



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 395 OF 2017

MIKE MAINA KAMAUPLAINTIFF

VERSUS

NA-YOMIE CONSTRUCTION LIMITED.....1ST DEFENDANT

COUNTY GOVERNMENT OF MACHAKOS.....2ND DEFENDANT

AND

SABAKI RESIDENTS ASSOCIATION.....APPLICANT/PROPOSED INTERESTED PARTY

RULING

1. This Ruling is in relation to the Notice of Motion Application dated 13th December, 2018 brought under Section 3 and 3A of the Civil Procedure Act, Order 1 Rule 14 of the Civil Procedure Rules, 2010 and all the enabling provisions of the Law.
2. The Application is seeking for the following Orders:
 - a. Spent.*
 - b. That this Honourable Court do order that Sabaki Residents Association be enjoined in this suit as a Defendant/or Interested Party.*
 - c. That this court do make directions in the following terms; firstly that the Plaint be amended accordingly and secondly that the Plaintiff do serve the enjoined Interested Party with summons to enter appearance and respond to the suit accordingly.*
 - d. The costs of this Application.*
3. The Application was supported by the Affidavit of Franklyn Orutwa, the Chairman of Sabaki Residents Association, who deponed that on or about 10th October, 2018, the road adjacent to L.R. No. 20527 that had been approved vide a physical plan dated 11th May, 1992 was being upgraded and that the Plaintiff purported to fence off the public road.
4. According to the Interested Party, upon consultation with the County Survey Office, it was noted that the road adjacent to L.R. No. 20527 was a public road as evidenced by the physical plan for L.R. No. 20604/2 dated 7th January, 1995 and that the Plaintiff could not lay claim over L.R. No. 20527 which was a public road.
5. On record is an Affidavit deponed on 14th October, 2019 by Peter Kiarie Muraya, the Chief Executive officer and Managing Director of the 1st Defendant, who deponed that he supported the proposed Interested Party's Application and that the joinder of the Interested Party would help the court to determine the issues in dispute.
6. The Application was strenuously opposed by the Plaintiff vide a Replying Affidavit sworn on 5th February, 2019. The Plaintiff deponed that the Applicant lacked *locus standi* to file the instant Application; that there is no evidence to show that the deponent of the Supporting Affidavit has the authority of Sabaki Association to swear an Affidavit on behalf of the Association and that he is the registered proprietor of property known as L.R. No. 20527 (*Grant I.R 38743*) as evidenced by the title and survey plan.
7. The Plaintiff deponed that there was no public road adjacent or running through his property; that in July, 2017, the 1st Defendant illegally created a road through his property and that he found out that by a letter dated 25th May, 2016, the 1st Defendant had applied to upgrade the

Southpark Estate-Mulinge Phase 111 Road.

8. According to the Plaintiff, the 1st Defendant indicated that he was willing to remove the construction material that was on the suit property as evidenced in his letter dated 7th August, 2017 and that the court issued an injunction restraining the 1st Defendant from proceeding with construction of the impugned road

9. In the Supplementary Affidavit, the Applicant's Chairman deponed that Sabaki Residents Association is registered as indicated in the Registration Certificate; that the public road adjacent to L.R. No. 20527 was approved by the Director of Physical Planning - Ministry of Lands and Housing on 12th May, 1992 and that the right of an individual cannot supersede that of the public.

10. The Application was canvassed vide written submissions. According to counsel for the Applicant, the singular issue for determination is whether the Interested Party/Applicant meets the threshold to be enjoined as such in the suit.

11. The Applicant's counsel invited the court to consider the cases of *Raila Amolo Odinga & Anor. vs. Independent Electoral and Boundaries Commission & 2 Others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR*, *Francis Kariuki Muruatetu & Anor. vs. Republic & 5 Others: SCK Petition No. 5 Consolidated with No. 16 of 2013 (2016) eKLR* and *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others SCK Petition No. 12 of 2015 (2015) eKLR*.

12. Counsel submitted that according to the Annexures, the Applicant has shown that it will be adversely affected by the Plaintiff's acts of annexing what is a Public road and that the Plaintiff has caused the public road to remain unconstructed and without street lighting thereby resulting in numerous cases of carjacking as well as robbery with violence being visited on the residents of the area.

13. Learned counsel for the Plaintiff/Respondent submitted at length on the issue of *locus standi*. Counsel relied on the Court of Appeal case of *Alfred Njau & 5 Others vs. City Council of Nairobi (1983) eKLR* where it was held as follows:

"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

14. It was counsel's submissions that an unregistered association lacked the capacity to sue and be sued. Counsel relied on the case of *Savana Jua Kali Association (Suing through its Chairperson) Anne Khasoa vs. Councillor Amos Ngata [2005] eKLR* where the court held as follows:

"There is no evidence that the Association is registered. It is not known whether the Association has power to sue or be sued. The whole suit is clearly misconceived and for that reason is incompetent. For the above reason this suit is struck out."

15. Learned counsel submitted that Sabaki Residents Association has no identifiable stake in the subject matter of the suit and further that there was no evidence to show that they owned land next to where the suit property was located.

16. In the Plaint dated 11th September, 2017, the Plaintiff has stated that he is the registered proprietor of land known as L.R. No. 20527; that in July, 2017, he learnt that the 1st Defendant had been instructed by the 2nd Defendant to upgrade Southpark Estate-Mulinge Phase III Road to Bitumen standard and that the construction of the said road traverses through his land.

17. The Applicant is an association representing the residents of Sabaki area. According to the Chairman of the Association of Sabaki Residents Association, the Association was registered as a Society on 14th July, 2011 under the Societies Act. The Chairman annexed on the Affidavit a copy of the Certificate of Registration. That being the case, Sabaki Residents Association can sue and be sued through its duly elected officials, notwithstanding that it is an incorporate body.

18. The law relating to parties being enjoined in a suit is Order 1 Rule 14 of the Civil Procedure Rules which provides as follows:

"Any Application to add or strike out or substitute a Plaintiff or Defendant may be made to the court at any time before trial by Chamber Summons or at the trial of the suit in a summary manner."

19. Order 1 Rule (10) (2) of the Civil Procedure Rules is also instructive. The provision empowers the court, at any stage of the proceedings, upon Application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

20. Commenting on this provision, the learned authors of *Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887)*, state that:

"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties."

21. Order 1 Rule (10) (2) and 14 of the Civil Procedure Rules contemplates an Application for amendment or joinder of parties where proceedings are still pending before the court and at any time before trial. It is trite that for a party to be so enjoined, his presence must be necessary in determining the matter. Hence, the Applicant has to show that he has a stake in the proceedings and his presence will help determine the issues at hand.

22. The Civil Procedure Act is silent on the concept of "Interested Party". *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Legal Notice No. 117 of 2013* defines an Interested Party as:

"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation."

23. The Black's Law Dictionary 9th Edition, page 1232 defines an Interested Party as;

"A party who has a recognizable stake (and therefore standing) in the matter."

24. The Black's Law Dictionary, 9th Edition defines a "Necessary Party" as being

"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."

25. The Applicant's case is that adjacent to the Plaintiff's land, there is a public road which was approved by the Department of Physical Planning on 12th May, 1992; that the Plaintiff purported to fence off the road in question and that the Plaintiff is not entitled to the said public road.

26. The Applicant's members, being residents of Sabaki and members of the public are the ones who will use the impugned road. Indeed, the Applicant's members' interests in the impugned public road are closely related to the lawsuit filed by the Plaintiff against the Defendants. It is my finding that the Applicant's members are necessary parties in the suit, and their officials should be included in the suit as Defendants.

27. For those reasons, I allow the Application dated 13th December, 2018 as follows:

a) Sabaki Residents Association and its officials be and are hereby enjoined in this suit as the third Defendant.

b) The Sabaki Residents Association and its officials to file their Defence within 21 days of this Ruling.

c) Each party to pay its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE