



**Kheri & 5 others v Land Registrar Kwale (Miscellaneous Civil Application  
E005 of 2022) [2023] KEELC 746 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 746 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
MISCELLANEOUS CIVIL APPLICATION E005 OF 2022  
AE DENA, J  
FEBRUARY 13, 2023**

**BETWEEN**

**JUMA RAMA KHERI ..... 1<sup>ST</sup> APPLICANT  
JUMAA SELEMAN MWAKUHEZA ..... 2<sup>ND</sup> APPLICANT  
OMAR RASHID CHIRIZO ..... 3<sup>RD</sup> APPLICANT  
MOHAMMED RASHID NYERE ..... 4<sup>TH</sup> APPLICANT  
JUMA OMAR NYERE ..... 5<sup>TH</sup> APPLICANT  
JUMA ALI CHIGUNIA ..... 6<sup>TH</sup> APPLICANT**

**AND**

**LAND REGISTRAR KWALE ..... RESPONDENT**

**RULING**

**Background**

- 1 These proceedings were commenced by way of notice of motion dated April 12, 2022 by the applicants who were sued as 1-5<sup>th</sup> defendants in Kwale High Court ELC No 33 of 2021 (formerly Mombasa High Court civil suit No 48 of 2012) by Hathaway Limited. The subject matter in the said suit were parcels known as Kwale/Galu Kinondo 41,42,43,44 and 45 (suit properties). The notice of motion was filed against the land registrar Kwale and sought to issue certificates of title in respect the said parcels and the titles to vest and be registered in the names of Juma Rama Kheri, Jumaa Seleman Mwakuheza, Omar Rashid Chirizo, Mohammed Rashid Nyere, Juma Omar Nyere and Juma Ali Chigunia the defendants in the said suit.
- 2 It is noteworthy that ELC No 33 of 2021 was dismissed by this court for want of prosecution on December 2, 2012. According to the said defendants it was just and fair that the matter having been



concluded that the suit properties be registered in the names of the defendants therein who were alleged to be the registered owners. The notice of motion was canvassed by way of written submissions and was pending ruling on October 10, 2022. However, before the ruling was delivered the present application the subject of this ruling was filed as here below.

### **The Present Application**

- 3 The firm of Nchogu, Omwanza & Nyasimi advocates filed the present motion dated September 23, 2022 on behalf of Hathaway Limited who as stated earlier was the plaintiff in ELC No 33 of 2021. To distinguish the applicants in view of the two applications, I will for purposes of the present application refer to the applicant as Hathaway Limited. The application is made pursuant to the provisions of articles 27[1]40,50[1],159[2] [b] of the Constitution, sections 1A,1B and 3A of the Civil Procedure Act, order 10 rule 2, order 51 rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
- 4 The application is premised upon grounds listed on its face and the supporting affidavit of Hooman Ehsani a Director of Hathaway Limited sworn on September 23, 2022. It is averred that Hathaway Limited is the registered absolute owner of the suit properties and has been paying land rates for many years for the same. That well aware of this the respondents filed the application dated April 12, 2022 whose particulars and orders sought are already highlighted in the background to this ruling. Hathaway Limited accuse the respondents of failing to disclose this information to the court in the said application. That Hathaway Limited was not enjoined in the suit herein and neither were they served with the said application. It is further deponed that the actions indicate an attempt to mislead the court by denying Hathaway Limited a chance to be heard. It is averred that Hathaway Limited found out about the present proceedings from the Kwale lands registry after seeking to confirm the status of the suit properties.
- 5 According Hathaway Limited, the judgement/ruling herein would be a breach of their right to equal protection and treatment before the law and is an attempt to deprive them off their property. That unless the court grants the orders sought the they stand to suffer great prejudice and loss of its property. Hathaway Limited therefore filed the present application seeking the following orders; -
  1. Spent
  2. That pending the hearing and determination of this application interparties, judgement and/or ruling by the 1<sup>st</sup> to 6<sup>th</sup> respondents application dated April 12, 2022 be arrested
  3. That pending the hearing and determination of this application, judgement and/or ruling in this matter slated for delivery on October 10, 2022 or on a date so scheduled by the honourable court be and is hereby arrested and the consequently vacated
  4. That the applicant herewith be and is hereby joined as an interested party and allowed to file a replying affidavit in the matter within 14 days of the orders issued by the court
  5. That on the filing of the replying affidavit and or any substantive response by the applicant herein, the application by the 1<sup>st</sup> to 6<sup>th</sup> respondents dated April 12, 2022 be re heard afresh and directions issued as the court may please
  6. That the honourable court be pleased to issue any orders it may deem fit in the interest of justice in this matter.
  7. That the costs be provided for.



- 6 The application was opposed through the affidavit of the 1<sup>st</sup> respondent Juma Rama Heri sworn on October 13, 2022 on behalf of the rest of the respondents. It is averred that the applicants suit had sued the respondents for encroaching on the suit properties, that the said suit was dismissed with costs and to date no appeal has been filed against the said orders. That the court cannot sit on its own appeal. It is further averred that the matter is res judicata having been determined in the previous suit.
- 7 On October 12, 2022 Mr Makuto state counsel appearing for the land registrar the 7<sup>th</sup> respondent in the present application informed this court he does not oppose the application. He indicated that he had in fact raised the issue of the non-joinder of the registered owner of the property to the present proceeding/suit.

### **Submissions**

- 8 The application was disposed of by way of written submissions which parties filed and exchanged except the 7<sup>th</sup> respondent.

### **Applicants /Hathaway Limited Submissions**

- 9 Hathaway Limited submissions are dated October 28, 2022 and filed before court on even date. Counsel submitted on two issues joinder and right to be heard. Citing order 10 rule 2 of the *Civil Procedure Rules 2010* on joinder it is submitted that Hathaway Limited is the registered absolute proprietor of the suit property the subject matter of the proceedings and were entitled to be joined in the proceedings. That the 1<sup>st</sup> to 6<sup>th</sup> respondents failed to disclose Hathaway Limited interests in the suit property in an attempt to mislead the court and deprive the applicant of ownership of the suit land. Reliance was placed in the case of *JMK vMWM & another* [2015] eKLR where the court held that all persons necessary for a complete adjudication of a suit should be made parties. That based on the finding in the mentioned authority, the applicant is a necessary party in this suit. Several other authorities were cited to buttress this point and which I have read.
- 10 On the right to be heard, it is submitted that the principles of natural justice dictate that every person has the right to a fair hearing before any decision is made that will negatively affect them. That the same is enshrined under article 47 of the *Constitution*. It is submitted that the applicant has a constitutional right to be heard. Reference is made to the holding in *Maishabora Limited v Land Registrar Kilifi County & 2 others* [2020] eKLR. It is submitted that it is common ground that the Hathaway Limited holds titles that have not been challenged or cancelled by a court of law. That for that reason it has a sacrosanct right to be heard. The court is urged to allow the application as prayed.

### **Respondents Submissions**

- 11 The respondent's submissions are dated November 24, 2022 and filed before court on November 25, 2022. It is stated that the intended respondent to the main proceedings has misapprehended the law in seeking to be joined as a party in this matter. That as per the provisions of order 1 rule 10[2] a party is enjoined in a suit to enable the court to effectually and completely adjudicate over a matter. In this case the respondents are keen on enforcing a court decree. For that reason, the suit is not where rights of parties are to be determined.
- 12 It is further submitted that the thrust of this matter is the court decree dated December 2, 2021 and the court is thus functus officio over the suit. That it is not denied that Hathaway is the owner of the suit property, the respondents however state that the applicant initially instituted a case against the respondent claiming title of the land and the same was dismissed with costs to the respondents. The court is urged to dismiss the application and enter judgement as earlier scheduled.



## Determination

- 13 I have already given the background to the contest between the parties herein starting with the decree issued under ELC No 33 of 2021 and the gist of the present suit commenced by way of notice of motion. My understanding of the present application is that Hathaway the applicant simply wants to be joined to the present proceedings as an interested party so that they can participate or reply to the notice of motion dated April 12, 2022 which affects it as the registered proprietor of the suit properties which are the subject of the said application. This is what this court will pronounce itself on to avoid getting into the merits of the said application.
- 14 The court has been moved under the provisions of order 10 rule 2 of the Civil Procedure Rules. I think there is a typographical error because order 10 rule 2 deals with affidavit of service upon non-appearance. My suspicions are proved correct when in paragraph 5 of Hathaway Limited submissions it is the contents of order 1 rule 2 that are quoted verbatim albeit being referred to as provisions of order 10 rule 1. This is an error on the face of the record and it shall be deemed to be dully corrected appropriately under the powers conferred on this court by section 100 of the Civil Procedure Act. Order 1 rule 10 (2) of the Civil Procedure Rules provides for a party to be enjoined in a suit as a necessary party as follows:
- The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
- 15 Hathaway Limited seeks to be enjoined as a necessary/interested party in the suit and not as a defendant. From the above provisions there are two requirements which are disjunctive, that the applicant ought to have been joined either as a defendant or plaintiff or that the participation of that party in the suit is necessary to enable the court to effectually make a full determination of all the questions involved in the dispute. The provisions of order 1 rule 10 were elaborated in Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matagaro & Ezekiel Misango Mutisya (2014) eKLR, as follows; -
- A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.” (emphasis is mine).
- 16 In the case of Meme v Republic [2004]1 124, the principles of the law on joinder as an interested party were cited as hereunder; -
- a. joinder of a person because his presence will result in the complete settlement of all questions involved in the proceedings
  - b. joinder to provide a protection of a party who would otherwise be adversely affected in law
  - c. joinder to prevent a likely course of proliferated litigation.



- 17 It is noted that prayer 2 of the notice of motion application dated April 12, 2022 seeks that the land registrar Kwale issues certificates of title to the suit properties herein to the 1<sup>st</sup> to 6<sup>th</sup> respondents. The respondents further seek that the said titles are registered as stated in paragraph 3 of the motion (see paragraph 1 of this ruling). It is not disputed by the parties herein that the suit properties are registered in the name of Hathaway Limited. The orders sought clearly affect them as registered proprietors. This makes them a necessary party to the suit. It is understandable that the 1<sup>st</sup> – 6<sup>th</sup> respondents feel that Hathaway should not be given another opportunity to defend its ownership when it failed to prosecute ELC No 33 of 2021 which was dismissed for want of prosecution. In my view this argument is not for this application but for the application dated April 12, 2022 once it is re-opened if at all. It is important to emphasize that in this application parties should not and ought not get into the merits of ELC No 33 of 2021 or even purport to argue the application dated April 12, 2022.
- 18 I think enough has been said to demonstrate why Hathaway Limited is a necessary party in this suit and why it should be enjoined as prayed.
- 19 The upshot of the above is that I find the application dated September 23, 2022 has merit and the following orders shall issue to dispose of the same
- I. That the intended judgement and/or ruling by the 1<sup>st</sup> to 6<sup>th</sup> respondents application dated April 12, 2022 be arrested
  - II. That the applicant in the application dated September 23, 2022 be and is hereby joined as an interested party and allowed to file a replying affidavit in the matter within 14 days of the date of this order.
  - III. That upon service as stated in ii) above the respondent shall be at liberty to respond thereto within 7 days of service.
  - IV. That the application by the 1<sup>st</sup> to 6<sup>th</sup> respondents dated April 12, 2022 be heard afresh.
  - V. That the notice of motion application dated April 12, 2022 is set for further directions on its hearing and disposal on March 14, 2023.
  - VI. Costs shall be in the cause.

Orders accordingly

**DELIVERED AND DATED AT KWALE THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2023**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No Appearance for Applicants.

Ms. Maiga holding the brief of Mr. Matheka for the 1-6<sup>th</sup> Respondents

Mr. Makuto for the 7<sup>th</sup> Respondent

Mr. Disiii- Court Assistant.

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