



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**CONSTITUTIONAL PETITION NO. E 005 OF 2020**

**IN THE MATTER OF ARTICLES 1,2,3,10 (1) &(2),19,20 (1),(2) & (4),21,**

**22 (1) & (3),25 (c),27 (1) &(2),40,43,47 (1) &(2),50 (1), 61 (1), 64(b), 67, 68, 73(1), 75(1),**

**(2) & (3),159,162,176,184 &232(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT,2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT,2012**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT,2015**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT, NO.17 OF 2012**

**AND**

**IN THE MATTER OF THE URBAN AREAS AND CITIES ACT, NO. 12 OF 2012**

**AND**

**AND IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, NO.5 OF 2012**

**AND**

**IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, NO.19 OF 2012**

**AND**

**IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT NO.4 OF 2003**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT NO.10 OF 2017**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA(PROTECTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES,2013**

**BETWEEN**

**NAVINCHANDRA LAJI SHAH.....1<sup>ST</sup> PETITIONER**

**SANDIP LAJI SHAH.....2<sup>ND</sup> PETITIONER**

**-VERSUS-**

**COUNTY GOVERNMENT OF KISUMU.....1<sup>ST</sup> RESPONDENT**

**CITY MANAGER.....2<sup>ND</sup> RESPONDENT**

**AND**

**RULING**

**BRIEF FACTS**

**The respondents have filed a Notice of Motion Application dated 1<sup>st</sup> July 2021** under Sections 1a,1b,3a and 95 of the Civil Procedure Act, Order 1 Rule 10 (2) and Order 51 Rule 1 and 15 of the Civil Procedure Rules and the inherent powers of the court and all other enabling provisions seeking the orders that the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested parties do hereby be enjoined as the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties in the Petition filed before this Honourable Court. That the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties be allowed to participate in these proceedings as interested parties and to file a response to the Petition herein within such times as the Honourable Court may deem fit to grant.

That the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties be allowed to submit with leave of court any other information the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties may deem important and relevant to allow for the just disposition of the petition before this Honourable court. That costs of the application be in the cause.

The Application was supported by the Affidavit of Michael Abala Wanga on his behalf and on behalf of the 1<sup>st</sup> Respondent and the interested party/3<sup>rd</sup> Applicant and deposed that the Petition before this Honourable Court relates to public land that was illegally, irregularly and/or acquired through a corrupt scheme.

That the 1<sup>st</sup> Intended Interested Party is the custodian of Public Land in Kenya knowledge of disposal of public land, present or historical is within its province.

That the 1<sup>st</sup> Intended Interested Party has a constitutional duty to monitor the registration of all rights and interests in land and therefore has a duty to help the court effectively and completely adjudicate on all the issues in this petition in relation to the suit property.

That the court will benefit immensely from the information and records adduced before it by the intended interested parties should they be allowed to participate in these proceedings.

That he is aware that the 1<sup>st</sup> Intended Interested Party's constitutional obligation to administer public land on behalf of the county governments, including Kisumu County and to ensure that Public Land under the management of Kisumu County Government is sustainably managed for the intended public purposes. Consequently, the 1<sup>st</sup> Intended Interested Party has an identifiable stake which is public interest by virtue of being the custodian of public land in these proceedings.

That his Advocates on record have advised him that the Supreme Court of Kenya has been clear on the role of the 1<sup>st</sup> Intended Interested Party which is to provided for the management and administration of public land which include allocation of land, disposing of public land and leasing.

That the orders sought in the petition will affect the 1<sup>st</sup> Intended Interested Party directly and adversely if granted in the manner and form sought by the Petitioner herein.

That the 2<sup>nd</sup> Intended Interested Party is a Constitutional Commission established pursuant to Article 79 of the Constitution whose functions among others, include to undertake preventive measures against unethical and corrupt practices and conduct investigations on with respect to any corrupt practices.

That he believes that the suit property was acquired illegally, irregularly and/or through a corrupt scheme and consequently, this Honourable Court would benefit from the 2<sup>nd</sup> Intended Interested Party's response to the Petition.

That the 2<sup>nd</sup> Intended Interested Party has a statutory obligation to institute and conduct proceedings in court for purposes of the recovery or protection of public property.

That it is in the interest of justice that the 1<sup>st</sup> and 2<sup>nd</sup> Intended Interested Parties to be joined in the proceedings.

That it necessary for the 1<sup>st</sup> and 2<sup>nd</sup> Intended Interested Parties to participate in these proceedings as interested parties to avoid a multiplicity of suits which may arise out of fears that their rights may be infringed or threatened.

#### **ANALYSIS AND DETERMINATION**

##### **a) Whether the Intended Interested parties should be enjoined in this suit.**

Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows: -

*" The court may at any stage of the proceedings either upon or without the application for either party and on such terms as may appear to the court to be just order that the name of any party ..... whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit (Emphasis added).*

**Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR:**

*"...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."*

The principles set out in paragraph 37 of **Francis Kariuki Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013 [2016] eKLR** demonstrate elements applicable where a party seeks to be enjoined in proceedings as an interested party, they are:

*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.*

The applicant has not demonstrated any interest by the intended interested parties through an affidavit of the director of the Ethics and Anti-Corruption Commission or the authorized officer of the National Land Commission. The applicant has not demonstrated that the intended interested parties are investigating the acquisition of the suit property by the petitioners. The Intended Interested parties that the 2<sup>nd</sup> Respondent seeks to enjoin in this suit are the ones to make the formal application to this Honourable Court and not the 2<sup>nd</sup> Respondent. In the circumstances herein, I dismiss the Notice of Motion Application dated 1<sup>st</sup> July 2021.

**DATED AT KISUMU THIS 19<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**