

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ELC LAND CASE NO. E042 OF 2024

RAHAB THIRA NJOROGE.....1ST
PLAINTIFF/APPLICANT

STEPHEN GITUATHA.....2ND
PLAINTIFF/APPLICANT

PETER KARANJA.....3RD PLAINTIFF/APPLICANT

MIRRIAM WANJIKU NDIRANGU.....4TH
PLAINTIFF/APPLICANT

DAVID KABURU MUIRURI.....5TH
PLAINTIFF/APPLICANT

ELIZABETH MUTHONI KIARIE.....6TH
PLAINTIFF/APPLICANT

LEAH NJERI MUIRURI.....7TH PLAINTIFF/APPLICANT

GRACE WAITHIRA MWANGI.....8TH
PLAINTIFF/APPLICANT

ISAIAH KAMORO.....9TH
PLAINTIFF/APPLICANT

STEPHEN NJUNGE NGUGI.....10TH
PLAINTIFF/APPLICANT

RUTH NDUNGU.....11TH
PLAINTIFF/APPLICANT

BENSON MATHENGE.....12TH
PLAINTIFF/APPLICANT

SIMON KIFE.....13TH
PLAINTIFF/APPLICANT

TALEY GATHERU.....14TH
PLAINTIFF/APPLICANT

MARY WAMBUI.....15TH
PLAINTIFF/APPLICANT

GRACE MUTHONI.....16TH
PLAINTIFF/APPLICANT

LUCY NDUTA.....17TH
PLAINTIFF/APPLICANT

TERESIA NJOKI GATIBARU.....18TH
PLAINTIFF/APPLICANT

MARTHA WAMBUI MWENDE.....19TH
PLAINTIFF/APPLICANT

PERIS WANJIKU GATHUMU.....20TH
PLAINTIFF/APPLICANT

HANNAH WANJIRU GITHIOMI.....21ST
PLAINTIFF/APPLICANT

FRANCIS MAINA.....22ND
PLAINTIFF/APPLICANT

STERAH NJERI NDUNGU.....23RD
PLAINTIFF/APPLICANT

BUNICE WAMUYU.....24TH
PLAINTIFF/APPLICANT

MONCAH GITAU.....25TH
PLAINTIFF/APPLICANT

JOSEPHINE GITHURE.....26TH
PLAINTIFF/APPLICANT

TOMAS LUCENO.....27TH
PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAKURU.....1ST
DEFENDANT/RESPONDENT

GILGIL NATIONAL GOVERNMENT
CONSTITUENCY DEVELOPMENT
FUND COMMITTEE.....2ND
DEFENDANT/RESPONDENT

RULING

1. Before me for determination is a Notice of Motion Application dated 3rd April, 2025 brought under the provisions of Sections 1A, 1B, 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, Order 1 Rule 10 (2) and Order 51 of the Civil Procedure Rules 2010, and all other enabling provisions of the law wherein the 2nd Defendant/Applicants have sought to be struck off from the suit with costs, for lack of reasonable cause of action against it.
2. The said application was supported by the grounds therein as well as the supporting Affidavit of 3rd April, 2025 sworn by Peter Chege Njoroge, the Chairperson of the 2nd Defendant/Applicant herein who deponed the 2nd Defendant/Applicant had been joined as a party to the suit on allegations that it was involved in the development of a new market where demolitions had to be done despite the plaintiff/Respondent not having been involved in public participation to upgrade the market.
3. That whereas the 1st Defendant is established by the Constitution of Kenya wherein its functions are prescribed under Part 2 of the Fourth Schedule of the Constitution and Section 5 of the County Government Act, 2012, the Applicant on the other hand is established under the provisions of the National Government Constituency Development Fund Act, 2023 where its functions are provided for under the provisions of Section 11 of the National Government Constituency Development Fund Regulations, 2016.
4. That the functions of constructing and/or developing markets therefore did not fall within the Applicant's mandate but rather within the functions of the 1st Defendant/Respondent for which the Applicant was not involved in allotment of markets or balloting of any kind, as that was not its mandate and/or functions and neither does it receive any rent and rates from the Plaintiffs/Respondents as was exhibited in the Plaintiffs' list and bundle of documents.
5. That the Applicant was neither mandated to present any plans on the construction of a market, provide for reallocation or compensation for

traders, or even arrange for public participation for traders within markets and therefore there had been no reasonable cause of action formed against it.

6. That the Honourable Court does not issue orders in vain. And therefore, there had been no legal basis to join Applicant to the instant suit for which the suit against them dated 25th September 2024 ought to be dismissed with costs.
7. In response and in opposition to the 2nd Defendant's Application, the Plaintiffs/Respondents, through Rahab Thira Njoroge, argued that the Application was frivolous and baseless and should be dismissed. She asserted that the Applicant was a relevant and necessary party to the suit based on its constitutional and statutory duties.
8. That the Applicant was charged with enabling public participation in the determination and implementation of national government development projects at the constituency level, pursuant to Article 10(2)(a) of the Constitution and Section 3 of the NG-CDF Act wherein its duties included creating a harmonious relationship between citizens and the government in local development and supplementing infrastructure development at the constituency level.
9. That the Applicant as the government's representative at the constituency level (Gilgil), had a duty to ensure the Respondents and residents of the suit property participated in the project to construct and renovate Karunga Market but had blatantly disregarded and/or ignored its duty to facilitate public participation prior to approving and authorizing the Karunga Market project.
10. That Karunga Market development was undertaken using public funds disbursed from the National Treasury to the NG-CDF and its constituency committees for which the Applicant was a necessary party to **account for the project** and its public participation mandate to promote development, including infrastructure projects like trade markets (Karunga Market).

11. That the Applicant had failed to create a framework for citizen-led development to assist the national government in planning and prioritizing resources for this specific project, despite the County Government's directive.
12. That under Section 15 of the NG-CDF Regulations, the Applicant was required to maintain accurate records of every project, whether fully or partly funded by the national government. That although some functions were concurrent, yet the Constitution must be read as an integrated whole. The Applicant's duties stem from the national government's mandate at the local level. That the Application for removal was therefore premature and ill-conceived and should be dismissed with costs so the court can determine the matter on its merits.
13. The 1st Defendant did not participate in the Application herein.
14. On the 28th July, 2025 direction had been taken for the disposal of the application by way of written submissions wherein only the Plaintiffs/Respondent complied with the Applicant stating that they would rely on the contents of their Replying Affidavit. (sic)

The Plaintiffs/Respondents submissions.

15. The Plaintiffs/Respondents vide their submissions dated 25th July 2025, framed two (2) issues for determination as follows; -
 - i. Whether the Plaintiffs' suit discloses a reasonable cause of action against the 2nd Defendant/Applicant sufficient to warrant its continued inclusion in the suit.
 - ii. Whether costs should be awarded to the Plaintiffs/Respondents in the event the Application to strike out the 2nd Defendant/Applicant is dismissed.
16. On the first issue for determination, the Plaintiffs/Respondents strongly argued that their suit disclosed a reasonable cause of action against the Applicant/2nd Defendant sufficient to warrant its continued inclusion. That Courts approach applications to strike out a suit or a party's name with

extreme caution as was held in **Civicon Limited v Kivuwatt Limited and 2 Others [2015] eKLR**. That it was drastic jurisdiction that should only be exercised in plain and obvious cases. They relied on the decision in **DT Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1** to submit that wherein the established test was that when only the allegations in the Plaint are considered, the suit must disclose some plausible cause of action or raise triable issues.

17. That it was not required at this stage for them to prove the case but to show that a legally cognizable claim was made out in the pleadings. Reliance was placed on the decision in **Drummon-Jackson v British Medical Association (1970) 1 WLR 688**. That striking out the Applicant at this stage would be premature and would shut out the Plaintiff from ventilating a bonafide grievance against a necessary party. That where doubts or weaknesses exist in Pleadings, they should be resolved at trial and not at the interlocutory stage. Reliance was placed on the decision in **Yaya Towers Ltd v Trade Bank Ltd (in liquidation) [2000] eKLR**.
18. The Plaintiffs further submitted that the Applicant's involvement in public development projects and management of public funds at the constituency level made it a necessary party to the suit, aligning with Order 1 rule 10(2) of the Civil Procedure Rules. That its claim was intertwined with the conduct, act and omission of the Applicant/2nd Defendant.
19. That they had established a viable cause of action based on the Applicant's breach of its fiduciary, constitutional, and statutory duties in accordance to Article 10(2)(a) of the Constitution wherein the Applicant's duty was to ensure the principle of public participation in governance and development processes and which duty it had breached when it failed and/or neglected to organize participatory forums regarding the Karunga Market project. Reliance was placed on the decision in **British American**

Tobacco Kenya PLC v Cabinet Secretary for Ministry of Health & Others [2019] eKLR.

20. That pursuant to the provisions of Article 206(2)(c) of the Constitution & NG-CDF Act the Applicant was tasked to authorize the withdrawal and expenditure of public funds allocated for constituency projects and therefore assume a fiduciary role in overseeing projects like Karunga Market which duty it breached thus giving rise to a viable cause of action. That under the Public Finance Management Act, 2012, the Applicant was tasked to ensure transparent, accountable and prudent management of public resources and was therefore responsibility and accountability for prudent management was incumbent on all involved government organs.
21. That the Applicant's active role in funding, overseeing, and managing the Karunga Market project connected it directly to the dispute, establishing a justiciable cause of action even with the County Government's involvement in land allocation. The overlap of concurrent functions (Fourth Schedule) did not therefore absolve the Applicant/2nd Defendant of its responsibilities.
22. Finally, the Plaintiff submitted that they had incurred unnecessary costs in opposing the ill-founded application. That awarding costs supported the overriding objectives of the Civil Procedure Rules by deterring frivolous and vexatious interlocutory applications and encouraging full participation. That the court's discretion to award costs should be guided by principles of fairness and reasonableness, especially since the Application lacks merit and wasted the court's time and resources.

Determination.

23. I have considered the application herein the argument for and against the Applicant/2nd Defendant's application seeking to be struck out from the suit herein. I have further considered the law, submissions, and the authorities cited therein.

24. With regard to joinder of parties, Order 1 Rule 9 of the Civil Procedure Rules states that no suit shall be defeated for misjoinder or non-joinder of parties and requires that the court deals with the matter in controversy so far as regards the rights and interests of the parties actually before it. On the other hand, Order 1 Rule 10(2) of the Civil Procedure Rules also provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either part, 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 Defendants, 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.”

25. It can be deduced from the above provision of the law, that a party whose presence in a suit cannot help the court determine the subject matter of the suit is an unnecessary party and should be struck out of the proceedings.

26. In **Pravin Bowry v John Ward & another [2015] eKLR** the Court of Appeal commenting on who is a necessary party referred to the Ugandan case in **Deported Asians Custodian Board v Jaffer Brothers Ltd [1999] 1 E.A. 55 (SCU)** where the court stated as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be

joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a Defendant) to be joined as a co-Defendant, where it is shown that the Defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."

27. It is therefore clear that the court may on its own motion or on application of any party to the proceedings order the striking out a party whose presence in a suit will not enable the court to effectually and completely adjudicate upon and settle all questions involved in the matter. In the exercise of that discretion, the court must as a matter of course, act according to reason and fairness and not according to its whims and caprice.
28. The issue that arises for determination is whether the 2nd Defendant is a necessary party to this suit and if so, whether any cause of action is disclosed against it.
29. The provision of Order 2 Rule 15(1) (a) of the Civil Procedure Rules states that at any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that it discloses no reasonable cause of action or defence in law. The said provision of the law provides:

"1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

30. The Plaintiff in its suit seeks that judgment be entered against the Defendants jointly and severally for:

a) An order of permanent injunction to restrain the Defendants whether, themselves their agents, servants, employees or any person acting under the Defendant's mandate or authority or direction from trespassing or encroaching entering or constructing or demolishing or developing or in any way howsoever from interfering with the Plaintiffs ownership, use and possession of the Plaintiffs market plots at Karunga Market within Gilgil Township.

b) An order that any decision taken to construct a new market at Karunga Market within Gilgil Township is illegal, null and void.

c) The cost of the suit.

d) Any other and better relief and appropriate in the circumstances.

31. The 2nd Defendant/Applicants' application in seeking to be struck from the Suit is founded on the argument that it is established under the provisions of the National Government Constituency Development Fund Act, 2023 where its functions are provided for under the provisions of Section 11 of the National Government Constituency Development Fund Regulations, 2016. That the functions of constructing and/or developing markets therefore did not fall within its mandate but rather within the functions of the 1st Defendant/Respondent for which the Applicant was not involved in allotment of markets or balloting of any kind and neither does it receive any rent and rates from the Plaintiffs/Respondents. That there had been no legal basis to join it to the suit as no cause of action had been established against it.

32. The general objective of Order 1 Rule 10(2) of the Civil Procedure Rule is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be joined.

33. In the case of **Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others [1998] eKLR** it was held that:

"For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party."

34. The Plaintiffs/Respondent on the other hand, is of the opinion that the Applicant breached its fiduciary, constitutional, and statutory duties accordance to Article 10(2)(a) of the Constitution, to ensure the principle of public participation in governance and development processes, when it

failed and/or neglected to organize participatory forums regarding the Karunga Market project. That striking out the Applicant at this stage would be premature and would shut out the Plaintiff from ventilating a bonafide grievance against a necessary party.

35. I find that the Plaintiffs/Respondent have established a strong link between the Committee and the construction project by citing its roles in Article 10(2)(a) of the Constitution where the Committee is charged with the constitutional duty to ensure inclusive citizen involvement in the determination and implementation of national government development projects at the constituency level. The claim that the construction decision is illegal, null, and void is primarily based on the Committee's alleged failure to facilitate public participation concerning the Karunga Market project.

36. Secondly the Plaintiffs/Respondents have established that under Article 206(2)(c) of the Constitution & National Government Constituency Development Fund Act, the project is funded by public funds channelled through the Applicant for which the Committee is responsible for overseeing the withdrawal, expenditure, and implementation of these funds, thereby assuming a fiduciary role. For the court to fully scrutinize the propriety of the project's funding and execution, the entity accountable for the money must be included.

37. Given that the Plaintiffs seek to declare the decision to construct the market illegal and void, and their primary ground for this relief is the breach of public participation and prudent management duties by the NG-CDF Committee, and upon acting very cautiously and carefully and after considering all facts of the case without embarking upon the merits of the suit, I find that indeed removing the Committee would likely lead to an incomplete resolution, as the court would be unable to settle the fundamental issue of accountability for the alleged lack of public participation and improper management of the project's public funds.

38. To this effect I dismiss the application dated the 3rd April, 2025 with

costs.

**Dated and delivered via Teams Microsoft at Naivasha this 13th day of
November 2025.**



M.C. OUNDO

ENVIRONMENT & LAND COURT - JUDGE