



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**PETITION NO. 46 OF 2014**

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ARTICLES 3, 19, 20, 22, 23, 165 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION, VIOLATION AND/OR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED UNDER ARTICLE 40 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE LAND AND LAND REGISTRATION ACTS

AND

IN THE MATTER OF: THE DOCTRINE OF WENESBURY REASONABLENESS, PROPORTIONALITY AND LEGITIMATE EXPECTATION AND THE PRINCIPLE OF NON-DISCRIMINATION

AND

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

**BETWEEN**

ROBINA C. KIMKUNGU & 4 OTHERS.....PETITIONERS

VERSUS

REDEEMED GOSPEL CHURCH INC AND 13 OTHERS.....  
RESPONDENTS

AND

1. EQUITY BANK LIMITED
2. LOW SHAD INVESTMENTS LIMITED
3. BISHOP WILFRED LAI
4. BISHOP CHARLES MUOKI
5. BISHOP MARK KEGOHI
6. BISHOP JAMES KIMEMIA
7. PASTOR JUSTUS KIMEU (all suing as Registered Trustees of  
JESUS CELEBRATION

CENTRE.....INTERESTED PARTIES

**RULING**

1. This Ruling relates to a Notice of Motion dated 25<sup>th</sup> July, 2014 as Amended on 18<sup>th</sup> September, 2015 in which the Petitioners (Applicants) sought leave of court to amend their Petition by inclusion of other Respondents and Interested Parties.
2. The Applicants also sought an order for this court to vary the orders of this court dated 14<sup>th</sup> July, 2014 and extended on 21<sup>st</sup> July, 2014 to include parcels of land situate well outside the jurisdiction of this court, and whose owners or former owners or persons having interest of any kind in those parcels of land are not parties to these proceedings.
3. The Application was supported by the Affidavit of one Bernard Odhiambo Aduda, the Second Petitioner, and the grounds on the face thereof.
4. In support of the Application, Dr. Khaminwa, learned counsel argued that the entire application for amendment of the Petition was premised upon the principle that a single Judge sitting as a Judge of the High Court has unlimited original jurisdiction to determine any matter placed before it for consideration and determination and that there was no institution of a County Judge. Counsel argued that Article 259 of the Constitution of Kenya 2010 (the Constitution) gives broad principles for construction of the Constitution; that despite the fact that the Petition was filed in 2014, the Attorney-General had not objected to the inclusion of any party as Respondent or that there had been any objection to the joinder or misjoinder of any party, and though a Preliminary Objection had been raised and ruled upon, no objection had been raised on the question of joinder or misjoinder.
5. The court had ruled only that certain parties be enjoined to the Petition, the subject of the Application of this Ruling. The striking out of the 4<sup>th</sup> – 11<sup>th</sup> Respondents would only lead to a multiplicity of suits; that the Applicants are one church, and they are concerned with private land, and not public land, and that since the concern is with regard to registered land, it is necessary to join the Land Registrars, hence the joinder of the various Land Registrars where the Applicant church has land or interests in land, and that there has been no misjoinder of any party, and it is the duty of the court to apply the law and Constitution so as to ensure it protects the rights of the Applicants. Counsel therefore urged the court to allow the application for amendment.

## THE RESPONDENTS' CASE

6. Miss Lutta who represented the 4<sup>th</sup> to 11<sup>th</sup> Respondents was opposed to both the Petition and the application for amendment thereof. Her case is that there is no constitutional issue being raised in the Petition or Amendment thereto which concerns these Respondents, that the issue is a pure land dispute between the Petitioners and the Interested Parties, and the jurisdiction of the court is wanting in terms of the provisions of Article 162 of the Constitution, and the challenge is not merely on geographical grounds.

7. Counsel argued that even if the claim was properly before this court, there was no claim against the 4<sup>th</sup> – 11<sup>th</sup> Respondents, and if the Petition raised any principle of law, it was one of **trusteeship**, a principle which is well developed in the law, and the issues lie in the civil and commercial courts, and the issue need to be identified before court, and demonstrate when, how, where, why, the principle concerns the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.

8. Counsel urged that the law and procedures set out in the various statutes be followed by the Petitioners, counsel urged strongly that even though the Constitution grants **locus** to the Petitioners, it does not oust the statutory provisions, on issues of land. Counsel, relying on her Grounds of Opposition, (dated 30<sup>th</sup> October, 2015) urged the court to strike out the names of the 4<sup>th</sup> – 14<sup>th</sup> Respondents from the Petition. Counsel also urged the court to disallow paragraph 5 of the Notice of Motion which purports to seek a variation of the court orders of 17<sup>th</sup> April, 2015.

9. Mr. Adere who appeared for the First, Second and Third Respondents submitted that he was not opposed to the Notice of Motion, except to paragraph 5 thereof. There was no order of court under which paragraph 5 of the proposed amendment could be included, that issues concerning item 5 of the proposed amendment expired a long time ago. There was no order to add other properties. More importantly an order of court could not be amended or varied in the manner proposed once an order of court is sealed, it can only be varied by review, and ingredients for review must be shown. An application for an amendment is not an application for review. In addition, the lands to be included, did not fall under Bill of Rights, and claims thereto can only be pursued in areas where those lands are situate, and that this court has no jurisdiction to determine those issues.

10. Counsel had however no objection to other amendments proposed.

11. On the issue of jurisdiction, the doctrine of **stare decisis** does not bind courts of cognate jurisdiction, and the court can strike out any party for misjoinder, under Rule 5(d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, either of its own motion or on application of any party; in order to facilitate the just, expeditious, proportionate and affordable resolution of the case. The striking out would not be a delay but a way to determine the issues raised in the Petition.

## ANALYSIS AND DETERMINATION

12. The issue for determination is whether or not to allow the Amended Notice of Motion in its entirety or partly. There was no objection to allowing the Amended Notice of Motion in its entirety including paragraph 5 thereof, by Mogambi, counsel for the First Interested Party. There was however strong opposition from counsel for the First – Third Respondents, and Fourth to Eleventh Respondents.

13. As there was no objection from these counsel to the orders sought in paragraphs 1 – 4 of the Amended Notice of Motion, the Amended Notice of Motion in terms of paragraphs 1 – 4, is therefore allowed.

14. The opposition to paragraph 5 of the Amended Notice of Motion was in two parts – **Firstly** that the order sought to be varied was not among those made in the Ruling of Muriithi J in the Ruling of 17<sup>th</sup> April, 2015. **Secondly**, the amendment sought, even if it were among the orders made by the learned

Judge was procedurally improper as procedure for review, and grounds therefore were not followed, and could not therefore be countered by the Respondents.

15. I have perused the learned Judge's Ruling, and indeed, nowhere does he refer to or make any reference to the lands and matters being introduced by and under paragraph 5 of the orders sought. The procedure for variation or review was not followed. The inclusion of paragraph 5, is therefore without basis, and is therefore declined.

16. On the larger issue of joinder and misjoinder raised by counsel for the 4<sup>th</sup> – 11<sup>th</sup> Respondents, Rule 5(d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the **Mutunga Rules**) empower this court at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just –

- (i) to order that the name of any party improperly joined be struck out; and
- (ii) to order that the name of any person who ought to have been joined, or whose presence before court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

17. In this regard, I have perused the Petition herein in relation to the 4<sup>th</sup> – 14<sup>th</sup> Respondents, and I do not find any denial, violation or infringement or threat by those Respondents of any rights of the Petitioners guaranteed under the Bill of rights. What I see, is a dispute claims and counter-claims by the Petitioners against the First, Second and Third Respondents, and the 6<sup>th</sup> Interested Petitioner/Applicant over ownership of various parcels of land across the country, and which in my humble opinion cannot be resolved by way of a constitutional Petition or this Petition in particular.

18. This matter being basically a dispute over ownership of land, the proper court to determine it, is the Environment Land Court established pursuant to Article 162(2), and this court has no jurisdiction thereon in terms of Article 165(5) of the Constitution.

19. In the circumstances, I know I should stop here, but in the interests of justice and expeditious delivery of justice, I make the following orders –

- (1) I allow the Amended Notice of Motion dated 18<sup>th</sup> September, 2015 in terms of paragraphs 1 to 4 (inclusive).
- (2) For reasons given, I decline to grant prayer 5.
- (3) I strike out Respondents Nos. 4 to 14 (inclusive).
- (4) I direct that this file be transferred to the Environment and Land Court for determination of disputes in relation to land situate within the County of Mombasa only.
- (5) Claims and counter-claims in respect of lands situate in the boundaries outside the County of Mombasa be filed and be determined by courts within Counties in which such lands are situate.

20. In light of the convoluted and complex nature of the claims and counter-claims herein, I direct that the costs herein abide the outcome of the main suit in the Environment and Land Court.

22. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 4<sup>th</sup> day of December, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

Dr. Khaminwa for Petitioners/Applicants

Mr. Adera for 1<sup>st</sup> – 3<sup>rd</sup> Respondents

Miss Lutta for 4<sup>th</sup> – 11<sup>th</sup> Respondents

Court Assistant Silas Kaunda