



**Wamboi & 4 others v National Land Commission & 3 others; Obel (Applicant)
(Petition 26 of 2021) [2024] KEELC 468 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 468 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 26 OF 2021
FM NJOROGE, J
FEBRUARY 7, 2024**

BETWEEN

**RUTH NYAWIRA WAMBOI 1ST PETITIONER
WALAD AHMED WALAD (THE ADMINISTRATOR OF THE ESTATE OF
AHMED WALADI AHMED) 2ND PETITIONER
NZAI KOMBE 3RD PETITIONER
SIRO BAHATI JOHNSON 4TH PETITIONER
MARY GUMO MAPINGU 5TH PETITIONER**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
CHIEF LAND REGISTRATION OFFICER, KILIFI 3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT**

AND

JOHN DOMINIC OBEL APPLICANT

RULING

The Application.

1. The motion dated 28/2/2022 is the subject of this ruling. By it the applicant, John Dominic Obel seeks the following orders:
 - a. That he be joined as an interested party to the present suit;



- b. That the cabinet secretary for lands and physical planning be joined to the suit as a respondent;
 - c. That execution of orders and decree issued on 3/12/21 be granted;
 - d. That the 1st 2nd 3rd and 4th IPs be compelled to reinstate his proprietorship of the suit property;
 - e. That the 3rd and 4th IPs be compelled to cancel the titles irregularly and unlawfully awarded to the respondents that had been revoked by the 1st IP vide the determination in the Kenya Gazette Notice No 1547(Vol CXXI-No 21) dated 15/2/2019;
 - f. That the court do issue orders enforcing the judgment of hon Justice Angawa dated 31/3/2009;
 - g. That this court do review and/or set aside and /or vary and /or discharge its ruling and orders and the decree issued on 3/12/2021;
 - h. That a temporary injunction be issued restraining the defendants/respondents or their agents or through any other person from interfering in any manner whatsoever with the suit property;
 - i. That this court do issue an order restoring and maintaining the status quo pending the hearing and determination of the application.
2. The motion is premised on the grounds at its foot and in the supporting affidavit of the applicant sworn on 28/2/2022. The grounds are as follows:
- a. That this court made orders in rem without the applicant being invited to make his representation in violation of articles of the constitution;
 - b. That the respondents, fully aware of the applicant's interest in the suit property deliberately and secretly erected to omit him as a party to the petition despite the gazette notice;
 - c. That the cabinet secretary for land is a necessary party to these proceedings as he has been mandated to effect registration of public and private land in accordance with Section 6 of the Land Act and the suit land can be confirmed to be private land.
 - d. The petition proceedings were irregularly and hastily conducted.
 - e. No evidence was tendered to demonstrate that the interested parties were served in the petition and other pleadings and their participation in the matter is in doubt. That no cogent explanation regarding the respondent's accusation of the suit property was given in the petition while the applicant acquired his proprietorship by way of the land adjudication process provided for in Section 7 of the Land Act.
 - f. That property land cannot be disposed of by way public allocation.
 - g. The judgment of Lady Justice Angawa dated 31st March, 2009 confirmed that the suit land is private land.
 - h. The applicant is the first registered proprietor of the suit land having purchased it from the original owner one Mr. Masha Wanje Banda in 1978.
 - i. That in 1986 the 2nd and 3rd Interested Party cancelled the applicant title claiming that the suit was public land and Lady Justice Angawa ruled in favour of among others the applicants after the hearing of a test case.



- j. The 1st Interested Party NLC having summoned the applicants and others on 11th October 2018, to a meeting in Watamu he appeared in person and presented his ownership documents while the petitioners failed to appear and so the NLC under statutory power provided for in Section 5 and for the NLC Act 2012 rendered its determination which has neither been appealed from nor reviewed. The NLC determination was published in the Gazette Notice confirming the applicant as the absolute proprietor of the suit land.
- k. The applicant has failed in his attempt to lodge a caution against the title.
- l. That this court has jurisdiction.
- m. That Article 40 provides that every person has a right to acquire and own property of any description in any part of Kenya.
- n. Article 50 guaranteed the applicant fair hearing in any dispute.
- o. That the Respondent may dispose of the suit property and subject the applicant to irreparable loss if the order issued in this petition are allowed to subsist and it is in the interest of justice that the orders the applicant seeks be granted.

Responses by the Petitioners

- 3. The petitioners responded to the application vide grounds of opposition filed on 20/6/2022 and stated as follows:
 - a. That the NLC had in 2013 confirmed that the petitioners had paid registration fees for the suit land and forwarded a lease duly stamped and signed for registration to the then district Land Registrar Kilifi;
 - b. That in 2019 the national land commission through its legal office communicated its determination on the suit title to the Chief Land Registrar, and that determination was to the effect that the suit land was legally owned by the petitioners and the NLC therefore gave a greenlight for the 3rd respondent to allow the petitioners to deal with the property without hindrance;
 - c. That this petition was then settled by way of consent which was adopted as an order of this court before Hon Odeny J and has the force of a judgment by the court given in the exercise of its judicial discretion and no appeal or review has been lodged by any of the parties to the petition against it and the decision is final;
 - d. That the decree has already been executed by way of its registration against the suit title and the suit land has already been transferred for consideration to Hellen Wambui Kimani and Patrick Kimani Wainaina who are not parties to these proceedings and the court is now functus officio as envisaged by the decision of the Supreme Court of Kenya in Raila Odinga & 2 Others v IEBC & 3 Others 2013 eKLR and the only recourse is an appeal to the Court of Appeal as envisaged by Section 16 of the Environment and Land Court Act;
 - e. That as per the provisions of Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 joinder of parties can not be effected after the petition has been concluded and judgment delivered;
 - f. That this court can only set aside, discharge or vary the said consent order upon application by a party dissatisfied with it;



- g. That the *Civil Procedure Rules* are inapplicable to petitions.

Response by the 1st respondent.

4. The 1st respondent filed an affidavit sworn by its Director Of Legal Affairs, Brian Ikol and stated that the NLC in line with Section 6(1) (2) (3) of the *NLC Act* published on 18/9/18 their intention to hold inquiries to determine ownership in the Kijipwa Settlement Scheme; that on 11/10/2018 the petitioners appeared through an advocate before the NLC and claimed ownership on the basis of squatting on the suit land; that the applicant also appeared before the Commission on the same day and indicated how he had purchased the land from one Masha in 1979; that noting that the petitioner's title was recent (2016) compared with the applicant's (1979) and that consequently the NLC recommended that the title be regularized in favour of the applicant.

Submissions of the parties.

5. The application was disposed of by way of written submissions. The applicant filed his written submissions on 17/2/2023 and the petitioners filed theirs on 26/6/2023. Those submissions emphasized what is contained in the application and response respectively.

Analysis and Determination.

6. In brief, the applicant's complaint in the present application is that he was the registered owner of the suit land having purchased the same from another person; that in 1986 the Commissioner Of Lands and the Chief Lands Registration Officer Kilifi cancelled his title; that litigation that ensued over the said cancellation of title reinstated him as proprietor of the suit land; that in addition in 2018 the National Land Commission pursuant to its power and mandate under the *NLC Act* after hearing the dispute regarding the said title in the absence of the petitioners who had been notified of the proceedings, restored him as proprietor vide a Gazette Notice in 2019; that the judgment of the court and the decision of the NLC held that the land was private land; that the present petition whose decree declared the petitioners as proprietors of the suit land was filed and concluded without the applicant's and interested parties' participation yet the respondents failed in the petition to explain cogently how they acquired the suit property.
7. The principal respondents to the instant application, naturally, are the petitioners. The petitioners had filed the petition in October 2021 without naming the applicant either as a respondent or interested party. They stated that they were allocated the suit land by the Commissioner Of Lands in 2010 vide a letter of allotment dated 5/11/2010 and that they were issued with a lease and a certificate of lease thereafter after complying with all the conveyancing protocols and they were registered as tenants in common over the suit land at the Kilifi Land Registry in 2016; the chairman of the NLC had been involved in the process of forwarding their lease to the District Land Registrar for registration and they thus claimed in the petition that the NLC is thus estopped from denying that the petitioners were the owners of the suit property. The petitioners also claim to have assumed and maintained to date, quiet possession of the suit land after registration. However, the petitioners stated, between September 2018 and February 2019 the NLC acted as described by the applicant, and published the Gazette Notice earlier mentioned herein above. That gazette notice stated inter alia as follows:
- a. In 1970 the Minister for Lands and Settlement applied the land adjudication act vide legal notice 155/1970 to land within the Kilifi district, including Kilifi Jimba where the suit land is situate;
- b. The proclaimed areas were adjudicated and registered between 1974 -1986;



- c. The areas were Trust Land and Sections were declared as adjudication sections;
 - d. Sections were registered in 1978 and titles subsequently issued under the RLA (now repealed);
 - e. Later the Commissioner Of Lands vide an circular of May 1986 and Gazette Notice No 2505 of 30/5/1986 declared the areas as Government Land which were not therefore subject to adjudication under the CAP 284. Specifically, in respect of the suit land, the NLC recommended that the title to the petitioners be revoked and the title to the applicant be regularized.
8. The petitioners claimed in their petition that they have never been made aware of any complaint against them by the NLC and they were not given an opportunity to be heard in their defence as per Articles 25 and 50 of the Constitution 2010; citing Mativo J's decision in Sceneries Ltd v NLC 2017 eKLR, they claimed that the NLC's determination was ultra vires for the reason that it had made a determination whereas the law only required it to make recommendations for redress after its investigations into the present or historical land injustices.
9. Further, it was pleaded by the petitioners that the mandate to review all grants and dispositions of public land had expired by the time the determination of the NLC was made and hence it was without jurisdiction. After claiming violation of various provisions of the Constitution with regard to them by the NLC, the petitioners sought the following orders:
- a. A declaration that they are the legal proprietors of the suit land;
 - b. A permanent injunction restraining the respondents from interfering with the petitioner's use of the suit land;
 - c. An order of certiorari to quash the determination by the NLC in the impugned Kenya Gazette Notice;
 - d. An order of prohibition prohibiting the respondents from implementing in any manner the determination of the NLC regarding the suit land;
 - e. An order of mandamus compelling the 3rd respondent to restore the register for the suit land and issue to the petitioners a certificate of search;
 - f. Costs of the petition;
 - g. Any such order(s) as the court may deem just.
10. The applicant's application came after the petition had been finalized by the consent of the parties recorded and adopted by the court on the first sitting of the court on 1/12/2021. It would appear that what the applicant gained by virtue of the proceedings taken by the National Land Commission in 2018 was nullified by the same Commission by way of its participation in recording of the consent in this Petition.
11. The court stated as follows in adopting the consent of the parties;
- “Petition is hereby allowed as prayed. Parties to bear their own costs. This matter is marked as settled.”
12. Soon thereafter on 22/3/22 the present application was filed. The applicant framed 3 issues for determination arising from the application as follows:



- a. Whether the exclusion of the applicant from the petition proceedings was an infringement of his constitutional rights;
 - b. Whether the petitioners constitute the bona fide proprietors of the suit land;
 - c. Whether the applicant is the bona fide and absolute owner of the suit land.
13. On a preliminary basis, issue No. (a) above would require ventilation in a substantive petition. Issues Nos (b) and (c) would require ventilation in an ordinary suit. The petitioners framed the following 4 issues for determination:
- a. Whether the applicant has satisfied the conditions for the grant of stay of execution;
 - b. Whether the applicant is deserving of equitable relief;
 - c. Whether the orders sought in the application can issue against Hellen Wambui Kimani and Patrick Kimani Wainaina;
 - d. Whether the applicant has met the threshold for the grant of conservatory orders.
14. On a preliminary basis, this court is of the view that prayers nos 5, 6, 7, and 8 are not for determination in the present application. The first three would be for consideration in the main proceedings after the application in the event the other prayers sought succeeded. It is in great doubt that prayer no. 7 can be considered in the present application and petition and in this court's view, it befits canvassing in the suit in which such judgment sought to be enforced was issued. The fourth prayer (no. 8) cannot obviously be granted because there is no such ruling, decree or order alleged to have been issued on 3/12/21. In addition, prayer no 9 cannot even be considered in the application because it gives no timelines for the proposed temporary injunction and this court is not inclined to make presumptions and therefore purport to amend the application for the applicant suo moto. In the same vein I can not consider prayer no 10 because it gives no specifics of the status quo expected to be reverted by the applicant; despite allegations during the pendency of the application that the suit land has already been sold and transferred to third parties who are not parties to the present application or the petition, the applicant never amended his application with regard to the orders seeking status quo to be reversed.
15. The only issues arising for determination in the present application are therefore as follows:
- a. Should the Cabinet Secretary for Lands and Physical Planning and the Commissioner of Lands and the applicant be joined to the petition as interested parties?
 - b. Should the consent order recorded between the parties and adopted as the judgment of the court be set aside?
 - c. Should a stay of execution of the decree issued on 3/12/2021 be granted?
 - d. Who ought to bear the costs of the present application?
16. Regarding the first issue it must be borne in mind that the concluded petition was principally as between the petitioners and the 1st respondent whose decision upholding the applicant's claim to the land and recommending the petitioner's title was impugned. The NLC did not hold any interest in rem in the title to protect. It dealt with the suit land title only as a body mandated by law to determine historical land injustices. It never competed with the petitioners for the rights and interest in the land as the applicant now has shown he intends to do. Hence, the claim between the petitioners and the National Land Commission was not a private adversarial claim for title but public law litigation alleging violation of constitutional rights for the manner in which the NLC handled the issue of the



validity of the petitioner's title. Once the NLC was convinced that its action could not pass legal and constitutional approval by the court it surrendered by way of conceding to a consent against settling the petition and saving itself the burden of legal costs.

17. The dispute between the NLC and the petitioners was not one into which the applicant needed to be joined, even at his instance. Though the presence of the applicant may have supplied the court with his version of events, the petitioners, in ventilating their grievance of infringement of constitutional rights, needed not have joined him as a respondent; their remedy in public law was sought purely against the NLC and the other respondents. The petitioners were within their rights to sue the 4 respondents since the affected title was registered in their names. That the petitioners chose the public body to sue and brought proceedings successfully against it in public law litigation without joining the applicant is no basis for grievance that can form the foundation of a joinder application such as the present. Whether or not any orders could have been made in the applicant's favour perchance had he been joined at the inception of the petition remains within the realm of speculation.
18. Besides the foregoing it is noted that the applicant's application seeks joinder of the Cabinet Secretary Ministry of Lands and Physical Planning as a respondent in the proceedings. First such an application is premature and presumptuous as the applicant has not even become a party to the proceedings himself so as to merit making an application for orders joining other parties. Further, the Attorney General, is assumed under the provisions of Section 12 of the *Government Proceedings Act* to have been representing the various government offices involved, including the Chief Land Registrar (who had been already named 2nd respondent in the Petition) and the Chief Land Registration Officer Kilifi who had been named 3rd respondent in the Petition) and who all work under the general direction of the Cabinet Secretary sought to be joined. For these reasons, there would be in this court's view much duplication of roles and an exercise in futility in the petition if the prayers for joinder of the Cabinet Secretary were allowed. The Cabinet Secretary is adequately represented in these proceedings and the application for his joinder as a substantive party lacks merit.
19. Secondly both the applicant and the Cabinet Secretary are proposed to be brought into the petition after judgment. After judgment, joinder may be allowed only in certain exceptional circumstances as seen in the case of *Carol Silcock v Kassim Sharrif Mobamed* [2013] eKLR. In that case the court observed as follows:

“It is true, as argued by the Intended Interested Party's Advocate that it will not be procedural to join a party to a suit after Judgment has been delivered. Joinder of parties can only be allowed before the entry of Judgment.”
20. The court in the *Carol Silcock case* (*supra*) however despite the above observation, allowed joinder of a third party in order to enable the issuance of an order cancelling a title that had been issued to him during the pendency of the case.
21. In the case of *JMK v MWM & another* [2015] eKLR the court observed as follows:

“We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. *Sarkar's Code*, (*supra*) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our *Civil Procedure Rules*, in *Tang Gas Distributors Ltd v. Said & Others* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even



without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014.”

22. There is an order in the instant application seeking setting aside of the consent order, but I think the main question that arises is if the applicant and the Cabinet Secretary are joined as interested parties to these proceedings, then what would follow? The applicant has not sought any order requiring new proceedings to be undertaken, or these new parties’ participation in such proceedings. Further, it has not been demonstrated in the application how such joinder as is proposed would serve the applicant’s interests, he and the Cabinet Secretary being proposed to be joined only as interested parties and not as substantive parties to the petition. This too militates against ordering the joinder of the two persons into the petition.
23. Finally, there is another weightier issue arising from the petitioner’s and the applicant’s and the respondents’ documents filed in this matter that dissuades this court from allowing the motion. Taking a bird’s eye view of the situation described in those documents, this court perceives that there is a serious dispute as to whether the suit land is owned by the applicant or the petitioners. What the petition determined is the public law dispute between the petitioners and the NLC.
24. This matter is further complicated by the allegation, if true, made by the petitioners that the suit land has already been disposed of to two third parties whose names are given. Notwithstanding the Petitioners said disclosure, or the fact that the court has found that the attempted joinder should fail, the applicant had taken no steps to amend his application to attempt to bring in those third parties just as he has sought to join the Cabinet Secretary. It is a source of considerable concern that the applicant does not seem to appreciate the fact that should the orders sought herein be granted, he would still be left with some newly registered proprietors of the suit land to contend with, and that he may finally need fresh litigation in order to do that.
25. In this court’s view anyone whose registration has been effected in the suit land register deserves to be a substantive party to the dispute at hand in a forum where validity of the suit title they already hold can be adjudicated. The applicant may heavily lean on the fact that he has indeed sought that this court do make orders enforcing the judgment rendered by the Hon. Justice Angawa dated 31/3/2009, but quite curiously, he has not demonstrated that he has ever sought to enforce the ancient judgment in respect of the suit land by way of any other prior proceedings. That he would find the present petition the appropriate forum to first seek such an order sounds strange.
26. Notwithstanding the veracity or otherwise of the allegations regarding the existence of a past judgment in the applicant’s favour, there is a main issue that arises from the court’s finding that there is a serious and unresolved proprietorship dispute between the applicant and the petitioners, and that is the question of which is the proper forum for such a dispute’s determination. A petition such as the present is not the appropriate forum for the resolution of such a land ownership dispute. Petitions are usually tried by way of affidavit evidence and not viva voce evidence. The most appropriate method of subjecting a land ownership dispute is a normal suit commenced by way of plaint where all the concerned parties bring their oral and documentary evidence and are subjected to cross-examination as well as other means of testing the documents or other evidence for authenticity. This has been reiterated



in many cases before- see for example, *Petro Oil Kenya Limited v Kenya Urban Roads Authority* [2018] eKLR. Persons laying claim to land title, as long as they can establish their claim by way of evidence at the proper forum, should be heard in such a forum, subject to all other procedural and other laws governing such process. See: *Denis Noel Mukbulo & Another v Elizabeth Murungari Njoroge & Another*, CA No. 298 of 2013 and *Chemey Investment Limited v Attorney General & 2 others* [2018] eKLR.

27. It is the case that this is the court mandated to hear and determine disputes concerning ownership of land, but the jurisdiction of this court must be invoked in the appropriate and prescribed manner, and the case heard and determined on its merits in the presence of the affected parties. Then, and only then can the final seal of approval be given by the court to any registered owner's or other claimant's title by way of orders of the type now sought by the applicant.
28. For the foregoing reasons, I find that the application dated 28/2/2022 lacks merit and it ought to fail and I hereby dismiss it with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 7TH DAY OF FEBRUARY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

