



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 72 OF 2018

PIUS MBUGUA NGUGI.....1ST PLAINTIFF

LUCY WANJIKU LEITMANN.....2ND PLAINTIFF

UKINGONI FARM LIMITED.....3RD PLAINTIFF

VERSUS

THE CHIEF LAND REGISTRAR.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

HARUN CHEMJOR CHEPKEITANY.....3RD DEFENDANT

THE DIRECTOR OF SURVEY KENYA.....4TH DEFENDANT

THE NATIONAL LAND COMMISSION.....5TH DEFENDANT

DISTRICT LAND REGISTRAR, NAKURU.....6TH DEFENDANT

DIRECTOR OF LAND ADMINISTRATION.....7TH DEFENDANT

AND

NGENDALEL KOIYO FARM LIMITED.....APPLICANT

RULING

(Application by person seeking to be enjoined as interested party; applicant having filed a case over the same land in issue and having lost the case; applicant cannot be said to have any interest in the land as it lost the litigation; application dismissed).

1. The application before me is that dated 14 March 2018 filed by Ngendalel Koiyo Farm Limited, who have sought the following orders :-

(i) That Ngendalel Koiyo Farm Limited be enjoined in this (sic) proceedings as a party to this (sic) proceedings.

(ii) That the Honourable Court makes such other orders or directions to accommodate the applicant in the proceedings and for its best interests.

(iii) That the costs of this application be provided for.

2. The application is based on the following grounds :-

(a) That there are proceedings in the High Court in Nakuru in HCCC No. 71 of 1994 between Ukingoni Farm Limited, the 3rd plaintiff herein and Ngendalel Koiyo Farm Limited the interested party/applicant over the suit property land parcel LR 8437 and LR 10762 situate in Lower Subukia in Nakuru County the subject matter of the suit herein also.

(b) That the interested party/applicant being aggrieved with the judgment filed a notice of appeal and an application seeking stay of execution pending appeal.

(c) That the original court file in the said proceedings got lost together with all proceedings and original documents adduced at the hearing on filing of the notice of appeal.

(d) That due to the loss of the file there was an order for reconstruction of the court file.

3. The application is supported by the affidavit of one Edward Cherutich Kiptanui and is opposed. Before I go to the gist of it, I want to give a little background on this case.

4. This case was commenced by way of a plaint which was filed on 9 February 2018. From the pleadings, it is averred that one Joseph Leitmann and Noel Coelbeck (both deceased) were the directors and shareholders of Ukingoni Farm Limited, the 3rd plaintiff. The 2nd plaintiff is wife to Joseph Leitmann. It is averred that Ukingoni Farm Limited was proprietor of the land parcels LR No. 10762 and LR No. 8437 through a title issued on 10 September 1965. After the death of Joseph Leitmann, the 2nd plaintiff commenced succession proceedings over his estate, and was issued with a confirmed grant which distributed the suit properties to the 2nd plaintiff and her children. The properties were charged by the Land and Agricultural Bank of Kenya from 1965 and later Agriculture Finance Corporation. It is alleged that on 31 May 1991, the 3rd defendant, who was an employee of Ukingoni Farm Limited, fraudulently applied for a provisional certificate of title under the guise that he was secretary of the said company and claimed that the original certificate is lost. The 1st defendant pursuant to this application, issued a provisional certificate dated 17 August 1991 to the 3rd defendant. In the year 1994, the deceased instituted the suit Nakuru HCCC No. 71 of 1994 against Ngendalel Koiyo Farm Limited (the applicant) who were claiming ownership of the suit properties alleging that they purchased the same in a public auction. Judgment in the said suit was delivered by Koome J (as she then was) on 13 October 2006 when it was held inter alia that the applicant has no right over the suit properties. It was also declared that the applicant's members who are on the suit properties are trespassers and an order for their eviction was issued. It is averred that during those proceedings, the 3rd defendant was a witness of the plaintiff, and that the original titles were produced at the hearing of that suit. After the judgment, the 2nd plaintiff, applied for release of these original titles and the same were released to her. In the year 2015, the 2nd plaintiff and her sons, Michael Christopher Leitmann and Bobby Warren Leitmann, sold the suit properties to the 1st plaintiff and released the original titles to him. When the 1st plaintiff lodged the documents for registration, it came to his attention that provisional titles had been issued in the year 1991. The 1st plaintiff advised the 1st defendant of this anomaly, and the 1st defendant promised that he will cancel the provisional titles. A transfer was effected on 14 July 2016 in favour of the plaintiff, but the 1st defendant later proceeded to cancel the transfer, which the plaintiffs claim was done illegally. The suit properties were later on subdivided into the land parcels Kasegas/Subukia West Block 5 (Ukingoni), a Sub division of LR No. 4437, and Kasegas/Subukia West Block 6 (Chemarmars) a sub division of LR No. 10762. It is claimed that this was done fraudulently. In the suit, the plaintiffs have asked for orders inter alia for a declaration that the original titles were fraudulently subdivided, an order to reinstate the original titles and a permanent injunction to stop the defendants from interfering with the suit properties.

5. In the affidavit in support of this application, Mr. Kiptanui has inter alia deposed that there are proceedings touching on the suit properties being Nakuru HCCC No. 71 of 1994. He averred that the applicant has filed a notice of appeal against the said judgment and applied for a stay of execution pending appeal which was granted. He annexed copies of the judgment, the notice of appeal and the order of stay of execution. He has deposed that the court file has gone missing and that an application to reconstruct was allowed. He has deposed that since the dispute in these proceedings touch on the same land in the suit Nakuru HCCC No. 71 of 1994, it is important that they be enjoined.

6. In opposing this application, the plaintiffs have filed Grounds of Opposition inter alia that (slightly paraphrased):-

(i) The judgment in HCCC No. 71 of 1994 was delivered on 13 October 2016, while the notice of appeal was lodged on 16 November 2006 after the lapse of 14 days contrary to Rule 75 of the Court of Appeal Rules and as such, there lies no appeal as the same was filed outside the prescribed time.

(ii) The applicants have not furnished any document or letters requesting for the proceedings or any complaint thereto on the allegation that the file has been missing as alluded from April 2010.

(iii) The application is a mere afterthought to frustrate the case of the plaintiffs.

(iv) The issue of ownership between the applicant and the plaintiffs was determined on 16 November 2006 and adjudication over the same issues would be res judicata.

7. The 3rd defendant also opposed the application by filing a replying affidavit. He averred that the applicant's aim is meant to subvert the hearing and determination of this matter. He also stated that the claim of the applicant was heard and determined and therefore their presence is not necessary in this suit.

8. I invited counsel to make brief submissions which they did and I have taken note of these in arriving at my ruling.

9. Although it is not patently clear from the wording of the orders in what capacity the applicant wants to come into these proceedings, an issue raised by Mr. Kahigah, learned counsel for the 3rd defendant, who pointed out that in the prayers, it is not clear whether the applicant wants to come to these proceedings as plaintiff, defendant or interested party, I am prepared to take it that this is an application by an entity which wants to be enjoined to these proceedings as an interested party.

10. There are no clear-cut provisions in our civil procedure rules for the involvement of an interested party in proceedings and courts generally utilize the provisions of Order 1 Rule 10 (2), which empower the court to order the joinder into a suit, of a person, if such joinder will assist the court to fully and effectually determine all questions. That provision of the law is drawn as follows :-

10 (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

11. It will be seen from the above, that the court can order the name of a person to be added as either plaintiff or defendant, and the court can also incorporate into the proceedings, a person "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit..".

12. In my view, in determining whether the presence of the party is necessary, the court needs to make an assessment of the cause of action before it, by referring to the pleadings and the prayers sought in the case. The court also needs to assess the position of the applicant, and determine for itself, whether it is necessary to have the applicant in the matter, in order to fully adjudicate the dispute, of course taking into context the nature of litigation before it. If the cause of action before the court does not touch on any rights of the applicant, and the issues that arise can be determined without the input of the person sought to be enjoined, the court ought to be slow in allowing such person to be enjoined as a party to the case. Indeed, where it is clear that the aim of such applicant is to present a case which is disparate from the cause of action before the court, then such person should be advised to file his own separate suit, for his inclusion in the suit will only befuddle the issues before the court, and can muddle the litigation, by raising matters which are not germane to the adjudication of the dispute. The joinder of such person is only going to overburden the litigation yet it is not going to assist the court in determining the issues before it.

13. The dispute in this case is primarily over the cancellation of entries by the Chief Land Registrar, which entries transferred the suit properties to the 1st plaintiff upon a sale by the 2nd plaintiff and 3rd plaintiff. The other serious issue in the case is over the manner in which the suit properties were subdivided to bring forth new titles which the plaintiffs wish to have cancelled.

14. The main, if not sole, reason, why the applicants want to be enjoined in this case, is because they had litigation over the ownership of the suit properties, with the 3rd plaintiff, Ukingoni Farm Limited. I have seen that in the said litigation, Nakuru HCC No 71 of 1994, the applicant lost the case and the court declared that the rightful proprietor of the suit properties is Ukingoni Farm Limited. It does appear that the applicant filed a Notice of Appeal on 16 November 2006, which to me seems to have been done out of time, and it is common ground that no substantive appeal has been filed, close to 12 years since the judgment of the court in the said suit.

15. I ask myself what assistance the applicant is going to bring to this suit which will help in resolving the questions raised and I am unable to see any. It has already been held by a competent court that the applicant has no right over the suit properties, and unless they succeed on appeal, it cannot be said that they have any right over the same. Having no right over the land, I do not see why they feel that they are necessary parties to this case. How will they assist this court in deciding whether the Chief Land Registrar was wrong in cancelling the transfer of the suit properties to the 1st plaintiff? How are they going to be of assistance to court in assisting the court determine whether or not the subdivision of the suit properties was done properly or fraudulently? In fact, what interest could they possibly have over the suit properties having already lost litigation and it having already been declared that they have no right over the said properties? I see no answer to the above questions which would be in favour of the applicant. In assessing their application, I have not seen anywhere where the applicant has stated what it wants to do in these proceedings; whether it wants to lodge a separate claim which must be heard within this litigation, or whether it merely wants to produce critical evidence. The applicant cannot of course present any additional claim over the suit land which it did not present in the case Nakuru HCCC No. 71 of 1994. In my view, including the applicant in these proceedings will only cause confusion over what is being litigated and cause hardship and delays to the main protagonists. As it is, the litigation is already complex enough and it will not help matters to complicate it further by including the applicant when it is not even clear what the applicant wants to do in these proceedings.

16. From the above, it is apparent that I am not persuaded that this application is merited. It is hereby dismissed with costs.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 4th day of July 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Yator holding brief for Mr. Moibi for applicant.

Ms. Cheruto holding brief for Mr. Musyoka for the plaintiff.

Ms. Nyawira holding brief for Mr. Kamau for the 1st, 2nd, 4th, 6th and 7th defendants.

Mr. Kemboi and Mr. Kahigah both present for the 3rd defendant.

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

