



**Wendano Matuu Company Limited v Masaku & 7 others (Environment & Land
Petition E002 of 2023) [2024] KEELC 6975 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6975 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION E002 OF 2023
CA OCHIENG, J
OCTOBER 23, 2024**

BETWEEN

WENDANO MATUU COMPANY LIMITED PETITIONER

AND

CYRUS MUTUNGA MASAKU 1ST RESPONDENT

MUISYO MUTUA 2ND RESPONDENT

JAMES MWOVI MWANGANGI 3RD RESPONDENT

JULIUS MUTISYA MUTUKU 4TH RESPONDENT

PATRICK MUANGE MBUVI 5TH RESPONDENT

MARTIN MUTHUSI 6TH RESPONDENT

CHIEF MAGISTRATE COURT, KANGUNDO 7TH RESPONDENT

THE HON ATTORNEY GENERAL 8TH RESPONDENT

JUDGMENT

1. The Petition herein revolves around a member of a company filing separate cases in different courts touching on the same subject matter alleging bias of a judicial officer. In this instance, the Petitioner filed the instant Petition contemporaneously with a Notice of Motion Application dated the 4th September, 2023. The Court issued directions on 5th September, 2023, 11th October, 2023 and 28th November, 2023 respectively on canvassing the Application wherein the Petitioner was supposed to file its written submissions, since its Counsel had confirmed receipt of the Replying Affidavit. On 27th February, 2024, the Petitioner's Counsel had not filed its written submissions and sought leave of seven (7) days to do so. By that time the Respondents had already filed written submissions. On the 23rd May, 2024, the matter was mentioned and fixed for a further mention on the 2nd October, 2024. On



2nd October, 2024, when the matter was mentioned, the Petitioner did not attend court, was yet to file written submissions and the Respondents sought for the Petition to be dismissed. However, the Court declined to do so and fixed a Judgment date for the main Petition on 23rd October, 2024.

Pleadings

2. Through a Petition dated the 4th September, 2023, the Petitioner prays for Judgment to be entered against the Respondents jointly and severally for: -
 - a. A declaration that the 7th Respondent is unable to guarantee a fair hearing to the Petitioner that is guaranteed and protected under Article 50(1) of *the Constitution*, whether in KANGUNDO CMCC NO. E01 OF 2023, or in MACHAKOS CM ELC NO. E065 OF 2023.
 - b. An order be and is hereby given in exercise of this Court's supervisory jurisdiction under Article 165(6) of *the Constitution* to call for the record and court file in KANGUNDO CMCC NO. E01 OF 2023 and MACHAKOS CM ELC NO. E065 OF 2023, which are hereby transferred for hearing and determination before the Machakos Environment and Land Court.
 - c. The Chief Magistrate's Court Machakos, in MACHAKOS CM ELC NO. E065 OF 2023, shall stay its proceedings pending any further directions of this Court pertaining to those two cases, KANGUNDO CMCC NO. E01 OF 2023 and MACHAKOS CM ELC NO. E065 OF 2023.
 - d. Costs.
3. The Petition is supported by the Affidavit of STEPHEN NDAMBUKI MULI.
4. The 1st to 6th Respondents opposed the instant Petition by filing a Replying Affidavit sworn by CYRUS MUTUNGA MASAKU where they explained that the Petitioner through one Stephen Ndambuki, alleging to be its Director filed a suit at Kangundo Law Courts being ELC No. E01 of 2023 together with an Application dated the 4th April, 2023 and obtained ex parte interim orders through misrepresentation. They aver that the Petitioner did not prosecute its own Application as ordered by the Court and on 8th June, 2023, the ex parte orders were discharged. They contend that the Applicant then filed an Application dated the 25th July, 2023 to reinstate the interim orders and the Court gave directions on the said Application and fixed a mention date on 15th August, 2023 to confirm compliance. Further, while the said suit was pending, the Applicant filed another suit in Machakos Court being ELC No. E65 of 2023 together with an Application dated the 7th August, 2023 and obtained interim orders. They state that the Petitioner further filed contempt proceedings against some of the parties herein and the matter is still pending at Kangundo Court even after he obtained new Orders in Machakos Court. Further, upon filing of similar proceedings in multiple courts, the Petitioner filed an Application in the High Court at Machakos. The High Court directed that the files be put together and the matter be mentioned on 21st September, 2023.
5. They state that the allegations at paragraphs 6 and 7 of the Petition are untrue and made in bad faith as the Petitioner was heard and the orders made were lawful and within the powers of the Court. Further, the Petitioner has not annexed the alleged complaint lodged against the 7th Respondent for the court to examine it and they are not aware of such complaint. They argue that the contents of paragraph 11 of the Petition are speculative and amount to forum shopping. Further, that the Petitioner's contempt application dated the 9th August, 2023 does not contain a prayer for recusal as claimed. They reiterate that the only motivation for this suit is to continue using interim orders obtained fraudulently on material non-disclosure and in clear breach of the rules of procedure. They insist that there is no constitutional violation as alleged by the Petitioner, who is in blatant violation of the law. They reaffirm



that the Petitioner is crying foul because the interim orders were declined, but it was happy when it was enjoying the same. They deny that they have destroyed the Petitioner's property and state that they are bona fide members of the Petitioner and have an interest over the property and seek to protect it. Further, that the subject in dispute is in Matungulu Sub County and within the territorial jurisdiction of the Kangundo Chief Magistrate's Court. They explain that the instant suit seeks to tarnish the reputation of the court. They seek for the Machakos Chief Magistrate ELC 065 of 2023 to be transferred and consolidated with Kangundo ELC E01 of 2023 which is still pending.

6. On the 2nd October, 2024, the 7th and 8th Respondents Counsel said they were relying on their Grounds of Opposition dated the 30th November, 2023 to oppose the instant Petition. They contended that the Petition is bad in law, incompetent and incurably defective. They argued that the same had been brought in bad faith and a waste of court's judicious time. Further, that it is misconceived, misleading and is based on half-truths and selected facts. They reiterated that the Application herein had been overtaken by events therefore not capable of being entertained by this Honourable Court. Further, that the said Application herein is maliciously orchestrated to circumvent due processes of the court and provisions of the *Civil Procedure Act* among other statutes and lacks merit.
7. The Petition was canvassed by way of written submissions however it is only the 1st to 6th Respondents that filed written submissions, which the 7th and 8th Respondents sought to rely on. The Petitioner failed to file written submissions.

Submissions

8. The 1st to 6th Respondents in their submissions relied on the averments in their Replying Affidavit and contended that this Petition is sub judice as there are two other pending cases in Machakos and Kangundo respectively. They argued that the Petition amounts to an abuse of the court process. Further, that the Petition is based on mere allegations and sought to challenge impartiality of a judicial officer. They reaffirmed that the Petitioner seeks to forestall court proceedings by engaging in forum shopping of orders in different courts and since Machakos HCCC No. 2 of 2014 which is touching on the issue of different directors is part-heard and near conclusion, the Petitioner is restless and seeks to frustrate the operations of Wendano Matuu Company Ltd. To support their averments, they relied on Articles 19 (3) (a) of *the Constitution* and the following decisions: Kenya Bankers Association V Kenya Revenue Authority (2019) eKLR; Mbuvi Gedion Mike Sonko v Director of Public Prosecution & 4 Others (2021) eKLR; *Ojiambo & Co. Advocates v Wamae Allen Advocates Civil Case No. E 169 of 2019*; *Andrew Alex Wanyandeh v the Attorney General & Kenya Railway Corporation – Nairobi Milimani HCCC No. 844 of 2005* and Hassan Omar & Anor v Independent Electoral & Boundaries Commission & Others (2017) eKLR.

Analysis and Determination

9. Upon consideration of the Petition, respective Affidavits, Grounds of Opposition and submissions, the following are the issues for determination:
 - a. Whether the Petition meets the Constitutional threshold.
 - b. Whether the Petition is sub judice.
 - c. Whether the Respondents have violated the Petitioner's rights.
 - d. Whether the Petition is merited.



As to whether the Petition meets the Constitutional threshold.

10. On constitutional threshold of a Petition, in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance* Civil APP.290/2012 (2013) eKLR, the court observed that:-

“...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”
11. From a perusal of the Petition, except for the Petitioner blaming the Chief Magistrate for setting aside orders of interim injunction that had been issued, which allegedly made the Respondents destroy the suit property, it had not demonstrated the biasness of the Judicial Officer. It has actually emerged that the Petitioner had filed another case in Machakos in respect to the same subject matter during the pendency of the Kangundo case. Further, there is a related matter in the High Court at Machakos whose fulcrum revolves around the determination of the valid Directors of the Petitioner. The 1st to 6th Respondents have argued that the Petitioner’s art of filing multiplicity of suits amounts to forum shopping and an abuse of the process of court.
12. It is my considered view that the issues the Petitioner is raising do not fall within the ambit of *the Constitution* but within the Civil Procedure Rules. It seems to me that the Petitioner sought to benefit from favourable orders of injunction that he obtained ex parte as against the Respondents, without the Respondents being granted an audience but in an adversarial system, this won’t do. In the foregoing, I find that the Petitioner’s claims of discrimination against it, by the Respondents do not meet the constitutional threshold as set out in the authority cited above. In the foregoing, I find that the Respondents have not violated any of the Petitioner’s rights as claimed.

As to whether the Petition is sub judice.

13. The Respondents have claimed the Petition is sub judice. I note the Petitioner filed another suit in Machakos Court being Chief Magistrate ELC No. E 65 of 2023 and an Application dated the 7th August, 2023 and obtained interim orders. Further, it filed contempt proceedings against some of the parties herein and the matter is still pending at Kangundo Court, even after it obtained new Orders in Machakos Court. I further note that upon filing of similar proceedings in multiple courts, the Machakos High Court in Misc Application No. E153 of 2023 *Cyrus Mutunga Masaku & Others V Wendano Matuu Co. Limited*, on 25th August, 2023 had already directed that all the related matters were to be mentioned before the Chief Magistrate, Machakos to deal with the issue of parallel injunctions. Further, the matter was to be mentioned on 21st September, 2023 for directions.
14. On sub judice, Section 6 of the *Civil Procedure Act* provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



15. I note the Petitioner in its Petition has sought for this Court to make orders in respect to KANGUNDO CMCC NO. E01 OF 2023, and MACHAKOS CM ELC NO. E065 OF 2023 which are both still pending. In the foregoing while relying on these legal provisions as well as the facts as presented, I find that the Petition herein is indeed sub judice.
16. In the circumstances, I find the Petition unmerited and will proceed to dismiss it with costs.
17. I direct that Stephen Ndambuki Muli does personally bear the costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF OCTOBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Andrew Ombwayo for Petitioner

Muema Njeru for Guantai for 1st – 6th Respondents

Kuria holding brief for Lung'u for 7th and 8th Respondents

Court Assistant – Simon/Ashley

