REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 191 of 2008

KIPTALAM ARAP CHERUNYA.....PETITIONER

VERSUS

COMMISSIONER OF LANDS.....1ST RESPONDENT

CHIEF REGISTRAR OF LANDS.....2ND RESPONDENT

THE LAND REGISTRAR UASIN GISHU DISTRICT.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Introduction

1. The applicant, Industrial & Commercial Development Corporation (ICDC) filed its application brought by way of Notice of Motion on the 25th of July 2011 seeking the following prayers:

a) This court be pleased to grant leave to the applicant to be enjoined as a party to these proceedings

(b) This Honourable court be pleased to set aside the judgment and decree of the Honourable court delivered on the 5th October 2010.

(c) Pursuant to prayer (b) above, the Honourable court be pleased to grant leave to the Applicant to take part in the proceedings for purposes of asserting its title Eldoret/Municipality 15/1757

(d) That in the alternative to prayers (b) and (c), the Honourable Court be pleased to vary its judgment to recognize the validity of the Applicant's title number Eldoret/Municipality 15/1757.

(e) The costs of this application be provided for.

2. The application is expressed as being brought under the provisions of section 80 of the Civil Procedure Act, Order 12 Rule 7 and Order 45 Rule 1 of the Civil Procedure Rules.

3. The application is supported by the affidavit sworn on 18th July by Grace Magunga, the applicant's corporation secretary. The year it was sworn is not indicated though it is presumably 2011.

4. The 5th respondent, Kiptalam Arap Cherunya, who was the original petitioner in this matter, opposes the application and has filed a replying affidavit sworn on 4th November 2011. Both the applicant and the 5th respondent filed written submissions dated 18th November 2011 and 23rd April 2012 respectively.

Background

5. The applicant is seeking to be enjoined as a party to these proceedings at this stage as it asserts that it was not heard before the High Court (Wendoh J) made its judgment in the petition on the 5th of October 2010. The applicant contends that the judgment, having been made without it being heard, violated its rights and it was condemned unheard.

6. The 5th respondent filed this petition in 2008 alleging that his rights to property under section 75 of the repealed constitution had been violated. He alleged that he had bought the suit property, L.R. No. LR 8148, which was registered under the Registration of Titles Act, Cap 281 Laws of Kenya on 8th March 1963; that in 1978, the government vide Gazette Notices Nos. 1458 and 1459 dated 14th May 1978 sought to compulsorily acquire 400 acres of his land and indicated that the purpose of the acquisition was to use the acquired land for industrial purposes as it adjoined Rivatex Company in Eldoret; that he was paid Kshs. 1,807,000.00 as compensation and was informed that he would also be allocated alternative land.

7. The 5th respondent claimed in the petition that the government had failed to pay him the additional compensation in form of allotment of land, that the acquired land was not used for the purposes for which it was compulsorily acquired, and that the government failed to subdivide the land and separate his title from that which was compulsorily acquired, and that some persons who were allocated the land that was compulsorily acquired had encroached on his remaining 217 acres.

8. The petition was heard before Justice Wendoh and involved the **Kiptalam Arap Cherunya** as the petitioner, the Commissioner of Lands, the Chief Registrar of Lands, the Land Registrar, Uasin Gishu District and the Attorney General. The applicant in this case was not a party to the petition.

9. After hearing the parties represented in the petition Wendoh, J found in favour of the petitioner and issued several declarations *inter alia* that the land was not used for the purposes for which it was acquired and thus the acquisition was null and void. The court also declared the sub-divisions of LR No. 1848 and issuance of titles to individuals as unconstitutional, null and void. The court also ordered that the register in respect of the land be rectified to reflect the petitioner, the 5th respondent, as the bona fide owner of the land. The court also restrained the Registrar of Lands Uasin Gishu District, the Commissioner of Lands and any other person from transferring or further dealing with LR 8148 new Eldoret Municipality Block 15/2365-(400 acres) and 15/23366-(217 acres).

10. Justice Wendoh is now sitting outside this station and so it fell on me to determine the merits of the application to set aside or review the judgment.

The Applicant's Submissions

11. The applicant's case is that it was allocated, by way of a letter of allotment dated 14th February 1991, a parcel of land measuring 60.70 ha (approximately 136 acres) known as Title No. Eldoret Municipality 15/1757 which was part of all that parcel of land then known and registered as ELD 17/89/15; that the allocation was for industrial purposes, and that upon allocation it duly paid all the required outgoings namely the standard premium rent, conveyancing fees, registration fees and stamp duty all totaling to Ksh. 5,362,345.00.

12. The applicant therefore contends that by virtue of holding a title to the said land, it ought to have been made a party to the petition so that it could get an opportunity to present its case before a decision that was prejudicial to its interests was made. It states that it was condemned unheard and is thus aggrieved by the orders issued by Wendoh J which violated its right to be heard.

13. Learned Counsel, Mr. Maondo, who presented the case for the applicant, submitted that none of the four respondents who were heard by the court before judgment was reached, including the Attorney General, appeared in the proceedings on its behalf and none of the said parties set forth the case of the applicant.

14. Mr. Maondo submitted further that the applicant is a public body and it acquired the land using public funds and the land is to be used for industrial purposes for the benefit of the public; that since the acquisition of the land, it has been in the process of finalizing the development proposals and sourcing funds to enable it commence developments on the land.

15. The applicant submitted therefore that having been allocated the land for the proper use, and having paid compensation for the same in form of premiums, it should be allowed to hold the property. It urged the court to set aside the judgment of Wendoh J to enable it take part in the proceedings for the purposes of demonstrating that it holds a valid title over the land.

Submissions by the 5th Respondent

16. The position taken by the 5th respondent as presented by his learned counsel, Mr. Katwa, is that the applicant was not a necessary party to the proceedings in Petition No. 191 of 2008; that had it been a necessary party, the court should have ordered that it be joined as a party.

17. Mr. Katwa submitted that the applicant's interests were duly represented in the case as the Attorney General and the other three respondents, particularly the Commissioner of Lands and the Chief Registrar of Lands made submissions on the acquisition of the land; that in any event the applicant ought to have been aware of the existence of Petition No. 191 of 2008 and ought to have applied to be joined as a party; that for this court to set aside the judgment of Wendoh J would be for the court to sit on appeal on that judgment. He relied on the case of **Charles Mwangi Kagonia –v- Dharaj D. Popat and Another High Court Civil Case No. 96 of 2005.**

18. The 5th respondent further argued that there is no case to which the applicant could be joined as judgment in Petition No. 191 of 2008 had already been entered and the issue relating to the compulsory acquisition of the land determined by a competent court and cannot be litigated again. According to Mr. Katwa, there is no legal right that remains undetermined to justify the joinder of the applicant as a party and the applicant is a stranger to both the petition and the judgment. He submitted that the matter is *res judicata* and relied on the *case of* **Mawji Patel -v- Toney Keter, Eldoret HCC No. 140 of 1999, Dominic Elkayani Lesormat & 336 Others -v- Machamuka Farmers Co. Ltd & 17 Others Civil Appeal No. 31 of 2005**and **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996.**

19. The 5th respondent also took the position that the applicant was a beneficiary of an illegality. It had been allocated property carved out of the 5th respondent's land for a purpose other than that for which the land was acquired; that consequently the applicant should not be allowed to continue benefiting from land to which it did not have a valid claim; that the applicant had failed to establish any reason to warrant a review as provided for under section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules and the applicant was in any event guilty of inordinate delay as it had brought this application ten months after the delivery of the judgment.

Submissions on Behalf of the 1st-4th Respondents

20. In his submissions on behalf of the respondents, Learned State Counsel, Mr. Ojwang, associated himself with the submissions made on behalf of the applicant. He urged the Court to be guided by the provisions of Article 159 (2) (a) which provides that justice shall be done to all; that under the provisions of Article 156 one of the function of the Attorney General is to represent the national government and that his office does not represent individuals who can sue and be sued in their name, and that therefore the Attorney General did not represent the interests of the applicant in the petition when it was heard before

Justice Wendoh.

Issues for Determination

21. The applicant has asked this court to permit its joinder as a party in this petition, and to set aside the judgment and orders of this court made by Justice Wendoh on the 5th of October 2010. The basis of the application is that though it was a party that was materially affected by the outcome of the petition as the effect of the judgment was to deprive it of its property, Title No. Eldoret Municipality Block/15/1757, it was not made a party and was therefore condemned without being heard. From the submissions by the 5th respondent, it is clear that the fact that the applicant was a party whose interests were affected by the decision of the court is not in dispute. The 5th respondent presents four arguments which need resolution: **the petitioner is a stranger to the petition; that the matter is res judicata; that the petitioner is guilty of inordinate delay; and that for this court to review the orders made on 5th October 2010 is to sit on appeal against the decision of a court of concurrent jurisdiction**. The applicant, in turn, raises one critical issue that the court must consider: **whether the applicant was condemned unheard and should therefore be given a chance to present its side of the story.**

Is the Applicant a Stranger to the Petition?

22. The applicant has submitted that it is the registered owner of **Title No. Eldoret Municipality Block/15/1757**, one of the properties resulting from the subdivision of the subject property. It states that it was allocated the land for commercial purposes, and that it made various payments in respect of the land. It has also made plans for development and sought finances for such development. In such circumstances, can it properly be argued that it is a stranger to the petition? It is a stranger, in my view, only to the extent that it was not made a party to the petition. However, the decision of the court, made after hearing various parties but not the applicant, will have an effect on the rights of the applicant. I think, therefore, that the applicant cannot properly be described as a stranger to the petition.

Is the Matter Res Judicata?

23. The 5th respondent contends that the matter is res judicata, having been determined by a court of competent jurisdiction. Section 7 of the Civil Procedure Act contains the provisions in our law with regard to the doctrine of res judicata and provides as follows:

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

24. Had the applicant in this matter, or a party litigating under the same title as the applicant been a party to the petition, then the doctrine of *res judicata* would apply to bar the applicant from litigating the same issues that had been heard and determined by a court of competent jurisdiction. The decisions cited by the 5th respondent, among them **Dominic Elkayani Lesormat & 336 Others -v- Machamuka Farmers Co. Ltd & 17 Others Civil Appeal No. 31 of 2005, Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996** basically are in support of the position that litigation must be brought to an end and parties cannot be permitted to continue litigating matters that have been determined by a court of competent jurisdiction.

25. Is this the position in the current case? The applicant, though a party whose title to property was likely to affected by the decision of the court, was not made a party to the petition. The 'matters in dispute' cannot properly be said to have been '***directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim…..'***

Has the Applicant Been Guilty of Inordinate Delay?

26. The applicant seeks to set aside the judgment and orders of the court made on October 5th 2010. Its application is dated 25th July 2011 and was filed on the same day, meaning that it was filed some nine (9) months after the decision. It was not a party to the proceedings, and it may be reasonable to assume that it would not have known of the judgment of the court until long after it had been pronounced.

27. In the circumstances of this case, and bearing in mind the constitutional imperative and obligation to do substantial justice and not to be bound by procedural technicalities, I believe the period of nine months prior to the filing of the application did not amount to inordinate delay. This is particularly so considering that the applicant was not a party to the petition and therefore could not have known when the decision of the court was made, and it filed the application before the court as soon as it realised that such a judgment had been made.

Was the Applicant Condemned Unheard?

28. The applicant contends that it was condemned without being heard, and I believe that there is no dispute about the fact that it was not heard, or that its interests in the land it states it was allocated are affected by the decision of the court in the judgment made on 5th October 2010. The question is whether, in such circumstances, the applicant has a basis for seeking a setting aside of the orders made on 5th of October 2010.

29. In my view, the answer will depend on the importance that is placed on the right to be heard, and whether the fact that a matter has been heard and determined closes all doors to a party who ought to have been made a party to the suit but was not. In **Pashito Holdings Ltd & Anor –v- Paul Nderitu Ndungu & Anor, Civil Appeal No. 138 of 199**7, the court stated as follows with regard to the right to a hearing:

'The rule of 'audi alteram partem' which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd ed) 'It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him. There is an unpronounceable Latin Maxim which in simple English means; 'he who shall decide anything without the other side having being heard, although he may have said what is right, will not have done what is right'.

30. In **AmRaphael Mbogholi Msagha -v- Chief Justice of Kenya & 7 Others, Misc Applic No. 1062 of 2004,** the court observed that the principle of natural justice was an essential requirement for the performance of any judicial or quasi judicial function. It stated that

'A decision is unfair if the decision-maker deprives himself of the view of the person who will be affected by the decision.'

31. The decision of the Court of Appeal in **Adolf Gitonga Wakahia & 4 Others –v-Mwangi Thiong'o (1986-89) EA LR,** in which several defendants in an arbitration pertaining to land had been condemned to lose part of their land and an award of costs had been made against them without their being heard even though they were party to the suit, is particularly apt with regard to the right to accord all parties a hearing and not to condemn any party unheard. In his judgment, Gachuhi, Ag. J stated as follows:

'As a matter of law, is it just that judgment should be imposed on them without being heard? Their complaint was laid before the judge on an application to review the judgment but the court overlooked this vital allegation that vitiates the judgment. It was up to court, when it was pointed out in an application for review that judgment was entered against some defendants without being heard, to hold that the whole arbitration proceedings were a nullity in the interest of justice and the judgment should be set aside.'

32. Justice Gachuhi went on to observe that

'It is basic law that no one should be condemned, to a judgment passed against him without being

afforded a chance of being heard: Ruithibo v Nyingi CA 21 of 1982 unreported. The chance is by being summoned but if he is served and chose not to attend, then he should be bound by the judgment unless he can show cause why he failed to attend. Roboi Holdings Ltd v Sita 11 CA 50 of 1982. (unreported)

33. In the present case, the applicant was not made a party to the proceedings, and so the court did not have the benefit of hearing what arguments it would have made with regard to the issues before it. Mr. Katwa argues that the applicant's interests were represented by the Attorney General, but I think this is a fallacious view of the situation: the Attorney General could not be taken to have represented an individual or corporate entity who was not a party to the petition. The inescapable conclusion in this matter is that the applicant was not a party to the petition, and was not heard nor was its interests represented before the court arrived at its decision. The decision of the court was therefore arrived at in breach of a cardinal rule of natural justice. This court is not sitting on appeal on the decision of the court made on 5th October 2010, and has no basis for so doing. However, the fact that the applicant was not joined as party to the petition and was not heard on the matters then before the court makes the decision, even if it was right, an unfair decision for failing to accord the applicant a hearing.

Can This Court Set Aside the Judgment Made on 5th October 2010?

34. Having found that the applicant was not a party to the petition and was therefore not heard before the decision that affects its interests was made, and that there was therefore a breach of a fundamental tenet of natural justice, I believe that the inescapable conclusion is that the interests of justice demand that the judgment be set aside and the applicant be given an opportunity to be heard. The question is whether this court has jurisdiction to set aside the judgment of the court made on 5th October 2010.

35. In its application to set aside the judgment made on 5th October 2010, the applicant relied on the provisions of Order 12 Rule 7 of the Civil Procedure Rules. This Rule provides that the court, on application, may set aside or vary the judgment or order which has been entered under the order upon such terms as it may be just. (Emphasis mine).

36. Order 12 of the Civil Procedure Rules relates to the hearing and consequences of non-attendance of a party to a suit. To my mind therefore the applicant cannot rely on this rule in seeking to set aside the judgment of 5th October 2010 as it was not a party to the proceedings.

37. The law, however, and the dictates of justice require that we should not be bound by technicalities in the dispensation of justice. The fact that the applicant has approached this court on the basis of the wrong provisions of law should not militate against the power of the court to make orders in its favour if it takes the view that such orders are merited.

38. More importantly, this application arises in a petition for vindication of constitutional rights, in which the petitioner, the 5th respondent in this application, sought protection of his rights to the suit property. In my view, it would be a mockery of justice and would undermine the aspirations of Kenyans under the new Constitution to transform and build a new society based on justice for all, the rule of law and constitutionalism were the court to deny the applicant a chance to present its case and be heard on the merits.

39. For the above reasons, I allow the application by the applicant and order:

i) That the judgment made in this petition on the 5th of October 2010 be and is hereby set aside.

ii) That the applicant be and is hereby joined as a party to this petition as an Interested Party.

iii) That the petition be and is hereby transferred to the Environment and Land Court for directions with regard to the hearing.

iv) That the costs of this application shall be in the cause.

Dated Delivered and Signed at Nairobi this 29th day of November 2012

MUMBI NGUGI

JUDGE

Mr. Maondo instructed by the firm of Muriu & Co. Adv. for the Interested Party/Applicant

Mr. Ojwang instructed by the Attorney General for the 1st 2nd 3rd and 4th Respondent

Mr. Katwa instructed by the firm of Katwa & Kemboi Advocates for the 5th respondent