



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 64 OF 2017

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22(1) & 22 (2) AND 22 (3), 24, 165, 258, 259 & 260 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE ALLEGED VIOLATION AND OR THREATENED, VIOLATION OF THE FUNDAMENTAL
RIGHTS AND FREEDOMS SECURED AND GUARANTEED UNDER ARTILCES 10 (2) (B), 27, 43 (1) (f), 40, 47, 53 (1) (b) AND
55 (a) OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: THE BASIC EDUCATION ACT NO. 14 OF 2013 AT SECTION 3, 4, 28 AND 30

AND

IN THE MATTER OF: THE ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

**IN THE MATTER OF: THE RELOCATION OF MAMDUDU PRIMARY SCHOOL, LOCATED ON PLOT NO. 909/MN/VI IN
KINANGO SUB-COUNTY, KWALE COUNTY**

BETWEEN

1. SALIM KOBO GODANI

2. STEPHEN M. K. MBINU

3. CHARLES M. SHANGA

4. ALI MBAJI KOBO

5. MDOE NYANJE MDOE

6. SADA CHITI

7. HAMISI TSUMA MWERO

8. HASSAN MKUBA (suing as Board of Management of Mwamdudu Primary

School and as Affected Members of Public Resident at Mwamdudu Sub-

Location Kwale County)PETITIONERS

VERSUS

1. THE MINISTRY OF EDUCATION

2. THE HON. ATTORNEY GENERAL

3. CHUNKY LIMITED.....RESPONDENTS

AND

1. KAHIA TRANSPORTERS LIMITED

2. TRADE LEAD LIMITED.....INTENDED INTERESTED/AFFECTED PARTIES

RULING

1. By the Notice of Motion application herein dated 5/11/2019 the Applicants herein, Kahia Transports Limited and Trade Lead Limited pray to be joined to the petition herein as Interested or Affected Parties.
2. The application is premised on the grounds set out therein and supported by affidavit of Osman Ahmed Kahia sworn on 5/11/2019.
3. The Applicants' case is that the Petitioners herein are abusing the process of this Court and have proceeded with matter through material non-disclosure that the Affected Parties are the registered proprietor of the property comprised in (Plots No.MN/VI/5154, 5153 and 5141); the aforesaid properties are situated in Mombasa County and both Kahia Transporters and Trade Lead Limited have over the past few years, been paying their rates to the said county and its predecessors; there exist boundary dispute between the 3rd Respondent and the Intended Interested/Affected Parties and there are three matters already in Court and due for hearing on the 4/2/2020 and 12/11/2019 i.e. ELC Petition 9 of 2018, HCCC No. 273 of 2017 and 405 of 2017; there is absolutely no proper and/or legal basis or justification for the Petitioners to obtain orders purporting to restrain or interfere with the Intended Interested/Affected Parties; the Petitioners' and Respondents' conduct is not only deliberately misleading this Court, but is also completely and absolutely lacking in candor and bona fides; that the 3rd Respondent purported Titles No. C.R 7239/1 (Plot No. MN/VI/909) & 97641(Plot No MN/VI/910) are fraudulent, illegal and unlawful; it is beyond peradventure that the Petitioners and respondent are being disingenuous and are attempting to wrongfully, unlawfully and fraudulently stake a claim to compensation payable towards compulsory acquisition of the Intended Interested/Affected Parties' property; this suit is not only scandalous, frivolous and vexatious but is also an abuse of the process of this Court; the Intended Interested/Affected Parties stand to suffer harm, loss and irreparable damage as well as injustice given that not only have they lost occupation and use of such portion of their property as has been compulsory acquired but have also been kept out of compensation therefore for close to three years now. Any continued delay in releasing the payment of compensation to the Intended Interested/Affected Parties is highly unjust and contravenes the Intended Interested/Affected Parties' constitutional rights to protection of its property as well as fair administration action and the Plaintiffs and Respondents herein are opportunists seeking to lay claims over compensation they have no entitlement to.
4. The application is supported by the 1st and 2nd Respondents. However, it is opposed by the Petitioners and the 3rd Respondent. Mr. Khagram, Learned Counsel for the 3rd Respondent did not file either a Replying Affidavit or submissions to the application, but stated that they relied on pleadings filed by Mr. Jengo for the Petitioners in the application before the court.

Response

5. The Petitioners/Respondents opposed the application through a Replying Affidavit sworn by Salim Kobo Godani on 23/11/2019. The Respondents' case is that they are strangers to the claim by the Applicants against the 3rd Respondent, which they allege is a civil claim, while their claim in the petition hinges on alleged violation of the Petitioners' constitutional rights. The Respondents aver that if the Applicants' application to be joined herein is allowed, then it would have the effect of confusing matters and delaying the petition herein. The Respondents further state that the Applicants' alleged titles No. CR 68637 (Plot No. MN/VI/5153) and CR 68273 (Plot No. MN/VI/5141 and Title No. CR 68689 (Plot No. MN/VI/5154) are not the same with Petitioners' Plot No. CR 7239/1 (Plot No. MN/VI/909) and so the Applicants have not explained their interest in the petition subject matter.

Submissions

6. Parties filed submissions which I have considered.
7. In **Kensalt Limited vs. Water Resource Management Authority [2018] eKLR**, the Supreme Court considered circumstances where a party could be joined to a suit as follows:

“[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. Enjoinder 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.”

8. Further, as a matter of established judicial prudence and practice, the policy running through court decisions is that a joinder will not normally be denied if it can help to reduce a multiplicity of suits, and especially so if the issues affecting all the parties could be determined with finality.

9. In the petition before the court the Petitioners are essentially claiming against the 3rd Respondent a title being CR 7239/1 (Plot No. 909/MN/VI) in which they allege their school stands. The same title is shown to belong to the 3rd Respondent. (See annexure SKG-3 in the Supporting Affidavit of Salim Kobo Godani to the petition). It is this same Plot No. 909/MN/VI which the Applicants claim to belong to them and hence they want to be joined herein to protect their interest. I do not know how clearer the Applicants can state their interest to enable them be joined herein as Interested or Affected Parties. The Petitioners’ submitted that CR 7239/1 (Plot No. 909/MN/VI) is not listed in paragraph 3 of the Applicants’ Supporting Affidavit and therefore that the Applicants are not interested in that property. However, that plot is listed at paragraph (g) of the grounds upon which the application is premised.

10. Further, Mr. Khagram submitted that this petition is related to Petition No. 202 of 2018 (Mombasa) in which the Applicants herein are making a claim against the 3rd Respondent herein in relation to the same plot of land. It therefore seems reasonable to me that the Applicants should be given an opportunity to explain the nature of their interest to the court. The Petitioners claim is concerned with educational rights of their children, and not with the civil dispute between the Applicants and the 3rd Respondent. However, it is my considered view that the underlying issue is the ownership of the suit property, and a title to property is also constitutionally protected.

11. Civil Procedure Rules, 2010, Order 1 Rule 10(2) provides that: -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

12. In **J M K vs. M W M & Another [2015] eKLR** the Court of Appeal stated that: -

“Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar’s Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

13. The upshot is that the application for joinder herein dated 5/11/2019 is merited. The same is herewith allowed with costs in the cause.

Dated, Signed and Delivered at Mombasa this 27th day of July, 2020.

E. K. OGOLA

JUDGE

Ruling delivered in Chambers via MS Teams in the presence of:

Mr. Khagram for 3rd Respondent

Mr. Makuto for 2nd Respondent

No appearance for Petitioners

No appearance for Interested Parties

Mr. Kaunda Court Assistant