Case Number:	Petition (Application) 8 of 2016
Date Delivered:	31 Aug 2018
Case Class:	Civil
Court:	Supreme Court of Kenya
Case Action:	Ruling
Judge:	Jackton Boma Ojwang, Isaac Lenaola, Mohammed Khadhar Ibrahim, Smokin Charles Wanjala, Njoki Susanna Ndungu
Citation:	Kensalt Limited v Water Resources Management Authority [2018] eKLR
Advocates:	-
Case Summary:	**Requirements to be met for joinder of Interested Parties to a Supreme Court petition.** **Kensalt Limited v Water Resources Management Authority** **Application No 8 of 2016** **Supreme Court at Nairobi** **M K Ibrahim, J B Ojwang, S C Wanjala, S N Ndung'u & I Lenaola, SCJJ** **August 31, 2018** **Reported by Beryl A Ikamari** ***Civil Practice and Procedure****-parties to a suit-joinder of parties-joinder of Interested Parties to a*

Supreme Court petition-legal requirements to be met in an application for joinder of intended Interested Parties to a Supreme Court petition-circumstances under which Applicants for such a joinder would be said to have demonstrated that they would suffer prejudice due to a non-joinder.

Brief facts

Two parties made two different applications seeking to be joined as Interested Parties to the substantive appeal by the Petitioner. The applications for joinder were made by Krystalline Salt Limited (via an application dated June 22, 2016) and Malindi Salt Limited (via an application dated February 27, 2017.)

The matter originated from the Environment and Land Court wherein the Respondent claimed Kshs.270,295,759.90, as charges allegedly due for use of water in the course of salt manufacture from the Petitioner. An application for the striking out of the plaint was made at that court. In the application it was said that there was no basis for the levying of charges in respect of sea water and that Respondent did not have *locus standi*. The Petitioner stated that the Respondent was constitutionally debarred from levying tax, in the absence of express provisions under the Water Act or the Water Resources (Management) Rules, 2007. The application was allowed and the Respondent's suit was struck out.

The Respondent filed an appeal at the Court of Appeal and the Petitioner cross-appeal on one limited question. The Court of Appeal gave a judgment to the effect that the Respondent's case was to be subjected to a full hearing before a different judge. The Petitioner appealed against the Court of Appeal decision and contended that the Respondent had no lawful mandate over sea water, in view of the terms of the Constitution, the Water Act, or any other law and that the Environment and Land Court lacked jurisdiction to entertain the matter.

The Applicants stated that they had been charged for the use of sea water and they had claims

against the Respondent which were similar to those of the Petitioner. They therefore made applications for joinder at the Supreme Court.

Issues

1. What were the principles applicable to joinder of intended Interested Parties to a Supreme Court petition?
2. When would a party be said to have shown that he would suffer prejudice as a result of non-joinder in an application for joinder of an intended Interested Party to a Supreme Court petition?

Held

1. The principles related to joinder of new parties in on-going causes were settled. For one to be enjoined, the making of a formal application was necessary. Enjoinment was not as of right but was at the discretion of the Court and hence sufficient grounds had to be laid before the Court, on the basis of the following elements:-

a. The party's personal interest or stake in the matter had to be set out in the application. The interest had to be clearly identifiable and proximate enough, to stand apart from anything that was merely peripheral.
b. The intended Interested Party would have to demonstrate to the satisfaction of the Court, the prejudice that would be suffered in the case of non-joinder. The prejudice that would be suffered would have to be clearly outlined and not something remote.
c. The party, in its application, would have to set out the case and/or submissions that it intended to make before the Court and demonstrate the relevance of those submissions. That party should also demonstrate that those submissions were not merely a replication of what other

	parties would be making before the Court. 2. The prejudice that the Applicants submitted that they would suffer entailed a denial of their right of access to justice under article 48 of the Constitution and that if they waited to be heard in their own causes, interest would keep accruing on the amounts demanded as payment by the Respondent. The claim on denial of access to justice was not new and it was not raised at the Environment and Land Court, at the Court of Appeal, or within the texture of the petition before the Supreme Court. 3. There was no order of stay of proceedings and no situation to prevent the Applicants from lodging their own suits for hearing and determination and filing appeals thereafter in the event of unfavourable outcomes. Therefore, there was no basis for the claim of denial of access to justice. 4. It was relevant that joinder was not sought at the Court of Appeal and the Environment and Land Court. The Supreme Court was not convinced that there was prejudice which the Applicants would suffer at the Supreme Court but would not have suffered at the Court of Appeal. 5. It was of relevance that the Applicants filed suits before the Trial Court and that Court had the duty to conduct the matters judicially and duly make prescriptive findings. 6. The Applicants failed to demonstrate that they would suffer prejudice if they were not joined in the appeal before the Supreme Court. *Orders:-* 1. *The Notice of Motion of June 22, 2016 by Krystalline Salt Limited was disallowed.* 2. *The Notice of Motion of February 27, 2017 by Malindi Salt Limited was disallowed.* 3. *The parties had to bear their own respective costs.*
Court Division:	Civil
History Magistrates:	-

County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Notice of Motion disallowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

PETITION (APPLICATION) NO. 8 OF 2016

–BETWEEN–

KENSALT LIMITED.....PETITIONER

–AND–

WATER RESOURCES MANAGEMENT AUTHORITY.....RESPONDENT

(Being an Application for joinder in the appeal by Krystalline Salt Limited and Malindi Salt Works Limited dated 22 June 2016 and 27 February 2018 respectively)

RULING OF THE COURT

[1] RESTING BEFORE THE COURT are two applications by way of Notice of Motion: one by Krystalline Salt Limited (22 June 2016), and the other by Malindi Salt Limited (27 February 2017). Both applicants are seeking joinder in the substantive appeal by the petitioner, Kensalt Limited.

[2] TO THE SAID APPLICATION, there is a Notice of Preliminary Objection by the respondent in the petition, dated 2nd November, 2016. The objector questions this Court's jurisdiction to hear the petition.

[3] AS A MATTER OF PROCESS, the learned Deputy Chief Justice and Vice-President of the Court has already, on 25th November, 2016 given directions that the joinder application shall first be disposed of, and thereafter, the jurisdictional objection is to be heard within the framework of the main appellate cause.

[4] IN THE BEGINNING, the respondent had moved the Environment and Land Court at Malindi, claiming against the petitioner herein the sum of Kshs.270,295,759.90, as charges allegedly due for use of water in the course of salt manufacture.

[5] THE PETITIONER responded by Notice of Motion on 17 January, 2014, seeking to have the plaint struck out and the Environment and Land Court proceedings dismissed, on the basis that the respondent lacked *locus standi* to move that Court, since that Court lacked mandate under the Constitution, the Water Act or any other law – and so had no basis for levying charges in respect of use of sea water. The petitioner contended that sea water was *res nullius*, and lay outside ownership notions, whether in law or equity. The petitioner averred that the respondent was constitutionally debarred from levying tax, in the absence of express provision under the Water Act or the Water Resources (Management) Rules, 2007.

[6] THE ENVIRONMENT and Land Court (*Angote, J.*) allowed the petitioner's application, and struck out the respondent's suit.

[7] AGGRIEVED BY the Environment and Land Court decision, the respondent moved the Appellate Court in Civil Appeal No. 9 of 2015; but the petitioner then came up with a cross-appeal, on one limited question.

[8] THE COURT OF APPEAL at Malindi gave judgment on 22 April 2016, restoring the respondent's case for a full hearing at the trial Court, though by a different Judge.

[9] THE PETITIONER was aggrieved by the Appellate Court decision, and now filed an appeal before the Supreme Court (6 June 2016), under the terms of Article 163 (3)(b)(i) and (4)(a) of the Constitution, and Section 15(2) of the Supreme Court Act, 2011.

The petitioner contends that the respondent has no lawful mandate over sea water, in view of the terms of the Constitution, the Water Act, or any other law; and that the Environment and Land Court lacks jurisdiction to entertain the matter.

[10] NOW THE JOINDER applications by Krystalline Salt Limited ('1st interested party') and Malindi Salt Limited ('2nd interested party') are based upon Rules 3, 23 and 25 of the Supreme Court Rules, 2012. The applicants are seeking leave to join the petitioner's appeal motion, against the Appellate Court's decision in Civil Appeal No. 9 of 2015 dated 22 April 2016.

[11] EVIDENCE IN AID of each application is rendered by way of affidavits: that of Hasmita Patel, in the case of the 1st interested party; and that of Charles Onyiego Bwogari, in the case of the 2nd interested party. Both applicants are represented by the same firm of Advocates, which has filed written submissions for each case.

[12] The 1st interested party states that it had been sued by the respondent for the sum of Kshs.3,847,935,000/= – being charges for using sea water for a twelve-month period, with interest thereon; and the 2nd interested party, that it had been sued for a sum of Kshs.7,564,075,000/= – being charges for the use of sea water for the period between 1 October 2007 and 31 September 2013, with interest thereon.

[13] BOTH APPLICANTS submit that the respondent's claims against them are substantially similar to the claim which the respondent had made in the Environment and Land Court – and from which claim the Appellate Court proceedings ensued.

[14] IT IS THE APPLICANTS' case that their interests in the matter before the Environment and Land Court are directly dependent on the outcome of the appeal cause before the Supreme Court – and so they should be accorded a place in the hearing and determination of that cause. They contend that they have questions to canvass which have not been raised by the petitioner, and upon being enjoined, they will have a basis for making comprehensive submissions, enabling the Court to arrive at a just decision.

[15] ALTHOUGH IT IS to the first application that the petitioner expressly signalled no-objection, the indications are that such is also the position as regards the second. The respondent, on the other hand, has filed objections to the two applications for joinder.

[16] FALLING FOR DETERMINATION, at this stage, is a single question: whether the applicants should be granted joinder as interested parties.

[17] ONE CASE IN WHICH this Court has in the past devoted its attention to joinder of new parties in on-going causes, is ***Francis Kariuki Muruatetu and Another v. Republic and Four Others***, Supreme Court petition No. 15 of 2015. We may regard that case as laying down clear guiding principles, in the mode of common law practice, as sanctioned by the express terms of the Constitution of Kenya, 2010 (Articles 163 (7); 166 (2) (b)). In this context we cite from paragraph 37 of the said decision:

"[T]he following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: One must move the Court by way of a formal application. Enjoinment is not as of right, but 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 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."

[18] THE APPLICANTS have submitted that they stand to suffer prejudice if they are not granted joinder. They claim that their right of access to justice, under Article 48 of the Constitution, has been denied; and that if they have to wait for long before they are heard in their own causes, then in the meantime, interest will keep accruing on the claims of payment being demanded by the respondent.

[19] SUCH CONTENTIONS are contested by the respondent, who avers that the applicants though well aware of the proceedings in the lower Courts, had expressed no interest. The respondent also urges that the allegation of risks of denial of access to justice is all novel, not having been litigated through the Court's hierarchical setting.

[20] IT IS INDEED the case that the claim of denial of access to justice is a new one – not having been raised at the Environment and Land Court, at the Court of Appeal, or within the texture of the petition before this Court.

[21] THE CONTENT of the foregoing paragraph, for the most practical grounds of litigation practice, dispose our determination towards accommodating the applicants' prayer. There being no Order of stay of proceedings in place, we find no situation such as prevents the applicants from setting down their own suits for hearing and determination, possibly lodging appeals thereafter, in the event of unfavourable outcomes. There is no basis, therefore, to the claim of denial of access to justice.

[22] IT IS RELEVANT, in that very context, that the applicants had made no attempts to secure joinder at the Appellate Court level. Indeed, a genuine concern on their part, for an opportunity for a hearing, should have led the applicants at the very beginning, to seek a consolidation of their cause with the motions at the Court of first instance. We are not convinced that there is a prejudice that the applicants stand to suffer in this Court, but which they would not have suffered at the Appellate Court.

[23] IT IS OF NO LESS relevance, in our inclination in this matter, that the applicants did file suits in the trial Court, and it properly falls to that Court to conduct such matters judicially, and duly make prescriptive findings.

[25] WE HAVE TO MAKE the inference that the applicants have failed to demonstrate that they stand to suffer prejudice, if they are not joined in the appeal before the Supreme Court.

[26] ACCORDINGLY, we now make orders as follows:

(a) The Notice of Motion of 22 June 2016 by Krystalline Salt Limited is disallowed.

(b) The Notice of Motion of 27 February 2017 by Malindi Salt Limited is disallowed.

(c) The parties shall bear their own respective costs.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **August, 2018.**

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M. K. IBRAHIM **J. B. OJWANG**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

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S. C. WANJALA **S. N. NDUNG'U**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

…….

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA.