Mwangi & 259 others v Kimani; Starehe Community Group & another (Proposed Interested Parties); Mwango & another (Interested Parties) (Enviromental and Land Originating Summons 125 of 2009) [2024] KEELC 14141 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 14141 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 125 OF 2009

JO MBOYA, J

NOVEMBER 21, 2024

BETWEEN

RICHMOND MWANGI & 259 OTHERS ..... PLAINTIFF

AND

LEAH MWATHI KIMANI ..... DEFENDANT

AND

STAREHE COMMUNITY GROUP ..... PROPOSED INTERESTED PARTY

NCDF STAREHE CONSTITUENCY ..... PROPOSED INTERESTED PARTY

AND

AMOS MWANGO ..... INTERESTED PARTY

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

RULING

1. The 1st Proposed Interested Party/Applicant has filed the Amended Application dated 30th September 2024 and wherein same [Applicant] seeks the following reliefs;

    i. That this Application be heard ex-parte in the first instance on the ground that the entire object of this application will be defeated and rendered nugatory if any procedural step is taken without the involvement of the Applicant.

    ii. That Starehe Community Group; Ncdf Starehe Constituency Hon Amos Mwango MP Starehe Constituency and National Land Commission be enjoined in this suit as interested parties. That pending the hearing and determination of this application, this Honourable

Court be pleased to issue an Order of Stay of execution of the Consent recorded in Court on 8th July 2014 and the resultant decree.

iii. That Starehe Community Group: Ncdf Starehe Constituency Hon Amos Mwango MP Starehe Constituency and National Land Commission be joined in this suit as interested parties.

iv. That the proceedings and more particularly the-process of alienation and or vesting ownership rights to the Plaintiff be-stayed pending hearing and determination of prayer 2 above. That this Honourable Court be pleased to set aside the consent order recorded in Court on 8th July 2014 and direct that the matter proceed to full trial.

v. That costs of this application be provided for.

2. The instant Application is anchored/premised on the grounds which have been highlighted at the foot thereof. In addition, the Application is supported by the Affidavit of Ephantus Mugo sworn on 30th September 2024 and to which the deponent has annexed four documents including a copy of the certificate of registration of the Applicant.

3. Upon being served with the instant Application, the Plaintiff/Respondent filed Grounds of Opposition dated 16th September 2024. For coherence, the Grounds of Opposition were filed in respect of the original application prior to the amendment. Nevertheless, upon the amendment of the application, the Plaintiff/Respondent still chose to rely on the said grounds of opposition.

4. On the other hand, the Defendant/Respondent responded to the instant Application vide Grounds of Opposition dated 15th October 2024. Instructively, the Defendant/Respondent has contended that the Applicant beforehand is not a legal entity and thus same [Applicant] lacks the requisite locus standi to approach the court for purposes of joinder.

5. The instant Application came up for hearing on 24th October 2024 whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing of the written submissions.

6. Thereafter, the Applicant proceeded to and filed written submissions dated 30th October 2024 whereas the Plaintiff/Respondent filed written submissions dated 12th November 2024. Nevertheless, the Defendant/Respondent did not file any written submissions.

Parties' Submissions

a. Applicant's Submissions

7. The Applicant herein filed written submissions dated 30th October 2024 and wherein same Applicant has adopted the grounds contained at the foot of the Application as well as the contents at the foot of the Supporting Affidavit and thereafter same has canvassed three salient issues for consideration by the court.

8. Firstly, learned counsel for the Applicant has submitted that the Applicant herein is a community-based organization registered pursuant to the Community Groups Registration Act, 2022. In this regard, learned counsel for the Applicant has contended that by virtue of such registration, the Applicant herein is vested with the requisite mandate to mount and maintain the subject application on behalf of her members. In particular, learned counsel for the Applicant has cited and referenced

the provisions of Section 21 of the Community Groups Registration Act which underpins the general objects of community groups.

9. To this end, learned counsel for the Applicant has therefore implore the court to infer and construe that the Applicant is seized of the requisite locus standi to approach the court.

10. Secondly, learned counsel for the Applicant has submitted that the suit property which was being disputed between the Plaintiff/Respondent on one hand and the Defendant/Respondent on the other hand is public property which is inhabited by the members of the Applicant. In addition, it has been contended that the members of the Applicant carryout and/or undertake various business on the suit property.

11. Owing to the fact that members of the Applicant inhabit and undertake various business activities on the suit property, it has been contended that the Applicant therefore has a stake and/or interest in the suit property. to this end, it has been contended that the Applicant has therefore demonstrated a basis to warrant joinder into the suit.

12. To buttress the submissions that the Applicant has established and demonstrated a basis to warrant joinder into the suit, learned counsel for the Applicant has cited and referenced *inter alia* the case of *Nkuku & 200 Others v Ereri Company Ltd; Stephen Ndungu Njenga & Others [Interested Parties]; County Land Registrar, Nakuru Intended 56th Interested Party* [2023] KEELC 15992 [KLR] and *Francis Kariuki Muruatetu & Another v Republic & 5 Others* [2016] eKLR, respectively.

13. Thirdly, learned counsel for the Applicant has submitted that the Plaintiff/Respondent and the Defendant/Respondent entered into and executed a consent dated 8th July 2024 concerning the suit property. Nevertheless, it has been contended that the impugned consent touches on and concerns a public property. furthermore, learned counsel for the Applicant has submitted that pursuant to the impugned consent, the Plaintiff/Respondent on one hand and the Defendant/Respondent on the other hand sought to transfer public land to a private entity, which action is contended to be illegal and unlawful.

14. To the extent that the impugned consent touches on and concerns what is contended to be public property, learned counsel for the Applicant has therefore invited the court to find and hold that the impugned consent is vitiated by fraud and illegality.

15. Based on the foregoing, learned counsel for the Applicant has therefore implored the court to review and set aside the consent and thereafter to join the Applicant herein into the suit.

16. In support of the foregoing submissions, learned counsel for the Applicant has cited and relied on various decisions including *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] KECA 470 [KLR]; *Flora N Wasike v Destimo Wambogo* [1988] eKLR; *Kenya Commercial Bank Ltd v Benjo Amalgamated & Another* [2016] eKLR, Sofia Muhamed v Rodah Sitieney [1992] eKLR and *Hirani v Cassam* [1952] 19 EACA134, respectively.

17. In a nutshell, learned counsel for the Applicant has implored the court to find and hold that the application beforehand is meritorious and thus same [application] ought to be allowed.

b. Plaintiff/Respondents' Submissions

18. The Plaintiffs/Respondents herein filed written submissions dated 12th November 2024 and wherein the Respondent have reiterated the contents of the grounds of opposition dated 16th September 2024. In addition, the Respondents have canvassed three salient issues for consideration by the court.

19. First and foremost, learned counsel for the Respondent has submitted that the 1st Proposed Interested Party/Applicant is not a legal entity bestowed with the requisite mandate/authority to approach a court of law. In any event, it has been contended that the Applicant herein can only sue and/or be sued through her officials and not otherwise.

20. To the extent that the Applicant herein is divested of the requisite locus standi, learned counsel for the Respondent has submitted that the Application beforehand is therefore misconceived and a nullity ab initio.

21. Secondly, learned counsel for the Respondent has submitted that the consent which is sought to be impeached/impugned by the Applicant herein was enteRed into and executed by the Plaintiffs/ REspondents and the Defendant/Respondent. In this regard, it has been posited that the Applicant was not party to the said consent and hence cannot seek to set aside the said consent.

22. To this end, learned counsel for the Respondents has therefore invited the court to find and hold that the application beforehand is misconceived and legally untenable.

23. To vindicate the submissions pertaining to setting aside of a consent, learned counsel for the Respondent has cited and referenced the holding in the case of *Board of Trustees, NSF v Michael Mwalo* [2015] eKLR.

24. Thirdly, learned counsel for the Respondent has submitted that the instant application has been mounted with unreasonable and inordinate delay. For good measure, it has been posited that the consent which is sought to be set aside was entered into and executed on 8th July 2014. In this regard, learned counsel for the Respondent has submitted that the current application has been filed after more than 10 years from the date of the impugned consent.

25. Arising from the foregoing submissions, learned counsel for the Respondents has contended that the subject Application is therefore defeated by the doctrine of latches.

c. Defendant's/Respondent's Submissions

26. Though the Defendants/Respondents filed grounds of opposition dated 15th October 2024. Same however did not file any written submissions.

27. Instructively, the only submissions on record are the ones filed by the Applicant and the Plaintiffs/ Respondents. Notably, the said submissions have been highlighted elsewhere hereinbefore.

Issues for Determination

28. Having reviewed the application beforehand and the responses thereto and upon consideration of the written submissions filed on behalf of the respective parties, the following issues crystalize and are thus worthy of determination;

    i. Whether the Applicant herein [Starehe Community Group] is seized of the requisite locus standi to mount the subject application.

    ii. Whether the Applicant herein can be joined into the matter which stands closed upon the adoption of the consent or otherwise.

    iii. Whether the Applicant herein has established or demonstrated any stake and/or interests in respect of the suit property to warrant joinder or otherwise.

Analysis and Determination

Issue Number 1. Whether the Applicant herein [Starehe Community Group] is seized of the requisite locus standi to mount the subject application.

29. Though the instant Application highlights and adverts to several proposed interested parties, it is evident that the primary mover of the application is the 1st Proposed Interested Party/Applicant. For good measure, the Application beforehand is said to have been filed on behalf of the Applicant and not Applicants.

30. On the other hand, it is also imperative to underscore that the written submissions dated 30th October 2024 have been filed on behalf of the 1st Proposed Interested Party/Applicant. in this regard, if there was any doubt as pertains to the primary mover then such doubt has been eliminated vide the written submissions filed.

31. Having highlighted the foregoing, it is now apposite to revert to the issue and to ascertain whether or not the Applicant herein is vested with the requisite legal capacity to file and/or commence legal proceedings in its own name.

32. Suffice it to point out that learned counsel for the Respondents has submitted that by virtue of being a community-based organization, the Applicant herein is not clothed with the requisite mandate and/or capacity to sue in its own name. Instructively, it has been posited that it is only body corporate that has the capacity to sue and be sued in their own names.

33. On the other hand, learned counsel for the Applicant has contended that the Applicant herein is a community-based organization registered pursuant to the *community groups Registration Act*. In this regard, it has been contended that by dint of Section 21 of the said Act, the Applicant is seized of the requisite locus standi to approach the court.

34. Having considered the rival submissions, it is now appropriate to undertake the exercise of discerning whether the Applicant is a legal entity capable of filing proceedings and making applications before the court.

35. Learned counsel for the Applicant cited and referenced Section of the *Community Groups Registration Act* and thereafter implored the court to infer and/or imply that the Applicant has the requisite locus standi.

36. To this end, it suffices to reproduce Section 21 of the *Act* [supra]. The said Section states thus;

> 21. A community group may, in accordance with its general objects of constitution groups,
>
> (a) invest and deal with funds of the community group not immediately required for its objects;
>
> (b) raise or borrow money on any terms and in any manner as resolved by a majority of its members; No. 3 0 Director may make changes in register.
>
> (c) jointly secure the repayment of funds raised or borrowed by the community group or the payment of a debt or lability of the community group by giving mortgages, charges or securities on or over all or any of the property of the community group; and
>
> (d) do anything that is incidental or conducive to the attainment of the purposes of the powers of the community group.

37. I have reviewed and considered the entire provisions of Section 21 of the *Act* [supra] which has been cited and relied upon by learned counsel for the Applicant. However, I am unable to discern any aspect thereof which confers legal capacity upon a community-based organization to sue and/or be sued in its own name.

38. Suffice it to underscore that if the Act intended to bestow upon the Community Based Organization the legal capacity to sue and/or be sued in their own names, then nothing would have been easier than for parliament to state as much.

39. In the absence of clear and express provisions conferring legal status on the community-based organization, it then means that such community-based organization can only sue and/or be sued through their registered officials acting on behalf of the community-based organization.

40. To my mind, the *Community Groups Act* operate in a manner like societies created/established under the *Societies Act* Chapter 108 Laws of Kenya, wherein the societies can only sue registered officials.

41. Arising from the foregoing discussion, it is my finding and holding that the Applicant herein [1st Proposed Interested Party] is divested of the requisite locus standi to file and maintain the instant Application in its name.

42. In the absence of the requisite locus standi, there is no gainsaying that the Applicant can therefore not approach the seat of justice with an application like the one beforehand for joinder as a party.

43. Suffice it to underscore that locus standi is a critical issue and where a party is divested of same, such a party cannot progress the impugned proceedings at all. Instructively, locus standi is a threshold question/issue and must therefore be addressed at the onset.

44. To this end, it is imperative to cite and reference the holding in the case of *Alfred Njau, Aluchio Liboi, Joseph Muya Mukabi, Peter Inyangala, Akhonya Analo and Jacob Gichigo v City Council of Nairobi* (Civil Appeal 74 of 1982) [1983] KECA 56 (KLR) (Civ) (28 June 1983) (Judgment), where Court had occasion to discuss the two. They stated:

> Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ..."

The court proceeded to state:

> To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

45. The importance of *locus standi* of a party was also elaborated in the case of *Julian Adoyo Ongunga & Jared Odhiambo Abano v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* (Civil Appeal 119 of 2015) [2016] KEHC 4186 (KLR) (20 July 2016) (Judgment), where the court stated thus;

> Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus

standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings.

46. Arising from the foregoing, it is my finding and holding that the Applicant herein is divested of the requisite locus standi to mount and/or maintain the impugned proceedings before the court. Simply put, the Applicant herein lacks the legal capacity to approach the seat of justice.

Issue Number 2. Whether the Applicant herein can be joined into the matter which stands closed upon the adoption of the consent or otherwise.

47. The Applicant herein seeks to be joined into the matter as an interested party. Nevertheless, despite the Application beforehand, it is common ground that the instant suit was concluded vide a consent dated 8th July 2014.

48. To my mind, the adoption of the said consent brought the entire proceedings to a close. Henceforth, there is no more pending proceedings before the court to warrant the joinder of a party, the Applicant not excepted.

49. For coherence, there is no gainsaying that a party, the Applicant not excepted is at liberty to apply to be joined in a matter at any stage of the proceedings. However, it is instructive to underscore that the application for joinder ought to be made during the pendency of the suit and not after the suit has been concluded and or terminated.

50. Furthermore, it is not lost on this court that the purpose of joinder of a party, the Applicant herein not excepted is intended to enable the joinder to facilitate the effective and effectual hearing and determination of all the issues in controversy. At any rate, the joined party is obligated to assist the court towards arriving at a just and expedient determination of the issues in controversy.

51. Nevertheless, the question that does arise is whether the joinder of the Applicant herein shall serve any meaningful or legal purpose. To my mind, the issues in controversy, if at all have since been resolved and/or adjudicated upon. Consequently, there are no more issues in controversy.

52. Notably, if the Applicant herein had appreciated and internalized the provisions of Order 1 Rule 10 of the *Civil Procure Rules*, 2010, then the Applicant would have come to the conclusion that the instant application was/is stillborn.

53. To vindicate the position that an application for joinder ought to be made and/or mounted at any stage of the proceedings but not after the conclusion of the suit, it suffices to reference the decision in the case of *J.M.K v MWK & Another* 2015 eKLR where the court held and stated thus:

> 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.

54. Without belabouring the point, I beg to adopt and reiterate the decision [supra]. In this regard, it suffices to underscore that the intended joinder is not legally tenable.

Issue Number 3. Whether the Applicant herein has established or demonstrated any stake and/or interests in respect of the suit property to warrant joinder or otherwise.

55. The Applicant herein has contended that the suit property which was being disputed between the Plaintiffs/Respondents on one hand and the Defendants/Respondents on the other hand, is public property. furthermore, the Applicant has contended that the suit property is inhabited by members of the Applicant herein.

56. On the other hand, the Applicant herein has also contended that members of the Applicant's group operate several businesses on the suit property, which is contended to be public property.

57. Nevertheless, it has been stated by the Applicant that despite being public property, the Plaintiffs/Respondents and the Defendant/Respondent have colluded to have the suit property transferred to and registered in the name of a private developer.

58. As a result of the contented collusion to [sic] alienate what is turned to be public property, the Applicant now seeks to be joined into the suit and thereafter to ventilate the interests of her members.

59. Despite the contention by and on behalf of the Applicant herein, there is no gainsaying that the Applicant has neither adverted to nor espoused any personal stake and/or interest in respect of the suit property to warrant joinder into the matter. Instructively, it was incumbent upon the Applicant to demonstrate personal nexus and proximate cause, to the suit property to underpin the intended joinder.

60. Where an Applicant like the one beforehand does not demonstrate any personal stake and/or interests in the suit and by extension suit property, no joinder can be decreed or at all.

61. For coherence, it is worth positing that the joinder of a party into a suit, the instant suit not excepted is intended to enable the joined person to canvass some issues to assist the court. Pertinently, the joinder is not for cosmetic purposes.

62. To buttress the exposition that an application is called upon to exhibit and demonstrate personal stake and/or interests before joinder as an interested party, it suffices to reference the decision of the Supreme Court in the case of *Francis Kariuki Muruatetu v Republic* [2016] eKLR, where the court stated as hereunder;

> 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.

63. Other than the fact that the Applicant has not established a personal stake or interest to warrant joinder, there is yet another perspective that merits mention and a short discussion.

64. The perspective herein relates to the reason why the Applicant is seeking to be joined. Instructively, the Applicant is seeking to be joined into this matter so that same [Applicant] can canvass separate and distinct issues which are at variance with the issues which were placed before the court by the primary parties.

65. The question that does arise is whether an interested party or a proposed interested party can be joined into an existing suit, with a view to propagating a cause of action that is at variance with the dispute beforehand.

66. To my mind, what the Applicant herein is endeavouring to do [subject to joinder] is to highjack the suit [now determined] and thereafter to propagate own agenda/cause of action. Such an endeavour is inacceptable and cannot therefore found a basis for joinder.

67. To this end, it suffices to cite and reference the holding of the Supreme Court in the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR, where the court stated thus;

> (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."

68. In my humble view, the Applicant herein is merely seeking to sneak into the subject matter and upon joinder to bring forth and agitate issues that are outside the scope of what was being disputed by the primary parties. In short, even if the Applicant had surmounted the first and second hurdles [which is not the case] I would still have been reluctant to join a person disguising itself as an interested party but one whose motive is at variance with the stake of an interested party.

Final Disposition

69. Flowing from the arguments [highlighted in the body of the ruling], I come to the conclusion that the Applicant herein has neither met nor satisfied the requisite ingredients to warrant [sic] joinder as an interested party.

70. In the premises, the final orders that commend themselves to the court are as hereunder;

    i. The amended Notice of Motion Application dated 30th September 2024, be and is hereby dismissed.

    ii. Costs of the Application be and are hereby awarded to the Plaintiffs/Respondents and the Defendants/Respondent.

iii. Furthermore, the costs in terms of clause [ii] be and are hereby assessed and certified in the sum of Kes.20, 000/= only to the Plaintiffs/Respondents; and the Defendant/Respondent, respectively.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2024.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant

Mr. Bulowa h/b for Brain Khaemba for the 1st Proposed Interested Party/Applicant

Mr. Kabue Thumi for the Plaintiffs/Respondents

Mr. Munyalo Muli for the Defendant/Respondent

N/A for the 2nd, 3rd and 4th Proposed Interested Parties