



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

JUDICIAL REVIEW CASE NO. 7 OF 2017

IN THE MATTER OF

ADJUDICATION OF TINGA GROUP RANCH

CHRISTOPHER LEKALEPI

GEORGE LANYASUNYA.....EX PARTE APPLICANTS

-VERSUS-

LAND ADJUDICATION AND SETTLEMENT OFFICER SAMBURU COUNTY....RESPONDENT

DAVID LEADUMA

KAPENGURIA LENARUM

CHRISTINE LETITIA (Sued as Chairman, Secretary and Treasurer)

TINGA GROUP RANCH.....INTERESTED PARTY

MARY WAIRIMU GIKUNJU.....EX PARTE APPLICANT

RULING

1. Pursuant to leave granted to the *ex parte* applicants on 18th October, 2017 to apply for an order of mandamus to compel the respondent to perform his duties under section 9 of the Land Adjudication Act by convening a meeting between all members of the interested party (Tinga Group Ranch), the *ex parte* applicant brought the notice of motion dated 30th October, 2017 seeking an order of mandamus directed at the respondent and requiring the respondent to perform his statutory duty under the Land Adjudication Act (LAA) Cap 284 Laws of Kenya by convening a meeting to resolve all the disputes arising from the survey process, compilation of the group register and the entire adjudication of Tinga Group Ranch.
2. The application is premised on the grounds that Tinga Group Ranch is an adjudication section established under the LAA; that the respondent is mandated to oversee the entire process of land adjudication, creation of individual titles and resolving disputes that might arise in the course of the adjudication process; that the *ex parte* applicants and other members of the interested party raised complaints on the manner the entire process of land adjudication was being undertaken. The respondent is said to have failed to and/or refused to convene a meeting for the resolution of the disputes.
3. Terming the failure by the respondent to convene a meeting for resolution of the disputes among the members of the interested party an abdication of the respondent's statutory duty, the *ex parte* applicants contend that an order of mandamus should issue to compel the respondent to perform his said duties.
4. It is deposed that the interested party has proceeded with survey work and compilation of the final register notwithstanding the fact that the disputes amongst its members have not been resolved.
5. The application is supported by the statutory statement and verifying affidavit filed therewith.
6. In support of the averments contained in the notice of motion the statutory statement and verifying affidavit the *ex parte* applicants have

annexed the following documents to the verifying affidavit:-

- (i) A list of the members of the interested party marked **GL-1**;
- (ii) Copy of undated letter of complaint addressed to the CEC in charge of lands Samburu County. The letter was copied to the DC Samburu Central, County Land Officer, County Surveyor, National Commission (read National Land Commission), area MCA Loosuk Ward and Governor Samburu County; marked **GL-2**; (**Office of the respondent not one of the offices copied**).
- (iii) Letter to the respondent dated 19th March, 2017 and a further letter dated 18th April, 2017 addressed to the Lands Foundation and Settlement Officer Samburu County, marked **GL-3**;

Application for stay

7. Through the application for leave, dated 18th October, 2017 the ex parte applicant prayed that the leave, if granted, should operate as stay of any further survey work, compilation of the final group register, submission of the register to the lands office and issuance of individual titles. Although the time span of the order for stay is not indicated, it is reasonable to conclude it is pending the performance of the statutory duty the respondent was accused of having failed to perform.
8. The application is opposed through the notices of preliminary objection filed on 8th December, 2017 and on 8th February 2018 on the grounds that it is incompetent, bad in law, fatally defective, a non- starter and an abuse of court process-there is a similar suit pending in court to wit Nyahururu ELC JR. Application No.11 of 2011 (P.O dated 8th December, 2017).
9. Vide the notice of preliminary objection dated 6th February, 2018 it is contended that the application is *res judicata* vide Nyahururu ELC JR Case No.11 of 2017, that the application is bad in law, incompetent as it offends the provisions of Order 53 of the Civil Procedure Rules and the Law Reform Act Cap 26 Laws of Kenya; that the application is brought in bad faith, misconceived, a forum shopping exercise and an abuse of court process.
10. The application is also opposed through the replying affidavit of Leaduma (Tinga A Group Ranch) sworn on 5th December, 2017 in which it is deposed that the instant proceedings are an abuse of court process because one of the ex parte applicant's namely George Lenyasunya had filed a similar suit to wit Nyahururu ELC No. 335 of 2017 in which he failed to obtain the orders sought; that the ex parte applicant have failed to disclose the former suit rendering the current proceedings fatally defective, that the applicants have not exhausted the alternative dispute settlement mechanism provided for under the group constitution), that the complaint referenced in the letters annexed to the verifying affidavit is not valid to warrant being by the Group management committee or AGM of the group ranch or any other forum. Further that the dispute was not referred to the County Lands Officer for arbitration which option they did not exercise, that the process of sub-division of land within the group ranch and allocation of land to members commenced in 1991 and the members have been kept informed of the process, that some of the persons listed as members of the group ranch vide annexure **LL-1** are deceased (their signatures appearing therein are forged); that the *ex parte* applicants ought to have petitioned for a special general meeting, that the interests of the *ex parte* applicants should not be allowed to affect the interest of other members who are satisfied with how the process of sub-division and surveying of the group ranch is being conducted. That the deponent of the verifying affidavit (Lanyasunya) is not a member of the group. The *ex parte* applicants are said to have grabbed a huge portion of the group ranch hence apprehensive of losing the land they have grabbed if individual titles are issued.
11. Initial ground picking exercise is said to have been conducted by a surveyor in 2015 and since then several meetings have been held to address issues arising from that exercise.
12. Terming the ex parte applicants frivolous and vexatious litigants, the deponent points out that the *ex parte* applicants have instituted proceedings of a similar nature before the Nyahururu ELC court, Nyahururu ELC JR. No.11 of 2011, which they mischievously withdrew after realizing that the court would not grant them an order of stay.
13. It is further deposed that survey work has concluded and the 1st applicant was shown his portion which he has taken possession of and began developing. That the applicant's suit has been overtaken by events.
14. Vide the replying affidavit sworn on 6th February, 2018 it is deposed that the instant application is *res judicata* the JR application dated 18th October, 2018 which was withdrawn, application has been overtaken by events as each member has been shown their surveyed land; that except the ex-parte applicants all group members were satisfied by the survey exercise, that through their meeting held on 13th January, 2018 attended by the *ex-parte* applicants all members unanimously approved the concluded survey process without any dissent whatsoever, that the application for stay is misconceived and calculated at misleading the court, that the group ranch has internal dispute settlement mechanism which the *ex-parte* applicant ought to have pursued, that the allegation of possible armed conflict amongst members of the group ranch are wild, unfounded and existing in the minds of the *ex-parte* applicants only; that it is in public interest to deny the application as an order of stay would adversely affect the entire membership of the group.
15. The court is urged to transfer the case to Nyahururu ELC Court which has territorial jurisdiction over the suit property.
16. The application was disposed off by way of written submissions.

Interested Party's submissions

17. On behalf of the LP reference was made to the provisions of **Section 2** and **5** LAA which provide for how an area is constituted into a land adjudication area or section, that is to say through a notice issued by the minister and because the *ex-parte* applicants have not annexed

any notice issued by the minister capable of confirming that the suit property is an adjudication area or section submitted that the *ex-parte* applicants have not proved that the subject matter of these proceedings is governed by the LAA. The *ex-parte's* applicant's application in as far as is premised on the provisions of LAA is said to be based on a misapprehension of the law.

18. Even assuming that the suit property is an adjudication area or section as contemplated hence governed by the provisions of LAA, it is submitted that the Act does impose an obligation on the respondent to convene meetings of members of group ranches.

19. Terming the application by the *ex-parte* applicant premature, the I.P submits that before the respondent can be compelled to perform his statutory duty, the *ex-parte* applicant must demonstrate that the respondent has a duty imposed on him by statute, which duty he failed to perform despite having been requested to do so.

20. In the circumstances of this case it is submitted that the ex parte applicants have not demonstrated that the respondent had a duty imposed by statute to convene meetings of the members of the I.P for purpose of resolving disputes amongst the members and/or that the respondent failed to convene the meeting despite having been required to do so. The letters relied on in support of the *ex-parte* applicant's contention that the respondent failed or refused to perform his statutory duties are said to be incapable of proving that fact because they were neither addressed to the respondent nor copied to him. The letters are also said to be inauthentic as they neither contained details of their nor are they signed.

21. Terming the application premature, the I.Ps contend that the ex parte applicant ought to have first used the dispute resolution mechanism provided for in the group ranch constitution before moving to court. In that regard reference was made to the case **Geoffrey Muthinga & Another vs. Samuel Muguna & 1756 Others (2015) e KLR** where the importance of exhausting internal dispute resolution mechanisms before moving to court was emphasized.

22. The *ex-parte* applicant is also accused of having failed to inform the court that they had filed previous proceedings concerning the subject matter. Based on the case of **Sceneries Ltd v. National Land Commission (2017) e KLR** where the importance of disclosure to court of information that has a bearing on grant of orders sought was underscored, it is submitted that by filing the current suit without disclosing to the court the previous proceedings concerning the subject of this suit renders the current application an abuse of the court process.

23. With regard to the application for stay, reference is made to **Order 53(4)** of the Civil Procedure Rules which provides for when an order of stay may be sought (where the applicant is seeking an order of certiorari and mandamus) and submitted that an order of stay cannot issue in the instant application because the applicant is not seeking an order of certiorari or prohibition.

Ex parte applicant's submissions

24. On behalf of the ex parte applicants it was pointed out that they had written 2 letters to the respondent's employer, ministry of land complaining about how the land adjudication process hereto was conducted, it was submitted that to be entitled to the orders sought he was only required to demonstrate that their was a public or statutory duty which ought to be performed by the respondent that the respondent had failed or refused to perform, based on the allegations that the respondents notified the respondent's employer concerning their displeasure on how the adjudication process was being conducted which letters were never responded to and because the respondent expressed willingness to convene the meeting sought, it was submitted that the respondent admitted that he had a statutory duty to convene the meeting sought for.

25. Concerning the objection by the interested party to the application and the reasons given for the objection, it was submitted that the interested party cannot stop the respondent from discharging its statutory mandate.

26. With regard to the contention that the applicants should have exhausted the group ranch's internal dispute resolution mechanism, it was submitted that the group ranch's management has no role in determination of issues arising from adjudication process.

27. As to whether the adjudication process was transparent, it was submitted that the same can only be determined by the respondent in the meeting to be called for addressing grievances arising from the adjudication process.

28. Concerning the other suits filed by the *ex-parte* applicants it was submitted that the issues raised in this matter are different from the issues raised in second matter. For instance, the Nyahururu case is said to have been withdrawn because the orders sought therein had been overtaken by events.

29. As to whether the orders sought have been overtaken by events, it was submitted that there still remains something that can be stayed pending the resolution of the disputes hereto.

Analysis and determination

30. From the pleadings filed in this matter and the submissions, the sole issue for determination is whether the applicants have made a case for grant of the orders sought.

31. From the submissions filed in this matter, it is common ground that for an order of mandamus to issue in favour of the applicants they must prove that there is a duty imposed on the respondent and which duty the respondent failed to undertake despite having been moved to undertake that duty.

32. According to the I.Ps, an order of mandamus cannot issue in the circumstances of this case because:-

- (i) The respondent has no duty imposed on him by law to constitute a meeting of the members of the I.P for purpose of resolving

such disputes as much arise among the members of the I.P;

(ii) Even assuming that the respondent had a statutory duty to resolve disputes amongst the members of the I.P, it has not been demonstrated that the respondent was moved to resolve the disputes and failed or refused to do so;

(iii) That the applicant moved to court prematurely, that is to say without exhausting the dispute resolution mechanism provided in the I.Ps' constitution; and

(iv) That the conduct of the applicant of failing to inform the court about previous court proceedings touching on the subject matter of this suit disentitles them to the orders sought.

33. Starting from the second ground which from the affidavit evidence adduced in this matter the court can easily make a determination, upon reading and considering the documents on which the allegation that the respondent refused to convene a meeting of the I.P for purpose of resolving disputes among the I.Ps' members concerning the adjudication in respect of the suit property, I agree with the submission by I.P that those documents cannot form a basis of concluding that there was a request addressed to the respondent to convene a meeting of the I.P for the purpose of resolving disputes which request the respondent failed to heed to. No wonder, when the respondent appeared before court it expressed willingness to do what the applicants wanted it to be compelled to do even without any orders compelling it to do what it was accused of having failed to do.

34. The applicant having failed to demonstrate that they issued the respondent with a request or demand note requiring it to do that which they accuse it of failing to do, which it failed to do, I find the application herein to be unmerited and dismiss it with costs to both the respondent and the Interested Parties.

Dated, signed and delivered in open court Nyeri this 2nd day of October, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the exparte applicant

Mr. Nderitu for the respondent

Mr. Macharia h/b for Mr. Mwangi for the interested party

Court assistant - Esther