



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 207 OF 2012

E O (Minor Suing through

the Next friend and father HO)..... 1ST PLAINTIFF

D N (Minor suing through the Next friend

And mother RMC.....2ND PLAINTIFF

RUTH MUTHONI CHEDGE.....rd PLAINTIFF

GEORGE NJOROGE.....4RD PLAINTIFF

NAHASHON KIVUVA.....5TH PLAINTIFF

MARION WACEKE MBURU.....6TH PLAINTIFF

JOSEPH MWAI.....7TH PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY (KPC) LIMITED.....1ST DEFENDNT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....3RD DEFENDNT

CHINA PETROLEUM PIPELINE

BUREAU (CCP).....4TH DEFENDANT

AND

STEPHEN KARANI.....1ST INTERESTED PARTY

JAMES NJERU MWANIKI.....2ND INTEREHSTED PARTY

DEDAN WAITHAKA WAMBUI.....3RD INTERETSED PARTY

KEZIAH WANJIRU GATHINJI.....4TH INTERESTED PARTY

STEPHEN KOMU.....5TH INTERESTED PARTY

DANIEL MUNYIRI KAMAU &

FRANCIS KAMAU.....6TH INTERESTED PARTY

(Suing as legal representatives of Estate of LUCY NYAWIRA KINYUA deceased)

RULING

On 28th September, 2015 counsel for the parties herein compromised a Notice of Motion dated 25th November, 2014 which sought the stay of all suits arising from the cause of action herein pending the determination of this suit, and that High Court Civil Case No. 207 of 2012 be selected and tried as a test case on liability, in respect of all suits arising out of the fire that broke out at Sinai informal settlement on 12th September, 2012.

It is common ground that some of the suits are in the lower court while the suit selected to be the test case is in the High Court. The defendants are also the same in all the suits pending in the two courts. Following the consent signed by the advocates appearing for the parties, the 4th, 5th and 6th interested parties who are plaintiffs in some of the suits in the lower court filed an application dated 26th March 2019 to vacate and or set aside the orders relating to the said consent.

The grounds for seeking that order are set out on the face of the application, alongside a supporting affidavit sworn by the advocate for the interested parties. The application is opposed and the respondents have filed their respective grounds of opposition and/ or replying affidavits.

I am alive to the grounds for setting aside a consent order which include misrepresentation, fraud and non-disclosure of material facts among others. It is on record that the defendants in this suit filed an application to have the suit dismissed which however was dismissed by Kamau J on 30th July 2019. Following that decision, the defendants moved to the Court of Appeal and that matter is pending determination.

It is the delay occasioned by the steps taken by the defendants, and also the fact that the advocate who held brief for counsel appearing for the applicants herein had no authority to compromise the application, that has led to the applicants wishing to opt out of the said order.

As the applicants ride on the back of this suit which had been identified as a test case for all the claims, their cases in the lower court remain undecided. It will be noted that the defendants in the lower court did not move the court to have the suits dismissed for want of prosecution as they did in the present case. The consent entered into was related to the determination of liability only and not any other issue. The application to have this suit dismissed came after the said consent. That application, as already observed, did not include the suits in the lower court.

As clearly as it can be seen, prejudice is likely to be visited upon the plaintiffs in the lower court if the Court of Appeal agrees with the defendants that the test suit should be dismissed. The apprehension on the part of the applicants herein, and the concern that their cases are being delayed in the lower court, are sufficient grounds to have them opt out of the consent order.

It will be noted that the application that led to the consent order was filed by the 1st defendant. Whereas I believe the application was made in good faith and to facilitate orderly and expeditious disposal of the cases, the parties now approaching the court to opt of the consent order did not anticipate the defendants would take the action to have the cases terminated for want of prosecution.

Identifying as I do, that prejudice is likely to be visited upon the applicants herein which may lead to injustice, and considering the cause of action took place about 7 years ago, I am persuaded that the orders sought are justified.

The application by the 4th, 5th and 6th interested parties is allowed and therefore the said parties are now discharged from the said orders. Since the 1st, 2nd and 3rd interested parties are also plaintiffs in the lower court they are also released and discharged from the said order. Whatever transpires relating to this suit in the Court of Appeal shall only affect the parties in this suit. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE