



**Del Monte Kenya Limited v Githae & 3 others (Civil Appeal  
51 of 2020) [2024] KECA 370 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KECA 370 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 51 OF 2020  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
MARCH 22, 2024**

**BETWEEN**

**DEL MONTE KENYA LIMITED ..... APPELLANT**

**AND**

**EPHANTUS GITHAE ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MURANG'A ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling of the Environment and Land Court of  
Kenya at Murang'a (Kemei J.) dated 4th April, 2019 in Petition No. 6 of 2018)*

**JUDGMENT**

1. This is an appeal against the ruling of the Environment and Land Court (ELC) of Kenya at Murang'a (Kemei, J.), delivered on 4<sup>th</sup> April, 2019, where the ELC dismissed the appellant's application dated 3<sup>rd</sup> December, 2018. In the application, the appellant had sought to be enjoined to the petition as an interested party.
2. A brief background of the case is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a petition against the 3<sup>rd</sup> and 4<sup>th</sup> respondents, dated 5<sup>th</sup> November, 2018, alleging violation of their constitutional rights under Articles 10, 60, and 65 of *the Constitution*. The petition was supported by affidavits sworn by the 1<sup>st</sup> and 2<sup>nd</sup> respondents of the same date. It was the 1<sup>st</sup> and 2<sup>nd</sup> respondents' assertion that the appellant (Del Monte Limited) is the registered lessee of land parcels numbers 12157, 12157/2, 12157/3, 12157/4, 12157/5, 12158 (part) and 13289 (hereinafter 'suit properties'), within the Republic of Kenya, and currently enjoys exclusive occupation of the suit properties. The 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the appellant is a foreign company, with no local shareholding. They contended that the land-holding rights of the



appellant, being a non-citizen, were subject to the provisions of Article 65 of *the Constitution*, which provides that a non-citizen may hold land on the basis of a leasehold tenure only, and such lease cannot exceed ninety-nine years.

3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents pleaded that the appellant does not enjoy the right to automatic extension of the leases they hold, with respect to the suit properties. That as per the provisions of Article 68 of *the Constitution*, upon the expiry of a lease granted to a non-citizen, the revisionary interest vests upon the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents asserted that the appellant applied for renewal of the leases on 1<sup>st</sup> October, 2012, ten years prior to the expiry of the leases in the year 2022. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contended that the 3<sup>rd</sup> and 4<sup>th</sup> respondents, being possessed of the application for extension of lease by the appellant, are bound by the provisions of *the Constitution*, and have a duty to take into account the interests of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as well as other residents within the geographical jurisdiction of the 4<sup>th</sup> respondent, in considering the said application.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the 3<sup>rd</sup> and 4<sup>th</sup> respondents cannot proceed to consider the application by the appellants, without invoking the public participation principle, as stipulated by *the Constitution*. The 1<sup>st</sup> and 2<sup>nd</sup> respondents alleged that failure of the 3<sup>rd</sup> and 4<sup>th</sup> respondents to involve them in the process of making the decision of whether or not to renew the appellant's leases was in violation of Articles 60 and 65 of *the Constitution*. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were apprehensive that unless the 3<sup>rd</sup> and 4<sup>th</sup> respondents are compelled by the ELC to comply with the stated provisions of *the Constitution*, the 3<sup>rd</sup> and 4<sup>th</sup> respondents will not conduct the renewal of the appellant's leases in an open and transparent manner, and in full compliance of the constitutional guidelines, that accord all persons equitable access to land. In this regard, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought the following orders from the ELC:
  - i. A declaration that any further lease of suit properties herein be by public tender after the expiry of the term of the current leases and in compliance or accords with the principle enunciated under Article 60 of *the Constitution*.
  - ii. An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to advertise and invite public bids for the lease of the suit properties.
  - iii. The processing of any application for renewal of the leases over the suit properties aforementioned is null and void for want of a proper and meaningful public participation and threatens and/or violates Articles 10, 60 and 65 of *the Constitution*.
  - iv. Costs of the petition to be borne by the respondents.
5. Before the petition could be heard, the appellant filed an application dated 3<sup>rd</sup> December, 2018, seeking to be enjoined to the proceedings as an interested party. The application was supported by an affidavit sworn by Harry Odondi, on the same date. The appellant averred that it is the registered proprietor, by way of lease, of the suit properties listed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their petition. It contended that the leases to the suit properties were nearing their expiry date, and that it had lodged applications for renewal of the same. The appellant asserted that the respondents' petition sought conservatory orders aimed at stopping the renewal of the subject leases, and that the effect of such orders, if granted, would put the appellant out of business. As such, the appellant averred that it had a huge interest in the outcome of the petition filed before the ELC, and asked the Court to enjoin it as an interested party to the proceedings.
6. The appellant's application was opposed. The 2<sup>nd</sup> respondent, vide his replying affidavit dated 14<sup>th</sup> December, 2018, deponed that the appellant was merely the registered lessee of the suit properties, and



was not authorized by law to process renewal of leases, which formed the basis of the petition by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 2<sup>nd</sup> respondent deponed that the appellant is not a necessary party to the petition, as the orders prayed for in the said petition can only be executed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents, and thus the presence of the appellant in the proceedings was wholly unnecessary. The 2<sup>nd</sup> respondent deposed that the appellant stood to suffer no prejudice if its application was disallowed.

7. The 4<sup>th</sup> respondent filed a replying affidavit dated 2<sup>nd</sup> January, 2019, in opposition to the appellant's application. The 4<sup>th</sup> respondent deponed that it had received the appellant's application for renewal of leases, with respect to the suit properties, but that the process of evaluating the said applications was still in its infancy stage, and no substantive decision had been made by the 3<sup>rd</sup> and 4<sup>th</sup> respondents, regarding the said applications. The 4<sup>th</sup> respondent deponed that the process of renewal of the leases was exclusively within the mandate of the 3<sup>rd</sup> and 4<sup>th</sup> respondents, and that the applicant has not demonstrated any prejudice they have suffered in the ongoing process. They contend that the proposed inclusion of the appellant in the proceedings before the ELC was meant to provide the appellant with a forum to improperly influence the administrative decision-making duty of the 3<sup>rd</sup> and 4<sup>th</sup> respondents, with respect to the appellant's application for renewal of the leases to the suit properties. They deponed that since the appellant's application for renewal of the leases had not been rejected by the 3<sup>rd</sup> and 4<sup>th</sup> respondents, its application to be enjoined as an interested party was pre-emptive, and an abuse of the court process.
8. The application was argued orally before the learned Judge (Kemei, J.). After hearing the parties, the learned Judge, in a ruling delivered on 4<sup>th</sup> April, 2019, determined that the appellant failed to demonstrate its stake in the petition filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as its interest was that of a private nature, and that the appellant failed to demonstrate how it would assist the Court in determining the matter, with respect to the renewal process of the subject leases. The learned Judge further determined that the appellant failed to demonstrate any prejudice it stood to suffer if its application was disallowed. In the end, the learned Judge dismissed the appellant's application for lack of merit.
9. It is this decision of the learned trial Judge that provoked the instant appeal. The appellant proffered twenty-one (21) grounds of appeal challenging the said decision. In a nutshell, the appellant faulted the learned Judge for failing to appreciate the principles that govern applications for joinder of interested parties, and that such applications ought to be freely allowed. The appellant faulted the learned Judge for failing to appreciate that joinder of the appellant to the proceedings before the ELC would not have prejudiced any of the other parties, and dismissal of the application was in violation of its right to be heard, and right to property. The appellant was aggrieved that the learned Judge failed to appreciate the grave prejudice the appellant stood to suffer, if not enjoined as an interested party, as the petition touched on the renewal of leases held by the appellant. The appellant took issue with the fact that the ELC relied on irrelevant authorities, in making its determination, and considered factors which it ought not to have considered, and thereby exercising its discretion wrongly. The appellant urged us to allow its appeal, set aside the decision of the ELC, and in effect allow its application dated 3<sup>rd</sup> December, 2018.
10. The appeal was canvassed by way of written submissions. Counsel for the appellant, Mr. Thuo, submitted that Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("Mutunga Rules") define an interested party as a person or entity with an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings, or may not be directly involved in the litigation. Counsel cited two decisions of the apex court setting out the principles to be considered in an application for joinder of interested parties to proceedings, and faulted the learned Judge for relying on foreign case law, yet the decisions



of the apex court were binding on all courts below it. Mr. Thuo urged that the fact that the appellant is the registered proprietor of the suit properties means that the appellant has an identifiable stake and legal interest in the suit before the ELC. It was his submission that the outcome of the proceedings before the ELC will definitely affect the appellant's application for renewal of leases with respect to the suit properties. Counsel asserted that the appellant is apprehensive that its interest will not be well articulated unless it is represented in the said proceedings. He explained that the appellant, in its supporting affidavit, intimated that it intends to bring to the court's attention, the existence of other proceedings involving the same subject matter, which point to a possible abuse of the court process. He asserted that as at the date of filing the application for joinder, the 3<sup>rd</sup> and 4<sup>th</sup> respondents had not put in any responses to the petition, and have not done so to date. Mr. Thuo submitted that the appeal is merited, and asked us to allow the same as prayed.

11. None of the respondents, despite being duly served with the hearing notice, put in any written submissions in this appeal.

12. This being a first appeal, our duty was well stated in *Abok James Odera T/A A.J. Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates [2013]* eKLR, where this Court held:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

13. Guided by the foregoing principles, the record of appeal as well as the appellant's submissions, we are called upon to determine whether the ELC improperly exercised its discretion in dismissing the appellant's application, seeking to be enjoined to the proceedings before the ELC, as an interested party. The circumstances in which an appellate court can interfere with the exercise of judicial discretion is settled. In *Mbogo & Another v. Shah [1968]* E.A., the Court observed thus:

“...a Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...”

14. Turning to the instant appeal, Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Legal Notice No. 117 of 2013, cited by the appellant, defines an interested party as:

“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

15. Although the Civil Procedure Rules do not make an explicit mention of an interested party, Order 1 Rule 10 (2) of the Civil Procedure Rules does give the trial court power to enjoin a party to the suit, “whose presence before the Court may be necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit...”

16. In the case of *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others [2014]* eKLR the Supreme Court observed that “an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. 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.”

17. Similarly, the Supreme Court, in *Communications Commission of Kenya & 3 Others v. Royal Media Services Limited & 7 Others [2014]* eKLR cited with approval the case of *Meme v. Republic [2004] 1 EA 124*, where the High Court observed that a party could be enjoined in a matter:

- “i) because his presence will result in the complete settlement of all the questions involved in the proceedings;
  - i. to provide protection for the rights of a party who would otherwise be adversely affected in law;
  - ii. to prevent a likely course of proliferated litigation.”

18. The Supreme Court in *Muruatetu & Another v Republic; Kenya National Commission on Human Rights & 2 Others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR)* outlined the elements applicable, when a party seeks to be enjoined in proceedings as an interested party, as follows:

“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.”

19. In the instant case, the appellant has demonstrated that it is the registered proprietor of the suit parcels of land, that are at the heart of the dispute in the petition filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The appellant averred that it has carried out extensive developments on the suit parcels of land. These facts are not disputed. It is also not disputed that the 3<sup>rd</sup> and 4<sup>th</sup> respondents are in receipt of an application by the appellant, seeking to renew the subject leases, with respect to the suit parcels of land. It is clear to us that from the perusal of the orders sought by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, in their petition before the ELC, that if granted, the orders will affect the pending process of renewal of the appellant’s leases to the suit parcels of land. The appellant is therefore directly and legally interested in the decision of the Court with respect to the issues raised in the petition. It has a direct stake in the outcome of the petition.

20. The appellant further deponed, in its affidavit in support of the application, that once enjoined in the said proceedings, it will seek to raise the issue of the existence of other prior proceedings, involving the same subject matter, which point to a possible abuse of the court process. The appellant, in its written submissions before this Court listed the said proceedings as HCCC No. 398 of 2018, ELC



Murang'a Case No. 86 of 2018, ELC Murang'a Case No. 53 of 2018 and Petition No. 6 of 2018. These arguments are different from what the other parties have tabled before the ELC, and may aid the ELC in making its decision with respect to the petition.

21. From the foregoing, with respect, we find that the learned Judge wrongly exercised her discretion in making the finding that the appellant had failed to demonstrate that it has an identifiable stake in the petition that is proximate enough. We hold that the appellant undoubtedly had a right to be enjoined as an interested party to the petition.
22. It is our considered view that the appellant is entitled to be heard as an interested party, by virtue of it being the registered owner of the suit parcels of land. The appellant has shown the prejudice it is likely to suffer if it is not enjoined to the petition.

The appellant has also set out the argument it intends to make before the ELC, and the relevance thereof. We are of the considered view that there will be no prejudice in allowing the appellant to be given a chance to be heard and to ventilate its concerns, before the ELC pronounces itself on the matter.

23. Having held as above, we are satisfied that the appeal herein is merited. The ruling of the learned Judge dated 4<sup>th</sup> April, 2019, is hereby set aside, and substituted by an order of this Court allowing the appellant's application dated 3<sup>rd</sup> December, 2018. The appellant shall be enjoined in the petition as an interested party. The petition shall be mentioned before the ELC for further directions. The appellant will have costs of this appeal.

**DATED AND DELIVERED AT NYERI THIS 22<sup>ND</sup> DAY OF MARCH, 2024.**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

