



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO.100 OF 2016

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
42, 69 AND 70 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLETED CONTRAVENTION OF FUNDAMENTAL RIGHTS
UNDER ARTICLES 20(2) AND 22(1) & 23 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

KAREN NGONG VEIW ESTATE ASSOCIATION (KNVEA).....PETITIONER

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA).....1ST RESPONDENT

KAREN VILLAGE LIMITED.....2ND RESPONDENT

RULING

1. Before me are two applications dated 22/2/2019 and 7/6/2019. In the application dated 22nd February 2019 the petitioner seeks the following orders:-

- a) That the application herein be certified urgent and fit to be heard on priority basis.
- b) That this Honourable Court be pleased to strike out the Supplementary affidavits, filed and served on 14/2/2019 on behalf of the 2nd Respondent, namely:-
 - i) Margaret Gatimu
 - ii) Kithinji Mwirigi
 - iii) Tony Mugo
 - iv) Anne Mwiti
 - v) Moses Wanjuki
 - vi) Boniface Q. Opany.

c) That in any event, the costs hereof be awarded to be the Petitioner/Applicant.

2. The application dated 7th June 2019 by proposed interested parties, they seek the following orders:-

a) This matter be certified urgent and service thereof be dispensed with in the first instance.

b) This Honourable Court be pleased to allow Margaret Gatimu, Kithinji Mwirigi, Tony Mugo, Anne Mwiti, Moses Wanjuki, and Boniface Ochieng Opany be enjoined in this petition as Interested Parties, and thereafter be at liberty to file any court papers as they may wish in respect of the matters that are before this Honourable Court.

c) The Supplementary Affidavits sworn by the said Margaret Gatimu, Kithinji Mwirigi, Tony Mugo, Anne Mwiti, Moses Wanjuki, and Boniface Ochieng Opany on 14th February 2019 and filed in this matter on the same day be admitted as duly filed and the same to constitute the evidence of the Proposed Interested Parties in tis petition.

d) The Honourable Court be pleased to issue any such further orders as it may deem fit and convenient in the circumstances of this case.

e) Costs of this application be in the cause.

3. The two applications are interrelated and I propose to deal with the same together.

4. The Application dated 7th June simply seek, that the Applicants who are seeking to be enjoined in this matter their affidavits be struck out in the application dated 22nd February 2019.

5. The 2nd Respondent filed grounds of opposition dated 8th April 2019.

6. As regards application dated 7th June 2019 the petitioner filed Replying affidavit sworn by Josephat M. Ngile on 17th October 2019.

Analysis and Determination

7. I have very carefully considered the two applications; affidavits in support and submissions thereto and the issue arising for determination in the two applications can be summed up as follows:-

a) Whether this court may exercise its jurisdiction and struck out the six supplementary affidavits filed on 14/2/2019?

b) Whether this court may dismiss the 2nd Respondent's application dated 7th June 2019?

A) Whether this court may exercise its jurisdiction and struck out the six supplementary affidavits filed on 14/2/2019?

8. The petitioner is seeking to have struck out the supplementary affidavits filed and served on 14th February 2019 on behalf of the 2nd Respondent by:

i) **Margaret Gatimu**

ii) **Kithinji Mwirigi**

iii) **Tony Mugo**

iv) **Anne Mwiti**

v) **Moses Wanjuki**

vi) **Boniface Q. Opany.**

9. The basis for seeking the same to be struck out is mainly that they were filed and served without leave of this Honourable Court and none of them is supplementary to any affidavits on record. That the affidavits are said to have been introduced not only to vex and annoy the petitioner, but also to sneak in evil allegations through the back door. It is further contended the supplementary affidavits and Replying affidavits to the main petition being sneaked into the proceedings in the 11th hour and being filed thereof, will open up the proceeds which are at the hearing stage to require the petitioner to respond to new issues raised thereon.

10. It is petitioner's contention the filing of 6 supplementary affidavits without the leave of the court will defeat the very essence of the pre-trial conferencing and re-open the case to further pre-trial proceedings and which will lead to undue delay and denial of justice and especially when the suit touches on the state of the environment at the suit property. It is further argued while these proceedings have been pending in the court, the 2nd Respondent has developed hotel, bar and Restaurant, hardware shop, supermarket, office and other commercial ventures within the suit property, all to open defiance to the authority of the Honourable Court.

11. The 2nd Respondent on his part terms the application as grossly incompetent having been brought under non-existent provisions of the law; and when jurisdiction to hear the application has not been properly involved. That the application offends Rule 3(2) of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013* (otherwise known as *Mutunga Rules*)).

12. It is further argued that no sufficient cause has been shown to warrant the striking out of the supplementary affidavits; and the applicant in desperate to delay the hearing of the petition and that at any rate court has powers to admit any evidence that is relevant and admissible in any proceedings. It is further averred that no prejudice is likely to be suffered by the petitioner on admission of the supplementary affidavits.

13. The petitioner in seeking the pleadings to be struck out relies on **order 2 Rule 15 of the Civil Procedure Rules** which provides:-

"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) It discloses no reasonable cause of action or defence in law; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition."

14. From the above striking out of the pleading is allowed and is part of a practice that is enshrined under the Laws of Kenya. However the courts are expected not to be drastic in striking out pleadings and shutting a would be litigant out of the corridors of justice. In the **Cabro East Africa Limited vs Rusoga Investments Limited [2013] eKLR** it was held that the power to strike out pleadings should be exercised cautiously as the court would be striking the same out without first hearing the merits of the case through discovery and oral evidence. Additionally, in the case of **Tom Odhiambo Achillah T/A Achilla T/A Achilla T.O & Co. Advocates vs Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 others [2015] eKLR** the court stated that:-

"The power to strike out pleadings or a party from the suit, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. That power should only be exercised after the court has considered all facts and not the merit of the case."

15. It should however be noted that where there is a clear and apparent case of abuse of the court process and in line with provisions of order 2 Rule 15, of Civil Procedure Rules, this Honourable Court has jurisdiction to strike out such pleadings. This position was opined by the Court of Appeal in **D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another [1980] eKLR** while quoting **Lawrence vs Lord Norreys, 15. A.C. 2010 at page 219** as follows:-

"It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court."

16. The petitioner contend that the 2nd Respondent's 6 supplementary affidavit amount to an abuse of the court process and relies in the case of **Richard Muthusi vs Patrick Gituma Ngomo & another [2017] eKLR** while replying on **Stephen Somek Takwenyi & another vs David Mbutia Githare & 2 others Nairobi (Milimani) Hccc No. 363 of 2009** had the following to say on the court's jurisdiction in striking out pleadings on grounds of abuse of court process:-

".....The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused.

An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."

17. It is further urged that while the 2nd Respondent was fully aware that the main suit was ready to proceed for hearing, proceed without leave of court and proceeded to introduce new issues thereby setting the hearing back and delaying the cause of justice.

18. I have considered the application and the 2nd Respondent grounds of opposition and note that under **Rule 15(2) (a) of the Mutunga Rules** there is a limited period within which to file a Replying affidavit and failure to respond within a stipulated time under clause 15 of the Mutunga Rules the court may hear and determine the petition.

19. From the above I find that the stage at which the parties could have filed pleadings without leave of the court lapsed before filing of the supplementary affidavits. No leave was sought and further more an attempt to present new evidence before this court without orders allowing it to do so, is an abuse of the court process. The 2nd Respondent time to file affidavit without leave lapsed with the period granted under **Rule 15(2) (a) and (b) of Mutunga Rules**. I find all supplementary affidavits have been filed without leave of this court and when all essential pleadings to the suit had been closed, it is an abuse of the court process and the 6 supplementary affidavits are for striking out having been filed on 14th February 2019 when time for doing so had long lapsed. In the case of **Bullen & Leake and Jacobs Precedents of Pleading 12th Edn.) at 145 as mentioned in Law Society of Kenya vs Martin Day & 3 others [2015] eKLR** the court had the following to say about what amounts to a frivolous and vexatious pleading.

"....Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense."

20. On the 2nd Respondents intended New evidence, if allowed through affidavits filed without the leave of the court and contrary to Mutunga Rule, it would cause the petitioner unnecessary expense and trouble in extended applications and resorting to defend the application, that is already made without leave of the court and which is an abuse of the court process. In **Trust Bank Limited vs Hemanshu Siryakat Amin & Company Limited & another Nairobi Hccc No 984 of 1999**, as mentioned in the case of **Law Society of Kenya vs Martin Day & 3 others [supra]** the court held as follows:-

"....and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the court machinery or process."

B) Whether this court may dismiss the 2nd Respondent's application dated 7th June 2019?

21. The 2nd Respondent's application dated 7th June 2019 is intended to cure the errors made in filing the 6 supplementary affidavits without the leave of the court. In other words its purpose is to have the parties who made the averments in the affidavits of 14th February 2019 enjoined as interested parties in these proceedings.

22. The petitioner question the applicants intention in seeking to be enjoined at this stage, urging the parties to this suit have already been long identified before this court and an attempt to introduce new parties is an attempt by the 2nd Respondent to sanitize what was brought improperly before this honourable court and further evidence of the 2nd Respondent's amounts to an abuse of the process of this court.

23. This is a constitutional petition, and under **Rule 7 of the Mutunga Rules** it is provided:-

"7(1) A person may, with leave of the court, make an oral or written application to be enjoined as an intended party.

7(2) A court may on its own motion join any interested party to the proceedings before it."

24. For a party to be joined in any pleadings he/she has to demonstrate that he/she has identifiable legal stake/or legal interest in the development and duty in the proceedings and that the presence of the proposed interested party in the matter is vital to enable the court to effectively and completely adjudicate upon and settle all questions in the matter. The applicants claim to be tenants on the Development where they ply their trade and their business interest. From the above and the nature of the petition herein, I find the Applicants have failed to demonstrate that they have identifiable legal stake or legal interest in the development being mere tenants nor have they demonstrated their presence in this matter is necessary in enabling the court to effectively and completely adjudicate upon and settle all questions of law in this matter. I therefore do not see any need of enjoining the proposed interested parties in these proceedings as interested parties being tenants arising out of what the petitioner has deponed as an illegality arising from unauthorized construction of an Art, culture or heritage centre on suit property, that is alleged, was constructed without public participation and without necessary permit.

25. From my finding in both applications proceed to make the following orders:-

a) The petitioner's application dated 22/1/2019 is allowed and six (6) supplementary affidavits, filed and served on 14/2/2019 on behalf of the 2nd Respondent namely:-

i) Margaret Gatimu

ii) Kithinji Mwirigi

iii) Tony Mugo

iv) Anne Mwiti

v) Moses Wanjuki

vi) Boniface Q. Opany are struck out.

b) Application dated 7th June 2019 by 2nd Respondent is dismissed.

c) Costs of the applications to the petitioner.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

.....

J .A. MAKAU

JUDGE