



**Ense Limited v Chairman & Secretary Parents Teachers Association Naka Primary School & 2 others; Ethics and Anti-Corruption Commission (Proposed Interested Party) (Environment & Land Case 146 of 2015) [2023] KEELC 16375 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16375 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 146 OF 2015  
A OMBWAYO, J  
MARCH 24, 2023**

**BETWEEN**

**ENSE LIMITED ..... PLAINTIFF**

**AND**

**THE CHAIRMAN & SECRETARY PARENTS TEACHERS ASSOCIATION  
NAKA PRIMARY SCHOOL ..... 1<sup>ST</sup> DEFENDANT**

**HON. DAVID GIKARIA ..... 2<sup>ND</sup> DEFENDANT**

**DR. JULIUS KARIUKI ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION .... PROPOSED  
INTERESTED PARTY**

*(The matter is based on two applications by the Plaintiff. The 1st application dated 15th December 2022 and the 2nd application dated 3rd February 2023.)*

**RULING**

1. There are 2 applications before this court. The 1<sup>st</sup> application is dated December 15, 2022. The applicant seeks orders;
  - i. That this honorable Court be pleased to enjoin the Ethics and Anti-corruption Commission as an interested party and to stay the execution of the orders adopted on November 10, 2022 pending the hearing and determination of prayer number (4) herein.



- ii. That this honorable court be pleased to set aside order No 2 of the consent orders adopted by this honorable court on November 10, 2020.
  - iii. That this honorable court be pleased to make any other interlocutory and/or further orders as may be just and convenient and in the interest of justice. That costs of this application be in the cause.
2. The application is based on grounds that the applicant is a statutory body mandated under the Constitution and the Ethics and Anti-Corruption Commission Act, 2011 to, inter alia, carry out investigations to establish liability for loss of, or damage to, public property and to institute civil proceedings for compensation or recovery of such public property under the provisions of Article 252 (1) (a) of Constitution and section 11(j) of the Ethics and Anti-Corruption Commission Act, 2011.
3. Pursuant to its aforesaid statutory mandate, the applicant undertook independent investigations on allegations of illegal or irregular alienation and allocation of Land Parcel Nakuru Municipality Block 23/108, the suit property herein. Investigations by the applicant established that the suit property, Land Number Nakuru Municipality Block 23/108 was and is part of Government Land reserved and/or set aside for public utility specifically for Naka Primary School (a public school) and therefore was never available for alienation to any person therefore any dealing thereof was irregular, illegal null and void.
4. That the applicant wrote a demand letter to the Plaintiff on September 10, 2019, informing it of the findings of the investigations and demanded surrender of the same back to the Government of Kenya through the Commission.
5. The applicant further contends:-
  - i. 'That parties held a meeting in a bid to settle the matter amicably and bring Nakuru ELC No 46 of 2015 Ense Limited vs Naka Primary School & 2 others to a close. That from the discussions held on September 15, 2020, in the absence of the Commission, the parties reached an agreement that was adopted in Court on November 10, 2020.
  - ii. That one of the terms of the consent orders is that the Commission is to supervise the excision and transfer of a part of the suit property to Naka Primary, the 1<sup>st</sup> defendant as per the terms of the consent executed by parties to the suit on September 16, 2020, yet the Commission was not a party to the suit and never participated in the alleged negotiations.
  - iii. That the Commission ought not to be bound by orders made in a matter in which it was neither a party and nor participated in the meeting that culminated into an agreement between the parties in this matter.
  - iv. That the Commission is unable to comply with the orders that the Plaintiff seeks to execute since it never took part in the negotiations and was never a party in Nakuru ELC No 146 of 2015 Ense Limited vs Naka Primary School & 2 others.
  - v. That under the circumstances, the applicant herein has a direct and substantial interest in the matter as counsel for the Plaintiff is threatening to institute legal proceedings against the Commission to compel it to supervise the excision and transfer of part of the suit property despite having not participated in the



negotiations and considering that it was not a party in the proceedings and as such ought not to be bound by the orders in question.

- vi. The Commission received a copy of a letter dated December 6, 2022 from the Nakuru County Director Land and Physical Planning addressed to the Deputy Registrar Environment and Land Court, Nakuru High Court, in which letter the County Director was informing the Deputy Registrar that the Commission had failed to avail a representative to participate in the sub division of the suit property as per the consent orders adopted by the Court thus was seeking confirmation that they could proceed.
  - vii. That unless this Honorable Court grants the orders sought, the Commission is apprehensive that the County Government of Nakuru will proceed and use the orders that the Commission seeks to challenge to commence the application process to the detriment of the Commission.
  - viii. That in light of the facts set out above, it is not only paramount but urgent that the Commission, which is a Constitutional body mandated to safeguard public interest, be joined as an Interested Party so as to safeguard for its interest as well as protect public interest in the matter.'
6. The applicant concludes that he is a proper and necessary party in these proceedings whose joinder in the suit would enable the court effectively and completely adjudicate upon and settle all the matters in question given its mandate and statutory obligation to recover public property obtained through corrupt conduct and wishes to participate in the proceedings as an interested party to ventilate pertinent issues in the acquisition of the suit property.
  7. The parties will not suffer any prejudice if this application is allowed; in any event the Commission and the public stand to suffer gravely if it is denied a chance to be heard.
  8. That pursuant to the above communication, the applicant became aware of the said subsisting consent orders affecting the suit property which investigation by the applicant herein established that the said parcel of land had been set aside for use as a public primary school.
  9. It is in the interest of public and justice that the proposed interested party be joined into the proceedings as an Interested Party and be granted a chance to participate in this matter and the court do set aside the consent orders issued herein and allow the interested party to present its case.
  10. The respondent filed a replying affidavit whose gist is that for over a decade that the proposed interested party has purported to investigate this matter they have never taken any positive that would assert their connection that the suit land is public property.
  11. The complaint that the proposed interested party was acting upon originated from the defendants herein, and it expired once they agreed and recorded consent. That after receiving the letter for surrender and replied, they were summoned by the officers of the proposed interested party and they held several meetings with them in their office.
  12. They made it clear to the officers of the proposed interested parties that they purchased the suit land on the strength of records kept by the land department which is a public office, and if it turned out that the same was public property then they would have no alternative but to sue the Government of Kenya for the losses and damages suffered.



13. That in one of their meetings with the officers of the proposed interested parties, we shared with them a letter dated October 23, 1998 from the land officer Nakuru which confirmed that the suit land was for residential use and proceeded to give approval for subdivision.
14. That during that period they also stumbled on a recommendation contained the EACC quarterly report for the period January to march 2019 dated July 22, 2019 which recommended the closure of the inquiry file over the suit land. That report referred to above is a public document and may be found on the EACC website at the press of a button.
15. That based on their intention to exercise their right to sue for damages amongst others, a decision was reached that they pursue an out of court settlement. And after several consultations with both parties differently, they eventually met at the boardroom of the proposed interested party and agreed on the out-of-court settlement.
16. That all the events leading to the negotiations, agreement, and consent order were done with the blessings of Hassan Khalid and Christine Natome who were and are still officers of the proposed interested parties and whatever they did in the course of their lawful duties is binding on their successors.
17. That Ignasius Wekesa who is the main architect of the application to join the EACC is guilty of material no-disclosure of material facts.
18. They verily believe, that for the just determination of this matter, it is imperative that the court listens to the side of the story of the officers who initiated and supervised the process. It is also incumbent that Mr Ignatius Wekesa in cross examined on the contents of his affidavit and also be ordered to produce the inquiry file in court
19. That in sum they urge the court to find that the application by the proposed interested party lacks merits or basis and should be dismissed.
20. I do find that for any person to apply for review or setting aside of a judgment whether by consent or otherwise, he need not have been a party to the suit or consent judgment.
21. Order 45 rule 6 provides:-  
Bar of subsequent applications [Order 45, rule 6.]  

'No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.'
22. The upshot of the above is that the applicant can still review the consent judgment without necessarily being a party. In any event the dispute has been settled by consent of the parties and therefore there is no suit before court. What is pending is the execution of the court order.
23. The applicant has not come to court to set aside the entire consent judgment but has come to court to set aside the order that requires them to supervise to subdivision. I do find that having not been parties to the suit and consent judgment they cannot be compelled to supervise the implementation of the court order. The persons who can be made to supervise the said subdivision are the County Land Registrar and Surveyor, Nakuru. Therefore, the application is allowed in terms of prayer 2. I do review the consent order and set aside order No 2 of the consent orders adopted by this honorable court on November 10, 2020.
24. The 2<sup>nd</sup> application is dated February 3, 2023 filed by the plaintiff. The plaintiff seeks orders that the honorable court be pleased to issue summonses to Christine Natome, and Hassan Khalid to attend



- court and give evidence and shed light on the events culminating in the consent order dated September 16, 2020.
25. That further and in the alternative, this honorable court be pleased to issue an order directing Christine Natome, and Hassan Khalid to swear and file affidavit evidence shedding light on the events culminating to the consent order dated September 16, 2020.
26. That the honorable be pleased to the attendance of Ignatious Wekesa for purposes production of the Inquiry file over the suit land, and cross-examination on his affidavit. That the costs of this application be in the cause.
27. The application is made on grounds:-
- a.' That the ADR process of the September 15, 2020 took place with the blessings of Christine Natome, and Hassan Khalid who were Chief Executive officer (CEO), and Legal officer of the EACC South Rift Regional Office based at Nakuru.
  - b. That meeting between the plaintiffs' representative and those of the defendants on the September 15, 2020 took place at the EACC Boardroom at Assumption Centre.
  - c. That the aforesaid officers were informed of the outcome of the negotiation between the parties and a copy of the minutes was supplied to the EACC office for their records.
  - d. That to ensure that the agreement between the parties was affected, it was advised that the EACC supervise the execution of the same and hence the necessity to include their participation in the consent. That Ignasius Wekesa is guilty of material no-disclosure of material facts.
  - e. That the investigations and inquiry over the suit land has been finalized and files recommended for closure.
  - f. That upon agreement between the parties the officers in charge of South Rift Region prepared a report and which report is in the inquiry file.
  - g. That it is therefore in the interest of justice that the orders sought in the application herein be granted.'
28. The application is opposed by the proposed interested party who filed a replying affidavit on February 23, 2023 whose gist is that the suit land is public land hence not available for allocation by the Municipal Council of Nakuru. The respondent states that the Commissioner is a stranger to the proceedings in this matter. The respondent states that if investigations to transfer and found it fraudulent. The respondent further states that no officer from the Commission participated in the alleged negotiations because the Commission was not a party in the suit thus could not invoke the procedure its ADR Policy. The only decision that is binding on any officer of the Commission is that which has been sanctioned by the Commission,
29. I have considered the application and do find that the applicant has not laid a basis for summonses to offices of the intended interested party. Moreover, the intended interested party was not a party to the proceedings and has not been enjoined as a party. Lastly, there is no suit before the court after the consent order entered by the court.



30. Section 22(b) of the *Civil Procedure Act* Cap 21 Laws of Kenya envisages an existing suit for purposes of giving evidence. The section provides:-

22. Power to order discovery and the like Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

(b) Issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

31. I do find the application not merited and is hereby dismissed with no orders as to the costs as this is a concluded matter.

**RULING DATED, SIGNED AND DELIVERED VIA EMAIL AT NAKURU THIS 24<sup>TH</sup> DAY OF MARCH 2023.**

**A O OMBWAYO**

**JUDGE**

