



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 371 OF 2011 (O.S)

IN THE MATTER OF PARCELS OF LAND REFERENCE NO. 10426/82 I.R NO. 126720 & LAND
REFERENCE NO.10426/81 I.R. NO. 126719

AND

THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CHAPTER 22 OF THE
LAWS OF KENYA, ORDER 37 RULES 7 OF THE CIVIL PROCEDURE RULES

BETWEEN

1. JEREMIAH OLE MATURA NKOITIKO
2. SIMINKOR NKAMIYA
3. KITASI MOITALEL NKIMINIS
4. JAMES KINTANYEI KANYORO
5. SALAU OLE LOLO MUNANTAUWA
6. JAMES KOSEN
7. SIMON KOSEN
8. PETER SUAKEI OLE PATEI
9. ERICK KOISAYO KANYORO
10. JEREMIAH OLTITI KUSERO APPLICANTS

VERSUS

1. AGRICULTURE SYNDICATE LIMITED
2. NATIONAL HOUSING CORPORATION RESPONDENTS

R U L I N G

1. On 1/10/2012, directions were given by the court that the hearing of the **Originating Summons** herein do proceed as follows:-

1. **“The Originating Summons is to be treated as a plaint.**
2. **Replying affidavits to be treated as defence.**
3. **The Originating Summons to proceed by way of the affidavits on record and subsequent written submissions.**
4. **Mention on 2/11/12 for further orders and or directions.**
5. *Status quo* **currently obtaining extended until then.”**

2. When the parties appeared before me on 7/3/2013, the Plaintiffs’ counsel made an application for a site visit. The application was not objected to and was allowed. However, when the court visited the site on 20/5/2013, the Plaintiffs’ counsel did not turn up. The site visit however proceeded as scheduled.

3. During the next mention date on 30/7/2013, the Plaintiffs’ advocate requested for fresh directions as to whether the suit will proceed by way of affidavit or *viva voce* evidence. The Defendants were objected to the issuance of fresh directions and stated that the court gave directions on 1/10/2012.

4. In the meantime, the 2nd Defendant, **Agriculture Syndicate** had filed the application dated 27/7/2013 seeking orders that the suit against them be struck off for misjoinder. The court however dismissed the application on 19/6/2014. Thereafter the Plaintiffs took the position that this matter do proceed by way of *viva voce* evidence. Both Defendant 1 and 2 took the position that the matter do proceed by way of affidavit evidence as per the directions given on 1/10/2012. The 1st Defendant was not in court on 1/10/2012 when the said directions were given. The 1st Defendant sought the court’s leave to file a replying affidavit. This was not objected to and the leave was granted and the said replying affidavit filed on 3/10/2014.

5. The parties are not in agreement on whether to proceed by way of *viva voce* evidence or affidavit evidence. Although the court gave directions on 1/10/2012 the subsequent filing of further documents calls for the taking of fresh directions.

6. The site visit also included the taking of *viva voce* evidence. That evidence was not taken in the presence of all the parties. The said evidence is yet to be subjected to cross-examination.

7. With the foregoing, my view is that the ends of justice will be met by the case starting *de novo* and fresh directions taken. This being an **Environment & Land Case**, I decline to give any fresh directions in the matter and refer it to the **Environment & Land Court**.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of **October** 2014.

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B. THURANIRA JADEN

JUDGE