

Katiba Institute & 2 others v Attorney General & another; Judicial Service Commission & 16 others (Interested Parties) (Petition 268 of 2018 & 251 of 2017 (Consolidated)) [2021] KEHC 12541 (KLR) (Constitutional and Human Rights) (21 January 2021) (Ruling)

Katiba Institute & 2 others v Attorney General & another; Judicial Service Commission & 10 others (Interested Parties); Stallion Civil Works Ltd & 5 others (Intended Interested Parties) [2021] eKLR

Neutral citation: [2021] KEHC 12541 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 268 OF 2018 & 251 OF 2017 (CONSOLIDATED)

AC MRIMA, J

JANUARY 21, 2021

BETWEEN

KATIBA INSTITUTE 1ST PETITIONER

OKIYA OMTATA OKOITI 2ND PETITIONER

**KENYA COALITION FOR WILDLIFE CONSERVATION AND
MANAGEMENT 3RD PETITIONER**

AND

ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL ASSEMBLY OF KENYA 2ND RESPONDENT

AND

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED
PARTY**

NATIONAL LAND COMMISSION INTERESTED PARTY

KENYA WILDLIFE SERVICE INTERESTED PARTY

KENYA RAILWAY CORPORATION INTERESTED PARTY

CHINA ROAD AND BRIDGE CORPORATION INTERESTED PARTY

**MINISTRY OF TRANSPORT AND INFRASTRUCTURE INTERESTED
PARTY**

**MINISTRY OF ENVIRONMENT AND MINERAL RESOURCES . INTERESTED
PARTY**



HABITAT PLANNERS TEAM	INTERESTED PARTY
AFRICA CENTER FOR OPEN GOVERNANCE	INTERESTED PARTY
HOMESCOPE PROPERIESY LIMITED	INTERESTED PARTY
STALLION CIVIL WORKS LTD	INTERESTED PARTY
PATRICK MOKAYA	INTERESTED PARTY
BEATRICE NJERU	INTERESTED PARTY
MUNENE GITONGA	INTERESTED PARTY
ALFETTA KOOME	INTERESTED PARTY
EDERMANN PROPERTY LIMITED	INTERESTED PARTY

RULING

Introduction:

1. There are two Petitions in this matter which are consolidated. The Petitions, in the main, variously challenge the amendments made on Sections 125 and 129 of the Environment Management and Co-ordination Act No. 8 of 1999 through the Statute Law (Miscellaneous Amendment) Act, 2018.
2. The Petitions are still pending. This ruling is in respect of three applications for joinder. The applications are opposed and supported in equal measure.

The Applications:

3. All the applications are by way of Notices of Motion. They are the Notice of Motion dated 28th July, 2020 filed by Stallion Civil Works Ltd, the 12th Intended Interested Party (hereinafter refer it to as ‘the Stallion Application’), the Notice of Motion dated 20th April, 2018 filed by Patrick Mokaya, Beatrice Njeru, Munene Gitonga and Alfetta Koome, the 13th, 14th, 15th and 16th proposed Interested Parties respectively (hereinafter refer it to as ‘the Mokaya Application’) and the Notice of Motion dated 8th July, 2020 filed by Edermann Property Limited, the 17th Intended Interested Party (hereinafter refer it to as ‘the Edermann Application’).
4. The Stallion application prays for the following orders: -
 1. That the Honourable Court be and is hereby pleased to certify this application as urgent, hear it ex-parte and grant the prayers sought herein.
 2. that, the Honourable Court be and is hereby pleased to issue an order joining and/or admitting Stallion Civil Works Limited, as n interested party in this petition; for the limited and specific purpose of allowing the Stallion Civil Works Limited, canvass the instant Application; and, seek an interpretation and/or clarification of the legal effect and import to current proceedings being instituted and pending before the national Environment Tribunal, of the conservatory orders grated by the Hon. Lady Justice W. A. Okwany on 24th September, 2018.
 3. That the Honourable Court be and is hereby pleased to issue an Order interpreting and/or clarifying, that the legal effect and import of the Conservatory order it had issued on 24th of September, 2018 herein, does not amount to, mean, have effect of, or in any way howsoever serve to revive, re-enact or otherwise resuscitate the application of the repealed Section 129(4),



Environment management Co0ordination Act, 1999, as enacted in 1999 and amended in 2017 by Section 29 of the prevention of torture Act, 2017 or any way give the Honourable National Environmental Tribunal the powers to issue or confer automatic stop orders upon filing of an Appeal before the Hon. Tribunal.

4. That the Honourable Court be and is hereby pleased to issue an order declaring that application of the repealed provisions of Section 129(4), Environment Management Co-ordination Act, 1999 by the National Environment Tribunal to confer, grant, issue or award any automatic stop orders, on application of the Conservatory order granted herein is null and void; and, the Appellants currently enjoying such orders be at liberty to move the Hon. Tribunal under Section 129(3)(d), Environment Management Coordination Act, 1999 and any other enabling provision for a consideration for the grant of appropriate injunctive and/or status quo orders if at all merited upon well-established principles of granting injunctive reliefs or orders.
 5. That the Honourable Court be pleased to issue any further Orders as may be necessary to give effect to the prayers sought herein.
 6. That the Honourable Court be and is hereby pleased to issue an order that the Applicant's costs be provided for.
5. The application is supported by the Affidavit sworn by James Njoroge Mwangi on 28th July, 2020. The Applicant filed written submissions together with a List of Authorities dated 15th September, 2020 in support of the application. It also filed Grounds of Opposition upon service of the responses to the Stallion Application.
6. The Mokaya application prays for the following orders: -
1. That this application be certified urgent and be heard ex-parte in the first instance.
 2. That leave be granted to Patrick Mokaya, Beatrice Njeriu, Munene Gitonga and Alfetta Koome to be enjoined in this Petition as interested parties.
 3. That there be no orders as to costs in any event.
7. The application is supported by the Affidavit sworn by Patrick Mokaya on 20th April, 2018. The Applicants did not participate in the hearing.
8. The Edermann application prays for the following orders: -
1. That this application be certified urgent and heard ex-parte in the first instance.
 2. That Edermann Property Limited be enjoined as an interested party to this petition.
 3. That the Honourable court be pleased to vary and/or set aside conservatory orders of 27th September, 2018 suspending all the selective amendments effected to Section 129(4) of the Environment Management and Co-ordination Act 1999 by the Statute law (Miscellaneous Amendment) Act, 2018 (No. 4 of 2018) pending the hearing and determination of this application.
 4. The Honourable Court be pleased to issue an order allowing the amendments effected to Section 129(4) of the Environment management and Co-ordination Act 1999 by the Statute law (Miscellaneous Amendment) Act, 2018 (No. 4 of 2018) to take effect forthwith.
 5. That costs of this Application be provided for.



9. The application is supported by the Affidavit sworn by Zuyen Yang on 8th July, 2020. The Applicant filed written submissions together with a List of Authorities both dated 7th October, 2020.

a. The Responses:

10. The applications are wholly opposed by the 1st and 2nd Petitioners as well as the 10th Interested Party. The 1st Interested Party only opposed the setting-aside of the conservatory orders.
11. In opposition, the 1st Petitioner and the 10th Interested Party filed a Replying Affidavit sworn by Lempaa Suyianka on 18th August, 2020. They also filed two sets of Grounds of Opposition dated 26th July, 2020 and 5th August, 2020 respectively as well as two sets of submissions dated 26th July, 2020 and 5th August, 2020.
12. The 2nd Petitioner filed Grounds of Opposition dated 16th November 2020, a Further Affidavit he swore on 16th November, 2020 and written submissions, as well.
13. The 1st Interested Party filed a Replying Affidavit sworn by Winfrida Mokaya, the Registrar of the Judicial Service Commission on 17th September, 2020 together with evenly dated written submissions and a List of Authorities both dated 17th September, 2020.
14. The rest of the parties supported the applications.
15. The parties highlighted on the filed submissions.

Issues for determination:

16. From the reading of the application, the affidavits and the submissions, I discern the following issues: -
 - (i) Joinder of parties;
 - (ii) Setting aside of the conservatory orders.
17. I will deal with the issues in sequentially.

Analysis and Determination:

(i) Joinder of parties:

18. The Mokaya application was not prosecuted.
19. Stallion Civil Works Limited fronted its grounds for seeking joinder in the Stallion application as well as the Affidavit in support. The main grounds in the application are as follows: -
 1.
 2. The Applicant has however recently learnt that on the basis of the conservatory orders granted by this Court the Hon. National Environment Tribunal has been applying the repealed Section 129(4), of the Environment Management and Coordination, 1999 whose effect was to grant an automatic status quo upon filing of an appeal at the National Environmental Tribunal to grant, issue and award automatic stop orders against developers; including recently in NET Appeal 16 of 2020 Boniface Nyagaka Mosote v NEMA, Machakos county Govt. & United Paints on 29th May, 2020.
 3. The aforesaid automatic status quo order is made ostensibly on account of the Hon Tribunal's interpretation per incuriam of the legal effect and import of the Conservatory Order issued on



the 24th of September, 2018 in this Petition by the Hon Lady Justice W.A. Okwany; Whereas Section 129(4), EMCA, 1999 was repealed by Statute Law (Miscellaneous Amendments) Act, 2018, which commenced on 21st May, 2018.

4. The solitary substantive legal question posed in this Application for determination ex-parte is whether the grant of the Conservatory Order on 24th September, 2018, can LEGALLY and PLAUSIBLY have the effect of conferring jurisdiction or discretion to the Honourable National Environmental Tribunal to revive, resuscitate, renew or re-enact a legal provision of section 129 (4) (as had been enacted in 1999 version of EMCA) and which, as aforesaid, was first amended in 2017 (by section 29 of the Prevention of Torture Act, 2017) and then again through the overhaul of section 129 of EMCA through Statute Law (Miscellaneous Amendments) Act No 4 of 2018, whose commencement date was 21st May, 2018.
 5. That arising from this patently misinterpretation of the law, it has become necessary to bring this succinct Application to obviate the Applicant's and other developers continued suffering because of the previously mentioned confusion.
 6. The determination of this Application will not in any way howsoever, compromise, affect or influence the determination of the contestations pending in the Constitutional petition herein: but determination of the Application herewith is critical to redress the rights of persons negatively and gravely prejudiced by the misinterpretation of the Conservatory orders issued by the Hon Lady Justice W.A. Okwany on 24th of September, 2018.
 7. ...
 8.
 17. The Applicant is happy to be discharged from the Petition after a determination of this application: with its cost being provided for; having brought this Application to mitigate against the automatic orders currently automatically issuing even on frivolous appeals – whereas the law does not permit.
20. Edermann Properties Limited sought the joinder on the following grounds, as appearing in the body of the application: -
1. This Honourable Court on 27th September, 2018 issued conservatory orders suspending ALL amendments effected to Section 129(4) of the Environment Management and Co-ordination Act 1999 by the Statute Law (Miscellaneous Amendment) Act, 2018 (No. 4 of 2018).
 2. The Honourable Court also issued orders prohibiting the respondents whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect in any way whatsoever to the amendments effected to Section 129(4) of the Environment Management and Co-ordination Act 1999 by the Statute Law (Miscellaneous Amendment) Act, 2018 (No. 4 of 2018).
 3. The matter is of great public interest as the orders of this Honourable Court issued on 27th September, 2018 have affected litigation before the National Environmental Tribunal to the extent that the automatic stay orders which was repealed by the Statute Law (Miscellaneous Amendment) Act, 2018 (No. 4 of 2018) remains operational.
 4. That frivolous Appellants have been and continue to take advantage of the orders of this Honourable Court of 27th September, 2018, to file vexatious and incompetent Appeals before the National Environmental Tribunal. Consequently, these appeals stall hardworking and



progressive citizen's and even government bodies and institution's development projects as there is now an automatic stay under Section 129(4) of the EMCA 1999 upon lodging of an appeal before the Tribunal.

- 5 That because of the orders of this Honourable Court of 27th September, 2018, several hardworking developers, investors and government bodies continue to incur great financial losses at the instant of such frivolous appellants who continue to take advantage and abuse those orders by lodging malicious appeals before the tribunal in order to stall such projects and/ or investments.
- 6 The Applicant/Proposed Interested Party herein has live matters before the Honourable Tribunal which include, NET 26 of 2020-London Distillers Kenya V NEMA & 3 Others, NET 21 of 2019 London Distillers Kenya V NEMA & 3 Others wherein a frivolous Appellant constantly lodges appeals before the Tribunal to deliberately obtain the automatic stay order under Section 129(4) of EMCA. These appeals have frustrated and stalled the projects of the Applicant which projects include Great Wall Gardens Phase1, Phase 2, Phase 3 and most recently Phase 4.
- 7 That because of the orders of this Honourable Court, the Applicant's development projects have been frustrated and stalled by the numerous, frivolous and malicious appeals lodged against it. That the effect of this is financial loss of great magnitude to the applicant as well as the public who have already purchased the properties under development.
- 8 That the orders issued by this Honourable Court on 27th September, 2018 put away the wishes of Parliament, the law-making arm of government to amend Section 129(4) of EMCA for no justifiable reason at all.
- 9 THAT the conservatory orders were issued in 2018 and no steps have been taken to conclude this petition in the last two years
- 10 The Applicant is apprehensive that frivolous appellants will continue to bombard the Tribunal with frivolous appeals so as to stall the projects and developments of hardworking citizens in terms of Section 129(4) of EMCA
- 11 The Applicant is therefore praying that the orders of this Honourable Court of 26th June, 2019 be set aside or varied forthwith in the interest of the developers and investors and in the interest of the public who benefit from such investments and developments.
- 12 It is in the interest of fairness and justice that this Application be allowed as prayed.
21. The above grounds are also replicated in the Affidavit in support of the Edermann application.
22. The Applicants filed comprehensive submissions. They also referred to various decisions in support of their positions.
23. The applications were opposed. In essence, the 1st and 2nd Petitioners and the 1st and the 10th Interested Parties posited the following grounds in their opposition, that: -
 - (i) The applicants have failed to satisfy the conditions precedent to the grant of joinder applications;
 - (ii) The applications seek to irregularly expand the consolidated Petitions;
 - (iii) The joinder will adversely affect other parties not in the proceedings;



- (iv) The applications are guilty of inordinate and unexplained delay;
 - (v) Edermann Properties Limited has variously disobeyed Court orders;
 - (vi) The prayer seeking to discharge the conservatory orders is made by a stranger to the consolidated Petitions;
 - (vii) The discharge orders sought are not available given the history of the matter;
 - (viii) The High Court in Nairobi Petition No. 253 of 2019 and 284 of 2019 declared similar amendments as those challenged in the consolidated Petitions as void.
24. The above grounds are variously contained in the Grounds of Opposition and the Affidavits of the 1st Petitioner, the 2nd Petitioner, the 1st Interested Party and the 10th Interested Party.
25. Having set out the parties' positions, I will now deal with the law on joinder of parties as interested parties.
26. The law is settled. The starting point is the Constitution. Rule 2 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as 'the Mutunga Rules') define an 'interested party' to mean: -
- 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;
27. The Supreme Court in *Trusted Society of Human Rights v Mumo Matemu & 5 others* [2014] eKLR observed as follows: -
- ... 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.
28. Later, the Supreme Court delimited the legal principles applicable in joinder applications. That was in *Petition No. 1 of 2017 Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR and in *Petition No. 15 as consolidated with Petition No. 16 of 2013 Francis Kariuki Muruatetu & Another v Republic & 5 others* [2016] eKLR.
29. In *Francis Kariuki Muruatetu & Another v Republic & 5 others* *Petition 15 as consolidated with 16 of 2013* [2016] eKLR the Supreme Court identified the following applicable conditions, and, stated 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.
30. I have reproduced verbatim the reasons why Stallion Civil Works Limited and Edermann Properties Limited seek joinder in this matter.
 31. Stallion Civil Works Limited intends to seek an interpretation of the conservatory orders issued by this Court (Okwany, J.) on 24th September, 2018. Once such interpretation is made, Stallion Civil Works Limited, ‘...is happy to be discharged from the Petition....’.
 32. By juxtaposing the criterion set by the Supreme Court in the foregoing decisions against the reasons why Stallion Civil Works Limited seeks joinder, it is apparent that the reasons fall way below the expected bar. It is clear that the party has no any other interest in the proceedings apart from the interpretation of the conservatory order.
 33. The interpretation of the order can be sought by any of the parties already in the proceedings. One of such parties can be the Honourable Attorney General, who pursuant to Article 156 (6) of the Constitution, is to promote, protect and uphold the rule of law and defend the public interest. Further, there is no evidence that the party could not seek such interpretation from the Tribunal. I am, hence, not convinced that the party stands to suffer any prejudice in case of non-joinder.
 34. This Court now finds and hold that the joinder of Stallion Civil Works Limited in these proceedings will not add any value to the matters at hand. The interpretation of the order to be sought is peripheral in relation to the core issues in this matter.
 35. Edermann Properties Limited put a lot of premium on the setting aside and discharging of the conservatory orders. It did not address the issue of joinder at all, either in the application or the Affidavit in support.
 36. Apart from stating that it is a developer which is greatly and adversely affected by the orders issued by this Court and seeking to set aside and discharge the said orders, Edermann Properties Limited has not, in any manner whatsoever, neither set out the case and/or submissions it intends to make before Court nor demonstrated the relevance of those submissions to the matters in the consolidated Petitions.
 37. Likewise, I hereby find and hold that, the joinder of Edermann Properties Limited will not in any way aid the Court in determining any of the issues raised in the consolidated Petitions.
 38. Having said as much, it is apparent that the foregoing discussion does not in any way find favour with any of the applications put forth by the proposed interested parties. As such, I am of the considered position that a consideration of whether the conservatory orders ought to be set aside is not necessary since it will largely be an academic exercise.
 39. As I come to the end of this ruling, I remain most grateful to Counsel appearing before me for their industry in assembling jurisprudence from within the jurisdiction and further afield and for their cogent and incisive submissions which were of great assistance. If there is any authority I have not referred to, it is not for my non-consideration of it, but out of the satisfaction that the point is otherwise already amply made.



40. The upshot is that the Notice of Motion dated 28th July, 2020, the Notice of Motion dated 20th April, 2018 and the Notice of Motion dated 8th July, 2020 are not merited. Each of the application is, hereby, dismissed with costs.

41. The Court will give directions on the hearing of the contempt of Court proceedings on 22/02/2021.

42. Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 21st day of January 2021

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Ochiel Dudley, Counsel for the 1st Petitioner and 10th Interested Party.

Mr. Okiya Omtatah Okoiti, the 2nd Petitioner in person.

Mr. Moimbo, Learned Senior State Counsel instructed by the Honourable Attorney General for the 1st Respondent and the 7th and 8th Interested Parties.

Mr. Arnold Angaya, Counsel for the 2nd Respondent.

Mr. Ochieng, Counsel for the 4th Interested Party.

Mr. Kamau Muturi & Miss Mugi, Counsel for the 5th and 9th Interested Parties.

Mr. Ondego, Counsel for the 6th Interested Party.

Mr. Lusi, Counsel for the Proposed 12th Interested Party.

Prof. Tom Ojienda, SC, Counsel for the Proposed 17th Interested Party.

Dominic Waweru – Court Assistant

