



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Ibrahim, Njoki, Lenaola, Ouko, SCJJ)

PETITION NO. E009 OF 2024

— BETWEEN —

FREEDOM LIMITED.....APPELLANT

-AND-

OMAR AWADH MBARAK.....RESPONDENT

-AND-

**HON. ATTORNEY GENERAL on behalf of CABINET SECRETARY,
MINISTRY OF LANDS, PUBLIC WORKS, HOUSING AND URBAN
DEVELOPMENT, CHIEF LAND REGISTRAR, DIRECTOR OF SURVEY,
DIRECTOR, LAND
ADMINISTRATION.....PROPOSED INTERESTED PARTY/APPLICANT**

(Being an application for joinder as an interested party)

Representation:

Anjarwalla & Khanna LLP for the Appellant

Muturi Gakuo & Kibara & Co. Advocates for the Respondent

Attorney General for the Proposed Interested Party

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 20th May 2024, and filed on 24th May 2024 by the Proposed Interested Party (the Applicant) pursuant to Section 24 of the Supreme Court Act 2011, Rules 3(1), (2), (4) and (5), 24 and 31 of the Supreme Court Rules 2020, and Direction 55(a) of the Supreme Court

(General) Practice Directions 2020; seeking *leave for admission as an interested party; thereafter, an opportunity to file a response and submissions to the petition upon service; and costs incidental to the application be provided for; and*

[2] UPON CONSIDERING the grounds on the face of the application, and the supporting affidavit sworn by *David Nyandoro Nyambaso*, the Chief Land Registrar, on 14th May 2024, to the effect that the property awarded by the Court of Appeal in ***Omar Awadh Mbarak vs. Freedom Limited***, Mombasa Civil Appeal No. E028 of 2022 no longer exists; that the applicant was not a party to the proceedings both in the Environment and Land Court or before the Court of Appeal and only became aware of the dispute recently; that though the Court of Appeal expressed significant doubts over the process leading up to the appellant's acquisition of the suit property, and found several unresolved questions regarding the authenticity of the ownership documents presented by both parties, it nonetheless failed to invoke Rule 31 of the Court of Appeal Rules 2022 in order to resolve the lacuna by asking for additional evidence; that the Court of Appeal instead invoked the uncodified doctrine of *seisin* to award 973 acres of Plot No. 287/3, Section V, mainland to the Respondent above constitutional and statutory provisions; that as the Chief Land Registrar, the applicant is mandated to safeguard the integrity of the certificates of title issued by his registries; that according to their records, the person whom the Court of Appeal has issued orders in favour of has never been the registered proprietor and it is not clear how his interest accrued; and that had the Chief Land Registrar been a party to the proceedings he would have provided information as to the status of the property, and the court may have reached a different determination; and

[3] UPON FURTHER considering the applicant's supplementary affidavit sworn by *Wilfred Muchae Kabue*, the Assistant Director of Survey with the Ministry of Public Works, Housing and Urban Development, on 6th June 2024 wherein the applicant reiterates its grounds in support of the application and submits that it has met the criteria for a joinder application of an interested party as enunciated

in the case of *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others*, SC Petition No. 12 of 2013; [2014] eKLR; and

[4] BEARING IN MIND that the appellant in his replying affidavit sworn by *Harji Govind Ruda* on 30th May 2024, has expressed support for the application of joinder of the applicant as an interested party; and

[5] NOTING that the respondent, on the other hand by a replying affidavit sworn by *Omar Awadh Mbarak* on 29th May 2024 and submissions dated 29th May 2024 is opposed to the Motion on the grounds that the affidavit supporting the application is fatally defective and incompetent as the deponent, *David Nyandoro* who has described himself as the Chief Land Registrar was not the Chief Land Registrar on account of a judgment delivered on 24th May 2024 in *Nairobi ELRC No. E218 of 2023* consolidated with *Petition No. E217 of 2023* which revoked his purported appointment; that the applicant was all along aware of the existence of the land dispute between the parties having been a party to *Mombasa High Court Constitutional Petition No. 42 of 2019* and *Mombasa Chief Magistrate Court Criminal Case No. 1278 of 2017*; that the applicant does not meet the well-settled criteria for joinder as an interested party neither has the applicant demonstrated that its concerns will not be well articulated on the basis of what has been presented to the Court or the prejudice the applicant stands to suffer if the joinder application is not granted; and

[6] Having considered the application, responses, and submissions before us, WE NOW OPINE as follows:

- i.** Rule 24 of the Supreme Court Rules, 2020 provides for the joinder of an interested party in the following manner:

“(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;

(b) a depiction of such prejudice as the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the interested party, their relevance to the proceedings, and their departures from the standpoint of the parties.”

ii. These provisions have been previously considered by the Court and there is a long line of the Court’s pronouncements on its power to admit an interested party. For instance, in ***Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others***, SC Petition No. 12 of 2013; [2014] eKLR and in ***Francis Kariuki Muruatetu & Another vs. Republic & 5 others***, Petition 15 as consolidated with 16 of 2013; [2016] eKLR, the Court outlined the elements that must be satisfied for a party seeking to be joined in proceedings as an interested party to succeed.

iii. Those elements may be summarized as follows;

a) since the joinder of a party to proceedings before this Court is not as of right, but at the discretion of the Court, the applicant must lay sufficient grounds to qualify for the exercise of that discretion;

b) any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the Court. The primary impact is on the parties that first moved the Court;

c) whether one is joined as an interested party, *amicus*, or intervener 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;

d) one of the principal considerations for admission of an interested party is that such a party must demonstrate that he/she has an identifiable personal

stake or legal interest in the matter before the Court. That stake or interest cannot take the form of an introduction to an altogether new issue;

- e) the applicant must demonstrate the nature of prejudice he/she stands to suffer in case of non-joinder; and
 - f) lastly, the applicant must demonstrate the relevance of his or her case and show that it is not merely a replication of what the other parties will be presenting before the Court.
- iv. The question this application seeks to answer is, in what way will the applicant be affected or prejudiced by the decision of the Court when it is finally made either way? Or put differently, will the applicant's legal interest or personal stake suffer if they are not permitted to personally articulate and champion them in the proceedings? Or how different will the applicant's intended submissions before this Court be from those the appellant will be making?
- v. From inception in 2015 following the institution of Constitutional Petition No. 58 of 2015 (***Freedom Limited vs. The Chief Land Registrar & 2 Others***) the Chief Land Registrar and the County Land Registrar, Mombasa County and the Attorney General were parties. Similarly in ***Mombasa High Court Constitutional Petition No.42 of 2019*** instituted by the appellant, the Director of Survey, the Director of Criminal Investigations Land Fraud Unit, and the Chief Land Registrar were all sued.
- vi. In addition to the two cases above, the respondent was charged in ***Mombasa Chief Magistrates Court Criminal Case No. 1278 of 2017*** for alleged forgery of a Transfer and Sale Agreement in which the key witnesses were the Principal Surveyor and the Land Registrar.
- vii. Though the applicant has not been a party to the proceedings giving rise to the present appeal, it is not accurate, in view of the foregoing background to say that the applicant has not been aware of the dispute between the parties herein over the ownership of the suit property.
- viii. It is however important to state that from the record, it is apparent that an oral application by the appellant to call the Director of Surveys was

dismissed by the trial Judge and the court proceeded to determine the case based on the evidence before it. It ultimately found that the appellant was a *bona fide* purchaser; and that the respondent had failed to establish his proprietary interest.

- ix.** On appeal, the Court of Appeal in overturning the decision of the trial court concluded that the oral application to call the Director of Surveys was properly rejected but curiously wondered why those who would have testified in answer to some of the gaps were either deliberately or inadvertently excluded from the proceedings either as parties or witnesses.
- x.** From the totality of the material before it, the appellate court made the final conclusion that the suit property belonged to the respondent, thereby overturning the trial court.
- xi.** In the present application, the applicant seeks leave to join the proceedings to address the Court as to the authenticity and origins of the titles to the suit property, in order to show that Plot No. 287/3 granted to the respondent by the trial court is non-existent; and that the original parcel overtime has been subdivided in favour of third parties who were not privy to the suit before the superior courts below.

[7] UPON CONSIDERING these averments, can it be said that the applicant's Motion has met the threshold for admission as an interested party? We do not think he has. This is why.

- i.** First, he has not established any definable personal interest or legal stake that is proximate enough to occasion any prejudice to him, if not joined in these proceedings.
- ii.** The applicant has categorically stated that he only made the instant application after "*receiving several queries from the Petitioner (appellant herein) requesting the Ministry's intervention to confirm the origins of the title that it holds and for any correspondence that may exist at the Ministry's headquarters in Nairobi in respect of the Original Parcel*".

- iii.** Pursuant to this invitation, it is apparent from the annexures to the affidavit in support of the application that the applicant, if admitted intends to present what would appear to us to be further evidence in the form of the government records held by various relevant state departments in respect of the suit property. That evidence runs into several pages of documentary evidence.
- iv.** Is this not a case of leave to adduce further evidence through a third party camouflaged as an application informed by a genuine desire to be joined to assist the Court in reaching a just outcome? Both the trial court and the first appellate court based their decision on the material presented by the primary parties. A third party who is unlikely to be affected by the ultimate decision of this Court cannot present a new case independent of that of the primary parties. An application for joinder cannot be used as an avenue to attempt to fill gaps in any of the primary party's cases.
- v.** The applicant has not persuaded us that he will suffer personal prejudice if we do not grant this application.
- vi.** Looking at the petition of appeal, the response, and the two judgments of the courts below, we entertain little doubt that the applicant's participation in the proceedings would not be of any additional significance. The dispute between the primary parties, as it is, appears to us plain, and can be resolved without intervention by a third party.
- vii.** Inevitably, on the basis of all that we have said, we come to the conclusion that none of the conditions for the grant of leave to be joined as an interested party has been satisfied.
- viii.** We therefore find no merit in the application and accordingly dismiss it.

[8] DULY GUIDED by our decision in *Jasbir Singh Rai vs. Tarlochan Singh Rai*, SC Petition 4 of 2012; [2014] eKLR, we exercise our discretion against an award of costs against the applicant.

[9] **HAVING SO** found that this application lacks merit, we make the following orders:

- i) The Notice of Motion dated 20th May 2024 is hereby dismissed.*
- ii) We make no orders as to costs.*

Orders accordingly.

DATED and DELIVERED at NAIROBI this 2nd Day of August 2024.

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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