



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

CONSTITUTIONAL PETITION NO. 6 OF 2020

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 27, 28, 29(d), 39, 40, 43(b),

47, 48, 50(1), 52, 64(b), 162(2)(b) AND 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS

UNDER ARTICLES 19, 20, 21, 22, 23, 27, 28, 29(d), 39, 40, 43(b), 47, 48, 50(1), 52, 64(b),

162(2)(b) AND 159 OF THE CONSTITUTION AND OTHER FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF: CONTRAVENTION OF RIGHTS TO ACQUIRE, OWN AND ACCESS PROPERTY

AND

IN THE MATTER OF: THE LAND ACT AND LAND REGISTRATION ACT

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACT

AND

JOHN WABOI MWANGI.....1ST PETITIONER

MARTHA WANJUMBI WABOI.....2ND PETITIONER

=VERSUS=

COMMISSIONER GENERAL OF PRISONS.....1ST RESPONDENT

OFFICER IN-CHARGE, MACHAKOS MALE AND

FEMALE GK REMAND PRISON AND/OR REMAND.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

ETHICS & ANTI-CORRUPTION.....INTENDED INTERESTED PARTY

RULING

1. By its chamber summons application expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 1 Rules 10 and 25 of the Civil Procedure Rules, Ethics and Anti-Corruption Committee (*hereinafter referred to as the Intended Interested Party*) seeks the following orders: -

1) THAT leave be granted to the Ethics & Anti-Corruption Commission to join in these proceedings as an interested party.

2) THAT the Petitioner do serve the Ethics & Anti-Corruption Commission with all the pleadings filed on its behalf and the Ethics & Anti-Corruption Commission be at liberty to file pleadings in response thereto within such time frame and on such terms as the Court may direct or order.

3) THAT costs of this application be provided for.

2. The application is dated 20th May, 2020 and was filed in court on even date. It is predicated on the five grounds on its face and is supported by the affidavit of Regina Jemutai, the Advocate who has the conduct of this matter.

3. The application was served upon the Petitioners as well as the Respondents. The latter do not oppose it.

4. On the 26th May, 2020, the Petitioners filed a notice of preliminary objection dated 20th May, 2020. The preliminary objection is based on the grounds: -

1. That the Application offends the Provisions of Section 6 of Civil Procedure Act Cap 21 Laws of Kenya;

2. An Interested Party is not allowed to file pleadings in opposition to the suit.

5. The Court directed that both the Intended Interested Party's application and the Petitioners' notice of preliminary objection be argued together.

6. In her submissions, the Counsel for the Intended Interested Party drew the Court to Rules 5(d) (ii), 7(i) and 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 issued under legal notice 117 of 2013, popularly known as the Mutunga Rules.

7. The Counsel submitted that under the aforementioned Rules, the Court may at any stage make an order for addition of a party or a person with leave of the Court to make an oral or written application to be joined as an Interested Party and the procedure in which a petition is to be heard. In other words, the Rule deals with addition, joinder, substitution and striking out of parties.

8. Arising from the above, the Counsel submitted that this being a constitutional petition, the same is guided by the Mutunga Rules.

9. It was further submitted that the Intended Interested Party has an interest, a stake and something to say in court (*emphasis are mine*) and they should be allowed to say it. In support of her submissions, the Counsel relied on the case of **Trusted Society of Human Rights Alliance vs. Mumo Matemo & Others [2014] eKLR** where the Supreme Court defined an Interested Party as: -

"... 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 the one who will be affected by the decision of the court when it is made, either way. Such a person feels that his cause or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."

10. Arising from the above, the Counsel for the Intended Interested Party submitted that the subject matter in this petition is the same as in ELC Nos.33 to 38 of 2018 with ELC number 39 of 2018 being the pilot file. The Counsel pointed out that the Petitioners are seeking for a declaration of ownership of the suit property which is the same prayer sought by the Interested Party in the aforementioned suits.

11. The Counsel went on to submit that if the orders sought herein are issued, they will affect the other matters pending and will affect the recovery mandate (of the suit property) by the Ethics and Anti-Corruption Commission (EACC) under Section 11 of the EACC Act and Section 55 of the Anti-Corruption and Economic Crimes Act (ACECA).

12. The Counsel further submitted that if interim orders are issued, they are in nature mandatory and would require the Intended Interested Party to go for eviction if they were to proceed to the main petition. The Counsel urged the Court to enjoin the Intended Interested Party in the petition so that it can assist the Court in arriving at a just determination. The Counsel added that the Intended Interested Party seeks to be formally served with the four (4) Petitions and to be granted leave to file a replying affidavit and submissions just like the parties to this suit have done.

13. The Counsel for the Respondents did not oppose the application for joinder.

14. The Petitioners' Counsel submissions were that EACC has admitted that there is a competent suit between EACC alone and the Respondents who are the Petitioners in this suit. The Counsel went on to submit that those other suits have not been brought before this court for obvious reasons that the Petitioners in this petition are not parties in those suits. The Counsel pointed out that there is even a judicial pronouncement by this Court that there is no suit pending in court between the Petitioners in this case and the Respondents in the case apart from this suit.

15. It was further submitted that there is no suit in court in as far as the subject matter is concerned between EACC and the Respondents in the petition. That the moment an order of enjoining EACC is granted, at the split of a second, this petition becomes sub judice. The Counsel pointed out that the Applicant has admitted that the application is intended to delay the hearing of the application by the Petitioners. That having admitted that there is a competent suit, the Applicant should have approached the Court in their separate suits under Order 11 Rule 3(1) of the Civil Procedure Rules to inform it of the existence of two suits between different parties over the same subject matter. The Counsel pointed out that the Order in question gives the Court unfettered jurisdiction for consolidation of suits so as to cure the mischief of a party being denied the seat of justice as he cannot claim for a relief against those who are not parties in a suit. It was further submitted that in those other suits where the Applicant filed a preliminary objection and the Court made a determination that there is no suit over the subject matter where the Respondents in this petition were involved, the Court proceeded to strike out the application. The Counsel pointed out that the application is still active before the court against EACC.

16. It was further submitted that if EACC is allowed to join, this matter will become sub judice and yet the Court said that the Respondent cannot participate in the other suit. The Counsel added that EACC should have implored the Attorney General to join the proceedings in those other suits instead of filing a preliminary objection. The Counsel went on to submit that even in these proceedings, the Respondents have not filed any cross-petition and this is why EACC is asking to join them as an Interested Party. The Counsel pointed out that under the Mutunga Rules, an Interested Party cannot file a cross-petition, and them having admitted that EACC and the Respondents are two distinct statutory and constitutional bodies, EACC cannot seek to join proceedings when it is not an agent of the Respondent.

17. It was also the Petitioner's submissions that the Attorney General is a participant in these proceedings by virtue of Government Proceedings Act and is the custodian of the evidence and documents before a court of law.

18. As to the Intended Interested Party's assertion that the suitland belongs to the 1st and the 2nd Respondents, the Counsel for the Petitioners submitted that EACC has not informed the Court the handicap that the Respondents will suffer so as to be unable to produce the evidence they are holding. And on the assertion by the Intended Interested Party that the Petitioners are talking of files that are not before court, the Petitioner's submissions were that had the files in question been brought through proper procedure, the Court would have perused them in order to see where the Intended Interested Party has admitted that the Petitioners are in occupation. The Counsel added that the Petitioners are only being denied access. The Counsel went on to submit that even if it were to be assumed that Petitioners are not in occupation and are granted access, any interim order will lapse by the operation of the law.

19. It was also submitted that the Intended Interested Party is seeking to be served with the pleadings after joinder but under ground 2 of their application, the Intended Interested Party is telling the Court that they established that the Petitioners are before court without disclosing about the persons who told them about the pleadings and as such, the Petitioners are opposed to their prayer to be supplied with pleadings. The Counsel concluded by urging the Court to allow the Preliminary Objection.

20. In reply, the Counsel for the Intended Interested Party submitted that they seek joinder because the subject matter is Prisons property. That the subject matter is public land which EACC is mandated to recover under Section 11 of the EACC Act. The Counsel posed the question of what will happen when the final orders of ownership are granted. The Counsel pointed out that the Intended Interested Party does not want to file a cross-petition, that all they want is to file a replying affidavit. The Counsel reiterated her submissions that any order that will be issued by this Court will affect EACC in the matters that are pending.

21. Having read the notice of preliminary objection and submissions made by the advocates on record for the parties herein, I am of the view that the issues for determination are whether or not the Intended Interested Party should be enjoined in these proceedings and whether the application offends the provisions of section 6 of the Civil Procedure Act chapter 21 of the Laws of Kenya.

22. Section 6 of the aforementioned Civil Procedure Act provides as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

23. It is not in dispute that there are other matters pending between the Intended Interested Party herein and Parties who are not the Petitioners in the suit before this Court. These suits are ELC number 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 48 all of 2018. The dispute in those suits is over the same subject matter as in this petition. In the ruling delivered on 16th April, 2020 in ELC number 39 of 2018 as consolidated with the aforementioned suits, I observed that the Intended Interested Party herein and who is the Plaintiff in those suits entered into a consent on the 16th June, 2019 with the Defendants. The terms of the consent were inter alia that the Plaintiff was to amend its pleadings so as to include other Defendants in those suits and who are now the Petitioners before Court. I further observed that in the said ruling, the Interested Party was yet to comply with the said consent order.

24. Arising from the above, if one were to take it that by virtue of the consent order recorded on the 17th June, 2019, the Petitioners herein are parties in ELC number 39 of 2018 as consolidated with the aforementioned suits, then this petition would run counter to the provisions of section 6 of the Civil Procedure Act and the Petitioners would therefore be estopped from claiming that it is the Intended Interested Party's application that runs foul of the said section 6. Even though I observed in the aforementioned ruling that the Petitioners herein and others have filed an amended defence and counterclaim in the aforementioned suits pending before this court, the truth of the matter is that the Petitioners herein are not included as Defendants. My observation therefore was made out of error and the import of the foregoing is that there are no proceedings between the Petitioners and the Intended Interested Party and as such, I hold that the instant application does not offend the provisions of section 6 of the Civil Procedure Act.

25. As earlier on observed in this ruling, the subject matter at the centre of this petition is the same subject matter in the suits pending before this Court. The Petitioners herein are seeking for a declaration that they are the legal owners of land parcel known as Machakos Municipality

Block 1/609. In ELC number 39 of 2018 as consolidated with the other pending matters, the Plaintiff in those suits and who is the Intended Interested Party herein seeks among others, a declaration that the allotment of the aforementioned parcel of land to the Defendants in those suits be null and void as it is public property.

26. As was correctly pointed out by the Counsel for the Intended Interested Party herein, under section 11 of the Ethics and Anti-Corruption Commission Act 22 of 2011 of the Laws of Kenya and Section 55 of the Anti-Corruption and Economic Crimes Act No.3 of 2003, the recovery mandate of public property lies with the Intended Interested Party.

27. **Section 11 of the Ethics and Anti-Corruption Commission Act** provides as follows: -

11. Additional Functions of the Commission

(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

(a) -

(i) -

(ii) -

(b) -

(c) -

(d) -

(e) -

(f) -

(g) -

(h) -

(i) -

(j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.”

Section 55 of the Anti-Corruption and Economic Crimes Act provides as follows: -

55. Forfeiture of unexplained assets

(1) -

(a) -

(b) -

(i) -

(ii) -

(2) The Commission may commence proceedings under this section against a person if—

(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

(3) -

(4) -

(a) -

(b) -

(5) -

(6) -

(7) -

(a) -

(b) -

(8) -

(9) -

28. Arising from the above, I would agree with the Counsel for the Intended Interested Party that the orders sought in this petition if issued, will affect the other matters pending in court as well as the recovery mandate of the Intended Interested Party. It is, therefore, clear to me that the Intended Interested Party has a stake and something to say in this petition and it ought to be allowed to come on board so that it can say it. Guided by the Supreme Court of Kenya in the case of **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others [2014] eKLR**, I hold that the Intended Interested Party is a necessary party in these proceedings. It will serve no useful purpose to direct the Intended Interested Party to file an application in the matters pending for the reasons that I have enumerated hereinabove.

29. The upshot of the foregoing is that the notice of preliminary objection raised by the Petitioners has no merit. Same is hereby dismissed with costs to the Intended Interested Party. And being satisfied that the application has merits, I hereby proceed to issue the following orders: -

1) Leave is hereby granted to the Ethics & Anti-Corruption Commission to join in these proceedings as an interested party.

2) The Petitioners do serve the Ethics and Anti-Corruption Commission with all the pleadings filed on their behalf within the next 7 days from today. The Ethics and Anti-Corruption Commission will be at liberty to file its replying affidavit in response thereto within the 7 days upon service. It will also have the chance hereinafter to file and serve its submissions. For the avoidance of doubt, the Petitioners and the Respondents will have leave to file supplementary and further affidavits and submissions in response to the replying affidavit and submissions by the Intended Interested Party within similar period.

3) Costs of the application are provided for.

This ruling to apply to Petition Nos.7/2020, 8/2020 and 9/2020.

Signed, dated and delivered in open Court at Makueni on this 15th day of June, 2020.

MBOGO C.G.,

JUDGE.

In the presence of: -

Mr. Nthiwa for the Petitioners

Ms. Jemutai for the Intended Interested Party

Ms. C. Nzioka – Court Assistant

No appearance for the Respondents

MBOGO C. G., (JUDGE),

15/06/2020.