



Al-Kamar Trading Company Limited v County Government of Mombasa; Rubeya & 2 others (Intended Interested Party) (Suing on their own behalf and on behalf of Residents of Majengo area of Mombasa and members of Majengo Ropa Residents Association) (Environment & Land Petition E010 of 2023) [2024] KEELC 6787 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E010 OF 2023**

**SM KIBUNJA, J
OCTOBER 16, 2024**

BETWEEN

AL-KAMAR TRADING COMPANY LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

RUBEYA ABEID RUBEYA INTENDED INTERESTED PARTY

ABEID SWALEH ABEID INTENDED INTERESTED PARTY

AWADH AHMED AWADH INTENDED INTERESTED PARTY

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF RESIDENTS OF
MAJENGO AREA OF MOMBASA AND MEMBERS OF MAJENGO ROPA
RESIDENTS ASSOCIATION**

RULING

[Notice Of Motion Dated 20th March 2024]

1. The intended interested parties filed the notice of motion dated 20th March 2024 that is brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 1 Rules 2 & 8 (3), Order 40 Rule 7 of the Civil Procedure Rules seeking for the following orders:
 - a. “Spent
 - b. That this Honourable Court be pleased to grant leave to the Intended interested parties to be joined in these proceedings as Respondents and be allowed to participate in the Petition.



- c. That this Honourable Court be pleased to review vary and/or set aside the Ex-parte Orders issued herein and allow the Intended interested Parties to challenge the Petitioner's Application.
- d. That costs of this Application be provided for."

The application relies on six grounds on its face and is supported by the affidavit of Rubeya Abeid Rubeya, 1st intended interested party, sworn on 20th March 2024, in which he inter alia deposes that he is resident in Majengo area, and a member of Majengo Ropa Residents Association; that Majengo lies in a town layout plan pursuant to the District Land Officer letter of Ref No. 3307/123 dated 6th February 1989, which plan described the feeder roads, way leavers and other common facilities; that sometime in April 2023, the residents noticed that part of the road serving L.R Nos. Block XVI/610 to 619 and Block XVI/973 had been blocked by construction works; that they reported to the County Government, and later followed up with the County Physical and Land Use Planning Department, and learnt there had been other complaints about illegal developments on the suit property and adjoining plots, designated as access roads; that those complaints had been reported to Ethics and Anti-Corruption Commission; that the plaintiff obtained interim ex parte orders on 7th December 2023 and used it to hurriedly develop the disputed plot and it is imperative that the said order be vacated since they were obtained through misrepresentation and active concealment of material facts; that the plaintiff's acquisition of the suit property is tainted with fraud as it created a plot from a public road; that it is imperative that they be joined in the petition as they have been greatly prejudiced and have a legitimate interest in the matter.

2. The application is opposed by the petitioner through the grounds of opposition dated 9th April 2024 inter alia stating that the application is bad in law and does not meet the pre-requisites for joinder of parties to a constitutional petition; that the intended interested parties have no legal standing to move this court, and that there are no ex-parte orders issued herein capable of being reviewed, varied and/or set aside.
3. The learned counsel for the intended interested parties and petitioner filed their submissions dated the 4th June 2024 and 21 May 2024 respectively, which the court has considered.
4. The issues for determination by the court are as follows:
 - a. Whether the intended interested parties have met the threshold for joinder in the petition.
 - b. Whether the intended interested parties' have a legal standing and whether the application is bad in law vis-à-vis the Mutunga Rules.
 - c. Whether there is any ex-parte order capable of being reviewed, varied and/or set aside.
 - d. Who pays the costs?
5. The court has after carefully considering the grounds on the application, affidavit evidence, grounds of opposition, submissions by the learned counsel, superior courts decisions cited thereon, the record come to the following findings:
 - a. The intended interested parties' application has invoked the provisions of the *Civil Procedure Act* and Civil Procedure Rules, while the matter before the court is a constitutional petition. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and



Procedure Rules, 2013 popularly known as the Mutunga Rules, provides for the procedure of moving the court in constitutional petitions. Rule 7 thereof states:

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- “(1) A person, with leave of the Court, may make an oral or written application to be joined as an intended interested party.
- (2) A court may on its own motion join any intended interested party to the proceedings before it.”

Further the scope of the objectives of the Rules under Rule 3 states as follows:

- “(1) These rules shall apply to all proceedings made under Article 22 of *the Constitution*.
- (2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of *the Constitution*.
- (3) These rules shall be interpreted in accordance with Article 259(1) of *the Constitution* and shall be applied with a view to advancing and realising the—
 - (a) rights and fundamental freedoms enshrined in the Bill of Rights; and
 - (b) values and principles in *the Constitution*.
- (4) The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.
- (5) For the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the—
 - (a) just determination of the proceedings;
 - (b) efficient use of the available and administrative resources;
 - (c) timely disposal of proceedings at a cost affordable by the respective parties; and
 - (d) use of appropriate technology.”

It is therefore trite that the Mutunga Rules must be applied when dealing with constitutional petitions, but the court must keep in mind the overriding objectives, which is to ensure ‘just, expeditious, proportionate and affordable resolution of all cases’. Furthermore Rule 3 (8) states that:

“Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”



This essentially means that the Mutunga Rules should not be used to defeat the pursuit of justice.

- b. To give tenor and effect to the overriding objectives of the Mutunga Rules, Article 159 (2) (d) of *the constitution* which shifts focus on procedural technicalities in favour of dispensing substantive justice. In the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR (Civil Appeal No. (Application) 228 of 2013)* the court opined as follows with regard to applicability of the aforementioned principle:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why *the Constitution* and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities.”

With the above in mind, I find the invocation of the *Civil Procedure Act* provisions and Civil Procedure Rules orders in a constitutional petition does not cause any substantive injustice or prejudice on the petitioner or respondent, and it is fair and just to proceed to determine the application on its own merit.

- c. On the issue of legal standing by the intended interested party, counsel for the plaintiff questioned the validity of the Majengo Ropa Residents Association for reason of lacking a certificate of registration. In the case of *Busaidy -Vs- Commissioner Of Lands & 2 Others [2002] KLR* the court held inter alia that:

“The legal position in England on locus standi has always been the position in Kenya.

For a party to have locus standi in a suit, he ought to show that his own interest particularly has been prejudiced or is about to be prejudiced. He must show that the matter has injured him over and above the injury, loss or prejudice suffered by the rest of the public. Otherwise public interests are litigated upon by the Attorney-General.”



The case laws relied on by the petitioner do not mention certificates of registration as being a pre-requisite for a residents' association having locus standi. It goes without saying that if the parties are residents in the area, then they will be affected by the afore mentioned construction works, whether or not they are members of Majengo Ropa Residents Association, and whether the association is registered or not. Article 22 of *the Constitution* on the enforcement of the Bill of Rights allows every person whether directly affected or not, with personal interest or not, to institute court proceedings where a right or fundamental freedom "has been denied, violated or infringed, or is threatened." The court therefore has no difficulties in finding that the intended interested parties have legal standing to file and prosecute the application in the way they have done. The court further finds that the intended interested parties should be joined in the petition as the 2nd to 4th respondents respectively. The petitioner will amend the petition accordingly to enable the 2nd to 4th respondents file their replies and participate in its hearing.

- d. On the prayer for the court to "review, vary and or set aside the exparte orders issued herein and allow the interested parties to challenge the petitioner's application", there is no specification of the date of the alleged order or application. The prayer as phrased is incapable of being granted. The court has perused the record and confirmed an interim order was granted on 12th October 2023, in terms of prayer (2) of the petitioner's application dated the 21st September 2023, on condition that the petitioner be responsible to bring the development down and restore the land at its own costs should it be found to have carried out the construction illegally. The application dated 21st September 2023, was on 7th December 2023, settled by consent in terms of the foregoing interim order, and it was agreed the order will remain in force pending the hearing and determination of the petition. Considering that the intended interested parties have just been admitted as respondents, I am of the view they should like the other parties focus on the petition instead of other interlocutory applications or actions that are likely to prompt other such applications that will definitely lead to unnecessary delay. In any case, that order was entered by consent of the petitioner and 1st respondent who were then the only parties, and no evidence sufficient to satisfy the level of proof to set aside, vary or review a consent has been tendered.
 - e. On costs of the application, I find it just to order that it will abide the outcome of the petition.
6. From the foregoing, the court finds and orders as follows:
- a. That prayer (b) of the application dated 20th March 2024 is hereby granted and the intended interested parties are granted leave to join in the petition as the 2nd to 4th respondents respectively.
 - b. That the petitioner is directed to file and serve an amended petition joining the 2nd to 4th respondents within the next fourteen (14) days. The petitioner be at liberty to file and serve additional documents/affidavits/statements and serve the same within the said time.
 - c. That the respondents to file and serve their replies/documents/statements in fourteen (14) days after service.
 - d. That the costs to abide the outcome of the petition.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 16TH DAY OF OCTOBER 2024.



S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Petitioner : Mr. Busieka

Respondent : No appearance

Intended Interested Parties : M/s Takah for Mutubia

Leakey – Court Assistant.

