



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

PETITION NO. 4 OF 2020

AHMED BASHIL ABDI.....1ST PETITIONER

ABDINOOR AHMEDMAGAN.....2ND PETITIONER

VERSUS

COUNTY GOVERNMENT OF WAJIR.....1ST RESPONDENT

CEC ENVIRONMENT, ENERGY & NATURAL

RESOURCES, COUNTY GOVERNMENT OF WAJIR.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY.....3RD RESPONDENT

ABDI BASHIR.....1ST PROPOSED INTERESTED PARTY/APPLICANT

HAMDY BARRE ABDI.....2ND PROPOSED INTERESTED PARTY/APPLICANT

MOHAMED ALI ABDI.....3RD PROPOSED INTERESTED PARTY/APPLICANT

SALAT ABDI HAT.....4TH PROPOSED INTERESTED PARTY/APPLICANT

RULING

By a Notice of Motion dated 23rd October 2020 and supported by an affidavit of even date, the Applicants herein approached the court seeking the following orders:

(i) Spent;

(ii) That the Court grant leave to the Applicants to join the suit as Interested Parties pending the hearing and determination of the Petitioner's application;

(iii) That the Court extends the Interim Order dated 29th July, 2020;

(iv) That the costs of the application be provided for.

The Applicant's prayers are grounded on the following premises:

a) That the proposed Interested Parties instituted Civil Suit No 8 of 2020 at Wajir Principal Magistrates' Court but was dismissed for want of jurisdiction via a ruling dated 14th August 2020 and before filing suit, the current Petition had already been instituted.

b) That the Applicants will raise substantive issues that would be crucial in the interest of justice, to afford them an opportunity to be heard and present evidence to enable the court adjudicate the dispute based on evidence and facts;

c) That the proposed Interested Parties are residents of Hodhan location where the incinerator is being constructed and installed by the 1st and 2nd Respondents;

d) That the incinerator under construction and installation by the 1st and 2nd Respondents, their servants, agents and/or employees, at TB Manyatta (a residential settlement) in Hodhani location is inhabited by the proposed Interested Parties and shall greatly affect their lives. As such, it is fair and just that the Applicants be allowed to join the suit;

e) That the Applicants have brought the application without unreasonable delay.

The proposed Interested Parties' application is opposed. Vide a replying affidavit sworn by Hassan Oman under the instructions of the 1st and 2nd Respondents, he avers that the Applicants had filed suit against them seeking permanent injunction orders barring the installation of the incinerator machine at TB Manyatta. That in response, the Respondents filed a preliminary objection on 6th July 2020, which application succeeded and resulted in the Applicant's plaint being struck out for want of jurisdiction. He further avers that the Applicants' concerns are adequately represented by the Petitioners, that the Applicants may not be able to shoulder costs should the Petition fail and that they do not stand to suffer any prejudice should they fail to be enjoined. He thus prays for the application to be dismissed with costs.

By consent, parties agreed to canvass the application by way of written submissions. The Applicants filed their submissions on 8th May 2021. They submit that they are residents of the parcels of land adjacent to the land upon which the incinerator is to be installed. It is their opinion that the only issue for determination is whether or not they ought to be enjoined as Interested Parties. In addressing this question, they cite the case of **Francis Kariuki Muruatetu and Another v Republic & 5 Others [2016] eKLR** which set out three matters for consideration in determining whether a party ought to be enjoined, being: that the party has an identifiable stake in the case; that the applicant will suffer prejudice if they are not enjoined and that their interest differs from that of the other parties. In addition, they cite **Rules 2 and 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and the decisions in **Kenya Medical Laboratory Technicians and Technologists Board and Others versus the Attorney General & 4 Others [2017] eKLR**. It is their further submission that the issue of joinder of parties falls within the Court's discretionary power, which ought to be exercised in their favour. Reliance is placed on the case of **Cyprian Andama v Director of Public Prosecution & Another [2018] eKLR**. In conclusion, they submit that their rights to a clean environment and their right to property stands to be violated should the application be dismissed.

The 1st & 2nd Respondents filed their submissions on 06th May 2021. They are in agreement that the issue for determination is whether or not the proposed Interested Applicants ought to be enjoined. They reiterate the contents of their replying affidavit and add that the Applicants have not provided any proof to the court that they are indeed residents of the parcels of land adjacent to the location where the incinerator is to be put up. They cite the decision in **Communication Commission of Kenya & 4 others v Royal Media Ltd & 7 Others SC Petition No.14 of 2014 and Meme v Republic [2004] 1 EA 124** in setting out the matters to be considered by a court invited to make a determination on the joinder of interested parties. It is their contention that the grounds raised by the Petitioners in their petition can be heard and determined without the input of the Applicants.

The court has considered the notice of motion application and the Parties' rival affidavits and submissions. The Court is in agreement with the parties that there lies a singular issue for determination, that of whether the proposed Interested Parties ought to be enjoined to the Petition.

As pointed out by the Respondents, the relevant legal provisions dealing with the issue of Interested Parties are captured under **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 2** defines an interested party as follows:

'Interested party means 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.'

Rule 7 provides the procedural framework for application to be enjoined as an interested party. The Rule reads thus:

'7. (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.'

(2) A court may on its own motion join any interested party to the proceedings before it.'

From the foregoing provisions, the following considerations with respect to interested parties are immediately discernible:

First, for qualification as an interested party, the applicant must demonstrate that they have a stake in the proceedings before the court. Secondly, they are required to show that they are not party to the proceedings upon which they seek joinder. Once the two qualifications are satisfied, the applicant is allowed to express their desire to be joined either orally or in writing. Finally, the court is vested with discretion to determine whether or not to grant the application for joinder of a proposed interested party.

Severally, courts have been called upon to determine whether or not applicants ought to be allowed to be enjoined as interested parties. Case law around this question has grown and the considerations to be taken into account, amplified. The Supreme Court decision in **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR** for example unpacks the place and purpose of an interested party in proceedings in the following words:

"Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his

or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.” (Underline, mine)

In **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** the Court extracted the definition provide by the Black’s Law Dictionary 9th edition, to explain the station of an interested party in a case:

“A party who has a recognizable stake (and therefore standing) in the matter.”

With respect to the procedural requirements for joinder as an interested party, the following decisions are instructive:

The Supreme Court in the decision of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** with reference to **Francis Kariuki Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013 [2016] eKLR** pronounced itself as follows:

“One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

(i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

(ii) The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

In **Meme v. Republic, [2004] 1 EA 124**, the High Court observed that a party could be enjoined in a matter for the reasons that:

(i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;

(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(ii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:

a) what is the intended party’s stake and relevance in the proceedings and

b) will the intended interested party suffer any prejudice if denied joinder.?”

A distillation of the authorities above provides clearer filters through which a court ought to run an application for joinder of interested parties. These include: whether the stake identified by the applicant is proximate to the matters in the proceedings; whether and to what extent the applicant would stand prejudiced by their non-joinder; and lastly, whether the applicant’s submissions will be useful to the court and different from those made by the other parties to the proceedings.

The Court will now apply the prescriptions above to the case at hand. The crux of the Petitioner’s case against the Respondents, is first, their ownership of unsurveyed land parcel R6311 upon which the Respondents intend to put up the incineration plant and upon which a dumpsite has been established. Secondly, they are aggrieved with the manner in which their land has been taken over for the project without following the tenets of compulsory acquisition laid out in law and further, without public participation. Lastly, it is their concern that the project will violate the right to a clean and healthy environment for the communities around. In response, the Respondents aver that the disputed land is actually public land belonging to TB Manyatta Health Center.

The proposed Interested Parties on the other hand base their claim, not on the disputed land, but on the proximity of the disputed land to their homes. It is their contention that they would be the primary victims of the harmful and cancerous wastes emitted from the operation of the incinerator. Although agreeing with the Petitioners that the project did not involve public participation, the gravamen of their case is on the Respondents’ decision to erect the incinerator in a densely populated public area. The prejudice to be suffered by their non-joinder, is that the installation of the project would render their homes inhabitable.

The question of the ownership of adjacent properties to the disputed land ought to be reserved for the main hearing. However, at this stage, it is apparent that the Applicant’s case brings on board a different angle from that of the Petitioners, although pegged on the same facts. While the Petitioners claim ownership of the land upon which the incinerator is to be built, they indicated to the court that they are residents of Wajir, but not inhabitants of the disputed land or its immediate surrounding. Their concern is therefore different from that of the Applicants who ostensibly live adjacent to the disputed land. Where hypothetically the outcome of the case revolving around the ownership of the land is found in favour of the Respondents, the Applicant’s concern would still be valid. In essence then, the Applicants have demonstrated their stake in the proceedings, and demonstrated that they would be prejudiced if they are not joined as interested parties. It is also clear that their submissions would be of importance to the court from a resident’s perspective.

The upshot of the analysis above is that the Applicant's application succeeds. It is my view that the prayer to be enjoined as Interested Parties ought to be granted. Further, it is my opinion that costs ought to abide the event. It is so ordered.

READ, DELIVERED AND SIGNED IN THE OPEN COURT THIS 2ND DAY OF JULY, 2021

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E. C. Cheronno (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Kimanzi for the Petitioners
2. Mr. Arunda for the Respondents
3. Applicant/Advocate; Absent
4. Fardowsa; Court Assistant