



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC NO.199 OF 2012

(FORMERLY HCCC NO.12 OF 2005)

NATIONAL HOUSING CORPORATION.....PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

JOSEPH KIMITEI KWAMBAL.....3RD DEFENDANT

MARGARET JESANG KOECH.....4TH DEFENDANT

MUSTAFA KIPROP.....5TH DEFENDANT

CAROLINE KIPLAGAT.....6TH DEFENDANT

ULTRA EUREKA FARM LTD.....7TH DEFENDANT

ROSE AKOTH NYAMORI.....8TH DEFENDANT

RULING

Introduction

1. This is a Ruling in respect of two separate applications. The first application is dated 6/11.2020. It is brought by the Plaintiff and it seeks for leave to appeal against the ruling of this court which was delivered on 26/10/2020 dismissing the Plaintiff's suit for want of prosecution.
2. The second application is dated 19/2/2021. It is brought by the 3rd Defendant and it seeks for an order directed at the Land Registrar Uasin Gishu County directing the removal of a restriction dated 10.5.2005 which was registered against title No. **Eldoret Municipality Block/13/449** which is registered in the name of the 3rd Defendant.

Background

3. The Plaintiff which is a state affiliated corporation was on 13/2/1998 allocated 14.65 hectares by the Commissioner of Lands, for purposes of constructing residential houses within Eldoret Municipality. The Plaintiff constructed houses which were known as Eldoret Mortgage Housing Scheme. Phase I and II of the project was completed and the houses were sold to the public. The Plaintiff then embarked on the Phase III of the project.
4. The Plaintiff had set aside about Kshs 160,000,000/= for Phase III. Some houses in phase III were 60% complete when the Commissioner of Lands wrote to the Plaintiff to relinquish its interest on the remainder of the land for allocation to private developers. The Plaintiff was not agreeable to the request by the Commissioner of Lands. The Commissioner then wrote back and assured the Plaintiff that the land will not be allocated to private developers.
5. In the meantime, the 3rd Defendant and others had moved to the ground where they applied to be allocated shopping spaces which were to serve the occupiers of the houses. It later turned out that the Commissioner of Lands had allocated several individuals and entities parcels

within Phase III of the project and titles had been processed. It is then after this that the Plaintiff filed this suit and thus seeking nullification of titles which were illegally obtained and for which the Commissioner of Lands admitted were given in error.

6. The issue of the illegal allocation was taken up by the then Kenya Anti Corruption Commission which is now known as Ethics and Anti Corruption Commission. The Plaintiff did not set down the suit for prosecution as it awaited the outcome of the investigations. The investigations were not completed in time despite the Plaintiff's lawyers writing several letters inquiring about the status of the investigations.

7. The 3rd Defendant filed an application dated 30/8/2007 seeking to have this suit dismissed for want of prosecution. This application was subsequently withdrawn on 24/10/2007. On 10/6/2020, the 3rd Defendant filed a fresh application seeking to have the Plaintiff's suit dismissed for want of prosecution. This application was heard and allowed vide a ruling delivered on 26/10/2020. This is what triggered the Plaintiff to file the application dated 6/11/2020. It is the same ruling which also triggered the 3rd Defendant to file the application dated 19/2/2021.

The First Application

8. The Plaintiff contends that when the ruling of 26/10/2020 was delivered, the counsel who had been briefed to argue the application on behalf of its counsel applied to court for leave to appeal but the request for leave could not be granted by the court as there was a network disconnection. The ruling was delivered virtually.

9. The Plaintiff argues that there is no automatic right to appeal from orders granted under *Order 17 of the Civil Procedures Rules* hence the request for leave which is mandatory before one can file an appeal arising from the said order.

10. The Plaintiff contends that its advocates discovered that leave to appeal was not granted after he called the registry to confirm if leave had been granted.

11. The 3rd Defendant opposed the Plaintiff's application through a replying affidavit sworn on 23/11/2020. The 3rd Defendant contends that the Plaintiff's application is made in bad faith; is fatally and incurably defective; bad in law and an abuse of the process of the court.

12. The 3rd Defendant states that the Plaintiff's suit was dismissed as the Plaintiff did not prosecute it for over 14 years and that it has been more than 10 years since investigations over the allegation of illegal allocation began.

13. The 3rd Defendant further contends that it will be very prejudicial to him if leave to appeal was to be granted.

14. The parties herein had been directed to file written submissions in respect of the two applications. As at the time of writing this ruling on 12/12/2021, it is only the 3rd Defendant who had filed his submissions in respect of the two applications. If the Plaintiff filed any submissions, then they are not in the file. The 1st and 2nd Defendants were granted seven days within which to file their submissions in respect of the second application with effect from 14/10/2021. As at the time of writing this ruling, they had not filed any submissions and if any were filed, then they are not in the file.

15. I have considered the Plaintiff's application and the opposition to the same by the 3rd Defendant. I have also considered the submissions by the 3rd Defendant. The only issue for determination is whether the Plaintiff has met the threshold for grant of leave to appeal. There is no contention that there is no automatic right to appeal from rulings arising from Order 17 of the Civil Procedure Rules.

16. The reason why there is no automatic leave to appeal from rulings arising from certain orders under the Civil Procedure Rules was to avoid cases where appeals are filed even in cases where the same is not deserved. In the instant case, it is clear that the Plaintiff has reason to appeal against the dismissal of its suit for want of prosecution. The Plaintiff had in the replying affidavit to the application for dismissal explained why the suit had remained unprosecuted for long. The Plaintiff's lawyers had written a number of letters to the investigating agency seeking to know the status of the investigations. These are serious grounds which need to be investigated on appeal. I therefore find that this is a proper case where leave for appeal should be granted. I therefore allow the Plaintiff's application dated 26/10/2020 in terms of prayers (b) and (c).

It is so ordered.

The Second Application

17. In this application, the 3rd Defendant contends that following the dismissal of this suit for want of prosecution, he has through his Advocates written letters addressed to the Land Registrar Uasin Gishu County seeking to have the restriction registered against title to Eldoret Municipality Block/13/449 lifted but that the Land Registrar has not complied with the request and this is why he has resorted to this court to order the Land Registrar to remove the restriction.

18. The 3rd Defendant's application was opposed by the 1st and 2nd Defendant through a replying affidavit sworn on 20/4/2021. The 1st and 2nd Defendants contend that the 3rd Defendant's application offends the provisions of the Land Registration Act and that the 3rd Defendant has not exhausted the procedures provided for under the Land Registration Act.

19. The 1st and 2nd Defendants further contend that the Land Registrar is not a party to these proceedings and that there is no evidence that the letters which the 3rd Defendant alleges to have written to him reached in his office. The 1st and 2nd Defendants further contend that the

issue of ownership of the suit property is yet to be determined.

20. I have considered the Applicant's application as well as the opposition to the same by the 1st and 2nd Defendants. I have also considered the submission by the 3rd Defendant. The only issue for determination is whether the 3rd Defendant has demonstrated that there are reasons for the removal of the restriction.

21. Section 78 of the Land Registration Act provides as follows: -

“78. (1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.”

22. It is clear from Section 78(2) of the Land Registration Act that the court has wide discretion upon being moved by a party affected by a restriction to either order its removal, variation, or make any order as it deems fit. In the instant case, this court has already granted the Plaintiff leave to appeal against the dismissal of the suit for want of prosecution. It will therefore not be in order to order removal of the restriction pending the outcome of the intended appeal by the Plaintiffs. This application was filed after the one seeking leave to appeal had been filed. I find that this application lacks merit. The same is dismissed with costs to the Plaintiff as well as the 1st and 2nd Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF JANUARY 2022.

E. OBAGA

JUDGE

IN THE VIRTUAL PRESENCE OF:

MR. SONGOK FOR MR. MAINA FOR APPLICANT

MR. ODONGO FOR 1ST AND 2ND RESPONDENTS

MS.KESEI FOR MS. CHELASAW FOR 3RD RESPONDENT

COURT ASSISTANT: MERCY

E. OBAGA

JUDGE

20.01.2022