



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 13 OF 2013

HCC PET 2 OF 2011

MARIA SOTI EDUCATIONAL TRUST.....PETITIONER

VS

THE REGISTRAR OF TITLES & ANOTHER..... RESPONDENTS

(Application to be enjoined to proceedings as interested parties; suit being a constitutional petition; principles to be applied to joinder in a constitutional petition; applicants stating that they are representing the community; first applicant also stating that he is a member of the county assembly; whether membership of county assembly makes one interested in litigation; whether applicants have demonstrated a special interest; need for interested party to file application for joinder in good time; application disallowed as it has been filed too late in the day.)

RULING

1. The application before me is an application by Thomas Kipkorir Kigen and Daniel Chepkuyeng Kiptegucho, who have applied to be enjoined to these proceedings as interested parties. They have also asked that upon being allowed to join these proceedings, they be allowed to file submissions. They want to be so enjoined inter alia because they are members of Kabarak Clan and Kapkomol Clan respectively, which clans are located within Kaitany Location on which the suit land is situated. They have stated that they are community leaders who have been mandated by the community to voice out the community's interest and concerns in this suit. The 1st applicant has also elaborated that he is a member of the County Assembly representing Kaptarakwa ward. The two have contended that there are pertinent facts which have not been brought out in the papers filed in court and which facts will greatly assist the court in determining the issues before it. They have averred that no prejudice will be caused by any of the parties if the application is allowed.
2. The application has been opposed by the Petitioner and 3 persons who are collectively termed as the 3rd interested parties. Before I go to the gist of their opposition, I think it is necessary that I set out a little background to this suit.
3. This is a constitutional petition that was filed on 8 February 2011. The petitioner is a trust registered under the provisions of the Trustee (Perpetual Succession) Act, CAP 164, Laws of Kenya. Two respondents are named, the Registrar of Titles and the Attorney General. It is the case of the petitioner that the government lawfully excised about 161.5 Hectares out of Kaptagat Forest, and allocated it to the petitioner in the year 1994. The petitioner then became registered on 7 December 1995, as proprietor of the excised land which was registered as LR No. 19054. Through a notice in the Kenya Gazette of 26 November, 2010, the Registrar of Titles revoked the title of the petitioner on the ground that the original parcel of land was reserved for a public purpose and the allocation of the land to the petitioner was

therefore illegal and unconstitutional. That notice provoked the petitioner to file this constitutional petition. In a nutshell, it is the contention of the petitioner, that the said notice is illegal and that it is in violation of the rights of the petitioner to own property as provided for vide Article 40 of the Constitution and also against Article 50 of the Constitution which donates the right to a fair hearing.

4. On the suit property, is developed a school named Maria Soti Educational Centre, a girls boarding secondary school.

5. Before the hearing of the matter commenced, three applications by the Kenya Forest Service (KFS) ; The Kenya Anti-Corruption Commission (KACC), now the Ethics and Anti-Corruption Commission (EACC); and by jointly Maria Kesumo Kemboi, Biwott Tarus, and Everlyn Mwazo; were filed seeking joinder as interested parties. The latter three persons are parents to students in the school developed on the suit land. There was no objection by either petitioner or respondent to the joinder of the last three persons, and although I have seen no specific order allowing them to participate as interested parties, they have been participating as interested parties to this suit. The application by the KFS and the EACC was contested but through a ruling dated 11 April 2013, the court (Ngenye-Macharia J), allowed the application by the KFS and the EACC to join to this petition as interested parties. Pursuant to that ruling, EACC , on 25 October 2013, filed a Replying Affidavit to the petition. I have not seen any affidavit filed by the KFS and indeed by the respondents.

6. On 6 November 2011, I directed the parties to file written submissions to present their positions on the petition. I gave the petitioner 30 days to file its submissions, and the respondents and interested parties 30 days to reply. I fixed the matter for mention on 19 February 2014 to take any oral submissions. In the intervening period, on 3 December 2013, this application was filed seeking joinder of the two applicants as interested parties. The application was canvassed inter-partes on 30 January 2014.

7. Mr. J.K. Maritim for the applicants, argued that the two applicants need to be enjoined as they represent the two clans and the community in general. It was further stated that Thomas Kigen is a member of the County Assembly and therefore has an interest in the litigation since the suit land falls in his jurisdiction. The respondents, KFS and the EACC, did not oppose the application. However the 3rd interested parties and the petitioner opposed the application. Ms. L.J. Kipseei for the 3rd interested parties argued that the fact that the 4th interested party is a member of the County Assembly does not give him a right to enter into these proceedings, unless it is the position, that the whole of the ward which he represents is opposed to this petition. It was argued that if he is only representing the Kapkomol and the Kabarak clan, then what about the other clans in the ward. It was also contended that the 5th interested party is not described, and that his description that he is a community leader is not sufficient. It was also argued that the issues that the two want to present are not the issues in the petition. It was contended that the applicants have come into the proceedings too late in the day as the matter is already at an advanced stage and therefore they cannot benefit from their indolence.

8. Mr. Karanja Mbugua for the petitioner, aligned himself with the submissions of Ms. Kipseei. He added that Article 22 of the Constitution only envisages three parties, the petitioner, the respondent and a friend of the court. He submitted that the applicants are busy bodies and that allowing this application will open the floodgates for anyone to join this petition. He averred that the views of the applicants are well taken care of by the respondents, especially the Attorney General, who represents public interest. He contended that there is no special contribution that the applicants are going to make to this petition.

9. In reply, Mr. Maritim for the applicants, pointed out that though it has been argued that the Attorney General represents public interest, the Attorney General is not opposed to the application. He averred that the applicants are entitled to have their voice heard. He argued that the applicants have not been indolent and denied that allowing this application will open up the floodgates to other parties.

It is with the above background and rival arguments that I need to decide this application.

10. On a general scale, a person needs to demonstrate an interest before being joined in any litigation. One cannot be a proper interested party, if he cannot show any special interest in the litigation before

court. Litigation by its very nature inevitably has a widespread effect, even to persons who are not parties to the litigation. However, it does not necessarily mean that every person who may be affected by litigation, however minutely, must be allowed to participate in the litigation as an interested party. For example, a forest has effects probably to the whole world, but this does not mean that the whole world has a right to be present to any litigation involving that forest. Something more needs to be demonstrated by an applicant who seeks to be enjoined to the litigation as an interested party.

11. In the previous application by KFS and EACC, the court allowed their applications to be enjoined as interested parties as the court was of the view that KFS, as custodian of forests, will be affected by any order given in this petition. It was also of the view that EACC has demonstrated an interest as issues of ethics may arise in this petition.

12. The applicants herein aver that they have an interest as they represent the Kapkomol and Kabarak clans which are resident in the area where the suit land is situated, and further, that the 1st applicant is a Member of the County Assembly of Kaptarakwa ward where the suit land is situated. He has averred that he and the 2nd applicant have been given mandate by the local community to represent their interests over the suit land. He has stated that he is also a member of Kabarak Clan which is located in Kitany location, where the land is situated. There is annexed a list of persons being residents of Kitany Location authorizing the two applicants to represent the local community. On his part, the 2nd applicant, David Chepkiyeng Kiptugo, has deponed that he is a member of Kapkomol Clan and that he is also a community leader within the clan.

13. I need to be convinced that the two applicants have demonstrated an interest that goes beyond the general interest that any person may have. I do not think that the mere fact that one is a member of the County Assembly of an area, gives him locus to appear in any proceeding touching on land within his area. If that were the case, then any member of the County Assembly, can barge into any litigation touching on land or other issues within his area. I think this will be expanding the limits of being an interested party too far.

14. I however think that from the material before me, the local community has an interest in the litigation. It is not denied that the land in contention was originally forest land. It is expansive land covering 161 hectares, which is about 400 acres. This is not a small parcel of land. The applicants have stated that the indigenous community have two cultural shrines situated on the suit land and that the land also comprises of the traditional grazing site for the community. It has also been stated that the suit land hosts water sources and watering points for the community. I believe that it is the contention of the applicants that the indigenous population comprises of the two clans which they seek to represent. I think the indigenous community has a closely tied connection to the forest and to the suit land in issue. Mr. Karanja Mbugua argued that Article 22 of the Constitution cannot allow participation by the applicants to this petition. He contended that only a petitioner, respondent, and friend of the court can participate in proceedings of this nature. With respect, I do not agree and I do not think that that is the proper interpretation of Article 22 of the Constitution. Article 22 of the Constitution provides as follows :-

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its

members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum,

and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

15. Article 22 above sets out who can file a constitutional petition. It will be seen that under Article 22 (2) a person can file a petition representing others or in the public interest. If such persons can file a petition on behalf of others, then I think they are perfectly entitled to join the proceedings as interested parties on behalf of a group, or on behalf of the public interest, so long as they can show that the group or public they seek to represent have an interest in the proceedings. Article 22 (3) empowers the Chief Justice to make rules. The Chief Justice through the gazette notice of 28th June 2013, made the rules contemplated by Article 22 of the Constitution. Section 7 of the Rules provides as follows :-

7. (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

(2) A court may on its own motion join any interested party to the proceedings before it.

16. It cannot therefore be argued that there is no provision contemplated by the Constitution for joinder of persons as interested parties in constitutional proceedings. Moreover, one of the principles of the Constitution set out in Article 10 (2) (a) and (b) include participation of the people and inclusiveness.

17. That said, and as I stated earlier, one needs to demonstrate some special interest before being joined in any proceedings. In so far as constitutional litigation is concerned, the rules as to joinder are slightly less stringent than would be, in ordinary civil proceedings. This is because, the very nature of constitutional proceedings, generally involve issues of public interest and at times, it is prudent to enjoin parties who represent the public interest. I can do no better than quote the dictum of the Court of Appeal in the case of **Meme v Republic & Another (2004) 1 KLR 637** at p656 where it was stated as follows :-

" More fundamentally, however, was our concern that constitutional litigation which touches on the public interest in such a central governance issue as corruption in public office, should not be restricted in its scope as a private matter, but should instead be opened up to all relevant stakeholders. We consider the constitution as such a vital framework of governance that any litigation touching upon it, ought to involve any interested parties. So important is this principle that, in our view, the participation of interested parties in constitutional litigation should never be kept under the restrictions of technical rules."

18. Following the above dictum, the community would have been perfectly entitled to be enjoined to these proceedings. However, I have a concern as to the timing of the application. This application was filed on 3 December 2013. The petition itself was filed on 8 February 2011. The application is coming close to three years after the institution of these proceedings. Indeed it was filed after the petitioner had already been given a timetable to file its submissions in support of the petition. The parties already know what the pleadings are and what they need to submit on. The petitioner indeed filed its submissions on the 9 December 2013. To allow this application at this stage would change the entire character of the petition. The petitioner will now have to answer to new matters which were not in its contemplation.

19. I think any party who wants to be enjoined as interested party, needs to file its application fairly early in the proceedings. If the application comes too late, then the parties to the suit will be prejudiced and hardship will be occasioned to them. It will be unfair to the original parties to allow an application for joinder as an interested party, very late in the proceedings. The original parties stand the risk of being caught flat-footed without the opportunity to rebut what the interested parties want to raise. In any event every party deserves to have his/her case heard and determined expeditiously.

20. I would have allowed the application for joinder if it had been filed timeously. But I find that it has been filed too late in the day and I am inclined to disallow it.

21. For the above reasons, the application by the two applicants to be enjoined to this proceedings as interested parties is hereby disallowed. I however make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Ms L.J. Kipsei holding brief for Mr. Karanja Mbugua for the petitioner & also present for the 3rd interested party.

Mr. D.O. Wabwire present for the respondent.

Mrs C. Natome present for the 2nd interested party.

N/A for Ms Kalya & Co for 1st interested party.

Mr. J.N. Njuguna present for applicants (intended 4th & 5th interested parties)