



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

PETITION NO.13 OF 2018

IN THE MATTER OF AN ALLEGED INFRINGEMENT AND/ OR VIOLATION OF THE PETITIONERS' CONSTITUTIONAL RIGHTS UNDER ARTICLES 19, 20, 21, 22, 23, 35, 40, 47, 63, 162 AND 165 OF THE CONSTITUTION OF KENYA, 2010.

BETWEEN

1. DAVID K KAITANY..... 1ST PETITIONER
2. CHESAINA CHEPTARUS.....2ND PETITIONER
3. SAMUEL TUITOEK3RD PETITIONER
4. GIDEON MENEGO4TH PETITIONER
5. SHADRACK TUITOEK5TH PETITIONER
6. REUBEN KENDAGOR.....6TH PETITIONER
7. JAPHETH K. CHEBII7TH PETITIONER
8. KIPCHUMBA CHELANGAT WILSON8TH PETITIONER
9. WASHINGTON KIPROP CHEPYEGON9TH PETITIONER
10. TITO MENEGO.....10TH PETITIONER
11. RICHARD KOSGEL.....11TH PETITIONER
12. WILLY K. C. MENEGO12TH PETITIONER
13. PHILIP KOECH BEYNAM13TH PETITIONER
14. BENSON KOSGEL14TH PETITIONER
15. VINCENT KIPLANGAT15TH PETITIONER
16. JOHN KENDAGOR.....16TH PETITIONER
17. TITUS TUITOEK.....17TH PETITIONER
18. ISAIAH CHEPTARUS.....18TH PETITIONER
19. KIPLANGAT ROTICH.....19TH PETITIONER

REPRESENTATIVES OF KABOMOI AREA RESIDENTS AND/ OR COMMUNITY

VERSUS

THE HEAD TEACHER/ SECRETARY THE SCHOOL MANAGEMENT COMMITTEE

NG'ONLONG PRIMARY SCHOOL.....1ST RESPONDENT

THE COUNTY DIRECTOR OF EDUCATION, BARINGO COUNTY2ND RESPONDENT

THE LAND ADJUDICATION AND SETTLEMENT OFFICER, BARINGO COUNTY....3RD RESPONDENT

MR. WILSON KAPKWANG THE ASSISTANT CHIEF, MOLOI SUB LOCATION OROKWO LOCATION,

BARINGO COUNTY.....4TH RESPONDENT

THE MEMBER OF COUNTY ASSEMBLY KABARNET WARD, BARINGO COUNTY...5TH RESPONDENT

THE COUNTY LAND REGISTRAR BARINGO COUNTY6TH RESPONDENT

THE COUNTY SURVEYOR, BARINGO COUNTY.....7TH RESPONDENT

THE COUNTY LAND OFFICER, BARINGO COUNTY8TH RESPONDENT

THE COUNTY GOVERNMENT OF BARINGO.....9TH RESPONDENT

THE NATIONAL LAND COMMISSION10TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL11TH RESPONDENT

RULING

1. The Petitioners approached this court by way of the Notice of Motion application dated 6th May 2021 wherein they sought for the following orders;

a) Spent;

b) That the petitioners/applicants be granted leave to amend the pleadings by enjoining Charles R Keitany (Principal Ng'olong Secondary School) and Andrew Yatich Cherubet (Chairman Board of Management) Ng'olong Secondary School as respondents to this suit; and,

c) Costs of this suit."

The application is based on the eight (8) grounds on its face, among them that the two proposed Respondents are involved in the dispute herein, which is the construction on the petitioners' property, being the parcel known as Ewalel/Serutunin/632. The petitioners contend that to date, two classrooms have been constructed on the suit property, and it is necessary to have the two proposed Respondents joined in the petition as they are the persons currently continuing the violation of their rights as the school Head teacher and Board of Management chairman respectively. The application is supported by an affidavit sworn on 6th May 2021 by the 1st Petitioner on behalf of the other petitioners, in which he among others deponed that the court had ordered a surveyor to visit the disputed land to ascertain its status. That the surveyor's report of 26th February 2019 confirmed that the disputed land was a section of land overlapping in the titles of Ewalel/Serutunin/632, occupied by the Petitioners, and Baringo/Kapchomuswo 'A'/2100. That Ng'olong Secondary School is being constructed on the overlapping section of the land and that the two proposed Respondents, Mr. Charles R Keitany and Mr. Andrew Yatich Cherubet, are the ones currently furthering the construction on the disputed portion of land, and are therefore necessary parties to be joined to the petition to finally adjudicate the issues herein. The deponent annexed to the affidavit a letter dated the 17th January 2017 by Charles R Keitany, to various governmental offices requesting for among others, security to be provided to enable construction of the classrooms to proceed on the disputed piece of land.

2. The application is opposed by the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th and 11th Respondents through their thirteen (13) grounds of opposition dated the 7th June 2021. They among others contend that the application was an afterthought, defective and contrary to the Constitution of Kenya, (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013, the Basic Education Act and Regulations thereunder. That the application did not meet the four parameters set out in the celebrated case of **Central Kenya Ltd vs Trust Bank Limited and 5 others [2000] eKLR**, and that the Petitioners have not clarified the capacity in which the persons they seek to join in the petition will appear. That the application has been delayed for 3 years from 2018, and will cause further delay coming after directions have been issued on the main petition. They also aver that the application is brought under the wrong provisions of the Civil Procedure Rules

which is inapplicable to constitutional petitions.

3. That after the directions for filing and exchanging submissions were given on the 23rd June 2021, the court has noted that only the learned counsel for the Respondents filed their submissions dated the 23rd November 2021. The counsel reiterated the Respondents position that the amendments and joinder of the two parties was unnecessary. They also cited a number of authorities which I have had the opportunity to peruse.

4. The following are the issues for the court's determinations;

a. **Whether the petitioners have shown that their application meets the threshold for joinder of the two proposed parties.**

b. **Who pays the costs of the application.**

5. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions, superior courts decisions cited and come to the following conclusions;

a. The question of joinder of parties is governed by Order 1 Rule 10 (2) of the Civil Procedure Rules which states 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.**”[emphasis added].

b. That in the case of **Sofia Muciku Jotham (Suing as the Legal Representative of the Estate of Jotham Gikunju Karu) v Lucy Waruguru (Sued as the Legal Representative of the Estate of Judy Kori Nyaga) & another [2021] eKLR**, the court stated as follows on an application for joinder;

“When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of a defendant, there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.”

And in the case of **Meme Vs Republic, [2004] 1 EA 124**, the court observed that a party could be enjoined in a matter for the reasons that;

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

c. That further, in the case of **County Government of Kiambu & another v Senate & others [2017] eKLR**, the court stated that;

“Therefore, distinction should be made between necessary and non-necessary parties. ‘**Necessary Parties’ are those parties from whom relief is claimed.** ‘Non-necessary Parties’ are those parties who may be parties to the suit, but from whom no relief has been claimed. **The presence of necessary parties is obviously required for the court to adjudicate and pass an effective and complete decree granting relief to the plaintiff.** However, the same does not hold good for non-necessary parties. **In the absence of necessary parties, the court may dismiss the suit, as it shall not be able to pass an effective decree.** But a suit can never be dismissed due to absence of non-necessary party. As Nambuye J (as she then was) held, ‘*Necessary Parties*’ are those parties in the absence of whom no effective decree can be passed by the court.

In the Indian case of **BENARES BANK LTD. V. BHAGWANDAS** the court laid down the two tests for determining the questions whether a particular party is necessary party to the proceedings. The said tests were reiterated in the case of Deputy Commissioner of **HARDOI V. RAMA KRISHNA**. The said tests are;

- i. There has to be a right of relief against such a party in respect of the matters involved in the suit.
- ii. The court must not be in a position to pass an effective decree in the absence of such a party.

Generally, a party from whom no relief is sought is not a necessary party. Thus, the nature of relief claimed is important in deciding who is a necessary party. Necessary parties are essentially those parties from whom the plaintiff has claimed relief, not those parties from whom he may claim relief. Proper parties need not be impleaded. Therefore, if complete and effective relief can be claimed by the plaintiff from some parties, there is no need to join other parties since other parties are not necessary parties.” (emphasis added).

d. That the Petitioners herein assert that because the two persons intended to be joined are continuing the construction of Ng’olong Secondary School, they are necessary parties to this suit. The Respondents’ position is that since the school, by law is governed by a Board of Management that has already been sued, the school is competently represented and the presence of the two will only serve to delay the hearing. They have cited sections 55, 56, 57, 58 and 59 of the Basic Education Act, No. 14 of 2013. Section 55 of the Basic Education Act provides for the establishment of a Board of Management for primary and secondary schools, while section 56 provides for its composition. Section 57 provides for qualifications to be a member of such boards. It is section 59 that is relevant to this proceeding which I reproduce partially hereunder;

“59. The functions of the Board of Management of a basic education institution shall be to-

a. - - - -

b. - - - -

(c) ensure and assure the provision of proper and adequate physical facilities for the institution;

(d) manage the institution’s affairs in accordance with the rules and regulations governing the occupational safety and health;

(n) administer and manage the resources of the institution;”

e. That I am persuaded that the above provisions support the position of the Respondents that the Basic Education Act bestows the management of educational institutions to Boards of Management. That was the position taken by the court in the case of *Beatrice Tiliti & anor vs William Kibet Chiboi (2017) eKLR*, where Odeny J, held that;

“Finally on this issue of capacity to be sued, Mativo J stated in the case of J.N. and 5 others vs. Board of Management, St. G School Nairobi and Another (2017) eKLR, that “my understanding of the law and the above provision is that the Board of management is a legal entity, capable of suing and being sued and the school Principal cannot be sued in her name or personal capacity for decisions made by the Board. There is nothing to show that she made the impugned decisions made by the board. There is nothing to show that she made the impugned decision in her capacity or acted outside her mandate to warrant personal liability: the petition does not disclose a case against her in her personal capacity and it would be improper, unfair and unjust to drag her through these proceedings when the decision being challenged was arrived at by a legal entity.”

Having considered the submissions of both parties and the relevant judicial authorities above, I find that the case did not disclose a cause of action against the appellants as they were sued in their personal capacities which was improper. The law and procedure are very clear on how to bring suits against public schools. If persons were to sue anybody who interacts with the school in one way or another then the Basic Education Act and regulations could have said so. The Act wanted to bring sanity, clarity and accountability on who to take responsibility in case of a wrong.”

f. That evidently, the court finds the two proposed parties are not necessary parties in this proceeding as whatever the Petitioners allege that they are continuing to do, is not in their personal capacities. There is no relief that could flow from them, or which this court could not grant without their presence. Equally, there are no personal interests of the two parties that necessitates their participation in this suit. From the foregoing, this court finds that the application for joinder of the two parties is without merit.

g. That the Petitioners having lost in the application would ordinarily be responsible for the costs, but the circumstances of this matter require the costs abide the outcome of the petition.

6. That flowing from the foregoing, the Petitioners application for joinder dated the 6th May 2021 is without merit and is hereby dismissed with costs abiding the outcome of the petition.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 23RD DAY OF FEBRUARY, 2022

S.M.KIBUNJA,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PETIONERS: ...Absent

RESPONDENTS: ...Absent

COUNSEL:Absent.....

COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

ELC ELDORET