



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 215 OF 2013

JARED BENSON KENAGWA PLAINTIFF

VERSUS

KENYA AGRICULTURAL RESEARCH INSTITUTE KARI DEFENDANT

ZACHARI BWARINGA NYABARO

BERNARD MOGAKA AND

FIVE FAMILIES OF 300 PEOPLE PROPOSED INTERESTED PARTIES

RULING

1. The proposed interested parties by a Chamber Summons application dated 25th March 2015 expressed to be brought under order 1 Rule 13 and 14 of the **Civil Procedure Rules**, Sections 63 (e), 3 and 3A of the **Civil Procedure Act** and Article 63 of the Constitution seeks orders that:-

1. That this honourable court be pleased to enjoin the applicants Zachary Bwaringa Nyabaro, Bernard Nyamanya Mogaka as interested parties in this suit.

2. That costs be provided for.

2. The applicants base their application on the grounds that appear on the face of the application and inter alia the applicants claim they have a legitimate claim on the suit property and that they have been making efforts to have a share of the said property from successive governments since independence. The applicants aver that unless they are enjoined in the suit, they will have no opportunity to participate in the proceedings, the outcome whereof will directly affect them. The applicants claim they are children and grandchildren of Nyabaro Ogotu whose land was alienated for the purposes of setting up Kisii research centre and now after the alienation the applicants stay/reside in a riparian area surrounded by two rivers which is not suited for settlement as it is routinely affected by floods.

3. One Zachary Bwaringa Nyabaro has sworn an affidavit in support of the application in which he sets out the background leading to the alienation of the suit land. In the affidavit the deponent concedes that the plaintiff among other persons were alienated land out of the land taken from their father by the government. The deponent further avers the land initially had been allocated to the defendant before it was re-allocated to among others, the plaintiff. The applicants' contend that since the land was not put to the use that it was intended for, it should revert to the applicants.

4. The plaintiff and the defendant oppose the application by the intended interested parties. The plaintiff

filed grounds of opposition dated 16th April 2015 and contends that the applicant's application is frivolous, vexatious, vague and an abuse of the process of the court. The plaintiff avers that the application lacks clarity whether it targets the plaintiff's land which is registered or the remainder of the land alienated by the government. The plaintiff further denies the applicants have the *locus standi* to bring the instant application.

5. The defendant filed a replying affidavit sworn by one Oscar Magenya on 5th May 2015 in opposition to the intended interested parties application. The defendant denies that the intended interested parties have any legitimate claim to the suit property and dismisses their claim for a share of the suit property as baseless. The defendant claims the interested parties/applicants have no authorization to bring the application on behalf of the 300 persons they claim to represent. The defendant avers that at the time the disputed land was allocated to the defendant it was not allocated in anybody's name and was for all intent and purposes public land and it is therefore not true that the land belonged to the father of the interested parties as alleged.

6. With the consent of the parties, the court directed the parties to argue and canvass the interested parties/application dated 25th March 2015 by way of written submissions. The interested parties submissions dated 26th June 2015 were filed on the same date. The plaintiff's submissions dated 7th July 2015 were also filed on the same date while the defendants submissions dated 21st July 2015 were filed on 3rd September 2015.

7. I have carefully reviewed the application and the affidavit filed in support and the grounds of opposition filed by the plaintiff and the replying affidavit by the defendant and I have considered the submissions filed by the parties and the issues that stand out to be determined are:-

(i) Whether the applicants have a locus standi to bring the instant application.

(ii) Whether the applicants have demonstrated they have a legal interest in the matter and that they are a necessary party to enable the court to completely adjudicate the issues in the suit.

The applicants' application is premised under Order 1 Rule 13 which provides as follows:-

13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

Quite clearly the application of the above provision contemplates a situation where the parties are either plaintiffs or defendants and owing to the numbers the parties elect to nominate one or several of their number to act and represent them in the suit and in that capacity can appear and plead on behalf of the rest being either plaintiffs or defendants. The marginal note to rule 13 of Order 1 which is in the following terms makes this clear:-

“Appearance of one of several plaintiffs or defendants for others”.

8. It is a mandatory requirement under Order 13 Rule 2 that the authority be in writing and be filed. In my view therefore Order 13 Rule 1 would have no application to the interested parties present application as it envisages a situation where a suit is being filed by several plaintiffs and/or where a defence is being filed and there are several defendants and in each case they chose to nominate one or several of their number to plead on their behalf. The rule may also find application where in an ongoing suit with several plaintiffs and/or defendants, the parties being either plaintiffs or defendants decide to nominate one or several of their number to act for and proceed with the suit on their behalf. The provision in my view

cannot be invoked in an application for joinder of parties without first complying with the provisions that provide for joinder of parties.

9. The interested parties in my assessment desired to act as representatives of the 300 people they indicate in the application. If that were the case the applicants would equally be required to satisfy the provisions of Order 1 Rule 8 of the **Civil Procedure Rules** which provides as follows:-

1. 8 (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced and unless the court otherwise orders, continued, by or against anyone or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit at all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advisement, as the court in each case may direct.

10. The particulars of the 300 persons said to have a common interest would require to be given and the court would under Order 1 Rule 8 be required to give directions as relates to the suit and service of the suit on the persons with interest. The applicants have not sought to bring a representative action and only seek to be enjoined as interested persons. Order 1 Rule 10 (2) which the applicants have referred to in their submissions would perhaps have been the appropriate provision to anchor their application on as it is the one that deals with joinder of parties and it provides thus:-

Order 1 Rule 10 (2):-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been enjoined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

11. The provision provides for the deletion of the name of a party who is improperly joined as plaintiff or defendant in the suit and for the addition of a party who ought to have been included either as a plaintiff or defendant at the institution of the suit but was omitted. The provision also provides for the enjoinder of a party **“whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit”**. **Are the interested parties such a party?**

12. In the suit the plaintiff states he is the registered proprietor of LR No. 17666 situated in Kisii Municipality measuring 2.032 hectares. A certificate of official search dated 17th April 2013 indicates the plaintiff was registered as owner of the said property on 13th April 1993. The plaintiff seeks an order of permanent injunction against the defendant to restrain the defendant from in any manner interfering with the plaintiff’s development activities in his said parcel of land. The defendant by its defence contests the ownership of the parcel of land by the plaintiff claiming if the plaintiff holds a registered lease the same was obtained irregularly and illegally and ought to be cancelled. In turn the defendant seeks a declaration that the property belongs to the defendant and that the plaintiff should be enjoined from interfering with the suit property.

13. The proposed interested parties for their part claim an interest on the suit property as they state the same formed part of the land alienated from their deceased father or grandfather. No evidence has been tendered to show or demonstrate that the suit land at any time was owned by the applicants’ deceased father. At any rate the applicants concede their land which was 51 acres was alienated before or about 1963 although they aver that the defendant increased the alienated land to 83 acres from the initial 51 acres which resulted with the applicants families being rendered destitute. It does appear the applicants’ interest in the land was revived after what they say was their realization that their father’s land was not put to the intended purpose but was instead subdivided and alienated to private individuals such as the

plaintiff. In my assessment of the suit, my view is that the issues in contest are directly between the plaintiff on the one hand and the defendant on the other hand. The interested parties interest as relates to the present suit are farfetched. From the account by the interested parties their issues appear to be whether or not there is a case of historical injustice and my view is that this would not be the proper forum to ventilate such an issue. The constitution under Article 67 (2) gives mandate to the National Land Commission to – “**initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress**”. I am therefore not satisfied that the applicants have demonstrated they have a legal interest in the subject matter of this suit or that any outcome of the suit would directly affect them.

14. They are not a relevant and necessary party to enable the court to fully and exhaustively determine the issues arising in the present suit. Their inclusion would convolute the issues unnecessarily and breed confusion which would make it inconvenient to the court. From my review and consideration of the application it is my finding that the application lacks any merit and the applicants have no **locus standi** to bring the application. I accordingly order the interested parties application dated 25th March 2015 dismissed with costs to the plaintiff and the defendant.

Ruling dated, signed and delivered at Kisii this 11th day of March, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

.....for the Applicant

..... .for the Respondent

.....for the Interested parties

J. M. MUTUNGI

JUDGE