



County Government of Bungoma & another v Attorney General & 2 others; National Land Commission (Interested Party) (Environment & Land Petition 563 of 2016) [2022] KEELC 2913 (KLR) (28 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2913 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 563 OF 2016**

SO OKONG'O, J

JUNE 28, 2022

IN THE MATTER OF: ARTICLES 2, 3, 6(1)(2), 10, 20, 22, 23, 28, 29, 40, 50, 62, 63, 67, 159, 201, 232, 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: HCCC NO. 1145 OF 1987 AT NAIROBI, AYUB MURUMBA KAKAI(AS LEGAL REPRESENTATIVE OF THE ESTATE OF WELLINGTON WELEKHASIA KAKAI) VS. WEBUYE MUNICIPAL COUNCIL

AND

IN THE MATTER OF: IN THE MATTER OF HC. MISC. CIVIL APPLICATION NO. 448 OF 2006 AT NAIROBI, AYUB MURUMBA KAKAI(SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF WELLINGTON WELEKHASIA KAKAI) VS THE TOWN CLERK OF WEBUYE TOWN COUNCIL

AND

IN THE MATTER OF: TITLE NO. NDIVISI/MUCHI/1265

BETWEEN

COUNTY GOVERNMENT OF BUNGOMA 1ST PETITIONER

CHIULI MURUMBA 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

MINISTRY OF LAND, HOUSING AND URBAN DEVELOPMENT 2ND RESPONDENT

AYUB MURUMBA KAKAI (AS LEGAL REPRESENTATIVE OF THE ESTATE OF WELLINGTON WELEKHASIA KAKAI) 3RD RESPONDENT



AND

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. The 1st petitioner is the county government of Bungoma established under article 6(1) of the Constitution of Kenya 2010 while the 2nd petitioner is the county secretary of the 1st petitioner. The petitioners brought this petition on May 2, 2014. The petition was filed in the High Court before it was transferred to this court in 2016 and given its current case number. In the petition, the petitioners challenged the consent judgment that was entered in HCCC no 1145 of 1987 at Nairobi, Ayub Murumba Kakai (as legal representative of the Estate Of Wellington Welekhasia Kakai) vs Webuye Municipal Council (HCCC no 1145 of 1987) on July 1, 1991 and the judgment that was entered in HC Misc Civil Application no 448 Of 2006 At Nairobi, Ayub Murumba Kakai(suing as legal representative of the Estate of Wellington Welekhasia Kakai) various The Town Clerk of Webuye Town Council(hc Misc no 448 Of 2006) on March 26, 2009.
2. The petitioners sought a declaration that the said judgments that were entered in favour of Wellington Welekhasia Kakai, deceased in respect of title no Ndivisi/Muchi/1265 were null and void. The petitioners sought a further declaration that the title that was issued to Wellington Welekhasia Kakaion September 9, 1981 in respect of title no Ndivisi/Muchi/1265 (hereinafter referred to as “the suit property”) was a forgery in that the land under that title that was owned by Wellington Welekhasia Kakai (hereinafter referred to only as “the deceased”) was compulsorily acquired by the government and compensation paid. The petitioners sought a further order that the suit property was government land under the beneficial ownership and custody of the 1st petitioner as successor in title to Webuye town council.
3. The petitioners averred that the suit property was owned by the deceased until 1970 when the same was compulsorily acquired by the government and the deceased paid compensation in the sum of kshs 12,414.70. The petitioners averred that the whole land comprised in the suit property was acquired and that the deceased retained no portion of the property. The petitioners averred that the suit property was one of the many parcels of land that were acquired by the government in Webuye township in or about 1970. The petitioners contended that the judgments that were entered in favour of the deceased in HCCC no 1145 of 1987 and HC.MISC 448 of 2006 on the basis that the deceased owned the suit property were entered on a wrong foundation. The petitioners contended further that the 1st respondent had no instructions from Webuye town council to enter into the consent that it entered into with the deceased in HCCC no 1145 of 1987 that was the basis of the judgment in that case. The petitioners contended that the consent was tainted with misrepresentation and was entered into by the 1st respondent without sufficient facts. The petitioner contended that the consent was founded on illegality and as such the same was unconstitutional and contrary to public policy. The petitioners contended that the judgment in HC Misc 448 of 2006 that was filed by the deceased to enforce the said consent judgment in HCCC No 1145 of 1987 was similarly based on a wrong foundation as it sought to enforce an invalid judgment against the petitioners. It was on account of the foregoing that the petitioners sought the reliefs set out earlier in this ruling.
4. The 3rd respondent who is the legal representative of Wellington Welekhasia Kakai (deceased) appointed the firm of Firdosh Jamal & Associates Advocates which filed a replying affidavit on November 3, 2016 in opposition to the petition and an interlocutory application that was filed by



the petitioners together with the petition. The 3rd respondent contended that the suit property was registered in the name the deceased and that the deceased's title was confirmed by the court in a final decree that was issued in HCCC no 1145 of 1987 that was not appealed. The 3rd respondent contended that the issues raised by the petitioners for determination in the petition were *res judicata* and that the only avenue that was available to the petitioners to challenge the judgment made in HCCC No 1145 of 1987 was to appeal against the same. I have not seen on record any response by the 1st and 2nd respondents and the interested party to the petition.

5. What is now before the court is an amended Notice of Motion application dated July 26, 2021 brought by one, Benjamin Barasa Wafula(hereinafter referred to only as “the applicant”). In the application, the applicant has sought the following orders;
 1. That the applicant be joined in the petition to assist or to enable or to help the 3rd respondent to communicate with the court to avoid delays in the prosecution of the petition.
 2. That the applicant be joined in the petition as 4th respondent so that the applicant's claim relating to common boundaries of various parcels of land which are the subject of Busia ELC no 59 of 2018 is not prejudiced by any determination that may be made in this petition.
 3. That the costs of the application be provided for.
6. The application was brought on several grounds. The applicant averred that there was a dispute over the compulsory acquisition of all those parcels of land known as title nos Ndivisi/Muchi/1122, 1123, 1124, 1125, 1126, 1127,1135, 1307, 1308, 1333, 1238, 1279, 1293, 1245 and 1288 (hereinafter referred to as “the disputed plots”). The applicant averred that his joinder to the petition would help the court to stop the 1st and 2nd respondents and the interested party from implementing a Gazette Notice that was published on June 25, 2021. The applicant averred that his joinder to the suit would also enable the court to reprimand the 1st and 2nd respondents and the interested party for knowingly and fraudulently cheating their parents to transfer their private land to the government before subdivision.
7. The applicant averred further that his joinder to the suit would assist the court to compel the 1st and 2nd respondents and the interested party to investigate the subdivision of the disputed plots so that the acreage of the suit property can be corrected. The applicant averred further that the 1st petitioner, the 1st and 2nd respondents and the interested party were parties in Busia ELC no 59 of 2018 which involved 65 parties and in which the matters the subject of this petition were also in issue. The applicant averred that his joinder to the petition would enable the court to settle the dispute over the suit property that had taken over 30 years. The applicant contended that his joinder to the petition would ensure that the court did not give orders that would be in conflict with orders that could be issued in Busia ELC no 59 of 2018. The applicant averred that failure to join him in the petition would enable the 1st and 2nd respondents and the interested party to acquire private land without compensation.
8. In his affidavit sworn on July 26, 2021, the applicant claimed that he had knowledge that the plaintiff's eye sight was damaged when he was serving in the Kenya Army between 1980 and 1990. The applicant also stated that he had knowledge that the suit property was private ancestral land and that there was a boundary dispute touching on the suit property and the other parcels of land forming part of the disputed plots which was the subject of Busia ELC no 59 OF 2018(hereinafter referred to as “the Busia case”). The applicant averred that his joinder to the petition would enable the court to determine whether the owners of the disputed plots were fully compensated for their land that was compulsorily acquired and whether the 1st and 2nd respondents and the interested party falsified the measurements of the disputed plots so as to pay less compensation to the plot owners.



9. The application was opposed by the petitioners through grounds of opposition dated October 8, 2021. The petitioners averred that the applicant had not demonstrated any nexus with the 3rd respondent to warrant his joinder to the petition to assist him. The petitioners averred that the applicant was using the excuse of assisting the 3rd respondent to appear for him in the petition as an advocate in violation of the *Advocates Act* that prohibits unqualified persons from masquerading as advocates. The petitioners averred that the 3rd respondent had all along been represented by an advocate until early 2021 when he filed a notice to act in person.
10. The petitioners averred that the applicant was a busy body who was attempting to muddle the proceedings at a late stage when directions had been given and the matter was waiting to be heard. The petitioners averred that the applicant had not demonstrated any identifiable interest in the property that was the subject of the petition. The petitioners averred that the joinder of the applicant to the petition would lead to a delay in the determination of the suit having regard to the issues raised in his application. The petitioners averred that the applicant's application was an abuse of the process of the court since the applicant had no basis for seeking to be joined in the petition. The petitioners averred that the applicant was seeking to introduce the Busia Case in this petition so as to muddle the same. The petitioners averred that the applicant was trying to use his purported status of "Interested applicant/intermediary" as a decoy to introduce a new case in this petition which the petitioners are strangers to.
11. The parties filed skeleton submissions which they highlighted on October 12, 2021 and October 21, 2021. The applicant filed his submissions on October 29, 2021 while the petitioners filed their submissions on October 12, 2021. I have considered the application by the applicant together with the affidavit filed in support thereof. I have also considered the petitioners' grounds of opposition filed in opposition to the application. Finally, I have considered the submissions both written and oral that were made before me by the applicant in person and the advocates for the petitioners.
12. The application was brought under order 1 rule 8 (1) and (2) and order 8 rules (1) and (5) of the *Civil Procedure Rules*. As rightly observed by the petitioners in their submissions, I am in agreement that this being a constitutional petition, the provisions of the Civil Procedure Rules on joinder were inappropriately invoked by the applicant. The application should have been brought under rules 5(d) and (e) or 7 (1) and (2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to only as "the rules") which provide for the joinder of parties to a constitutional petition either as substantive parties or as interested parties.
13. Rule 5(d) and (e) of the rules provide as follows:
 - "(d) 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 just—
 - (i) order that the name of any party improperly joined, be struck out; and
 - (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
 - (e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents."
14. Rule 7 (1) and (2) on the other hand provide as follows:
 - (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.



- (2) A court may on its own motion join any interested party to the proceedings before it.”
15. The applicant has sought to be joined in this petition in two capacities. First, as an interested party/ intermediary to assist the 3rd respondent in prosecuting his defence to the petition herein. Secondly, as a 4th respondent.
16. Under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013(the Rules), an interested party is defined as:
- 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 burden was on the applicant to establish that he had an identifiable stake or legal interest or a duty in the proceedings before this court warranting his joinder to the proceedings as an interested party. I have at the beginning of this ruling set out the nature of the dispute the subject of this petition. In summary, the petitioners were aggrieved by two decisions that were made by the High Court against them. They have claimed that the decisions violated their constitutional rights and have sought to have the same set aside on the ground that the same are null and void. The said decisions which were in favour of the 3rd respondent concerned the parcel of land, title no Ndivisi/Muchi/1265 (the suit property). What this court has been called to determine is whether the said decisions violated the petitioner’s constitutional rights and as such should be set aside. The other orders sought are consequential in nature. The suits in which the said judgments were made concerned the petitioners and the 3rd respondent. The applicant was not a party to any of the cases and was not affected by the decisions made in the same.
18. I am in agreement with the petitioners that the applicant has not demonstrated that it has any stake or interest in these proceedings. He has also not demonstrated that he has any duty in the proceedings. I am in agreement with the petitioners that the applicant is trying to import the dispute pending before the Environment and Land Court at Busia to this court. I have considered the pleadings filed by the parties in the Busia case that were filed herein by the applicant particularly the amended plaint dated June 18, 2019. It is my finding that the dispute in the Busia case is not related to the dispute before this court. This court has not been called upon to determine any issue concerning subdivision or boundary of any parcel of land or validity of compulsory acquisition of any land. The court will restrict itself to the issues before it namely, whether the petitioners’ rights were violated through the two judgements. I am of the view that the issues before this court are succinct and should not be muddled by the dispute in the Busia case. The Busia case concerns several parcels of land. In the petition before me, only one parcel of land is in dispute. That is the suit property. The 3rd respondent is a party to the Busia case and to this petition. If there is anything in the Busia case that he may wish to bring to the attention of this court that may touch on the suit property, he is at liberty to do so. The 3rd respondent does not require the applicant to join this petition to protect his interest in the suit property.
19. On whether the applicant has any duty in the proceedings before this court, again, even this has not been established. The applicant has not told the court what relationship if any he has with the 3rd respondent. The applicant has claimed that the 3rd respondent has a problem with his eye sight. No evidence has been produced before this court in proof of that allegation. Even if the allegation is true, I am of the view that it would not have entitled the applicant to join the petition so as to give assistance to the 3rd respondent. If the 3rd respondent notifies the court that he has some physical or medical challenges that restricts or limits his ability to communicate with the court, the court would readily give directions on how he can be assisted. Article 50(7) of the [Constitution](#) gives power to the court in



the interest of justice to allow an intermediary to assist a party before the court to communicate with the court.

20. The 3rd respondent's alleged physical disability has been disclosed to the court for the first time by the applicant who has not proved the same. The applicant does not need to join this petition so as to assist the 3rd respondent to communicate with the court in case the 3rd respondent has a problem with his eye sight. The 3rd respondent's alleged eye problem is in the circumstances not a good ground to join the applicant to this petition.
21. On the applicant's joinder in the petition as a respondent, the applicant had to demonstrate that he ought to have been joined in the petition when it was filed or that his presence before the court is necessary in order to enable the court adjudicate upon and settle the petition. Rule 2 of the Rules defines a respondent as follows:

respondent means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.”
22. There is no doubt from the foregoing definition of a respondent that the petitioners could not have joined the applicant as a respondent in this petition. The applicant was not a party to any of the suits in which the judgments challenged herein were made. The applicant was also not the owner of the suit property. The petitioners had no claim of a constitutional nature or otherwise against the applicant to warrant joining him in the petition.
23. The applicant has also not satisfied the court that his joinder as a respondent in this petition is necessary to enable the court to determine the issues arising for determination in the petition. I am in agreement with the petitioners that the joinder of the applicant to this petition would confuse issues rather assist in expediting the determination of the petition.
24. The upshot of the foregoing is that the applicant's amended Notice of Motion application dated July 26, 2021 has no merit. The same is dismissed with each party bearing its own costs.

DELIVERED AND DATED AT NAIROBI THIS 28TH DAY OF JUNE 2022.

S OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of Mr Wesonga h/b for Mr Wekesa for the petitioner

N/A for the 1st and 2nd respondents

The 3rd respondent present in person

N/A for the interested party

The applicant present in person

Ms. C. Nyokabi - Court Assistant

