



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 21 OF 2019

IN THE MATTER OF: ARTICLES 22(1), 23(1) & 23 (3) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION AND VIOLATION OF RIGHTS

AND FUNDAMENTAL FREEDOMS GUARANTEED UNDER ARTICLES 10,

19, 20, 21(1), 24, 27(1) & (2), 40, 47, 50(1), 60(1) (B), 64, 67 & 232(e) OF THE

CONSTITUTION OF THE REPUBLIC OF KENYA, 2010 LAWS OF KENYA

AND

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

BETWEEN

FIDELITY EXPORT & IMPORT LIMITED.....1ST PETITIONER

JACARANDA HOTELS LIMITED.....2ND PETITIONER

VERRSUS

1. THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

2. THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

3. THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

SOPHIA ABDILLAHI CHACHA.....APPLICANT

RULING

1. By this Notice of Motion dated and filed herein on 9th October 2019 Sophia Abdillahi Chacha (the Applicant) prays that she be enjoined in this Petition as the 4th Respondent.

2. The application which is supported by an Affidavit sworn by the Applicant is made on the grounds that:

i) By an order made on 24th June 2016 in Malindi HCC Misc. Application No. 15 of 2011(JR), KRE Kenya Real Estate Ltd was reinstated as the proprietor of Plot No. Chembe/Kibabamshe/399 situated within Kilifi District;

ii) In addition, the Court prohibited the Commissioner of Lands, the Chief Land Registrar, the Kilifi Land Registrar (who were the 1st, 2nd and 3rd Respondents respectively) on the one hand and Fidelity Export & Import and Esther Alphonse Mombo, (who were the 1st and 2nd Interested Parties) on the other hand from interfering with the said KRE Kenya Real Estate Ltd's occupation, possession, ownership and use or dealing with in any way with the said property;

iii) No appeal or review has been preferred against the said Judgment delivered on 24th June 2016 and the decree extracted therefrom on 30th June 2016;

iv) On 23rd April 2018, the said Kenya Real Estate transferred the said Title No. Chembe/Kibabamshe/399 to the Applicant herein.

v) Similarly by orders made on the same 24th day of June 2016 in Malindi ELC Misc Application No. 14 of 2011(JR), Antiochia Ltd was reinstated as the proprietor of Plot No. Chembe/Kibabamshe/409 situated within Kifilif District;

vi) In addition the Court prohibited the Commissioner of Lands, the Chief Land Registrar, the Kilifi Land Registrar (who were respectively the 1st, 2nd and 3rd Respondents) and Fidelity Export & Import Ltd and Neema Ali Mramba (the 1st and 2nd Interested Parties) from interfering with Antionchia Ltd's occupation, possession, ownership and use or dealing with the said property;

vii) No appeal or review has been preferred against the said Judgment of the Court issued in ELC Misc Application No. 14 of 2011(JR) delivered on the said 24th June 2016 and the decree extracted therefrom on 30th June 2016;

viii) On 23rd April 2018, the said Antiochia Ltd transferred the said Title No. Chembe/Kibabamshe/409 to the Applicant herein;

ix) Ever since she was registered as the proprietor of the freehold interest in Plot Nos. 399 and 409, the Applicant has been in quiet possession and occupation thereof without any interference from the Petitioners or the Respondents herein and has been meeting all the requisite land rates due to the County Government of Kilifi;

x) The orders sought by the 1st Petitioner herein shall directly and legally affect the Applicant and hence she has a legitimate interest in these proceedings and hence her application to be enjoined.

3. The application is opposed. By Grounds of Opposition dated 17th January 2020, Fidelity Exports & Import Ltd and Jacaranda Hotels Ltd (the Petitioners herein) are opposed to the application on the grounds that:

i) The applicant has moved the Court under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which do not envisage that the Honourable Court can be plausibly or lawfully invited to enjoin a substantive party to a Petition.

ii) The applicant has misapprehended the nature, purport and import of the Petition and the application before the Court to concern a revisit, revision on the Judicial Review Proceedings in Malindi HCCC Misc Application No. 14 of 2011 and Malindi HCCC Misc Application No. 15 of 2011; whilst the Petitioners application and Petition simply and solely concern a challenge on the legality of the exercise of the National Land Commission's power vide the impugned decision vis-à-vis the Petitioners fundamental rights and freedoms.

iii) In as far as the impugned proceedings before the National Land Commission, subject to these proceedings are concerned, the applicant has failed to show the jurisprudential value she would add in as far as the dispute centres on the conduct of the National Land Commission, and not matters extraneous thereto.

iv) The Petitioners do not have a claim on alleged violation of their fundamental rights and freedom against the Applicant, in as far as the Petition is circumscribed to the impugned decision by the National Land Commission and the hearings if at all preceding this decision.

v) The Applicant cannot through craft and novation, compel the Petitioner to institute, pursue or urge a Petition against her devoid of any legal premise.

vi) The Applicant's joinder in these proceedings, if at all, will only serve to unnecessarily delay, confound, conflate and obscure the substantive issues in dispute between parties.

vii) The Applicant has misapprehended the proceedings and seeks to advance her claim on the subject property, whereas the Petitioner only just having learnt of the titles supposedly issued in 2018 intends to challenge the merits of such in apt proceedings before the Environment and Land Court.

viii) In any case the determination in the Judicial Review Proceedings were restricted to the legality of the process of compelling and for revoking title by the Registrar, and not an interrogation or adjudication of ownership, which issues though contiguous hereto are not contemporaneous to the issues in this Petition.

ix) The Applicant has misapprehended the Petition to be challenging her claim to the subject land whereas the Petition is

challenging the National Land Commission in as far as it patently violated the Petitioners' rights and freedoms, in making the impugned decision.

x) The Party's right to be heard/or audience before the Court is not absolute and must be tapered with the prudent use of limited judicial resources and balancing the rights of the Petitioners; and instructively public interest in ensuring that the National Land Commission, a public Constitutional body, discharges its mandate with fidelity to the rule of law.

4. I have perused the application and the response thereto. The application before me is expressed to be brought pursuant to Rules 2, 4 and 5 (d) (i) & (e) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013 popularly known as the Mutunga Rules. Those Rules make provisions with respect to parties to Constitutional Petitions such as the one before me and with regard to who may be joined and as who.

5. While the Applicant seeks to be enjoined in these proceedings as the 4th Respondent, I was unable to find a provision under the Rules allowing for a substantive party to be enjoined to a petition such as this. From my perusal thereof, it was apparent to me that the Mutunga Rules only contemplate joinder of a party as a friend of the Court or as an Interested Party.

6. Under the definitions given at Section 2 of the Rules, a friend of the Court is defined as “an independent and impartial expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the Court with their expertise” while an interested party is defined 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 involved in the litigation.”

7. From the definition of an *amicus curiae* as provided under that Section, it was obvious to me that the same is clearly at variance with the position taken by the Applicant herein. On the other hand and having looked at the prayers in the Petition which relate to the two properties claimed by both the Petitioners and the Applicant before me, it was apparent that the Applicant had an indefinable stake or legal interest in the suit properties.

8. Rule 7 of the Mutunga Rules in this respect provides as follows:

(1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

(2) A Court may on its own motion join any interested party to the proceedings before it.

9. Rule 7(2) therefore gives the Court discretion on its own motion to direct that a party be enjoined in such proceedings. Like all discretions, the same must be exercised judiciously based on sound principles. As it were, the main purpose of joining parties is to enable the Court to deal with the matter brought before it and to avoid a multiplicity of suits. Before one can be joined as a party therefore, it must be established not only that he has an interest in the case but also that the orders sought would directly and legally affect the party seeking to be enjoined.

10. In the Petition before me, the Petitioners have brought this Petition against the National Land Commission, (the 1st Respondent), the Chief Land Registrar (the 2nd Respondent) and the Honourable the Attorney General (the 3rd Respondent). The Petitioners seek eight(8) substantive orders among them a declaration that the two properties claimed by the Applicant herein be left in their name and that the 2nd Respondent be prohibited from making any changes in the Land Register other than that reflecting their ownership thereof.

11. It was obvious to me that the orders sought will certainly impact on the Applicants interests, if any, on the said properties. I think one of the objectives of the Court is to ensure that as far as possible, all matters in controversy between the parties should be completely and finally determined.

12. This Court is completely aware of the position that a Plaintiff is *dominus litis*, and can sue whoever he or she wants to obtain relief from and that, a Plaintiff or Petitioner for this matter, cannot be forced to sue somebody whom he or she has not chosen to sue. It is however appropriate and in the wider interest of justice that all matters touching and concerning the subject matter of the suit in the case at hand be determined finally and completely to avoid litigating over the same again.

13. Accordingly and given the demonstrable stake the Applicant has in the outcome of this Petition, and notwithstanding that the Applicant desired to be enjoined in a different capacity, I hereby exercise my discretion as envisaged under Rule 7(2) of the Mutunga Rules and do hereby enjoin the Applicant as an Interested Party in these proceedings.

14. The Interested Party is hereby granted fourteen (14) days from the date of this order to file her response (if any) to the Petition.

15. I make no orders as to costs.

Dated, signed and delivered at Malindi this 10th day of July, 2020.

J.O. OLOLA

JUDGE