



REPUBLIC OF KENYA



**KENYA LAW**

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**Nationwide Finance Co Ltd v Meck Industries & another; Mwangi  
(Proposed Interested Party) (Environment & Land Case 3231 of 1985)  
[2023] KEELC 16056 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16056 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 3231 OF 1985  
OA ANGOTE, J  
FEBRUARY 23, 2023**

**BETWEEN**

**NATIONWIDE FINANCE CO LTD ..... PLAINTIFF**

**AND**

**MECK INDUSTRIES ..... 1<sup>ST</sup> DEFENDANT**

**MICHAEL KIMANI ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**JOHN MATHARA MWANGI ..... PROPOSED INTERESTED PARTY**

**RULING**

1. Through the Notice of Motion dated May 27, 2022, the Proposed Interested Party sought the following orders:
  - a. That the Applicant John Mwangi Mathara be enjoined as an interested party in this suit.
  - b. That this Honourable court do issue orders extending the time requiring the applicant to obtain the relevant Land Control Board consent.
  - c. That this Honourable court be pleased to grant orders directing the Land Registrar at Nyandarua District Land Registry to withdraw the caution against LR No Nyandarua/ Karati/728 by George Gikubu Mbuthia.
  - d. That this Honourable court do grant orders directing the Land Registrar at Nyandarua District Land Registry to withdraw the caution against LR No Nyandarua/ Karati/728 by Nationwide Finance Company.



- e. That this Court be pleased to grant orders lifting the prohibitory orders issued by this Honourable court against LR No Nyandarua/ Karati/728.
  - f. That the costs of this application be in the cause.
2. The grounds of the application, as stated in the application and the Affidavit of John Mathara Mwangi sworn in support, are that the Applicant purchased the suit property parcel number Nyandarua/ Karati/728 for Kshs. 9,010,000 on January 28, 2022 through an auction sale pursuant to the orders of this court and that he was issued with a sale agreement and a certificate of sale by Regent Auctioneers auction.
3. It was deposed by the Applicant that his joinder as an Interested Party is necessary to protect his interest as the legal proprietor of the suit property; that upon conducting a search, he became aware of a caution by George Gikubu Mbuthia claiming purchaser's interest and a caution by the Plaintiff claiming charges interest and that there also exist prohibitory orders against the suit property encumbering the title.
4. It is the Applicant's case that the presence of these cautions and prohibitory orders have inhibited him from obtaining a Land Control Board consent as required by law, and that if the orders extending the six months duration to apply for the consent are not issued, the transaction will be declared void by operation of law on or before July 28, 2022.
5. George Gikubu Mbuthia, the Interested Party/Objector opposed the application vide a Replying Affidavit in which he deposed that the Application is incompetent and defective as there is no Notice of Appointment or Memorandum of Appearance filed by the firm of Thuku & Company Advocates to act on the Applicant's behalf contrary to Order 9 Rule 4 of the [Civil Procedure Rules 2010](#).
6. It was deposed by the Objector that Miss Munyiva obtained ex parte order dated June 27, 2022 through misrepresentation as she works for Manthi Masika & Company Advocates as at June 16, 2022 and not Thuku & Company Advocates and that Miss Munyiva filed the application herein using the firm of Thuku & Company Advocates which ceased to operate in 2016.
7. The Objector deposed that Miss Munyiva engaged in unethical and unprofessional conduct by acting as the Applicant's legal representative yet she attested the memorandum of sale between the Applicant and Regent Auctioneer on January 28, 2022 ; that the application for joinder offends Section 22 of the [Environment and Land Court Act](#) as read with Rule 9 of the [Advocates \(practice\) Rules 1966](#) and Rule 82 of the [Law Society of Kenya Code 2015](#) and that the firm of Hamilton Harrison and Matthews have also not filed a Notice of Appointment of Advocate and Memorandum of Appearance.
8. He deposed that Miss Munyiva has not presented evidence of performance of the auction sale contract such as payment of consideration, evidence of payment of a refundable bidding fee of Kshs. 1,000,000 and a receipt issued by Regent Auctioneer thus discrediting the credibility and integrity of the sale agreement.
9. According to the Objector, the certificate of sale is defective for want of performance; that the Decree dated March 7, 1988 was not discharged in light of noncompliance with the terms of sale, rendering the application for vesting orders unenforceable; that the defective memorandum of sale dated January 28, 2022 renders the application for vesting order incompetent and unenforceable and that obtaining the consent from the Land Control Board is unsustainable.



10. According to the Objector, the Applicant purchased an encumbered property; that it was incumbent on the purchaser to ascertain the status of the suit property before committing themselves and that the Applicant has no proprietary interest in the suit land.

### Submissions

11. The Applicant's counsel submitted that this court has unfettered discretion to enjoin a party in proceedings at any stage when they deem fit, in accordance with Order 1 Rule 10(2) of the *Civil Procedure Rules*. It was submitted that the Interested Party has satisfied the elements for joinder as set out in the cases of *Francis K. Muruatetu and Another vs Republic & 5 others* (2016) eKLR and *Meme vs Republic* [2004] 1 EA 124.
12. It was submitted that the Applicant is the legal proprietor of the suit property and has sought to be enjoined in the suit to enable him to safeguard his interests; that the Applicant should be enjoined to shed light on the issues about the objector and that any orders emanating from these proceedings in respect of the suit property will affect the applicant herein.
13. Counsel for the Objector submitted that the applicant's written submissions are improperly before the court as they were filed on August 19, 2022, which is 28 days outside the 14-day window set by this court and that the Applicant did not seek leave to file submissions out of time. They sought to rely on the case of *Nicholas Kiproo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.
14. Counsel submitted that the firm of Thuku & Company Advocates has no legal capacity to represent the Applicant and has no right of audience before this court as they are not recognized by law and have not been instructed by the Applicant and that Miss Munyiva is conflicted as she attested the sale agreement as a witness and yet she is representing the Applicant. He relied on the case of *Jacob Muriungi Mwenda vs Mbaya M'mwendwa* [2004] eKLR.
15. Counsel for the Objector further submitted that the Applicant has no stake in the matter to be enjoined as an interested party because his written submissions are unsupported by evidence of identifiable interest and that the Applicant is well represented by the Plaintiff/ Judgement Creditor in its application dated April 25, 2022.

### Analysis and determination

16. In this matter, the Intended Interested Party has averred that he has a personal stake in the subject matter, having purchased the suit property vide an auction pursuant to this court's orders issued on January 28, 2022.
17. He submitted that it is necessary for him to be enjoined in this suit in order to protect his interest in the suit property. The Applicant attached on his Affidavit a copy of the Sale Agreement, the Certificate of Sale issued to him by Regent auctioneers and the notice of public auction dated December 20, 2021.
18. The Objector/Interested Party, George Gikubu Mbuthia, opposed the application and challenged the validity of the application on grounds that the Applicant's Advocate failed to file a Notice of Appointment or Memorandum of Appearance; that the advocate fraudulently used details of a non-existent law firm and that the advocate had no capacity to receive instructions from the Applicant.
19. It was deponed that the Applicant failed to provide evidence of performance of the auction sale contract such as payment of consideration, evidence of payment of a refundable bidding fee of Kshs.



- 1,000,000 and a receipt issued by the auctioneer and that the Plaintiff's submissions were filed out of time.
20. Before proceeding to resolving the issue herein, this court must point out that parties are bound by their pleadings and as aptly stated by the Court of Appeal in *Daniel Toroitich Arap Moi & Another vs Mwangi Stephen Murithi & Another* (2014) eKLR, submissions cannot take the place of evidence.
  21. On the issue of the Applicant's submissions being filed out of time, a review of the court's record indicates that on June 29, 2022, the court directed the Applicant to file submissions within 14 days, that is by July 13, 2022. The Applicant filed their submissions on August 19, 2022, more than a month later. The Objector has urged that following expiry of the timelines, there are no written submissions on record and that the application for joinder has not been prosecuted.
  22. The place of submissions was considered by the Court of Appeal in *Daniel Toroitich Arap Moi & Another vs Mwangi Stephen Murithi & Another* (2014) eKLR to be "marketing language" with each side endeavouring to convince the court that its case is the better one. The Court of Appeal in *Airtel Networks Kenya Limited vs Nyutu Agrovot Limited* [2021] eKLR also addressed the nature of submissions at the appellate court:

"written submissions are neither obligatory nor a prerequisite to the hearing and determination of an appeal under the Act and the Rules. Furthermore, it is acceptable, as a matter of practice in this Court, for a party to elect to make oral submissions in person or by counsel at the hearing. On the other hand, written submissions are desirable as a practical option in cases where parties do not wish to appear either in person or by counsel. Accordingly, we find as a fact and hold that the delay on the respondent's part in filing and serving their written submissions did not in any way prejudice the expeditious hearing and determination of the appeal."
  23. Guided by this decision, this court does not find that any prejudice was occasioned to the Objector by the Applicant's late filing of his submissions. This is more so considering that the Objector had the opportunity to file their submissions as well. This court finds that the submissions filed by both parties are properly on the record. In any case, even if this court was to find that the submissions are improperly on the record, this would not render the application unprosecuted.
  24. The Objector has raised several issues including the failure to file a Notice of Appointment or Memorandum of Appearance by the Applicant's advocate and that firm of Thuku & Company Advocates where the Applicant's advocate purports to work does not exist. The Objector has argued that the impact of this is that the application and supporting affidavit are improperly before the court.
  25. In the case of *Iway Africa Limited vs Infonet Africa Limited & another* [2019] eKLR, the court considered whether a Notice of Appointment of an advocate is necessary where a party has made a garnishee application. The court considered the requirement of Order 9 Rule 7 of the *Civil Procedure Rules* as follows:

"The above order is clear that it is only in a situation where a party after suing or defending a suit in person, appoints an Advocate to act in the case or matter on his behalf, he/she shall give notice of appointment of an advocate or notice of change of an advocate as the case may be. This is because there are situations in which Notice of Appointment of an Advocate is not necessary or required such as where an Advocate files a plaint for the plaintiff; petition; originating summons; or filing memorandum of appearance and defence. In view of this, I find order 9 rule 1 of Civil Procedure Rules having no express provision or having no



specific provision requiring a filing of a document entitled "Notice of Appointment of an Advocate" there is no basis for requiring a party, such as the garnishee in the instant case, to file a document that is not mandatorily required to be filed before taking part in the already filed proceedings."

26. On the basis of the above decision, it is the finding of this court that there is no legal requirement for an intended interested party to file a Notice of Appointment of an Advocate. Should the Objector wish to address the issue of Miss Munyiva's employment, he should file an application and include a prayer for determination of Miss Munyiva's employment status or for non-compliance with ethical standards.

27. This court shall now address the issue of joinder. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, Legal Notice No. 117 of 2013 defines an interested party as:

"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation."

28. An Interested Party is also defined by the Black's Law Dictionary, 9<sup>th</sup> edition as:

"A party who has a recognizable stake (and therefore standing) in the matter"

29. The Supreme Court of Kenya in the case of *Francis K. Muruatetu and Another vs Republic & 5 Others* (2016) eKLR articulated that enjoinder of a party is at the discretion of the court and is subject to certain elements which it articulated as follows:

"Enjoinder is not a 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:

- 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 participation, 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."

30. The Supreme Court also held that:

"An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court."

31. This court is guided by the principles stated above. The substratum of this suit is that the Plaintiff sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein and obtained a decree against the Defendants. The Plaintiff was



granted a prohibitory order and the suit property, which belonged to the 2<sup>nd</sup> Defendant was attached. The proceedings before this court are in regard to the execution of the said decree.

32. The Applicant has asserted that he purchased the property during an auction sale which was conducted under the order of this court. The Applicant's interest in the suit property is clearly identifiable. He has presented in evidence a sale agreement and a certificate of sale issued to him.

33. Whereas the Objector has asserted that the Applicant has failed to prove that he duly purchased the suit property, Order 22 Rule 79 of the Civil Procedure Rules which provides as follows:

“Where a sale of immovable property has become absolute, the court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser, and such certificate shall bear the date and the day on which the sale became absolute.”

34. The issuance of the certificate of sale is thus conclusive proof that the Applicant is the legal owner of the suit land. The Applicant consequently has a stake in the subject matter in this suit and will be prejudiced if he is not enjoined to protect his interests.

35. Based on the foregoing, the application dated May 27, 2022 is allowed in the following terms:

- a. The Applicant, John Mwangi Mathara, be enjoined as an interested party in this suit.
- b. The costs to be in the cause.

**Dated, signed and delivered virtually in Nairobi this 23<sup>rd</sup> day of February, 2023.**

**O. A. Angote**

**Judge**

**In the presence of;**

Mr. Mwihuri for Plaintiff

Ms Munyiva h/b for Thuku for proposed Interested Party

Court Assistant - June

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ELC NO. 3231 OF 1985

RULING

