



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**PETITION NO. 19 OF 2017**

**MOHAMED SAID OMAR & 4 OTHERS .....PETITIONERS**

**VERSUS**

**NATIONAL LAND COMMISSION MOMBASA & 8 OTHERS .....RESPONDENTS**

**RULING**

1. The application before me is that dated 3 February 2021 filed by the petitioners. It is a curious application. It seeks the following orders :-

(i) *That the application be certified urgent and service of the same be dispensed with ex parte in the first instance.*

(ii) *That the honourable court be pleased to grant leave to the applicants to amend this petition and the application dated 22 October 2020 upon such terms and conditions it may deem fit.*

(iii) *That costs of this application be in the cause.*

2. The application is founded on the grounds that there is need to substitute the deceased 1<sup>st</sup> petitioner with the administrator of his estate and further that there is need to add other necessary parties to the petition. The application is opposed by the 3<sup>rd</sup> respondent who has filed Grounds of Opposition.

3. To put matters into context, this suit was commenced through a constitutional petition filed on 8 September 2017. There are 105 petitioners who sue as members of Kitanga Juu BMU Fishermen and Traders. They filed this petition in person and remain unrepresented. They say that their address for service will be channelled through Cornel L. Shisanya, P. O Box 99707-80107 Mombasa and a mobile number is provided. The respondents are nine, respectively being the National Land Commission, Kenya Railways Corporation and Board of Governors, County Government of Mombasa, The Hon. Attorney General Mombasa, The Standard Gauge Railway and Board of Governors, The Cabinet Secretary Ministry of Environment Water and Natural Resources, and Abdalla Kombo, Mejai Mwinzikai, Said Zuberi Shemekame sued as the Officials of Kitanga Juu (BMU) Fishermen and Traders. The petitioners aver that they are licenced to undertake fisheries activities in the Indian Ocean and are located at Port Reitz, Mombasa. They claim to earn their livelihood on fishing activities since 1930 and that during the building of the Standard Gauge Railway (SGR) they were forced to pave way for it. It is said that the SGR and Board of Governors and the National Land Commission agreed to compensate them at not less than Kshs. 2 million per person which has not been done. In the suit they want a declaration that the 1<sup>st</sup> – 5<sup>th</sup> respondents do release the compensation money and for the 7<sup>th</sup> – 9<sup>th</sup> respondents to implement the payments. They also want modern fishing boats which they were provided to be released immediately.

4. The 7<sup>th</sup> – 9<sup>th</sup> respondents filed a reply through the law firm of M/s Marende Necheza & Company Advocates. They averred to be the officials of Kitanga Juu BMU. They averred that through their leadership they pushed for the rights of the petitioners until it was finally decided that money for compensation be released. They have averred that compensation was not standard for everyone but depended on the kind of fishing and the daily catch. They pointed out that they were not the decision making organs in determining what was to be paid by the petitioners. They themselves received some payments.

5. Strangely, there is a consent dated 31 July 2018 where by consent the 8<sup>th</sup> respondent states that he has joined the petitioners and the petitioners have withdrawn the 8<sup>th</sup> respondent. No amendment of pleadings was sought or filed. A similar consent dated 30 August 2018 was also filed now in respect of the 9<sup>th</sup> respondent but again no amendment of pleadings was sought or filed. I have seen that on 10 August 2018, the 9<sup>th</sup> and 8<sup>th</sup> respondents filed a notice of intention to act in person and gave their address for service as C/o Cornell Shisanya, Success House, 1<sup>st</sup> Floor, Meru Road, P.O Box 99707-80100 Mombasa. That is the same address given by the petitioners.

6. There are replies filed separately by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposing the petition. Their position, in general, is that the affected fisher

folk were identified and compensated and that the motivation for this suit is to extort unfair financial gain.

7. Getting back to the application, it will be observed that prayer (ii) thereof seeks orders to amend the petition and an application dated 22 October 2020. I regret my inability to allow amendment of the application dated 22 October 2020 because it was withdrawn by the petitioners on 9 February 2021. You cannot amend what does not exist.

8. On the amendment of the Petition, there is an annexed amended draft petition. I can see that the said draft seeks to add some additional persons as the 106 – 381 petitioners. It is said that they are members of Kitanga Juu BMU Fishermen and Traders. It also seeks to remove the 5<sup>th</sup> respondent and replace her with Kenya Maritime Authority and Board of Directors. There is a proposed addition of African Gas Oils Limited and Board of Directors, and National Environment Management Authority (NEMA) as 8<sup>th</sup> and 9<sup>th</sup> respondents. The draft proposes to remove the original 8<sup>th</sup> and 9<sup>th</sup> respondents. Part of the draft amended petition avers that NEMA and the Kenya Maritime Authority have failed to protect the petitioners by allowing African Gas Oils Limited to dig and erect huge steel pipes under the water for transporting poisonous substances to their depot in Miritini at the detriment of the petitioners. It is claimed that this activity puts all animals living under water at risk.

9. I have considered the application. First, the addition of new parties as petitioners cannot be made without their consent. I have seen nothing at all to suggest that the persons proposed as new petitioners wish to be joined to this suit. I cannot add them as petitioners as I do not know if at all they wish to be embroiled in this dispute. On addition of African Gas Oils, Kenya Maritime Authority and NEMA, it appears to me that the complaint against them is based on alleged activities of Africa Gas Oils Company which are said to be injurious to the environment. That to me is a completely different cause of action from the suit by the petitioners which is a claim for compensation because the SGR led to their removal or relocation from the site where they were fishing. I cannot see how a very separate issue relating to activities that are deleterious to the environment can effectively be combined and be heard with a claim for compensation which is completely different. I have to disallow this sort of amendment. The only amendment I will allow is that which is noted in paragraph 16 of the draft and it says that compensation was to be Kshs. 405,000,000/=. That to me is what is related to what is pleaded in the petition herein and can be inserted somewhere in the amended petition.

10. I think the 3<sup>rd</sup> respondent was well grounded in opposing the motion and although I have allowed a small bit of the draft I will award costs of the application to the 3<sup>rd</sup> respondent.

11. Before I close, I must say that I am uncomfortable with the address of service of the petitioners. They say that their address of service is C/o Cornel Shisanya, but he is not a party in this case. Order 9 Rule 1 addresses appearances and states as follows :-

*Applications, appearances or acts in person, by recognized agent or by advocate [Order 9, rule 1)*

*1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:*

*Provided that—*

*(a) any such appearance shall, if the court so directs, be made by the party in person; and*

*(b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney-General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.*

12. It will be seen from the above that appearance is either in person, or by a recognized agent, or through an advocate. A recognized agent is described in Order 9 Rule 2 as follows :-

*2. Recognized agents [Order 9, rule 2.]*

*The recognized agents of parties by whom such appearances, applications and acts may be made or done are—*

*(a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;*

*(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;*

*(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.*

13. From the above, it will be discerned that a recognized agent is one holding a power of attorney or persons carrying on business for and in the names of parties not residing within the local limits of the jurisdiction of the court, and in respect of a corporation, an officer authorized under the corporate seal.

14. Under Order 9 Rule 3, service of process is to be served to a party or his recognized agent. Under Order 9 Rule 4, a person residing within the jurisdiction of the court may be appointed an agent to accept service of process, but under subrule (2) "Such appointment may be special or general, and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in court."

15. It will be seen from the above how seriously the law takes the issue of who can appear or represent persons in court and who can be an agent for purposes of accepting service. In this instance, the address of service is not of any of the petitioners but of one Cornel Shisanya. He is not an advocate. On 13 November 2019, he filed a Notice of Appointment which I refused to consider. He cannot purport to act for the petitioners for he is not an advocate and neither can he pass for a recognized agent. It is important that courts be vigilant on who appears in court for it can cause a lot of disservice to poor litigants. It is akin to allowing a quack to proceed to treat a patient when you know very well that the quack has no qualifications that would entitle him to administer treatment. I cannot allow that. The petitioners may probably have a cause of action but I can see it being messed up by a stranger. I would in fact encourage the petitioners to appoint counsel, but if the petitioners want to act in person, so be it, but I cannot permit an unqualified person to purport to act for them under my watch. It will only lead to injustice. I will thus direct a further amendment to the petition and the petitioners to appoint one of them to receive process on their behalf and they should make clear his physical and postal address and telephone contact.

16. Orders accordingly.

**DATED AND DELIVERED THIS 21ST DAY OF APRIL 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**