



**Abeid & 5 others v Mvita Constituency Development Fund
Committee & another (Environment and Land Constitutional Petition
330 of 2015) [2023] KEELC 17171 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17171 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 330 OF 2015

SM KIBUNJA, J

MAY 3, 2023

[FORMERLY MOMBASA HIGH COURT CONTITUTIONAL PETITION NO. 1 OF 2013]

BETWEEN

MOHAMED KARAMA ABEID 1ST PETITIONER
YUSUF KARAMA TIMINI 2ND PETITIONER
OMAR ABDALLA HASSAN 3RD PETITIONER
MOHAMED MBARAK ALI 4TH PETITIONER
TWAHA MBARAK ALI 5TH PETITIONER
MBARAK TAISIR MBARAK 6TH PETITIONER

AND

**THE MVITA CONSTITUENCY DEVELOPMENT FUND COMMITTEE 1ST
RESPONDENT**

ROLLINS INVESTMENTS LIMITED 2ND RESPONDENT

***(CHAMBER SUMMONS DATED 18TH NOVEMBER 2021, NOTICES
OF MOTION DATED 31ST OCTOBER 2017, 30th JANUARY
2017, CHAMBER SUMMONS DATED 1ST AUGUST 2017)***

RULING

1. M/s Mogaka Omwenga & Mabeya Advocates filed the chamber summons dated the 18th November 2021 seeking to be allowed to cease acting for the petitioners. The application is premised on the four (4) grounds on its face and supported by the affidavit sworn by William Mogaka advocate on the 18th



November 2021, in which he among others deposed that the petitioners have failed to give further instructions to enable counsel proceed representing them in the petition.

2. The motion dated the 31st October 2017 was filed through M/s Wambo Muyala & Company Advocates for Idha Mbarak Ali, proposed interested party, on the 1st November 2017. It seeks for the said applicant to be joined in the suit as a necessary party. The application is based on the four (4) grounds on its face and supported by the applicant's affidavit sworn on the 31st October 2017 inter alia deposing that he is the registered proprietor of Mombasa/Block XV1/548, that is along the road constructed by CDF Mvita, and likely to be affected by the orders to be issued in this matter; that he could not join the suit earlier as he was then in the United Kingdom where his family lives; that the cabro paved road has encroached into his land without his consent and hence this application.
3. The notice of motion dated 30th January 2017 was filed through M/s Gichana Bw'omwando & Co. Advocates and seeks for amendment, review, varying and or discharging of the ruling, judgement, and other consequential orders made herein so as to incorporate Said Mzee Mohamed, applicant, as a necessary party, and any benefits meant for the applicant be released to him. The application is based on the five grounds on its face and supported by the affidavit sworn by the said applicant on the 31st January 2017, among others deposing that he is the registered proprietor of Mombasa/Block XV1/549 having purchased it from the 4th petitioner on the 11th October 2012.
4. The last application is the chamber summons by M/s Kiarie Kariuki & Co. Advocates for the "7th & 8th respondents by cross petition" seeking to be granted leave to cease acting for the said respondents. The application is based on the four (4) grounds on its face. It is also indicated to be supported by the affidavit sworn by Kiarie Kariuki. There is however no affidavit annexed to the application.
5. The record shows that the application dated the 30th January 2017 was allowed on the 13th July 2017 in the following terms;

"The application is allowed except the applicant is joined as an interested party and he is allowed to file a cross-petition. The applicant cannot substitute the 4th petitioner who is deceased since he is not the appointed legal representative of his estate. I do make an order that the applicant to file his pleadings within 14 days..... The petitioners and the cross-petitioners to serve the applicant with their pleadings within 14 days of this date...."
6. The application dated the 1st August 2017 for counsel to cease acting for the 7th & 8th respondents was granted on the 25th September 2017 as follows;

"The application dated 1st August 2017..... Since the application is not opposed, the same is allowed."
7. The application dated 31st October 2017 to join Idha Mbarak Ali was dismissed for want of prosecution/non-attendance on the 20th November 2017.
8. On the application dated the 18th November 2021 for counsel to cease acting for the petitioners, Mr. Mogaka advocate informed the court on the 18th January 2023 that it be deemed as withdrawn. On that same date, Mr. Gichana advocate submitted that his client's joinder application dated the 28th August 2017 was still pending and that as it was unopposed, it should be allowed. The court then gave directions on service of the application, filing and exchange of replies and submissions, and fixed the matter for mention on the 2nd March 2023. On that date no replies or submissions had been filed and the matter was reserved for ruling to day to enable the court peruse the record. The court then found it



necessary to address and restate the status of the four applications above so as to chart the way forward and avoid further delay.

9. That having considered the record and the submissions of counsel in relation to the above four applications, the court finds and directs as follows;
- a. That the application dated 30th January 2017 in respect of Said Mzee Mohamed was allowed on the 13th July 2017 in terms set out at paragraph 5 above. From Mr. Gichana advocate's submissions on the 2nd March 2023, he appeared to be of the erroneous view that the application was still pending, but the position is as restated above.
 - b. The application dated 1st August 2017 for counsel to cease acting for the 7th & 8th respondents was allowed on the 25th September 2017 as confirmed at paragraph 6 above.
 - c. The court order of 20th November 2017 indicates that the application dated 31st October 2017 in respect of Idha Mbarack Ali was dismissed for non-attendance. No application has been made to set aside and or review that order to date.
 - d. As for the application dated the 18th November 2021 for counsel to cease acting for the petitioners, the applicant [counsel] applied on the 18th January 2023 to have it marked withdrawn and there being no opposition raised, the same is hereby marked withdrawn.
 - e. In respect of an application reportedly dated the 28th August 2017 that Mr. Gichana addressed the court over on the 18th January 2023, the court has perused the record and there is no evidence of such application having been filed and or pending in the file. The court cannot therefore make a determination on an application that is not before it.
 - f. That as this matter was filed as Mombasa HC Constitutional Petition No. 1 of 2013, it appears to the court that an error was committed by the ELC Registry in failing to capture it as such when it was re-registered and given the current reference. The court on its own motion directs the Deputy Registrar do correct the mistake of registering this matter as an ELC suit and instead ensure it is registered as an ELC Constitutional Petition and communicate the reference thereof to all the parties/counsel within the next seven (7) days.
 - g. That all parties and their counsel have a duty to the court to ensure their pleadings, statements and documents are filed and exchanged timeously to enable their court matters are ready for hearing without unreasonable delay. That as the hearing in this matter appear not to have started though filed in 2013, the court will give directions after this ruling aimed at fast tracking it and all parties and their counsel are expected to comply and ensure they are ready during the next date.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 3rd DAY OF MAY 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of;

Petitioners : Absent

Respondents : Absent

Counsel : M/s Hamid for Hamza for Interested Parties.



M/s Ngei & Kiti for 1st and 9th Respondents respectively.

Wilson – Court Assistant

