



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 43 OF 2020

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER
ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF: PHYSICAL & LAND USE PLANNING ACT, NO. 13 OF 2019 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

BETWEEN

MBESA INVESTMENTS LIMITED.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA...RESPONDENT

AND

FAHAD IQBAL AHMED BAYUSUF.....1ST INTERESTED PARTY

MUSLIM FOR HUMAN RIGHTS.....2ND INTERESTED PARTY

RULING

1. The Notice of Motion dated 14/12/2020, filed by the Interested Party herein prays for the main order that there be a stay of all or any further proceedings in this petition, including any other interlocutory applications therein, pending the filing, hearing and determination of the intended appeal to the Court of Appeal by the Interested Party.

2. The motion is premised on the grounds set out therein and is supported by affidavit of Fahad Iqbal Ahmed Bayusuf.

3. The Applicant's case is that this Court delivered a Ruling herein on the 10/12/2020, upholding the jurisdiction to hear and determine all matters raised in this Petition. Pursuant to that, the 1st Interested Party has lodged a Notice of Appeal, to challenge the efficacy of that Ruling. However, by the provisions of Rule 32(1) of the Constitution practice and procedure Rules, such an intended appeal does not operate as either a stay of execution or proceedings, hence the imperative of making this application under Rule 32(3) of the said Rules. The Applicant contends that its intended appeal is not frivolous, and further, that unless there is a stay of proceedings, the Petitioner will proceed to have its Notice of Motion dated 1/7/2020, and filed in Court on 2/7/2020 prosecuted, or the entire Petition heard and concluded rendering the Applicant's intended appeal moot and nugatory. The Applicant contends that its appeal raises the Constitutional issue that the present

Petition falls to be heard and determined by Courts established under Article 162(2) (b) of the Constitution, and that by virtue of the aforesaid, the Applicant will argue in the appellate Court that the provisions of Article 165(5) of the Constitution prohibit this Court, in mandatory terms, from entertaining, hearing or making a determination of any matters that fall to be determined by Courts established under Article 162(2) of the Constitution. The Applicant contends further that Article 165(3) (b) of the Constitution is not intended and cannot in any manner be interpreted or applied in such a way as to override the mandatory provisions of Article 165(5) (b) of the same Constitution.

4. The Applicant further contends that the present Petition and Notice of Motion thereunder are predicated upon the Physical & Land Use Planning Act, which decrees that all matters arising therefrom be determined by either the County Physical & Land Use Planning Liaison Committee or the Environment & Land Court.

5. The Applicant states that it is fair, just and appropriate, in the circumstances, that no Court should proceed to hear and determine a matter, whilst its jurisdiction to do so is the subject of an appeal.

The Response

6. The 1st Respondent, the County Government of Mombasa, states that it supports the application, but they did not file any response to the application.

7. On their part the Petitioner/Respondent filed a Replying Affidavit sworn by its counsel Mohamed Ali Mohamed on 17/12/2020. The Petitioner's case is that on 10/12/2020, this Court rendered its Ruling with respect to the Respondent's Notice of Preliminary Objection filed on 13/7/2020 which was challenging the Court's jurisdiction to entertain this matter. The Petitioner avers that this Court observed that the objection lacked merit and proceeded to dismiss the objection with costs to the Petitioner.

8. As for this application, the Petitioner avers that they have not been served with a copy of the said Notice of Appeal and that in any event Rule 32 of the Constitution of Kenya (Protection of Fundamental Rights) Practice & Procedure Rules 2013 relied on by the Applicant is a general provision providing for stay and does not specify whether it is a stay of execution or stay of proceedings. The Petitioner states that in order for an Applicant to secure orders of stay of proceedings the Applicant must prove that:

- i. There is a *prima facie* arguable appeal;
- ii. The application was brought expeditiously; and
- iii. The interests of justice demand that the order of stay be granted.

9. The Petitioner avers that despite the timeous filing of the application, the 1st Interested Party has failed to demonstrate that there is a *prima facie* arguable appeal. The Petitioner states that this is a Petition where it claims its rights under Article 47 of the Constitution of Kenya 2010 have been infringed upon by the Respondent which Petition is yet to be heard and determined. This has caused the Petitioner to stop construction in the suit properties thus forestalling its project, and as such, should the order of stay of proceedings be granted, it would gravely cause injustice to the Petitioner due to delay in determining the petition. Further the Petitioner avers that the 1st Interested Party has not filed its Appeal yet, and so it would not be in the interest of justice for the order of stay of proceedings to be granted.

10. The 2nd Interested Party also opposed the application vide a Replying Affidavit sworn by **Francis Auma** and filed in court on 18/12/2020. The 2nd Interested Party's case is that the application is misconceived and amounts to an abuse of the court process with the sole intention of denying the Petitioner and 2nd Interested Party an opportunity to actualize their right of access to justice; that the Applicant is not suffering any prejudice occasioned by the present proceedings to warrant a stay of further proceedings. In any event the Applicant is enjoying the status quo in which the Petitioner and the 2nd Interested Party are greatly prejudiced and precluded from providing labour at the construction site; that if the Applicant desires a stay of further proceedings, then the court should as a condition reinstate the earlier conservatory orders issued on the 3/7/2020 allowing the Petitioner to continue with the project and the 2nd Interested Party to continue providing labour at the impugned location; that the justice of this case is that court should proceed with the hearing of the main case and dispense with the matter and the invitation by the Applicant for a stay of proceedings will unduly infringe on the right to access justice by the Petitioner and the 2nd Interested Party; that the vulnerable workers who are adversely affected by these proceedings and desire that this matter should be expeditiously concluded have been long suffering and are not able to fend for themselves and their families due to failure to earn a living and that the socio-economic rights of these workers and their right to life and equal protection and benefit of the law is threatened and they stand to continue to suffer irreparable violation of their rights if the hearing of this matter is stayed or delayed as sought by the Applicant.

11. Parties did not file submissions, and on 18/12/2020 the court reserved the matter for Ruling to be delivered on 20/1/2021.

Determination

12. This application for stay of proceedings stems from the Ruling made herein on 10/12/2020 upholding the jurisdiction of this court to entertain the petition herein. The issue then that arises for determination is whether or not a stay should issue pending appeal by the 1st Interested Party against the said Ruling.

13. A stay of proceedings by its very nature is a drastic step to take in proceedings because it stops any further action until the intended appeal is finalized. This means that stay of proceedings may only be granted in the most deserving cases so that proceedings are not unnecessarily delayed. The court must be vigilant that stay of proceedings is not granted merely to satisfy fanciful consideration of the Applicant, but is granted to stall a possible miscarriage of justice.

14. The petition before the court was filed on 2/7/2020 together with an application of even date which despite being certified urgent, has today never been heard due firstly, to application to join other parties to the petition, and lately, due to objection on jurisdiction. The petition and the application therein have been sufficiently delayed, and any further delay, unless founded on cogent grounds, may amount to denial of access to justice.

15. However, in order to establish whether the application for stay of proceedings is merited, it is important to look at the party that is making the application for stay of proceedings. The Petitioner and the Respondent are the main parties in this matter. In response to this application the Respondent has stated that while it supports the application in principle, it is not filing any responses to the same. This Court is left to believe that the stay of proceedings is not very important to the Respondent and that being so, the Respondent can afford to be ambivalent towards the application. The Applicant is an Interested Party, whose interest is always peripheral to that of the main parties to the proceedings. The Interested Party cannot therefore hijack the proceedings and lift them about the interests of the main parties. In Mombasa Petition No. 159 of 2018 **William Odhiambo Ramogi & others vs. Attorney General & others [2020] eKLR** a 5 Judge Bench stated that an Interested Party's case must not depart from the case between the Petitioner and the Respondents, and that an Interested Party cannot plead his own case different from that of the principal parties.

16. The Black's Law Dictionary 9th Edition, at page 1232 defines an interested party as "a party who has a recognizable stake (and therefore standing) in the matter." It also defines a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings."

17. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 defines an interested party as "a person or entity that has an identifiable or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation."

18. In **Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013, [2015] eKLR** (an application by Katiba Institute) the supreme Court stated:

"Consequently, 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."

19. Clearly, the role of an interested party in proceedings is peripheral as was expressed in **Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR**, where the Supreme Court was called upon to determine whether substantive orders could be granted in a matter where a cross-petition had been introduced to a constitutional matter by way of an affidavit by an Interested Party. In its majority decision, the Supreme Court stated as follows at paragraph 51-55:

"[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution..."

[53] ... Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in Francis Kariuki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

"Having carefully considered all arguments, we are of the opinion that 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 determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

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...

[54] In like terms we thus observed in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012 (paragraph 24):

"A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.

20. Similarly, an attempt to introduce new issues was considered by the Supreme Court in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** viz:

"The applicant, in essence is introducing new facts and issues that were not before Court. It follows that he is not in a

position to advance any submission that will be helpful to the Court as it resolves the main question at hand. He is, in effect introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application.”

21. What emerges from the above decisions is the principle established in our jurisprudence that an interested party is a peripheral party in a suit and cannot introduce new issues for determination by the Court. Further, that in determining the matters before it, the Court will only consider the issues raised in the pleadings by the principal parties.

22. In the present case, it requires no belaboured analysis to conclude that 1st Interested Party herein has peripheral interests in the proceedings which he now seeks to stay, while at the same time the Respondent, who has the direct interest in the matter stands *a-kimbo*, disinterested. This Court cannot allow the 1st Interested Party to expand the Respondent’s case beyond what was pleaded. The Respondent who would be directly affected by stay of proceedings herein, has not applied for stay of proceedings. It is like a case of a mourner wailing louder than the bereaved. In any event, it has not been shown to the satisfaction of this Court that the alleged interest of the 1st Interested Parties, if any, would not be compensated in damages if the proceedings herein continue, and the 1st Interested Party suffers loss.

23. From the foregoing it is the finding hereof that the application for stay of proceedings herein is ill founded, lacks merit and the same is dismissed with costs to the Petitioner and the 2nd Interested Party.

Dated, Signed and Delivered at Mombasa this 20th day of January, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Saeed for Petitioner

Mr. Buti for 1st Interested Party

Mr. Ogola for 2nd Interested Party

Mr. Tajbhai for Respondent

Ms. Peris Court Assistant