



**REPUBLIC OF KENYA**

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

**ELC NO. 37 OF 2017**

**EDGAR KIPSASE CHOGE**

**HARRY JUMBA MBITI**

**FRED OMBIRI**

**COLLETTA INZAYI (Suing on behalf of**

**KAMOBON VILLAGE RESIDENTS.....PLAINTIFFS**

**VERSUS**

**CHINA OVERSEAS ENGINEERING**

**GROUP CO. LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENTS**

**NANDI COUNTY GOVERNMENT.....2<sup>ND</sup>  
DEFENDANT/RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT**

**AUTHORITY NANDI COUNTY.....3<sup>RD</sup>  
DEFENDANT/RESPONDENT**

**ELIJAH KIPLAGAT.....4<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**AND**

**ENOS MUDOGA**

**FRANCIS CHAHANZA**

**JOHN CHWEYA (Suing on behalf of**

**KAMOBON VILLAGE RESIDENTS).....PROPOSED INTERESTED PARTY**

**RULING**

This is the ruling in respect of an application by way of Notice of Motion dated 6<sup>th</sup> September 2017 by

the Interested Party for orders:

1. Spent.
2. That the orders of this honourable court issued on the 27<sup>th</sup> July 2017 be stayed pending the hearing of this application *inter partes*.
3. That there be an order to enjoin one ENOS MUDOGA, FRANCIS CHAHANZA, JOHN CHWEYA (suing on their own behalf and on behalf of KAMOBON VILLAGE RESIDENTS) to these proceedings as an Interested Parties.
4. That upon grant of prayer (3) above, the court be pleased to discharge the injunctive orders issued on 27<sup>th</sup> July 2017 in favour of the plaintiffs.
5. That upon grant of prayer (4) above there be an order for status quo and/or injunctive orders in favour of the Interested Parties pending the hearing and determination of this suit.

There were two applications which came for hearing on 28 /9/17 whereby the 2<sup>nd</sup> defendant and the Interested Parties sought for the orders granted on 27/7/17 be set aside and the application dated 31<sup>st</sup> February 2017 be heard *de novo* and in the alternative the said application be dismissed for lack of service.

Counsel agreed to canvas both applications together on the same date. Counsel for the respondents in the suit took issue with a replying affidavit which was filed by counsel for the plaintiff without the leave of the court. The court noted that the applicant had been granted 14 days to file a response to the application whereby the applicant filed a replying affidavit sworn by EDGAR KIPSASE on 26 /9/17. Later the applicant filed another replying affidavit on 28 / 9/17 when the matter had been placed aside for hearing of the application without the leave of the court. The respondents prayed that the replying affidavit be expunged from the court record as it amounts to ambush. No good reason was advanced why the affidavit was not filed in good time. The court therefore agreed with the counsel for the respondents and expunged the replying affidavit of **HARRY JUMBA MBIRI** from the court record.

Mr. Ayieko Counsel for the proposed Interested Parties argued the application dated 6<sup>th</sup> September 2017 and relied on the provisions of the law, the grounds on the face of the application and the supporting affidavit and annexures. He stated that he was seeking for an order for stay of the order 27 / 7/17 and enjoining the Interested Parties. He submitted that although the plaintiffs came to court in a representative capacity, they did not seek the consent of the members of Kamobon village. He further stated that the plaintiffs are guilty of material non-disclosure of facts and that the parties were negotiating this matter. He prayed that the interested parties be enjoined in this suit and the orders granted *ex parte* be set aside. Counsel further submitted that from the replying affidavit, there is no reason why the Interested Parties should not be enjoined in this suit and that there will be no prejudice that will be occasioned to the plaintiffs if the said orders are granted.

Mr. Magare Counsel for the 2<sup>nd</sup> defendant submitted that he is not opposed to the application for enjoining the Interested Parties. He stated that from the annexures and the supporting affidavit it comes out clearly that the interested parties are persons who are interested in the subject matter in dispute. Counsel further submitted that from the replying affidavit it is clear that a dispute between the parties arose in 2016 and that the subject matter has been *in situ* from 2014. It was his submission that the interested parties would give a clear perspective to the court on the issues in controversy.

Mr. Waziri Counsel for the 1<sup>st</sup> defendant was also not opposed to the application for setting aside the order granted on 27 /7 / 2017 and the one for enjoining the interested parties. He submitted that paragraphs 12, 14, 15 and 17 amounts to hearsay. The replying affidavit has no compelling reason why the interested parties should not be enjoined in this suit.

In reply to the application dated 6 /9 / 2017 Mrs. Khayo for the plaintiff/ respondent relied on the replying affidavit of Edgar Kipsase and submitted that prayer (2) cannot be granted as it was sought in the interim and has already been overtaken by events. She further submitted that they would not have any problem if the proposed interested parties were joined as parties in their own capacity but not as representatives of Kamobon village. She further submitted that this suit was brought by the plaintiffs on behalf of Kamobon village residents whereby the necessary authority was sort and filed in this court on 3 /2 / 2017 together with the suit.

Counsel submitted that if the purported interested parties had the authority from the Kamobon village residents then they would have had the signatures or minutes allowing them to do so. They have annexed names without signatures and that does not give the interested parties authority on behalf of the villagers. Counsel also submitted that the issue raised by the interested parties that they were negotiating in this matter was never brought to court by any evidence. Counsel stated that enjoining the interested parties is not for the benefit of the Kamobon village residents and that the interested parties have no interest of the community. Counsel submitted that in prayer (4) the interested parties are seeking to be enjoined and to discharge and order that they do not know about. Counsel therefore prayed that the application be dismissed as the parties have not come to court with clean hands.

In reply Mr. Ayieko stated that this suit was brought to court without the knowledge of the proposed interested parties and that this being a representative suit should have been brought by way of petition. He therefore prayed that the application be allowed. Mr. Magare counsel for the 2<sup>nd</sup> defendant argued the application dated 21 / 9 /2017 and relied on the grounds on the face of the application and the supporting affidavit. He prayed that the orders granted on the 27 /7 / 2017 be set aside reason being that the 2<sup>nd</sup> defendant was never served. He stated that the matter did not proceed on 21 / 2 / 2017 as the 1<sup>st</sup> defendant had applied for time to reply and the other defendants were absent. Submissions were filed on 22 /6 / 2017. The 2<sup>nd</sup> defendant appeared on 24 / 4 / 2017 and served the plaintiff and at that time the application had not been heard and the plaintiff had not sort leave to dispense with service of the 2<sup>nd</sup> defendant.

Counsel submitted that the 2<sup>nd</sup> defendant came to know of the ruling on 22 /8 / 2017 when they filed a replying affidavit. He stated that there was no reason why the plaintiff did not serve the 2<sup>nd</sup> defendant and from the coram the plaintiff's counsel never brought to the attention of the court that there were parties that had not been served. It was counsel's further submission that the subject matter affects land registered in the name of the 2<sup>nd</sup> defendant and an order issued in this matter affects the operations of the 2<sup>nd</sup> defendant as they are proper parties. He argued that the court can set aside the orders under Order 51 Rule 15 of the Civil Procedure Rules. The law requires that a party is served under Order 51 Rule 14 a replying affidavit needs to be filed 3 days before hearing. Counsel stated that they ought to have been served as they were on record. Counsel urged the court to exercise its discretion under Order 51 and set aside the orders and set down the application for hearing *de novo* or dismiss the application with costs.

Mr. Waziri and Mr. Ayieko supported the application. Mrs. Khayo for the plaintiff respondent opposed the application and entirely relied on the replying affidavit filed in court. She submitted that the application seeks to obstruct the cause of justice as the application dated 3 / 2 /2017 was served on all parties and an affidavit of service filed in court together with a hearing notice. She submitted that the 2<sup>nd</sup> defendant chose not to attend court and there is no reason advanced why the 2<sup>nd</sup> defendant did not respond in good time. She further submitted that this application is an afterthought as they brought this matter one month down the line and therefore sufficient cause has not been shown to warrant the court to set aside the order. She prayed that the application be dismissed.

Mr. Magare in response stated that service of 15 / 2/ 2017 is not disputed and that what is disputed is subsequent service which was not done. He also stated that there was no delay in filing this application and that the 2<sup>nd</sup> defendant is a county government. He prayed that the application be allowed.

### **Analysis and determination.**

The court has been asked to deal with two applications both seeking for setting aside and one seeking for enjoining interested parties to this suit. I will first of all deal with the issue of enjoining the interested parties before the setting aside one.

I have carefully considered the application by the proposed interested parties, the opposition thereto and the rival submissions by Counsel for the plaintiff. The main issue is that the Interested parties are stakeholders and were not consulted when this case was filed. That the plaintiffs did not file the necessary authority from the Kamobon village residents. Counsel submitted that the parties were negotiating at one point.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:-

*“2. The court may at any stage of the proceedings, either upon or without the application of either party, 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 defendant, 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.”*

It is clear from the above provision that the court can, upon satisfying itself that the person whose presence before the court may be necessary in order to enable or assist it effectually and completely determine all questions involved in a dispute, add such person as a party. The rules do not define who this person whose presence before the court is necessary is.

In the case of **Judicial Service Commission – Vs – Speaker of the National Assembly & Another (2013) eKLR**, the court defined an interested party as:

*From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.”*

Having said that the issue is as to whether the Interested parties have an identifiable stake or legal interest in this case. Counsel for the plaintiff submitted that they did not have a problem with the applicants being joined as plaintiffs but not as representatives of Kamobon village. It is also on record that the necessary authority was sought and filed in court 3/2/17 together with the suit. I find that the applicants have not met the threshold to be joined as interested parties but can be joined as plaintiffs if they so wish since they are also members of Kamobon village. They can do so within 14 days. On the issue of setting aside the court order dated 27/7/17 I am not convinced that applicant deserves the order.

On the second application by the 2<sup>nd</sup> defendant for setting aside the orders of the court dated 27/7/17 I notice that the 2<sup>nd</sup> defendant had been served with the application initially and an affidavit of service filed in court but subsequently there is no evidence on record that the 2<sup>nd</sup> defendant was served having entered appearance. On that ground the court exercises its discretion and sets aside the order granted on 27<sup>th</sup> July 2017 and orders that the application be heard de novo.

Costs of the application in the cause.

Dated and delivered at Eldoret on this 19<sup>th</sup> day of October, 2017.

**M. A. ODENY**

**JUDGE**