



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 23 OF 2021

(Formerly Eldoret ELC No. 48 of 2020)

DAVID A. KURIA.....1ST PLAINTIFF
SELINA JEBET SUTER.....2ND PLAINTIFF
JANE W. NDUNGU.....3RD PLAINTIFF
EMMANUEL S. CHONGE.....4TH PLAINTIFF
ISSA HUSSEIN GIWE.....5TH PLAINTIFF
TERESIA C. KENY.....6TH PLAINTIFF
HELLEN W. KARANI.....7TH PLAINTIFF
HESBON MUTAI.....8TH PLAINTIFF
VIVIAN ADTHIAMBO.....9TH PLAINTIFF
GITONGA STEPHEN MAITIMA.....10TH PLAINTIFF
ISAAC MURIERI.....11TH PLAINTIFF
JOHN N. IBANDA.....12TH PLAINTIFF
JACKSON ODTIAMBO.....13TH PLAINTIFF
WANYOIKE MUCHOKI.....14TH PLAINTIFF
PAULINE NDUTA.....15TH PLAINTIFF
OYOO ADTHIAMBO.....16TH PLAINTIFF
WANJIRU MUHIA.....17TH PLAINTIFF
KYALO NYANGI.....18TH PLAINTIFF
RUTH W. WACEKE.....19TH PLAINTIFF
SAID ALI.....20TH PLAINTIFF
ISAACK K. SIBOKO.....21ST PLAINTIFF

SALOME WAMBUI.....22ND PLAINTIFF
TOM SIRENGO WAKESA.....23RD PLAINTIFF
AMINA BAKARI.....24TH PLAINTIFF
IBRAHIM INDIAZI.....25TH PLAINTIFF
MARGARET T. MWANGI.....26TH PLAINTIFF
ALI A. MAINA.....27TH PLAINTIFF
JOSEPH GOVEL.....28TH PLAINTIFF

VERSUS

G.W. MOTT.....1ST DEFENDANT
JOSEPH HJERBERT WREFORD SMITH.....2ND DEFENDANT
JAMES MICHAEL HISSEY.....3RD DEFENDANT
JOAB OPINDO & G.H. FITZ NATLE.....4TH DEFENDANT
J.F. LIVINGSTONE.....5TH DEFENDANT
JOHN STEPHEN SPEARS.....6TH DEFENDANT
A.V.M. SHAH & A.B. SHARMA.....7TH DEFENDANT
WILSON HILLISY BOY.....8TH DEFENDANT
THE CHIEF LAND REGISTRAR.....9TH DEFENDANT
NATIONAL LAND COMMISSION.....10TH DEFENDANT
KENYA NATIONAL HIGHWAY AUTHORITY.....11TH DEFENDANT
DIRECTOR OF SURVEY.....12TH DEFENDANT
SUB-COUNTY COMMISSIONER ENDEBESS.....13TH DEFENDANT

RULING

The Application

1. The application dated 9/4/2021 and filed in court on 21/4/2021 has been bought under **Section 1A, 3, 63** of the **Civil Procedure Act, Order 25 Rule 1** of the **Civil Procedure Rules**. The applicants/plaintiffs seek the following orders:-

- (1) That this application be certified as urgent and service thereof be dispensed within the first instance.
- (2) That pending the hearing and determination of this application and suit, the plaintiffs be granted leave to amend the plaint as per the Draft Amended Plaint annexed to this application.
- (3) That the Draft Amended Plaint be deemed as filed subject to payment of the requisite court fees.
- (4) That pending the hearing and determination of this application this suit be consolidated and heard together with KITALE ELC NO. 100 of 2018 - In the matter of MUVIMBA WATITA & 51 OTHERS scheduled for hearing on the 16/6/2021.
- (5) That pending the hearing and determination of this suit, the 9th, 11th and 12th defendants and/or their authorized representative be summoned to attend court to shed light on the existence of government caveat on the subject properties

and the reason (if any) for failure to survey and remove government caveat in the said suit land estates filed herein.

(6) That pending the hearing and determination of the suit land estates the 9th to 13th defendants and/or through their respective authorized agents, servants, and/or employees be ordered to re-survey the remaining area after government acquiring area for the road for purposes of preparation of new deed plans.

(7) That cost of this suit such further and other relief that this honourable court may deem fit expedient to grant.

2. The application is supported by the affidavit sworn on 9/4/2021 by **Daudi A Kuria** and **Teresia C. Keny**, the 1st and 6th plaintiffs with authority of the other plaintiffs to swear on their behalf. The grounds on the face of the application are that vide **Gazette Notices Nos. 3304 and 3305 of 1974** the government of Kenya intended to acquire land for the construction of the Endebess-Suam Road and the road is now complete and that the notice dated **19th October 1974** ought to be removed; that the government issued a fresh gazette notice, **No 4496 of 10th May 2019** intending to acquire land for the Kitale-Endebess road; that the plaintiff's predecessors purchased land oblivious of the caveat; that the caveat has prevented them from benefitting from the land and that the caveat affects their fundamental rights.

The Response

3. The 9th defendant filed grounds of opposition on 3/5/2021 and raised the following grounds:

(1) That the Notice of Motion is misconceived, untenable and bad in law and an abuse of the court process as the prayers sought are untenable to be granted by a court of law.

(2) That the Notice of Motion is incurably defective, incompetent, frivolous and vexatious and devoid of substance with unsupported conclusions and only tailored and stage managed to hoodwink this court.

(3) That the reasons set forth in the application is a mere afterthought after the 9th defendant filed a Notice of Preliminary Objection and Defence on 19/2/2021 on issue of limitation of action and lack of *locus standi* to institute this suit by the plaintiffs.

(4) That the application is a mere grope in the dark as the applicant has laid no basis to warrant the court exercise its discretion.

(5) That the application is a non-starter, abuse of the court and justice as the plaintiff/applicant is guilty of laches, an afterthought and does not deserve the orders of this court.

(6) That this application is bad in law and should be dismissed with costs to the 9th defendant.

Reply to Grounds of Opposition

4. In response to grounds of opposition by 9th defendant, the plaintiffs filed what they refer to as "Reply to Grounds of Opposition" dated 3/5/2021.

5. The plaintiffs filed their written submissions on 18/5/2021. The defendants filed their submissions on 25/5/2021.

Determination

6. I have considered this application, the response and the filed submissions. The issue that arises in the instant application is whether the plaintiffs should be granted leave to amend the plaint and whether the instant suit should be consolidated with **Kitale ELC No.100 of 2018**. In so far as the second issue is concerned, I must state that it should not be addressed and will not be addressed in the instant application for the reason that the plaintiffs were on 8/4/2021 only directed to file a proper application to amend the plaint and no other prayers were envisaged by that direction. Besides, while the plaint has not been amended and replied to by the defendants and the issues identified, consideration of such an application for consolidation would be incompetent for the reason that issues have not crystallised.

7. On the first issue however, I will consider that the draft plaint reflects what the plaintiffs' desire. Parties are at liberty to amend their pleadings at any time before judgment. I consider that the objections the 9th defendant raises are premature. I therefore grant the application dated 19/4/2021 in terms of only **Prayer No. (2)** thereof.

8. The amended plaint shall be filed and served within **14 days** of this order.

9. As the rest of the prayers namely **Prayers Nos. (4), (5), and (6)** are premature and can not be tried before the amendment of the plaint, they are hereby struck out.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 30TH DAY OF JUNE, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.