



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW (APPLICATION) ELC NO. 7 OF 2019

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF NATIONAL LAND COMMISSION CLAIM REFERENCE NO NLC/HLI/025/2017 DETERMINATION DELIVERED ON 7TH FEBRUARY 2019

AND

IN THE MATTER OF KENYA GAZETTE NOTICE NO. 1995 OF 1ST MARCH 2019

AND

IN THE MATTER OF FLAMINGO HORTICULTURE (K) LTD AND LAND PARCELS NUMBER LR 20737/3; 20737/28; 20737/41 AND 20737/42 TOTALING 725.41 HECTARES (1,767.78 ACRES)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI INDER ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

FLAMINGO HORTICULTURE (K) LTD.....EXPARTE APPLICANT

ONTULILI MT KENYA

FOREST SQUATTERS....INTENDED INTERESTED PARTIES/APPLICANTS

RULING

1. On 28.3.2019, the Ex-parte Applicant FLAMINGO HORTICULTURE (K) LTD (herein after, the Company), filed a chamber summons application seeking leave to apply for Judicial Review Orders of Certiorari to quash the decision of the National Land Commission (NLC) delivered on 7.2.2019, of which leave was duly obtained. The substantive Motion was there after filed on 10.4.2019. Thereafter on 30.7.2019, the 2nd and 3rd respondents (the state) filed a Notice of preliminary objection averring that the suit is incompetent and is incurably defective. Then on 16.8.2019, an intended interested party filed an application seeking leave to be enjoined in these proceedings. On 25 9 2019, this court gave directions for the Preliminary Objection and the Application for joinder to be heard simultaneously, hence this ruling.

The Preliminary Objection filed on 30.7.2019

2. The 2nd and 3rd respondents have raised the following points of law in their Preliminary Objection;

- a. The application offends the provisions of order 4 rule 1 of the Civil Procedure Rules 2019, having been filed in absence of valid board resolution from Ex-Parte Applicant scattering the institution of the proceedings herein.
- b. The application is fatally incompetent and incurably defective.

3. It was argued for the 2nd and 3rd respondents that the Ex-parte Applicant is a company and therefore, the company act should apply and they needed to file a resolution of the board when filing the suit. It was therefore argued that the chamber summons dated 27/3/2019 and all other orders should be expunged. To support their argument they cited the case of **East African Portland Cement Ltd v. Capital Markets Authority & 4 others (2014) eKLR**, where the petition filed by a company was declared a nullity for want of a resolution approved by the directors of the company.

4. On the other hand, counsel for the Ex-parte Applicant argued that the suit herein is a judicial review which is neither criminal nor civil and therefore the rules appertaining to a plaint are not applicable. In support of their argument, the Ex-parte Applicant relied on the Court of Appeal case at Nakuru, **Civil appeal no. 234 of 1995 in The Commissioner of Lands v. Kunste Hotel Limited; Britind Industries Limited vs. APA Insurance Limited (2017)Eklr** and the case of **Welamondi v. The Chairman, electoral Commission of Kenya, KLR at pages 486-488** where Ringera J as he then was held that;

“Judicial review proceedings under order 53 of the civil procedure rule are special procedures, which are invoked wherever orders of certiorari, mandamus or prohibition are sought in either criminal or civil proceedings..... In exercising powers under order 53 the court is exercising neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction sui generis”.

5. The 1st respondent (NLC), associated itself with the case for the other respondents, hence supporting the Preliminary Objection.

6. The issue for determination is **Whether in filing this suit, Flamingo Horticulture Ltd offended the provisions of order 4 rule 1 of the civil procedure rules.**

7. In the case of **Spire Bank Limited v Land Registrar & 2 others [2019] Eklr**, the Court of Appeal was dealing with a situation where the suit before the High Court had been struck out for want of a board resolution sanctioning the commencement of the action by the company. The suit was not properly before the court because ***“...The Ex-parte Applicant has not exhibited in the verifying affidavit a copy of the resolution of the company authorizing the institution of these proceedings. There is also no evidence before this court that the said Josephine Musembi has been authorized by a resolution under seal.”*** The Court of Appeal clarified the position on this **question of authorization** by citing its own case in **Makupa Transit Shade Limited & Another vs Kenya Ports Authority & Another [2015] eKLR** where it was stated thus;

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.....So that it was sufficient for the authorized person to depone that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority, the onus being on the party making the allegation to prove it. A bare statement that the plaintiff or applicant was not authorized would not be sufficient (emphasize added).”

8. The court had gone ahead to analyze the import of order 4 rule 1(4) of the civil procedure rules stating that;

“It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized (emphasize added).”

9. In the case of **The Presbyterian Foundation & Another vs East Africa Partnership Limited & Another [2012] eKLR Odunga J stated that;**

“The Civil Procedure Rules do not define what an authorized officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavits be sworn by either the directors or company secretaries, nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word “authorize” which is defined by Oxford Dictionary as “sanction”; “give authority”; “commission”.

10. It is noted the **Court of Appeal in the Spire Bank Case** had also adopted the position taken by Judge Odunga. Guided by the position taken by the Court of Appeal, I conclude that it is not enough for the 2nd and 3rd Respondent to make a sweeping statement on the issue of Authority. It was upon the 2nd and 3rd respondents to avail sufficient evidence to show that Dennis Mwirigi did not have authority to bring

forth the suit of which no such evidence was availed. In any event, the resolution has since been filed by the company.

11. The upshot of my finding is that the Preliminary Objection has no merits.

Application filed on 16.8.2019

12. The intended interested parties have identified themselves as **Mt Kenya Ontulili Squatters**. Their notice of motion is brought under provisions of Section 1A, 1B of the Civil Procedure Act, order 1 rule 10 and order 51 rule 1 of the Civil Procedure Rules seeking to be enjoined in the suit. This application was not opposed by all the respondents. It was however opposed by the exparte applicant.

13. The application was based on the grounds on the face of it and on the supporting affidavit of Patrick Muriuki who averred that he is the secretary of the intended interested party/applicant. The applicant contends that the decision being challenged by the Exparte Applicant was rendered by the 1st Respondent in favour of the applicant, who are the ones who had moved the NLC. In the event that intended interested parties are not allowed to be part of these proceedings, then they (applicants will be locked out). It was further stated that there is another similar suit filed in this court, which is **Meru ELC JR ARPL NO. 5 OF 2019 MUTUMA ANGAINE & 3 OTHERS EXPARTE APPLICANT V. NATIONAL LAND COMMISSIONER & 4 OTHERS**, where the applicants are an interested party. The applicants have urged the court to allow the application in the interest of justice.

14. The Exparte applicant opposed the application for joinder via their replying affidavit dated 23/9/2019. It is averred that there is no clarity as to who the intended interested parties are and additionally they are an amorphous body with no right or power to sue or be sued. There is also no proof that those intended interested parties have authorized one Patrick Muriuki to represent them. Therefore, the notice of motion does not meet the threshold of the requirements of order 8 rule 1 of the Civil procedure rules, 2010.

15. It is further argued that if this court was to entertain the application, it would mean that this court is sitting on appeal in respect of another case **MERU H.C.C. JR NO. 218 of 2004 brought by Lucy Murigo Munyi & 50 Others vs. Minister for Lands and Housing and 3 Others**, where the question of who the intended interested parties are was raised and determined all the way to the court of appeal. The exparte applicant therefore contends that the court should not allow a faceless person to take part in these proceedings.

16. In support of the arguments raised by the Exparte Applicant, the case of **Rose Florence Wanjiru vs. Standard Chartered Bank of Kenya Limited & 2 others [2014] Eklr** was cited.

17. I have perused the applications, affidavits, submissions and the record in its entirety and the issue to be determined is **Whether to enjoin Mt Kenya Ontulili Squatters as interested parties to this suit?**

18. I will not belabor much on this issue save to make reference to two points. Firstly, that I have taken cognizance of the existence of the **MERU JR ELC NO. 5 OF 2019**, where the decision of the 1st Respondent has been challenged, and in which the intended interested party herein is already a party in that suit. Thus, locking out this party in this suit when they are already participating in the other suit (which incidentally has several interested and intended interested parties), will certainly result in disharmony and confusion.

19. Secondly, it is noted that the decision of the NLC dated 7.2.2019 was in favour of the intended interested party. It follows that the said parties stand to be affected by orders made in this suit. Thus, Ontulili forest squatters are necessary parties in terms of the provisions of **order 1 rule 10 of the Civil Procedure Rules in order to enable the court effectually and completely adjudicate upon and settle all questions involved in this suit.**

20. Final orders

(1) The Preliminary Objection filed on 30.7.2019 is hereby dismissed.

(2) The application of 16.8.2019 to have Ontulili Mt. Kenya Forest Squatters enjoined in this suit is allowed.

(3) Each party is to bear their own costs in respect of the Preliminary Objection and the application.

(4) Further, I direct that this matter runs along with the other matter Meru JR no 5 of 2019 so as to avoid any conflict.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 29TH JANUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

Ms. Miriti holding brief for AG Riungu for exparte applicant

HON. LUCY. N. MBUGUA

ELC JUDGE