



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE NO. 553 OF 2013

TOM ROTICH.....1ST PLAINTIFF

KIPRONO KIBORE.....2ND PLAINTIFF

VERSUS

HOSEA KIPLAGAT CHUMA.....1ST DEFENDANT

DANIEL CHEBET.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

AND

KAPTOROR HOLDINGS LIMITED.....PROPOSED INTERESTED PARTY/ APPLICANT

RULING

This ruling is in respect of an application by the proposed interested party dated 30th November 2020 seeking for the following orders:

- a) Spent
- b) Spent
- c) That the Honourable Court be pleased to order that KAPTOROR HOLDINGS LIMITED be enjoined to this suit in the capacity as an Interested Party.
- d) That the Honourable Court be pleased to grant leave to KAPTOROR HOLDINGS LIMITED to file such pleadings, affidavits and other documents subsequent to joinder.
- e) That the Court be pleased to expunge, from the filed pleadings and affidavits any reference to L.R Grant No I.R No 17434/1 whose ownership was already settled in favour of KAPTOROR HOLDINGS LIMITED by the judgment dated 30th July 2003 vide Judicial Review Case No. 1411 of 2001 Republic v Chief Land Registrar ex parte Kaptoror Holdings Ltd.
- f) That costs of the application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

Counsel for the applicant gave a brief history of the case and submitted that following prolonged and unexplained delay by the Chief Land Registrar to register the transfer instrument, Kaptoror filed Nairobi HC JR 1411 of 2001 and obtained orders of mandamus to compel the Chief Land Registrar to effect registration of a transfer document dated 2nd June 2001 in favour of Kaptoror; and prohibition restraining the Commissioner of Lands from interfering with the registration of transfer which judgement was annexed as an exhibit to the affidavit.

It was counsel's further submission that Kaptoror's ownership is not contested and that an official search conducted on 26th August 2020 confirms that the parcel is still registered in the name of the vendor Petrus Jacobus de Jager, having not been registered to any other person or entity.

Counsel also submitted that in the process of Kaptoror enforcing the compliance with the order against the Chief Land Registrar and Commissioner of Lands both by direct correspondences and through the Commission on Administration of Justice/Ombudsman, Kaptoror learnt of a letter dated 13th June 2019 written by Kibichiy & Company Advocates on record for the 2nd Defendant herein, expressly directing the Chief Lands Registrar alleging that this case relates to LR No. 10394, and that the Chief Land Registrar should:

"stay away action/transaction over Parcel no. 10394 (which is owned by Kaptoror) pending determination of the case involving Parcel/ No. 11205"

That the 2nd Defendant's letter adversely affected Kaptoror by halting enforcement and compliance with the order directing the Registrar to register the transfer for Parcel No. 10394 in favour of Kaptoror, and violated Kaptoror's right to its property.

Counsel therefore stated that the interruption by the 2nd Defendant directly brought Kaptoror into these proceedings to defend its uncontested ownership of LR No. 10394 by filing this application for joinder. Further that the 2nd Defendant - in his Replying Affidavit sworn on 16th December 2020 deponed that the suit property herein is in respect of property No. LR. No. 11205 and not LR No. 10394 and in essence admitting that the claim is limited only to LR No. 11205 and not any other property.

Counsel urged the court to make a finding that the 2nd Defendant has conceded that he does not claim ownership of L.R. No. 10394 and further that the 1st and 3rd defendants are not opposed to the application for joinder.

Counsel listed the following issues for determination by the court:

- a) Whether Kaptoror should be enjoined to this case, and if so, subject to what conditions;
- b) Whether the Court should expunge any references in the pleadings or evidence making direct or ancillary reference or claims with respect to LR No. 10394; IN LIGHT OF the judgment HC JR 1411 of 2001 Republic v Chief Lands Registrar ex parte Kaptoror Holdings Limited given in Kaptoror's favour;

On the first issue of joinder, counsel submitted that the applicant has established sufficient interest to warrant joinder into these proceedings as interested party as the 2nd Defendant expressly cited these proceedings in its letter of 13/06/2019 to the Chief Land Registrar stopping registration and any transaction on Kaptoror's Land known as L.R. No. 10394 until this suit is concluded.

That subsequently the applicant sought to be enjoined in this case to defend its ownership rights to the suit property and further to expunge and resolve any possibility at the Parties herein making such a similar claim affecting L.R. No. 10394 that may conflict with the JR judgment and Decree already affirming Kaptoror's bonafide ownership of LR no. 10394.

It was counsel's submissions that Kaptoror has a recognizable stake in these proceedings in so far as it relates to I R No. 10394, as the holder of duly executed transfers; and as the successful party in the annexed JR judgment of the **High Court (Rimita J) in HC JR 1411 of 2001 Republic v Chief Lands Registrar ex parte Kaptoror Holdings Limited**. Further therefore the applicant should be enjoined as a party to this suit.

Counsel relied on Order 1 Rule 5 of the Civil Procedure Rules and the case of **Rajab Ahmed Karume v Chief Registrar & 3 others; Nairobi ELC 816 of 2012 as consolidated with ELC 47 of 2010, [2019] eKLR** where Obaga J reiterated the tests for joinder as follows:

*"10. Though the Civil Procedure Act does not expressly provide for joinder of Interested Parties, the Courts have routinely allowed parties into proceedings but based on certain criteria. In the case of **Trusted Society of Human Rights Alliance Vs Mumo Matemu & 5 Others [2014]eKLR** the Supreme Court held as follows:-*

"...an Interested Party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."

Counsel further relied on the case of **Francis Kariuki Muruatetu & another v Republic & 5 others; Supreme Court Pet. 15 and 16 of 2015, [2016] eKLR** where the Supreme Court (Rawal, DCJ & V-P; Ibrahim, Ojwang, Wanjala & Njoki, SCJJ) established the tests for joinder of interested parties as follows:

"[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i) *The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.*
- ii) *The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.*

iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

On the second issue on expunging any reference of the Judicial Review orders in respect of LR No 10394, counsel submitted that the judgment and Decree in **HC JR 1411 of 2001 Republic v Chief Lands Registrar ex parte Kaptoror Holdings Limited** settled any and all disputes regarding ownership of L.R. No. 10394, in favour of Kaptoror Holdings Limited as judgements on land ownership issued by courts of competent jurisdiction are judgments in rem, conclusive as against the whole world, and not open to challenge herein.

Counsel cited the case of **Belgo Holdings Limited v National Land Commission & another; Nairobi HC Const. Pet. 21 of 2016, [2017] eKLR** where Onguto J held:

“54. According to Halsbury’s Laws of England, Vol. 15 (4th Ed), the meaning of a judgment in rem is defined in paragraph 351 as:

“Judgment of the court of competent jurisdiction determining the status of ... a thing, or the disposition of a thing as distinct from particular interest in it of a party to the litigation”.

Further that at paragraph 366, the most important distinction between judgments in rem and judgments in personam or inter partes is given as:

“judgments inter partes are only binding between the parties thereto and those who are privy to them. The judgment in rem of a court of competent jurisdiction is as regards...property situate within the jurisdiction of the court pronouncing the judgment, conclusive against all the world in whatever it settles as to the status of the property, or as to the right or title to the property, as to whatever disposition it makes of the property itself”.

55. The above principles may not be subject to any contest.

Mr Ochieng, counsel for the applicant relied on the principle of res judicata and submitted that the judgment established ownership of L.R. No. 10394 in favour of Kaptoror hence it cannot be litigated afresh. Counsel therefore urged the court to allow the application as prayed.

2ND DEFENDANTS'/RESPONDENTS' SUBMISSIONS

Counsel for the 2nd defendant respondent opposed the application and cited the principles to be met in an application for joinder of an interested party and who is to bear the costs of the application.

Counsel relied on the case of **John Harun Mwau v Simone Haysom & 2 others; Attorney General & 2 others (Interested Parties) [2021] eKLR** where the court quoted the following provisions and records in defining who an interested party is.

"The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as;

"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation"

It was counsel’s further submission that Kaptoror’s ownership is not contested and that an official search conducted on 26th August 2020 confirms that the parcel is still registered in the name of the vendor Petrus Jacobus de Jager, having not been registered to any other person or entity.

Ms Magut also submitted that the suit property between the plaintiff and the defendant is in respect of I R No 11205 and not I R No 10394 and therefore the applicant does not have a direct link to the suit property hence will not be affected by the decision of the court. Further that the court will only make a determination on a claim over I-R NO. 11205 and Defence and Counter Claim for Kshs. 882,000/= being purchase price over I-R. NO. 11205.

Counsel therefore urged the court to dismiss the application with costs to the 2nd defendant/respondent as the applicant has not met the threshold for joinder and the principles of striking out pleadings as was held in the case of **D T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR** by Madan JA thus:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that ‘is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits ‘without discovery, without oral evidence tested by cross-examination in the ordinary way’”. (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.”

ANALYSIS AND DETERMINATION

I have considered the application and the submissions by counsel the issues that arise for determination are as to whether the applicant has met the threshold for joinder as an interested party and whether the documents by the 2nd defendant in reference to IR No 10394 should be expunged from the record.

The principles for joinder of parties and Interested parties are well settled in many cases before our courts. In the case of **COMMUNICATIONS COMMISSION OF KENYA AND 4 OTHERS VS ROYAL MEDIA SERVICES LIMITED & 7 OTHERS PETITION NO. 15 OF [2014] eKLR** wherein the Supreme Court pronounced itself on who an interested party is and held as follows:

“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court’s decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

In the case of **Meme v. Republic, [2004] 1 EA 124**, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;*
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;*
- (iii) Joinder to prevent a likely course of proliferated litigation.*

The applicant has attached a letter dated 13th June 2019 addressed to the Chief Land Registrar by the 2nd defendant’s counsel Kibichy & Co Advocates in respect of parcel NO. 10394 which is purportedly owned by the applicant pending the hearing and determination of a case involving parcel No 11205.

The applicant has further given a synopsis of the suit parcel of land and a previous case involving the applicant which orders the Chief Land Registrar to register a transfer but the same had been rendered impossible by the latter by the 2nd defendant’s counsel.

The fact that the defendant has mentioned an interest in stopping the transaction involving the rights of the applicant is enough ground for the court to find that it has established an interest and a stake in the matter. The issue can be resolved within the case and if the defendant admits that he does not have a claim in the suit land then such orders can be granted to protect the interest of the applicant. If there is no such admission, then the court will determine the issues that arise.

Moreover, the 2nd defendant has nothing to lose if the applicant is enjoined in the case. It should be noted that the plaintiff and the 3rd defendants are not opposed to the application as the joinder will help in avoidance of duplication of suits.

On the issue whether the court should expunge the documents by the 2nd defendant in respect of IR No 10394, the applicant is not even a party to this suit, it should think of passing the hurdle of joinder before making applications for expunging certain documents in a case that it is not a party to. What about if the court does not allow the application for joinder, would he application have any basis or standing?

The issue that the applicant is raising on a previous order granted in a Judicial Review application can only be properly dealt with when it is already enjoined a party but not as a bystander.

Having said that it would be in the interest of justice to allow the application for joinder to litigate on the interest established on the suit land. The applicant to file any documents if need be within the next 14 days.

The second limb of the application to expunge the 2nd defendant’s documents is hereby disallowed. The costs of the application in the cause.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF JUNE, 2021

M. A. ODENY

JUDGE