



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**ELC JR NO. E002 OF 2021**

**IN THE MATTER OF AN APPLICATION BY WYCLIFFE OTIENOMENGA,  
LUCY ATIENO JUMA, JOYCE AKINYI OLUOCH, ANNA OKWARO OKELLO,  
JOYE ATIENO MIRUKA, RISPHER ACHIENG OKOTH, DOREEN NYABOYE,  
MACHUKI, DANIEL OWINO ODUNDO, LUCAS OKWIRRY YWAYA, PHILEMON  
ONYANGO, WALTER ONYANGO & RICHARD OCHIENG ONG'IRA ("THE EXPARTE  
APPLICANTS") FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION,  
CERTIORARI AND MANDAMUS DIRECTED TO THE RESPONDENTS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, NO. 4 OF 2015**

**AND**

**AND IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**EXPARTE APPLICANTS**

**WYCLIFFE OTIENOMENGA, LUCY ATIENO JUMA, JOYCE AKINYI OLUOCH,  
ANNA OKWARO OKELLO, JOYE ATIENO MIRUKA, RISPHER ACHIENG OKOTH,  
DOREEN NYABOYE, MACHUKI, DANIEL OWINO ODUNDO, LUCAS OKWIRRY YWAYA,  
PHILEMON ONYANGO, WALTER ONYANGO & RICHARD OCHIENG ONG'IRA**

**AND**

**PRINCIPAL SECRETARY, STATE DEPARTMENT**

OF HOUSING AND URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT

PRINCIPAL SECRETARY, STATE DEPARTMENT

OF LANDS AND PHYSICAL PLANNING.....2<sup>ND</sup> RESPONDENT

KISUMU COUNTY DIRECTOR OF SURVEY.....3<sup>RD</sup> RESPONDENT

KISUMU COUNTY DIRECTOR OF PLANNING.....4<sup>TH</sup> RESPONDENT

REGISTRAR OF LANDS, NYANDO.....5<sup>TH</sup> RESPONDENT

THE OFFICER COMMANDING STATION,

MUHORONI POLICE STATION.....6<sup>TH</sup> RESPONDENT

THE ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT

AND

SETTLEMENT EXECUTIVE

COMMITTEE.....INTENDED INTEREST PARTY/APPLICANT

### RULING

#### INTRODUCTION

Settlement Executive Committee filed a Notice of Motion Application dated 4<sup>th</sup> March 2021 seeking the following orders namely that this Honourable Court finds it just to allow the intended interested parties be enjoined in this suit as interested parties. That costs of this Application be in the cause.

The Application was supported by the Affidavit of JAMES OMONDI ALOSI who deposed That he is the Secretary of the Intended Interested Party and has been duly authorized to appear on their behalf. That the Intended Interested Party was a committee formed with the help of Kenya Informal Settlement Improvement Project (KISIP) together with residents of Shaurimoyo informal settlement in Muhoroni sub-county Kisumu that aimed at sensitizing the Residents of Shauri Moyo.

That the Committee's role was to mobilize residents to meet the Kenya Informal Settlement Improvement Project (KISIP) team, whose role was to sensitize the Residents of Shaurimoyo on the intention of the Government of Kenya to improve informal settlements in Kisumu and Uasin Gishu Counties.

That the aim of the Committee being formed was to ensure public participation and sensitization on the members of Shauri Moyo Community.

That the meetings were conducted by Kenya Informal Settlement Improvement Project (KISIP), a representative of the Government of Kenya to ensure there was adequate public participation.

That the former Chief, Mr. Ben Abong'o who is still a resident of Shauri Moyo sensitized people on settlement of public land. The current Chief stressed to the people that the parcel of Land in issue belonged to the government.

That some of the Applicants in the suit were present during the public engagements and meetings and have further been accorded parcels of land as beneficiaries of Kenya Informal Settlement Improvement Project (KISIP).

That the Intended Interested Parties are aware of the Applicant's Application and are in a position to aid this Honourable court deliver a well-deserved justice for all the community living in Shaurimoyo informal settlement.

That the presence of the intended interested parties will result in the complete settlement of all the question involved in the proceedings.

That the residents of Shauri Moyo are apprehensive that a decision made by the Honourable Court would adversely affect them and hence the prayer to be enjoined in the suit herein.

That being enjoined to this suit would provide protection for the rights of the residents of the informal sector who would otherwise be adversely affected in law by the decision of the Honourable Court.

That the joinder would help this Honourable Court prevent a likely course of proliferated litigation.

That it is now desirable, fair and just this Honourable Court to grant the orders sought and enjoin the Intended Interested persons in the suit as Interested Parties.

That he swears this Affidavit in support to this Application and pray that this Honourable Court do grant the orders sought.

On 15<sup>th</sup> March 2021 when this matter came up for Hearing, the court directed the Applicant to file a Replying Affidavit within 7 days, the Intended Interested Party to file a Supplementary Affidavit with Submissions within 7 days and the Applicant to file Submissions within 7 days.

### **1<sup>st</sup> -13<sup>th</sup> Applicants' Replying Affidavit.**

The 1<sup>st</sup> – 13<sup>th</sup> Applicants filed their Replying Affidavit on 24<sup>th</sup> March 2021 where WYCLIFFE OTIENO deposed and stated as follows:

- 1. That he is one of the Applicants, well conversant with the facts of this case and hence competent to swear this Affidavit.**
- 2. The he has authority of other Applicants to plead and to swear this Affidavit on their behalf.**
- 3. That he has read and understood the Intended Interested Party's Notice of Motion Application dated 4<sup>th</sup> March 2021 and the attached Supporting Affidavit sworn by JAMES OMONDI ALOSI.**
- 4. That save for what he expressly admits herein, he denies each and every allegation set in the Intended Party's aforementioned Notice of Motion Application and Supporting Affidavit as if the same were set out verbatim and traversed seriatim is frivolous, misconceived, mischievous, unmeritious, vexatious and a gross abuse of the Court Process.**
- 5. That the Intended Interested Party's Application dated 4<sup>th</sup> March 2021 is fit for striking out on the ground that the same has been brought by an entity that is not a legal entity and is thus devoid of the ability to be a party to a suit.**
- 6. That he admits the contents of the instant Replying Affidavit only in so far as it is merely expressive of the dependent's gender, adult status and state of mind. He denies every allegation thereto and invite the Intended Interested Party to strict proof thereof.**
- 7. That he denies paragraphs 2,3,4,5,6,7,8,9,10,11,12,13 and 14 of the said Replying Affidavit and put the Intended Interested Party to Strict proof of the same**
- 8. That in the alternative and/or without prejudice to the foregoing, the Intended Interested Party herein was established by the Kenya Informal Settlement Improvement Project (KISIP), which project was established by the Respondents herein. The Intended Interested Party therefore, at all material times to the instant suit and as regards the cause of action herein, maintained the status of the Respondents' agent acting for and/or on behalf of the Respondents.**
- 9. That further and without prejudice to the foregoing and with due consideration of the agent-principal relationship existing between the Respondents and the Intended Interested Party, any clarification, issue and or question intended to be brought by the Interested Party ought to be addressed by the Respondents.**
- 10. That it is in the interest of justice that the application by the Intended Interested Party be dismissed with costs.**

### **Intended Interested Party's Submissions**

The Intended Interested Party filed its Submissions on 30<sup>th</sup> April 2021 and the main issue that it raised was whether the Applicant has met the requirements to be enjoined as an Interested Party. The Intended Interested Party Submitted that Rule 2 of the Constitution of Kenya 9Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (2013) 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.”

The Intended Interested Party was a committee that was appointed with the main aim of getting in contact with the local public persons whose livelihoods were going to be affected by the Government initiative for Informal Settlement Development. That the Committee acted as a voice of the Residents of Shauri Moyo Area who allowed them to actively participate in Physical Development of the area in Shauri Moyo.

That the Applicant's Application means that there is a halt in issuing of Title Deeds to the area residents of Shauri Moyo whose residents form part of the Intended Interested Party and therefore the decision of this court will have an impact on the intended interested party as the property in question includes the ones where some of members of the Intended Interested Party have settled. The Intended Interested PARTY placed reliance in the case of **Francis K. Muruatetu & Another v. Republic & 5 Others (2016) eKLR** where the court set out identifiable key elements in an application for joinder as an Interested Party. The elements are as follows:

- 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 participation, 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.*

The Intended Interested Party submitted that a representative of the residents of Shauri Moyo who are apprehensive that there will be a delay in issuing of Title Deeds which will have an adverse effect on them since most of them have already settled in the allotted plots and have begun to develop them. The Intended Interested Party therefore submitted the court to consider the Application and allow the Intended Interested Party's prayer.

### **Ex parte Applicants' Written Submissions**

The 1<sup>st</sup> -13<sup>th</sup> Applicants filed their Submissions on 3<sup>rd</sup> May 2021 where they gave a brief background of this suit and raised the following issues for determination:

a) Whether the Intended Interested Party is capable of being a party to this suit.

The Applicants submitted that the Government of Kenya established Kenya Informal Settlement Improvement Project (KISIP) project in 2011 and the goals were to improve the living conditions of the residents in informal settlements, strengthen security of tenure of the residents in informal settlements and invest in infrastructure in consultation with the community in the informal settlements. In September 2017, the 1<sup>st</sup> Respondent through its agents and/or servants convened a meeting with the residents of Shauri Moyo settlement scheme with the purpose of mobilizing the residents towards enabling the demarcation and subdivision of parcels in order to register the same and issue titles to the residents. The meeting resolved to create the Settlement Executive Committee who are the Intended Interested Parties that were made up of representatives of the residents in the area and local administration representatives that were mandated to hear and represent the interests of the residents including the Ex parte Applicants.

The Applicants submitted that the Intended Interested Party is not a legal entity and is thus devoid of the ability to be a party to this suit and was not established, registered or managed under any legal framework. The Applicants relied in the case of **Kipsiwo Community Self Help Group v Attorney General & 6 Others (2013) eKLR** where the court held as follows:

*“ I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.”*

b) Whether in the Alternative and /or without prejudice to the foregoing, the Interested Party should be enjoined as an Interested Party in this suit.

The Applicants relied in the provisions of Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the case of **Francis K. Muruatetu & Another v. Republic & 5 Others (2016) eKLR** and submitted that the Intended Interested Party has not met the threshold set by the Supreme Court in the Muruatetu case. That the Intended Interested Party does not have a personal interest or stake in this suit and is not authorized to act as the representatives of the Ex parte Applicants or residents of Shauri Moyo. It has not demonstrated the prejudice it is likely to suffer in case of non-joinder.

The Intended Interested Party while working for the Respondents acted beyond its legal powers and without involving the ex parte Applicants and other residents, surveyed land parcels in the Scheme commenced the process of mass shifting of boundaries and displacement of some of the residents. That members of the Intended Interested Party proceeded to allocate to themselves, their friends and or relatives parcels of land that did not previously belong to them to the detriment of the ex parte Applicants and other residents of the scheme. That some of the ex parte Applicants herein have lost their parcels of land and others have been ordered to fewer prime areas of settlement.

The Applicants further submitted that the Intended Interested Party's Application is frivolous, misconceived, mischievous, unmeritorious and vexatious and a gross abuse of the court process. And therefore, this court should exercise discretion and decline them the orders sought.

c) Whether the costs of the Intended Interested Party's Application should be in the cause.

The Applicants submitted that the Intended Interested Party's illegal and/or irregular conduct that has threatened to deprive them of their parcels of land and that they are acting with mischief but also abusing the process of court and its Application should be dismissed.

### **Analysis and Determination**

It is the courts view that the main issue that arise for determination is;

a) Whether the Intended Interested Party should be enjoined in this suit as an Interested Party.

Order 1 rule 10(2) of the Civil Procedure Rules, 2010 which provides as follows:

**“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.”**

*Lucas Kabobia Njuguna vs Consolata Bank of Kenya Ltd [2005] eKLR* where it was held:

**“A plain reading of this sub rule shows that the only party who can be joined whether as Plaintiff or Defendant is one who ought to have been joined it is also clear that a party can be joined if his 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”**

Through the Affidavit sworn by James Omondi Alosi on behalf of the Intended Interested Party, he stated that the Settlement Executive Committee, the Intended Interested Party herein was a committee formed by Kenya Informal Settlement Improvement Project (KISIP) together with the residents of Shauri Moyo informal settlement in Muhoroni sub-county a fact that is not disputed by the ex parte Applicants in this suit in their Replying Affidavit and Submissions. The Intended Interested Party’s role was to mobilize residents of to meet Kenya Informal Settlement Improvement Project (KISIP) team, whose role was to sensitize the Residents of Shauri Moyo on the intention of the Government of Kenya to improve informal settlements in Kisumu and Uasin Gishu Counties.

For a party to be enjoined as an Interested Party in a suit, the case of **Kingori vs Chege and 3 Others (2002) 2 KLR** held that:

**“he must be a necessary party, he must be a proper party,... the ultimate order or decree cannot be enforced without his presence in the matter and his presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit”**

In the case of *Joseph Njau Kingori v Robert Mania Chege & 3 Others [2002] eKLR* the court set out the guiding principles for a party to be enjoined as an interested party as:

- 1. The proposed interested party must be a necessary party and a proper party;**
- 2. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff;**
- 3. The ultimate order or decree cannot be enforced without his presence in the matter;**
- 4. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.**

The ex parte Applicants herein are of the view that the Intended Interested Party should not be enjoined to this suit because it is not a legal entity, it is the Respondents who established the Committee and the Respondents herein are not in dispute of the same. The Committee carried out survey works on the parcels of land and commenced the process of mass shifting of boundaries and displacement of some of the boundaries and had allotted plots to some of the residents of Shaurimoyo.

In the end this court finds that the ultimate order that will be issued by this court, shall not be enforced without the presence of the Intended Interested Party in this matter as they were acting as a representative of the residents of Shaurimoyo who are apprehensive that there will be a delay in issuing of Title Deeds which will have an adverse effect on them since most of the residents have already settled in the allotted plots and have begun to develop on the said plots.

In conclusion based on the above analysis, this court orders that Applicant Settlement Executive Committee will be enjoined as an Interested Party and to file and serve an affidavit within the next 14 days. That costs shall be in the cause.

**DATED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.**

**ANTONY OMBWAYO**

**JUDGE**