff died. He was substituted by the current Plaintiff vide an initial order of this Court given in its Ruling delivered on 06/06/2023. But the current Amended Plaintiff would be filed on 21/09/2023 and the 6<sup>th</sup> and 7<sup>th</sup> Defendants filed their Amended Defence on 29/09/2023 following a consent recorded on 20/06/2023.
11. The Amended Plaintiff introduced the averment that the suit property had since been registered as Kitale Municipality Block 4/494. The Amended Defence responded to the averment and added that the transactions leading to the registration in the name of the final proprietor were lawful given that the property had been initially leased for 16 years with an option of purchase, which latter condition materialized and the property was bought lawfully and procedurally transferred to the 7<sup>th</sup> Defendant who was an innocent purchaser for value without notice of any defect in title.



12. One fact which none should not lose sight of is that on 18/01/2022 the 6<sup>th</sup> and 7<sup>th</sup> Defendants raised a Preliminary Objection as to the jurisdiction of this Court and it was determined. In this Court delivering its Ruling on 27/07/2022 it referred to its earlier Ruling delivered on 01/10/2020 by which the Plaintiff was granted leave to file this derivative action, and found that that this Court had jurisdiction by virtue of the fact that the Plaintiff had complied with the requirement of the [Companies Act](#) on how a Derivative Suit should be brought.
13. That said, this Court now moves to the step of determination of the Application.

### Submissions

14. The Application was disposed of by way of written submissions. The Applicants submitted that the question the court should determine is whether the order sought should be granted. They gave the definition of an Interested Party as found in [Black Law Dictionary](#) 11<sup>th</sup> Edition, p. 1351. They reproduced Order 1 Rule 10 (2) of the [Civil Procedure Rules](#), 2010 regarding necessary parties. This Court needs not reproduce the text of the provision here.
15. Then they relied on the case of [Mohan Galot v Walter Omosa Nyakundi and 21 Others. Pravin Galot and 2 Others \(Proposed Interested Party\)](#) [2020] eKLR. Finally, relied on decision of *Meme v Republic* [2004] EA, 124 and [Marigat Group Ranch and 3 others vs Wesley Chepkoiment & 19 Others](#) [2014] eKR.
16. On their part, the Plaintiff argued that the question was whether the application had merits. He summarized both the Intended Interested Applicant's case and his. Then he submitted on the Law in the issue. Starting with Section 238(1) of the [Companies Act](#) which defines a Derivative Suit as one brought by a member of the company in respect of a cause of action vested in the company, and seeking relief on behalf of the company. To expound on this, he relied on the case of [Gbelani Metals Limited & 3 Others v Elesh Gbelani Natwaral & another](#) [2017] eKLR.
17. He also relied on the definition in [Blacks Law Dictionary](#) on who an Interested Party is, being, one who has a recognizable stake in and therefore standing in a matter.
18. Further, he relied on Rule 2 of the [Constitution](#) of Kenya, 2010 (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 to define such a party. He also called to his aid three cases, one of which was *Meme v Republic* (*supra*). The other two were [Communication Commission of Kenya v & 4 Others v Royal Media Services Limited & 7 Others](#) [2014] eKLR and [Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v The Attorney General & 4 Others](#) [2017] eKLR. Lastly, he relied on the Supreme Court decision of [Francis Kariuki Muruatetu & Another v Republic & 5 Others](#), Petition 15 as consolidated with 16 of 2013 [2016] eKLR and the [Methodist Church of in Kenya v Mobamed Fugicha & 3 Others](#) [2019] eKLR.
19. The 6<sup>th</sup> and 7<sup>th</sup> Defendants filed their Submissions and argued on the Application of Order 1 Rule 10(2) of the [Civil Procedure Rules](#). They relied on the case [Communication Commission of Kenya](#) (*supra*) which gives four (4) conditions which a successful applicant in an application such as the instant, one has to fulfill. They expounded on each of the conditions, arguing that the Applicants had failed in each of them.
20. They concluded that the Applicants had not satisfied the court on the merits of the application.



## Issue, Analysis and Determination

21. This court has considered the application, the law and the submissions by all the parties. It is of the view that three issues lie for determination. The first one is whether the application is supported by an Affidavit sworn competently. The second one is whether the application is merited. The third one is who to bear the costs of the application.
22. The first issue is simple. The Applicants' Application was supported by the affidavit sworn by one Joshua Maruti Kai, who deposed that he had authority of all the other Proposed Interested Parties to swear the affidavit. Order 4 Rule 1 of the *Civil Procedure Rules*, 2010 which refers to filing of Plaints provides regarding verifying the contents of plaints which involve averments by several plaintiffs that:
- “Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.”
23. Further, Order 1 Rule 13 (1) & (2) of the *Civil Procedure Rules* 2010 which provides that:
- “(1) Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
- (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”
24. In my humble opinion this provision applies mutatis mutandis to where there are several Petitioners, Claimants, and to Defendants in case of counterclaims as signified under Order 1 Rule 13(1) cited above, and Applicants of such applications as this where there are proposed Interested Parties. An assertion that a party or deponent has the authority of the others to swear the Affidavit on their behalf should be accompanied by that authority in writing. Authorization of another to act or do something on behalf of another is fact which must be authenticated through a written authority by that other. It should never and can never be imagined or implied or presumed. By asserting without evidence in writing the deponent wishes the court to imagine that it was orally given, which is not. It does not matter whether the deponent annexes copies of documents alleged to have been given to him by the other person for him to annex to the Affidavit: the documents may have been stolen or obtained by the deponent by misrepresentation from that other person. There are many an instance where courts have been misled by unscrupulous deponents that the latter had authority of others to carry out certain acts on behalf of others only for them to turn out to be lies on oath.
25. In *Andrew Ireri Njeru - Embu Nyangi Ndiri Proposed Society Chairman & others -v- Daniel Nganga Kangi & another* [2015] eKLR, the court observed;
- “The Plaintiffs herein sue in their capacity as the representative of the proposed Nyangi Ndiri Society members. The authority to sue signed by the members has not been annexed to the plaint as required by the law”.



26. Similarly, in *Research International East Africa Limited -v- Julius Arisi & 213 Others* [2007] eKLR, the Court of Appeal stated:-

“In our view, the true construction of rule 1 (2) of Order VII *Civil Procedure Rules* is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule.”

27. In *Hezekia Kipkorir Maritim & 10 others v Philip Kipkoach Tenai & 2 others* [2016] eKLR the learned judge held:

“However, the court of appeal appears to have settled the foregoing issue when it held in the case of *Research International East Africa Ltd v Julius Arisi & 213 Others* [2007] eKLR, C.A at Nairobi Civil Appeal No. 321 Of 2003 that the superior judge had discretion and jurisdiction not to strike out a plaint where the verifying affidavit was sworn without the authority of other plaintiffs, but to allow the parties to remedy the situation by complying with the rules of procedure...Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII *Civil Procedure Rules*...”

28. In the *Hezekia Kipkorir Maritim* (*supra*) decision, the court was of the view that where the Plaint or pleading is verified with an Affidavit of one of the parties but which is not accompanied by a written authority that does not vitiate the pleading to the extent of striking it out. Rather, the pleading by the party verifying it stands but for the others it does not and they can only be given chance to remedy the same.

29. Well, that may well be true: that the authority is ‘severed’ as to relate only to the deponent. But the situation is different in the case where it is an Affidavit sworn either in support of an application or opposition to an adverse party’s affidavit. It would be difficult to ‘severe’ the depositions in the paragraphs in that affidavit. It follows that the deposition is in itself defective in entirety. It must be struck out. That deposition is actually based on a lie and it all must be “thrown out” of the record.

30. This being the exegesis of the Court, I find that the Affidavit in support of the instant application is defective and a candidate for striking out. But before I pen off, it is worth underscoring the reason why this Application is unmeritorious even if the supporting affidavit would be proper.

31. This is because, although only in this instance application as an exception, in line with the holding as guided by the provisions of Article 159(2)(d) of the *Constitution*, 2010 that this Court should place substance over procedure and the earlier holdings of the courts that rules of procedure should not be viewed as incessant fettering and rigid mistresses, this Court is of the view that the deponent of the Affidavit in support of the application having believed honestly that his Affidavit was proper may be taken in for use for determining the merits of the application.

32. Thus, while the *Civil Procedure Rules*, 2010 provided and still continues to provide for joinder of parties who are considered “necessary” to matters before courts for the determination (effectively) of all issues in controversy in matters, it is sufficing to say that after the promulgation of the 2010 Constitution, the procedure relating to joinder of interested parties is now firmly and clearly stipulated in the statutes and subsidiary legislation of this country. The special procedure is provided for in Legal



Notice No. 117 of 2013, 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).

33. Rule 2 of the Rules defines an interested party while Rule 7 gives the procedure on how that is to be done. Under Sub-rule 1 of Rule 7 it is provided that “A person, with leave of the Court, may make an oral or written application to be joined as an interested party.” In that respect it means a person moves the court. If he chooses to do so, he ought to seek leave of the Court first and once granted it, he will be enjoined. This is what the Applicants have done in the instant case.
34. In Francis K. Muruatetu case (*supra*), the Supreme Court of Kenya set out guidance on the requirements for successful application for joinder as an Interested Party. In it the apex Court gave, at paragraph 37, three principles to be followed. It stated 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.
35. Similarly, the case Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 Others [2014] eKLR, the Supreme Court stated as follows:-
- (22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling 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...”
- (23) 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 questions 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.”
36. In the decision Communications Commission decision (*supra*), the Court went on to hold at paragraphs 27 and 28 as follows:-



- (27) We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause. On this point, we are guided by the principle which we had pronounced in the Mumo Matemo case (at paragraph 24), as follows:
- “ A suit in Court is a ‘solemn’ 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 on 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.”
- (28) In our view, the standards to be applied in considering whether or not the applicant should be enjoined as an Interested Party, have not been established. This application, in our perception, is premised upon mere apprehension and speculation, that rights not-yet crystallized, will be violated.
37. This Court has carefully considered the facts of the application and the submissions of the rival parties herein and compared the authorities relied on by each, as read with the two decisions of the Supreme Court that it is quoted extensively above. It has then considered the same vis-à-vis the facts presented by the Applicants. The Applicants contend that they should be enjoined to the proceedings herein because they are Shareholders of the Affected Party. Is that stake enough? I do not think so. Based on the Muruatetu (*supra*) and the Communications Commission cases (*supra*), it is not enough for the Applicants to state that they want to be enjoined because they are shareholders. Are they the only Shareholders of the Affected Party? Why have they left out of their instant application other shareholders if they are genuine applicants? Secondly, what prejudice are they to suffer if the suit were to proceed to conclusion in their absence? In the instant suit the Plaintiff as a minority shareholder has moved the Court for reliefs not to his benefit but ultimately that of the Affected Party. If they Applicants had information beneficial to the Affected Party is it difficult to hand it over to the Plaintiff for purposes of benefitting the Affected Party?
38. Lastly, and most important, the Applicants have not demonstrated by way of any case or the case they intends to make before the Court. They have not demonstrated the relevance of their presence in the instant case even by submissions. The Applicants only state that they are Shareholders. What case do they intend to make to the Court if they are enjoined, which the Plaintiff is not making? He is making one that the rights of the minority shareholders were violated. Are the Applicants’ part of the group he represents? If they are then their case is covered. Are they part of the majority shareholders? Then they are the ones who are alleged to have violated the rights of the minority shareholders and their intention can only be divergent from that of the Plaintiff, but they have not demonstrated it as required by law. They have not shown that their case is not a mere replication of what the Plaintiff has.
39. In the circumstances, the upshot is that the application fails miserably. In the words of the Supreme Court in the *Communications case* (*supra*), the Court “...cannot exercise ... discretion to enjoin a party (herein the applicants) that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause.” Their Application is dismissed. Since costs follow the event, the Applicants shall pay the costs of the Application to the parties who opposed it.
40. This matter shall be mentioned on 08/10/2024 to fix a date for further hearing.
41. Orders accordingly.



**RULING DATED SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM ON THE  
27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**HON. DR.IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

In the presence of:

Ms. Lichuma holding brief for Kraido for Plaintiff/Respondent

Ms. Mukoye for 3<sup>rd</sup> - 4<sup>th</sup> Defendants

Ms. Mukanda holding brief for proposed Interested Parties/ Applicants

In absence of the rest, duly served.

