



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 1112 OF 2013**

MARY NDUTA KIHU.....1<sup>ST</sup> PLAINTIFF/APPLICANT

KATHIRA NOOR H. BILE.....2<sup>ND</sup> PLAINTIFF/APPLICANT

JOSEPH MWANGI.....3<sup>RD</sup> PLAINTIFF/APPLICANT

ROBERTT OKWOYO MIRONGA.....4<sup>TH</sup> PLAINTIFF/APPLICANT

VERSUS

MUUNGANO WA WANAVIJIJI

AKIBA MASHINANI TRUST .....DEFENDANT/RESPONDENT

JOHN MBATIA WAWERU....PROPOSED INTERESTED PARTY/APPLICANT

**RULING**

The matter coming up for determination is the Notice of Motion dated 29<sup>th</sup> June 2015, brought by a proposed interested party **John Mbatia Waweru** who has sought of the following orders.

***1. THAT John Mbatia Waweru, be hereby joined in this case as an interested party.***

***2. THAT this Hon. Court be pleased to order that Mukuru Makao Bora Trust (“MMBT”) do hold an Extra-Ordinary General Meeting (“EGM”) within the next forty five days on the Suit Property with the following agenda items to be included in the agenda.***

***2 (a) THAT an auditor be appointed by the ‘EGM’ to conduct a general audit on the finances of the MMBT;***

***2(b) THAT the Plaintiffs herein be and are hereby ordered to provide full cooperation and financial records to the said appointed auditor to enable the said auditor to verify all amounts paid by beneficiaries of the MMBT to the Plaintiffs;***

***2(c) THAT the plaintiffs provide a list of beneficiaries who are entitled to benefit in land owned by the MMBT and file this list in court within thirty (30) days after the date of the EGM***

***2(d) THAT the EGM do appoint a special committee whose task is limited to verification of the Plaintiffs list beneficiaries (to be filed in court).***

**2(e) THAT in the event that the special committee finds any discrepancies between the plaintiff's list of beneficiaries, the special committee be granted leave to file via John Mbatia Waweru pleadings to demonstrate the discrepancies and to seek further orders from the Hon. court.**

**2(f) THAT the minutes and resolution of the said EGM be filed in the Court file and after the said EGM is held, any party be at liberty to apply for a mention date.**

**3. THAT pending the conduct of the EGM and any further orders of this Hon. Court, due to the written request as notified by over 500 signatures being the beneficiaries of the MMBT, the title deed to the Suit Property do remain in the custody of the Defendant.**

**4. THAT for the sake of keeping peace, the Kenya Police are hereby ordered to maintain Law and Order during the meeting and ensure that the meeting is held on the grounds of the suit Property.**

The application is premised on the grounds stated on the face of the application on the affidavit of **John Mbatia Waweru**.

These grounds are:-

- 1. John Mbatia Waweru is a trustee of MMBT.**
- 2. John Mbatia Waweru represents a zone, being one of 29 zones, which were acting as collection vehicles for MMBT to raise funds to purchase the Property.**
- 3. The zone that John Mbatia Waweru represents has raised the most money of any of the zones.**
- 4. John Mbatia Waweru is desirous of making certain representations to this Hon. Court and it would be in the interests of justice for him to be made an interested party.**
- 5. John Mbatia Waweru states that the Plaintiffs taken as a unit only have 2 of the 32 votes in the governing body of MMBT.**
- 6. Each zone is represented by one trustee in the Board of Trustees of MMBT.**
- 7. The Defendant, being the donor to MMBT, is represented on the Board of Trustees.**
- 8. Each zone consists of several persons who have contributed funds to the purchase of the suit Property. These persons are the ultimate beneficiaries of the trust constituted by the MMBT. The trust funds were placed under the custody of the MMBT trustees for the purpose of acquisition of land and further, for the development of low income housing on the purchased property.**
- 9. Allegations are now surfacing that the Plaintiffs have tampered with the list by including persons unknown to some of the zone leaders and at the same time removing the names of legitimate beneficiaries and a list of the legitimate beneficiaries is available.**
- 10. John Mbatia Waweru has attempted severally to call for a general meeting but has met with resistance to date, making it difficult and dangerous for him to practice organizational democracy in a lawful and peaceful manner.**
- 11. Unless the orders sought above are granted, there is real and present danger that the affairs of the MMBT and the Suit property will be vandalized, looted and a general break down of law and order will result, to the great detriment and prejudice of the law abiding citizens who collected monies to buy property for their general economic betterment and uplift of their children's futures.**

In his supporting Affidavit dated **29<sup>th</sup> June 2015**, **John Mbatia Waweru**, avers that the reason he is asking for the **Extra Ordinary General meeting (EGM)** is because there is a legitimate fear that their money has been misappropriated .

Further that certain allegations have now surfaced that the plaintiffs have included other persons unknown to the zone leaders including himself as beneficiaries of MMBT yet these strangers to the trust are not know to the original beneficiaries or zone leaders.

The application is opposed by the Plaintiffs/Respondents who filed grounds of opposition and stated that

- 1. The application is Resjudicata.**
- 2. The application is incompetent bad in Law as an abuse of this court process.**
- 3. That the application lacks merit.**

Further **Mary Nduta Kihui** the 1<sup>st</sup> plaintiff sworn a Replying affidavit and averred that:- Though the applicant calls for Extra Ordinary General meeting under this Trust Deed of **Mukuru Makao Bora Trust** there is no meeting called "**Extra Ordinary General meeting**".

Further that in the said Trust Deed, there is no provisions, for the court to set out items or the agenda of any meeting of the trust. It was her contention that though the applicant has called for appointment of an auditor by this proposed "**EGM**", the appointment and responsibilities of the **auditor** to "**Mukuru Makao Bora Trust**" are provided for under **clause 2 of the Trust Deed**. She also averred that the list of the beneficiaries who are entitled to benefit in the land owned by **Mukuru Makao Bora Trust** is filed in Court together with the **Plaint**. She also confirmed that the **Title deeds** herein are in custody of the Defendant and plaintiffs have not demanded for them. She alleged that though **John Mbatia Waweru** is a member of the plaintiffs, he is working at behest of the defendant as he is using the same Law firm of **Brayant and Associates Advocates**, who are representing the defendant herein. She therefore averred that any party who brings an application before court should bring an application that will aid the court in determining the real question in dispute which are well captured in the prayers set out in the **Plaint**. The Respondent urged the court to dismiss the instant Notice of Motion.

The Court directed the parties to canvass the instant application by way of written submissions. The **Law Firm of Brayant & Associates** for the proposed interested party filed their submissions on **1<sup>st</sup> December 2015**, and requested the court to allow the prayers sought. The Law Firm of **Magee Wa Magee & Company Advocates**, for the Plaintiffs/Respondents filed their submission on **7<sup>th</sup> December 2015** and requested the court to dismiss the instant application with cost.

The court has now carefully considered the said application, the annexures thereto and the relevant provisions law. The court has also considered the written submissions and the court renders itself as follows:-

It is not in doubt that the plaintiffs filed this suit on (**18<sup>th</sup> September 2013** vide a **Plaint** even dated and sought for various prayers. Among the prayers sought is for "**transfer of LR. 7109/88 Nairobi and LR. 7109/89 Nairobi to Mukuru Makao Bora Trust**".

There is also no doubt that the Plaintiffs herein have brought this suit on behalf of **Mukuru Makao Bora Trust**. It is also on record that on **16<sup>th</sup> April 2014**, the applicant herein **John Mbatia Waweru, Gula Fadhili Yusuf, Cecilia Wanjiku Kibe, Jacinta Wakuhi Njue, and Thomas Githinji** had filed an application seeking to be enjoined in the suit as Defendants. The Court had on **14<sup>th</sup> November 2014**, delivered a Ruling on the said application and declined to add the said applicants as Defendants. However, the court found that the said applicants had a stake in the suit and they qualified to be interested parties. In the end, the court enjoined all the five proposed Defendants as **Interested Parties**, the applicant herein included. The applicant herein is therefore an Interested Party in the suit and his prayer

No. 1, in this application is already a decided matter and thus **Res-judicata**.

The application is brought under sections **1A** and **3A** of the **Civil Procedure Act** which sections deals with the overriding objective of the Act which is to facilitate the **just, expeditious, proportionate and affordable resolution** of Civil disputes brought under the Act. The matter herein is brought under the Civil Procedure Act and this court should therefore ensure that the overriding objective is met while deciding this application. Further, the court is granted inherent powers by section 3A to make orders that are necessary for the end of justice and to prevent abuse of the court process.

The court has considered the prayers sought by the applicant who is an interested party in No. 2, 3 & 4. The said prayers are dealing with the management of the Trust. The Trust herein is governed by the Trust Deed which is attached to the Plaint. The said Trust Deed out category of meetings in clause No. 11 which states that

“There shall be three classes of General meetings.

*a. Normal General meetings*

*b. Special General meetings SGM*

*c. Annual General meetings AGM*

The said clause also set out how these different meetings can be called. The court is not mandated anywhere in the said clause to call for any meeting. There is also no meeting called “**Extra General Meeting**” (EGM) in the said Trust Deed. The applicant has alleged that he has tried to call for ‘a **general meeting**’ to no avail. There is no evidence of any attempt by the applicant to call for any meeting.

Further clause No. 23 of the Trust Deed provides for “**the appointment of an auditor every year to inspect the Trust books of accounts, Financial Statements, Assets and liabilities.**” There is no reason given why the Court should intervene in the appointment of an auditor as no allegations of financial mismanagement have been raised herein. The suit herein is over Title to Land and not management of the **Trust. Clause No 26** of the Deed also provides for the inspection of Accounts and list of trustees. In the said clause, the Court is not mandated at all to issue any order before the inspection of the Accounts. There is also no evidence that the applicant herein has given Notice in writing for inspection of the Account as provided by **clause No. 26** of the Trust Deed and was denied such an exercise. The applicant is a Trustee of ‘**Mukuru Makao Bora Trust**’ and should be in the forefront in ensuring that the suit herein is expeditiously heard and determined. However by bringing numerous unnecessary applications, the applicant in is stifling the expeditious disposal of this suit. What the applicant is engaging is abuse of the Court process and the Court should not allow any party to abuse Court process.

The numerous applications herein also go against the spirit of section 1A of the Civil Procedure Act, on the overriding objective which is to facilitate **just, expeditious** and **affordable resolution** of civil disputes.

The Court is of the view that this kind of an application is abuse of the process because the applicant is seeking for orders which are related to management of the Trust whereas, the said orders sought for do not fall under the jurisdiction of the Environment and Land Court. The Jurisdiction of the Court is provided for under Section 13 of the Environment and Land Court Act, which states as follows:-

**13 (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall**

*have power to hear and determine disputes—*

*(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) Relating to compulsory acquisition of land;*

*(c) Relating to land administration and management;*

*(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) Any other dispute relating to environment and land.*

The prayers sought by the applicant are absolutely outside the above stated Jurisdiction and therefore, it is abuse of the court process and this Court has no jurisdiction to grant such orders.

The Court note that this matter was set for pre-trial conference but instead of complying with **Order 11**, the Interested Party chose to file this instant application which is not merited but only succeeded in scuttling the expeditious disposal of the suit.

Having now carefully considered the Instant Notice of Motion dated **29<sup>th</sup> June 2015**, by the Interested Party, **John Mbatia Waweru**, the Court finds it most undeserving and unmerited. The same is consequently dismissed entirely with costs to the Plaintiffs/Respondents to be borne by the applicant herein.

Further, the Defendant and the interested parties to comply with Order 11 of the Civil Procedure Rules within a period of 30 days from the date of this Ruling. As the court had observed on **15<sup>th</sup> July 2015**, Court orders are not given in vain. Failure to comply with Order 11 within the stipulated period given by the court, then the Sanctions contained in the ELC Practice directions will apply.

The matter to be mentioned on **28<sup>th</sup> March 2017** before any ELC

Judge to confirm compliance of the court orders herein and for pre-trial conference.

It is so ordered.

**Dated, signed and Delivered this at Nairobi this 24<sup>th</sup> day of February 2017.**

**L.GACHERU**

**JUDGE**

In the presence of

Mr Waitaba holding brief for Mr Magee for the Plaintiff/Respondent

None attendance for the Defendant/Respondent though served.

None attendance for the Interested party/Applicant though served.

Hilda : Court Clerk

**Court:**

Ruling read in open Court in the presence of Mr Waitaba holding brief for Mr Magee for the Plaintiff/Respondent and absence of the Advocate for the Defendant and interested party .Mention Notice to the Defendant and Interested party. Further mention on **28<sup>th</sup> March 2017** for Pre-trial Conference.

**L.GACHERU**

**JUDGE**