



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 2127 OF 2007

THE REGISTERED TRUSTEES OF RUIRU SPORTS CLUB

RONALD GRAHAME TIMMS

MICHAEL ALBERT ALLEN HARRIS AND

MAJ. GEN (RTD) HEZRON AMBUNDO MURUNGA.....PLAINTIFFS

VERSUS

ISAAC KARURI NYONGO.....1ST DEFENDANT

PETER MIRINGI KIBUI.....2ND DEFENDANT

SAMUEL KIMONDO THEURI.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

THE COMMISSIONER OF LANDS.....5TH DEFENDANT

JOSHUA KIMANI NJOGU.....6TH DEFENDANT

OAKES ENGINEERING INTER. LTD.....7TH DEFENDANT

PETER F. WAIGANJO.....8TH DEFENDANT

ALFRED KIMENDERA IRUNGU.....9TH DEFENDANT

DANIEL KITHUNKA RUKUNGA.....10TH DEFENDANT

ESTHER WAKINYO MBURU.....11TH DEFENDANT

DANIEL KIMANI WAINAINA.....12TH DEFENDANT

GEORGE KIRAGU NJAU.....13TH DEFENDANT

JAMES MBURU NJUGUNA.....14TH DEFENDANT

PETER KIUMU MUGECHI.....15TH DEFENDANT

TERESIA WANGUI KIUMU.....16TH DEFENDANT

RULING

The hearing of this suit commenced before this court on 5/2/2020. While Mr. Hezron Ambundo Murunga was giving evidence on behalf of

the Plaintiffs, Senior Counsel Mr. Paul Wamae, brought to the court's attention the fact that Obaga J delivered a judgement cancelling the Defendants' titles over land reference number (L.R. No.) 122/7 ("the Suit Property") following the decision of the National Land Commission (NLC).

This court directed parties to file submissions on the issue as to whether the judgement of Obaga J. determined this dispute or whether there was still a dispute to go for trial.

This case was previously handled by my brother Obaga J. On 1/10/2019 counsel for the Defendants requested Obaga J to recuse himself from hearing the matter based on the decision he rendered in **ELC Petition No. 28 of 2017**. Obaga J referred the file to the Presiding Judge of the Environment and Land Court for allocation to another judge. That is how this matter came to this court for determination.

The Plaintiffs, 3rd and 6th to 16th Defendants filed submissions as directed, which the court has considered together with the pleadings filed by the parties. The Plaintiffs attached the judgement of Obaga J. in **Milimani ELC Petition No. 28 of 2017- Samuel Kimondo Theuri v Dr. Mohamed Swazuri and 2 others**. The Plaintiffs was an Interested Party in that petition.

The Plaintiffs submitted that the issues in this suit were determined by Obaga J in the petition in which the Defendants here were parties. According to the Plaintiffs, the upshot of Judge Obaga's judgement was that it was the rightful owner of the Suit Property prior to it being acquired by the Government for the construction of Thika Super Highway and was therefore entitled to the compensation from the Government for the land taken up by this road. The Plaintiffs urged that this court cannot vary or set aside the decision of Obaga J. It further contended that no appeal had been preferred against the decision of Obaga J and that the 3rd Defendant only filed a notice of appeal but has not filed an appeal against Judge Obaga's decision.

The Plaintiffs argued that only two issues remained outstanding which are, compensation and an order of eviction and demolition of the structures on the Plaintiffs' land as well as the costs of this suit. It further submitted that the legal effect of the judgement of Obaga J. was that any occupation of L.R. No. 122/4 or any subdivisions created from it were unlawful and the occupants could be evicted at the Plaintiffs' behest or by an order of this court which it sought in the submissions. The Plaintiffs urged the court to take arguments from all parties on the issue of quantum of damages after the delivery of this ruling.

Mr. Njoroge who appeared for the widow of the 1st Defendant attended court on 5/2/2020 but did not file submissions as directed by the court. The court notes that despite an order being made on 17/11/2014 for the substitution of the 2nd Defendant by his legal representative, Mary Wairimu Miringu, she has not participated in the suit.

The 3rd Defendant submitted that the Plaintiff circumvented this court when it filed its claim before the NLC in 2016. He conceded that Obaga J upheld NLC's decision in the petition and that the Plaintiffs got the same orders from NLC that they seek in this suit and there was therefore nothing further for this court to determine. The 3rd Defendant contended that what is left for determination is its notice of indemnity against NLC and the Attorney General.

The 6th to 16th Defendants submitted that the suit ought to be heard on merit so that they can be heard on their defence and their prayer for indemnity from the co-defendant. They contended that they were not parties to the NLC proceedings and that they should not be condemned unheard. They urged that this suit was not *res judicata*.

It is useful to set out the gist of the pleadings filed in this case. The Plaintiffs averred in the Further Amendment to the Further Amended Plaintiff filed in court on 29/11/2019 that they were the registered owner of L.R. No. 122/4 measuring 245.5 acres from which the Defendants fraudulently excised 30 acres and caused to be registered as L.R. No. 122/7 in the names of the 1st and 2nd Defendants. These Defendants transferred L.R. No. 122/7 to the 3rd Defendant who in turn subdivided it into plots and transferred the resultant plots to the 6th to 16th Defendants and other third parties who are not parties to this suit. The Plaintiffs sought a declaration that Ruiru Sports Club was the owner of L.R. No. 122/4 measuring 245.5 acres and cancellation of the registration of the 1st to 3rd Defendants as the owners of L.R. No. 122/7. Further, it sought cancellation of any subdivisions of L.R. No. 122/7 and to be paid compensation for any land acquired from the subdivision of L.R. No. 122/7.

In his Further Amended Defence, the 3rd Defendant denied the Plaintiff's claim and averred that he lawfully acquired the land abutting the Sports Club's land after carrying out a search. He averred that he was an innocent purchaser for value without any notice of any defect in the title over L.R. No. 122/7 which he had subdivided and sold out to third parties who erected buildings worth millions of shillings and which were housing many families.

The 6th to 16th Defendants denied the Plaintiff's claim and maintained that they were innocent purchasers for value who obtained titles from the 3rd Defendant who had a clean title.

The 4th and 5th Defendants denied the Plaintiff's claim in the defence they filed in court on 9/9/2010 and averred that the registration of the 1st and 2nd Defendants as owners of L.R. No. 122/7 was not fraudulent as it was pursuant to a decree issued in Thika SPMCCC No. 773 of 2002 and Thika CMCCC No. 1740 of 2005.

The 3rd Defendant filed a Notice of Indemnity to Co-defendants on 11/10/2018 giving notice to NLC and the Attorney General that he would seek full indemnity against them for the loss of Kshs. 71,486,990/= together with interest from the date the suit land was valued in 2008 for compensation for its compulsory acquisition and for cancellation of his title over L.R. No. 122/7.

While this suit was pending, the Plaintiff prompted NLC to investigate the acquisition of L.R. No. 122/7 by the 1st to 3rd Defendants at the

point when NLC was about to pay compensation to the 3rd Defendant for the acquisition of 15 acres from L.R. No. 122/7 for the construction of the Thika Super Highway. The dispute centered on who should be paid the compensation by the Government when NLC gazetted the 3rd Defendant as the landowner who was to be compensated for the land taken up by the road. NLC made a finding that the Plaintiff's land was unlawfully acquired and substituted the Plaintiff as the landowner to receive compensation in the gazette notice published in November 2016.

Being dissatisfied with NLC's decision, the 3rd Defendant filed **Milimani ELC Petition No. 28 of 2017- Samuel Kimondo Theuri v Dr. Mohamed Swazuri and 2 others** seeking to have NLC's decision quashed by the court. Obaga J in his ruling delivered on 26/8/2019 upheld the decision of NLC. The judge observed that the 3rd Defendant was afforded an opportunity to be heard and was represented in the NLC proceedings by Mr. Stephen Gachie. Paragraph 18 of Judge Obaga's judgement reads as follows:

“The Petitioner is seeking injunction to restrain the NLC and its chairman from processing compensation in favour of the club and for orders restraining the club from receiving compensation. It is clear from the analysis hereinabove that a finding has been made that the suit property had been unlawfully excised from the club's land. The club has already been gazetted as the owner of the suit property. There is therefore no basis upon which the NLC and its chairman can be restrained from processing compensation or the club from receiving the compensation. It is clear from the verdict by NLC that the suit property was obtained by the vendors who sold it to the Petitioner in a fraudulent manner. The Petitioner was aware of the litigations which were pending in Court touching on the validity of title which he held. There is no injunction which can be issued in the circumstances.”

From the above excerpt of Judge Obaga's judgement, it is clear that a determination has already been made on the issues in dispute in this suit. The court found that L.R. No. 122/7 belonged to the Plaintiff and was illegally excised and sold to the 3rd Defendant. Therefore what remains of this suit is firstly, the eviction of the persons occupying the plots created from the subdivision of the remaining 15 acres out of the land that was registered as L.R. No. 122/7. The law provides for the procedure for eviction and the Plaintiffs will have to move the court in the prescribed manner.

The second issue pending is the indemnity sought by the 3rd Defendant against NLC and the Attorney General. Parties did not address the court on whether or not the compensation of Kshs. 71,486,990/= was paid to the Plaintiff following the judgement of Obaga J. The 3rd Defendant submitted that it had appealed against the decision of Obaga J without giving details of the status of his appeal.

In the court's view, the 3rd Defendant will have to elect whether to pursue his appeal against the decision of Obaga J vide which he found that the compensation for the land acquired for the construction of the Thika Super Highway was to be paid to the Plaintiff; or have this court determine whether or not he is entitled to the indemnity he seeks against NLC and the Attorney General in the sum of Kshs. 71,486,990/= together with interest being the compensation for part of L.R. No. 122/7 taken up by the Thika Super Highway. It would be illogical for the 3rd Defendant to pursue both claims at the same time as there is the likelihood that the Court of Appeal and the Environment and Land Court may arrive at conflicting decisions over this particular aspect of the claim. Nevertheless, it is prudent for the 3rd Defendant to pursue his appeal against the decision of Obaga J before prosecuting his claim for indemnity against NLC and the Attorney General unless he abandons the appeal and pursues his claim for indemnity.

Obaga J awarded the Plaintiff costs in ELC Petition No. 28 of 2017 when he dismissed the 3rd Defendant's petition. That is the decision that substantially determined the Plaintiff's claim in this suit. Each party in this suit should therefore meet its own costs owing to the fact that the hearing of this suit need not proceed.

Delivered virtually at Nairobi this 5th day of May 2020

K.BOR

JUDGE

In the presence of:-

Mr. S. Gachie for the 6th to 16th Defendants

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiffs and the 1st to 3rd Defendants