



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JR. MISC. CIVIL. APP. NO.47 OF 2010

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION AND MANDAMUS DIRECTED TO THE 1ST, 2ND AND 3RD RESPONDENTS AND

IN THE MATTER OF: REFUSAL AND OR FAILURE TO ASCERTAIN, FIX AND OR MARK BOUNDARY AND BEACONS TO LAND REFERENCE NO.GITHUNGURI/KIMATHI/591 CONTRARY TO CAP.300 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LANDS REGISTRAR, KIAMBU.....1ST RESPONDENT
DISTRICT LAND SURVEYOR, KIAMBU.....2ND RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE

KARIUKI KINOTHE

R U L I N G

The Notice of Motion dated 2nd June 2012 seeks that the applicants namely Paul Kigochi Mwaura, Peter Waweru Ichangai, Ndungu Kabu and Nicholas Thungu Mbugua be enjoined in this case as interested parties on grounds that they all have proprietary interest in parcels of land known as Githunguri/Kimathi/403, Githunguri/Kimathi/306, Githunguri/

Kimathi/371 and Githunguri/Kimathi/305 which border land subject matter of the proceedings in this case namely L.R. No. Githunguri/Kimathi/591 and that consequently they all have a common interest with the applicant in that the intended unsurveyed road passes in front of the aforesaid parcels of land.

In the affidavit supporting the motion sworn by Paul Kigochi Mwaura on his own behalf and on behalf of the other applicants, the deponent states that all the applicants had jointly with the exparte applicant instructed the firm of Ngarega Waiyaki and Company Advocates to institute proceedings to compel the respondent to resurvey their respective parcels of land following his failure to do so since Year 2004 but that for undisclosed reasons when suit was filed, they were not included as applicants in the suit. It was averred by the deponent that they now wished to be enjoined in the proceedings in order to have their said parcels of land resurveyed in order to determine whether the proposed road encroaches on their respective properties.

The application is opposed by Mr. Kiage, State Counsel instructed by the Attorney General appearing for

the respondent. Mr. Waiyaki, learned Counsel for the ex parte applicant chose not to take any position in the matter and left it to the court to decide.

Mr. Kiage opposed the motion on grounds that the applicants have not demonstrated that they have the legal capacity to represent the registered owners of the parcels of land in question in this proceedings and secondly and more importantly on grounds that there has been inordinate and unexplained delay in moving the court to be enjoined as interested parties in this case and their late entry if allowed will move backwards proceedings which are for all practical purposes determined.

Having carefully considered the application and the reasons given by Mr. Kiage in opposition thereto, I find that the applicants want to be enjoined in these proceedings not because they will be directly affected by any orders the court is likely to make at the end of these proceedings and would therefore want to be heard in opposition to the ex parte applicant's suit but as persons who share a common interest with the ex parte applicant and who wish to have their separate claims against the respondent litigated within the proceedings commenced by the ex parte applicant. It is clear from the depositions in the supporting affidavit that they do not want to be enjoined as parties in the proceedings because they have a common interest with the ex parte applicant so that whatever orders the court makes in these proceedings will be equally binding on them but their main interest is to have their respective parcels of land resurveyed.

Given the foregoing, even without making a finding as to their legal capacities to represent the registered proprietors of the land in question in these proceedings, it is my opinion that the application is not merited since besides having been made too late in the day when the instant proceedings are nearing completion, the applicants cannot be allowed to sneak in their own private claims and prosecute them within another litigants subsisting suit unless they commenced the suit jointly as co-ex parte applicants or are enjoined as applicants early in the proceedings with the consent of the Ex parte applicant.

The applicants have the option of instituting their own suits seeking the relief they desire but the law does not allow them to be enjoined in proceedings to open up the ex parte applicants' suit for purposes of litigating their own private rights. The law that governs joinder of persons as interested persons in judicial review proceedings envisages a situation where parties to be enjoined wish to be heard in opposition to the ex parte applicants' suit but not to propagate their own legal claims within a subsisting suit.

That law is found in Order 53 Rule 6 of the Civil Procedure Rules which stipulates as follows:

“On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order shall be made”.

In view of the foregoing, I am satisfied that the Notice of Motion dated 2nd June 2012 lacks merit and it is hereby dismissed with no orders as to costs.

Dated, Signed and Delivered by me at Nairobi this 20th day of July 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence - Court Clerk

M/s Othieno for proposed Interested Party

N/A Respondent

Mr. Assa holding brief for Mr. Waiyaki for Exparte Applicants