



REPUBLIC OF KENYA



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Fanikiwa Limited v Sirikwa Squatters Group & 20 others; Mibei & 10 others (Applicant) (Petition 32 (E036) & 35 (E038) of 2022 (Consolidated)) [2023] KESC 39 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KESC 39 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 32 (E036) & 35 (E038) OF 2022 (CONSOLIDATED)

PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ

JUNE 16, 2023

BETWEEN

FANKIWA LIMITED PETITIONER

AND

SIRIKWA SQUATTERS GROUP & 20 OTHERS RESPONDENT

AND

EZEKIEL KIBET MIBEI APPLICANT

NAFTALI KIPLIMO MIBEI APPLICANT

SOLOMON ESTIMOA LUVAI & 624 OTHERS APPLICANT

SIMON MACHARIA MAINA & 48 OTHERS APPLICANT

MARK SOMOEY & 13 OTHERS APPLICANT

JAMES KIPKEREBULIT YATICH & 438 OTHERS APPLICANT

KIBWARI PLC APPLICANT

CHARLES SANG'ANYI NYAMEINO & 26 OTHERS APPLICANT

UNIVERSITY OF EASTERN AFRICA- BARATON APPLICANT

JOHN. K. SITENEI & 9 OTHERS APPLICANT

LAW SOCIETY OF KENYA APPLICANT

(Being applications for joinder of the 1st to 10th applicants as interested parties and 11th applicant as amicus curiae in Petition No. 32 (E036) of 2022 consolidated with Petition No. 38 (E038) of 2022 pending the hearing and determination of an appeal from the judgment of the Court of Appeal at Eldoret in Civil Appeal 45 & 44 of 2017 (consolidated) P.O Kiage, K.M'noti & M.Ngugi JJ.A delivered on 18th November 2022.)



Conditions precedent for a party to be joined as an interested party in proceedings before the Supreme Court.

The instant appeal was instituted by the Sirikwa Squatters Group for the suit land on grounds that they were descendants of persons who were unlawfully and forcefully evicted from the suit land. The instant applications were 11 applications for joinder of parties, 10 who wanted to be joined as interested parties and the LSK that wanted to be joined as a friend of the court. The Supreme Court dismissed all joinder applications on grounds that the parties did not meet the threshold set out in Supreme Court Rules, 2020 rule 19 and 24(1); Matemba, Mumo v Trusted Society of Human Rights Alliance & 5 others (Civil Application 29 of 2014; [2014] KESC 6 (KLR)); and Muruatetu & another v Republic & 6 others, (Petition 15 & 16 of 2015; [2017] KESC 2 (KLR); [2017] 2 KLR 101)

Reported by John Ribia

Civil Practice and Procedure – parties to a suit – joinder of parties - *amicus curiae* (friend of the court) and interested parties - conditions precedent - conditions to be fulfilled by parties who intended to be enjoined to a suit as interested parties and conditions to be met by a party that intended to be enjoined to a suit as *amicus curiae* - the nature of the role of the *amicus curiae* (friend of the court) in court proceedings -

Brief facts

The Supreme Court was faced with determining 10 joinder applications, nine whom sought to be joined as interested parties and the Law Society of Kenya that sought to be joint as *amicus curiae*. The suit revolved around a claim by Sirikwa Squatters Group for suit land on grounds that they were descendants of persons who were unlawfully and forcefully evicted from the suit land.

Issues

- i. What conditions did an applicant need to fulfil to be joined as *amicus curiae* in a suit?
- ii. What conditions did an applicant need to fulfil to be joined as an interested party in a suit?

Held

1. An applicant to be joined to a suit as an interested party had to satisfy the Supreme Court that the applicant had met the legal requirements for joinder under rule 24(1) of the , under and under .
2. The applicants had not met the threshold for admission as interested parties. They failed to establish the prejudice that would be occasioned to them if they were denied joinder as interested parties. The appeal already had numerous interested parties whose cause largely revolved around what all the interested parties sought to raise. As such, they would not be prejudiced in any way.
3. The applicants had not specified what additional evidence they intended to adduce. Those applications did not meet the laid down principles governing the admission of additional evidence before the appellate courts.
4. Rule 19 of the allowed for the participation of friends of the Court. Rule 19 provided that the Supreme Court may on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the court. The Supreme Court was supposed to consider the proven expertise of the person; independence and impartiality of the person; or the public interest. The Law Society of Kenya did not have the requisite expertise to aid the Supreme Court in the instant matter. The *amicus* brief did not address point(s) of law not already addressed by the parties to the suit.

Applications disallowed.

Orders

No order as to costs.

Citations

Cases



1. Matemmu, Mumo v Trusted Society of Human Rights Alliance & 5 others (Civil Application 29 of 2014; [2014] KESC 6 (KLR)) — Explained
2. Muruatetu & another v Republic & 6 others, (Petition 15 & 16 of 2015; [2017] KESC 2 (KLR); [2017] 2 KLR 101) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 40, 50 — Interpreted
2. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 19, 24 (1) — Interpreted

Advocates

Ham & Hamsley Advocates for 1st & 2nd Applicants
Z.K Yego & Company Advocates for 3rd Applicant
Nyairo & Company Advocates for 4th and 8th Applicants
Maritim & Company Advocates for 5th Applicant
Ligami, Onani & Associates for 6th Applicant
Kosgey & Masese Advocates for 7th Applicant
Rachuonyo & Rachuonyo Advocates for 9th Applicant
Gordon, Ogola, Kipkoech & Company Advocates for 10th applicant
Oino Okemwa Advocates for 11th applicant
Arusei & Company Advocates for 1st respondent

RULING

Representation:

(Ham & Hamsley Advocates)..... For the 1st & 2nd Applicants
(Z.K Yego & Company Advocates)..... For the 3rd Applicant
(Nyairo & Company Advocates)..... For the 4th and 8th Applicants
(Maritim & Company Advocates)..... For the 5th Applicant
(Ligami, Onani & Associates)..... For the 6th Applicant
(Kosgey & Masese Advocates)..... For the 7th Applicant
(Rachuonyo & Rachuonyo Advocates)..... For the 9th Applicant
(Gordon, Ogola, Kipkoech & Company Advocates)..... For the 10th applicant
(Oino Okemwa Advocates)..... For the 11th applicant
(Arusei & Company Advocates)..... For the 1st respondent

A. Introduction

1. There are three appeals pending hearing before this Court all arising from the judgment of the Court of Appeal at Eldoret, Civil Appeal 45 & 44 of 2017 (Consolidated) (PO Kiage, K M’inoti & M Ngugi, JJA) delivered on November 18, 2022.
2. The three pending appeals Supreme Court Petition No 32(E036) of 2022 *Fanikiwa Limited v Sirikwa Squatters group & 20 others (Fanikiwa)*; Supreme Court Petition No 35(E038) of 2022 *Mary Jepkemboi Too & Sophie Jelimo Too (Suing as administrators’ ad litem in the Estate of Mark Kiptarbei Too v Sirikwa Squatters group & 20 others* and Supreme Court Petition No 36 (E039) of 2022 *Lonrho*



Agribusiness (EA) Ltd & David Korir v Sirikwa Squatters group & 20 others were consolidated by consent on January 16, 2017 with the lead file being Fanikiwa .

3. Additionally, as a result of the Court of Appeal Judgment, twelve applications have been filed before us. These constitute an application by Fanikiwa to adduce additional evidence, an application by Sirikwa to strike out both the 8th respondent's replying affidavit and John Hulme's affidavit sworn on January 9, 2013, and ten applications for joinder of parties. The focus of this ruling is the joinder of parties' applications. Nine parties, representing the 1st -10th applicants respectively seek to be joined in the consolidated appeal as interested parties. The 10th party, (11th applicant) the Law Society of Kenya (LSK) seeks admission as an *amicus curiae*.

B. Background

4. The litigation resulting in the impugned judgment was initiated by Sirikwa Squatters Group (Sirikwa). In the petition filed in the High Court, Sirikwa claimed, *inter alia*, that they were entitled to land parcels known as LR No 9606, 9608, 742/2, 7739/7R, 12398, 10793, and 10794 (suit property), all in Uasin Gishu District. The basis of this claim was that all the members of Sirikwa were descendants of persons who originally occupied the suit property, but who were forcefully evicted from the suit property by white settlers in the 1920's. Sirikwa was constituted of people who worked as farmhands and labourers for the registered proprietors of the suit property. The registered proprietors of the suit property changed severally, and at the time of filing suit, the land was registered in the name of the 7th respondent Lonrho Agri-Business East Africa Limited (Lonrho).
5. It was argued in the trial court that following a request made by Sirikwa to the former President of the Republic of Kenya (the late Moi), the President approved that the suit property be allocated to Sirikwa. It was contended that this never materialized because the Commissioner of Lands (2nd respondent), the Chief Registrar of Titles (3rd respondent), the Director of Land Adjudication and Settlement (4th respondent), the Director of Survey (5th respondent) and the District Lands Officer, Uasin Gishu District (6th respondent) failed to implement the Presidential directive or to execute the necessary conveyance, and/or issuance of titles to Sirikwa. Instead, it was claimed, they fraudulently issued titles to other individuals without following due process.
6. Thus, Sirikwa petitioned the High Court seeking, *inter alia*, a declaration that their rights and fundamental freedom and protection to right to property had been violated or infringed or was about to be violated in regard to the suit property through the arbitrary issuance of titles to Lonrho amongst others. It also sought orders cancelling all the titles or any title issued and/or emanating from the suit property as well as damages for breach and/or violation of their constitutional rights.
7. In his judgment delivered on February 9, 2017, the learned judge (A Ombwayo) found that Sirikwa had a legitimate expectation to be registered as the owner of the suit property. He concluded that Sirikwa had established their claim under the principle of legitimate expectation, and directed, *inter alia*, that all the resultant titles or any title issued by or emanating from the suit property, issued to Lonrho and Mark Too or any beneficiaries be cancelled and the register rectified accordingly.
8. The trial court judgment prompted three appeals and a cross-appeal. These were Eldoret Civil Appeal No 44 of 2017, lodged by Lonrho Agribusiness and Mr Korir. Herein, the learned Judge was faulted for: finding that Sirikwa had legitimate expectation to the suit properties; holding that conversion of the titles to the suit properties was unlawful; failing to hold that the suit properties were private property; and for failing to hear many affected parties. Eldoret Civil Appeal No 45 of 2017 filed by Fanikiwa faulted the learned Judge for canceling the applicants' forty-four titles carved out of the suit properties and registered in its name without affording it an opportunity to be heard. Eldoret Civil



Appeal No 68 of 2017 filed by Mary Jepkembai Too and Sophie Jelimo Too, the administrators of the estate of Mr Too, faulted the learned Judge for holding that the suit properties were surrendered for purposes of settling members of Sirikwa and for canceling indefeasible titles. The cross-appeal filed by Sirikwa challenged the learned Judge's finding that Mr Too had legitimately purchased 27 hectares from the suit properties and that no fraud or wrongdoing had been proved against him.

9. The three appeals were consolidated with Civil Appeal No 45 of 2017 being the lead file. It was then brought to the attention of the Court that many parties were likely to be affected as a result of the judgment of the trial court which canceled resultant titles emanating from the suit property. The Court of Appeal issued an order dated October 1, 2018 and directed Fanikiwa to publish within 14 days a notice in one of the daily newspapers with wide circulation notifying the public of the judgment issued by the trial court, its effect, and the existence of the three appeals.
10. Following the public notice and applications for joinder, seventy-eight individuals and seven financial institutions were joined as respondents in the appeal. The individual applicants based their applications for joinder on the assertion that they were innocent purchasers for value without notice and that their titles were canceled without being heard. On their part, the financial institutions hinged their applications on the fact that they were not afforded an opportunity to be heard, and that they stood to suffer massive loss because they held valid charges over some of the nullified titles on the strength of which they had advanced substantial loans to the registered owners.
11. Consequently, by a judgment delivered on November 18, 2022, the Appellate Court, (Kiage, M'inoti, Mumbi Ngugi, JJA) dismissed the consolidated appeals; varied the trial court judgment to the extent that the nullification of the titles of the individual and financial institution respondents who were joined to the appeal was set aside; and allowed Sirikwa's cross-appeal. This is what triggered the consolidated appeal and the ten applications for joinder of parties before us.

C. Joinder Applications

12. The ten applications before us can be categorised into four. Those which only seek joinder as an interested party; those which seek joinder as an interested party and extension of time to be joined as an interested party; those which seek joinder as an interested party, to file a cross-appeal and to adduce new evidence and the application for joinder as an *amicus curiae*. These will be interrogated and determined in turn.

D. Applications for Joinder as Interested Parties.

13. The 1st and 2nd applicants filed a notice of motion dated December 6, 2022 with supporting affidavits on even date with annexed copies of their respective title deeds. They seek for joinder orders as interested parties; for the Deputy Registrar of this court to supply the applicants with all pleadings filed by parties to this appeal, and for the court to grant them leave to submit affidavit evidence and written submissions in support of the appeal. Their application is premised on the grounds that they are bonafide purchasers in the year 2000 for value without notice of any defect on the title and having purchased the property comprising of 100 acres from the 7th respondent.
14. The 3rd applicants, Solomon Estimoa Luvai and 624 other applicants, filed a notice of motion dated December 30, 2022 seeking joinder as interested parties and leave to produce their title deeds. This application is supported by an affidavit sworn by Solomon Estimoa Luvai on even date. The application is premised on the grounds that the applicants are the lawful proprietors of the land parcels purchased for value in the year 2000 and that they obtained their titles from the 7th respondent Lornho Agribusiness (EA) Limited. The applicants aver that they conducted due diligence, paid the agreed



purchase consideration, were issued with certificates of occupation and later obtained consent from the Land Control Board in respect of the subdivision, executed transfer forms and thereafter obtained title deeds after paying the requisite stamp duty. However, their titles were cancelled without them being heard and without any evidence of fraud or misrepresentation against them.

15. The 4th applicants, Simon Macharia Maina & 48 others, filed a notice of motion dated January 10, 2023 seeking to be joined as interested parties. This application is supported by Simon Macharia Maina's affidavit sworn on even date. The applicants state that they are the registered owners of various land parcels resulting from the mother title which was part of suit property and that the Court of Appeal nullified their titles without hearing them. They seek joinder to canvass their case before us.
16. The 5th applicants, Mark Somoey & 13 others, filed a notice of motion dated January 11, 2023 seeking joinder as interested parties. The application is supported by the affidavit of Mark Somoey who has annexed, inter alia, copies of titles, searches and agreements. The applicants state that they are lawful proprietors of the suit land parcels having lawfully purchased them in the year 2000 from the 7th respondent Lonrho Agri Business (EA) Ltd for value and obtained title, transfer effected in their names and they continue to reside and develop the suit properties. Their cause is that the appellate court nullified their titles without hearing them. They have filed submissions in support of their application and urge the court to allow the appeal.
17. The 7th applicant, Kibwari PLC, filed a notice of motion dated January 13, 2023 for joinder as an interested party. The application is supported by an affidavit sworn by Francis Ruto on even date who has annexed a bundle of documents to support the applicant's claim of ownership of property known as Pioneer/Ngeria Block 1 (EATEC) 5322.

The application is premised on the grounds that the applicant is a bonafide purchaser and the legitimate owner of Pioneer/Ngeria Block 1 (EATEC)/ 5322 which ownership was nullified by the Court of Appeal. The applicant avers that the company's interests will not be articulated unless it is joined as an interested party in the appeal.
18. The 10th applicants John K. Sitinei and 9 others, filed a notice of motion dated January 13, 2023 for joinder as interested parties. This application is supported by the affidavit of Stephen Kirwa Chumo sworn on even date. The application is premised on the grounds that the ten applicants are the registered proprietors of approximately 121.389 hectares of land known as Pioneer/Ngeria Block 1 EATEC with legitimate title deeds which were issued as a result of the subdivision of the suit properties. The applicants contend that they were condemned unheard before the superior courts and stand to lose ownership right to their properties.

E. Application for Joinder as Interested Parties and Extension of Time

19. The 8th applicants, Charles Sang'anyi Nyameino & 26 others, filed a notice of motion dated February 17, 2023 for joinder as interested parties on the grounds that they are the registered proprietors of various parcels of land sold to them by the 7th Respondent on or about the year 2000. In addition, the applicants filed a notice of motion application dated March 2, 2023 seeking for orders of enlargement of time for admission of the above application dated February 17, 2023 and to set aside and or review the directions issued by the deputy registrar on February 28, 2023 declining to admit the application dated February 17, 2023. The application is premised on the grounds that at the time the Deputy Registrar issued the directions that all joinder applications should be filed by the 13th January 2023, the applicants had not instructed their advocate. They aver that no public notice had been issued on the directions and that the applicants will be greatly prejudiced if their application is not allowed.



F. Application for Joinder as an Interested Party/respondent, file a cross-appeal and to adduce new evidence

20. The 6th applicants, James Kipkerebulit Yatich & 438 other applicants, filed a notice of motion dated January 12, 2023 seeking orders: to be joined as interested parties/respondent; for leave to file a cross-appeal to challenge the decision of the Court of Appeal and to be allowed to adduce new evidence to challenge the Appellate court's decision. The application is supported by the affidavit of James Yatich sworn on January 13, 2023. The application is premised on the grounds that the applicants are first and subsequent generation buyers of parcels of land sold to them in the year 1999 by the 7th respondent Lonrho Business Limited and or East African Tanning Extract Company (EATEC). They aver that the Court of Appeal judgment condemned their titles and exposed them to nullification and takeover by Sirikwa without hearing them. The applicants filed written submissions in support of the application. They seek to ventilate their case now having not participated before the superior courts.
21. The 9th applicant, University of Eastern Africa- Baraton, filed a notice of motion dated February 8, 2023. It seeks orders for joinder as an interested party, leave to file a cross-appeal to the court of appeal judgment, and leave to adduce new evidence to challenge the Court of Appeal decision. This application is supported by an affidavit sworn on even date by Prof Philip Maiyo in his capacity as vice-chancellor of the applicant. The application is premised on the grounds that the applicant is the registered proprietor and legitimate owner of parcels number Pioneer/ Ngeria Block 1 (EATEC)/ 2156, 1987,2154,2155, 2140 and 2124 which titles were nullified by the Court of Appeal. The applicant claims that it was not aware of the suit and was not a party to the proceedings before the Court of Appeal and that its interests will not be properly articulated unless it joins the matter. The applicant also filed an application dated February 10, 2023 seeking to enlarge time for admission of the notice of motion application dated February 8, 2023. The application is premised on the grounds that it was filed without undue delay and that the applicant was informed late that the Deputy Registrar had issued directions that all applications for joinder should be filed by January 13, 2023.
22. All respondents, save for Sirikwa, have signed a consent stating that they are not opposed to the joinder orders being granted. The gist of the Sirikwa's opposition is that the applicants have not been diligent in pursuing their interest in the suit before the superior courts. Sirikwa emphasises that the Court of Appeal in the year 2017 directed Fanikiwa which was joining the matter at the appellate stage to publish an advertisement in a newspaper of wide circulation informing the public about the matter before the Court of Appeal. Sirikwa also contends that the intended interested parties are raising a new cause of action before this court.

On Joinder as Interested Parties

23. Considering the above context and all arguments set therein, we find as follows. An applicant to be joined to the suit as an interested party has to satisfy this court that the applicant has met the legal requirements for joinder. The relevant law in that regard is rule 24(1) of the [Supreme Court Rules, 2020](#). The said rule provides as follows:
 24. Interested parties
 1. A person may, within seven days of filing a response in any proceedings, apply for leave to be joined as an interested party.
 2. An application under sub-rule (1) shall include—
 - a. a description of the interested party;



whose cause largely revolves around what all the interested parties seek to raise. As such, they will not be prejudiced in any way.

On filing cross-appeals and adducing new evidence

28. The 6th and 9th applicants seek orders for leave to file cross-appeals against the judgment of the appellate court. We note that they have not specified the grounds of contention and the nature of the relief that they from the court in this cross-appeals. We do not think that allowing these cross-appeals will serve the ends of justice.
29. The 6th and 9th applicants also seek orders for leave to adduce new evidence to challenge the appellate court's decision. We note that the applicants have not specified what additional evidence they intend to adduce. Further, we are of the view that these applications do not meet the laid down principles governing the admission of additional evidence before the appellate courts as espoused in this court's decisions in *Communications Commission of Kenya & 4 others v Royal Media Services Ltd & 7 others* [2014] eKLR, *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR and *Chris Munga N Bichage v Richard Nyagaka Tong'I, IEBC & others* [2015] eKLR.

On extension of time to file the interested parties' applications

30. Having disallowed the joinder of interested parties to the appeal, it is unnecessary to pronounce ourselves on this issue.

G. Application for joinder an amicus curiae

31. The 11th applicant, LSK, filed a notice of motion dated February 7, 2023 seeking leave to be admitted as an *amicus curiae*. The application is supported by the supporting affidavit of Oino Okemwa sworn on even date. LSK has also filed an amicus brief dated February 7, 2023. LSK avers that it will assist the court on the issues of legitimate expectation vis a vis the rule of law, the meaning of innocent purchaser for value without notice vis a vis the right to fair hearing, interpretation of article 50 of the *Constitution* on the right to fair hearing and interpretation of articles 40 and 65 of the *Constitution* vis a vis the doctrine of legitimate expectation. The LSK avers that no prejudice will be occasioned to any party if it is joined to the suit.
32. The *Supreme Court Rules, 2020* allow for the participation of friends of the court. Rule 19 provides that this court may on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the court. This court is supposed to consider the proven expertise of the person; independence and impartiality of the person; or the public interest. We are unconvinced that the LSK has the requisite expertise to aid the court in this matter, and from a perusal of the appeal, we do not see how the amicus brief is addressing point(s) of law not already addressed by the parties to the suit. As such, we are not inclined to admit the LSK as an *amicus curiae*.
33. Consequently, we make the following orders:
 - a. The notice of motion application dated December 6, 2022 filed by Ezekiel Kibet Mibei and Naftali Kiplimo Mibei is disallowed.
 - b. The notice of motion application dated December 30, 2022 filed by Solomon Estimoa Luvai and 624 other applicants is disallowed
 - c. The notice of motion application dated January 10, 2023 filed by Simon Macharia Maina & 48 others is disallowed.



- d. The notice of motion application dated January 11, 2023 filed by Mark Somoey & 13 others is disallowed.
- e. The notice of motion application dated January 13, 2023 filed by Kibwari PLC is disallowed
- f. The notice of motion application dated January 13, 2023 filed by John K. Sitenei & 9 others is disallowed.
- g. The notice of motion application dated February 17, 2023 filed by Charles Sang’anyi Nyameino & 26 others is disallowed.
- h. The notice of motion application dated January 12, 2023 filed by James Kipkerebulit Yatich & 438 other applicants is disallowed.
- i. The notice of motion application dated February 8, 2023 filed by the University of East Africa -Baraton is disallowed.
- j. The notice of motion application dated February 7, 2023 filed by the Law Society of Kenya is disallowed.
- k. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2023

.....

P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR,

SUPREME COURT OF KENYA

