

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(CORAM: MARAGA CJ & P, MWILU, DCJ & VP; IBRAHIM; WANJALA;
AND LENAOLA SCJJ.)

APPLICATION NO. 21

OF 2016

BETWEEN

GOLDEN LIME INTERNATIONAL LIMITED.....APPLICANT

AND

BLUE SEA SHOPPING MALL LIMITED.....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI

(NOW NAIROBI CITY COUNTY).....2ND RESPONDENT

FARAH MOHAMED BARROW3RD RESPONDENT

ALI SHEIKH MOHAMED4TH RESPONDENT

AND

NATIONAL LAND COMMISSIONINTERESTED PARTY

(Being an application by the National Land Commission to be enjoined as an Interested Party).

R U L I N G

[1] Sometimes in 2008, the City Council of Nairobi, by an advertisement in a local daily, invited the private sector to partner with it in the development of markets at various locations in the City. Although Eastleigh Plot L.R No. 36/VII/1037 (the suit property) was not one of the plots earmarked for development of a market, its proprietor, the 1st respondent, prepared a detailed proposal and submitted it to the City Council. Subsequently, the City Council awarded a tender to the applicant to develop a market on that plot. Upon learning of the tender and contract, the 1st respondent filed a judicial review application and sought orders of certiorari to

quash the tender and mandamus to compel the City Council to comply with the Public Procurement and Disposals Act.

[2] Although the High Court found that the award of tender had flouted the Public Procurement and Disposals Act, it nonetheless declined to grant the reliefs sought on the ground that given other considerations including a dispute on the ownership of that plot pending before the Environment and Land Court, the reliefs sought were not efficacious. On appeal, the Court of Appeal set aside that decision and granted the 1st respondent the orders it had sought of certiorari and quashed the award tender. It also granted an order of mandamus compelling the City Council to comply with the Public Procurement and Disposals Act.

[3] Aggrieved by that decision, the applicant sought the Court of Appeal's certification under Article 163(4)(b) of the Constitution that its intended appeal to this Court involves matters of general public importance. The Court of Appeal found no merit in that application and accordingly dismissed it. The applicant has, vide its application dated 5th October 2016 brought under Article 163(5) of the Constitution, sought this Court's review of the said decision of the Court of Appeal and an order granting it certification to appeal to this Court. That Application is pending before this Court.

[4] In the meantime, the National Land Commission (the NLC) has applied to be enjoined as an interested party in the said application to clarify the status of the suit land as public property that was unlawfully alienated to the 1st respondent and that no structure should be erected thereon. Relying on the cases of ***Francis Muruatetu & Another Vs Republic & 5 Others*, [2016] eKLR, *Meme Vs Republic*, [2004]1 EA, and *Trusted society of Human Rights Alliance Vs Mumo Matemu & 5 Others, SC Petition No. 12 of 2013***, the NLC argues that if it is not enjoined, the suit property may be illegally developed to the detriment of the Kenyan public.

[5] The respondents find no merit in NLC's application. They argue that this Court, having not granted the applicant certification to appeal, the said application is premature and bad in law. Moreover, the respondents further argue, the issue before court in this application is compliance with the public procurement law. The NLC, which has yet to prove that the suit land is public property, wishes to come on board and turn this application into an ownership dispute over the suit property. Citing several authorities, the respondents concluded that such an application is not legally tenable.

[6] Having considered the matter, we agree with the respondents that the NLC's application to be enjoined in this matter is for dismissing. In the case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR**, Petition No. 12 of 2013, this court defined an interested party as;

“[18] ... 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.”

[7] Although the suit land may very well be public property and that the public may suffer prejudice if construction on it is allowed, on the authority of ***Attorney General v Kenya Bureau of Standards & Another [2018] eKLR***, ***Court of Appeal Civil Application No. 132 of 2017; Kensalt Limited v. Water Resources Management Authority [2018] eKLR***, ***Petition (Application) No. 8 of 2016; Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR***, ***Petition No. 1 of 2017***, and many others, it is trite that an interested party cannot be enjoined in a matter to obfuscate issues by raising a new cause of action.

[8] It is clear from the material placed before us that the NLC wishes to be enjoined in this matter to urge the public's alleged ownership of the suit property and stop

construction on it. That material will completely alter the character of the issues before us in this application. On its own admission, the NLC knows of ownership disputes over the suit land pending before the Environment and Land Court and other courts. It should seek to be enjoined in those suits and therein seek a resolution of the ownership dispute and not by this application.

[9] For these reasons, we find no merit in this application and we accordingly dismiss it. As to costs, the NLC being a public entity seeking to protect what it believes to be public property, we order that each party shall bear its own costs of this application.

It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of April, 2019.

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D.K. MARAGA
CHIEF JUSTICE & PRESIDENT
SUPREME COURT OF KENYA

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & DEPUTY
PRESIDENT OF SUPREME COURT

.....
M. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. WANJALA
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA