



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LANDS DIVISION

ELC CASE NO 1321 OF 2005

PIUS NGUGIPLAINTIFF

VERSUS

HELLEN FEARDEFENDANT

CONSOLIDATED WITH

ELCE CIVIL SUIT NO. 424 OF 2011

MUKTAR SAMAN OLOW..... PLAINTIFF

VERSUS

CHIEF LAND REGISTRAR2ND DEFENDANT

COMMISSIONER OF LANDS3RD DEFENDANT

ECL CIVIL SUIT NO. 437 OF 2011

PIUS NGUGI1ST PLAINTIFF

ANGELINE NGUGI2ND PLAINTIFF

VERSUS

MUKTAR SAMAN OLOW1ST DEFENDANT

JOSEPH KIMANI T/A

PYRAMID AUCTIONEERS2ND DFENDANT

RULING

The applicant herein Pius Ngugi has brought this chamber summons dated 26th July, 2013 brought under Order 1 Rule 10 of the civil Procedure Rules, 2010, Articles 35 and 67 of the Constitution and Section 3A of the Civil procedure Act seeking for these orders:-

- a. **That leave be granted to enjoin the National Land Commission in this suit as the 3rd Defendant in place of the Commissioner of Lands, the present 3rd Defendant in ELC No.424 of 2011.**
- b. **That the intended 3rd Defendant be compelled to produce before this court the correspondence and Deed files for land Reference No. 1870/240/1 (IR No. 17383) Nairobi.**
- c. **Costs of the application be in the cause.**

The application is supported by the following grounds:-

- i. **That various suits were consolidated on 31st October, 2011 which suits touched on the suit land herein.**
- ii. **That the applicant Pius Ngugi is a party in all the 3 suits while the Commissioner of Lands is the 3rd Defendant in civil suit No. 424 of 2011.**
- iii. **That by virtue of the provisions of Article 67(1) of the Constitution of Kenya, the Commissioner of Lands has been replaced by the National Land Commission.**
- iv. **Further that the applicant has made numerous requests to the Commissioner of Lands to provide him with crucial information in the files for IR No.17383 in relation as contemplated under Article 35 of the Constitution of Kenya and the Commissioner has refused and or neglected to do so.**
- v. **That the National Land Commission is now operational and is mandated. inter alia to monitor the registration of all rights and interests in Land and develop and maintain an effective Land information management system at national and county levels**
- vi. **That the intended 3rd Defendant holds vital information in relation to the subject matter of this suit since it holds all records in relation to any transfers and or transactions in relation to the suit property.**
- vii. **That the information held by the intended 3rd Defendant is critical in the effectual and complete adjudication of this suit.**
- viii. **That it is just and equitable that the orders sought be granted.**

The application was also supported by the Affidavit of Pius Ngugi, the applicant herein. He averred that one of the most critical issues for determination in the suits consolidated is the question as to whether Ms Hellen Fear, who was previously registered as the proprietor of LR No. 1870/240/1, transferred the property to Mr. Muktar Saman Olow. He further alleged that through his advocates on record he has made several requests to the Commissioner of Lands to provide him with information regarding the said Grant as contemplated by Article 35 of the Constitution but the said Commissioner refused and/or neglected to do so. He further stated that the information sought is critical in enabling the court to establish how Mr. Muktar Saman Olow obtained the property.

The chamber summons was vehemently opposed by Muktar Saman Olow and the office of the Attorney General who is acting for the Commissioner of Lands.

In opposition to the chamber summons, grounds of opposition were filed by counsel for Mr. Muktar Saman Olow and he stated that:

- i. **The National Land Commission will be the successor in title to 3rd Defendant and this is by operation of law and transitional schedule to the Constitution and not by requests of litigants through court processes.**
- ii. **That the orders sought by the applicant are speculative and fishing in nature as the information sought has already been provided by the 3rd Defendant in the documents filed on their behalf.**
- iii. **That the application is an abuse of the court process as it is not supported by the pleadings filed by the applicant.**
- iv. **Further the application is a blatant ploy by the plaintiff in his quest to forum shop in hope that the National land Commission maybe favourable to his desire of owning the property.**
- v. **That the application is one of the many tactics employed to delay the main hearing of the**

suit.

vi. **That the application is a waste of the courts time as it is trying to convert the court into an investigative agency.**

vii. **The application is frivolous vexatious and seeks details of title that does not exist at all.**

The application was canvassed orally in court. Counsels submitted at lengthy for and against the application. I have carefully considered the rival arguments and the cited authorities.

On the first prayer, the Applicant has applied to enjoin National Land Commission as 3rd Defendant to replace the Commissioner of Lands.

Order 1 Rule 10 of Civil Procedure Rules provides for substitution and/or addition of parties. It states as follows.

“Where a suit has been instituted with name of the wrong persons as plaintiff or while it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit if satisfied that the suit has been instituted through a bonafide mistake and that it is necessary for the determination of the real matter in dispute to do so order any other person to be substituted added as plaintiff upon such terms as the court thinks fit.”

The court may therefore at any stage of the suit order substitution of a party upon being satisfied that such substitution or addition is necessary for determination of the issues in dispute. The applicant herein has the duty to satisfy the court that it is necessary to substitute the parties as prayed.

The applicant submitted that upon promulgation of the Constitution 2010, all matter relating to Land were directed to National Land Commission. The applicant relied on article 67 of the Constitution which established the National Land Commission and also sets out the functions of this Commission.

The applicant also relied do Section 30 of the National Land Commission which deals with transitional provisions Section 30(b) of NLC states.

“Any function or transaction, civil proceedings or any other legal or other process in respect of a matter carried out in relation to the administration of public land by or on behalf of the Ministry of lands before the commencement of this Act, Shall be deemed to have been carried under this Act.”

The transition therefore is automatic due to operation of law. Whatever function or Civil proceeding existed before the Act came into existence will automatically be deemed to have been carried under this Act.

The 3rd Defendant herein is the Commissioner of Lands who carried out functions on behalf of the Ministry of Lands. Whatever functions he carried out are now deemed to have been carried under NLC Act. The National Land Commission therefore takes over the functions of 3rd Defendant by operation of law and court finds it not necessary for the applicant herein to make the request as he has already done through the instant application.

Further Section 32(1) of National Land Commission Act provides that

“All property, assets rights, liabilities. Obligations agreements and other arrangements existing at the commencement of this Act and vested in acquired, incurred or entered into by on or behalf of the Ministry of Lands with respect to the departments whose functions have been transferred to the Commission, shall upon the commencement of this Act be deemed to have vested in or to have been acquired , incurred or entered into b y or on behalf of the Commission to the same extent as they were enforceable by or against the such Department before the commencement of the Act.”

It is evident that the 3rd Defendant herein is the Commission of Lands. A civil proceeding creates either rights, liabilities or obligations depending with the outcome of such proceeding. From the reading of Section 32 of the National Land Commission Act, it is evident that such rights, liabilities and obligations that were held by 3rd Defendant shall automatically be transferred to the Commission: Such transfer is by operation of the law and there is no need for the litigant to request for it.

The applicant counsel did submit that the National Land Commission was just operationalized the other day. The structures and different departments within the National Land Commission have not been fully formed. Joining the National Land Commission at this stage will automatically lead to the delay in prosecution of this matter. That, indeed would be against the spirit of sections 1A and 1B of the Civil procedure Act which deals with the overriding objective of the Act.

Section 1A states as follows:- **“overriding objective of this Act and the rules made hereunder is a facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.”** Further Section 1B of the same Act deal with the duty of the court in furthering the overriding objective.

I will also be guided by the decision in the case of **KAMAU v MAKOMBAKI TEA FACTORY LTD (2005) IEA 154**, which the court held that;

“it is clear under Order 1 Rule 10(1) that the only party who can be joined as a plaintiff or defendant is one who ought to have been joined 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. The legitimate question to pose is not whether the applicant are necessarily parties but whether they were improperly left out of the suit.”

In the instant suit National Land Commission was not improperly left out but has effectively taken over the functions of the Commissioner of Lands by operation of law.

From the above analysis the court finds that the applicant herein has not satisfied the court that National Land Commissioner was improperly left out or is necessary for determination of the dispute. The court therefore declines to grant leave to the applicant to enjoin the National Land Commission as a 3rd Defendant herein and replace the Commission of lands.

On the second prayer the applicant asks the court to compel the 3rd Defendant to produce in court the correspondence and deeds files for LR No. 1870/240/1 (IR No. 17383) Nairobi.

Applicant relied on the provisions of Article 35 of the Constitution which provides for **“Access to information”**.

The applicant stated that they have relentlessly asked for the documents from the Commissioner of Lands but the same have not been availed. Applicant alleged that failure to obtain the said documents infringes on his right to fair trial. The Respondents opposed the said prayer and stated that the Applicant wishes to turn the court into an investigative agency. I have considered the arguments for and against the granting of this prayer. The applicant has relied on Article 35 of the Constitution which falls under the chapter dealing with the Bill of Rights. However in the instant case the parties have come to court for a civil dispute. All the parties herein expect fair treatment from the court. It is a common principle is law that **“he who alleges must prove.”**

Before the parties can fix the matter for hearing they are supposed to comply with order 11 of Civil Procedure Rule. Order 11 deals with discoveries and exchange of documents and witness statements. What the Applicant is asking the court to do now is what should have been done during the discoveries. On 25th May, 2013 parties fixed the matter for hearing and also agreed to file any supplementary documents. There was no mention of documents that 3rd Defendant has declined and/or neglected to

provide the Applicant herein. Applicant states that his claim is based on fraud and has a death certificate to show when one Hellen Fear allegedly died. Applicant should therefore build his claim based on the documents available to him. The 3rd Defendant alleges that all the relevant documents have been attached to its pleadings. I will concur with the 3rd Respondent's submissions that compelling the 3rd Defendant to produce the documents in court will be tantamount to this court engaging in investigative duties. The court is supposed to be an impartial arbiter and should not be involved in the gathering of evidence of any of the parties in the suit. The parties herein should have cleared the issues of documents during the discoveries as provided by Order 11 of the Civil procedure Rules. Consequently the court finds that the Applicant prayers No. 2 is not merited. The same is declined. The upshot therefore is that the Applicant's Chamber Summons dated 26th July, 2013 is dismissed. Costs in the cause.

Dated, signed and delivered at Nairobi this 23rd day of August ,2013

L. N GACHERU

JUDGE