



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CIVIL APPLICATION 222 OF 2004

THE COMMISSIONER OF POLICE RESPONDENT

THE MINISTER OF STATE IN

CHARGE OF INTERNAL SECURITYRESPONDENT

PROVINCIAL ADMINISTRATION & INTERNAL SECURITYRESPONDENT

EX-PARTE

NGURUMAN LIMITED APPLICANT

RULING ON PRELIMINARY OBJECTION

The Preliminary Objection herein as raised by the Learned State Counsel for the Respondents is that pursuant to the provisions of Order 53 Rule 3 (2) and (3) of the Civil Procedure Rules it is mandatory that the substantive Motion be served on all persons that may be directly affected by the Motion. Further it is a requirement that an Affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the Notice of Motion be filed in Court before the Notice is set down for hearing and of any person who ought to have been served, and has not been served the Affidavit should state that fact and the reason why service was not effected. The Learned State Counsel in support of the preliminary objection submitted that in the pleadings filed in Court, there are persons other than the named Respondents who would be effected by the decision of this Court on the Motion.

The said persons were neither served with Notice of Motion as required nor were they present in Court. In the Notice of Motion, the statement of facts and the Affidavit in support of the Motion, the Applicant has mentioned members of Shompole Group Ranch as being among the people who in December 1990 forcibly entered into the Applicant's parcel of land known as LR. NO. NAROK/NGURUMAN/KAMORORALI and have since built structures thereon and have refused to vacate the land. The said members of Shompole Group Ranch have since been joined by other persons whose particulars are not given. The Learned State Counsel further submitted that from the annexures to the Application, Shompole Group Ranch has a membership of about 1,600. According to the State these people are interested parties who ought to have been served so that they may come to Court and be heard with regard to the Application. As they were not served and no Affidavit having been filed by the Applicant giving reasons why they were not served, the Motion offends the provisions of Order 53 Rule 3 and ought to be struck out. To buttress this point the Learned State Counsel drew the Court's attention to the Court of Appeal decision – JAMES NDUNG'U WA WAMBU –VS- REPUBLIC & ANOR CIVIL APPEAL NUMBER 85 OF 1992 (unreported). In conclusion the Learned State Counsel submitted that

Order 53 Rule 3 is couched in mandatory terms. In the circumstances the Applicant had no choice but to comply. Having failed to do so it must face the consequence attendant to its non-compliance to the mandatory provisions of the Law; which is to have the Motion struck out.

In his response, Mr. Gross Counsel for the Applicant submitted that Order 53 Rule 3 does not mention anything to do with interested person or persons to be affected. That irrespective of the aforesaid trespassers are not interested parties. He further submitted that the instant Application had nothing to do with land rights and is not about ownership of Land. The Application is about enforcement of Court Orders issued in Narok RMCC 15 of 1991 and Nairobi High Court Miscellaneous Civil Case Number 930 of 1991. To the Learned Counsel, the Application was about who is to perform a Statutory duty, to uphold and enforce Court Orders. The Application is aimed at the Respondents who have failed to uphold the Applicant's Constitutional sanctity to the right to its property by evicting the trespassers on its property as ordered by various Courts. He further submitted that trespassers cannot be classified as interested parties. The Learned Counsel concluded his submissions by stating that this was not the forum for 400 or so trespassing squatters to rein-introduce a land grabbing claim by being afforded an opportunity to be heard on the motion.

The determination of this issue must begin with a reminder that Judicial Review has been said to be a special jurisdiction that is neither Civil or Criminal. (see **COMMISSIONER OF LANDS –VS- KUNSTE HOTELS LTD. (1995 – 1998) I.E.A.I.** It is strictly governed by the provisions of Order 53 of the Civil Procedure Rules. Order 53 Rule 3 (2) provides:-

“The Notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a Court, and the object is either to compel the Court or any officer thereof to do any action in relation to the proceedings or to quash them or any Order made therein, the Notice of Motion shall be served on the presiding Officer of the Court and on all parties to the proceedings.”

Rule 3 (3) of the Civil Procedure Rules further provide that: “An Affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the Notice of Motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule have not been served, the Affidavit shall state that fact and the reason why service has not been effected, and the Affidavit shall be before the High Court on the hearing of the Motion.”

In the instant case, it is common ground that the Applicant is the registered owner of all that piece or parcel of land known as LR. No. Narok/Nguruman/Kamorara/1. However by its own admission in paragraph 3 (b) and (c) of the Statement of facts; since December, 1990 members of Shompole Group Ranch have been in occupation of a portion of the said piece or parcel of land and have indeed built structures thereon and have refused to vacate. Similarly in the Affidavit sworn by one Moses Loontasati Ololouaya in support of the Motion he depones at paragraph 3 and 10 thus:-

“3. THAT on 4th December, 1990 Shompole Group ranch Members forcibly entered into our land parcel LR. NAROK/NGURUMAN/KAMARORA/1 10. THAT the Court Order requiring the invaders and trespasses to vacate from and to stop trespassing on the Applicant's Land is still in force. The trespassers have however resisted all the attempts by the Applicant to remove them.”

From the foregoing it is common ground that there are people occupying a portion of the Applicant's land. They have occupied the same since, December 1990. The Applicant has labelled them strangers. Are they entitled to be served with Notice of Motion as envisaged by Order 53 Rule (2) of the Civil Procedure Rules? To me the answer to this question is obvious. They ought to be served. A plain reading of the aforesaid provision supports my finding. It simply says that “the Notice shall be served on all persons directly affected.....” It is obvious to me that if the orders sought in the Application are granted they will directly impact on this group of people. They will have to be evicted. It matters not that they are trespassers. The provision alluded to does not make any distinction when it comes to the persons “directly affected.” There is no qualification regarding “persons to be affected” whatsoever. As I have already stated Judicial Review Proceedings are a special jurisdiction governed by the provisions of Order

53 of the Civil Procedure Rules. The rules made thereunder have to be strictly observed. The Court of Appeal in JAMES NDUNG’U WA WAMBU VS REPUBLIC & ANOR (SUPRA) held that the provision of Order 53 Rule 3 (2) are mandatory and have to be complied with. It is therefore my holding that these people occupying a portion of the Applicant’s parcel of Land are persons “directly affected” and ought to have been served with the substantive motion or an Affidavit filed in Court giving reasons why service had not been effected on them in terms of Order 53 Rule 3 (3) of the Civil Procedure Rules. In the result I uphold the Respondent’s preliminary objection. However, is the Applicant’s failure to serve the motion on these people fatal as to warrant the dismissal of the Application as urged by the Learned State Counsel? I do not think so. Order 53 Rule 3 (4) allows this Court at the hearing of the Motion to adjourn the same if it forms the opinion that any person who ought to have been served has not been served. The adjournment is meant to allow service of the motion on the said person.

I will in the circumstances of this case invoke this provision of the Law and direct that those people currently in occupation of a portion of the Applicant’s land as aforesaid be served with the Notice of Motion dated 11th May, 2004 by the Applicant. Pending such service the Motion is stood over generally. Costs shall be abide the outcome of the substantive Motion.

Dated at Nairobi this 10th of May, 2004.

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M. S. A. MAKHANDIA

Ag. JUDGE