



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION NO 9 OF 2017

IN THE MATTER OF

LAND PARCEL NO. NAROMORU/KIMATHAGE

BLOCK 2 (MWICHIRI) FORMERLY LR NO. 9620

IN THE MATTER OF THE

DECISION OF THE CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL PLANNING, REPUBLIC OF KENYA

RESURVEY LAND PARCEL NUMBER NAROMORU/KIAMATHAGE BLOCK 2 (MWICHIRI) (FORMERLY LR NO.9620)

THE PRIVATE PROPERTY OF THE PETITIONER

IN THE MATTER OF SECTIONS 4, 5, & 7 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

IN THE MATTER OF ARTICLE 20, 21, 22, 40 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

MWICHIRI FARMERS COMPANY LTD.....PETITIONER

-VERSUS-

CABINET SECRETARY, MINISTRY OF

LAND AND SETTLEMENT.....1ST RESPONDENT

DIRECTOR OF SURVEYS OF THE REPUBLIC OF KENYA.....2ND RESPONDENT

COUNTY LAND REGISTRAR, NYERI..... 3RD RESPONDENT

THE ATTORNEY GENERAL REPUBLIC OF KENYA.....4TH RESPONDENT

LAWRENCE MWANGI WAMBOOH & 600 OTHER MEMBERS OF

MWICHIRI FARMERS COMPANY LTD...INTERESTED PARTIES/APPLICANTS

RULING

1. The notice of motion brought under order 26 rules 1, 5 and 6 of the Civil Procedure Rules (CPR); sections 1A, 1B and 3A seeks to compel the petitioner to provide security for costs in the sum of Kshs. 2,000,000/= within such period of time as shall be determined by the court failing which the petition be dismissed with costs. In the alternative, the applicants pray that their names be expunged from the suit.

2. The application is premised on the grounds that the applicants who are members of the petitioner did not authorize Simon Muruthi George

to institute the petition on their behalf; that by 25th July, 2017 the applicants had received their title deeds and are happily living on their various parcels of land hence have no interest in launching the petition; that the applicants do not wish that their titles be cancelled and that the applicant will be directly affected by orders to be issued in this suit yet they have never authorized Simon Muruthi George to file the petition.

3. The application is supported by the affidavit of Lawrence M. Wambooh sworn and filed therein in which the grounds on the face of the application are reiterated.

4. In opposing the application, Michael Muriuki Mwangi who has described himself as one of the directors of the petitioner filed the affidavit he swore on 20th March, 2017 where he depones as follows:-

- (i) That it is iniquitous for the interested parties to ask for security of costs yet they are the ones who applied to be enjoined in the petition;
- (ii) That the application is frivolous, vexatious and without any basis in law;
- (iii) That the application is brought under the wrong provisions of the law;
- (iv) That the applicants are free to withdraw from the suit;
- (v) That the petitioner did not require the authorization of the applicants to institute the petition;
- (vi) That the applicants are unknown to the petitioner;
- (vii) That the list of the applicants is a forgery as it is signed by persons other than the listed persons;
- (viii) That the deponent of the supporting affidavit is not a shareholder of the petitioner; and
- (ix) That one of the reasons the petitioner filed the suit is because persons who were not shareholders of the petitioner were given land.

5. In reply to the issues raised in the affidavit of Michael Muriuki, the deponent of the supporting affidavit filed the replying affidavit he swore on 24th January, 2018. That affidavit was however, expunged from the court record for having been filed without the leave of the court.

6. When the application came up for hearing, counsel for the applicant reiterated the averments on the face of the application that the petition was filed without their consent or authorization. Explaining that the impugned resurvey of the suit property was done with the knowledge, consent and authorization the applicants, he stated that the petition was filed by a splinter group of the petitioner without the consent or authorization of the applicants. Because the impugned resurvey of the suit property was done with the applicants' consent and the applicants did not authorize the filing of the petition, he urged the court to allow the prayer for security for costs or allow the applicants to exit from the suit.

7. Concerning the averment that the applicants are free to leave the suit, he urged the court if it is inclined to allow the applicants to leave the suit not to allow the applicants' title to be affected by the orders to be issued in the petition.

8. Pointing out that the replying affidavit does not indicate who authorized the deponent to swear the affidavit, counsel for the applicant urged the court to disregard the issue of forgery concerning the list of the interested parties attached to the application because the applicants are happy with the titles issued to them.

9. In opposing the application, counsel for the petitioner reiterated the averments in the replying affidavit of Michael Muriuki and submitted that the applicants have not justified how the sum of two million shillings they are seeking was arrived at.

10. Arguing that under the Mutunga Rules there is no provision for security for costs, the petitioner's counsel urged the court to dismiss the application as it has no legal backing.

11. With regard to the alternative prayer, he submitted that the applicants do not know how companies are governed.

12. Concerning the order for costs issued in Petition 6 of 2012, he stated that the interested parties were praying that they be declared members of the petitioner. He informed the court that the petitioner's case was dismissed with costs to the petitioner.

13. In a rejoinder, the applicants counsel stated that under the Companies Act the company's members are charged with the responsibility of making the decision as to whether or not directors should file a suit on behalf of the members.

14. Concerning the contention that the applicants have not justified how the sum of Kshs. 2 million was arrived at, he stated that in arriving at the amount they considered the value of the land.

15. With regard to Petition 6 of 2012 he stated that it was dismissed as it was res judicata.

Analysis and determination

16. The sole issue for determination is whether the applicants have made up a case for being granted the orders sought or any of them.

17. Concerning that issue, upon review of the court record, I gather that the applicants became parties to the suit pursuant to their application dated 25.9.2017. In that application the applicants applied to be enjoined in this suit as interested parties for the reasons stated therein which include the contention that some of them are occupants of the suit property and as such they will be directly affected by the orders this court is being asked to grant. The applicants further contended that being shareholders of the petitioner their constitutional right to own property will be infringed if the orders sought are granted without their input and that it is in the interest of justice that the application be granted as prayed.

18. The application was by consent of the parties allowed on 23rd October, 2017 effectively making the applicants parties to this suit.

19. Barely a day after the applicants were made parties to the suit, they filed the instant application seeking the orders listed herein above.

20. As to whether the applicants have made up a case for an order for security for costs, I agree with the petitioner's counsel that the application in as far as it premised on the provisions of the Civil Procedure Rules as opposed to the Mutunga Rules under which the Petition was brought is premised on the wrong provisions of the law. In that regard see **Article 22(2)** of the Constitution of Kenya which obligates the Chief Justice to make rules providing for the court proceedings for enforcement of Bill of Rights. The rules made under that constitutional edict are supposed to satisfy the criteria set therein which include:-

“Article 22(3)(c) no fee may be charged for commencing the proceedings;

(d)the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.”

24. Pursuant to that constitutional edict, the Chief justice made the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 famously known as Mutunga Rules. The Rules apply to all proceedings made under **Article 22** and **258** of the Constitution.

25. As the proceedings herein are expressed to be brought under **Article 22** of the Constitution, among other Articles, the Rules applicable to the proceedings are the Mutunga Rules as opposed to the Civil Procedure Rules.

25. Whilst under the Mutunga Rules there is no provision for security for costs, **Rule 24(a)** provides that award of costs is in the discretion of the court. **Rule 24(b)**, on the other hand, provides a guideline for the court in determining whether or not to award costs. In that regard the Rule provides as follows:-

“In determining whether or not to award costs, the court may consider among other factors the bona fides of the proceedings, its public interest nature and its roles in advancing human rights jurisprudence.”

26. In the case of Peter **Munya v. Dickson Mwenda Kithinji & 2 Others (2014) e KLR** the Court of Appeal had this to say about an order for security for costs:-

“...The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In Noormohamed Abdulla -vs- Ranchhodbhal J. Patel & Another (1962) E.A. 448, it was held:-

“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties..”

It is therefore imperative in consideration of an application for security of costs, for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs. Article 24 (1) (d) of the Constitution, provides:-

“ 24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

a.

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;..”

27. In applying the above legal position to the circumstances of this case, the issue for determination is whether the applicants have made up a case for issuance of an order for security of costs.

28. In that regard, having considered the case urged by the applicants I find the reasons given for seeking the order for costs to be incapable of forming a ground for issuance of the orders sought.

29. Concerning the the alternative prayer, in which the applicant seek permission to leave the suit, one wonders why the applicants applied to be enjoined in the suit only to seek for permission to walk out of the suit without accomplishing the purpose for which they applied to be enjoined in the suit. That conduct by the applicants is not the conduct that can be expected of litigants who joined the suit on the premise that their rights stand to be trampled upon if the orders sought are granted. As a demonstration of the frivolousness of that prayer, counsel for the applicant, during hearing had the audacity to urge the court not to issue any orders adverse to the applicants should they be allowed to exit the proceedings. Why would a person who has been given opportunity to participate in court proceedings be heard to limit the court on the orders the circumstances of the court may call for merely because he chose of his free will not to participate in the proceedings?

30. Being of the view that there is no reason or justification to accede to the applicants plea that if they are allowed to exit the proceedings then the orders issued should not affect their titles, I decline to entertain that invitation and without hesitation find that the applicants are at liberty to exit the proceedings but at their own risk as to any adverse orders the circumstances of the case may permit being made against them.

The upshot of the foregoing is that the prayer for security for costs is dismissed. The applicants are free to leave the proceedings but at their own risk to such adverse orders as the circumstances of the case may warrant being made against them.

Directions

31. If the applicants opt to leave the proceedings, they should do so by filing and serving a notice to that effect within fourteen (14) days from the date of delivery of this ruling otherwise they would be deemed to have chosen to proceed with the matter as parties to the suit.

32. The cost of this application shall abide the outcome of the petition.

33. Orders accordingly.

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

L N WAITHAKA

JUDGE

Coram:

Mr. Ng'ang'a Munene h/b for Muchiri wa Gathoni for petitioner

Mr. Nderitu h/b for Mr. Njoroge for the respondents

Mr. Oluoch h/b for Betty Rashid for the interested parties/applicants

Court assistant - Esther