



REPUBLIC OF KENYA



**Some & 4 others v Attorney General & 6 others (Anti-Corruption
and Economic Crime Petition 7 of 2021) [2022] KEHC 11631 (KLR)
(Anti-Corruption and Economic Crimes) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 7 OF 2021
EN MAINA, J
MAY 31, 2022
(FORMERLY IN THE ENVIRONMENT AND LAND AT
NAIROBI CONSTITUTIONAL PETITION NO E022 OF 2020)**

BETWEEN

**DAVID BARNO SOME 1ST PETITIONER
ESTHER CHEBET SOME 2ND PETITIONER
DASAHE INVESTMENT LIMITED 3RD PETITIONER
KEIBUKWO INVESTMENT LIMITED 4TH PETITIONER
OLOMOTIT ESTATE LIMITED 5TH PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT
CHIEF MAGISTRATE ANTI-CORRUPTION AND ECONOMIC CRIMES
COURT (TRIAL MAGISTRATE ACC CASE NO. 33 OF
2018) 5TH RESPONDENT
KENYA RAILWAYS CORPORATION 6TH RESPONDENT
ETHICS AND ANTI-CORRUPTION COMMISSION 7TH RESPONDENT**



RULING

Introduction

1. This ruling pertains to two applications both filed by the petitioners: one a notice of motion dated October 21, 2020 seeking conservatory orders pending the hearing of the petition (herein referred to as the “application for conservatory orders”) and a notice of motion dated March 4, 2021 seeking leave to amend the petition (“the application for amendment”). Both applications are supported by affidavits sworn by the 1st petitioner David Barno on October 21, 2020 and March 4, 2021 respectively. Only the petitioners, the 4th respondent, 6th respondent and 7th respondent participated in the two applications. All the other parties did not file any responses or submissions to the applications.

Application To Amend The Petition

2. The petitioners’ notice of motion dated March 4, 2021 is brought under rule 18 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) and order 51 of the [Civil Procedure Rules](#) and seeks the following orders:-

- “ 1) That this application be certified as urgent, service be dispensed with and the same be heard *ex parte* in the first instance for purposes of prayers 2 and 3 hereof;
2. That leave be granted to the petitioners to amend the petition dated October 21, 2020, and the amendment be in the style and manner demonstrated by the draft amended petition attached as annexure DSB-1 in the supporting affidavit of David Some Barno filed herewith;
3. That the honourable court be at liberty to issue such further directions and orders for purposes of meeting the ends of justice;
4. The costs of this application be provided for.”

3. The application is premised on grounds that the petitioners are desirous of amending the petition, to inter alia remove the 4th respondent (Director of Public Prosecutions) and the 5th respondent (the Chief Magistrate, Anti-Corruption & Economic Crimes Court) from the suit, and with the said excision, the corresponding averments and reliefs; that the proposed amendments shall centrally affect any directions intended to be issued by the court on March 8, 2021 (now past), and it is accordingly necessary and it shall be in the interest of justice that the application be heard and determined in priority to any application filed and before any directions are issued and that rule 18 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure, Rules, 2013](#), gives this court jurisdiction to grant leave for amendment of petitions at any stage of the proceedings and that is in in the interests of fair administration of justice and public interest that the application be allowed.

Application For Conservatory Orders

4. The other application is the petitioner’s notice of motion dated October 21, 2020 which seeks the following orders:

- “ 1 Spent
2. That conservatory orders be and are hereby issued restraining, the 7th respondent from implementing its demand dated September 28, 2020 Ref EACC/AT/INQ/43/2019



addressed to the petitioners pending hearing and determination of this application *inter partes* or until further orders of court;

3. That conservatory orders be and are hereby issued restraining, the 5th respondent from further hearing and sitting in trial in Nairobi Chief Magistrates Court, Anti- Corruption Case No 33 of 2018 Republic v Prof Abdalla Swazuri Mohammed & others pending hearing determination of this application inter partes or until further orders of court;

4. That conservatory orders be and are hereby issued restraining, the 7th respondent from implementing its demand dated September 28, 2020 Ref EACC/AT/INQ/43/2019 addressed to the petitioners pending hearing determination of the question of ownership of LR No 9084, 9085, 9086, 9087 and 9088, in the petition filed herewith;

5. That conservatory orders be and are hereby issued restraining the 5th respondent from further hearing and sitting in trial in Nairobi Chief Magistrates Court, Anti- Corruption Case No 33 of 2018 Republic v Prof Abdalla Swazuri Mohammed & others pending hearing determination of the question of ownership of LR No 9084, 9085, 9086, 9087 and 9088, in the petition filed herewith;

6. That the honourable court be at liberty to issue such further directions and orders for purposes of meeting the ends of justice;

7. The costs of this application be provided for.”

5. The application is made on the grounds that the petitioners and interested parties are being prosecuted in Nairobi Anti- Corruption Case No 33 of 2018 Republic v Abdalla Swazuri Mohammed & others, a trial presided over by the 5th respondent, Chief Magistrate, who does not have jurisdiction to hear and determine the question of ownership of the suit properties LR No 9084, 9085, 9086, 9087 and 9088, whose admitted value is Kshs 221,375,000 as the Chief Magistrate’s Court’s pecuniary limit on criminal and civil cases is Kshs 20,000,000.
6. The petitioners/applicants aver that the suit properties LR No 9084, 9085, 9086, 9087 and 9088 were registered and title deeds issued under the provisions of the [Land Registration Act, 2012](#) and as such the proprietors of these properties have indefeasible rights which have to first be impeached and cancelled before prosecuting them over the properties. They contend that the impugned prosecution should not precede the impeachment of the titles under section 80 of the [Land Registration Act](#) and the trial therefore ought to be stayed pending the hearing and determination of the issue of ownership in this petition.
7. Further that it shall be egregiously prejudicial to the petitioners if the prosecution shall continue in the Magistrates Court only for this court to make a finding that the suit properties did not belong to the 6th respondents and were in fact properly alienated to the 3rd and 5th petitioners. They assert that the judicial time and resources expended in the criminal prosecution shall have been wasted and the petitioners and interested parties will have been prejudiced by having been required to physically attend the trial court.
8. They also contend that the 7th respondent has prematurely served demands upon the petitioners for refund of the sum of Kshs 221,375,000 before the adjudication of the issue of proprietary interests over the suit properties being the monies paid to the petitioners as compensation for compulsory acquisition of their properties on the basis that the properties belonged to the 6th respondent, a position that is contested. They aver that their rights have been infringed upon by the prosecution in the Magistrates Court as they are being persecuted for being the proprietors of the suit properties without any declarations under the Act divesting the properties from them.



9. Finally, they aver that it is in the interest of justice, the rule of law, preservation of constitutionalism and preservation of sovereignty of the peoples of Kenya to grant the reliefs sought in the application so as to prevent the imminent and impending violation of the [Constitution of Kenya](#).

Response by the 4th Respondent

10. The 4th respondent has opposed both applications vide a replying affidavit sworn by Wesley Nyamache on January 27, 2021 and grounds of opposition dated March 8, 2021.
11. In respect of the application for amendment, the 4th respondent raises several grounds summarized as follows: that the application is a tactic by the petitioners to protract litigation; that the application is an abuse of court process; the application is an afterthought as it intends to defeat the 4th respondent's application dated February 2, 2021; that the 4th respondent has answered all issues, averments and contentions raised in the petition; that the application is an attempt by the petitioners to have a one sided discourse in these proceedings and to conceal material facts that ought to be litigated by the 4th respondent; the 4th respondent is entitled to a fair hearing on the averments filed in response and they will be greatly prejudiced as the outcome of these proceedings will have a direct bearing on Anti-Corruption Case No 33 of 2018 where all the petitioners and interested parties are facing charges. They urge that the application be dismissed with costs.
12. The 4th respondent also opposes the application for conservatory orders through the affidavit of Wesley Nyamache sworn on January 27, 2021 and urges for its dismissal. The 4th respondent avers that they carefully evaluated the report forwarded to them by the 7th respondent together with the evidence presented by the Ethics and Anti-Corruption Commission and found that the petitioners were beneficiaries of an illegal process of compensation through compulsory acquisition; That the 4th respondent upon its own analysis arrived at an independent and rational decision to charge the petitioners alongside other accused persons and that the decision to charge was based on sufficiency of evidence, the evidential and public interest test under article 157(11) of the [Constitution](#) and the National Prosecution Policy. It is averred that the 4th respondent considered all relevant factors and acted procedurally and in good faith with no collateral purposes except the public interest.
13. The 4th respondent avers that the petitioners were charged on August 13, 2018 and they have all participated in the trial and have never raised the issue of jurisdiction of the trial court before the Magistrates Court. The 4th respondent asserts that the petitioners have misinterpreted the provisions of the [Magistrates Court Act, 2015](#) regarding jurisdiction of magistrates and contends that the matter being one relating to corruption and economic crimes it is properly before the magistrate's court.
14. The 4th respondent further contends that the Petition and the application are *res judicata* as the issues raised have been conclusively determined in Anti-Corruption Petition No 23 of 2018 and Anti-Corruption Petition No 31 of 2018. That the petitioners have concealed the fact that they actively participated in the said petitions and the petitions were conclusively determined.
15. On the jurisdiction of the court (petition was initially filed in the Environment and Land Court) the 4th respondent avers that the Chief Justice established the Anti-Corruption Division of the High Court vide Gazette Notice No 9123 of December 8, 2015. That the Practice Directions in Gazette Notice No 7262 of June 26, 2018, all petitions and judicial review applications on claims of infringement of constitutional rights relating to corruption and economic crimes such as the instant petition were to be heard in this division and hence the Anti-Corruption and Economic Crimes Division of the High Court is the correct forum to litigate the petition herein.



Response by the 6th Respondent

16. The Kenya Railways Corporation, 6th respondent opposed the application for conservatory orders through a replying affidavit sworn on February 16, 2021 by Duncan Mwangi its Principal Land Surveyor.
17. The 6th respondent narrates the history of the ownership of the suit properties and avers that the properties have never been within their reserve either through requisition or vesting order and the National Land Commission did not provide any documentation to indicate that the land was reserved for the 6th respondent. They refer to an affidavit sworn on November 16, 2018 by one Erastus Mwangi, a surveyor with Kenya Railways sworn in HC Constitutional Petition No 31 of 2018 describing how the suit properties were acquired by the National Land Commission.
18. It is deponed that the responsibility for compulsorily acquiring land for the Standard Gauge Railway fell on the National Land Commission (3rd respondent) and the 6th respondent's role was only to identify the parcels of land to be acquired. It is National Land Commission's duty to conduct due diligence, value, review or authenticate titles of the subject properties prior to acquisition. The 6th respondent avers that it identified the subject properties being LR Nos 9084, 9085, 9086, 9087 and 9088 and handed over the list to the National Land Commission to confirm ownership and conduct valuation which it proceeded to do and made an award of compensation to the owners save for LR No 9084.
19. The 6th respondent avers that the petitioners ought to have dealt with the issue of authenticity of their claim to title of the suit properties as against the 3rd respondent first since all the records in the possession of the 6th respondents do not show that the suit properties have ever belonged to it or that it has ever applied for reservation of the same.
20. They aver that the survey plan/drawing F/R-12/102 dated February 28, 2017 which was the first survey done in respect of all the area in Embakasi shows all the beacons marking the boundaries of Embakasi Township Reserve, Embakasi Railway Station Reserve, Embakasi Railway Line Reserve and Embakasi Road Reserve. That the suit properties do not fall within railway reserve or any of properties of the 6th respondent and there is no evidence to show that the suit properties belong to 6th respondent.
21. Finally, they aver that the 6th respondent have not in any way infringed on any of the constitutional or legal rights of the petitioners and they do not have in possession any evidence to prove that the suit properties have ever been reserved for the 6th respondent.

Response of the 7th Respondent

22. The Ethics and Anti-Corruption Commission, 7th respondent herein opposed the application for conservatory orders, through the affidavit of Dorothy Mnjala sworn on February 22, 2021 but did not file any response or submissions on the application for amendment.
23. The 7th respondent avers that the Commission, on the basis of information received from credible sources conducted investigations on allegations that the 6th respondent (Kenya Railways) and the 3rd respondent (National Land Commission) paid compensation to persons or entities affected by the Standard Gauge Railway for land which lay on the railway reserve, flight path and marshalling yard in Embakasi. That through their inquiry *vide* file No EACC/AT/INQ/43/2019, the Commission established that the petitioners received an illegal benefit of a sum of Kshs 221,375,000 being public funds for the purported compulsory acquisition of LR Nos 9085,9086,9087,9088 Nairobi County (the suit properties) which land had been allocated for public use.



24. That the suit properties had been irregularly allocated to the Petitioners and were not supported by any approved plans and the titles were revoked by the National Land Commission on July 22, 2015 and October 7, 2015 for reasons that the land belonged to the 6th respondent. That the records of alienation of the suit properties as Kenya Railway line reserve in the planning of Embakasi Investment Promotion Centre Zone *vide* PDP Number 42/14/90/2A registered as PDP 269 were held by the Ministry of Lands and Physical Planning, the 3rd respondent, the 6th respondent and the Survey of Kenya. That the land therefore was public land and the allocation of the same to the petitioners and subsequent compulsory acquisition by National Land Commission was null and void. The Commission contends that based on the reports it made a recommendation to the 4th respondent to prefer criminal charges against the petitioners.
25. The Commission contends that it subsequently on September 28, 2020 wrote a demand letter to the petitioners for refund of Kshs 22,375,000 illegally paid to the petitioners for the purported compulsory acquisition of the suit properties.
26. The Commission avers that the decisions by the 4th and 7th respondents to investigate and prosecute the petitioners are not amenable to a stay of the proceedings and trial unless there is proof of bad faith, dishonesty or any exceptional circumstances. That the orders sought, if granted would amount to interference with the mandate of the 4th and 7th respondents as there is no evidence of violation of the rights of the petitioners.
27. Further that the rights accruing to the petitioners under article 40 are subject to the limitation in article 40(6) of the *Constitution* and the rights do not extend to property that has been found to have been unlawfully acquired. The Commission further asserts that there is no pecuniary limit to the criminal jurisdiction of the Magistrates Court; that the petitioners have been properly charged before the Magistrates Court for offences of corruption and economic crimes and the resultant trial shall lead to the finding of guilt of each party.

Submissions of the Petitioners/Applicants

28. In regard to the application for amendment learned counsel for the petitioners/applicants submitted that the general rule is that amendments ought to be freely allowed at any stage of the proceedings provided they do not occasion any prejudice to any of the parties; That the test and principles for amendment of pleadings in constitutional petitions is similar to that in ordinary civil litigation and that the form of the application is that set out in order 8 rule 7(2) of the *Civil Procedure Rules*. Counsel relied on the cases of *Ann Muthoni Karanu v La Nyavu Gardens Limited* NBI ELC 181 of 2014 [2015] eKLR and *The Institute for Social Accountability & Another v Parliament of Kenya & 2 others* [2014] eKLR.
29. Counsel stated that the principles for consideration in such applications are as determined by the Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd* [2002] EA 365. Counsel framed the issues in regard to that application to be: whether the amendment is necessary for determining the real question in controversy, whether the application was made without undue delay, whether the amendment introduces a new or inconsistent cause of action and whether the amendment occasions any prejudice or injustice to the opposing party which cannot be properly compensated by costs.
30. The petitioner submits that the substratum of the petition relates to ownership of LR No 9084, LR No 9085, LR No 9087 and LR No 9088 previously owned by the 3rd petitioner and LR No 9086 previously owned by the 5th petitioner, properties that have since been compulsorily acquired for construction of the Standard Gauge Railway by the Kenya Railways Corporation, the 6th respondent



herein. That the 1st, 2nd, 3rd, 4th and 5th petitioners, claimed proprietorship over the suit properties. The 3rd respondent, National Land Commission, gazetted designated properties for compulsory acquisition including the suit properties herein and the 3rd and 5th petitioners were compensated for the suit properties save for LR No 9084, which compensation is still held by the 3rd respondent.

31. Counsel stated that the 4th respondent preferred charges against the petitioners and interested parties in Anti-Corruption Case No 33 of 2018 Republic v Abdalla Swazuri Mohammed & others at the instigation of the 7th respondent principally on the allegation that the compensation paid to the 3rd and 5th petitioners amounting to Kshs 221, 375,000, was fraudulent since the suit properties LR No 9084, LR No 9085, LR No 9086, LR No 9087 and LR No 9088, belonged to the 6th respondent. That the 6th respondent has however confirmed on oath through an affidavit by Mr Duncan Mwangi, its Principal Land Surveyor, that Kenya Railways did not own the suit properties. That subsequently, pending the conclusion of the criminal case and before adjudication of the question of proprietary interest in the suit properties, the 7th respondent served demands upon the petitioners for refund to the 7th respondent, the sum of Kshs 221, 375,000.00, being the monies paid to them as compensation for compulsory acquisition of the petitioners' properties on the basis that the suit properties belonged to the 6th respondent, a position which is vehemently contested.
32. Counsel argues that the real question in controversy is the impugned demands issued to the petitioners by the 7th respondent which if executed would infringe on the petitioners' rights to property. That there is need to amend the petition to remove the criminal aspect thereof as it is a different cause presently before another court and which may dilute or overshadow the real question in controversy in this petition.
33. On whether the amendment was sought without undue delay, counsel submitted that the petition is yet to be heard or determined and out of the seven respondents in the suit, only two have filed responses and as for the interested parties none has filed a response despite having been served. Counsel submitted that the two respondents who have filed responses would not require to file any further responses after the amendments and that the 6th respondent's case is not affected by the proposed amendments; that the prayers seeking to injunct and quash the decision of the 4th respondent shall be deleted and will no longer be an issue for determination by this court and that in effect, the amendment is sought timeously and no party shall suffer prejudice should the same be allowed. Counsel placed reliance on the case of Nairobi HCCC No 159 of 1981 *Patel v Amin*.
34. On whether the amendment introduces a new or inconsistent cause of action, counsel submitted that it does not. That the amendment simply desires to streamline the real issues in controversy, which is the alleged impending violation of the petitioner's right to property; That the deletion of the issue that touches on the prosecution in Nairobi Chief Magistrates Court, Anti-Corruption Case No 33 of 2018; Republic v Prof Abdalla Swazuri Mohammed & others shall limit the petition to that of protection of right to property and illegal deprivation of land and hence the amendment does not prejudice any party. Counsel submitted that the proposed amendments are done in good faith and the court's duty is to ensure that the real matters in controversy between the parties are really brought out, the other party is not prejudiced, the character of the suit or defence is not altered and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work an injustice. Counsel concluded by submitting that the applicant has met all the requirements for the grant of leave to amend its petition and as such it shall no doubt be in the interest of fair administration of justice and public interest that the application is allowed as prayed.



Submissions of the 4th Respondent

35. In its written submissions dated January 13, 2022 the 4th respondent addressed the two applications together. Counsel for the 4th respondent submitted that the petitioners have not demonstrated at all that the conservatory orders should be granted; that the petition and the application are an afterthought considering that the trial in CMACC 33 of 2018 is nearing the end with 21 witnesses having testified and only 3 witnesses remaining. Counsel stated that the petitioners have realized the strength of the prosecution's case and now seek an attempt to sanitize their actions by locking out the 4th respondent.
36. Learned counsel stated that the challenge to the jurisdiction of the Magistrates Court is a red herring since 21 witnesses have already testified before the trial court and that the court does indeed have jurisdiction to hear the case and the petitioners have misinterpreted section 7 of the *Magistrates Courts Act*.
37. Counsel stated that the petitioners were bound to demonstrate a prima facie case with a likelihood of success and that they are likely to suffer prejudice as a result of the alleged violation. Counsel cited the cases of *Tom Onyango & Independent Police Oversight Authority and another* [2015] eKLR and the case of *Ezekiel Waruinge v Director of Public Prosecutions & 2 others* [2017] eKLR in support.
38. The 4th respondent also opposed the application for amendment and submitted that the 4th respondent is a necessary party to the proceedings as they touch on the suit properties that are subject of CMACC 33 of 2018. That the proposed amendment is an attempt to irregularly remove the 4th respondent from these proceedings thereby depriving them the opportunity to participate and be heard. Learned counsel for the 4th respondent reiterated the grounds of opposition and submitted that the application for amendment is frivolous, vexatious and unreasonable and ultimately an abuse of court process; that, the petition directly relates to the issues that are pending determination in the Magistrates Court and it is in the public interest that the 4th respondent remains a party to this petition. Counsel contended that the application is in any case an afterthought and is intended to defeat the 4th respondent's application dated February 2, 2021; that the 4th respondent is prosecuting all the petitioners and interested parties including the former Managing Director of Kenya Railways who has made grave averments in his affidavit sworn on February 16, 2021 and which the 4th respondent has sought to cross examine him on; that the 4th respondent is entitled to argue the petition by way of rebuttal and removing him from the petition would be prejudicial and inimical to the rules of natural justice. Finally, that the 4th respondent has irrefutable and incontrovertible evidence that the titles in question were irregular, illegal and fraudulent since the purported letters of allotment were issued long before the 3rd, 4th and 5th petitioners were incorporated.

Submissions of the 6th Respondent

39. The 6th respondent's written submissions are dated March 14, 2022. Learned counsel for the 6th respondent singles out two issues for determination: whether or not conservatory orders should issue and costs of the application.
40. Counsel submitted that the petitioners have not met the criteria to warrant the issuance of conservatory orders; they have not shown how the petition will be rendered nugatory and how they would be prejudiced should the orders be denied; that the 6th respondent has categorically denied ownership of the suit properties and demonstrated that compulsory acquisition is solely the mandate of the National Land Commission, the 3rd respondent, hence the 6th respondent cannot be said to have infringed the petitioners' rights.



41. Counsel stated that petitioners had the onus to demonstrate lawful acquisition of the suit properties and that the title deeds are not sufficient proof of ownership. That the petitioners ought to show that there is a real danger which is imminent and that they would suffer prejudice should conservatory orders be denied. To support the foregoing submissions counsel cited the case of *Progress Welfare Association of Malindi & 3 others v County Government of Kilifi & 4 others* [2020] eKLR. Counsel further submitted that it is not in the interests of justice that this court grants the orders sought. That the petitioners have not demonstrated a prima facie case with a likelihood of success and the applications should be dismissed. Counsel further cited the cases of *Okiya Omtatah Okoiti v Kenyatta University Teaching Referral & Research Hospital & 2 others; Kenyatta University Council & 2 others (Interested Parties)* [2019] eKLR in further support of his submissions.

Submissions of the 7th Respondent

42. The 7th respondent, the Ethics & Anti-Corruption Commission, submitted that it was well within its constitutional and statutory mandate to issue to the petitioners the demand dated September 28, 2020. That section 193A of the *Criminal Procedure Code* allows for concurrent civil recovery and criminal proceedings and that therefore is not a ground for stay or prohibition of the criminal proceedings. Counsel submitted that the Ethics and Anti-Corruption Commission was well within its mandate to demand a refund and institute asset recovery proceedings during the pendency of the criminal proceedings. Counsel cited the case of *Ethics and Anti-Corruption Commission v Evans Kidero & 13 others* [2021] eKLR in support.
43. Counsel further submitted that the issues raised by the Petitioners with respect to ownership of the suit properties are best determined by the trial court or in a civil suit instituted at the Environment and Land Court. For this counsel placed reliance on the case of *Paul Ng'ang'a Nyaga & 2 others v Attorney General & 3 others* [2013] eKLR and the case of *Francis Mbugua v Commissioner of Police and 2 others* [2012] eKLR.
44. Counsel for the Commission (7th respondent) argued that the demand by the Commission does not amount to violation of a constitutional right; that the legality of the demand and civil proceedings can only be determined at the hearing of such proceedings and not at this stage and this court should not usurp the jurisdiction of the trial court or pre-empt its findings on the recovery proceedings. Counsel cited the case of *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR and urged this court to dismiss the petitioners' applications with costs.

Issues For Determination

45. From a review of the applications, the responses thereto and submissions of learned counsel for the parties, the issues arising for determination in both applications are:
1. Whether the petitioners' application for leave to amend the petition is merited; and
 2. Whether the petitioner has met the threshold for grant of conservatory orders.



Analysis And Determination

Whether The Petitioners' Application For Leave To Amend The Petition Is Merited

46. The application for amendment of the petition is premised on rule 18 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. The rule provides:

“ a party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court.”

47. It is trite law that the court may, at any stage of the proceedings, allow a party to amend its pleadings, provided that such amendment will not prejudice the other party. The power of the court to allow amendment of pleadings is discretionary and is intended to aid the court in determining the real question in controversy between the parties or for the purpose of correcting any error or defect in the proceedings. Like in all other instances this discretion must be exercised judiciously. Amendments may be allowed at any stage of the proceedings.

48. The petitioners/applicants herein seek to amend the petition, so as to remove the 4th and 5th respondents and the attendant prayers made against them from the petition. The 4th respondent opposed the application for the reasons, inter alia that it is a necessary party, having been adversely mentioned in the petition and its removal from these proceedings would greatly prejudice its case in the ongoing criminal proceedings in the Magistrates Court ACC No 33 of 2018 which is the subject of the petition.

49. In the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held: -

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.

Rule 18 of the *Rules* clearly stipulates that the court may permit an amendment at any stage of the proceedings. The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

50. Having reviewed the draft amended petition produced in the supporting affidavit of the 1st petitioner, it is my finding that the proposed amendments would be prejudicial to the 4th and the 7th respondents as the end result would amount to gagging them and eventually condemning them unheard. Indeed, there are pertinent issues to be addressed by the 4th respondent and it has already filed responses to the petition. It is noteworthy that the 4th respondent has filed a notice to cross-examine one Dancun Mwangi, Principal Surveyor of the 6th respondent on the basis of his replying affidavit sworn on 16th February in response to the petition which it cannot do if it is removed from the proceedings. I find that



the 4th respondent and the 7th respondent are necessary parties to these proceedings and that they would be prejudiced by the amendment sought. In the premises the application for amendment is declined.

Whether the petitioner has met the threshold for grant of conservatory orders

51. In the case of *Centre for Rights Education & Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* [2017] eKLR it was held that:-

“55. A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending cause or petition.

56. In other words, an applicant should demonstrate to the court that she/he has a prima facie case with a probability of success and that should the court not grant the conservatory order sought, she/he will continue to suffer prejudice while awaiting determination of her/his cause.

57. That is what Musinga, J (as he then was) said in the case of *Rights Education and Awareness (CREAW) and 7 others v Attorney General* [2011] eKLR, that at this stage a party seeking a conservatory order is only required to demonstrate that he has a Prima facie case with a likelihood of success and that unless the conservatory order is granted, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.

58. A conservatory order would normally issue where there is real impending danger to violation of the *Constitution* or fundamental rights and freedoms with a consequence that a petitioner or the public at large would suffer prejudice unless the court intervenes and grants Conservatory orders. In such a situation, the Court would issue a conservatory order for purposes of preserving the subject matter of the dispute. (*Bidco Oil Refineries Ltd v Attorney General & 3 others* [2012] eKLR)”

52. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR the Supreme Court summarized it as follows:-

“(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

53. The question of what constitutes public interest was discussed in the case of *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR where the Court of Appeal stated: -

“The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, state interest may outweigh societal interests. In the context of the interest of the administration of justice, it is the public interest *inter alia*



that persons reasonably “suspected of committing a crime” are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by State and citizens.”

54. The petitioner seeks a total of 15 reliefs in the petition, inter alia, a permanent injunction restraining the 7th respondent from implementing its demand dated September 28, 2020 Ref EACC/AT/INQ/43/2019 pending the determination of the issue of proprietorship of the suit properties and an injunction restraining the 5th respondent from hearing Nairobi Chief Magistrates Court, Anti-Corruption Case No 33 of 2018 Republic v Prof Abdalla Swazuri Mohammed & others for want of jurisdiction. They contend that they are the bonafide proprietors of the properties the subject of the criminal proceedings facing them in CMACC No 33 of 2018 and that before determining their guilt the trial magistrate would have to first determine the issue of proprietorship and given the value of the properties that court does not have the requisite jurisdiction. It is my finding however that this is a misconception of the law given that the criminal jurisdiction of magistrates is determined by the sentence such court can impose but not the value of the subject matter. The magistrate trying the petitioners and interested parties is a special magistrate designated as such under section 3 of the [Anti-Corruption and Economic Crimes Act](#) and section 4 gives those magistrates power to try offences under the Act does not limit their jurisdiction based on the value of the subject matter.
55. It is also my finding that the issue of ownership of the subject properties which to me is mounted as a defence is one which ought to be raised during the trial and that applying the “inherent merit of a case test” laid in the Supreme Court case of [Peter Gatirau Munya](#) (*supra*) the application by the petitioners for a conservatory order cannot succeed. Further the public interest far outweighs the rights of the Petitioners to the conservatory order. In my view the proceedings must be allowed to continue to their logical conclusion without interference by this court. As has always been stated in applications of this nature the [Constitution](#) and the [Criminal Procedure Code](#) have more than adequate safeguards to a fair trial and moreover the petitioners are entitled to come to this court on appeal should the outcome of the prosecution aggrieve them. Further there is no justification for this court to restrain the 7th respondent from implementing the demand in the letter dated September 28, 2020 or from bringing an action over the demand as it can only act on an actual case but not on speculation. Accordingly, for the foregoing reasons the application for conservatory order cannot succeed and both applications are dismissed with costs to the 4th and 7th respondents. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF MAY, 2022.

EN MAINA

JUDGE

