



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC NO. 196 OF 2016**

**HADIYA CONSTRUCTION &**

**MINERAL LTD ..... PLAINTIFF/APPLICANT**

**VERSUS**

**AJABU EAST AFRICA LTD ..... DEFENDANT/RESPONDENT**

**AND**

- 1. JEREMIAH MULIMI**
- 2. EDWARD INDIMULI**
- 3. WILSON AMENA**
- 4. SAMUEL ATSIAYA**
- 5. ANNE MUNDIA**
- 6. SAMUEL IMBWAGA ISIGI**
- 7. RASHIDA BACHU**
- 8. MIRIAM MUGANZI MASINZA**
- 9. JOHN KATUMANGA MUSAMBAYI**
- 10. NOBERT GUSERWA SONGOLE**
- 11. JORAM PHIP NABWAYO OMMANI**
- 12. SIMEO MBEGE MUGAMI**
- 13. CHRISTOPHER BULIFA**
- 14. ARTHUR MUGUSI**
- 15. CATHERINE WITUKA**
- 16. WILFRIDA KHAMETE NAMUSENDE**
- 17. VIOLET NASWA OKUMU**

**18. RHODAH NAKHUMICHA MOLENJE**

**19. MUNICIPAL HOUSING COOPERATIVE**

**20. TABITHA MUYOKHA MULUSA**

**21. AGGREY ZEYAZI MUUBI**

**22. DOUGLAS SHIWANI**

**23. LYDIA ABUKO MUDIRI**

**24. SAMMY LUTOMIA**

**25. MUNICIPAL HOUSING PR. SCHOOL**

**26. MUNICIPAL HOUSING SH. CENTRE**

**27. MUNICIPAL HOUSING HEALTH ..... INTERESTED PARTIES**

### **RULING**

The application is dated 23<sup>rd</sup> March 2018 and is brought under sections 3 and 3A of the Civil Procedure Act and order 1 rule 10 of the Civil Procedure Rules and seeks the following orders;

1. This honourable court be pleased to enjoin the interested parties on this suit.
2. Costs in the cause.

It is brought on the grounds that the interested parties are the registered owners of the parcels of land which form the subject matter of these proceedings. The final outcome of the suit shall either way directly affect the rights of the applicants. The interested parties are desirous to be enjoined in this proceeding to enable this honourable court to properly determine the dispute between the parties. The grant of prayer sought will not cause any injustice to the parties herein. It is therefore in the interest of justice that the prayer sought be granted.

The defendant respondent submitted that, the said application is fictitious and has been filed by persons who have no interest and locus standi in this case hence a delaying tactic and gimmick of the plaintiff. That some of the alleged registered owners who are purported to have given authority died long time ago hence the application and authority to act is wanting and has been signed by persons who do not have capacity and locus standi to act. Annexed is a copy of a death certificate marked "B.M.-1". That this court is under duty on its own suo moto to call for physical attendance and verifications of the plaintiff's/applicant's in the foresaid circumstances to stab malpractice and forgery of a clique of the purported plaintiff's who have no authority to act. That this court is under duty to call for physical attendance and verifications of the intended interested parties in the foresaid circumstances to stab malpractice of the plaintiff and a clique of the purported interested parties. That the intended interested parties leased out the said parcels of land and interest to HADIYA CONSTRUCTION AND MINERAL LTD, the plaintiff herein, and by the said action their interest over the said parcels of land for the said period got extinguished and became vested with the plaintiff by operation of the law. That the enjoinder as an interested party is not as of right, but is at the discretion of the court, hence, sufficient grounds must be laid before the court, which the intended interested parties failed to do so and must be done on the basis of the following elements:-

- (i) That the personal interest or the stake that the party has in the matter must be set out in the application and the interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- (iii) A party must, in its application, set out the case and/or submissions it intends to make before the court and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.

That the defendant/respondent organized for public participation which was attended and approved by the community as enshrined in the law. That the interested parties application is sub-judice having filed Kakamega High Court E.L.C. No. 281 of 2017 now currently Kakamega High Court E.L.C. No. 514 of 2018 which is pending for hearing and final determination. Annexed are copies of plaint and defence marked "B.M.-2 a & b". That in the premises and from the foregoing, it is clear that the intended interested party's application is meant to deny the defendant/respondent peaceful permission of their lawful mandate to carry out the said activities as granted and to delay the determination of this case. That the intended interested party's application defeats the rules of natural justice and equity. That in the premises, the intended interested party's application is unfounded, lacks merit, misconceived, full of laches, frivolous, vexatious, no-starter, a delaying tactic and it is an abuse of due process of the law and should be dismissed with costs.

This court has carefully considered both the respondent's and the interested parties' submissions herein. On the issue of the matter being sub-judice, Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

*“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”*

Section 7.

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

The respondent submitted that, the interested parties application is sub-judice having filed Kakamega High Court E.L.C. No. 281 of 2017 now currently Kakamega High Court E.L.C. No. 514 of 2018 which is pending for hearing and final determination at the Chief magistrates Court Kakamega. I have perused the pleadings in that matter and find that the plaintiff in this matter is not party to that suit. I find that the same is not sub-judice and perhaps would require consolidation.

On enjoining of interested parties, the Supreme court of Kenya in the case of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] Eklr** quoted the case of **Francis Kariuki Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013 [2016] eKLR** to demonstrate elements applicable where a party seeks to be enjoined in proceedings as an interested party, they are:

*One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:*

*(i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.*

*(ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.*

*(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.*

The respondent submitted that, the intended interested parties leased out the said parcels of land and interest to HADIYA CONSTRUCTION AND MINERAL LTD, the plaintiff herein, and by the said action their interest over the said parcels of land for the said period got extinguished and became vested with the plaintiff by operation of the law. That the enjoinment as an interested party is not as of right, but is at the discretion of the court, hence, sufficient grounds must be laid before the court, which the intended interested parties failed to do so. Be that as it may I find that the intended interested parties have an interest in the land since the same was leased out and not sold hence the beneficial interest will revert to them upon expiry of the lease. I find that their *interest is clearly identifiable and is proximate enough except for the 9<sup>th</sup> applicant who is deceased. The application is therefore granted as prayed with the exclusion of the 9<sup>th</sup> applicant and cost to be in the cause. This matter is transferred to the Chief Magistrate Kakamega Court who is handling a similar matter for hearing and determination.*

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28<sup>TH</sup> DAY OF JUNE 2018.**

**N.A. MATHEKA**

**JUDGE**