



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**JUDICIAL REVIEW NO. 6 OF 2015**

*(Formerly Nakuru High Court J.R. No. 99 of 2009)*

**IN THE MATTER OF AN APPLICATION BY WAIRIMU NGIGI & OTHERS FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF SUBDIVISION OF LAND ARISING FROM THE DECREE ISSUED IN NAIROBI HCCC NO. 2286 OF 1993**

**BETWEEN**

**WAIRIMU NGIGI & 30 OTHERS.....APPLICANTS**

**VERSUS**

**DIRECTOR OF SURVEY OF KENYA.....1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**COMMISSIONER OF LANDS .....3<sup>RD</sup> RESPONDENT**

**AND**

**KIAMBU NYAKINYUA FARMERS CO. LTD.....INTERESTED PARTY**

**RULING**

1. This suit has a long and checkered history as outlined in my last ruling delivered on 25<sup>th</sup> November 2016. By the said ruling, this court granted the *Exparte* Applicants’ motion filed on 13/8/2014. Prayer 5 and 6 of the Application that were granted are to the following effect:-

**“5. THAT this honourable court be pleased to order the 1<sup>st</sup> Respondent to account to this court and produce before this court the entire list of persons issued with titles in the parcel of land known as LONGONOT/KIJABE BLOCK 6 (KIAMBU NYAKINYUA) belonging to KIAMBU NYAKINYUA FARMERS COMPANY LIMITED**

**6. THAT this honourable court be pleased to order the 2<sup>nd</sup> Respondent to produce before this court the Registered Index map being used to issue titles in respect of the parcel of land known as LONGONOT/KIJABE BLOCK 6 (KIAMBU NYAKINYUA) belonging to**

**KIAMBU NYAKINYUA FARMERS COMPANY LIMITED.”**

2. A subsequent application filed by the Applicants on the 6<sup>th</sup> March to amend the resultant orders was allowed so that orders arising from prayer 5 was addressed to the 2<sup>nd</sup> Respondent [District Land Registrar] and prayer 6 to the 1<sup>st</sup> Respondent [the Director of Surveys Kenya], as appropriate. The errors had been occasioned by the drafting of the prayers by counsel for the Applicants.

3. On 23/3/2017 the Interested Party through Mr. Akoto approached the court by a certificate of urgency with the Notice of Motion of even date, and expressed to be brought under Section 13 of the Environment & Land Court Act, Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The substantive prayer therein was prayer 2 which sought:

**“2. THAT this Honourable Court be pleased to clarify its Court Order arising from ruling issued on the 25<sup>th</sup> of November 2016 by directing that the said Order did not sanction the 2<sup>nd</sup> Respondent decision to freeze all dealings and transactions on parcels of land emanating from Land Title Number: Longonot/ Kijabe/Block 6.”**

4. The grounds on the face of the Notice of Motion are as follows:

**“1) This Honourable Court on the 25<sup>th</sup> of November, 2016 delivered its ruling on the Application dated 13<sup>th</sup> August, 2014 filed by Wairimu Ngigi & 30 others whereby the following directions were made interalia;**

**a) That the Court cannot interfere with the running of the Applicant herein Kiambu Nyakinyua Farmers Company Limited and any person who feels aggrieved should seek redress from the proper forum.**

**b) That Kiambu Nyakinyua Farmers Company Limited, the Applicant herein must comply with the decree issued in Nairobi HCCC No. 2286 of 1993 which was clarified by an order of the Court sitting in Nakuru in Judicial Review No. 99 of 2009.**

**c) That the Applicant herein has not fully complied with the orders especially order (c) which provides that Kiambu Nyakinyua Farmers Company Limited will have complied with the decree when it allocates each of the 1403 members an equal share of the land available for distribution.**

**2) That this ruling enjoins the Applicant herein to ensure that the suit property to wit Land Title Number Longonot/Kijabe/Block 6 is fully subdivided to its members.**

**3) Despite having knowledge of the said ruling, the 2<sup>nd</sup> Respondent has frozen all transactions on the said land. The Applicant is unable to proceed with the subdivision of the land to its members as all its efforts are frustrated by the 2<sup>nd</sup> Respondent and the Applicant risks being held in contempt of Court at the behest of the 2<sup>nd</sup> Respondent.**

**4) That at the moment some of the members who had already been allocated their parcels in the said land have already disposed their parcels to third parties but the registration of the new proprietors has been frustrated by the 2<sup>nd</sup> Respondent yet these individuals were not party to the suit.**

**5) That the orders of the Court need to be clarified to enable the Applicants to comply with the courts decree and to also enable other citizens who own the interests in the land to make their transactions.”**

5. These grounds are further amplified in the affidavit of **George Akoto** in support of the Motion. The

*Ex parte* Applicants in their grounds of opposition termed the Motion uncalled for and supported the alleged actions of the 2<sup>nd</sup> Respondent in restricting dealings in the land parcels identified in prayer 2 of the Application.

6. The incumbent of the 2<sup>nd</sup> Respondent **Gildine Karani** wore an affidavit in Reply opposing the Motion. In the affidavit, the Land Registrar essentially cites her reasons justifying the freezing of all transactions relating to **Longonot/Kijabe Block 6** (the suit property). The reasons are set out in paragraphs 4 to 9.

7. The gist of these paragraphs is *inter alia* that the 2<sup>nd</sup> Respondent has received numerous complaints by members of the Interested Party regarding levying or high charges for registration of titles and noted numerous double allocations and anomalies regarding the allocation of the parcels already registered.

8. Also cited was the initial error, now corrected, regarding the respective parties targeted in the orders made by this court by its ruling of 25<sup>th</sup> November 2016. Attached to her affidavit is a list marked **GK1** which contains particulars of **91 parcels** affected by double allocations. During the hearing of the application Mr. Kirui for the Attorney General attended. Also present was the 2<sup>nd</sup> Respondent.

9. In arguing his application Mr. Akoto contended that the 2<sup>nd</sup> Respondent's action has affected **3437 titles** of the suit land and which are owned by the third parties who have in turn raised complaints with the Interested Party. He takes issue with the alleged double allocations asserting that anomalies in respect of 91 titles ought not to cause the freezing of the entire 3437 titles. He urged the court to pronounce itself as to the subject matter of its order.

10. For his part Mr. Kirui, relying on the affidavit of the 2<sup>nd</sup> Respondent asserted that there are problems in the Interested Party so far as identification of *bona fide* members is concerned, leading to many double allocations. That the 2<sup>nd</sup> Respondent cannot identify the *bona fide* list of members. Thus the court must step in and give directions.

11. As far as Mr. Njuguna for the *Ex parte* Applicants is concerned, the Interested Party's application is unmerited. He submits that it is a fallacy to assert that the 2<sup>nd</sup> Respondent's action is premised on this court's ruling when the said party has explained her concerns. That the Interested Party was obligated to provide an authenticated list of its members to enable each member's share be identified. He supports the 2<sup>nd</sup> Respondent's action notwithstanding the number of cited titles affected by the double allocation. That it is a proper exercise of her discretion in the circumstances of this case.

12. Pointing the court back to the order requiring the 2<sup>nd</sup> Respondent to account for titles issued in respect of the suit property, Mr. Njuguna stated that the task is impossible without the benefit of the Interested Party members list. In his view, the restriction should remain in force until the entire problem is resolved as the Interested Party has shown no willingness to provide the members' list. Instead the Interested Party evinces every intention to continue the piecemeal issuance of titles. He points out that all the alleged 3<sup>rd</sup> parties impact on the titles of the *Ex parte* Applicants. His position is that the rights of the 3<sup>rd</sup> parties cannot override those of the rightful owners.

13. In his response, Mr. Akoto stated that the 2<sup>nd</sup> Respondent is in possession of sufficient information to enable her account to the court as ordered. Further, that she has a statutory duty to effect legal transactions unless otherwise ordered by the court. That the Interested Party cannot be blamed for any double allocations. He urged that the court gives clear directions in the matter.

14. I have given due consideration to the matters canvassed in respect of the Motion before me. I have also considered the orders (as amended) granted to the *Ex parte* Applicants through my ruling of 25<sup>th</sup> November 2016. The orders are clear and explicit both in substance and subject.

15. I am unable to fathom what further clarity is required by the present Applicant. Evidently the

Interested Party has approached this court pursuant to the admitted freezing of all transactions in respect of Land Title No. **Longonot/Kijabe/Block 6** (the suit property).

16. The 2<sup>nd</sup> Respondent has by her affidavit explained how she arrived at the decision. I would add here that at this stage, this court has no obligation to examine whether the impugned action was justified or not. That said, the court cannot ignore the fact that the orders given on 25/11/2016 arose from the material placed before the court in support of complaints raised by the Applicant members of the Interested Party. The complaints related to the failure by the Interested Party to comply with the decree of **Ransley J**, (as he then was) and subsequent consent orders related thereto, which were intended to ensure that the all 1403 members of the interested party as identified in the register presented in evidence in **HCCC No. 2286 of 1993** got their equal shares of the suit land.

17. So far as the instant application is concerned, the restriction complained of cannot in my opinion hinder the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from complying with the court's orders of 25<sup>th</sup> November 2016, and which the *Exparte* Applicants believed to be a condition precedent to the enforcement of the decree in their favour. It is pertinent that the *Exparte* Applicants through Mr. Njuguna support the restriction in dealings imposed by the 2<sup>nd</sup> Respondent. They are not complaining at all, and indeed if it were true, as suggested by the Applicant that the restriction has made it impossible for the Interested Party to comply with the said decree, the *Exparte* Applicant's attitude would be confounding. Because, as the record herein shows, the *Exparte* Applicants have fought long and hard in hopes of enjoying the fruits of their judgment in HCC No. 2286 of 1993.

18. As I said before, I am not willing to accept the invitation to make any orders, clarifications or directions in respect of third parties who are not before me in this matter. The orders made on 25<sup>th</sup> November 2016 still stand in the *Exparte* Applicants' favour. In the event that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents fail to comply, the Applicants will take necessary legal counsel as to the next legal step.

19. In my opinion, the parties herein overreached themselves by arguing the present application as if it was intended for the said Respondents and particularly the 2<sup>nd</sup> Respondent to show cause why she has not complied with the said order, or alternatively as a judicial review application brought against her in respect of the exercise of her statutory mandate. In fact, in my considered view it was neither of these.

20. Thus, with respect, there is nothing in the orders which are the subject of the instant Motion requiring to be clarified. These orders were given pursuant to a considered ruling of this court. Naturally, the court did not issue the orders in vain and expects them to be obeyed on pain of appropriate sanctions.

21. For the avoidance of doubt, paragraphs 31, 34, 35 to 36 of my ruling of 25<sup>th</sup> November 2016 are replicated hereunder:

**“31. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents unlike the Interested Party hold public offices. The 1<sup>st</sup> Respondent's mandate includes the maintenance of land records such as survey maps. The 2<sup>nd</sup> Respondent also maintains records of land ownership and transactions. It seems to me that these proceedings initially targeted the 1<sup>st</sup> to 3<sup>rd</sup> Respondents all of them public officers.**

32. ....;

33. ....;

**34. It is a scandal in my opinion that a decree of the court issued in 2003 remains unsatisfied todate, and that instead, the decree holders have been given the run around by concerned public officials and the Interested Party. Without the advantage of records held by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the Applicant and indeed all other aggrieved members will continue to wallow in frustration as they cannot prove to any court whether or not the Interested Part has fully complied with the decree herein. An unexecutable decree amounts**

to a pyrrhic victory for the decree holder and is a travesty of justice.

35. In the face of obduracy by the Interested Party the aggrieved parties are entitled to all information necessary to give meaning to their decree. Indeed under Article 35 (1) of the Constitution a every citizen has the right to access information held by the state, including state officers. In light of the foregoing, I will grant prayers 5 and 6 of the Notice of Motion filed on 13/8/2014.

36. But for reasons earlier given, I do not consider it necessary, or even appropriate for this court to direct how the Interested Party should go about satisfying the decree in HCCC No. 2286 of 1993 or consent orders herein. Besides, the Applicant herein and any aggrieved party who takes issues with the *bonafides* of the directors currently in the office or their activities has a remedy under company law. The Interested Party will bear the costs of the Application.”

22. In light of all the foregoing, I have found no merit in the Notice of Motion of the Interested Party filed on 23/3/2017 and I dismiss it with costs.

Delivered and signed at Naivasha this 24<sup>th</sup> day of July, 2017.

In the presence of:-

Mr. Adoli holding brief for Mr. Akoto for the Applicant/ Interested Party

Miss Kithinji holding brief for Mr. Njuguna the Exparte Applicants

N/A for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Court Assistant - Barasa

**C. MEOLI**

**JUDGE**