



**Al Muntanda Al-Islam Trust v Mohamed Osman Igal & 6 others; Makkah Estate Co. Ltd
(Interested Party) (Cause E214 of 2021) [2022] KEELC 3706 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3706 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CAUSE E214 OF 2021
OA ANGOTE, J
MAY 5, 2022**

BETWEEN

AL MUNTANDA AL-ISLAM TRUST PLAINTIFF

AND

MOHAMED OSMAN IGAL 1ST DEFENDANT

ABDULRAHMAN OMAR AHMED 2ND DEFENDANT

MOHAMUD SALAT ABDULE 3RD DEFENDANT

BIN HANBAL TRUST 4TH DEFENDANT

NAIROBI METROPOLITAN SERVICES 5TH DEFENDANT

NATIONAL CONSTRUCTION AUTHORITY 6TH DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 7TH
DEFENDANT**

AND

MAKKAH ESTATE CO. LTD INTERESTED PARTY

RULING

DIVISION - BACKGROUND

1. In the Notice of Motion application dated June 25, 2021, the Intended Interested Party herein seeks for the following orders:
 - a) That after hearing of this Application, this Honourable Court be pleased to enjoin the Intended Interested Party as a party to this suit.



- b) That the costs be in the cause.
2. The Application is premised on the grounds on the face of the Motion and is supported by the Affidavit of Billow Adan Kerrow, the Chairperson of the Intended Interested Party/Applicant. The Chairperson of the Intended Interested Party/Applicant deponed that the leases in respect of L R No 209/13285/1 and L R No 209/13285/2 (the suit properties) were issued to the Plaintiff by the Intendent Interested Party.
 3. It was deponed by the Chairperson of the Intended Interested Party /Applicant that on December 3, 2020, the Plaintiff was de-registered by the Government of Kenya vide Gazette Notice No 15883 and the properties subsequently reverted to the Intended Interested Party /Applicant as Head lessor and that on May 17, 2021, the Intended Interested Party/Applicant terminated the Lease Agreement between itself and the Plaintiff.
 4. The Intended Interested Party's Chairman deponed that on June 15, 2021, the Plaintiff wrote to the Applicants' counsel seeking to resolve the issue of termination of the Lease by Arbitration, to which counsel responded that there was no valid lease, the same having terminated by operation of law and that the Intended Interested Party/Applicant, as the owner of the suit property, has consented to the construction of the Mosques on the suit property by Ahmed Bin Hanbal Trust.
 5. It was deponed that the construction of the Mosque on the suit properties is in its completion stages but the Plaintiff keeps interrupting the construction through filing of numerous cases; that the Plaintiff is guilty of material non-disclosure with regards to the termination of the lease; that the Applicant risks losing its investments and that the interests of justice dictate that the Applicant is allowed to participate in the suit.
 6. In response to the application, the Plaintiff filed Grounds of Opposition and a Replying Affidavit sworn by its County Director, Mr Muadh Mohamed Amman both dated September 8, 2021. Vide both the Grounds of Opposition and the Replying Affidavit, it was contended that this court lacks jurisdiction to entertain the application due to the fact that the sub-lease dated March 25, 2003 in respect of the suit properties provides that any dispute with respect to the lease between the Plaintiff and the Applicant shall be subjected to Arbitration.
 7. According to the Plaintiff, the Intended Interested Party cannot plead in any suit as it is not a proper party to the suit and subsequently its joinder is of no probative value; that the Applicant is the cause of confusion and the fraud perpetrated by the 1st-4th Defendants and may participate as a witness and that it is an abuse of the court process for the Applicant to seek to be joined in the suit while they have refused to submit to the Arbitration process.
 8. The Intended Interested Party/Applicant's advocate submitted that this court is duly vested with jurisdiction to entertain the application pursuant to Order 1 Rule 10 (2) of the *Civil Procedure Rules*; that the Applicant is a necessary party as defined in the case of *Amon vs Raphael Tuck & Sons Ltd (1956) 1 ALL ER 273*; that as the registered owner of the suit property, the Applicant has a direct interest in the case and that the Intended Interested Party is likely to be adversely affected by the outcome of the case.
 9. Reliance in this regard was placed on the case of *Jan Bolden Nielsen vs Herman Philipus Steyn & 2 Others* [2012] eKLR; that this suit can only be effectively resolved with the participation of the Applicant and that the Plaintiff has not justified the reason for instituting the suit against the Applicant's Directors to the exclusion of the Applicant which is a distinct legal entity from its Directors and shareholders and should not be sued as such.



10. On whether there exists an arbitration clause limiting the participation of the Applicant in these proceedings, it was submitted that following the de-registration of the Plaintiff, the sub-lease dated March 25, 2003 in respect of the suit properties was frustrated and that the Plaintiff has not filed a Replying Affidavit and subsequently the Applicants' averments remain un-rebutted. Reliance in this regard was placed on the case of *Mustano Rocco vs Aniello Sterelli* [2019]eKLR.
11. The Plaintiff's advocate submitted that the letter dated June 15, 2021 by the firm of M/S Ali & Company Advocates on behalf of the Plaintiff shows the machinations by the Applicant to have the Plaintiff de-registered; that clause 4.2 of the registered sub-leases provides that disputes regarding the lease should be subjected to arbitration and subsequently this court has no jurisdiction to entertain the Application and that Section 6 of the *Arbitration Act* is inapplicable in this case as the Applicant is not yet a party to the suit.
12. Counsel for the Plaintiff deponed that courts cannot re-write agreements between parties and that where the parties agree to refer disputes to Arbitration, the court will abide by such an agreement. Reliance in this regard was placed on the cases of *Wringles Company (East Africa) vs Attorney General & 3 others* [2013]eKLR, *Kenya Airports Parking Services & Another vs Municipal Council of Mombasa* (2010) eKLR and *County Government of Kirinyaga vs African Banking Corporation Ltd*[2020]eKLR.
13. Counsel submitted that as the Applicant is not yet a party to these proceedings, no application is contemplated under Section 6 of the *Arbitration Act* and that their Application should be summarily dismissed.

Analysis & Determination

14. Having considered the Motion, the Affidavits and the submissions by the parties, the issues that arise for determination are
 - i. Whether the Court has jurisdiction to entertain this Application?
 - ii. Whether the Applicant should be enjoined as an Interested Party in the proceedings herein?
15. It is trite that jurisdiction is everything and a question on the court's jurisdiction being one that is dispositive in nature must be determined at the first instance. As expressed by Nyarangi J in the Court of Appeal case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* (1989) KLR 1;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
16. The Plaintiff asserts that this court lacks jurisdiction to entertain this application. This objection is premised on the premise that the suit properties herein are subject to a Lease Agreement between the Plaintiff and the Applicant, which lease provides that in case of a dispute, the matter should be referred to Arbitration. On the other hand, the Applicant maintains that there is no lease between the parties, the same having been extinguished by operation of law when the Plaintiff was de-registered as an NGO.
17. That the court has powers to join parties to a suit is not in doubt. Section 3A of the *Civil Procedure Act* recognizes the inherent jurisdiction of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, while Order 1 Rule 10 (2) of the Civil Procedure Rules specifically gives this court powers to join in this suit any party whose presence before the court may be necessary to enable the court adjudicate upon and settle all questions in the suit.



18. In view of the foregoing, the question before this court is whether, as submitted by the Plaintiff, this court's jurisdiction aforesaid is ousted by the existence of an arbitration clause in the Lease Agreement which provides that any dispute between the Applicant and the Intended Interested Party with respect to the lease be referred to Arbitration.
19. By way of brief background, the Plaintiff instituted this suit against the Defendants seeking, inter-alia, for a declaration that it is the legal proprietor of the suit properties and permanent injunctive orders against the Defendants. It is the Plaintiffs' case that the Defendants are interfering with its possession and ownership of the suit properties. The Applicant contends that contrary to the Plaintiff's assertion, it is the duly registered owner of the suit properties and only allowed the Defendants permission to utilize the suit properties.
20. It appears that the Plaintiff's proprietorship of the suit property arises from the lease granted to it by the Applicant. It also appears that the two parties are at odds with respect to whether or not the lease was terminated and/or extinguished by operation of law. However, the question of whether or not the lease exists and the consequences thereof is not a question for determination before the court at this juncture.
21. However, before the court can determine whether the Plaintiff owns the suit property as a head lessor or not, it cannot be said that the Arbitration clause therein ousts this court's jurisdiction to entertain the present Application. That being the case, it is the finding of this court that it has jurisdiction to entertain the current application.
22. The Applicant herein is seeking to be joined in this suit as an Interested Party. Whereas there is no explicit provision for the inclusion of an Interested Party to a suit, Order 1 Rule 10 of the Civil Procedure Rules gives the court discretion to join parties in a suit whose presence is necessary for a complete adjudication of all questions. Order 1 Rule 10 provides 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.”
23. *Black's Law Dictionary* defines an Interested Party as;

“a party who has a recognizable stake (and therefore standing) in the matter.”
24. The Supreme Court in *Trusted Society of Human Rights Alliance vs Mumo Matemu* (2015) eKLR in defining an Interested Party stated thus;

“...an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”



25. In the case of *Francis Kariuki Muruatetu & Another vs Republic & 5 Others* [2016] eKLR, the Supreme Court set out the principles applicable in considering the question of whether a person qualifies to be joined as an Interested Party as follows:

“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:

- i. 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:
- iii. 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.
- iv. 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.
- v. 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.

26. Similarly, the court in *Skov Estate Limited & 5 others vs Agricultural Development Corporation & another* [2015] eKLR persuasively stated thus;

“In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.

In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.”



27. The court will be guided by the foregoing considerations in determining whether the Applicant satisfies the criteria for joinder as an Interested Party in these proceedings.
28. The dispute herein involves the ownership of the suit properties which the Plaintiff asserts ownership over. The Applicant equally lays claim to the suit properties by virtue of being the head lessor. The Applicant attached on its Chairman's Affidavit the Certificate of Title for the property known as L R 209/13285.
29. The Applicant also annexed on its Affidavit the Lease Agreements between itself and the Plaintiff with respect to the suit properties herein being L R 209/13285/1 and L R 209/13285/2 which emanated from L R 209/13285. In support of its claim of ownership of the suit properties, the Plaintiff has relied on the Lease Agreement between itself and the Applicant.
30. It is therefore apparent that a determination as to who between the Plaintiff and the Applicant owns the suit property must of necessity involve interrogating the relationship between the Plaintiff and the Applicant with respect to the property.
31. Further, it has been alleged that the 1st to the 3rd Defendants are agents of the Applicant and have been sued in relation to actions done for and on behalf and/or with the authority of the Applicant. That being the case, no conclusive determination can be made with respect to the proprietorship of the suit properties in the absence of the Applicant who seems to have a lawful stake in the property.
32. Any determination of the suit without the involvement of the Applicant has the potential of dispossessing the Applicant of its title contrary to the guarantee to own property under Article 40 of the Constitution and the rights of a registered proprietor under Section 26 (1) of the Land Registration Act, 2012.
33. Contrary to the Plaintiff's assertions, an Interested Party is not precluded from adducing evidence before the court. An Interested Party is only prohibited from framing new issues or introducing new causes of action in a suit. In the *Francis Kariuki Muruatetu & Another vs Republic & 5 Others* [2016]eKLR, the Supreme Court held as follows:

“Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. 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.”
34. The ownership of the suit properties herein is a question for determination before this Court. The Applicant as an Interested Party is well within its rights to adduce evidence to aid the court in determining this question.
35. In conclusion, the court is convinced that the Applicant is a necessary party to this suit. Consequently, the court finds that the application dated June 25, 2021 is merited and the same is allowed in the following terms:
 - a. The Applicant, Makkah Estate Co Limited, be and is hereby joined in this suit as an Interested Party.



b. The costs of this Application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF MAY, 2022

O A Angote

Judge

In the presence of;

Ms Murangiri for Mr Mbogo for the Plaintiff

Mr Cohen for the 1st, 2nd and 3rd Defendants

Mr Alosa for Intended Interested Party

Court Assistant – Caroline Kajuju

