



Republic v National Land Commission & 3 others; Kibua & another (Exparte Applicants); Ethics and Anti-Corruption Commission (Intended Interested Party) (Judicial Review Application 03 of 2023) [2023] KEELC 22404 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22404 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW APPLICATION 03 OF 2023
A NYUKURI, J
DECEMBER 13, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

COUNTY LAND REGISTRAR 2ND RESPONDENT

MACHAKOS COUNTY 3RD RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS 4TH RESPONDENT

AND

THOMAS NZIOKI KIBUA EXPARTE APPLICANT

ANNAH SYOKAU MBATE EXPARTE APPLICANT

AND

**ETHICS AND ANTI-CORRUPTION COMMISSION INTENDED
INTERESTED PARTY**

RULING

Introduction

1. Before court is a notice of motion dated 7th July 2023 filed by the intended interested party seeking the following orders;
 - a. Spent



- b. That leave be granted to the Commission to be joined in these proceedings as an interested party or in any other capacity as the court may deem fit to order.
 - c. That the applicants/respondents do serve the commission with all the pleadings filed on its behalf in this suit and the commission be at liberty to file pleadings in response thereto within such period and on such terms as the court may direct or order.
 - d. That costs of this application be provided for.
2. The application is premised on the supporting affidavit sworn on 7th July 2023 by Salad Wato Boru an investigator with the applicant. The applicant's case is that they are investigating allegations that Machakos Municipality Block 1/32 (formerly LR 909/563 also known as Ngei Estate measuring 4.08 acres (suit property) which had been set aside for public purpose was fraudulently, illegally and unlawfully allocated to private persons. He deponed that preliminary investigations had established that the suit property was government land planned and reserved for civil servants' rental housing scheme and therefore unavailable for alienation. She deponed that in 1968 survey was done on the suit property resulting the creation of parcel No. L.R No. 909/563 measuring 4.08 acres and that in 1970 the National Housing Corporation built 24 housing units on the said parcel which still remains to date.
 3. He further stated that on 22nd November 1973 parcel L.R No. 909/563 was converted to Machakos Municipality Block 1/32 which parcel was illegally subdivided to create parcel Nos. Machakos Blocks 1/679 and 681 among other parcels. He averred that on 21st December 1993, in total disregard of the existing alienation and public user the 2nd applicant was irregularly issued with a letter of allotment Ref No. 21658/X over land described as UNS B.C.R. PLOT NO.6-MACHAKOS on behalf of unstated county council, which allotment letter was supported by a Part Development Plan No. MKS/56/4 dated 3rd May 1992. He stated that in total disregard of the existing alienation and public user KANU Women League was issued with allotment letter Ref No. 21658/X over land described as UNS. B.C.R. PLOT NO. 7 MACHAKOS on behalf of Machakos County Council which letter of allotment was supported by a Part Development Plan No. MKS 56/92/4 dated 3rd May 1992, which plot was transferred to Thomas Nzioka Kibua the 1st Applicant herein. He averred that the latter was surveyed as Machakos Municipality Block 1/586 and Block 1/587. He stated that a survey plan Ref No. 328/120 was prepared to cancel parcels 1/586 and 1/587 and created parcels Machakos Municipality Block 1/679 and 1/681 respectively.
 4. He further deponed that the applicant in seeking orders of mandamus to get leases in respect of their aforesaid letters of allotment, have adversely mentioned the involvement of the Commission and therefore it is important that the Commission is granted opportunity to state its case. Further that the orders issued herein will affect the Commission and will adversely affect investigations and preclude the Commission from taking action in relation to the suit properties. That the commission is a necessary party in these proceedings and it is therefore important for the Commission to participate in these proceedings. He attached Part Development Plan; survey plan; letter dated 22nd October 1968; Conversion list; and two other survey plans.
 5. The application is opposed. Thomas Nzioki Kibua, the 1st ex parte applicant herein filed a replying affidavit sworn on 12th October 2023 on his own behalf and also on behalf of the 2nd ex parte applicant. He deponed that the intended interested party had not met the threshold for joinder as they failed to cite the stake that is sufficiently proximate to this matter; failed to demonstrate prejudice to be suffered and demonstrate relevant submissions that are different from those of the National land Commission.
 6. He conceded that he mentioned the Intended Interested party but only to demonstrate possibility of potential mischievous conduct, which is shown by the instant application which is based on a



provisional and preliminary investigations and incomplete statements and not on a conclusive report. He stated that the law relied upon being section 11 (10 of the Ethics and Anti Corruption Act is meant for institution of suits and not for joinder of existing suits. He maintained that the Commission ought to conclude its investigations first and file its own proceedings for recovery of land as per section 55 of its Act. He stated that the application was mischievous and would prejudice their interest.

7. He stated that his documents were from 1993 while the Commission's documents were from 1967 to 1993 and that therefore the Commissioner of lands had power to allocate the suit property. That the Commission has not shown that the Commissioner of lands acted illegally.
8. In a rejoinder, Salad Wato Boru filed a further affidavit sworn on 30th October 2023. He stated that the Commission had completed its investigations and had established that the suit property was fraudulently and unlawfully subdivided to create the suit parcels. He stated that the Commission had met the requirements for joinder. He stated that the National Land Commission had jurisdiction to review all grants of public land and determine legality of grants and dispositions. And that the NLC had no power to alienate land already set aside for public purpose. He stated that the applicants letters of allotment which are the foundation of their case cannot defeat public interest in the suit properties. He stated that the Commission was willing to file a replying affidavit to assist the court in arriving at a just determination.
9. The matter was disposed by way of written submissions. On record are submissions filed by the Commission on 31st October 2023 which the court has duly considered.

Analysis and determination

10. The court has carefully considered the application, the response and submissions and the only issue that arise for determination is whether the intended interested party has met the threshold for joinder as an interested party in these proceedings.
11. Order 1 Rule 10 (2) of the Civil Procedure Rules provides for the jurisdiction of the court to join a party to a suit, whose presence in the proceedings is necessary to assist the court to effectually and completely determine all the issues in dispute.
12. For a person to be joined to any court proceedings as interested party, they must demonstrate that they have an identifiable stake in the issues before court and that their presence in the suit is necessary to enable the court determine the questions in dispute. (See the decision in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* [2014]eKLR)
13. In the instant application, the intended interested party avers that the suit property is Government land set aside for civil servants rental housing scheme, having twenty four houses and that therefore the same was not available for alienation and allocation to the ex parte applicants. The intended interested party maintains that the subdivision of the suit property and subsequent allocation to the ex parte applicants was unlawful. On the other hand the ex parte applicants state that the Commission has no recognizable interest in the suit property and has not met the threshold of joinder as interested party.
14. The court has considered the pleadings herein and in the suit before court, the ex parte applicants have sought for orders of mandamus to compel the respondents to issue them with leases in respect of the suit property and prohibition to bar the respondents from conducting proceedings in respect of the said properties, on the basis of letters of allotment issued to them in 1993. The ex parte applicants have termed the respondents' failure to issue them with leases to the suit property as unreasonable, unfair, and an abuse of power. Incidentally, none of the respondents has responded to the claim filed by the ex parte applicants. The Commission argues that it has power to investigate cases of corruption,



economic crimes and unethical conduct and is mandated to investigate corruption allegations and to institute legal proceedings against any person and for recovery of public property, under section 11 of the *Ethics and Anti-corruption Commission Act*, 2011.

15. Having considered the issues herein and noting that it is the ex parte applicants' case is that they are the allottees of the suit property, and the issue raised being allocation of public land, it is therefore necessary for the court to establish whether the allocation process was in compliance with the law and whether they are entitled to the orders sought. I reject the ex parte applicants' argument that section 11 of the *Ethics and Anti-corruption Commission Act* only allows the Commission to file a fresh suit and not seek to be joined to existing proceedings. This is because the wording of that section does not exclude joinder. The power to institute and conduct proceedings in my view includes being sued, suing and joining existing proceedings. Therefore I find and hold that the intended interested party by their evidence, have demonstrated a recognizable stake in the proceedings as they have power to institute proceedings in respect of property they think to be public property but unlawfully acquired.
16. In my view therefore, the matters raised by the Commission are relevant in determining the issues raised in this suit by the ex parte applicants. I therefore hold and find that the Ethics and Anti-corruption Commission is a necessary party to these proceedings, and their presence in these proceedings is necessary so as to enable the court to effectually and completely determine the matters in question.
17. In the premises, I find and hold that the application dated 7th July 2023 is merited and the same is allowed in the following terms;
 - a. Leave be and is hereby granted to the intended interested party to join these proceedings as interested party.
 - b. The ex parte applicants are ordered to serve the interested party with all the pleadings filed in this suit, in 14 days of this Ruling and the interested party is ordered to file their pleadings in response thereto in 21 days of service.
 - c. The costs of the application shall be costs in the cause.
18. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 13TH DAY OF DECEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

1. Ms Kimani holding brief for Mr. Nzuko for 3rd Respondent
2. Mr Aseka holding brief for Ms Lugu for 2nd Respondent
3. Mr. Mugo for Exparte Applicant
4. Ms Lunyolo for intended interested party
5. Josephine –Court Assistant

