



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PETITION NO. 44 OF 2020

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA

- AND -

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 1, 3, 10, 19, 21, 22, 23 (3), 35, 40, 42, 47, 50, 69, 70, 232, 258, CHAPTER SIX AND THIRTEEN OF THE CONSTITUTION OF KENYA

- AND -

IN THE MATTER OF: ARTICLES 13 AND 24 OF THE AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLES’S RIGHTS.

- AND -

IN THE MATTER OF: SECTIONS 3, 13, & 18 OF THE ENVIRONMENT AND LAND COURT ACT

BETWEEN

SWALEH HUSSEIN SALEH1ST PETITIONER

AWADH SALEH SAID.....2ND PETITIONER

SWALEH MOHAMMED SALEH SAID.....3RD PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION1ST RESPONDENT

THE CHIEF LAND REGISTRAR2ND RESPONDENT

THE ATTORNEY GENERAL3RD RESPONDENT

THE COUNTY GOVERNMENT OF

MOMBASA4TH RESPONDENT

AND

IQBAL AHMED BAYUSUF.....1ST INTERESTED PARTY

ETHICS AND ANTI CORRUPTION

COMMISSION2ND INTERESTED PARTY

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY.....3RD INTERESTED PARTY

KENYA URBAN ROADS AUTHORITY.....4TH INTERESTED PARTY

NATIONAL CONSTRUCTION

AUTHORITY.....5TH INTERESTED PARTY

RULING

1. What is before the Honorable Court for determination is a Notice of Motion application dated 22nd January, 2021 instituted by the 1st Interested Party and filed in court on the same date. It is brought under Rule 19 of the Constitution of Kenya Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules).

THE 1ST INTERESTED PARTY CASE.

2. From the afore mentioned application, the 1st Interested Party seeks for the following orders:-

a) Spend;

b) That the Notice of Motion application dated and filed on the 8th December, 2020 by the 1st , 2nd and 3rd Petitioners /Respondents and the main Petition also dated and filed on dated and filed on the 8th December, 2020, both be struck out.

c) That costs of this application together with the entire Petition be awarded to the 1st Interested Party/Applicant herein.

3. From the afore mentioned application, the 1st Interested party seeks for the following orders:-

d) Spend;

e) That the Notice of Motion application dated and filed on the 8th December, 2020 by the 1st , 2nd and 3rd Petitioners /Respondents and the main Petition also dated and filed on dated and filed on the 8th December, 2020, both be struck out.

f) That costs of this application together with the entire Petition be awarded to the 1st Interested Party/Applicant herein.

4. From the very onset, though founded on some grounds and testimonies by the Learned Counsels for the 1st Interested Party has not provided any Supporting Affidavit upon which facts of the case are deponed as required under the provisions of Order 19 and 51 respectively of the Civil Procedure. Nonetheless, I shall come back to that later on in this ruling. The Learned Counsel holds that the Petition

by the Petitioners ought to be struck out mainly for the following two (2) broad grounds. These are Firstly, the 1st Petitioner, is a different person from the one in the Grant. The **Swaleh Hussein Saleh** claims to be the holder of the Grant but on close perusal of the Grant, it shows that same was not issued to this 1st Petitioner but to a different party by the names of **Swaleh Hussein Swaleh Sherman**. They have held that, indeed the said subject Grant was issued to this party together with another person called Mohammed Hussein Swaleh both of which are not Petitioners the in these proceedings. For this reason, therefore, they asserted that in the given circumstances the 1st Petitioner was not the holder of any Grant that would entitle him to institute the Constitutional proceedings that he had instituted herein.

5. Secondly, the Learned Counsel for the 1st Interested Party argued that the Petitioners lacked the legal capacity ('locus standi') to institute this suit. They held the Grant sought to be relied upon was specifically described as ***'a letter of administration ad Colligenda bona'*** which in law did not permit the Petitioner or any other person to institute any proceedings such as the present Petition. Ideally, they held the said Letter of administration specifically entitled the party to whom it was granted to only collecting and getting in and receiving the estate and doing such other things as may be necessary for the preservation of the same and other representation including instituting this Petition. They further held that the General Power of Attorney issued to the 2nd Petitioner could not be of any legal effect in these proceedings as the 1st Petitioner himself lacks the legal capacity to institute any proceedings as elaborately set out here. Thus, they held that both the affidavit and the supporting affidavit of the Notice of Motions Application and of the main Petition sworn by one Swaleh Hussein Swaleh are incurably defective and therefore out to be struck out with costs.

THE PETITIONER'S RESPONSES TO THE 1ST INTERESTED PARTY

6. On 25th May, 2021 the 1st Petitioner filed a 31 Paragraphed Replying Affidavit sworn by one **SWALEH HUSSEIN SWALEH SHERMAN also known as SWALEH HUSSEIN SALEH** dated 21st May, 2021 and four (4) annexures marked as "SS – 1 to 4". He deposed that the 1st Interested Party had not denied that all parcel of land known as Land reference Numbers MOMBASA/BLOCK XVIII/1399 located along the Tom Mboya Avenue off Ziwani Road/Lane was a Public Access lane used by residents of Ziwani, Tudor. He held that the 1st Interested party never produced any documentary evidence to show how a known public access road was leased, excised, acquired and/or converted to him for commercial purpose. He held that the 1st Interested Party was reverting to deal on technicalities than the matter at merit as founded on the Petition. He deposed that this was purely an inadvertent mistake. To support the point he stated that he was a holder of the national identity bearing number 27497200 in the names as **"Swaleh Hussein Swaleh Sherman"** while his deceased father was known as **"Hussein Swaleh Said Sherman"**, "Hussein Saleh Said" and "Hussein Sherman".

7. On the issue of locus. He held that it was not in dispute that the 1st Interested Party commenced construction of commercial structures/buildings on the public access lane used by the residents of Tudor and Ziwani and the Petitioners. Thus, a citizen of this Country, he was allowed to have instituted this Constitutional Petition on his behalf and that of the general public where their fundamental rights and freedoms were denied, threatened and violated. He deposed that the General Power of Attorney did not give him power to institute this Petition on behalf of the 2nd and 3rd Petitioners as they are in the matter on their own standing being registered owners to the adjacent properties to the suit land and hence adversely affected.

II. SUBMISSIONS

8. On 18th February, 2021 in the presence of court, all the parties were directed to dispose off the said application dated 22nd January, 2021 by the 1st Interested party by way of written submissions. On 5th October, 2021 taking that all parties complied and hence a ruling date was reserved for 6th December, 2021 accordingly.

A) WRITTEN SUBMISSION BY THE 1ST INTERESTED PARTY/APPLICANT

9. On 11th June, 2014 the advocates for the 1st interested party/applicant the law firm of News Paul and Buti Advocates filed the written submission dated 17th June, 2012. They submitted that this was in form of a preliminary objection on matter of law. It was guided by the ratio found on the famous case of ***Mukisa Biscuits Manufacturing Co. Ltd Versus West end Distributors Ltd (1969) E.A 696*** which ruled on the parameters to be met before raising a preliminary objection.

11. The Learned Counsel submitted that the 1st petitioner relied on Letters of Administration *ad colligenda bona* issued to one Hussein Swaleh Said Sherman in bringing and instituting this instant Petition.

The purpose of the petition was for the protection of the interests of the owners of property known as Land Reference Mombasa/Block XVII/16. The Petitioner together with the fathers of the 1st and 3rd Petitioners were the registered proprietors to the suit property situated at Tudor, they are the beneficiaries of the two estate and are entitled to enjoy all the rights to possession and access to public property adjacent to the petitioners property. The Applicant hold that the holder of the letters of administration, *ad colligenda bona* has not legal capacity to institute any suit for the benefit of any estate of a deceased in the manner that the present 1st Petitioner had purposed to do. On this point they relied on the decision of ***“Marjoria – Versus - Abdalla Civil appeal No 1 of 1982 and the Estate of Stephen Kerusi Makori 2018 e KLR***

12. The Learned Counsel further submitted that the power of attorney which the 1st petitioner relied on the donors were two Awadh Soleh Said Shermani and Said Soleh Sherman, the donors is Swaleh Hussein Saleh Sherman. It is noted that Awadhi Swaleh Said - the 2nd petitioner is the one who donated this power of attorney to the 1st petitioner. However, according to the learned counsel a perusal of that power of attorney shows that Awadhi Saleh Said was not the one of the donors of that power of attorney.

The 1st Petitioner is Swaleh Hussein Saleh. He is also not the donor of that power of attorney in the given circumstances ,they argued that the persons named in the power of attorney had no legal relationship or any known legal nexus to the Petitioners who instituted the petition.

13. On the further basis of the argument was that Swaleh Hussein Swale is different person to another described as Swaleh Hussein Swaleh Sherman and who is not the same and one person as the petitioners herein. The applicant has held that Petition which is incurably defective and incompetent of being sustained is full and addled with typographical errors and therefore should be dismissed with costs.

A) THE PETITIONERS SUBMISSIONS

14. On 2nd of July, 2021 the advocates for the 1st, 2nd and 3rd Petitioners the law firm of Messrs. Oluoch Kimori & Co Advocates filed their written submission dated 26th July, 2021. The Learned Advocates held that their submissions were based on two broad issues. There were mainly (a) whether the Petition had *locus standi* to institute the Petition. They relied on the provision of Articles 22 and 258 of Laws of Kenya .They held that the suit was filed by the 1st, 2nd and 3rd petitioners as citizens of this country and the law of Kenya allowed them right to institute a Constitutional suit on their behalf and on behalf of the general public.

15. They held that the 1st Petitioner Swaleh Hussein Saleh was the biological son of Hussain Swaleh Said Sherman, one of the registered properties of the suit property and therefore as a beneficiary of the estate the 1st Petitioner was within his legal rights to ensure the interest of his deceased father’s estate was protected.

They added that the 2nd Petitioner - Awadhi Swaleh Said was one of the registered proprietors of the suit

property. The 3rd Petitioner Swaleh Mohamed Swaleh Said was the son of Mohamed Hussain Swaleh also one of the registered proprietors of the suit property and therefore the beneficiary of this estate. For this point they relied on the case of in ***“Mining Tentoi and Another – Versus - Governor of County of Bungoma and 17 others”***

16. The Learned Counsels stated that the petitioners had established a clear nexus between themselves, the suit land and the public access have along Tom Mboya Avenue off Ziwani Road/Lane

They held that the 1st Interested party had not fully established the clear principles set out under the provision of Order 2 rule 15 of Civil Procedure Code for striking out proceedings and urged court not to strike out the Petition. They relied on the decision of ***“Coast Projects Versus Mr. Shah Construction (K) Ltd (2004) e KLR 118”*** where the court held ***“striking out a pleading is to be resorted in very clear, plans, and obvious cases. It is a summary procedure by virtue of that, it is a radical remedy and a court of law should be slow in resorting to this procedure.”***

17. With regard to the issues raised by the 1st Interested party on the power of attorney-the 1st Petitioner Swaleh Hussein Saleh did not institute this suit on behalf of the 2nd Petitioner but the Petitioners brought it individually in their own capacity either as registered properties of the suit land or dependants/ beneficiaries of the registered properties of the land. They held that the general Power of Attorney was clear and unambiguous and therefore the 1st Interested party could not infer a meaning to it other than what was expressly written.

18. The Learned Counsel held that there was an inadvertent error in the spelling of the names of the 1st Petition where letter “W” was left out from the name “Swaleh” to read “Saleh” and the last name “SHERMAN” is missing. This typographical error cannot be so detrimental to substance of the petition and constitutional issues. Raised.

In the long analysis, they urged court to dismiss the 1st interested party’s application dated 22nd January, 2021 with costs.

II. ANALYSIS AND DETERMINATION

19. I have carefully assessed all the filed pleadings, the written submissions, the cited authorities and the relevant provisions of the law by all the parties herein with regard to the Notice of Motion application dated 22nd January, 2021 by the 1st Interested party.

In order to arrive at an informed decision the Court has framed the following issues to be considered:-

(a) Whether the Notice of Motion application dated 22nd January, 2021 by the 1st Interested Party meets the fundamental threshold required for striking out the application and the entire Petition under Rule 19 of the Constitution of Kenya Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules) and Order 2 Rule 15 of the Civil Procedure Rules, 2010.

(b) Whether the 1st Interested Party is entitled to the reliefs sought.

(c) Who will bear the costs.

ISSUE NO. (a) Whether the Notice of Motion application dated 22nd January, 2021 by the 1st Interested Party meets the fundamental threshold required for striking out the application and the entire Petition under Rule 19 of the Constitution of Kenya Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules) and Order 2 Rule 15 of the Civil Procedure Rules, 2010.

20. Its trite law that public interest proceedings on the breach, violation, denial and threat to the

fundamental rights and freedom of the Constitution of Kenya are taken seriously by this court.

Indeed, the Petition which from the face value raises such weighty and triable issues. All the Respondents have dedicated a lot of their resources in responding to the said issues in a very intellectual and professional manner. They all should have their day in court during a full trial. It will just be fair and reasonable that both the application for conservatory orders and the Petition are heard and determined on their own merit.

21. Based on the principles set out in the edit of The Court of appeal case of *the Mumo Matemu – Vs – Trusted Society of Human Rights Alliance & Another (2013)eKLR* provided the standards of proof in the Constitutional Petitions as founded in the case of *Anarita Karimi Njeru –VS- Republic [1980]KLR 154* where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

Further, in the *“Thorp – Vs – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR* said in the year 1876 and which hold true today:

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”

22. The Petition in this instant case in in order. This honorable court is fully satisfied that the Petitioner has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and pleading for the prayers sought.

Additionally, the Notice of Motion application dated 22nd January, 2021 by the 1st Interested party has no merit at all. They are all issues on technicalities which are barred under the provisions of Article 159 (2) (d) of the Constitution of Kenya.

The court exercises discretionary powers in striking out pleadings because of its consequential order. An application to strike out pleadings is founded under Order 2 Rule 15 of the Civil Procedure Rules, 2010 has established clear principles which guide the courts in the exercise of that power on the following terms:-

15(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that:-

(a) It disclose no reasonable cause of actions or defence in law or

(b) Its scandalous, frivolous and vexatious or

(c) It may prejudice, embarrass or delay the fair trial of the actions

(d) It is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.

23. Additionally, a cursory perusal of the Plaintiff and Defence filed shows they raise triable issues and should not be struck out at this stage. The Principle that guide the court is determining whether to strike out a pleading here set out in the case of *“D.T. Dobie & Company (Kenya) Limited –versus- Joseph Mbaria Muchina & Another Civil Appeal 37 of 1978 (1980) eKLR by Madan J.A. thus;-*

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery without oral evidence tested by cross examination in the ordinary way”

Seller L.J. (Supra) as far as possible, indeed not at all, there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it.

24. By and large its trite law striking of suit is such a draconian and drastic decision on litigation which should be resolved to sparingly as the very last resort. It is only where a pleading cannot be salvaged by an amendment that the court will utilize this procedure, hence the use of the word “May” meaning it is discretionary.

Issue (b) Whether the 1st Defendant/Applicant is entitled to the relief sought?

25. We reiterate that, the application by the 1st Interested Party has no merit this court has noted it. All the issues raised regarding the Petitioners not having legal capacity to institute this Petition and the errors appearing from the contents of the General Power of Attorney have been effectively responded to here.

In short, for the elaborate reasons adduced herein, the application by the 1st Interested Party dated 22nd January, 2021 has no merit and therefore he is not entitled to the reliefs sought as such.

ISSUE No. (c). Who will bear the costs

26. Under the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 Costs follow the events. In this case, the immediate results of this proceedings are the collapse or dismissal of the Notice of Motion application by the 1st Interested Party dated 22nd January, 2021. For that reason the 1st Interested Party must pay the costs to the 1st, 2nd and 3rd Petitioners thereof.

DETERMINATION

27. In view of the foregoing, and for avoidance of any doubt, I do make the following orders:

a) THAT the Notice of Motion application dated 22nd January, 2021 by the 1st Interested party is found to be unmeritorious and hence be and is hereby dismissed.

b) THAT the Notice of Motion application dated 8th December, 2020 by the Petitioner/Applicant be disposed off by way of written submission as follows:

i) The Interested Parties and all the Respondents who may not have filed their responses to do so within the next twenty one (21) days from this date hereof.

ii). The 1st, 2nd and 3rd Petitioners are granted twenty one (21) days to have filed and served Supplementary affidavit and their Written submissions;

iii). The 1st, 2nd, 3rd, 4th and 5th Respondents and the 1st, 2nd and 3rd Interested Parties are granted twenty (21) days thereafter to file and serve their written submissions.

c) THAT the matter be mentioned on 3rd February, 2022 for further directions and taking a ruling date.

d) THAT in the alternative, for the sake of expediency and the time taken in the matter, the parties may by consensus consider having the suit property be preserved and instead the Petition be adjudicated by way of adducing Viva Voce evidence and thereafter disposed off by way of written submissions.

e) THAT each party to bear their Costs.

IT IS SO ORDERED

RULING IS DATED, SIGNED and DELIVERED at MOMBASA VIRTUALLY THIS 6TH DAY OF DECEMBER 2021.

JUSTICE L.L NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT, MOMBASA

In the presence of:-

M/S. YUMNA – THE COURT ASSISTANT

M/S. OLUOCH ADVOCATES FOR THE PETITIONERS/RESPONDENTS.

MR. PAUL BUTI ADVOCATE FOR THE 1ST INTERESTED PARTY.

MR. MAKORI HOLDING BRIEF FOR M/S. SONGOLE FOR THE 5TH INTERESTED PARTY.