



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC PETITION NO. E004 OF 2021**

EDWIN MOTARI ONGUTI.....1<sup>ST</sup> PETITIONER

SAMUEL MOGAKA OCHARO.....2<sup>ND</sup> PETITIONER

**-VERSUS-**

PETER KAMAU.....1<sup>ST</sup> RESPONDENT

CHATUR PROPERTIES LIMITED.....2<sup>ND</sup> RESPONDENT

MADATALI SABURAH CHRTUR.....3<sup>RD</sup> RESPONDENT

HUSSEIN MADATALI CHATUR.....4<sup>TH</sup> RESPONDENT

ZABA MADATALI CHATUR.....5<sup>TH</sup> RESPONDENT

**THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA)**

**T/A THE MATER MISERICORDIAE HOSPITAL.....6<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY**

**(NEMA).....8<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....9<sup>TH</sup> RESPONDENT**

**NAIROBI CITY WATER AND SEWERAGE COMPANY LTD**

**(NCWSC).....10<sup>TH</sup> RESPONDENT**

**CITY COUNTY OF NAIROBI.....11<sup>TH</sup> RESPONDENT**

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED....12<sup>TH</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. Vide Notice of Motion Application dated the **8<sup>th</sup> of March 2021**, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents herein have sought for the following Reliefs;

i. *The suit as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents be struck out for failure to Disclose any reasonable cause of action against them and it will be impossible to enforce any court orders by or against the said Respondents.*

ii. *The Costs of this Application together with the entire suit be assessed and awarded to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent.*

2. Following the filing of the subject Application, the Petitioners herein filed Grounds of opposition, whereby same opposed the Application under reference and essentially contended that the Application itself was an abuse of court process.

3. On the other hand, counsel for the 6<sup>th</sup>, 7<sup>th</sup> and 11<sup>th</sup> Respondents, did not file any Responses to the subject Application. To the contrary, the said counsel indicated that same were supporting the Application filed by and/or behalf of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents.

#### **GROUND IN SUPPORT OF THE APPLICATION:**

4. The subject Application is premised and/or anchored on the provisions of **Order 2 Rule 15 (1) paragraph (a) of the Civil Procedure Rules 2010**, and in this regard the Application ought not and therefore was not supported by any affidavit.

5. Be that as it may, the Application is grounded on the basis of several grounds, which are contained at the foot thereof and the same as hereunder;

I. *The Petitioners/Applicants have pleaded that the suit property being **L.R no. 209/13083**, is public land.*

II. *By virtue of being public land the Petitioners themselves and other members of the neighboring community have a right of way in.*

III. *The Petitioners have claimed that the 2<sup>nd</sup> to 5<sup>th</sup> Respondent are constricting a boundary wall in the suit property and thus hindering the right of way.*

IV. *The cause of action is substantially paged on the said construction of a perimeter wall.*

V. *The 2<sup>nd</sup> to 5<sup>th</sup> Respondents are not the ones constructing the wall and have in their replying affidavits to the suit deponed that they do not have any personal interest in the suit premises.*

VI. *Consequently, they are not the ones constructing the perimeter wall being complained about by the petitioners.*

VII. *Win the premises, there are no issues for determination between the Petitioners and the said Respondents herein.*

VIII. *The 4<sup>th</sup> and 5<sup>th</sup> Respondents are merely directors of the company that is the duly registered proprietor of the suit property, thus they ought not to be suit in their personal capacity.*

IX. *The Petitioners/Applicants have not shown any particular nexus that proof that it is the 2<sup>nd</sup> to 5<sup>th</sup> Respondent who are constricting the wall.*

X. *Enforcement of any court orders against the 2<sup>nd</sup> to 5<sup>th</sup> Respondent as sought will be academic exercise as they don't have any personal interest in the suit property and they are not the one undertaking the construction.*

XI. *The 2<sup>nd</sup> to 5<sup>th</sup> Respondents cannot be able to enforce any court orders in regard to the suit property as they have no nexus to the said suit property and the construction of the disputed wall.*

#### **SUBMISSIONS:**

6. The Subject matter came up for hearing of the Application dated the **5<sup>th</sup> January 2021**, filed by and/or on behalf of the Petitioners. For clarity, the said Application had sought for orders for temporary injunction and conservatory order to issue against the Respondents herein from *inter-alia* constructing a perimeter wall on **L.R No. 209/13083**, whose effect was to block the Petitioners' access to a neighboring river, as well as the Road access.

7. However, when the matter was called out, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents indicated to the court that same have also filed an Application, which essentially sought to strike out the names of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents from the suit herein.

8. Owing to the nature of the Application filed by the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, it was agreed that same be heard and disposed of beforehand. Consequently, directions were issued and/or taken in respect to the said Application.

9. On the other hand, the court ordered and/or directed that the Application under reference, namely, the one dated the **8<sup>th</sup> March 2021**,

be canvassed and/or be disposed of by way of written submissions.

10. Following the directions by the court, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents filed their submissions to the Application under reference. However, the rest of the parties, failed to file any submissions.

11. Nevertheless, it is worthy to note that counsel for the 6<sup>th</sup>, 7<sup>th</sup> and 11<sup>th</sup> Respondents indicated that same would be supporting the Application.

#### **ISSUES FOR DETERMINATION:**

12. Having examined the Notice of Motion Application dated the **8<sup>th</sup> March 2021**, and the grounds upon which same is anchored and having considered the submissions by the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, the following issues are germane for determination;

*I. Whether the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have any nexus to the suit property or better still, whether same have been mis-joined in the subject matter.*

*II. Whether the Issue raised by the 2<sup>nd</sup> to 5<sup>th</sup> Respondent can be determined in a Summary manner.*

#### **ANALYSIS AND DETERMINATION**

##### **ISSUE NUMBER 1:**

**Whether the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have any nexus to the suit property or better still, whether same have been mis-joined in the subject matter**

13. The Petition herein was filed and/or mounted by and/or on behalf of the Petitioners, whereby same contend that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent have been constructing and/or erecting a perimeter wall against **L.R No. 209/13083**, (hereinafter referred to as the suit property), with a view to blocking a right of way and/or access path used by the Petitioners and other neighbors, as well as school going children.

14. On the other hand, it was also stated in the Petition that the 8<sup>th</sup> Respondent despite being aware of the complaints made and/or mounted by the Petitioners, have refused and/or declined to intervene and thereby preserve the public interest over the suit property.

15. Upon being impleaded, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents filed a Replying Affidavit opposing the Petition and thereafter filed the subject Application seeking to have their names expunged from the record and/or proceedings.

16. Vide the grounds of the Application, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have made very contradictory averments and/or statements. For clarity, the Grounds upon which the Application is premised, have been reproduced hereinbefore.

17. In the first instance, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have contended that same have no nexus to and/or interest over the suit property. Consequently, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have sought to be removed from the proceedings.

18. On the other hand, the same 2<sup>nd</sup> to 5<sup>th</sup> Respondents have laid a claim to ownership of the suit property and thereby contended that by virtue of such ownership they are entitled to the suit property.

19. From the averments alluded to, it is apparent that the 2<sup>nd</sup> to 5<sup>th</sup> Respondents are actually laying a claim to ownership over the suit property, which is the subject matter in dispute before the court.

20. Whilst on one hand, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents are claiming ownership of the suit property, on the other hand, the Petitioners are alleging and/or contending that the suit property is indeed public property and thus ought to be preserved and/or protected, in the interest of the public.

21. From the foregoing, it is apparent and/or evident that the issue of ownership over and in respect of the suit property, is in question. Besides, it is also apparent that there is also a dispute as to whether the suit property is private property or otherwise.

22. In view of the foregoing, what comes out is that there are serious issues of facts, which are in controversy and shall therefore require adduction of evidence, before the court can be able to authenticate, the actual status, including ownership rights, if any by the 2<sup>nd</sup> to 5<sup>th</sup> Respondents.

23. To the extent that the issue in dispute herein require adduction of evidence, the contention by the 2<sup>nd</sup> to 5<sup>th</sup> Respondents that same have no interest over the suit property, cannot therefore be taken at face value.

24. Be that as it may, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have also raised the issue of misjoinder and therefore averred that same ought not to have been sued.

25. Despite the averment by and/or at the instance of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents that same have been wrongly sued, it is worthy to note that it is the same 2<sup>nd</sup> to 5<sup>th</sup> Respondent, who have similarly laid a claim over the suit property.

26. In the premises, it is difficult to understand the actual position taken by the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, insofar as same appears to be approbating and reprobating at the same time. Simply put, the 2<sup>ND</sup> to 5<sup>th</sup> Defendants, cannot be allowed to play Lottery with the Court Process.

27. Nevertheless, I must also point out that the issues of facts, which are under controversy like the ones herein, cannot be resolved by way of summary procedure, either as sought vide the subject Application or at all.

28. Suffice it to note, that whilst dealing with an Application for striking out, the court is not called upon, to carry out minute examination of the facts and/or issues in dispute, which would look like conducting a mini trial.

29. However, the court is called upon to exercise great caution and necessary circumspection and thereby avoid usurping the mandate of the trial court, which includes, conducting a Plenary Hearing.

30. In the premises, I find and hold that subject application, which seeks to invite the court to delve into determination of issues in controversy, is not only misconceived, but is also an abuse of the court process. In any event, the 2<sup>ND</sup> to 5<sup>TH</sup> Defendants, cannot be allowed to blow hot and cold at the same time.

31. In support of the foregoing position, I can do no better than to invoke and/or rely in the decision in the case of **Industrial and Commercial Development Corporation v Daber Enterprises Limited [2000] eKLR**, where the honourable Court of Appeal observed as hereunder;

**“Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination - see the case of Wenlock v. Moloney and Others , [1965] 1 W.L.R. 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment.**

*The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable - see the cases of Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd. (In Liquidation) , [1990] 1 W.L.R. 153, 158 and Balli Trading v. Afalona Shipping, The Coral, [1993] 1 Lloyd's Rep. 1, C.A. A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition - see the case of Jacobs v. Booth's Distillery Co., (1901) L.T. 262 H.L”.*

32. Clearly, in the subject matter before hand there are serious issues in controversy, pitting the Petitioners on one hand and the 2<sup>nd</sup> to 5<sup>th</sup> Respondents on the other hand, which shall require to be ventilated and addressed in the usual course of hearing, before the Court can form an Opinion, one way or the Other.

## **ISSUE NUMBER 2:**

**Whether the issue raised by the 2<sup>nd</sup> to 5<sup>th</sup> Respondents can be determined in a Summary manner.**

33. The subject Application has been premised and/or fronted on the basis of **Order 2 rule 15(1) (a) of the Civil Procedure Rule 2010.**

34. Owing to the foregoing, it is therefore necessary to take cognizance of the import and tenor of the said provision and in this regard, it is therefore imperative to reproduce the said provision as hereunder;

### **15.Striking out pleadings [Order 2, rule 15.]**

**(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**(a) it discloses no reasonable cause of action or defence in law; o**

35. Based on the said provision, the determination of whether a suit and/or matter discloses a reasonable cause of action, can only be ascertained and/or assessed by looking at the statement of claim, in this case the Petition and no other.

36. Looking at the Petition filed by the Petitioners, it is apparent and/or evident that same raises plausible, cogent and indeed triable issues, which ought to be investigated via a plenary hearing.

37. In fact, the issue at the core of the dispute, touches on and/or concerns whether the 1<sup>st</sup> to 5<sup>th</sup> Respondents have encroached onto the suit property and whether the suit property comprises of public land, for the benefits of the Petitioners and the residents of the neighbors thereto.

38. On the other hand, there is also the issue as to whether the offensive perimeter wall has been constructed on a portion of land comprising the riparian area and therefore violating the provisions of the Water Act, 2012 as well as Environmental Management and Coordination Act, 1999.(2015)

39. Simply put, the petition beforehand, does not only raise semblance of triable issues, but raises very potent and pertinent issues, which the court ought to engage with and determine, in the appropriate manner.

40. Be that as it may, the striking out of the names of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, is a kin to exercising summary procedure and thereby defeating a substantive hearing.

41. For clarity, recourse to summary procedure ought to be resorted to in plain and clear cases, particularly where the subject of claim, is hopelessly and/or irredeemably bad and beyond redemption, in any manner whatsoever.

42. Otherwise, where there is a semblance of suit or claim against any party thereto, the rights and interest of the said parties, must be investigated in the usual manner and thereby affording either party his/her day in court.

43. Suffice it to say, that the subject application is calculated to drive away the Petitioners from the seat of justice and such an action, shall not only deprive the petitioners of a right to fair hearing, but shall also circumvent and/or defeat the Due process of the law.

44. In support of the foregoing statement of the law, I can do no better than to quote the decision in the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR, where the honourable court held as hereunder;

*"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power." per Danckwerts L.J. ibi at p. 1244.*

#### **FINAL DISPOSITION:**

45. From the foregoing observations, it is apparent that the ascertainment and/or determination as to whether a suit or a claim discloses a reasonable cause of action, can only be assessed by looking at the statement of claim.

46. Having looked at the Petition dated the **5<sup>th</sup> January 2021**, I am more than convinced that same espouses, discloses and/or otherwise, exhibits issues that can only be addressed and/or resolved vide a plenary hearing.

47. In the premises, the subject Application, which contends to the contrary, is therefore not only misconceived, but, is similarly legally untenable.

48. Consequently, the order that commends itself to me, is that the Application dated **8<sup>th</sup> March 2021**, is Devoid of merits. Consequently, same be and is hereby Dismissed with Costs to the Petitioners.

49. It so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>th</sup> DAY OF FEBRUARY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

**June Nafula                  Court Assistant**