



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. PETITION NO. 12 OF 2020**

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE PETITIONER'S CONSTITUTIONAL RIGHTS  
UNDER ARTICLE 19, 20, 21, 22, 23, 40, 47, 50 AND 165 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**DAVID MUTINDA KIVUVA.....PETITIONER**

**VERSUS**

**ALI ABDI ALI.....1<sup>ST</sup> RESPONDENT**

**KALOLENI WELFARE SOCIETY.....2<sup>ND</sup> RESPONDENT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. In the Chamber Summons dated 22<sup>nd</sup> July, 2020, the Petitioner has sought for the following orders:

***a) That leave be granted to enjoin the National Land Commission in this suit as the 3<sup>rd</sup> Respondent in place of the Commissioner of Lands, the present 3<sup>rd</sup> Defendant in Petition No. 12 of 2020.***

***b) That costs of the Application be in the cause.***

2. The Application is premised on the grounds that this suit was filed on 17<sup>th</sup> June, 2020 under a Certificate of Urgency; that regrettably, due to an inadvertent error and/or mistake on the part of the Advocate who drafted the initial Application, the Commissioner for Lands was cited as the 3<sup>rd</sup> Respondent and that by virtue of the provisions of Article 67(1) of the Constitution of Kenya, the Commissioner of Lands has been replaced by the National Land Commission.

3. It is the Petitioner's case that the National Land Commission is now operational and is mandated *inter alia* to monitor the registration of all rights and interests in Land and develop and maintain an effective Land information management system at National and County levels.

4. The Petitioner's advocate deponed that the intended 3<sup>rd</sup> Defendant holds vital information in relation to the subject matter of this suit since it holds all records in relation to any transfers and or transactions in relation to the suit property and that the information held by the intended 3<sup>rd</sup> Defendant is critical in the effectual and complete adjudication of this suit.

5. In response, the 1<sup>st</sup> Respondent deponed that he is the Chairman of the 2<sup>nd</sup> Respondent; that the proceedings herein do not disclose a cause of action; that the Applicant is a perennial litigant and that the plea of infringement of the Petitioner's rights must disclose the State organ that infringed upon his rights.

6. The Petitioner's advocate deponed that a person may be joined in a suit not because there is a cause of action against him, but because that person's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter. Counsel relied on the case of ***Andy Forwarders Service Ltd & another vs. Price-Waterhouse Coopers Ltd & another (2012) eKLR.***

7. It was submitted that the addition of the National Land Commission in place of the 3<sup>rd</sup> Respondent is necessary for the reason that its

presence shall aid the court to effectually and completely adjudicate upon the issue between the parties and that no injustice will be caused to the Respondents if the orders sought are granted.

8. On his part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' counsel submitted that the Petition was filed against a non-existent party; that there is no party to substitute and that the Civil Procedure Rules are not applicable in these proceedings. Counsel submitted that in any event, there is in existence another suit in respect to the same suit property being Machakos ELC No. 113 of 2019 and that these proceedings are an abuse of the court process.

9. This suit was commenced by way of a Constitutional Petition. In the Petition, the Petitioner has sought for several declaratory orders, including a declaration prohibiting the Respondents from alienating L.R. No. 24628 located on Mulinge Scheme, Katani, Machakos County and from interfering with his peaceful possession of the suit property.

10. Although the Petitioner sued the Commissioner of Lands, the said office was abolished by statute. Most of the functions of the 3<sup>rd</sup> Respondent were taken over by the National Land Commission, the intended 3<sup>rd</sup> Respondent. The Petitioner is seeking for an order to enjoin the National Land Commission to replace the Commissioner of Lands.

11. This being a Petition, the same is governed by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules)*. Rule 5 of the *Mutunga Rules* provides as follows:

*“Substitution and striking out of parties -*

*(a) Where the Petitioner is in doubt as to the persons from whom redress should be sought, the Petitioner may join two or more Respondents in order that the question as to which of the Respondent is liable, and to what extent, may be determined as between all parties.*

*(b) A Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.*

*(c) Where proceedings have been instituted in the name of the wrong person as Petitioner, or where it is doubtful whether it has been instituted in the name of the right Petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as Petitioner upon such terms as it thinks fit.*

*(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.”*

12. The *Mutunga Rules* allows this court at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just, to order that the name of any party improperly joined, be struck out or 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.

13. The office of the Commissioner of Lands ceased to exist when the National Land Commission was established. The National Land Commission took over most of the operations of the Commissioner of Lands. That being the case, the 3<sup>rd</sup> Respondent was improperly joined in these proceedings and should be struck out. The correct office, the National Land Commission, should be enjoined in these proceedings to enable the court to adjudicate upon and settle the matters raised by the parties in accordance with Rule 5 of the *Mutunga Rules*.

14. That being the case, and the Respondents having not shown the prejudice which they will suffer in the event the National Land Commission is joined in these proceedings, I shall, which I hereby do, allow the Application dated 22<sup>nd</sup> July, 2020 as follows:

***a) Leave be and is hereby granted to enjoin the National Land Commission in this suit as the 3<sup>rd</sup> Respondent in place of the Commissioner of Lands, the present 3<sup>rd</sup> Respondent.***

***b) Each party to bear his/its own costs.***

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 4<sup>TH</sup> DAY OF JUNE, 2021.**

**O. A. ANGOTE**

JUDGE