



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION CASE NO. 3 OF 2020

IN THE MATTER OF ARTICLE 22 (1), (2) & 23 (1), (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLE 40(3) OF THE CONSTITUTION OF KENYA

BETWEEN

JOHN HENRY KARIUKI.....1ST PETITIONER

GABRIEL KAMAU CHEGE.....2ND PETITIONER

DICKSON KANYINGI CHEGE.....3RD PETITIONER

LEAH WANJIKU NJERU.....4TH PETITIONER

EUNICE NJERI WANJOHI.....5TH PETITIONER

HARUN GATHARA CHEGE.....6TH PETITIONER

CONSOLATA WANJIRU WOKABI.....7TH PETITIONER

PETER KING'ORI CHEGE.....8TH PETITIONER

MORRIS MAINA GIKONYO.....9TH PETITIONER

BEATRICE WANJIRU CHEGE.....10TH PETITIONER

PAUL KAMAU CHEGE.....11TH PETITIONER

MARY NGIMA KARIENYE.....12TH PETITIONER

-VERSUS-

COUNTY GOVERNMENT OF NYERI.....1ST RESPONDENT

NYERI WATER & SEWERAGE COMPANY LIMITED (NYEWASCO).....2ND RESPONDENT

RULING

A. INTRODUCTION

1. By a petition dated 25th February, 2020 expressed to be grounded upon **Articles 22, 23(1) and 40(3) of the Constitution of Kenya, 2010** the Petitioners sought a declaration that the Respondents' alienation or acquisition of their property, that is, Title number Aguthi/Gatitu/617 (*the suit property*) was in violation of their constitutional right to property; a declaration that they were entitled to compensation for deprivation of the suit property in the sum of Kshs.90,720,000/-; and an order for payment of punitive and aggravated damages in the sum of Kshs.15,000,000/-. They also sought payment of costs of the petition among other reliefs.

2. The Petitioners pleaded that they were all members of the family of the late Chege Kamau Gathoka (*the deceased*) and heirs to his estate. They contended that the deceased was the owner of the suit property at all material times and that in 1979 the defunct Municipal Council of Nyeri forcibly took over the suit property without due process and without payment of compensation. It was further pleaded that the Respondents then established a sewerage treatment plant thereon.

B. THE 2ND RESPONDENT'S APPLICATION

3. By a notice of motion dated 10th September, 2020 expressed to be grounded upon the provisions of **Rules 3 and 5(d)(i) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**; as read with **Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21; Order 1 Rule 10(2), Order 1 Rule 14, Order 2 Rule 15(1) a, c and d of the Civil Procedure Rules, 2010**; and **all other enabling provisions of the law**). The 2nd Respondent sought to be struck out of the petition. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Peter M. Gichaaga on 10th September, 2020. The 2nd Respondent contended that it was a water and sanitation company wholly owned by the 1st Respondent but having a distinct legal personality from that of the 1st Respondent. It was further contended that it was merely managing the sewer treatment plant on the suit property on behalf of the 1st Respondent. It was further contended that as an agent the 2nd Respondent was not liable to be sued on behalf of a disclosed principal.

4. The 2nd Respondent further contended that it never took part in the alleged compulsory acquisition of the suit property in 1979 since it was only incorporated in 1997. It was thus contended that since it was not privy to the acquisition by the suit property its presence in the proceedings would not add any value thereto and that it was not a necessary party for the purpose of determining the real issues in controversy in the petition.

C. THE PETITIONERS' RESPONSE

5. The Petitioners filed a replying affidavit sworn by the 1st Petitioner, John Henry Kariuki, in opposition to the said application. It was contended that the application was defective, incompetent, misconceived, frivolous and an abuse of the court process which was merely intended to delay the hearing and determination of the petition. The Petitioners contended that in certain cases both the principal and agent may be held liable hence the necessity of suing both the 1st and 2nd Respondents.

6. The Petitioners also contended that the 2nd Respondent was properly joined as a necessary party for the purpose of enabling the court to adjudicate upon all the issues in controversy in the petition. They consequently urged the court to dismiss the application with costs.

D. DIRECTIONS ON SUBMISSIONS

7. When the application was listed for directions on 24th September, 2020 it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their written submissions. The record shows that the 2nd Respondent filed its submissions on 18th February, 2021 whereas the Petitioners filed theirs on 19th February, 2021. The 1st Respondent did not file any submissions since its advocates informed the court that they were not opposed to the application.

E. THE ISSUES FOR DETERMINATION

8. The court has considered the 2nd Respondent's notice of motion dated 10th September, 2020, the Petitioners' replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:-

(a) *Whether the 2nd Respondent is a necessary party to the petition.*

(b) *Whether the 2nd Respondent ought to be struck off the petition.*

(c) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATION

(a) **Whether the 2nd Respondent is a necessary party to the petition**

9. The court has considered the submissions of the parties on this issue. Whereas the petitioners contended that the 2nd Respondent was properly sued as a necessary party, the 2nd Respondent contended otherwise. The 2nd Respondent contended that it was not the acquiring entity with respect to the suit property and that it was not the successor in title to the defunct Municipal Council of Nyeri which was alleged to have compulsorily acquired the suit property without following due process. It was submitted that the 2nd Respondent had no information on execution of the alleged acquisition or on the legality or constitutionality thereof hence it was unable to offer any useful assistance to the court in the adjudication of the petition.

10. The 2nd Respondent further submitted that it was occupying and utilizing the suit property under licence or authority of the 1st Respondent hence it was merely an agent of a disclosed principal which ought not to be sued in the circumstances. The 2nd Respondent contended that as an agent it did not acquire any ownership rights over the assets of the 1st Respondent in its capacity as a service provider. The 2nd Respondent cited the case of **Philomena Mbete Mwilu v Judicial Service Commission and 2 Others [2020] eKLR** in which the court considered and made a pronouncement on who is a necessary party.

11. The 2nd Respondent further submitted that it could not be sued as a Respondent whereas it was merely an agent of a disclosed principal, who is the 1st Respondent in the petition. The 2nd Respondent cited the case of **Anthony Francis Wareham t/a Wareham and 2 Others v Kenya Post Office Savings Bank [2004] eKLR** in support of that submission.

12. The court has carefully examined the petition dated 25th February, 2020 and the supporting affidavit of even date sworn by the 1st Petitioner, John Henry Kariuki. It is abundantly clear from paragraph 5 of the petition and paragraph 6 of the supporting affidavit that it is the defunct **Municipal Council of Nyeri** and not the 2nd Respondent which allegedly forcibly took over the suit property in 1979. The Petitioners cannot therefore run away from the particulars of their claim as pleaded in the petition. The court is not satisfied that the 2nd Respondent is a necessary party for the purpose of adjudicating the real issues in controversy in the petition.

13. In the case of **Pizza Harvest Limited v Felix Midigo [2013] eKLR** Havelock J considered who is a necessary party thus:

“...I have also been taken cognizance of the case of Amon v Raphael Tuck and Sons Limited (1956) 1 All ER 273 in which Devlin J held at page 286 -287:

“What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the

questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.” (Emphasis added)

14. The main question for adjudication is whether or not the alienation or forcible takeover of the suit property by the predecessor in title of the 1st Respondent was unconstitutional and unlawful. The material on record shows that the 2nd Respondent or its predecessor had nothing to do with the alleged compulsory acquisition. The court is of the opinion that the question as to whether due process was followed in the acquisition of the suit property or whether compensation was ever paid for it can only be answered by the 1st Respondent. The presence of the 2nd Respondent shall not be necessary for the purpose of resolution of the issue.

15. The court is further of the opinion that the 2nd Respondent cannot be legitimately sued in the instant petition since it is clear from the material on record that its operations on the suit property are under licence and authority of the 1st Respondent. The 2nd Respondent is therefore an agent of a disclosed principal in the circumstances of this petition.

16. In the case of **Anthony Francis Wareham t/a Wareham and 2 Others v Kenya Post Office Savings Bank (supra)** the Court of Appeal of Kenya held, *inter alia*, that:

“It was also prima facie imperative that the court should have dismissed the Respondent’s claim against the 2nd and 3rd Appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued ...”

17. The court is unable to accept the Petitioners’ submission that it is permissible to sue both the agent and disclosed principal seeking the same reliefs against them. The Petitioners did not cite any authority in support of that submission. It is also pertinent to point out that so far the 1st Respondent has not disputed the legal status of principal attributed to it by the 2nd Respondent. The 1st Respondent has not denied that it has delegated its statutory functions of provision of water and sanitation services to the 2nd Respondent. In the premises, the court finds and holds that the 2nd Respondent was wrongly joined in the instant petition.

(b) Whether the 2nd Respondent ought to be struck off the petition

18. The court has already found and held that the 2nd Respondent is not a necessary party and that its presence is not required to enable the court to adjudicate upon and determine the issues in controversy in the petition. The court has also found and held that the 2nd Respondent was merely an agent of a disclosed principal hence it could not be sued together with the principal in respect of the same cause of action. It would, therefore, follow that the 2nd Respondent was wrongly joined in the petition hence it ought to be struck off the petition.

(c) Who shall bear costs of the petition

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in

accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant should not be awarded costs of the application. Accordingly, the 2nd Respondent shall be awarded costs of the application. However, the 2nd Respondent shall not be awarded costs of the petition since the petition has not taken off and no directions on the hearing thereof have been given.

G. CONCLUSION AND DISPOSAL

20. The upshot of the foregoing is that the court finds merit in the 2nd Respondent's application. Accordingly, the 2nd Respondents' notice of motion dated 10th September, 2020 is hereby allowed in the following terms:

(a) The 2nd Respondent be and is hereby struck off the petition.

(b) The 2nd Respondent is hereby awarded costs of the application only but is not awarded costs of the petition.

21. It is so decided.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 21ST DAY OF APRIL, 2021.

In the presence of:

Mr. Makura holding brief for Mr. Gori for the Petitioners

Mr. Lusi for the 2nd Respondent

No appearance for the 1st Respondent

HON. Y. M. ANGIMA

JUDGE

21.04.2021