



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 44 OF 2020

BETWEEN

ASHOK LABSHANKER DOSHI.....1ST PETITIONER

PRATIBHA ASHOK DOSHI.....2ND PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

GREENVIEW LODGE LIMITED..... INTERESTED PARTY

RULING

PETITION

1. The Petitioners through a Petition dated *6th July, 2020* and filed on even date seeks the following reliefs:-

1. A declaration be and is hereby issued that any intended summons, arrest, charges, prosecution, questioning, investigation, harassing and intimidation of the petitioners on account of any alleged Criminal offences or offences or fraud relating to or concerning title, ownership, dealing and stamp duty of the property known as Land Reference No. 209/3850 (Grant No. I.R No. 56396) is unconstitutional, violates the Petitioners' constitutional rights, is in bad faith is an abuse of the Criminal justice system and therefore unlawful, null and void.

2. An order of prohibition and permanent injunction be and is hereby issued restraining the Respondents whether by themselves agents and servants and/or whomsoever is acting under their authority or instruction, from arresting, charging, prosecuting, summoning, questioning, investigating, harassing and intimidating the Petitioners herein on account of any alleged Criminal offences or fraud relating to or concerning title, ownership, dealing and stamp duty of the property known as *Land Reference No. 209/3850 (Grant No. I.R No. 56396)*.

3. The costs of this Petition be provided for.

4. Any further relief or order that this Honourable Court shall deem just and fit to grant.

Application

2. The Interested Party through a *Notice of Motion* dated *17th November, 2020* brought pursuant to **Rule 8(2) and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (otherwise referred to as "The

Mutunga” Rules) seek the following orders:-

a. Spent.

b. That this Honourable Court be pleased to transfer Mombasa Constitutional Petition No. 44 of 2020 Ashok Labshanker Doshi & Pratibha Ashok Doshi versus Director of Public Prosecutions, Director of Criminal Investigations, The Inspector General of the National Police Service , The Honourable Attorney General and Greenview Lodge Limited, Interested Party to Constitutional and Human Rights Division of the High Court of Kenya at Nairobi for determination.

c. That costs of this application be provided for.

3. The application is premised on the grounds set out on the face of the application and on the supporting affidavit of *Jeniffer Nthenya Wambua* sworn on 17th November, 2020. The deponent avers that the subject of the Petition is *Land Reference No. 209/3850 (Grant No. I.R No. 56396)* which is situate in Nairobi within the jurisdiction of Constitutional and Human Rights Division of the High Court of Kenya at Nairobi. Further, the deponent deposed that investigations by the 2nd Respondent on account of the proposed charges against the Petitioners were all conducted in Nairobi, where also are based all the prosecution witnesses, and the Interested Party’s offices are located in Nairobi and so are its witnesses.

Responses

4. Respondents have not filed any response to the Interested Party’s Application for transfer of the Petition to Nairobi. When the Application came up for hearing on 30th November, 2020, their Counsel on record indicated that they were in support of the said motion.

5. The Petitioners vide *Replying Affidavit* sworn by the 1st Petitioner on 27th November, 2020 opposed the Application on grounds summarized herein as follows:

a. That the instant Application is an afterthought since all the parties were present in Court on the 9th July, 2020 and on 29th September, 2020 and directions for hearing were issued on how the Application dated 5th July, 2020 for conservatory orders was to be canvassed. However, the issue of transfer never arose and it was only raised informally on the 12th November, 2020 as a delay tactic.

b. That the Interested Party is a peripheral party in the Petition and therefore it cannot formulate the trajectory the Petition will head to.

c. That this Court has jurisdictional allover Kenya and the respondents as constitutional office holders have a duty to discharge their mandate all over the republic.

d. That the Petition is not challenging the ownership of the Land Reference No. 209/3850 (Grant No. I.R No. 56396) as the same are being handled in Nairobi Misc. Application No. 46 of 2020 Ashok Doshi & Pratibha Doshi V. The Chief Land Registrar. The subject of the instant Petition is challenging the petitioners intended arrest and prosecution. Since the arrest are to be carried out in Mombasa where the petitioners live, Rule 8(1) of the Mutunga Rules requires the petitioners to institute a Petition in the High Court within whose jurisdiction the alleged violation took place.

e. That the issues of the venue of the investigations and the domicile of the witnesses is premature since at this juncture the Petitioners seek to stop the intend prosecution. Therefore, the concerns raised by the Interested Party would only crystalize after the instant Petition is determined.

Analysis And Determination

6. I have considered the application before the Court and *Replying Affidavit* filed by the Petitioner in opposition thereof. I have also considered the oral submissions made by counsel. From the above, the issue arising for consideration is:

a. Whether the Interested Party has met the threshold to justify the transfer of this petition as sought in the application dated 17/11/2020?

7. The Interested Party seeks transfer of the instant Petition to the Constitutional and Human Rights Division of the High Court of Kenya in Nairobi for determination on the grounds that *Land Reference No. 209/3850 (Grant No. I.R No. 56396)* which is the subject of the instant Petition is situate and registered at the Central Registry in Nairobi; that all the investigations by the 2nd Respondent and the recommendation to prosecute the Petitioners were all conducted in Nairobi; that the offences the 1st Respondent recommended for prosecution were committed in Nairobi; and that the intended Criminal prosecution is to be undertaken in Nairobi

8. Rule 8(1) & (2) of the Mutunga Rules, 2013 provides that:-

8. (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.

(2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.

9. **Article 165(3)(a),(b)** of the **Constitution** provides that:

(3) subject to clause (5), the High Court shall have-

“(a) unlimited jurisdiction in criminal and civil matters

(b) Jurisdiction to determine the question whether a right for fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.

10. It therefore follows that a High court has jurisdiction to transfer a suit pending before it as provided under **Rule 8(1) & (2) of the Mutunga Rules, 2013** if it is persuaded by the Interested Party’s arguments.

11. Be that as it may, it is noteworthy that the present Application was brought by an Interested Party who was enjoined vide Application dated **27th July, 2020**. It is trite law that 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...

12. What emerges from the above decision is that an Interested Party is a peripheral party 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. This rule will be particularly unyielding when the matter before court is private as opposed to a public interest claim. In this Petition, the issue of transfer of the Petition to Nairobi did not emanate from the principal parties. Consequently, if the Interested Party believes that it was deliberately and by design left out from the proceedings by the Petitioners, then the appropriate cause for the interested party would be to join these proceedings as a Respondent or Petitioner.

13. I have however noted in agreement with the Petitioners that quite apart from the peripheral nature of the interested party’s interest herein, this Court would still retain the jurisdiction to hear and determine the Petition here in Mombasa for the very valid reasons provided by the Petitioners, being that the Petition herein simply seeks to stop the arrest and prosecution of the Petitioners, who ordinarily live in Mombasa, from where they would easily be arrested and possibly prosecuted.

14. The upshot is that the Notice of Motion the subject of matter of this Ruling lacks merit and is dismissed. Parties to bear own costs.

Dated, Signed and Delivered at Mombasa this 17th day of December, 2020.

E.K. OGOLA

JUDGE

Judgment delivered in chambers via MS Teams in the presence of:

Mr. Oluga for Petitioners

Mr. Eredi for the AG

Mr. Eredi holding brief Githinji for interested party

NOTE: This Judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.