REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION 23 OF 2013

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSITITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 22 AND 23 AND 68 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012

BETWEEN

AKITHII RANCHING (DIRECTOR AGRICULTURAL) COMPANY LIMITED.....PETITIONER

AND

THE DISTRICT LAND ADJUDICATION AND SETTLEMENTS OFFICER TIGANIA DISTRICTS.....1ST RESPONDENT

THE PERMANENT SECRETARY, MINISTRY OF LANDS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

R U L I N G

This application is dated 13th November, 2013 and seeks orders:

(a) THAT this application be certified urgent and heard exparte in the first instance.

(b) THAT the Honourable Court be pleased to order that the applicants be enjoined in this case as INTERESTED PARTIES.

(c) THAT the costs of this application be provided for.

The application is supported by the Affidavits of Adriano Mworia, the 1st applicant as well as the

following grounds:-

(a) The applicants are representatives of over 10,000 families, resident at New Kiare/Mintutu Sub locations of Rwanda/Mumui Locations in Tigania, Meru County.

(b) The said families have lived there for over 40 years undisturbed and they have known no Other home but that . They carry out farming and have put up institutions such as schools, churches and chiefs camps. They had looked forward to the time the area shall be demarcated, and that time came.

(c) On 5th October, 2009 the district Land Adjudication and Settlement Officer, Tigania East and West Districts declared the area an adjudication section, in a declaration that described the extent and limits of the section to be adjudicated. The process had been going on well and all the residents know their boundaries and have fenced off their parcels. Others have built permanent homes. Others have sold theirs.

(d) It came to the attention of the applicants in the month of October, 2013 that the petitioner herein obtained orders by way of fraudulent non- disclosure of material facts. The orders permanently restrained the respondents from continuing with the adjudication process. The applicants were not aware of the existence of this petition until judgment was delivered and the petitioner's proxies in the adjudication section began to take of impending evictions. The applicants immediately instructed an advocate who desperately tried to access the court file for perusal but has been unsuccessful as the file is not in the court registry. He however managed t see copy of the pleadings at the State Law Officers.

(e) The orders obtained are drastic, with a direct impact on all the residents who were legally and constitutionally entitled to the process of acquiring land.

(f) It is also transpires that even through the 1st Respondent had filed a Replying Affidavit on 26th February, 2013 sworn by 2nd respondent and supported by a Further affidavit by one Bernard Muthaura the bona fide chairman of the petitioner, the same may not have been considered by the court as the petitioner's proxies keep saying that the petition was uncontested.

(g) The applicants and the residents ought to have been served with the pleadings as they live in the adjudication section thus entitled to a stay in court. Unless they are given a chance to ventilate their case which is not prejudicial to he petitioner, they will have been condemned unheard

(h) It is the applicants desire to apply to have the judgment set aside in order to accord all parties an opportunity to be heard, but before they seek those orders, it imperative that they are granted leave to be enjoined as interested parties to give them locus before court.

(i) It is for this reason that they are applying for the said leave.

The applicants have submitted that they are law abiding citizens of an area known as Rwanda Location in Tigania, Meru county. They say that they had a legitimate expectation to have title deeds issued to them when adjudication was carried out. They submit that when implementing the adjudication process the District Land Adjudication officer prepared a list of 3321 members. They say that they were not aware of this suit. They submit that the petitioner had not disclosed the existence of people and institutions in the suit property. They argue that the petitioner concealed and continues to conceal material facts.

The applicants urge the court to admit these as Interested Parties and if they are granted audience the merits of the dispute will be interrogated afresh.

The applicants have taken great exception of the language used by the petitioner about them. They point out that the petitioner in the replying affidavit in various paragraphs has described the applicants as land grabbers and corrupt beneficiaries. They argue that these connotations unfairly cast aspersions on the

person of all the applicants as lacking decency and civility. They suggest that the petitioner's language amounts to hate speech. They describe themselves as honest litigants who have chosen to place themselves before the Court's jurisdiction as honest Kenyans are expected to do while addressing their grievances.

The Petitioner has opposed the application and pointed out that the land owned by the petitioner has been the subject of other cases in the High court and it is clear that the property is properly mapped out and does not include the area mentioned by the applicants. They say that the petitioner's land is a ranch and the prayers granted by the Court only meant to conserve the ranch and to allow the company to manage it. They contend that if the applicants are members of the company, they should be aware that they had a voice in general meetings where they could argue their issues. Otherwise, in law, they did not have *locus standi* to bring a case against the company. As such the petitioner has submitted that the case is a on-starter, bad in law and ought to be dismissed with costs. The petition claims that the application which is said to have been brought under Order 1 (3) , 10 (2) of the Civil Procedure Rules, Section 1A, 1B of the Civil Procedure Act, Article 22 and 159 (a) and (b) of the Constitution has no merit.

The Petitioner submits that this Court is *functus Officio and has no jurisdiction to* re-open the case and issue fresh orders as the court has already finalized the case.

The Petitioner also submits that even if it was the situation that the Case was still in progress, which is not he case, the Court should not add a person as a defendant or by any other name called in a suit where the plaintiff is opposed to such action. The petitioner argues that the plaintiff is dominus litis and as such owns the suit, it is the suit's mater and as such cannot be compelled to fight against a person from whom he does not claim any relief. It urges this Court to dismiss the application with costs.

The applicant has proffered the following authorities;

(a) Civil Appeal No. 60 of 2013 – Telkom (K) Ltd Versus John Ochanda

(b) Commentary on Civil Procedure by Steve Ouma, Page 107.

(c) Civil Case No. 571 of 2011 (Milimani) – Bellevue Development Co. Ltd Versus Vinayak Builders Ltd & Another.

I have carefully considered the averments, the submissions and the authorities proffered by the parties.

My ruling in this suit was delivered on 2nd October, 2013. Although, I called my final decision a ruling because the suit had been brought to court by way of a Chamber Summons application. The ruling I delivered, which other people may have called a judgment, finalized this suit. To demonsrate the finality of my decision, Mr. Cliff N. Menge, Principal Litigation Officer in the Attorney General's Office at Meru filed a Notice of Appeal, under rule 74 of the Court of Appeal Rules, on 15th October, 2013. this application was filed on 13th November, 2013, almost one and a half months after I had delivered the final ruling in this matter.

I do not find it necessary to address most of the issues raised by the parties. The overriding determination I need to make regards whether this Court made its final decision on 2nd October, 2013. It is pellucidly clear that a final decision was made in this matter by this Court.

I find the authorities proffered by the Petitioner to be relevant to the circumstances of this case. However, I need not reinvent the wheel. The Court of Appeal at Nyeri in Civil Application No. 21 of 2013 – Dickson Murichu Muriuki Versus Timothy Kagondu Muriuki & Others opined that:

"20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery its judgment and pending the hearing and determination of an intended appeal to the Supreme Curt, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the

principle functus officio prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most case will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after deliver of its judgment. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a Court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the supreme Court or the court may change its mind and wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding.....Allowing this Court to issue stay orders after judgment would be detrimental to the concent of finality in litigation within hierarchy and structure of the Kenya Courts.

21. We take cognizance that when this court has delivered Judgment; all pertinent issues and points of law have been fully canvassed and considered upon delivery of the Judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed. The submissions by counsel, evidence or record, pints of law and relevant authorities all have been raised, re-examined, weighted, deliberated upon and judgment made. What new point of law can subsequently be raised in an interlocutory application for stay of execution that will make this court change its mind after delivery of judgment and order stay of execution? If there are new points of law or circumstances that arise from judgment, this Court is functus officio and justiciable forum to consider the merits or otherwise of these new circumstance must shift from this court to the Supreme Court."

I have quoted the Court of Appeal to emphasize on the principles of finality and *functus officio.* Once a court has made its final decision it has no jurisdiction to re-open the suit upon which its decision was made. In my ruling delivered on 2nd October, 2013 I made a final decision in this suit. The respondents therein filed a notice of Appeal under Rule 74 of the Court of Appeal rules.

I declare that this court is functus official. The application is dismissed with costs to the petitioner's

It is so ordered.

Delivered in Open Court at Meru this 23rd day of October, 2014.

Cc. Daniel

Kaimenyi h/b Rimita for Petitioner

Kiongo for Respondents

P. M. NJOROGE

JUDGE