



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 64 OF 2018

CHRISTOPHER OGANDA NYARURI.....PETITIONER

-VERSUS-

THE DIRECTOR PUBLIC PROSECUTION.....1ST RESPONDENT

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

AND

ESQUIRE INVESTMENTS LIMITED.....PROPOSED INTERESTED PARTY

RULING

BACKGROUND

1. In the petition dated 21st February 2018, the petitioner sued the respondents claiming, *inter alia*, that the decision by the respondents to charge him with a criminal offence arising out of a dispute between 2 companies over land ownership, a matter which is before the Environment and Land Court (ELC) is unconstitutional, unlawful and against the public interest. The petitioner sought the following prayers in the petition.

a) A declaration that the petitioner's rights are being violated or are threatened by the 1st and 2nd respondents.

b) An order of prohibition to issue restraining the 1st and 2nd respondents from arresting, detaining, charging, questioning, investigating and/or prosecuting the petitioner in relation to land reference Nos. 3734/1411& 3734/1412 or L.R. No. 3734/28.

c) Costs of the petition.

2. Parties to the petition agreed to canvass it by way of written submissions which they filed and exchanged but before a date could be fixed for highlighting of submissions the interested party filed an application 2nd July 2018 which is the subject of this ruling.

Application

3. In the application dated 2nd July 2018, the proposed interested party seeks the following orders:-

1. That Esquire Investment Limited be hereby enjoined as an interested party to these proceedings;

2. That the petitioner and the 1st and 2nd respondents serve their documents on Esquire Investment Limited forthwith;

3. That any other consequential and/or incidental relief(s) be made to meet the ends of justice; and

4. That the cost of this application be provided for.

4. The application is premised on the grounds that:

i. That the proposed interested party is the lawful and registered proprietor of LR No. 3734/28, Muthangari Road, Lavington, Nairobi (fraudulently subdivided into titles number 1.R. No. 157642, L.R. No. 3734/1411 and title number 1.R. No. 157643, L.R. 3734/1412).

ii. That the proposed interested party is the plaintiff in ELC Case No. 952 of 2016 Esquire Investment –vs- The Attorney General and 4 others where it has sued Korari Agencies Limited for fraudulently and illegally purporting a transfer of the said property and further unlawfully and illegally subdividing the suit property contrary to and in blatant disregard of the proposed interested party's right enshrined under Article 40 of the Constitution of Kenya 2010.

iii. That the proposed interested party is the complainant in the investigations subject to this petition having lodged a complaint through its director Mr Ramji Devji Varsani against Korari Agencies Limited to the Land Fraud Unit of the Directorate of Criminal Investigations on 29th January 2018. Suffice to note the petitioner herein is a director of Korari Agencies which is subject to the impugned investigations.

iv. That furthermore, the petitioner's petition is premised on numerous unfounded averments against and with regard to the proposed interested party. Therefore the proposed interested party ought to be accorded its legal and constitutional right to respond to any allegations and or averment made against it.

v. That the inclusion of the proposed interested party will assist this Honourable Court to effectively and completely adjudicate on and settle all questions involved in the suit.

vi. That it is in the interest of natural justice and fairness for the proposed interested party to be enjoined in this matter to ensure the just, efficient and procedural disposal of this suit.

vii. That the applicant shall suffer irreparable loss if the prayers sought herein are not granted.

viii. That the parties herein shall not suffer any prejudice if the orders sought herein are granted.

ix. That this Honourable court has inherent jurisdiction to grant the said prayers.

5. The application is supported by the affidavit of Ramji Devji Varsani the proposed interested party's Managing Director in which he repeats the grounds set out in the body of the application.

6. In their submissions in support of the application M/S Okwach & Company Advocates submitted that, as the complainants in the criminal suit which the petitioner seeks to halt through the instant petition, they are within their rights to apply to be enjoined in this petition as interested parties so as to safeguard their interests and put the record straight on some of the erroneous and misleading averments that the petitioner has made against them in the petition.

7. It was submitted that the proposed interested party has a stake and a clearly identifiable interest in the petition. It was the applicant's case that their joinder to the case would assist the court in making a just, legal, equitable and procedural determination.

Petitioner's response.

8. The petitioner opposed the application through the grounds of opposition dated 9th July 2018 in which he outlined the following grounds of opposition.

1. That the petition seeks a declaration on the petitioner's personal rights, which do not directly, and in any way, affect the interested party.

2. That the petition seeks an order of prohibition against the 1st and 2nd respondents, which is a judicial review order concerned with the decision making process rather than the merits of the decision. The interested party's application delves into the merits of the Environment and Land Court case, thus transforming this petition into ordinary civil litigation.

3. That proposed interested party has no personal interest or stake in the petition and the same is not demonstrated in the application.

4. That proposed interested party has not shown what prejudice it will suffer in the case of non-joinder. The petition is against the 1st and 2nd respondents, and the matters raised in the application are currently before the Environment and Land Court Case No.952 of 2016. Whatever decision this Honourable Court reaches in this petition will not affect the said case and the proposed interested party can ventilate its issues therein.

5. That the application is defective as the proposed interested party has not set out its case and/or the submissions it intends to make before this Honourable court to demonstrate its relevance. The proposed interested party's application is a mere replication of what is contained in the petition and the replying affidavit.

6. That no benefit will be gained by the joinder, which will only militate against the expeditious disposal of the petition.

7. That the application is misconceived and it otherwise an abuse of the process of the court.

8. That the application does not satisfy the conditions for the joinder of an interested party.

9. M/S Nyasore Nyangau & Company Advocates for the petitioners filed written submissions to the application in which they stated that the applicant did not set out the personal interest or stake in the petition before the court in which the petitioner sought the enforcement of his rights. Counsel submitted that the instant petition was separate and distinct from the case before the Land Court being ELC No. 952 of 2016 and the this court will not be called upon, in this petition, to determine the merits of the land case.

10. Counsel further submitted that the applicant will not suffer any prejudice as a result of the issues outlined in this petition and that whatever decision is made by this court will not affect the land case. The respondents did not oppose the application.

Determination

11. I have considered the instant application, the Grounds of Opposition filed by the petitioner and the parties' respective submissions. The main issue for determination is whether the applicant should be enjoined in this case as an interested party.

12. In determining this issue, it is worth to consider the genesis of the instant petition and how the applicant fits in to the current proceedings. A perusal of the petition shows that the petitioner challenges the respondents' decision to charge him with a criminal offence arising out of a land dispute, on a matter that is already before the land court.

13. My understanding of the petitioner's case is that he is yet to be charged in court for a criminal offence and in fact, one of the prayers in the petition is for an order of prohibition to restrain the 1st and 2nd respondents from charging, detaining, questioning, investigating and/or prosecuting him in relation to the land reference Nos. 3734/1411 and 3731/1412 or LR No. 3734/28.

14. The petition was filed on 21st February 2018 and the current position is that the petitioner has not been charged with any criminal offence. The decision on whether or not to allow a party to be enjoined in a case as interested party lies at the discretion of the court. The procedure for joining a necessary party to a suit is provided for under Order 1 rule 10 (2) of the Civil Procedure Rules to be available to **either party** to move the court, so that a person who is not a party but who seeks to join may, as done by the applicant in this case, invoke the inherent jurisdiction of the court and the overriding objective of the civil process.

15. The issue therefore becomes whether it is in the interest of justice for the applicants to be joined, whether as necessary parties or as interested parties - whether it is on own motion of the court or on their application. As necessary parties, the provisions of Rule 10 Order 1 will apply to require that their involvement to be **necessary** for the court to *'effectually and completely adjudicate upon and settle all questions involved in the suit'*. As interested parties, the applicants

need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit.

16. In the instant case, I find that it is not necessary to enjoin the applicant to this case for the following reasons; Firstly, it is not disputed that there is already a case before the Environment and Land Court pitting the applicant and the petitioner herein where, I believe, the real issues between the parties will be ventilated. Secondly, it is apparent to me that the instant petition is an offshoot of the matter before the Environment and Land Court as the petitioner seeks to stop the respondents from instituting criminal charges against him over the same land dispute. My take is that the instant petition is purely a matter between the respondent and the petitioner in which case, should the criminal proceedings be initiated against the petitioner, the applicants interests, as a complainant in the said case, would be well taken care of by the Director of Public Prosecution who is in charge of the prosecution and the Director of Criminal Investigation who is the investigative body in the said criminal proceedings.

17. The broader principles of joinder were enunciated in the case of **Mai Mahiu Kijabe/Longonot/Co. Ltd v Ayub Mugo Njoroge & 5 Others**

Civil Suit No. 1672 of 2001, Unreported, [eKLR] in which the court held;

"It is a cardinal rule of procedure that any party who stands to be directly affected by any orders that may be made in any suit and or whose participation is necessary in a suit for effective adjudication of the matters in issue ought to be made a party in the suit or at least be notified about the existence of the suit."

18. In the instant case, I find that the applicant is already aware of the existence of the present petition and that its interests have already been catered for by the respondents who are well versed investigations or the intended prosecution should the same be initiated. I find that the applicant may not, in the totality of the circumstances of this case, be a necessary party to this case. Moreover, the applicant has not demonstrated that the respondents will be incapable or unwilling to present the complainants side of the story in the instant petition.

19. To my mind, this petition primarily challenges the respondents' exercise of their Constitutional and statutory functions and not the evidence to prove the alleged fraud which will be determined by the criminal court should criminal charges be filed against the petitioner. I further note that the respondents filed detailed replying affidavit to the petition in which they explained the nature of the investigations that they conducted around the land dispute following a complaint filed by the applicant's managing director. The applicant has not stated that the said response is inadequate or wanting so as to necessitate their entry into the case.

20. For the above reasons, I decline to grant the orders sought in the application dated 2nd July 2018 which I hereby dismiss with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 28th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Miss Motabori for the petitioner/respondent

Mr Wanyama for Goloma for the proposed interested party

Court Assistant – Kombo