



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

E.L.C PETITION NO 5 OF 2018

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

AND

IN THE MATTER OF ARTICLES 10,19,20,21,22,23,24 AND 25 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF WATER ACT, 2002 (REPEALED), AND WATER ACT, 2016

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF THE ACCESS TO INFORMATION ACT, 2016

AND

IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE LAND (ASSESSMENT OF JUST COMPENSATION) RULES, 2017

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,35,40,47,48,50,60 (1) (b), 232 AND 249 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

STEPHEN MBUGUA GITUTH.....RESPONDENT /1ST PETITIONER

EUNICE NJERI NYOIKE.....RESPONDENT /2ND PETITIONER

ALLAN MWANGI MAINA.....RESPONDENT/3RD PETITIONER

(All Applicants suing on their own behalf and on behalf of 57 other Applicants)

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

ATHI WATER SERVICES BOARD.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....APPLICANT/INTENDED INTERESTED PARTY

RULING

1. On the 14/9/2020 the Applicant/Intended Interested Party filed a Notice of motion dated the 6/9/2020 seeking interalia orders of joinder, stay of mitigation and sentencing emanating from the ruling dated the 18/6/2020 and that the prohibitory orders of the Court issued on the 31/7/2019 be reviewed, set aside and or vacated.

2. The application is premised on the grounds and the dispositions by Joseph Wairagu Irungu the Principal Secretary Ministry of Water, Sanitation and Irrigation. It is the applicant's contention that the prohibitory orders are prejudicial to them for the reason that the project has stalled and has caused economic loss as enumerated in ground 5. It is further their averments that the Respondents have taken steps to comply with the orders of Court.

3. The Applicant anchored its prayer for review on the premise of public interest. It is their assertion that the tax payers' money has been expended on the project and the Applicant will play a pivotal role in mitigating the loss by accessing the site and completing the project. That the orders of Court of 31/7/2019 are prejudicial and are causing irreparable loss and damages.

4. The Petitioners opposed the application vide a Replying Affidavit dated 23/9/2020 sworn by Stephen Mbugua Gituthi. He deponed that the Applicant was by operation of Article 156 of the Constitution aware of the Court orders and there being no compliance of the said orders of Court, the continued disobedience of the same makes the Applicant contemptuous. As to why they should not be enjoined, the Petitioner contends that there has been such a delay in bringing the application and that there are no issues pending for determination that needs the attendance of the proposed interested party. It is the Petitioners' response that the issues for determination by this Court were between the Petitioners and the Respondents and the interested party has no statutory and/ or constitutional role thereof. The remaining issues being compliance of the Court orders, the Petitioners deponed that there is no prejudice that will be occasioned on the Applicant.

5. The Petitioners further opposed the prayer for review and made reference to annexure "JW16 (a) & "JW16 (b)" asserting that the documents were within the knowledge of the Respondents but were not produced at the hearing of application for contempt. The Petitioners made reference to a number of annexures by the Applicant and aver that the same were within the knowledge of the Respondents who are using the Applicant to introduce new evidence to buttress their reclaim. That if the documents have any relevance then, it is the Petitioner's dispositions that the same will introduce new parties to the suit who will in turn require that their contractual interest be protected, a consequence that would amount to reopening the suit.

6. The Petitioners further deponed that the Respondents are still in contempt of the orders of Court. That the application is not a matter of public interest as it emanates from breach of Court orders. The Petitioners contend that the Applicant has no basis whatsoever to stay the mitigation and sentencing of the contemnor as it was not a party to it. The Petitioners attached a bundle of documents to buttress their claim and urged this Court to dismiss the application.

7. The Applicant submitted that to promote and protect public interest it should be enjoined and relies on the case of **Francis Kariuki Muruatetu & Another vs. Republic & 5 Others** as consolidated with 16 of 2013; [2016] eKLR which set down the principles of joinder. It maintained that the proceedings involves matters of public interest and must therefore be enjoined and enumerated the circumstance thereof. It is further its submission that the orders of 31st July, 2019 should be set aside as they continue to cause irreparable loss and damages at the behest of the Petitioners' enjoyment of the orders thereof. That there was material non-disclosure on the part of the Respondents which information would have informed the Court to arrive at a different conclusion.

8. It is the Applicant's submissions that Courts should intervene in matters public interest where public finances are at a risk of being misused and placed reliance on the case of **Anne Mumbi Hinga vs Victoria Njoki Gathara {2009} eKLR**. On submitting that this a matter of public interest and should thus be enjoined, they relied on the cases of **R (Corner House Research vs Director of SFO [2008] 4 All ER 927** and **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others {2014} eKLR**.

9. From the record, the Petitioners did not file submissions in respect of the instant application.

10. The issues for determination are; whether the Applicant should be enjoined to the suit; whether the orders of the Court should be reviewed; whether the Court should issue stay of mitigation and sentencing; who meets the cost of the application.

11. Order 1 Rule 10(2) of the Civil Procedure Rules (CPR) provides that;

"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 to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added".

12. This order requires the Court to evaluate the importance of such a party to the suit and their relevance to the just determination of the suit.

13. **Rule 7 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules 2013** provides that an interested party can apply to be enjoined or the Court can move *suo moto* and enjoin a party to proceedings before it. Rule 2 thereof defines an interested party 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.

14. Similarly, the elements that guide a Court in enjoining a party were well settled in the Muruatetu case supra. In this case the Court held that; the Applicant must demonstrate the personal interest that he has in the matter by laying sufficient grounds before the Court; the prejudice he would suffer if he is not enjoined as interested party; he must set out the case that he intends to make before the Court and demonstrate the relevance of the evidence being proffered to the Court in determining the issue in controversy.

15. From the foregoing, an interested party must have a direct stake or legal interest in the dispute before Court and as such joinder is not a matter of right. It is a discretionary exercise of the Courts powers.

16. The background of this application is that the Petitioners instituted a petition in 2018 against the Respondents seeking to challenge the process of compulsory acquisition of wayleaves over their properties and improvements. It was the Petitioners' contention that the process of compulsory acquisition was devoid of legal process.

17. The Court in its judgement determined the matter in favour of the Petitioners on the 31/7/2019 and declared that the acquisition of the suit properties and improvements undertaken by the Respondents was carried ultra vires the Constitution, and statutory law, thus infringing and violating the Petitioner's rights to property. In addition, the Court prohibited the Respondents, their servants, agents in any manner whatsoever from vesting the right of way (wayleave) in favour of the 2nd Respondents unless due process is followed and prompt payment of just compensation is made to the Applicants.

18. Saving other procedural processes envisaged under section 34 of the Civil Procedure Act, the Court on delivery of judgment became *functus officio*.

19. What is the meaning of *functus officio*? In the case of **Raila Odinga & Others vs. IEBC & Others [2013] eKLR** the Court stated;

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of Appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

20. In the case of **Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550** it was observed that:

“A Court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the Court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the Court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the Court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher Court if that right is available.”

21. Similarly, *functus officio* is defined in Black's Law Dictionary, Ninth Edition as [having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

22. In the circumstances the Court declines the invite by the Applicant to re-engage with the dispute in a way that is likely to introduce new issues and parties to a case that stands adjudicated.

23. I therefore see no benefit in discussing the other two issues as in my view they now stand moot.

24. I find the application has no merit and I proceed to dismiss it.

25. I make no orders as to costs.

26. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 10TH DAY OF JUNE, 2021

J.G. KEMEI

JUDGE

Delivered in the presence of:

Thige for the 1st – 4th Petitioners

1st Respondent – Absent

Mulekyo for the 2nd Respondent

Munene, Ms Mbatian and Ms Hassan for the Intended Interested Party.

Alex: Court Assistant