



Nairobi City County v Waithaka; Vidonyi & 34 others (Interested Parties) (Environment and Land Appeal E116 of 2024) [2024] KEELC 7065 (KLR) (28 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E116 OF 2024**

**JO MBOYA, J
OCTOBER 28, 2024**

BETWEEN

NAIROBI CITY COUNTY PLAINTIFF

AND

JOHN MACHUA WAIHAKA DEFENDANT

AND

PHILISTERSR VIDONYI INTERESTED PARTY

ESTHER WAIHIRA CHEGE INTERESTED PARTY

JANET AWINJA MSAMARI INTERESTED PARTY

JAMES MAINA NGURU INTERESTED PARTY

NANCY NJERI MAINA INTERESTED PARTY

DORAH WAITHERERO INTERESTED PARTY

PETER SEREM INTERESTED PARTY

SAMUEL OWINO INTERESTED PARTY

MARY M KIMINZA INTERESTED PARTY

NELSON SHAHAKA INTERESTED PARTY

MOSES MAVEGE INTERESTED PARTY

DOMINIC NZOMO MULWA INTERESTED PARTY

GEORGE MUCHOI MURURU INTERESTED PARTY

HARRISON MUTINDA MATHEKA INTERESTED PARTY

ROBERT MWANIKI INTERESTED PARTY

DICKSON MAINA INTERESTED PARTY



ELIAS LOSHILAARI LAZIER	INTERESTED PARTY
FREDRICK ONYANGO NYANGOYA	INTERESTED PARTY
JANE WAMBUI NDEGWA	INTERESTED PARTY
JAMES MURITHI MURUNGI	INTERESTED PARTY
VERONICA WANGARI GITAHU	INTERESTED PARTY
THOMAS LANGAT	INTERESTED PARTY
BEATRICE KATUNGE	INTERESTED PARTY
MABLE KHAVERE	INTERESTED PARTY
SELLY CHEMELI KIPSUGE	INTERESTED PARTY
KALLEN WAMBETI	INTERESTED PARTY
JANE WANJIRU	INTERESTED PARTY
DAVID KAGUI MUIGAI	INTERESTED PARTY
JOSPHAT WANYOIKE	INTERESTED PARTY
JOSHUA OTIENO	INTERESTED PARTY
MARGARET WAMBUI	INTERESTED PARTY
MERCY NGATIA	INTERESTED PARTY
MARY MUMBI KAMORE	INTERESTED PARTY
CHARLES KILONZI	INTERESTED PARTY
ALEX ONKUNDI	INTERESTED PARTY

RULING

Introduction And Background:

1. The proposed Interested Parties/Applicants have approached the court vide the application dated the 1st of October 2024 brought pursuant to Rule 5(d)(ii) and Rule 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules, 2013 and in respect of which same [Applicants] have sought for the following reliefs.
 - a. This Honourable court be pleased to grant leave to the 1st to 32nd Interested Parties to be joined to these proceedings and thereafter be allowed to tender evidence.
 - b. Orders issued by the Environment and Land Court on 20th May 2024 do apply to them.
 - c. Costs of the application be provided for.
2. The application beforehand is anchored on the various grounds which have been enumerated at the foot thereof. Furthermore, the application is supported by the affidavit of Philisters Vidonyi, the 1st Proposed Interested Party/Applicant sworn on the 1st of October 2024.
3. Upon being served with the application beforehand, the Defendant/Respondent filed grounds of opposition dated the 23rd of October 2024 and a replying affidavit sworn on even date. In addition,



the Defendant/Respondent has annexed various documents inter-alia a copy of the certificate of title deed relating to the suit property.

4. On the other hand, the Plaintiff/Respondent did not file any response to the application. In any event, the Plaintiff contended that same [Plaintiff] was supporting the inclusion of the proposed Interested Parties.
5. The application beforehand came up for hearing on the 28th of October 2024, whereupon the Advocates for the respective parties covenanted to canvass and dispose of the application by way of oral submissions. Suffice to state that the application thereafter proceeded and the respective Advocates rendered their submissions.

Applicants' Submissions:

6. The Applicants herein adopted the grounds contained at the foot of the application as well as the averments in the body of the supporting affidavit. In addition, the Applicants herein ventured forwarded and highlighted five [5] salient issues for consideration by the court.
7. Firstly, learned counsel for the Applicants submitted that the Applicants herein are residents of South 'B' area, wherein the suit property is situated. Furthermore, learned counsel contended that what constitutes the suit property is a public land and same [suit property] was proposed to be used for the benefit of the local community.
8. It was the further submission by learned counsel that the Plaintiff herein, namely, the County Government of Nairobi had also given various assurances to the residents of South 'B' area, including the Applicants that the suit property would be utilized to construct a public market. In this regard, it was contended that the Applicants herein therefore have a legitimate expectation over and in respect of the suit property.
9. Secondly, learned counsel for the Applicants has submitted that the substratum of the suit before the court relates to the suit property which is public land. To the extent that the suit property is public land, the Applicants herein are therefore entitled to be joined into the suit with a view to helping the court to address the questions touching on and concerning the suit property.
10. Thirdly, learned counsel for the Applicants has submitted that the Applicants herein shall be prejudiced if the orders sought are not granted. In any event, it was contended that the suit property, which is public land will be litigated upon without the benefit of the Applicants.
11. Fourthly, learned counsel has submitted that the joinder of the Applicants in the suit would enable the court to address and determine all the issues in controversy. In this regard, learned counsel for the Applicants has cited and referenced the provisions of Order 1, Rule 10(2) of the Civil Procedure Rules. In particular, it was contended that the said provisions allow an application for joinder to be made at any stage of the proceedings.
12. Finally, learned counsel for the Applicants has submitted that the joinder of the Applicants in respect of the instant matter, shall neither prejudice the Plaintiff nor the Defendant/Respondent. To the contrary, it was posited that the joinder would enable the court to entertain and adjudicate upon all the issues in controversy under one roof.
13. Arising from the foregoing submissions, learned counsel for the Applicants has therefore invited the court to find and hold that the application beforehand is meritorious. Consequently, counsel has implored the court to proceed and allow the application.



Plaintiff's/respondent's Submissions:

14. The Plaintiff/Respondent did not file any response to the application. Nevertheless, learned counsel for the Plaintiff/Respondent intimated to the court that the Plaintiff/Respondent was not opposed to the application. In this regard, counsel for the Plaintiff/Respondent invited the court to allow the application and join the Applicants as Interested Parties.
15. Furthermore, learned counsel for the Plaintiff/Respondent submitted that the joinder of the Applicants herein will enable the Applicants to bring a different perspective of the matter before the court. In particular, it was contended that the perspective to be brought forth by the Applicants is separate and distinct from what has been canvassed by the Plaintiff/Respondent.
16. Additionally, learned counsel for the Plaintiff/Respondent has submitted that the Applicants herein shall also bring forth evidence which will enable the court to determine the dispute beforehand with finality. In this regard, learned counsel posited that it is in the interest of justice that the application be allowed.

Defendant's/respondent's Submissions:

17. The Defendant/Respondent adopted the contents of the grounds of opposition dated the 23rd of October 2024 and the replying affidavit sworn on even date. Furthermore, the Defendant/Respondent thereafter highlighted and canvassed three (3) salient issues for consideration by the court.
18. First and foremost, learned counsel for the Defendant/Respondent has submitted that the application before the court is incompetent and misconceived in so far as same [application] is underpinned by the provisions of Rule 5(d)(ii) and Rule 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules 2013, [hereinafter referred to as the Mutunga Rules], yet the suit before the court is not a constitutional petition.
19. In addition, it was contended that having invoked the Mutunga Rules which only apply to constitutional petitions, the application beforehand is therefore misconceived and legally untenable. Consequently, learned counsel implored the court to find and hold that the application constitutes an abuse of the due process of the court.
20. Secondly, learned counsel for the Defendant/Respondent has submitted that the current application ought to have been brought pursuant to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010. In any event, learned counsel has submitted that where an application is brought under the said provisions, it behooves the Applicant to demonstrate that same [Applicant] has a personal stake or interest in the suit and by extension the suit property.
21. Nevertheless, learned counsel has submitted that in respect of the instant matter, the Applicants herein, who are seeking to be joined into the suit, have neither demonstrated nor established any personal interest in respect of the suit property. In particular, it has been contended that the Applicants are not contending that same are the lawful owners of the suit property.
22. On the other hand, learned counsel for the Defendant/Respondent has also submitted that the mere fact that the Applicants reside in the neighborhood of the suit property, namely, South 'B' area, Nairobi, does not confer upon the Applicants any legitimate title or rights to the suit property. In short, learned counsel for the Defendant/Respondent has submitted that the Applicants have not established the requisite basis to warrant their joinder into the suit.



23. In support of the submissions that the Applicants have not demonstrated any personal interest or stake in the suit and by extension the suit property, learned counsel for the Defendant/Respondent has cited and referenced the holding of the Supreme Court in the case of Francis Kariuki Muruatetu Vs Republic & others [2016] eKLR, where the court highlighted the ingredients underpinning joinder of an interested party.
24. Thirdly, learned counsel for the Defendant/Respondent has submitted that the Applicants herein have neither shown nor demonstrated the prejudice that same [Applicants] shall be disposed to suffer unless same are joined in the suit. For good measure, learned counsel for the Defendant/Respondent has submitted that the joinder of a party into a suit must be anchored on some lawful or equitable interest by the Applicant and not otherwise.
25. Premised on the foregoing, learned counsel for the Defendant/Respondent has submitted that the Applicants herein have neither established nor demonstrated the requisite ingredients to warrant their joinder into the suit or at all. In this regard, learned counsel has posited that the application is devoid of merits and thus ought to be dismissed.

Issues For Determination:

26. Having reviewed the application dated 1st of October 2024 and the response thereto and upon consideration of the oral submissions of the Advocates for the respective parties, the following issues crystallize [emerge] and are thus worthy of determination.
 - i. Whether the Applicants have demonstrated any stake and/or interest in the suit and by extension the suit property to warrant the proposed joinder.
 - ii. Whether the joinder if at all would serve any meaningful purpose.

Analysis And Determination

Issue Number 1 Whether the Applicants have demonstrated any stake and/or interest in the suit and by extension the suit property to warrant the proposed joinder

27. The Applicants herein have brought the instant application and wherein same [Applicants] are seeking to be joined as Interested Parties. In particular, the Applicants have contended that same are residents of South 'B' area, which is in the neighborhood of the suit property.
28. Additionally, the Applicants herein have contended that the suit property which is the subject of the instant matter is public land, which was reserved for purposes of construction of a public market. In this regard, it has been contended that owing to the purpose for which the suit was reserved, same [suit property] was designated for the benefit of the local community, including the Applicants.
29. Arising from the contention that the suit property is public land, and which was intended to be used for construction of a public market and coupled with the fact that the Applicants reside within the neighborhood of the suit property, the Applicants have contended that same [Applicants] therefore have a legitimate expectation in respect of the suit property. In this regard, it was posited that the legitimate expectation by and on behalf of the Applicants is exposed to be violated unless same [Applicants] are joined as Interested Parties.
30. On the other hand, the Defendant/Respondent has contended that the Applicants herein have no equitable or legal interest over and in respect of the suit property. In any event, it has been contended that the mere fact that the Applicants reside in the neighborhood of the suit property does not bestow upon the Applicants any legal rights and/or interest on the suit property.



31. Furthermore, learned counsel for the Defendant/Respondent has submitted that the contention that the suit property is public land can only be ventilated by the Plaintiff herein. Besides, it has been submitted that in so far as the Plaintiff has already filed the suit, the filing of the suit is deemed to be for and on behalf of the all the residents of Nairobi, including the Applicants.
32. Consequently, learned counsel for the Defendant/Respondent has submitted that the Applicants herein have neither demonstrated any nexus to the suit or suit property and hence the intended joinder is not well grounded.
33. Having considered the rival submissions by and on behalf of the parties, I beg to take the following position. Firstly, there is no gainsaying that what is before the court is an ordinary suit commenced vide a Plaint and not a constitutional petition in terms of the provisions of Article 22 and 258 of *the Constitution*, 2010. In this regard, the Applicants herein were not at liberty to approach the court on the basis of the Mutunga Rules.
34. Suffice to underscore that the Mutunga Rules can only be invoked and relied upon when an Applicant is seeking to join or be joined in a constitutional petition intended to protect the constitutional rights and fundamental freedoms enshrined in the bill of rights. Consequently, it is my humble view that the invocation and reliance on the provisions of the Mutunga Rules, in propagating the instant application was misguided and misconceived.
35. Secondly, it is imperative and outline that where a party, the Applicants not excepted, are keen to be joined in an ordinary suit, in whatsoever capacity, same are obligated to invoke the provisions of Order 1, Rules 3 & 10 (2) of the Civil Procedure Rules. For good measure, the joinder of a party as an interested party is underpinned by the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules.
36. Suffice to point out that pursuant to the provisions of Order 1 Rules 10(2) of the Civil Procedure Rules, [which the Applicants ought to have invoked] it behooved the Applicants to demonstrate that same have a stake or interest in the suit and by extension suit property. To my mind, the Applicants were called upon to show/demonstrate that same have some personal claim to and in respect of the suit property.
37. It is instructive to underscore that the parameters for joinder of an Interested Party in an ordinary suit, are slightly different from the parameters to be demonstrated by an Applicant seeking to be joined in a constitutional petition. For coherence, an Applicant seeking to join a constitutional petition, may be joined if such an Applicant demonstrates that the issue beforehand has public interest implications. [See Article 22 and 258 of *the Constitution*, 2010]
38. Nevertheless, an Applicant who seeks to be joined as an Interested Party in an ordinary suit must ordinarily demonstrate and prove that same [Applicant] has a personal stake or interest in the suit or suit property. In this regard, it was incumbent upon the Applicant to show whether same [Applicant] has an equitable right or legal interest to the suit property.
39. To my mind, it was the obligation of the Applicants herein and their learned counsel to demonstrate to the court that the Applicants have a personal stake and/or interest over and in respect of the suit property. The demonstration of such stake or interest by the Applicants would be critical in the consideration as to whether the Applicants ought to be joined or otherwise.
40. Nevertheless, it is my humble view that the Applicants herein have neither demonstrated their personal stake or interest in respect of the suit property. For good measure, I beg to underscore that the mere fact that the Applicants reside at South 'B', Nairobi, which is in the neighborhood of the suit property, does not bestow upon the Applicants any legal or equitable rights to the suit property.



41. Barring repetition, it is instructive to underscore that if the suit beforehand was a constitutional petition seeking to enforce public interest rights, this court would have looked at the Applicants with a different lens. Nevertheless, it is not lost on the court that what is before the court is an ordinary suit and before a party is joined, such a party must demonstrate stake and interest.
42. In my humble view, the entirety of the supporting affidavit by and on behalf of the Applicants do not exhibit any stake and/or interest that the Applicants herein have over and in respect of the suit property. To this end, I am afraid that the Applicants herein have neither met nor satisfied the requisite threshold to warrant joinder into the instant matter.
43. Furthermore, it is worth recalling that the joinder of a party as an Interested Party is intended to enable the court to effectively and effectually determine all the issues in dispute. In this regard, the question that does arise is what aspect of the suit/dispute would the joinder of the Applicants help the court to deal with and/or determine. Suffice it to underscore that the Applicants herein has not substantiated same.
44. Before departing from the issue herein, it suffices to cite and reference the decision in the case of *Meme v. Republic* [2004] KLR 637 where the court considered the factors to be taken into account before joinder of a Party into the Suit.
45. For coherence, the Court stated as hereunder:
- “(i) Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings;
 - (ii) Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
 - (iii) Where the joinder will prevent a likely course of proliferated litigation.”
46. Similarly, the factors to be taken into account and/or considered before decreeing joinder of a party in a suit, whether as an Interested Party or necessary party, were also elaborated in the case of *Civicon Limited v. Kivuwatt Limited & 2 others* [2015] eKLR (Civil Appeal No. 45 of 2014) where the court held as hereunder:-
- “Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.”
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- From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”



47. The joinder of a party into a suit was also highlighted and discussed by the Court in the case of *Deported Asians Property Custodian Board v. Jaffer Brothers Limited* (1999) I EA 55 (SCU) where it was stated as hereunder;-

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter...

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (emphasis by underline).

48. Finally, the Supreme Court of Kenya distilled various ingredients to be established and demonstrated prior to one being joined as an Interested Party. The ingredients were distilled and elaborated in 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 court stated and held as hereunder;-

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“37. From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:-

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:-

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. 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. 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.”

49. Flowing from the foregoing analysis, my answer to issue number two [2] is two-fold. Firstly, the invocation and reliance on the provisions of Rule 5(d)(ii) and Rule 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules, 2013, was



erroneous and misconceived. For coherence, the said rules only suffice in constitutional petitions seeking to enforce the human rights and fundamental freedoms enshrined under the Bill of Rights.

50. Secondly, the Applicants herein have neither established nor demonstrated their stake/interest in respect of the suit property. In the absence of any personal stake and interest in the suit property, the Applicants herein have failed to meet the threshold for joinder as Interested Parties.

Issue Number 2 Whether the joinder if at all would serve any meaningful purpose.

51. Other than the question of stake and interest by the Applicant, which has been addressed in the preceding paragraphs, there is yet another perspective that merits mention and a short discussion. For good measure, the perspective herein relates to the intendment of the Applicants to join the suit beforehand.
52. Suffice to point out that the Applicants herein are merely seeking to be joined into the matter for purposes of tendering evidence. In this regard, what I hear the Applicants to be saying is that same desire to be witnesses and no more.
53. To my mind, a person who desires to tender evidence in a civil suit, like the one beforehand, only needs to approach the party in whose favour same [Applicant] wishes to support and thereafter seek to be added as a witness. For coherence, a witness does not need to be joined as a party in a suit or otherwise.
54. In my humble view, if the Applicants herein have crucial and critical evidence that would help the Plaintiffs to prove her claim, then it suffices for the Applicants to be added as witnesses and thereafter be called by the Plaintiff.
55. Without belaboring the point, if every person seeking to be a witness were to seek to be joined as a party in a suit, then the proceedings would become cumbersome and thereafter defeat the necessity for expeditious hearing and determination of disputes. In any event, I hold the view that such a scenario would be antithetical to the provisions of Section 1A and 1B of the Civil Procedure Act as read together with the provisions of Article 159 2(b) of the Constitution 2010.
56. In a nutshell, it is my finding and holding that a person who desires to tender and adduce evidence before a court of law, like the Applicants beforehand, do not require to be joined as interested Parties.
57. Be that as it may, if a party the applicants not excepted, desire to be joined as interested Parties in line with the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules, then, such a party must satisfy the requisite ingredients including proof of stake or interest in the suit property and prejudice, if any, to be suffered unless joinder is decreed.
58. Finally, I beg to underscore that parties, the Applicants not excepted, are not to be joined in a matter for aesthetic or cosmetic purposes. For good measure, it is incumbent upon a court of law to sieve the application made and thereafter to be satisfied that there is a genuine interest/stake by an Applicant before joinder. Instructively, the joinder of a party into a suit entails exercise of discretion and which discretion, must be exercised judiciously.
59. Arising from the foregoing analysis, my answer to issue number two [2] is to the effect that an Applicant seeking to be a witness, the current applicants not excepted, cannot seek to be joined as Interested Parties.

Final Disposition:

60. Having dealt with and addressed the issues that were highlighted in the body of the Ruling, it is now appropriate to bring the matter to closure. Nevertheless, it suffices to state that while discussing



the various issues, the court has found and established that the Applicants herein have neither demonstrated nor proved any stake or interest in the suit property.

61. Furthermore, the purpose of joinder of any party into a suit, is circumscribed by the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules. Instructively, joinder is intended to enable the court to effectively and effectually determine the issues in dispute and not otherwise.
62. Consequently and in the premises, I come to the conclusion that the application dated the 1st of October 2024 is devoid of merits. In this regard, I proceed to make the following orders: -
 - i. The Application dated 1st October 2024 be and is hereby dismissed.
 - ii. Costs of the Application be and are hereby awarded to the Defendant/Respondent only.
63. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2024.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court Assistant.

Ms. Achieng for the proposed Interested Parties/Applicants.

Ms. Muthoni h/b for Mrs. Maina for the Plaintiff/Respondent.

Mr. Patterson Kamaara for the Defendant/Respondent.

