



Ogogoh & 4 others v Dahir & 6 others; Kenya Forest Services (Interested Party) (Environment & Land Petition E015 of 2023) [2024] KEELC 5386 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E015 OF 2023**

**SM KIBUNJA, J
JULY 24, 2024**

BETWEEN

**JULIUS OGOGOH, COMMISSIONER FOR HUMAN RIGHTS AND JUSTICE 1ST PETITIONER
ACTIVE ENVIRONMENT TEAM 2ND PETITIONER
SHERIA NA HAKI HUMAN RIGHTS INSTITUTE 3RD PETITIONER
PORTREITZ BEACH MANAGEMENT UNITS NETWORKS .. 4TH PETITIONER
UJAMAA CENTRE 5TH PETITIONER**

AND

**SAHAL AHMED DAHIR 1ST RESPONDENT
HAHIA TRANSPORTERS LIMITED 2ND RESPONDENT
CHIEF LAND REGISTRAR, KENYA 3RD RESPONDENT
DIRECTOR OF SURVEYS 4TH RESPONDENT
THE NATIONAL LAND COMMISSION 5TH RESPONDENT
CABINET SECRETARY, MINISTRY OF LAND, PLANNING AND HOUSING 6TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 7TH RESPONDENT**

AND

THE KENYA FOREST SERVICES INTERESTED PARTY

(PETITIONERS' NOTICE OF MOTION DATED 4TH DECEMBER 2023 & 2ND RESPONDENT'S NOTICE OF MOTION DATED THE 6TH MARCH 2024)



RULING

[Petitioners' notice of motion dated 4th December 2023 & 2nd respondent's notice of motion dated the 6th March 2024]

1. The petitioners moved the court through the notice of motion dated 4th December 2023 seeking for inter alia “an order restraining the 1st respondent from developing, disposing off, transferring, wasting, constructing building and fixtures or evicting members of the 4th petitioner therefrom and any dealing with any manner whatsoever with the suit parcel of land comprising of title No. CR70862, Portreitz-Mombasa”, the suit property. The application is premised on the thirteen (13) grounds on its face marked (a) to (m) respectively, and supported by the affidavit of Julius Ogotoh, Executive Director of 1st Petitioner, sworn on the 4th December 2023. It is the petitioners' case inter alia that the suit property is public land as it falls within the 60 metres high and lower water mark of the Indian Ocean, and cannot be alienated; that the said land forms part of the gazetted mangrove forest, and is used as fish landing site; that beach management units have been registered, gazetted and mandated to conserve and protect the area where the suit property is situated to ensure there is no disturbance and or destruction of the ecosystem; that the 1st respondent purportedly illegally and wrongfully acquired the said parcel, and the 2nd respondent's activities thereon of introducing massive development, construction and displacing the 4th petitioner's members, who have been responsible for its conservation, will greatly disturb and destroy the existing ecosystem; that the 2nd respondent's activities will render the 4th petitioner members, being fishermen jobless, and create animosity with the public; that the efforts of the national and county governments to make the 2nd respondent cease its hostilities against the 4th petitioner members has been unsuccessful and hence this petition.
2. Kahia Transporters Limited, the 2nd respondent, filed the notice of motion dated the 6th March 2024, seeking for inter alia, consolidation of this petition with ELC No. E012 of 2023; Africa Gas and Oil Limited versus Kahia Transporters Limited & 6 Others, exparte County Government of Mombasa & 2 Others, and ELC No. E004 of 2023; Miritini Freeport Limited versus Kahia Transporters Limited & 6 Others, exparte County Government of Mombasa & 2 Others. The application is based on the nine (9) grounds on its face marked (1) to (9) respectively, and supported by the undated affidavit of Osman Ahmed Kahia, a director. It is the 2nd respondent's case inter alia that the plaintiffs in the two other suits are proprietors of adjacent parcels of land, and have had several legal disputes traced back to the compulsory acquisition of part of their land by Kenya Railways Corporation, and Kenya National Highways Authorities, for projects that have since been completed; that the two plaintiffs and community based organizations have invented ways of troubling the 2nd respondent by questioning the legality of its parcel of land L.R. No. MV/V1/5169; that the plaintiffs have installed commercial pipes with the help of the interested party, through the 2nd respondent's land that they use to pump petroleum products to their properties; that the other two other matters have been consolidated for they raised similar facts over the same subject matter; that this petition raises common questions of law and facts, seeks similar reliefs, and is over the same transactions as the other two suits, and should be consolidated to avoid the likelihood of conflicting decisions.
3. On the 14th December 2023, counsel for the 3rd, 4th, 6th and 7th respondents indicated they will not be participating in the hearing of the petitioners' application dated 4th December 2023 as it had not sought for any orders against her clients. The counsel also indicated that she will be seeking to have the Kenya Forest Services joined as an interested party, as it was also a party in ELC E004 of 2023 and E012 of 2023, which were before ELC 2 and ELC 3 respectively. The court heard the counsel present on



- the various matters raised and inter alia granted the Attorney General leave to have the Kenya Forest Services joined in the petition as an interested party, and interim conservatory order in terms of prayer 2. The court also directed parties to file and exchange their replies and submissions, and gave liberty to file and serve consolidation application.
4. The 2nd respondent's application is opposed by the "3rd, 4th, 6th, and 7th, respondents" through the undated grounds of opposition filed through the Attorney General, raising five grounds summarized as follows:
 - a. The application is bad in law and in fact as it seeks to consolidate ordinary suits, which are over private ownership, with a petition, that is over constitutional rights.
 - b. That the application is bad in law and in fact as the two other suits and this petition have no common issues of law and fact and reliefs sought are different.
 - c. The application is frivolous, vexatious, has not met the principles of consolidation of suits and should be dismissed.
 5. The petitioners opposed the 2nd respondent's application through the replying affidavit of Julius Ogogoh, sworn on the 8th April 2024, inter alia deposing that it was made in bad faith, is res judicata as a similar one was dismissed on 14th December 2023, and is aimed at delaying their application dated 4th December 2023; that the status of the two other suits has not been disclosed, and there is no similarities between them and this petition. The petitioners also filed their submissions dated the 28th March 2024 and 29th April 2024, on the applications dated 4th December 2023 and 6th March 2024 respectively, which the court has considered.
 6. The 2nd respondent filed the submissions dated the 29th April 2024, on their application dated the 6th March 2024. During the mention of the 7th May 2024, the counsel for the petitioners applied to have the 2nd respondent's submissions filed the day before, and outside the time earlier given, to be expunged from the record. The court reserved its determination to the time of ruling on the two applications that was fixed for 24th July 2024. While preparing the ruling, the court perused the CTS and noted the 2nd respondent has since filed a replying affidavit sworn on the 10th June 2024 and submission dated the 12th June 2024, both in respect of the petitioners' application dated the 4th December 2023, and will be addressing them further shortly here below.
 7. The following are the issues for the determinations by the court on the petitioners' application dated the 4th December 2023 and that of the 2nd respondent dated 6th March 2024:
 - a. Whether the replying papers and submissions filed outside the time given and without leave should be struck out, and expunged from the record.
 - b. Whether the petitioners have met the threshold for the injunction order sought to issue at this interlocutory stage.
 - c. Whether the 2nd respondent has made a reasonable case for consolidation of the two other suits and this petition.
 - d. Who pays the costs in each of the two applications?
 8. The court has carefully considered the grounds on each of the two applications and grounds of opposition, affidavit evidence, submissions filed by the learned counsel, superior courts decisions cited thereon and come to the following determinations:



- a. Starting with the fate of the submissions dated the 29th April 2024, replying affidavit sworn on 10th June 2024 and submissions dated the 12th June 2024, that were filed by the 2nd defendant outside the time given by the court, I wish to remind the parties, and indeed counsel, that the filing of affidavits and submissions in court proceedings is governed by procedural rules and judicial decisions that aim to ensure fairness, while maintaining the efficiency of the judicial process. The filing of affidavits and submissions within prescribed timelines is essential to the orderly conduct of litigation and to ensure that all parties have a fair opportunity to respond. While adherence to timelines is crucial, the court retains discretion to extend time limits for filing documents under appropriate circumstances, as provided for under the applicable rules. The overriding concern to the court, while dealing with this issue, is whether the late filing prejudices the other parties' ability to respond or causes undue delay in the proceedings.
- b. On the 7th May 2024, Mr. Towett, learned counsel for the 2nd respondent submitted that their application dated the 6th March 2024 should be heard and determined first, before that of the petitioners' dated 4th December 2023. That it is not good use of judicial time to require his client to respond to the petitioners' application, as it will be required to again file a fresh reply in the consolidated suits, if its consolidation application is granted. That their submissions dated 29th April 2024 was filed on 6th May 2024 because their firm's managing director was away on medical issues. That while that explanation may otherwise look plausible and acceptable, the court wishes to express its displeasure that the learned counsel appear to have already made a decision on behalf of the court, that his client's application must be heard and determined first, despite having been filed months after that of the petitioners. It is also important to consider the timelines given on the 11th April 2024 on filing and exchanging submissions on their application dated the 6th March 2024, that was filed under certificate. The 2nd respondent had been given seven days to file and serve their submissions, and thereafter, the petitioners were to file and serve theirs in seven days after service. That when the 2nd respondent filed their submissions on the 6th May 2024, when the petitioners had already filed and served theirs, it means the petitioners would not have the opportunity to respond to its contents. This definitely amounts to exposing the petitioners to prejudice, and that submission is hereby struck out.
- c. As for the 2nd respondents' replying affidavit sworn on the 10th June 2024, in response to the petitioners application dated the 4th December 2023, it is clear it was filed after the last mention of 7th May 2024, when the ruling date of 24th July was fixed. No leave to file it outside time had been sought and obtained prior to its filing or after. Obviously, the petitioners will get no opportunity to respond to the depositions thereon, and is therefore prejudicial. The same goes to the submissions dated the 12th June 2024, and both are hereby struck out, on the court's own motion.
- d. That no replying papers had been filed in opposition to the petitioners' notice of motion for injunction order dated 4th December 2023 by the date of last mention, 7th May 2024. The 2nd respondent's replying affidavit sworn on the 10th June 2024, that was filed more than a month after date for ruling was fixed, has been struck out in (c) above. The application is therefore left unopposed. Even then, the court has to satisfy itself that the petitioners have met the threshold for the order to be issued. Already the court had issued a conservatory order in terms of prayer 2 that has been in force since 14th December 2023. From the unchallenged depositions in the supporting affidavit of the Julius Ogogoh, the court is satisfied that unless an injunction is issued as sought, the 4th respondents membership's livelihood that reportedly depends on



fishing and using the suit property for landing their catches, would be prejudiced. It is only fair and just that the injunction order sought, be issued pending the hearing and determination of the petition. Due to the nature of the claim and contestation herein, the court is of the considered view that the costs of the application abide the outcome of the petition.

- e. In respect of the 2nd respondent's consolidation application dated the 6th March 2024, it is apparent it has been opposed by the 3rd, 4th, 6th & 7th respondents through their grounds of opposition, and by the petitioners through the replying affidavit sworn on 8th April 2024, summarized in (4) and (5) above respectively. It is not disputed, that ELC No. E004 of 2023 and E012 of 2023 were unlike this petition commenced as civil suits. It has also not been disputed that the suit property and the respondents in this petition are the same as in those two other suits. That though from the affidavit evidence the application to consolidate appears reasonable, I have noted the parties have not addressed the court on the status in the two other suits that have been reportedly consolidated. I therefore find it could be better to instead direct this petition to be transferred to the court before which the two suits are pending for further directions. The costs in the application will also abide the outcome of the petition.
9. The determinations above leads the court to find and order as follows in respect of the two applications:
- a. That injunction order in terms of prayer (3) of the petitioners' notice of motion dated the 4th December 2023, is hereby granted.
 - b. That in respect of the 2nd respondent' notice of motion dated the 6th March 2024, for consolidation, the court finds it has no merit is dismissed.
 - c. The court on its own motion however directs that this this petition be placed before the court dealing with ELC NO. E004 of 2023 and E012 of 2023, for further directions and hearing.
 - d. That the costs in the two applications to abide the outcome of the petition.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 24TH DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Petitioners : Mr. Kamwendwa

Respondents Mr Towett for 2nd Respondent

M/s Rukiya for 3rd, 4th, 6th & 7th Respondents

Ms Rukiya.

Leakey – Court Assistant.

