



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 43 OF 2020

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER
ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF: PHYSICAL & LAND USE PLANNING ACT, NO. 13 OF 2019 OF THE LAWS OF KENYA

AND

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

BETWEEN

MBESA INVESTMENTS LIMITED.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA..... RESPONDENT

AND

FAHAD IQBAL AHMED BAYUSUF.....INTENDED INTERESTED PARTY

RULING

The Application

1. The Notice of Motion herein dated 10/7/2020 seeks as the main prayer that **Fahad Iqbal Ahmed Bayusuf** be joined to the petition herein as an Interested Party.
2. In establishing his interest, the Applicant states that his property is within very close proximity to that of the Petitioner in this case, which properties are listed as L.R. Nos. MN/I/5503, 5504 and MN/I/3412; That for such reasons of proximity of the properties, the developments that are being undertaken by the Petitioner on its three properties listed above, and which are the subject matter of these proceedings, negatively affect him as the Applicant herein. The Applicant further states that on 1/7/2020 he filed a suit in the Environment and Land Court being **ELC Case No. 3 of 2020 (Now No. 70 of 2020)**

Fahad Iqbal Ahmed Bayusuf -Versus- Mbesa Investments Limited, County Government of Mombasa and NEMA

3. The Applicant states that the said suit together with Notice of Motion filed simultaneously therein seeking for injunctive orders were served upon all the parties. It is therefore strange that when the present Petitioner herein Mbesa Investments Limited filed this petition on 2/7/2020 it made no reference to the Applicant's existing suit which had been served upon it the previous day and that it is evident that the Applicant has a substantial interest in these proceedings. The Applicant avers that any decision reached in his absence is likely to affect him negatively and substantially so.

4. The application is supported by affidavit of the Applicant sworn on 10/7/2020. To the affidavit are annexed title documents and copy of the ELC suit.

The Response

5. The motion is opposed by the Petitioner vide a Replying Affidavit sworn by Hussein Shariff Alwy on 17/7/2020. The Respondent's case is that the only issue in dispute in the present Petition is on the validity or otherwise of a Notice dated 24/6/2020 issued by a Chief Officer, Lands Planning and Housing Department, from the Respondent County Government purporting to stop development by the Petitioner on its plots MN/1/5503, MN/1/5504 and MN/1/3412, the suit premises; that the suit filed by the Applicant in the Environment and Land Court to wit Case 70 of 2020 is merely seeking reliefs based on environment, whereas the Petition herein is seeking a specific constitutional order against the County of Mombasa; that as regards the Petitioner's "non-disclosure" of the Applicant's case in the Environment and Land Court to wit Case 70 of 2020 in this petition, the Applicant admits that the pleadings in that case were served upon them a day before they filed this petition. As such, it would not have been humanely possible to include or rather disclose the said case in this Petition as the process of filing this petition was already on course; that the Applicant is merely seeking to frustrate the Petitioner in its investment as the Applicant has failed to demonstrate how he will be affected by the development of the Petitioner's project; that the Petitioner's project is a massive one involving the construction of 2 storey buildings of 10 floors and 1 storey of 18 floors whose total investment runs into billions of Kenya Shillings.

6. The Petitioner avers further that the subject matter in this Petition is about the infringement of the Petitioner's constitutional right of fair administrative action by the Respondent County Government, an issue which does not require the participation of the Proposed Interest Party, and whose presence is not necessary for purposes of making a determination on the said issue. Further, Petitioner avers that the Applicant has not met the threshold for joinder of Interested Parties as set out by the Supreme Court in **Trusted Society of Human Rights Alliance vs. Mumo Matemu [2014] eKLR** and in **Francis Kariuki Muruatetu & Another vs. Republic & 5 Others [2016] eKLR**. The Petitioner avers that other than alleging that he is a neighbor to the suit premises, the Applicant has not demonstrated any identifiable stake or legal interest in the proceedings. In any event, the Petitioner avers that the issue raised by the Applicant that he is a neighbor is irrelevant as he had an opportunity to present his grievances at the time of change of user way back in 2015. Therefore, the joinder of the Applicant will not assist the Court in adjudicating the issues in controversy but instead it will only serve to muddle up and obfuscate the issues and thereby render it difficult for the court to determine the real issues in controversy.

7. The Petitioner avers that if the Applicant is allowed to join these proceedings, it will argue issues which have already been raised in the Environment and Land Court which dispute is being heard by a court of competent jurisdiction.

Determination

8. Parties filed submissions to the motion which I have carefully considered. In my view the only issue for determination is whether the Applicant is sufficiently interested in the petition to be joined to it.

9. The order to join a party to proceedings is a discretionary one to be exercised by court in the interest of the just determination of the matter before the Court. The need to join a party to proceedings may also be necessary to avoid a multiplicity of suits on the same issues. At the stage of the application, the court is required to establish the nature of the Applicant's interest, whether it is a passing or enduring interest on the suit subject matter, and whether the Applicant stands to be prejudiced if the Applicant is denied the order to join. This is not a matter which should pose a problem to a court to which all information have been given.

10. In this petition, the Petitioner's cause of action is against the Respondent for an alleged infringement on its constitutional right to a fair administrative action. This then begs the question, what would be the role of the intended Interested Party in these proceedings? In other words, should the intended Interested Party be enjoined in these proceedings? The Interested Party relies on the provision of Rule 7 (1) of the **Mutunga Rules** for his joinder and according to his interpretation, it is a matter of right that once a party applies to be enjoined as an interested party, orally or in writing, the Court has to allow such a party in the particular proceedings. The intended Interested Party further submits that there are no laid down conditions to be met by an Applicant before leave for joinder can be granted. Who then is an Interested Party? Rule 2 of the **Mutunga Rules** 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 in the litigation."

11. Obviously, it is not a matter of right that once a party applies to be enjoined as an Interested Party, orally or in writing, the Court has to allow such a party in the particular proceedings. In **Isaac Mugo & 13 others vs. Fred Okengo Matiang'i & 2 Others; Independent Electoral and Boundary Commission of Kenya (1st Interested Party) & 18 others [2019] eKLR** the Court, faced with a similar application analyzed both the provisions of Civil Procedure Rules 2010 and the Mutunga Rules and several case law including from the Supreme Court of Kenya regarding the joinder of Interested Parties and had this to say:

"19. The legal provisions above gives this Court latitude in determining if and whether a party has a cognizable stake in the proceedings pending before it and therefore should be enjoined. In exercising this discretion a number of guiding principles have emerged through various court decisions some of which have been cited by the Respondents in this Application. In Communication Commission of Kenya and 4 Others vs. Royal Media Services Ltd and 7 Others [2014] eKLR the Supreme Court made the following observations: -

"In determining whether the Applicant should be admitted into these proceedings as an Interested Party, we are guided by this court's decision in Mumo Matemu case where the court at paragraphs 14 & 18) held:

"[An] Interested Party is one who has a stake in the proceedings though he or she was not a 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 herself appears in the proceedings and champions his or her case."

12. Similarly in the case of **Mewe vs. Republic [2004]1 EA 124** the High Court observed that a party could be enjoined in a matter for the reason:

- (i) that his presence will result in the complete settlement of all question involved in the proceedings;
- (ii) to provide protection for the rights of a party who would otherwise be adversely affected;
- (iii) to prevent a likely course of proliferated litigation.

13. The Applicant in a bid to prove that he has an identifiable stake and/or legal interest or duty in the proceedings, alleges that his plot L.R. No. MN/I/5193 is within close proximity, and in some respects abuts the Petitioner's suit properties. The issue herein is the allegation that the Petitioner intends to construct two storey buildings at 10 floors, and one storey building of 18 floors in plots adjacent to that of the Interested Party, who fears that this development will interfere with his rights to peaceful and quiet enjoyment of his property. In my view, that is a legitimate concern, and the Interested Party has the right to express his views concerning the possible effects of that construction to the enjoyment of his rights. The joinder of the Interested Party does not mean that the Interested Party has a case. It means that the Interested Party is given the right to express his views in the matter before a decision which may negatively affect him is made.

14. I am satisfied that the Interested Party has shown an interest in the suit property, and that he has the right to be enjoined so as to robustly express that interest in the proceedings before this court.

15. In the upshot the application before the court dated 10/7/2020 is allowed with costs in the cause.

16. It is further hereby ordered that for purposes of good order, and for the security and preservation of the suit property, the interim conservatory orders issued herein on 3/7/2020 allowing the Petitioner to proceed with construction on the suit property is hereby lifted to enable all parties to operate on equal footing pending the determination of the issues before the court.

Dated, Signed and Delivered at Mombasa this 5th day of October, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Buti for Applicant

Mr. Tajbhai for Respondent

Ms. Peris Court Assistant