



qREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 9 OF 2014

BENJAMIN K. KIPKULEIPETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MOMBASARESPONDENT

AND

MUSK DEER LIMITED PROPOSED INTERESTED PARTY

RULING

INTRODUCTION

1. The application before the court is the Proposed Interested Party's Amended Notice of Motion dated 28th November 2014. In it, the Proposed Interested Party (Musk Deer Limited) is seeking leave of the court to be enjoined as an interested party to the petition. The application is supported by the affidavit of Ashok Doshi sworn on 2nd April 2014 and a further affidavit sworn on 9th September 2014. The crux of the application is that the orders sought by the petitioner should he succeed, would adversely affect Musk Deer Limited.
2. The petitioner by affidavit sworn on 30th April 2014 has opposed the application stating that the proceedings herein have been brought against the respondent in respect of violation of the petitioner's fundamental rights as protected by the Constitution of Kenya, a matter in which Musk Deer Limited has no connection or relevance.
3. The parties filed and exchanged written submissions which they highlighted in oral arguments through Mr. Khagram for the Petitioner and Mr. Oloo for the Proposed Interested Party on 8th December 2014, and ruling thereon reserved.

BACKGROUND

4. The petition was filed on 28th February 2014 and seeks orders *inter alia* for the reinstatement of the petitioner's name as proprietor of the property known as L. R. No. MN/I/5194 registered in the Land Titles Registry in Mombasa as C. R. 21127 (the suit property) which is estimated to be valued at over Kshs.40Million. The petitioner in the verifying affidavit sworn on instant date detailed that the property had been repossessed by the respondent on an alleged execution of default judgment entered in Mombasa Civil Case No.2094 of 2006 (*Municipal Council of Mombasa vs Benjamin Kipkulei*), a suit for the recovery of land rates arrears.
5. The suit property was subsequently sold by auction at Ksh.15Million and transferred to a third party – Musk Deer Limited, and the petitioner evicted therefrom. The petitioner in an attempt to recover the suit property made an application to set aside the order of the court, which application

was declined, resulting in an appeal – Mombasa High Court Civil Appeal No.178 of 2009 (Benjamin K. Kipkulei vs Musk Deer Limited & Municipal Council of Mombasa). This appeal is still pending before the court.

THE PROPOSED INTERESTED PARTY'S CASE

6. Musk Deer Limited pointed out that the prayers in the petition make reference to its position as follows:

1. Paragraph D of the prayers seek

“an order directing land titles registrar Mombasa in the registry to rectify his records to reflect the name Benjamin Kipkulei as the proprietor of the said property LR MN/I/5194 registered at the land titles registry as CR 21127 as stated in the original Title Deed issued on the 18th February 1991.”

2. Paragraph E seeks,

“an order prohibiting the Respondents by themselves or through other persons purporting to derive title through or under them from interfering with the proprietary and/or possessory rights or enjoyment of the suit property.”

7. The proposed interested party has further submitted that the appeal, in which it is enjoined as a co-respondent is filed on the same ground of fair hearing and seeks similar prayers to the petition. On this proposition, it is submitted that the petition intends to adduce evidence emanating from documents filed in the appeal, which issues are intertwined and affect the proposed interested party. The proposed interested party has submitted that it has an identifiable stake or legal interest or duty in the suit property, having purchased the same from a public auction conducted pursuant to the subordinate court's decree.

8. Musk Deer Limited is also said to be in possession of the suit property. It was further argued that it had been adversely mentioned in the petition, specifically at paragraphs 5, 15 and 18 J, and the orders sought, particularly in prayers (d) and (e) would definitely affect it, and therefore they were entitled to be heard under **The Constitution of Kenya, Article 50**, the right to fair hearing and **Article 48** on access to justice. Reference was made to **Walter Osapiri Baraza vs The Cabinet Secretary Ministry of Interior and National Coordination & 6 Others** (2013) eKLR, **Meme vs Republic** (2004) 1 EA, **Departed Asians Property Custodian Board vs Jaffer Brothers Limited** (1999) 1 EA 55 and **Amon vs Raphael Tuck & Sons Limited** (1956) 1 All ER 273.

THE PETITIONER'S RESPONSE

9. The petitioner submitted that the issues in the appeal are different from the matters in the petition. The appeal, it was submitted, relates to and is against the order of the subordinate court declaring itself *functus officio* on the petitioner's application to set aside judgment. On the other hand, the petition involved the question of fundamental violations and breach of the petitioner's Bill of Rights, as committed by the respondent, and made no complaint as against the proposed interested party.

10. In addition, it was submitted, no relief had been sought against the proposed interested party. Furthermore, the right sought to be protected, accrued prior to the interested party's involvement in the suit property and as such had no connection to it. The court was urged to note that the proposed interested party was not a party to the suit in the subordinate court, whose judgment resulted in the infringement of the petitioner's rights.

11. The petitioner argued that the proposed interested party had no identifiable stake, legal stake or legal interest to warrant the court to exercise its discretion to enjoin it as a party. Referring to **Evans Odhiambo Kidero vs Director of Public Prosecutions & 3 Others** (2014) eKLR, it was also submitted that the consequential effect of any determination made upon the proposed interested party is irrelevant to the consideration of whether the petitioner's fundamental rights and freedoms have been infringed.

DETERMINATION

12. **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** empowers the court to exercise its discretion to join an interested party under **Rule 7** which provides that the court make orders to join any interested party to any proceedings before it, either on its own motion or by application for leave whether orally or in writing by any person. In addition, **Rule 5** provides for joinder of necessary parties
13. It is admitted that the proposed interested party herein currently holds title and possession over the suit property. At paragraphs 18 (j) of the Petition, the Petitioner avers to this and states

“In the circumstances, the Petitioner has been unlawfully, wrongfully and arbitrarily deprived of the possession of his said property which has purportedly been registered in the name of MUST DEER LIMITED based on material falsehood and clear breaches of statutory provisions of laws.”

14. The petition challenges the legality of such title and possession and by prayers (d) and (e), the petitioner hopes to regain them from the proposed interested party. While it is agreed that the proposed interested party may not have played any role in the transactions that eventually deprived the petitioner of his right to the suit property, the proposed interested party's current position is under threat by virtue of this petition as it stands to lose its title if the prayers of the Petition are granted as prayed.
15. Without, at this stage, making any concluded findings on the merits of the respective parties' cases, the determination of the breach of the petitioner's right to property may not involve the proposed interested party whose interest only arise post-breach; however, the impact of the order for rectification of the register as prayed by the petitioner will undoubtedly affect the proposed interested party as it immediately erase his title acquired upon purchase of the property.
16. I consider that the proposed Interested party complete fits the billing of an Interested Party within the meaning of Rule 2 of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** that:

“interested party means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

17. The scope of the remedies sought clearly calls for joinder of the interested party as a person with a lawful stake or interest in the property because the effect of the order would appear therefore be taking away, without hearing, the Interested Party's title contrary to the guarantees under Article 40 of the Constitution and rights of a registered proprietor under section 26 (1) of the Land Registration Act, 2012, which provides that –

“26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

18. As a registered proprietor, the proposed interested party has a statutory right under section 26 (1) of the Land Registration Act, 2012 to enjoy his title until it can be shown that his acquisition thereof was tainted with fraud or misrepresentation to which it was a party or the certificate was

- acquired illegally, unprocedurally or by corrupt scheme in the wording of the Act. The joinder of the proposed interested party will make it possible for the Court to determine in the same suit any question of the *bona fides* of the Interested Party's title and certificate of Title before an order, in its effect, invalidating it is made.
19. Moreover, I consider that in determining the application for joinder of the proposed interested party, the court must consider where the balance of convenience lies. Does it lie in not hearing a person who is the registered proprietor of the suit property by sale at a public auction pursuant to a court order because the infringement of the petitioner's right to property only involves the respondent OR does it lie with hearing the proposed interested party as a party who appears to have an interest in the property the subject of the suit, even though his interest is dependent on the successful defence by the respondent of the main suit between the petitioner and the respondent? The concerns of cost and delay in the prosecution of the suit which may be occasioned by the joinder are subordinate when weighted against the benefit of full hearing of the dispute and rendering substantial rather than technical justice. The test for joinder of a party as an interested party is not that the applicant must show a stake or interest that must prevail in the suit, as that is not possible before the full hearing of the matter; the applicant should demonstrate a legal interest that calls for hearing before a decision on the dispute before the court is adjudicated. In common judicial parlance, I would say that the applicant ought to show on 'an arguable case' basis that he has an interest recognized in the law and capable of protection. As a registered proprietor of the suit property upon public auction which is subject of challenge in these proceedings, the proposed party has an identifiable stake and legal interest in the property the subject of, and therefore an interest in, the proceedings before the Court.
20. In keeping with Article 159 of the Constitution of Kenya 2010, for the promotion of substantial justice without undue regard to technicalities of procedure, I would find that to require the proposed interested party to wait for the determination of the petition between the petitioner and the respondent to find out whether it shall, if the petition is defeated, keep the suit property or sue the respondent for damages if the petition is successful, is breach of the substantial justice principle as the entire dispute between the parties could be heard and determined as one whole after hearing all the parties.
21. I, however, do not think that the interested party should be allowed hearing so as to muddle the issues of breach of the petitioner's fundamental rights, which is matter purely between the petitioner and the respondent before the interested party came into the scene by purchase of the suit property. In my view the Interested Party's right to hearing may properly be restricted to evidence, representation or submissions on the events and legal consequences of acts or omissions relating to the sale of the suit property.
22. For the reasons set out above, the Amended Notice of Motion dated 28th November 2014 for joinder of the proposed Interested Party is allowed with costs in the cause. In the interest of an expedited hearing and determination of the petition, the Interested Party will file its response to the Petition within 14 days from the date of this ruling. The Petitioner and the respondent will have leave of court to file supplementary affidavits in response to the replying affidavit of the Interested Party within 7 days of service upon them of the affidavit of the Interested Party. The matter will then be fixed for hearing on a mention for that purpose on a date to be fixed in consultation with the parties' counsel.

DATED SIGNED AND DELIVERED THIS 12TH DAY OF MARCH 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Khagram for the Petitioner

No appearance for the Respondent

Mr. Oloo for the Proposed Interested Party

Ms. Linda - Court Assistant.