



Wangari v County Government of Kirinyaga & another; Kenya Medical Research Institute (KEMRI) (Interested Party); Kimike Co-ordinating Committee (Intended Interested Party) (Constitutional Petition 4 of 2019) [2019] KEELC 276 (KLR) (9 December 2019) (Ruling)

Leonard Kuria Wangari v County Government of Kirinyaga & another; Kenya Medical Research Institute (KEMRI) & another (Interested Party) [2019] eKLR

Neutral citation: [2019] KEELC 276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
CONSTITUTIONAL PETITION 4 OF 2019
EC CHERONO, J
DECEMBER 9, 2019**

BETWEEN

LEONARD KURIA WANGARI PETITIONER

AND

COUNTY GOVERNMENT OF KIRINYAGA 1ST RESPONDENT

**DEPARTMENT OF LAND, HOUSING AND UBRAN DEVELOPMENT,
KIRINYAGA COUNTY 2ND RESPONDENT**

AND

KENYA MEDICAL RESEARCH INSTITUTE (KEMRI) INTERESTED PARTY

AND

KIMIKE CO-ORDINATING COMMITTEE . INTENDED INTERESTED PARTY

RULING

Background

1. The petitioner, Leonard Kuria Wangari instituted this petition on 25th September 2019 seeking the following orders:
 - (1) That a declaration of violation of the right to access to information do issue against the Respondents.



- (2) That a declaration be made that the public land should not be disposed of or otherwise used without express terms of the intended use by the beneficiary.
 - (3) That a Memorandum of understanding be prepared to enumerate; the plan for the project and the resultant benefits for the residents of Kirinyaga County.
2. On 30th September 2019, the petitioner filed a Notice of Motion under certificate of urgency seeking a raft of orders at interlocutory stage pending the hearing and final determination of the main petition. When the said application was placed before the duty Court, the same was certified urgent to be heard on priority basis. While that application was pending, the applicant, Kimike Co-ordinating Committee filed the present application dated 12th November 2019 seeking the following orders:
- (1) Spent.
 - (2) That the Honourable Court be pleased to grant leave to the applicant to be enjoined as an interested party to this petition.
 - (3) That the costs of this application be provided for in any event.
3. That application is supported by the affidavit of Jonah Gitimu Mubuthi. On 15th November 2019, the firm of C.M. Advocates, LLP instructed by the interested party filed grounds of opposition. The petitioner and the respondents did not file any response.

Applicant/Intended Interested Party's Case

4. The applicant stated that it is a registered community based organization with the objective of protection of social and economic development welfare of residents within Kirinyaga County. It stated that the suit land parcel No. Mutithi/Strip/1449 is a public land held in trust of the residents of Kirinyaga by the 1st respondent. The applicant further stated that the 1st and 2nd respondents are in the process of transferring the suit property to the 1st interested party without any consideration and/or consultation from the community residing within that locality.
5. The applicant further contends that unless she is enjoined as an interested party, the residents of Kirinyaga County may stand to lose opportunities that may arise out of the intended project e.g. employment.

Interested Party's Case

6. Kenya Medical Research Institute (KEMRI) who is the interested party herein opposed the application on the following five grounds:
 - (1) That the application is devoid of legal and factual merit; and thus fails the legal threshold/test for joinder of the applicant as an interested party in the instant petition.
 - (2) That the application by the petitioner is devoid of any specificity and or particularly in merit that would warrant the grant of the orders sought.
 - (3) That the application and proposed joinder of the interested party would unduly delay the expeditious disposal of the instant petition; noting the urgency of the underlying issues and certainly conflate, confound and obfuscate the simple real issues in the petition.
 - (4) That no demonstrable and plausible prejudice will be visited on the applicant; however contrarily, the public interest and the interested party will be gravely prejudiced and exposed to rising loses of public funds from inability to lawfully proceed and develop the subject property.



- (5) That the circumstances obtaining herein, it is in the greater interests of justice and fairness as well as public interest that the said application be dismissed with costs.

Issues for Determination

7. The single issue for determination in this application is whether KIMIKE Co-ordinating Committee should be admitted to these proceedings as interested party.

Analysis

8. The Superior Courts have pronounced themselves on the principles regarding applicants seeking to be enjoined as an interested party in a suit. In the case of *Trusted Society of Human Rights Alliance Vs Mumo Matemo & 5 others*, Supreme Court Petition No. 12 of 2013 (unreported) held as follows:

“..... While an interested party has a “stake/interest directly in the case, an amicus’s interest is its ‘fidelity to the law; that an informed decision is reached by the Court, having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause abinitio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a friend of the Court, his (or her) cause is to ensure that a legal and legitimate decision is achieved”.

9. I entirely agree with the decision by the Supreme Court which is also binding on me. The position governing the admission of persons in legal proceedings in Kenya has no legal framework in place as aptly observed by Mr. Justice Odunga in the case of *Mr. Justice Phillip K. Tunoi & another Vs Judicial Service Commission & 2 others* (2014) e K.L.R where he observed as follows:

“It is unfortunate that in this country, unlike in other jurisdictions with an advanced Constitution such as ours, we do not have in place comprehensive rules which govern the admission of persons as amici in legal proceedings”.

10. From the pleadings and the evidence disclosed from the list of documents filed in Court, it is not in dispute that the suit land L.R. No. Mutithi/Strip/1449 is a public land registered in the name of the County Government of Kirinyaga (1st respondent). It is not in dispute that under Article 67 (2) (b) of the *Constitution* of Kenya 2010, such public land held in the name of the County Government is managed by the National Land Commission on behalf of the County Government of Kirinyaga. It has also been argued by the applicant that no consideration has been given by the interested party for the suit property. The issue of whether consideration was given or not can best be answered by the National Land Commission which has the Constitutional mandate to receive such funds and account for the same as required under the law. The other reason being advanced by the applicant is that the residents of Kirinyaga County stand to lose any employment opportunities that may arise out of the intended project. The applicant has not shown how they will assist in securing employment for the same residents of Kirinyaga County if they are joined as parties to these proceedings. It is trite law that an application for joinder as a party is a discretionary power inherent in the Court which must be exercised judicially. In the case of *Trusted Society of Human Rights Alliance Vs Mumo Matemo & 5*



others (20150 e K.L.R, the Supreme Court of Kenya made the following guidelines regarding the role of amicus curiae which is more less similar to that of an interested party:

- “ 41. From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of amicus curiae:
- (I) An amicus brief should be limited to legal arguments.
 - (II) The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.
 - (III) An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the *Constitution*'s call for resolution of disputes without undue delay. The Court may therefore, and on a case by case basis, reject amicus briefs that do not comply with this principle.
 - (IV) An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.
 - (V) The Court may call upon the Attorney General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney General is not defeated solely by the subsistence of a State interest, in a matter of public interest.
 - (VI) Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see *Raila Odinga & others Vs I.E.B.C & others*; Supreme Court Petition No. 5 of 2013 – Katiba Institute's application to appear as amicus).
 - (VII) An amicus curiae is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.
 - (VIII) The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.
 - (IX) In appropriate cases and its discretion, the Court may assign questions for amicus research and presentation.



(X) An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.

42. In addition, we would adopt, with respect, certain guidelines which emerge from Mr. Justice Odunga's decision in the Justice Tunoi's case (op. cit):

(XI) The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.

(XII) The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.

(XIII) The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.

(XIV) The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.

(XV) Whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor".

11. The Court went further and set out the following additional guiding principles:

(i) A party seeking to appear in any proceedings as amicus curiae should prepare an amicus brief, detailing the points of law set to be canvassed during the oral presentation. This brief should accompany the motion seeking leave to be enjoined in the proceedings as amicus.

(ii) The Court may exercise its inherent power to call upon a person to appear in any proceedings as amicus curiae.

(iii) In proceedings, before the Supreme Court, the Bench as constituted by the President of the Court, may exercise its discretion to admit or decline an application from a party seeking to appear in any proceedings as amicus curiae, and denial or acceptance such of an application should have finality.

(iv) The Court reserves the right to summarily examine amicus motions, accompanied by amicus briefs, on paper without any oral hearing.

(v) The Court may also consider suggestions from parties to any proceedings, to have a particular person, State organ or organization admitted in any proceedings as amicus curiae".

12. In considering the above guidelines, I note that the applicant Community Based Organization constitution has not been attached to the affidavit in support to show what activities it is promoting within Kirinyaga County. The applicant has not shown what expertise in law in the field relevant to



the matter in dispute she intends to assist the Court toward the resolution of the same. There is no submission intended to be advanced by the applicant if she is admitted to these proceedings. No new and novel aspects of legal nature have been submitted by the applicant which will enrich the decision of this Court if the application is granted. In my view, there are no new points of law not already addressed by the parties to the petition or the interested party who is already admitted to these proceedings.

13. In the final analysis, I find the application dated 12th November 2019 lacking in merit and the same is hereby dismissed. However, I find and hold that the National Land Commission is a necessary party in these proceedings. Being an institution mandated by law to manage public land registered in the name of a County Government, her presence and contribution in these petition will assist in determining the real issues in controversy. In the result, I make the following orders:

- (1) The applicant's Notice of Motion dated 12th November 2019 is hereby dismissed.
- (2) The National Land Commission is hereby enjoined as an interested party.
- (3) The National Land Commission to file and serve their response to the petition herein within 14 days from today.
- (4) Each party shall bear his own costs of this application.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 9TH DAY OF DECEMBER, 2019.

E.C. CHERONO

ELC JUDGE

9TH DECEMBER, 2019

In the presence of:

1. M/S Cheronon holding brief for Nyamodi for the 1st & 2nd Defendants
2. Mr. Asimwe holding brief for Lusi for the Interested party
3. Mr. Ombachi for the Applicant
4. Mr. Machira appearing alongside Mr. Lusi for the Interested party
5. Mr. Gitonga for the Petitioner.

Mr. Gitonga

In view of the ruling, we can take a mention next year to give the new Interested party time to file their response.

Mr. Machira – I agree.

Mr. Ombachi - I have no objection.

Court

By consent of the parties, mention on 15th January 2020 for further directions. Interim orders extended.

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E.C. CHERONO

ELC JUDGE

9th DECEMBER, 2019

