

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 6 OF 2016

IN THE MATTER OF CONSTITUTIONAL INTERPRETATION, PROTECTION AND ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 1,19, 20, 21, 22, 23, 24, 27, 28, 48, 159, 165, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONSTITUTIONAL INTERPRETATION AND THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 40, 47, 50, 60 AND 64 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 (1), (2) & (3), 28, 35, 41 (1), 47 910, AND 50 (1), (2), (A) AND (O) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 106 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF SECTION 23, 60 AND 61 OF THE REGISTRATION OF TITLES ACT, CAP 281 (REPEALED)

AND

IN THE MATTER OF GAZETTE NOTICE NO. 15580 IN VOLUME CX11-NO. 124 OF THE KENYA GAZETTE OF 26TH NOVEMBER 2010 WITH REGARD TO LAND REFERENCE NOS. 209/13539/124, 209/13539/82, 209/13539/47, 209/13539/148, 209/13539/108, 209/13539/140, 209/13539/113, 209/13539/109, 209/13539/114, 209/13539/107, 209/13539/97, 209/13539/61, 209/13539/42, 209/13539/74 AND 209/13539/94

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

TAMBAYYA ENTERPRISES LTD.....1ST PETITIONER

BROOKSIDE STUDIOS LIMITED.....2ND PETITIONER

ABISHAX HEIGHTS LIMITED.....3RD PETITIONER

CATHERINE R. NJERI.....4TH PETITIONER

VALEVIEW PLAZA LIMITED.....5TH PETITIONER

INDUSTRIAL COLLABORATIVE LIMITED.....6TH
PETITIONER

PHILIP WAINAINA.....7TH PETITIONER

MAREWA PLANTATIONS LIMITED.....8TH
PETITIONER

JENNIFER WANJIRU NJAU.....9TH PETITIONER

NOEL K. WAMBUA.....10TH PETITIONER

JAMMA CONSOLIDATED LIMITED.....11TH
PETITIONER

PARKSIDE MEDICAL CENTRE.....12TH PETITIONER

SATELLITE INDUSTRIES SUPPLIES LIMITED.....13TH
PETITIONER

WARIWAX GENERATIONS LIMITED.....14TH
PETITIONER

GATHIRU ENTERPRISES LIMITED.....15TH
PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

REGISTRAR OF TITLES.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD
RESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION....INTENDED INTERESTED
PARTY/APPLICANT

RULING

By a notice of motion dated 4th May 2016 expressed under the provisions of Rule 7 (1) & (2) and 19 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013,[\[1\]](#)(hereinafter referred to as the Rules), the **Ethics & Anti-Corruption Commission**(hereinafter referred to as the applicant) moved this honourable court seeking an order that it be enjoined in this petition as an interested party. The application is premised on the grounds stated on the face of the application and the annexed affidavit of Pius Maithya sworn on 4th May 2016 annexed thereto. The grounds relied upon are that:-

(a) *That sometimes in the year 2006, the intended interested party received a complaint about an alleged illegal and subsequent transfer of 108 houses within L.R. No.13539 (hereinafter referred to*

as the suit property in Nairobi popularly known a woodley estate and immediately commenced investigations into the said allegations under its statutory mandate .

(b) That the investigations revealed that the suit property is public property and that all the 108 houses that had been illegally allocated and transferred to individuals and private companies were houses meant for the staff of the City Council of Nairobi (Now Nairobi County Government) and in a move to preserve the said property the commission moved to court and obtained preservation orders pending the filing of recovery suits against the illegal allottees.

(c) That the affected persons were notified that the titles they held were public property and were never available for allocation and that some allottees surrendered their titles to the council and others resisted prompting the National Land Commission to institute recovery proceedings against them and there are about 50 suits pending before the Environment and Land Court and that the commission applied for consolidation of the said suits in ELC No. 2054 of 2007^[2] and the proposed consolidation includes the suits by the 2nd, 3rd, 4th, 6th, 7th, 8th, 10th, 11th, 12th, 13th and 14th petitioners and that the court directed that all the suits listed in the application for consolidation be stayed pending the hearing and determination of ELC No. 2054 of 2007 and that the parties herein were party to the said order and since then seven witnesses have so far testified in the said case.

(d) That the petitioners in the above listed cases challenged the **locus standi** of the applicant herein to institute recovery suits in ELC No. 101 of 2007^[3] but the said application was dismissed culminating to an appeal which was also dismissed.

(e) That the crux of the suits in question is the illegal acquisition of the houses for lack of ministerial consent and that article 40 of the constitution does not extend to unlawfully acquired property.^[4]

(f) That recovery of the properties in question is a matter of public interest and granting the orders sought herein without the benefit of hearing the applicant will be great injustice and that the ownership of the properties is awaiting court determination.

In their grounds of objection dated 12th May 2016, the petitioners state *inter alia*:-

(a) That the intended interested party is not a relevant party to these proceedings since there are neither any orders sought against it nor would the outcome of the proceedings affect it in any way and that it has no identifiable stake in the proceedings.

(b) That the fact that the applicant has filed suits in the Environment and Land Court against some of the petitioners touching on ownership of the properties is not a ground for enjoining it in these proceedings and that these proceedings seek to challenge the decision by the Registrar of Titles to cancel the petitioners' title vide a gazette notice and that the applicant has brought this application on the presumption that he will succeed in the suits pending in court and that it has a forum to ventilate the issue of ownership of the properties.

(c) That the decision of the Environment and Land Court in the cases before it will not in any way affect the outcome of this case since the Registrar of titles had no powers to cancel the titles nor will the decision of this court affect the outcome of the cases pending in court.

Applicants advocates submissions

Counsel for the applicant reiterated the above grounds and added that an interested party needs only to demonstrate interest in the subject matter and that the phrase "all questions involved in a suit" is not to be restrictively construed to mean only such questions as are raised by the present parties.^[5]

The Respondents did not oppose the application.

Petitioners advocates submissions

Counsel for the petitioners submitted that the interested party has no stake, legal interest or duty, that the proposed interested party's mandate is spelt out under section 13 of the Ethics and Anti-Corruption Commission Act^[6] and that the circumstances giving rise to this petition do not warrant an exercise of the proposed interested party's mandate in any way and that the test for joinder does not have to be so low that any busy body can squeeze himself into a suit as an interested party and that there ought to be a clear demonstration that the suit affects the person directly.^[7]

Whether the application raises sufficient grounds

Rule 2 of the Rules, 2013^[8] defines an interested party as follows:-

“interested party” means 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;”

Rule 7 (2) provides that a court may on its own motion join any interested party to the proceedings before it. The broad principles which should govern disposal of an application for joinder are that the court can, **either** on an application made by any interested party **or** on its own motion direct any person as party to be enjoined in the proceedings.

Regarding the exercise of discretion in applications of this nature to enjoin a party on its own motion, the courts discretion, must be exercised judiciously based on sound principles.^[9] Importantly, the main purpose of joining parties is to enable the court to deal with matter brought before it and to avoid multiplicity of pleadings. It is a fundamental consideration that before a person can be joined as party, it must be established that the party has an interest in the case. In addition, it must be clearly demonstrated that the orders sought in the suit would directly legally affect the party seeking to be added.^[10]

It must be emphasized that, among others, the purpose of joinder of parties is to avoid multiplicity of suits. It is a mandate of the court as far as possible to deal with all matters in controversy between the parties completely and finally determine and that all multiplicities of legal proceedings concerning any of the matters before the court ought to be avoided. In this regard, it would be appropriate and in the interest of justice that all matters touching and concerning the subject matter of the suit in the instant case be determined finally and completely to avoid litigating over the same matters again.

This court is acutely aware of the position that a plaintiff is *dominus litis*, and can sue whomever he or she thinks will obtain relief from; and that a plaintiff cannot be forced to sue somebody whom he or she has not chosen to sue. Further that where a plaintiff sues a wrong party he or she has to shoulder the blame.

In the instant application, however, the adding of the Applicant as an interested party by an order of this court exercising its discretion within the provisions of the law, would not amount to “forcing” petitioners to sue someone they does not have a claim against, or suing “a wrong party.” It is admitted that the same properties the subject of this petition are also the subject of various suits pending in court in which the applicant is a party by virtue of its statutory mandate.

The elements to be to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:-

(a) the intended interested party must have "an identifiable stake"

(b) or legal interest

(c) or duty in the proceedings

The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.

A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights.^[11] In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.^[12] It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit.

An interested party is someone who is identified as being directly affected by the case (in particular, the relief that may or may not be granted by the court depending on whether it finds for or against the claimant).^[13] An interested party may also be added to the case by the court itself, where it appears to the court that it is desirable to do so to resolve a dispute or issue.

The Black's Law Dictionary^[14] defines an interested party as "A party who has a recognizable stake (and therefore standing) in the matter." It also defines a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings."

In law, standing or *locus standi* is the term for ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Standing exists from one of the following:-

(a) that the party is likely to suffer adverse effect,

(b) that the harm suffered is likely to affect others who might not be able to ask the court for relief,

(c) that the party is granted standing by the law^[15]

In the case of **Judicial Service Commission – vs – Speaker of the National Assembly & Another**^[16] the court, referring to the definition of an interested party under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules as defined above stated that:-

"From the foregoing it is clear that an interested party is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."

In **Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 Others**^[17] the court held as follows: -

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion or sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. the standard guide for locus standi must remain the command in Article 258 of the Constitution."

Judicial decisions, particularly in such instances, do more than merely decide disputes between, or

determine the guilt or innocence of, individuals. They decide how the law of the land is applied to us all. Against this background, it is perhaps unsurprising that independent evidence and submissions on the scope and impact of the law may assist judges to reach a fairer and more sustainable result. Interested party interventions are of great value in litigation because they enable the courts to hear arguments which are of wider import than the concerns of the particular parties to the case.

The global experience

In other common law jurisdictions, such as the United States, Canada and South Africa, third party interventions before the courts have long been the norm. Consistent comparative practice across Supreme and Constitutional courts globally support the contribution made by interested parties in important cases with a constitutional impact or on any wider public interest.[\[18\]](#)

Public Interest intervention

It is important to distinguish between two kinds of interested party interventions, those where the intervener is seeking to represent the public interest, or merely his or her own private interest. Generally speaking, a case may be appropriate for an intervention if it:- **(i)** raises one or more issues of public importance; and **(ii)** there is a risk that this public interest may not be sufficiently well-addressed by the submissions of the parties alone. In short, any would-be public interest intervener must ask how they might assist the court in the case; or how they might ‘add value’ to the court’s consideration of the issues before it.

Determination

It is not disputed that the properties in question were once public properties. It is not disputed that the titles were transferred to individuals. It is not disputed that there are civil suits pending in court touching on the ownership of the petitioners titles and or challenging the manner in which the transfers were done or the manner in which the alienation was done. It is not in dispute that the applicant is a public entity whose legal mandate is clear and includes investigating the manner in which the properties were alienated. It has not been demonstrated that the applicant is not acting in public interest in the present case.

It is not disputed that an application seeking to challenge the *locus standi* of the applicant in the suit(s) in the ELC was dismissed. In my view, the applicant in the suits in question and in the present case is acting within its statutory mandate and as a matter of public interest. The dispute touching on the properties in question touches on public interests. It touches on the manner in which the titles in question were acquired and the interpretation of Article 40 (6) of the constitution. It is admitted that the case touches on the legality or otherwise of the decision by the Registrar of Titles to cancel titles issued to individuals on properties that were once public land.

I am satisfied that the applicant has demonstrated a “legitimate interest” in these proceedings within the Rules. I am satisfied that the applicant has demonstrated sufficient grounds to be enjoined in these proceedings. I also find that the petitioners will not in any manner be prejudiced by the orders sought. The presence and participation of the applicant in these proceedings is necessary. I find that this is a proper case for the court to exercise its discretion in favour of the applicant.

Accordingly, guided by the above authorities and considering the relevant law and the facts of this case, I allow the application and order as follows:-

a) *That the Ethics and Anti-Corruption Commission be and is hereby enjoined in these proceedings as an interested party.*

b) *That the Interested party be and is hereby granted fourteen (14) days from the date of this order to file its Response (if any) to this petition.*

c) ***That*** the Petitioners be and are hereby granted ***fourteen (14) days*** from the date of service by the Interested Party to file their Response if any.

d) No orders as to costs.

Orders accordingly

Signed, Delivered, Dated at Nairobi this 12th day of May 2017

John M. Mativo

Judge

[1] Legal Notice No. 117 of 28th June 2013

[2] KACC vs Paul Moses Ngetha

[3] KACC vs Industrial Collaborative Ltd

[4] Article 40 (6) of the constitution

[5] Counsel cited KACC vs Paul Moses Ngetha ELC No. 2054 of 2007

[6] Act No. 22 of 2011

[7] Counsel cited High Court decision rendered in Joseph Leboo & 2 Others vs Director Kenya Forest Services & Another {2013}eKLR

[8] Supra

[9] **See:** *Yahaya Kariisa v. Attorney General & A'nor*, S.C.C.A. No.7 of 1994 [1997] HCB 29

[10] **These considerations have been amplified by the Supreme Court of Uganda in the case of the Departed Asians Property Custodian Board v. Jaffer Brothers Ltd [1999] I.E.A 55**

[11] This is the test which has been applied in *Amon v. Raphael Tuck and Sons Ltd.*, 1956 - 1 All ER 273

[12] See *Dollfus Mieg et Compagnie S.A.V. Bank of England*, 1950-2 All ER 605 at p. 611. **See also:** *Gokaldas Laximidas Tanna v. Store Rose Muyinza*, H.C.C.S No. 7076 of 1987 [1990 – 1991] KALR 21.

[13] See CPR Part 54.1(2)(f), defining an ‘interested party’ as “any person (other than the claimant and defendant) who is directly affected by [a]claim” (Part 54.1(2)(f) [emphasis added]. An interested party can be named as such by either the claimant (in the claim form) or the defendant (in the acknowledgment of service). In *R v Rent Officer and another ex parte Muldoon* [1996] 1 WLR 1103, the House of Lords held “that a person is directly affected by something connotes that he is affected without the intervention of any immediate agency” (per Lord Keith).

[14] 9th Edition, page 1232

[15] Lee, Evan; Mason Ellis, Josephine (December 3, 2012). " The Standing Doctrine's Dirty Little Secret." *Northwestern Law Review*. 107, 169

[16] {2013} eKLR,

[\[17\]](#) {2013} eKLR

[\[18\]](#) R v Home Secretary ex parte T & V [1997] 3 WLR 23. JUSTICE's written submission provided a detailed analysis of the UK's relevant obligations under international law, including the UN Convention on the Rights of the child