



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 64 OF 2019

JEREMIAH MBITHI1ST PLAINTIFF/RESPONDENT
KYALO JOEL2ND PLAINTIFF/ RESPONDENT
MICHAEL JAMES3RD PLAINTIFF/RESPONDENT
ALEX KATIKU4TH PLAINTIFF/RESPONDENT
MUOKI KAMOLO.....5TH PLAINTIFF/RESPONDENT
MARTIN MULE.....6TH PLAINTIFF/RESPONDENT
AGNES MUSYOKA.....7TH PLAINTIFF/RESPONDENT
MUTUKU NZOMO.....8TH PLAINTIFF/RESPONDENT
PETER GAKUNGA9TH PLAINTIFF/ RESPONDENT
GEOFFREY MUASA.....10TH PLAINTIFF/ RESPONDENT
GEOFFREY MWANGI11TH PLAINTIFF/ RESPONDENT
MULI JOEL12TH PLAINTIFF/ RESPONDENT
GILBERT KIOKO13TH PLAINTIFF/ RESPONDENT
ROSE SIMON.....14TH PLAINTIFF/ RESPONDENT

VERSUS

ATHI WATER SERVICE BOARDDEFENDANT/APPLICANT

AND

THE COUNTY GOVERNMENT OF

MACHAKOS.....1ST INTENDED INTERESTED PARTY

TANATHI WATER WORKS

DEVELOPMENT AGENCY.....2NDINTENDED INTERESTED PARTY

RULING

a Notice of Motion brought under Order 1 Rule 15, Order 8 Rule 5(1) of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Section III of the Land Act, Section 5 and 6 of the National Commission Act and all other enabling provisions of the law. The Applicant is seeking for the following orders:

a) Spent.

b) That this Honourable Court be pleased to grant the Defendant leave to amend the Defence as proposed in the annexed copy of the Further Amended Defence and Statement of Defence.

c) That this Honourable Court be pleased to grant leave to the Defendant/Applicant to enjoin Machakos County Government and the Tanathi Water Works Development Agency as Interested Parties in the suit.

d) That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Principal Legal Officer of the Defendant/Applicant, who has deponed that sometimes in the year 2009, following the goals and aims of vision 2030 for water and sanitation, the Ministry of Water and Sanitation, following an ADF loan, undertook to implement the Miwongoni River Dam Project.

3. The Defendant's /Applicant's Principal Legal Officer deponed that the project being in Machakos County, the owner of the asset will be the Tanathi Water Works Development Agency; that the Miwongoni River Dam Project based in Machakos County will be handed over to Tanathi Water Works Development Agency and that it was necessary that Machakos County Government be joined in this suit because they will be the ultimate beneficiaries of the project under the Water Act, 2016.

4. According to the deponent, most of the land on which the project lies is privately owned land; that the said land will be compulsorily acquired and that the Machakos County Government will be of great support in the resolution of any land disputes that will emerge.

5. It was deponed by the Defendant's/Applicant's Principal Legal Officer that there was need to amend the Defence and join the Intended Interested Parties. A copy of the proposed amended Defence was annexed on the Affidavit.

6. In reply, the 1st Plaintiff deponed that the only issue in this suit is whether the Plaintiffs were ever compensated for their land; that the National Land Commission responded to that issue in which they confirmed that the Plaintiffs have never been compensated; that the issue of compensating the Plaintiffs was referred to negotiations and that the Intended Interested Parties were not involved in the negotiations.

7. The 1st Plaintiff deponed that the presence of the intended 2nd and 3rd Defendants was not necessary in determining the matter; that the two parties are not privy to the contracts between the Defendant and the contractor who intends to undertake the construction of the dam and that the intended 2nd and 3rd Defendants will not be affected by the decision of the court.

Submissions:

8. The Application was canvassed by way of written submissions. While relying on the case of *Pravin Bowry vs. John Ward & Another (2015) eKLR*, the Interested Party's advocate submitted that the test to be met in an Application for joinder is whether the Applicant has an identifiable interest in the subject matter of the suit.

9. Counsel submitted that the Applicant has an identifiable interest in the suit property; that the suit land falls within the jurisdiction of Machakos County Government and that the gist of the litigation in the present suit is in regard to a water supply and sewerage project within Machakos County worthy an estimated Kshs. 3 billion.

10. The Intended Interested Parties' advocate submitted that under the Fourth Schedule of the Constitution, the provision of water and sanitation is to be undertaken by the County Public Works; that the Intended Interested Parties have a direct mandate and function in respect to the provision of water and that and that the 1st Intended Interested Party has engaged donors to fund the project and should be enjoined in this suit.

11. In reply, counsel for the Plaintiffs submitted that the issue which needs to be determined by the Court is whether the Plaintiffs were compensated for their land; that none of the Plaintiffs was compensated as per the provisions of the Land Act and that the Applicants' presence is not necessary.

12. The Plaintiffs' counsel relied on the case of *Judicial Service Commission vs. Speaker of the National Assembly & Another (2013) eKLR*, where the court defined an interested party as:

“From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He 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.”

13. Counsel submitted that the Applicants have not established that they have a legal and identifiable interest in this case and that they will not in any way be affected by the decision because the only issue for determination is whether the Plaintiffs were ever compensated.

Analysis and findings:

14. I have considered the Application, the submissions by counsels and the cited authorities.

15. This suit was commenced by the Plaintiffs by way of a Plaint dated 6th June, 2019. In the Plaint, the Plaintiffs averred that at all material times, they were the owners of the vast land in Kathekakai area, in Machakos County; that they have been in occupation of the land since time immemorial and that they have developed the said parcels of land.

16. The Plaintiffs have averred in the Plaint that sometimes in the year 2017, the Defendant conducted a feasibility study in respect to their land for the construction of the Miwongoni Dam without involving them and that there were no stakeholder consultations carried out to inform them about the proposed project.

17. The Plaintiffs averred in the Plaint that on 20th March, 2018, the Defendant caused to be published a report titled '*Machakos Water and Sanitation Design and Build Project*' and that on 2nd November, 2018, the Defendant awarded to a contractor a tender for the construction of Miwongoni Dam.

18. It is the Plaintiffs' case that the Defendant has not compensated them for their land; that they have no other place to go in the event they are evicted from the suit property and that a permanent injunction should issue restraining the Defendant from occupying the suit property.

19. The elements to be considered before allowing an interested party in a suit were considered in the case of *Shirvling Supermarket Limited vs. Jimmy Ondicho Nyabuti & 2 others* [2018] eKLR, where the court held as follows:

"The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit."

20. Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows:

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

21. For the Proposed Interested Parties to be enjoined in this suit, their presence must be necessary to enable the court effectually and completely adjudicate and settle all questions involved in the suit. Hence, the Applicants have to show that they have a stake in the proceedings and that their presence will help determine the issues at hand.

22. The *Black's Law Dictionary 9th edition*, defines an "Interested Party" as:

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

23. 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."

24. The Intended Interested Parties are seeking to be enjoined in this suit on the ground that the Miwongoni River Dam Project will be handed to them upon completion and that under the Constitution, the provision of water and sanitation has been devolved.

25. Indeed, under Schedule Four of the Constitution, storm water management systems in built-up areas; and water and sanitation services have been devolved to the County Governments. The construction of the dam for provisions of water and sanitation is therefore a project whose success or failure will directly affect the operations of the Interested Parties in meeting their constitutional obligation of providing water to the residents of Machakos County.

26. Under the Water Act, 2016, the Water Works Agencies have the mandate of managing water until such works are handed over to County Governments. Section 68 of the Act provides as follows:

"The powers and functions of the water works development agency shall be to –

(a) undertake the development, maintenance and management of the national public water works within its area of jurisdiction;

(b) operate the waterworks and provide water services as a water service provider, until such a time as responsibility for the operation and management of the waterworks are handed over to a county government, joint committee, authority of county

governments or water services provider within whose area of jurisdiction or supply the waterworks is located;

(c) provide reserve capacity for purposes of providing water services where pursuant to section 103 the Regulatory Board orders the transfer of water services functions from a defaulting water services provider to another licensee:

(d) provide technical services and capacity building to such county governments and water services providers within its area as may be requested; and

(e) provide to the Cabinet Secretary technical support in the discharge of his or her functions under the Constitution and this Act.”

27. That being the case, and considering the constitutional role of the Water Works Agencies and County Governments in the provision of water and sanitation, it is my finding that the Intended Interested Parties herein are parties who are closely connected to the impugned project and should be included in the case as Defendant.

28. For those reasons, I allow the Application dated 3rd February, 2020 as follows:

a) The Machakos County Government and the Tanathi Water Works Development Agency be joined in this suit as Defendants.

b) Each party to bear his/its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE