



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC PETITION NO. 6 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS)  
PRACTICE & PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ARTICLES 1, 10, 22(1), 27, 40,60,65 & 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT, CAP 286 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE  
1,10,27,40,46 & 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**EPHANTUS GITHAH.....1<sup>ST</sup> PETITIONER**

**JAMES MWANGI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MURANGA.....2<sup>ND</sup> RESPONDENT**

**AND**

**DEL MONTE KENYA LIMITED.....APPLICANT/INTERESTED PARTY**

**RULING**

1. This Notice of Motion was filed pursuant to Art 47 and 159 of the Constitution of Kenya, 2010 and Rule 7 of the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013 and all other enabling provisions of the law. The Applicant seeks joinder as an interested party in the petition.
2. The application is based on the grounds annexed thereto and those deponed to in the supporting affidavit of Harry Odondi, the Legal Officer of the Applicant sworn on the 3/12/18.
3. Briefly it is the Applicant's case that it is the registered owner of the suit properties set out under para 16 of the petition as leases from the Government of Kenya which leases are due to expire by the year 2022. The Applicant is desirous in seeking for renewal/extension of the leases and has commenced the process in earnest which process is now at various stages before the Respondents. That the Petitioners seek to stop the renewal of the leases in favour of the Applicant and if granted, it will drive the Applicant out of business. That the petitioners have referred to the Applicant as an interested party in its pleadings but failed to enjoin it as such.
4. The Applicant has urged its case by stated that it has a huge interest and stake in the petition since its right to property is likely to be contravened and further that its interest and rights in the petition will not be articulated unless it is enjoined as a party to the proceedings and lastly the Applicant's input and participation will aid the Court in determining the petition fairly and conclusively.

5. The Applicant has pleaded with the Court that once it is enjoined it will bring to the attention of the Court the existence of other suits involving the subject matter and seek the Court's directions on how this matter may be conducted in light of the pending proceedings.

6. The 1<sup>st</sup> Petitioner opposed the application and deponed that the Applicant is not an interested party to the petition as the orders being sought in the petition can only be enforced/executed by the Respondents named in the petition. That the Respondents are charged by the Constitution and the Land Act with the responsibility of extending and or renewing leases and therefore the presence of the Applicant is not necessary in solving the issue at hand. That admission of the Applicant to the proceedings will aid in clogging and complicating the issues in the proceedings. That their presence in this suit is intended to be used as forum to ventilate their case for renewal of the leases which they have already sought before the Respondents. Finally, that the Applicant stands to suffer no prejudice if the application is declined since the petitioners are not challenging their application of renewal of leases but rather the process itself which is the prerogative of the Respondents.

7. The 2<sup>nd</sup> Respondent through Hon S T Masaki opposed the application and confirmed that the Applicant has indeed applied for the renewal of the leases but the process of considering the application is still at its infancy stage and no substantive decision has been made. That the process is exclusively within the domain of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are bound to be guided by the Constitution and the law and the Applicant has not demonstrated any prejudice that they have suffered in the ongoing process of consideration of the lease renewals. The proposed inclusion of the Applicant is meant to provide them with a forum to improperly influence the Respondents in the renewal of the leases in the Applicant's favour. In any event the Applicant's application for lease renewal has not been rejected by the Respondents and therefore this application is preemptive and an abuse of the Court process.

8. On the 13/2/19 the parties elected to argue the application orally before me in Court. The Applicant reiterated the contents of its application and submitted that it has an interest and stake in the proceedings as it is the registered lease holder of the suit properties which are subject to lease extension/renewal by the Respondents. The Applicant has developed the properties which include interalia factories, pineapple crop, irrigation infrastructure and staff houses. The purpose of the petition is to stop the renewal of the leases which orders if granted will put the Applicant out of business. That the petitioners have recognized them as interred parties in the petition and hence the need to be enjoined so that all the issues are canvassed at once before the Court.

9. The 1<sup>st</sup> Petitioner submitted that the Respondents are duty bound in law to determine the extension of the leases of the Applicant and the Applicant's presence in these proceedings are akin to canvassing the renewal of the leases through the Court. That the interest of the Applicant is a pure private right which they will have the occasion to prosecute before the Respondents. That according to section 13 of the Land Act, 2012, extension of leases is not automatic in law to non-citizens. Mr Ogutu, Counsel for the petitioners argued that the petitioners are not opposed to the renewal of the leases but that the process should include public participation and sharing of information on the process with the public.

10. The 2<sup>nd</sup> Respondent argued that the process of considering the renewal of the leases is ongoing and no substantial decision has been made whether to renew the leases or not. In any event, he submitted, the process is the mainstay of the Respondents as provided by section 13 of the Land Act. That the Act does not anticipate a scenario where the Applicant would be actively involved in the process of renewal. Allowing them to be party to these proceedings would be giving them a forum to improperly influence or participate in an administrative decision-making process not entitled to. Secondly, the proposed interested party has filed a petition No 389 of 2015 in the High Court at Nairobi through which they can canvass the issues that they want to advert in this Petition. That there is no prejudice that can be suffered by the Applicant if this application is declined.

11. In response the Applicant stated that para 39 of the petition sought to nullify and void any renewal of leases and that the Applicant has sought conservatory orders to stop the process of considering the application of the renewal of leases. He relied in the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 others Vs AG & 4 others (2017) EKLR** where the Court held that the test in joinder of an interested party are; presence of an identifiable stake or a legal interest or duty in the proceedings; the result of the petition would affect the party.

12. Mr Thuo for the Applicant disclosed to the Court that there are cases related to the subject matter as follows; **HCCC NO 398/2017; ELC NO 86/18; ELC NO 53/18 and Petition NO 6/18** Muranga (instant petition).

13. The background of this matter is that the Petitioners have claimed to be the permanent residents within the County of Muranga. That the Applicant is the registered leaseholder of the suit lands as lessee from the Government of Kenya of certain disclosed lands set out in para 16 of the Petition. That on the 1/10/12 the Applicant applied for renewal of the leases which are set to expire in 2022. The Respondents are possessed of the application for extension. The Respondents have a legal responsibility to consider the extension in accordance with the provisions of the Constitution and the Land Act taking into account of the needs petitioners and the residents of Muranga County.

14. The Petitioners claim that they have reason to be apprehensive that the lease extension/renewal may be carried out in secrecy and in a camouflaged manner without adhering to the constitutional tenets of access to information and public participation in the entire process. That so far, the Respondents have not availed relevant information in respect to the Applicant's application for renewal of leases. That the actions of the Respondents in not involving the petitioners and the residents of the county of Muranga in making the decisions to renew or not to renew the leases threatens violation of Art 60 and 65 of the Constitution. That the Respondents should be compelled by this Court to clearly outline and publish the steps they have or intend to undertake to ensure compliance with Art 60 and 65 of the Constitution.

15. Consequently, the Petitioner sought the following orders;

- a. A declaration that any further lease of the suit properties be by public tender after the expiry of the term of the current leases and in compliance or accords with the principles enunciated under Art 60 of the Constitution.
- b. An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to advertise and invite Public bids for the lease of the suit properties.

c. The processing of any application for renewal of the leases over the properties aforementioned is null and void for want of a proper and meaningful public participation and threatens to and or violates Article 10, 60 and 65 of the Constitution of Kenya.

d. Costs of the petition to be borne by the Respondents.

16. Rule 2 of the Constitution of Kenya (Protection of Rights and fundamental freedoms) Practice and Procedure Rules defines an interested party 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”

17. **Blacks Law Dictionary 9<sup>th</sup> Edition at page 1232** defines an Interested Party as a party who has recognizable stake (and therefore standing) in the matter. It defines necessary party as a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal proceedings.

18. Under Rule 7, the Court may on application by a party or on its own motion direct any person as a party to be enjoined in the proceedings. Like all discretions the Court must exercise its discretion based on sound principles. In the case of **Shah Vs Mbogo (1979) EA 116** gives guidelines on the exercise of discretion. It states thus;

“I have carefully considered in relation to the present application the principles governing the exercise of the Court’s discretion to set aside a judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

19. It is not in dispute that the subject leases are registered in favour of the Applicant who is also in exclusive occupation of the properties. The Applicant submitted that it has carried out extensive developments on the suit lands not limited to factories, pineapple farms, irrigation infrastructure and staff houses interalia and has indicated to the Court that should the leases not be renewed it will drive them out of business as the leasehold properties are the bedrock of their businesses. It is also commonly acknowledged that the Applicant applied for renewal /extension of leases in 2012, which applications are with the Respondents for consideration. It is also not in dispute that the said applications are pending before the Respondents.

20. The 1<sup>st</sup> Petitioner in his submissions stated that under section 13 of the Land Act, a non-citizen does not enjoy an automatic pre-emptive right in the renewal of leases. That in as much as they are not directly opposed to the renewal of the leases they are primarily concerned with the process and have argued that they want public participation, involvement and sharing of information with the public by the Respondents. The 2<sup>nd</sup> Petitioner has averred that the process is in its infancy and therefore nothing has been done to require the Applicant to be enjoined. He posed; how does the Applicant become prejudiced by a process in its infancy?

21. Both Petitioners contends that the Applicant is not a necessary and /or a proper party in this suit.

22. The Applicant insists that it is a necessary party as the outcome of the petition is to stop the renewal of the leases and that joinder is necessary so that all the issues are settled. That it is already referred in the body of the petition as an interested party and should therefore be joined. That once joined it will disclose to the parties other pending cases in which the subject matter is the same and seek directions on how to proceed to avoid an abuse of the process of the Court.

23. In the case of **Amon –Vs- Raphael Tuck & Sons Ltd (1956) 1 All ER 273**, Devlin, J held at p. 286-287 that:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the Court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

24. Section 13 of the Land Act, Act No. 6 of 2012 provides that :-

“S. 13. (1) Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.

(2) The Commission may make rules for the better carrying out the provisions of this section, and without prejudice to the generality of the foregoing, the rules may provide for the following.

(a) prescribing the procedures for applying for extension of leases before their expiry.

(b) prescribing the factors to be considered by the Commission in determining whether to extend the tenure of the lease or

re-allocate the land to the lessee.

(c) the stand premium and or the annual rent to be paid by the lessee in consideration of extension of the lease or re-allocation of the land.

(d) other covenants and conditions to be observed by the lessee”.

25. In this case, the Court must consider whether the interested party will assist in resolving the issues in dispute. Particularly, how the Applicant would assist this Court in finding a solution towards a fair, inclusive, public participation mode of renewal/extension of the leases of the suit. This is the gist of the Petitioner’s case. Instead, it has been properly argued in contestation, that the mandate to renew the leases squarely lies with the Respondents. It is also true that the final orders whether negative or positive may be easily enforced by the Respondents.

26. The law is that a party must demonstrate more than merely having a reasonable stake in the matter .The Applicant must prove that its presence is key in resolving the dispute and the final orders cannot be enforced without it .The Applicant has a further obligation to establish such loss and prejudice that it shall suffer and what interest in shall have in the matter .

27. In the case of Francis **Karioki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR**, the Apex Court stated as follows:

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court” [emphasis supplied].

28. In the case of **Trusted Society of Human Rights Alliance-Vs- Mumo Matemo & 5 others [2014] Eklr** the Court further rendered itself thus

“...A suit in Court is a ‘solemn’ process, “owned” solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

29. The Applicant has informed the Court in submissions that there are pending suits related to this subject matter , however it demonstrated how it will assist in curbing a foreseeable abuse of the Court process .The Applicant has not demonstrated the nature of reliefs it is seeking in this petition and further how its legitimate interests over the subject leaseholds shall be affected.

30. The Applicant has not demonstrated its interest or stake in the petition. Stake or interest herein should not be confused with ownership in the land. The Applicant’s interest is that of a private nature that is to say its ownership rights in the extension of the leases, which it currently owns. Therefore, it is not pursuing a public interest claim nor are they seeking to assist the Court in determining the matter.

31. The ownership of the land is not under challenge. What is being challenged by the Petitioners is the process that the Respondents is or is suspected of employing in the renewal of the leases. The Applicant has not shown how it will assist the Court in determining that issue. The Court does not agree with the 2<sup>nd</sup> Petitioner that by allowing joinder of the Applicant the Applicant will influence the process in its favour. The Court views this as speculative.

32. Further the Applicant has not demonstrated the prejudice that it stands to suffer if the application is disallowed.

33. In the end the application is without merit. It is dismissed with costs to the Applicant.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 4<sup>TH</sup> DAY OF APRIL 2019**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

T M Njoroge HB for Ogutu for the 1<sup>st</sup> & 2<sup>nd</sup> Petitioner

1<sup>st</sup> & 2<sup>nd</sup> Respondent – Absent

Gachomo HB for Thuo for the Interested Party/Applicant

Kuiyaki and Njeri, Court Assistants