



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM; NAMBUYE, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 303 OF 2019

BETWEEN

PROF. MUHAMMADSWAZURI.....PROPOSED INTERESTED PARTY/APPLICANT

AND

AFRISON EXPORT LIMITED.....1ST APPELLANT

HUELANDS LIMITED.....2ND APPELLANT

AND

THE NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF NAIROBI.....2ND INTERESTED PARTY

DIRECTOR OF SURVEYS.....3RD INTERESTED PARTY

CHIEF LAND REGISTRAR.....4TH INTERESTED PARTY

CABINET SECRETARY OF EDUCATION

SCIENCE AND TECHNOLOGY.....5TH INTERESTED PARTY

ATTORNEY GENERAL.....6TH INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION.....7TH INTERESTED PARTY

CABINET SECRETARY MINISTRY OF LANDS AND

PHYSICAL PLANNING.....8TH INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....9TH INTERESTED PARTY

PATRICK THOITHI KANYUIRA.....10TH INTERESTED PARTY

(Being an application for Orders that Professor Muhammad Swazuri be joined as an Interested Party

in the appeal from the judgment of the Environment and Land Court in Nairobi

(E. O. Obaga, K. Bor & Eboso, JJ.) dated 28th June, 2019

in

ELC Reference No. 1 of 2018)

RULING OF THE COURT

[1] The National Land Commission (Commission), who is the 1st interested party to the motion before us, filed a Reference before the Environment and Land Court (ELC) under Article 162(2)(b) of the Constitution and sections 127 and 128 of the Land Act, seeking determination of various issues, including the construction, validity and effect of title documents to LR. 7879/4 (*suit property*); whether the compulsory acquisition of the land comprising that title meets the constitutional threshold of public purpose; whether there has been loss of public funds; and to whom compensation is payable.

[2] At the time the Commission moved to court, Prof. Muhammad Swazuri (**applicant**) who was the Chairman of the Commission, swore an affidavit in support of the reference. In the reference, there were eleven parties who were cited as interested parties. These included Afrison Export Import Limited and Huelands Limited, who are the appellants in Civil Appeal No. 303 of 2019. A copy of title and certificate of postal search for the suit property showed that the two appellants were registered proprietors of the suit property. The reference was precipitated by events that were triggered by complaints made by the two appellants to the Commission, regarding historical injustices in the construction of Ruaraka High School and Drive-In Primary School on a portion of the suit property, without any compensation having been paid to them. As a result the Commission commenced a compulsory acquisition process for the portion on which the two schools were constructed. The portion of land was valued at Kshs. 3,269,040,600 for purposes of compulsory acquisition and part payment of Kshs. 1,500,000,000 was made to the appellants. Following complaints questioning the propriety of the compensation, investigations were initiated on the acquisition of the suit property. As the compulsory acquisition process and the investigations involved the Commission and nine others who were also cited as interested parties in the reference, they have now all been cited as interested parties to the applicant's motion.

[3] The Commission's reference was heard by a three-judge bench (**Obaga, Bor & Eboso, JJ**). In the judgment delivered on 28th June, 2019 the learned Judges found *inter alia*, that Ruaraka High School and Drive-In Primary School were already established in the portion of the suit property which was being acquired by the Commission; that the portion on which the two schools sit had already been surrendered for public purposes and reserved for that purpose; that the compulsory acquisition of the portion in which the two schools sit did not meet the threshold of public purpose and should not have been undertaken; and that the Commission misled the Ministry of Education into undertaking the compulsory acquisition exercise which was totally unnecessary, leading to loss of public funds. In addition, that a search on any title issued by the Land's office should be conclusive evidence of proprietorship, but may not necessarily be a true reflection of the correct position. In the case of the suit property, there were two search certificates with contradictory results; that since the searches are generated by the Registrar of Tittles and the Commission works closely with the Ministry of Land, the Commission should have gone a step further to ascertain the true status of the title to the suit property. Such due diligence included the final survey and determination of the acreage, boundaries and ownership of the suit property before the compulsory acquisition.

[4] The appellants who were dissatisfied with the judgment in the ELC reference, filed Civil Appeal No. 303 of 2019 before this Court, seeking to have the judgment set aside and orders made, that the title LR. 7879/4 is an indefeasible title of private land registered in their names, and that portions measuring 2.74 and 2.737 hectares of the suit property acquired by Drive-In Primary School and Ruaraka High School respectively, were not surrendered to the Government in September 1982; that there has been no loss of public funds as a result of the payment made by the Commission as partial compensation of Kshs. 1.5 billion, and that the Commission should pay the appellants the balance of compensation in the sum of Kshs. 1,769,040,600. The Commission and the other nine parties who were named as interested parties in the ELC reference are the respondents to the appeal.

[5] Prof. Muhammed Swazuri who has since been replaced as the Chairman of the Commission has now moved this Court by way of notice of motion dated 21st January, 2020 brought under sections 3A & 3B of the Appellate Jurisdiction Act, Rule 42 of the Court of Appeal Rules 2010, and Order 1 Rule 10(2) of the Civil Procedure Rules, seeking to be joined as an interested party in the appeal; and leave granted for him to file submissions and/or a response to the appeal. Due to the Covid-19 pandemic the hearing of the motion proceeded by way of written submissions. However, the Commission did not file any reply or submissions to the applicant's motion. Nor did the appellants or the 10th respondent who is the official receiver and liquidator of Credit Finance Limited which claims to have had a legal charge over the suit property, file any reply or submissions to the motion.

[6] The applicant contends that having been the Chairman of the Commission when the decision to compensate the appellants was made, and the Commission having been adversely mentioned in the judgment of the Superior Court, he is in a position to assist the Court with material facts concerning the compensation. Furthermore, that the Director of Public Prosecution is likely to initiate investigations and criminal proceedings against him and other Commissioners for the acts under inquiry, and it is therefore important that he participates in the appeal to enable him respond to any adverse claims made against him.

[7] The County Government of Nairobi, which is the 2nd interested party filed grounds of opposition contending that the applicant's motion offends order 1 rule 10(2) of the Civil Procedure Rules, and the law laid down by the Supreme Court in **Francis Karioko Muruatetu & Anor vs Republic & 5 Others [2016] eKLR (Muruatetu decision)**; and that the application was an abuse of the Court process. In its submissions, the 2nd interested party argued that the applicant had not met the threshold to be joined as an interested party.

[8] The 2nd interested party identified the threshold as laid down by the Supreme Court in the **Muruatetu decision** as follows:

“Enjoyment 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.”

[9] It was submitted that the applicant had not demonstrated any personal interest or stake in the outcome of the appeal, as the reference was filed by an independent commission which was not subject to the control or direction of any person or authority. Secondly, that the applicant had not demonstrated any prejudice that he would suffer as a result of the outcome of the appeal, but was merely speculating about possible action against him by the Director of Public Prosecutions (DPP). It was submitted that under Article 157(10) and (11) of the Constitution, the DPP could not act under the control or direction of any person in initiating criminal proceedings but had the obligation to take regard of public interest, the interest of the administration of justice and prevention of abuse of the legal process. Finally, it was submitted that the applicant did not put forward any submissions that would be relied on in presenting his case, and the mere reference to his understanding of the material facts was not sufficient. That in any case, any new information should have been given at the ELC during his tenure as Chairman of the Commission.

[10] The 3rd, 4th, 5th, 6th and 8th interested parties who were represented by the Attorney General filed written submissions opposing the applicant’s motion. In addition to the **Muruatetu decision**, these applicants relied on the Supreme Court decision in **Trusted Society of Human Rights Alliance vs Mumo Matemu [2014] eKLR (Mumo Matemu decision)**. It was submitted that the applicant did not meet the required threshold, as he swore the affidavit in his capacity as Chairman of the Commission, and did not therefore have a clear identifiable personal interest in the matter. That the applicant was acting in his official capacity, and since the Commission is party to the appeal, it is in a position to protect and defend its interest using its current commissioners.

[11] As regards any possible prejudice that the applicant would suffer in case of non-joinder, it was submitted that the applicant’s apprehension of the likelihood of criminal proceedings being instituted against him, was not supported by any evidence or action on the part of the DPP or EACC, and that in any case, even if criminal proceedings were instituted against him, there were sufficient safeguards including the Constitution that would ensure a fair hearing. It was contended that the applicant had not demonstrated how the ends of justice would be served by joining him in the appeal. The Court was therefore urged to disallow the application.

[12] EACC, who was the 7th Interested Party, also opposed the applicant’s motion, and similarly submitted that the applicant had not demonstrated a personal stake in the appeal, or any prejudice that he is likely to suffer. Further, that the applicant had no personal cause in the reference which was before the ELC; that having ceased to be chair, the applicant had no relationship with the Commission, nor did he have any authority over the Commission, that the applicant could not therefore instruct or advise the Commission and that he had not demonstrated what value he would add to the appeal.

[13] The DPP who was the 9th interested party also opposed the applicant’s motion, contending that the applicant’s motion was a legal misadventure intended at personal aggrandizement with no interest in pursuing the justice of the case; that the Commission was an independent Commission and being properly constituted, it had no reason nor was it bound to accept the advice or opinion of a former chairman. In addition, that the applicant did not have exclusive special knowledge on how statutory mandated compensation is done, and there was no logical assistance that he could present to the Court at this stage. The DPP dismissed the applicant’s apprehension on criminal proceedings, maintaining that he was obligated to perform his constitutional duty under Article 157 of the Constitution. It was reiterated that the applicant had not met the threshold to be joined in the appeal and the Court was urged to dismiss the applicant’s motion.

[14] We have considered the applicant’s motion, together with the responses and submissions filed by the interested parties. As already stated, the applicant in his motion is seeking to be joined as an interested party. The application was brought under the provisions of Sections 3A and 3B of the Appellate Jurisdiction Act, Order 1 Rule 10(2) of the Civil Procedure Rules, and Rule 42 of the Court of Appeal Rules. Order I Rule 10(2) gives the Court before which a suit has been instituted the power to substitute or add parties to a suit at any stage of the proceedings. That rule deals with the process in the trial court where the suit is instituted, and not the process in this Court as the Civil Procedure Rules are rules applicable in the High Court and the Magistrates Court and not the Court of Appeal, whose procedure is governed by the Court of Appeal Rules. Rule 42 of the Court of Appeal Rules is not of much help as it only provides for the format in which an application in the Court of Appeal should be brought.

[15] Unlike the Supreme Court that has Rule 25 of the Supreme Court Rules 2012, which provides for joinder of interested parties, the Court of Appeal Rules do not have a specific provision that provides for joinder of an interested party. There is only a provision under Rule 77 of the Court of Appeal Rules that provides for service of notice of appeal on persons directly affected by the appeal. The applicant was not a party to the reference in the ELC nor is he directly affected by the appeal. Rule 77 of the Court of Appeal Rules would therefore not be applicable to him. This means that essentially the applicant is invoking this Court’s inherent powers under Rule 1(2) of the Courts Rules and the overriding objective principle enshrined him applicant joined in the appeal as an interested party.

[16] In **Communications Commission of Kenya & 4 others v Royal Media Services and 7 others [2014]** the Supreme Court in addressing an application by a party seeking *inter alia*, to be joined as an interested party in an appeal before it, followed the **Mumo Matemu decision**, where it defined an interested party as follows:

“An Interested Party is one who has a stake in the proceedings, though he or she was not a 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 herself appears in the proceedings, and champions his or her cause....”

[17] As rightfully submitted by the respondents, the Supreme Court at paragraph 37 of the **Muruatetu decision** (reproduced at paragraph 8

of this ruling) went further and gave clear guidelines on when a person may be joined in proceedings before it, as an interested party. Such circumstances must include the personal stake or interest that the applicant has in the matter, the prejudice he is likely to face if not joined in the proceedings, and the value that the applicant's participation is likely to add to the resolution of the proceedings.

[18] In exercising its inherent powers under Rule 1 (2) of the Rules of the Court and the overriding objective principle in sections 3A and 3B of the Appellate Jurisdiction Act, in addressing the applicant's motion, this Court exercises a similar discretion as the Supreme Court when determining an application under Rule 25 of the Supreme Court Rules, 2012. The Court is in the same position as the Supreme Court where a party seeks to be joined in the proceedings in the Supreme Court in a matter which originated from another court. Therefore, the Supreme Court decisions in addressing the issue of joinder of an interested party are instructive, and the issue that we must address is whether the applicant has met the threshold set out in the Muruatetu decision.

[19] The applicant claims that his presence will give this Court perspective on the process of compensation of the appellants and how the Commission under his tenure undertook the compulsory acquisition. These were matters that were germane before the ELC. The Commission under the chairmanship of the applicant is the one which moved the ELC under sections 127 and 128 of the Land Act, for determination of questions relating to the validity of the title to the suit property and issues pertaining to the process of land acquisition. This means that the applicant had the opportunity to place, or ensure that all the necessary information was placed before the ELC. The reference was not a personal issue affecting the applicant, but an official issue relating to the Commission. The applicant may no longer be holding the position of chairman, but the official records and information should be available with the Commission, and can be availed through the Commission

[20] Moreover, the Commission is an independent body operating distinctly from the applicant. The applicant cannot therefore say that he is in a better position to give out the facts in person and on behalf of the Commission, since he only participated in the proceedings before the trial court in his capacity as chairman of the Commission, and not in his own personal capacity. The facts that the applicant claims he can bring before the Court must be facts that are well known to the Commission which is well represented in the appeal.

[21] Furthermore, at this appellate stage, this Court being a court of record, adduction of new evidence is restricted. The Court can only allow additional evidence under Rule 29 (1)(b) of the Court's Rules where there is sufficient reason. The applicant has not given any reason as to why he did not avail the evidence in the trial court, nor has he convinced the Court of the relevance of the evidence intended to be adduced, so as to justify the need for his intervention at this late stage. We are therefore not satisfied that the participation of the applicant in the appeal will add any value.

[22] In addition, the applicant has not demonstrated what prejudice he stands to suffer if he is not joined in the appeal. A bare assertion without any evidence that the DPP is likely to use this Court's decision to prosecute him is not enough. The ELC decision was delivered more than a year ago, and no evidence has been given of any adverse action taken by the DPP against the applicant. In any case, if the DPP were to initiate proceedings, there are sufficient constitutional safeguards in the criminal process that would ensure a fair process to the applicant.

[23] We come to the conclusion that the applicant has not satisfied this Court that his participation in the proceedings will help further the overriding objective of the just determination of the proceedings, or timely disposal of the proceedings as provided for under sections 3A and 3B of the Appellate Jurisdiction Act. Nor has the applicant demonstrated that he has a personal direct interest in the appeal, or that his participation would add any value to these proceedings.

[24] Accordingly, we decline to exercise our discretion in the applicant's favour and dismiss his motion. In the circumstances of this case we do not find it appropriate to make any orders as to costs.

Dated and delivered at Nairobi this 4th day of December, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR