



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 168 OF 2012

(CONSOLIDATED WITH PETITION NO 18 OF 2020)

BAHOLA MKALINDI RHIGHO.....PLAINTIFF

VERSUS

- 1. MICHAEL SETH KASEME**
- 2. FAMMY MWANGI**
- 3. COUNTY COUNCIL OF TANA RIVER.....DEFENDANTS**

IN THE PETITION NO. 18 OF 2012

PHILIPH SUBILI THIGHO & 8 OTHERS.....PETITIONERS

AND

- 1. MICHAEL SETH KASEME**
- 2. HASSAN BARISA KALIME**
- 3. SAMUEL KINGI MWANGI**
- 4. THE COUNTY COUNCIL OF TANA RIVER.....RESPONDENTS**

RULING

Background

1. By the Notice of Motion dated and filed herein on 11th January 2021, the 66 Applicants pray for orders: -

- 4. That the Honourable Court be pleased to set aside the Judgment of the Honourable Judge O.A. Angote dated, signed and delivered on 15th day of April 2016 and allow the matter be heard de novo with the participation of the Applicants herein;***
- 5. That upon the setting aside of the Judgment, the Applicants be enjoined in the suit as parties, formally served with all the pleadings and leave be granted for 21 days to allow them to file necessary replies to all the pleadings served upon them; and***
- 6. That the costs of the application be on the Respondents to this application.***

2. The application which is supported by two affidavits sworn by two of the Applicants Mohamed Abae Anna and Hezekiah Zita is premised on the grounds that: -

- i) The Applicants were condemned unheard contrary to the audi alteram partem rule of natural justice;***

ii) The Applicants have been denied their Constitutional right to be heard;

iii) The decree extracted is ab initio wrongly drawn and incapable of clearly defining the so called 15 acres allegedly belonging to the decree holder and it is the Applicants' contention that by serving the Applicants with the said notice, the decree holder has gone well out of the suit area. There is potential of executing an unclear decree to the disadvantage of the Applicants;

iv) The warrant to the bailiff has equally many errors apparent on the face of the record and basically so badly drawn that it is capable of wide interpretation leaving the Applicants exposed. There is danger of executing an incorrect warrant to the bailiff to deliver vacant possession; and

v) The Applicants were never served with any Court papers and proceedings were between different parties but execution is being visited upon them after strategically being denied the right to be heard in Court.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 21st January 2021, Philip Subili Righo (the Petitioner) asserts that the application is incompetent and bad in law as the 1st and 2nd Applicants have no authority to bring the same and the Applicants have no locus standi to bring the application.

4. The Petitioner avers that the Applicants have no stake or interest in the suit properties whose allocation by the 4th Respondent to the 1st, 2nd and 3rd Respondents were nullified. The Petitioner further avers that the Applicants were not parties to the suit and cannot have been condemned unheard.

5. The Petitioner contends that the 3rd to 66th Applicants have not demonstrated that they were allocated plots within the Petitioner's 15-acre piece of land and that if the Applicants contention is that the decree does not demarcate the boundaries and location of the Petitioner's 15-acre parcel of land then they ought to bring an appropriate application to that effect.

6. The Petitioner further asserts that the 6th, 19th, 21st, 26th, 27th, 28th to 32nd, 34th, 35th, 48th to 50th, 56th, 60th, 63rd and 66th Applicants do not occupy the suit property and were not served with any eviction orders and as such they are busy bodies as far as this application is concerned.

The Submissions by the Parties

7. In support of their Motion, the Applicants' Learned Advocate Danson Mungatana submitted that by the Judgment of the Court dated 15th April 2016, his clients had been condemned unheard as they were never given an opportunity to come to Court and give their side of the case. Mr. Mungatana submitted at length on the principles of natural justice particularly the *audi alterm* principle stressing that those principles had been deliberately breached in this case as at the time this suit was filed in the year 2012 his clients were already on the suit property but the decree-holder chose not to serve them with the suit papers.

8. Mr. Mungatana submitted that where the principles were breached, the persons affected were expected to have the determination against them set aside *ex debito justitiae* as the judicial system owed them a debt to ensure that justice was not only done but seen to be done. Learned Counsel told the Court that his clients had been given notice to hand over vacant possession of their homes failure to which the same would be demolished. He told the Court those notices had expired and hence the Applicants could not file objection proceedings.

9. Counsel for the Applicants told the Court that this matter affects more than 700 inhabitants of the area and urged the Court to overlook technicalities in dealing with the matter and to instead focus on justice.

10. In response Mr. Patrick Shujaa, Learned Advocate for the Petitioners submitted that only the 1st and 2nd Applicants have filed affidavits on the purport that they have the authority of the other Applicants to bring this application. Mr. Shujaa told the Court that since no such authority had been exhibited, there was no evidence that the other 64 Applicants had consented to the suit.

11. Mr. Shujaa further submitted that even though the Applicants sought to be enjoined in these proceedings, they had not demonstrated that they had a stake as they had failed to exhibit anything to show that their plots exist within the 15 acre parcel that was decreed to the Petitioner. Counsel further submitted that even if the Applicants had any land, the same was allocated to them by the County Government of Tana River which was already a party in these proceedings. Counsel further submitted that Judgment had been delivered herein and there was nothing to be enjoined and that the Applicants' remedy if any lay in filing objection proceedings and not seeking to set aside the Judgment.

12. Associating himself with the submissions by the Petitioner, Mr. Mayaka Learned Counsel for the Plaintiffs in the consolidated suit submitted that this Court was now functus officio and could not issue the orders sought as a decree had been extracted subsequent to the delivery of Judgment and execution was now on-going. Mr. Mayaka further submitted that the Applicants were busy bodies who were coming too late to Court. Counsel told the Court the Applicants cannot claim to have been condemned unheard when they had not in the first place subjected themselves to the adjudication authority and urged the Court to dismiss the application.

Analysis and Determination

13. I have considered in detail the application and the response thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

14. Order 1 Rule 10 (2) of the Civil Procedure Rules empowers the Court at any stage of the proceedings, upon application by either party or

suo motu, to order the name of a person who ought to have been joined or whose presence before the Court is necessary to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

15. *Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887)*, states that: -

“The Section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

16. That approach was adopted by the Court of Appeal in *Central Kenya Ltd –vs- Trust Bank & 4 Others CA No. 222 of 1998*, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that: -

“All amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

17. In the matter before me, the 66 Applicants aver that they are all plot owners in an area known as Ngombeni within Hola Town. It is their case that they have been unaware of this consolidated suit until sometime in December 2020 when the decree-holder herein served them with notices requiring them to vacate their parcels of land on the basis of a Judgment delivered herein.

18. The Applicants told the Court that upon learning of the notices, they came together and organized themselves as a committee of plot owners to fight for their rights. That Committee designated the 1st and 2nd Applicants herein as the Chairperson and Secretary respectively and authorized them to swear the two affidavits in support of this application on behalf of the other Applicants.

19. According to the decree-holders however, the Applicants have no stake or interest in the suit properties. It is their case that the 3rd to 66th Applicants have not demonstrated by their own affidavits that they were allocated land within the subject property and that save for the 1st and 2nd Applicants who have sworn the Affidavits, they should suffer the same fate as the 1st, 2nd and 3rd Respondents against whom the Petition and suit were initially filed if it can be shown that their parcels of land fall within the 15 acres decreed to the decree-holders herein.

20. It was however not lost on this Court that even as the decree-holders deny that the 3rd to 66th Applicants have any stake in the suitland, the Petitioner in his Replying Affidavit to the application tacitly concedes having served a great majority of the Applicants with the notices to vacate the land. At paragraph 9 of the said Affidavit, the Petitioner avers as follows:

“9. That the 6th, 19th, 21st, 22nd, 23rd, 24th, 25th, 26th, 28th, 29th, 30th, 31st, 32nd, 34th, 35th, 48th, 49th, 50th, 56th, 60th, 63rd and 66th Applicants do not occupy the Petitioners' 15-acre parcel of land and were not served with eviction orders and as such they are busy bodies as far as this application is concerned.”

21. Arising from the foregoing, and by denying having served notices on some 22 of the Applicants, it was evident to me that a great majority of the Applicants some 44 of them had in actual fact, going by the Petitioner's admission, been served with the notices. A copy of the notice annexed to the 1st Applicant's Supporting Affidavit and marked “MAA 7” dated 28th December 2020 reads in the relevant part as follows: -

“REF: NOTICE TO VACATE

Environment and Land Court Civil Suit No. 68 of 2012 and Petition No. 18 of 2012

I refer to the above matter where Judgment was entered against yourself and decree dated 15th April 2016 (attached) issued.

Take notice that you are hereby given SEVEN (7) DAYS notice from the date hereon to demolish and remove from site of any structure and/or material thereon which you have encroached in the said suit property immediately.

PLEASE BE ADVISED that failure to comply with the same, I the Plaintiff and my agents will proceed to demolish the existing structures on the suit property without any further notice to you as you are in contempt of the Court order and decree.”

22. The Applicants assert that prior to the service of this notice, they were unaware and were not parties to the suit and that they had been on the land for many years and had developed the same. According to the 1st Applicant, he was allocated his plot of land by the County Council of Tana River (now the 3rd Respondent), sometime in 1998. In support of that contention, he has annexed several receipts issued by the said Council in his name dated 8th December 1998, 10th May 2003, 15th May 2012 and the last one issued to him by the 3rd Respondent on 24th June 2018.

23. The 2nd Applicant on the other hand has annexed a copy of a Sale Agreement dated 29th June 1992 indicating that he bought the Plot for KShs 8,000/- on that day from one Samuel Kaihayu Hiribae. The 2nd Applicant has also annexed a letter from the County Council of Tana River dated 25th June 1991 (Annexure “HK 2”) from the Clerk of the Council confirming that the parcel of land described as a Commercial Plot had been allocated to the said Samuel Hiribae Kahayu. By another letter dated 25th May 1993, the Council recognized the 2nd Applicant as the owner thereof. The 2nd Applicant has also annexed three receipts indicating he was making certain payments to the Council between

1992 and the year 2002.

24. That being the case, it was apparent to me that as at the time the consolidated Petition was instituted in the year 2012, the Applicants and/or some of them had been on the suitland for a considerable period of time. Indeed, I have not seen anywhere in the Petitioner's response where he denies that the Applicants were on the suitland when the Petition was instituted.

25. The Applicants are aggrieved that inspite of their presence on the suitland they were neither made aware of the suit nor heard before the Judgment dated 15th April 2016 was delivered herein. It is their case that the failure to involve them in the proceedings was a blatant violation of natural justice and in particular the *audi alteram partem* principle, which demands that no person should be condemned unheard.

26. I have anxiously considered the Applicants' plea. It is not in dispute that as at the time this application was filed, there were no pending proceedings to which they could be made a party, the Judgment having been delivered some five (5) years earlier.

27. In my view, granted that the Applicants were already on the suitland when the Petition was instituted, I think it was incumbent upon the Petitioners to disclose their presence to the Court unless of course they were not seeking any right or relief from the Applicants. Otherwise, I think Article 50 (1) of the Constitution entitles the Applicants to a fair hearing before the properties they lay claim on could be taken away. That Article states as follows: -

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or, if appropriate, another independent and impartial tribunal or body.”

28. Considering the provisions of the said Constitution in *Pinnacle Projects Ltd –vs- Presbyterian Church of East Africa, Ngong Parish & Another (2018) eKLR*, the Court observed that: -

“While the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials, it is not lost that fair trial in civil cases includes: the right of access to court, the right to be heard by a competent independent and impartial tribunal; the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing and the right to be heard within a reasonable time.”

29. The Court went on to state that: -

“.....it is important that in any Judicial process of adjudication, parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective Judge or Magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.”

30. In this respect it was not lost on this Court that the Courts of this land have been consistent on the importance of observing the rules of natural justice and in particular the need to hear a person who is likely to be adversely affected by a decision before that decision is made. In *Onyango –vs- Attorney General (1986-1989) EA 456*, Nyarangi, J asserted thus: -

“I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly....

A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

31. In this regard, I am in agreement with the submissions of Mr. Mungatana Learned Counsel for the Applicants that where the principle of natural justice is breached, the person affected is expected to have the determination against him set aside *ex debito justitiae*. The principle of *ex debito justitiae* is founded on a recognition of a debt that the justice delivery system owes to a litigant to correct an error in a judicial dispensation.

32. Accordingly, and having carefully considered the unique circumstances herein, I am satisfied that the Applicants ought to be afforded an opportunity to be heard before a proper decision is arrived at in respect of the ownership of the subject properties.

33. In the premises, I allow the Motion dated 11th January 2021, set aside the Judgment dated 15th April 2016 in so far as the same relates to the Applicants and substitute therefor an order that the Respondents' claim be heard *de novo* with the applicants being afforded an opportunity to be heard as sought in Prayer Nos. 4 and 5 of the application.

34. In the circumstances of this application each party shall bear their own costs.

Dated, signed and delivered at Malindi this 28th day of May, 2021.

J.O. OLOLA

JUDGE