



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC MISC APP. NO E007 OF 2020

(CONSOLIDATED WITH ELC MISC 17 OF 2019)

HESBORN M KIURA

THE LIQUIDATOR OF DAGORETTI NYAKINYUA

SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED

(UNDER LIQUIDATION).....APPLICANT

VERSUS

CHIEF LAND REGISTRAR- NAIROBI.....1ST RESPONDENT

LAND REGISTRAR- NAKURU.....2ND RESPONDENT

LAND REGISTRAR- NAIVASHA.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

PATRICK MUIRURI NJOROGE & 20 OTHERS.....INTERESTED PARTY

RULING

1. Before me are two applications for ruling. There is the Notice of Motion application dated 24th August 2020 filed in court on 27th August 2020. This application inter alia sought the joinder of 12 interested parties who were the applicants; stay of further execution of the consent order issued on 28th November 2019 and any other consequential orders made pursuant thereof; and the setting aside of the consent order made on 28th November 2019 in its totality. The other Notice of Motion application the subject matter of the ruling is dated 21st September 2020 and inter alia sought the joinder of an additional 476 proposed interested parties; stay of further execution of the consent orders adopted by the court on 28th November 2019 and any other consequential orders thereof; the consolidation of the present matter with Nakuru ELC No.7 of 2020; the setting aside of the consent order entered on 28th November 2019 and the cancellation and nullification of Kenya Gazette Notice No.3756 dated 29th May 2020 published pursuant to the orders issued by the court on 28th November 2019.

2. A brief background of this matter is necessary to contextualize the two applications. On 2nd October 2019, Hesbon M. Kiura, the Liquidator of Dagoretti Nyakinyua Savings and Credit Co-operative Society Ltd (under liquidation) vide a Civil Misc Application No.17 of 2019 filed an Ex-parte Notice of Motion against the 1st to 4th respondents under a certificate of urgency seeking the following orders:-

1. *An order that service be dispensed with as the application is heard ex-parte.*
2. *An order that the 1st, 2nd and 3rd respondent's be and are hereby directed and compelled to facilitate and effect the National Land commission's recommendation in the Gazette Notice of 1st March 2019 to the effect that all titles emanating from the fraudulent transactions undertaken by the Dagorette Nyakinyua Company be revoked and the same be allocated to the members*

of the Dagoretti Nyakinyua Savings and Credit Co-operative society Limited who are the bonafide owners under the supervision of the commissioner of Co-operative.

3. The application was predicated on a recommendation made by the National Land Commission (NLC) on a claim lodged before it by Dagoretti Nyakinyua Savings and Credit Co-operative Society Ltd against Dagoretti Nyakinyua Company. The National Land Commission recommendation was carried in the Kenya Gazette Notice of 1st March 2019. As per the Notice the claim was allowed and the National Land Commission made a recommendation as follows:-

“All titles emanating from the fraudulent transaction undertaken by Dagoretti Nyakinyua Company to be revoked and the same be allocated to the members of the Dagoretti Nyakinyua Co-operative saving and credit Society Ltd who are the bonafide owners under the supervision of the commissioner of Co-operatives.

The chief Land Registrar to facilitate and effect the recommendations herein”.

4. The above is the recommendation that the applicant moved the court *ex parte* to have implemented. The application was directed against the Chief Land Registrar, the Land Registrar Nakuru and Naivasha where the land parcels were situated and the Hon. Attorney General. The proceedings before the National Land Commission that culminated in the recommendation were not availed and neither was a detailed ruling by the National Land Commission giving reasons for their decision availed. Upon the application being presented before the court on 2nd October 2019 the court declined to grant any order *ex parte* and directed the application to be served on the respondent and to be heard on 30th October 2019.

On 30th October 2019 Mr. Cheptarus advocate appeared for the applicant and Ms. Cheruiyot, State Counsel appeared for the Respondents. Mr. Cheptarus advocate informed the court the Land Registrar had signed a consent that would dispose of the matter. Ms Cheruiyot for her part stated she was not aware of the consent and sought time to consult with the Land Registrar. On 18th November 2019 when the matter was set for mention Ms. Cheruiyot, State Counsel had not as yet obtained instructions.

5. On 28th November 2019 the matter was once again mentioned in the presence of both counsel. Ms Cheruiyot state counsel on this occasion stated they would not oppose the application. She indicated the Land Registrar (Naivasha) was present in court and she had confirmed the application may be allowed . The court on the basis that there was no opposition to the application dated 30th September 2019 granted the *ex parte* Notice of Motion in terms of prayer 2 and 3 with no orders as to costs.

6. On 30th October 2019 the applicant filed a consent dated 15th October 2019 signed by Mr. Cheptarus advocate on behalf of the applicant and the Land Registrar, Naivasha for and on behalf of the 1st, 2nd and 3rd Respondents. The consent was in the following terms: -

CONSENT

*By consent of the applicant and 1st, 3rd and 4th respondents, the *ex parte* Notice of Motion dated 30th September 2019 and filed on 2nd October 2019 be and his hereby compromised in the following terms: -*

IT IS HEREBY ORDERED THAT:

- 1. An order that the 1st, 3rd and 4th respondents be and are hereby directed and compelled to facilitate and effect the National Land commission’s recommendation in the Gazette Notice of 1st March, 2019 to take effect that all titles emanating from the fraudulent transaction undertaken by the Dagoretti Nyakinyua Company to be revoked and the same be allocated to the member of Dagoretti Nyakinyua Savings & Credit Co-operative Society Ltd who are the bonafide owner under the supervision of the commissioner of Co-operatives.*
- 2. That an order that the 1st, 3rd and 4th respondents are hereby compelled to facilitate and effect the National Land Commission’s recommendation as contained in the Kenya Gazette of 1st March 2019 TABLE 2- NAIROBI KIAMBU, NYERI and MURANGA Counties, case number and county namely NLC/HL1/112 2017 Nairobi County in the matter of Dagoretti Nyakinyua Savings and Credit Co-Operative Society Limited (claimant) and Dagoretti Nyakinyua Company (Respondent) of that Kenya Gazette.*
- 3. That no order to costs.*

7. Essentially, it is the above consent that the court approved on 28th November 2019 and the effect was to dispose of the *ex parte* Notice of motion dated 30th September 2019. Attempts by the applicant to implement and/or execute the orders emanating from the *ex parte* applications as captured in the consent above provoked diverse applications for joinder including the two applications now the subject of this ruling. In the application dated 24th August 2020, the applicants sought to be enjoined to the proceedings as interested parties on the basis that they were the registered owners of various parcels in Gilgil Kekopey which pursuant to the court order issued on 28th November 2019 were supposed to be cancelled yet they had not been parties to the proceedings giving rise to the order and neither had they been afforded a hearing before the orders were made. The applicants further prayed that the consent order of 28th November be set aside. The applicants contended that the National Land Commission some time in 2017 unprocedurally and unlawfully in contravention of Articles 40,47 and 50 (I) of the constitution and Section 14 (3) of the National Commission Act proceeded to allow the claim by the applicant to the prejudice of the applicants/ interested parties as they were denied a hearing yet it was their titles that stood to be cancelled and/or nullified.

8. The applicants interested parties further agued that the written consent signed between the applicant and the 1st, 3rd and 4th Respondent on 15th October 2019 was in utter violation of the applicants/interested parties rights under articles 40 and 50 of the constitution as it’s effect

was to deprive the interested parties/applicants of their property without being afforded an opportunity of being heard which was contrary to the rules of natural justice. They further argued the 3rd respondent has in implementation of the unlawful order issued on 28th November 2019 issued a Gazette Notice No.5385 dated 30th July 2020 signifying her intention to cancel the titles affected upon the expiry of 30 days therefrom which would prejudice the interested parties interests and rights.

9.The Notice of Motion dated 21st September 2020 was similar in material particulars to the application dated 24th August 2020 save that it involves a lot more applicants (476 in number) and in the prayers additionally prays that this matter be consolidated with Nakuru ELC No.7 of 2020 and that Kenya Gazette Notice No.3756 dated 29th May 2020 issued pursuant to the orders of the court made on 28th November 2019 be nullified. The applicants proposed interested parties averred that they were the legal and registered owners of various parcels of land in Mau Summit/Molo Block 3 which properties formed part of LR No.10224 (I.R16461). The applicants claimed they had been in possession of the parcels of land from the time of allocation in 1988 either as allottees or purchasers from allottees and that they had effected various developments on their respective parcels of land. The applicants averred that the applicant without notice to them obtained adverse and prejudicial orders from the court which had the effect of leading to the cancellation of their titles without them being afforded any hearing. The proposed interested parties further averred they were not served with any court process and nor were they parties to any proceedings before the National Land Commission. The applicants contended the consent order dated 15th October 2019 adopted by the court on 28th November 2019 smacked of conspiracy between the applicant and the respondents calculated to violate and infringe on the interested parties rights of property ownership without giving them the opportunity of a fair hearing.

10. On 5th October 2020 the Notice of Motion dated 21st September 2020 came up for interpartes hearing. The Liquidator (applicant respondent) had not filed his response but as it was apparent the proposed interested parties applicants held titles to parcels of land affected by the orders issued on 28th November 2019, the court made an order that they be enjoined as interested parties in the matter. On 16th November 2020 when the matter was further fixed for mention for directions in regard to the prayer in the application seeking to have the consent order recorded on 28th November 2019, set aside, the Hon Attorney General through Mr.Weche, state counsel formally notified the court that the respondent did not support the consent as it was not validly obtained. Mr. Cheptarus for the applicant stated he was not aware that the Hon. Attorney General was renegeing on the consent. He stated he had filed a replying affidavit in opposition to the application seeking to vitiate and to set aside the consent resulting in the court orders issued on 28th November 2019.

11.Following allegations that there were persons that the Liquidator had authorized to carry out survey and fix beacons on the disputed land, a fact that was disputed by the advocates representing the Liquidator applicant, the court on 15th February 2021 issued an order that the Liquidator applicant appears in court in person on 15th March 2021 to clarify what the situation was on the ground. The liquidator Mr. Hesbon Mbutia Kiura attended court on 15th March 2021 and he stated he did not know Gakuyo Realty, the persons who were said to be interfering with the land on the ground and that they were not acting on his directions

12. Apart from the two applications which are the subject of this ruling there are at least two other applications where the applicants seek to be enjoined as interested parties on the basis that they are registered owners of various parcels of land that are affected by the order of the court issued on 28th November 2019. The complaint is generally that they were not party to any proceedings before the National Land Commission where a recommendation to cancel their titles was made and further they were not made party to the proceedings before this court before the consent between the applicant and the respondents was made.

13. The court having regard to the provisions of Order 1 Rule 10 (2) respecting joinder of parties was satisfied the applicants in the various applications had demonstrated they had an identifiable interest to entitle them to be enjoined as interested parties. Order 1 Rule 10(2) provides thus:-

(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.

14. The interested parties having demonstrated they had some tangible interest in the subject matter of the suit, there was no evidence to show that each of them had any notice of the proceedings before the National Land Commission yet the recommendations made by the commission was going to directly affect the land parcels in respect of which they held titles. Before this court, it is clear the matter was initiated as a miscellaneous application with the sole objective of implementing the recommendation made by National Land Commission. The application before the court apart from the recommendation by the National Land Commission made vide the Gazette Notice of 1st March 2019 did not provide details of the proceedings before the National Land Commission and/or a detailed ruling showing what the National Land Commission considered before reaching the determination that it did.

15. The Respondents did not file any response to the application by the liquidator. The applicant instead filed a consent which was reproduced earlier in this ruling which consent basically was to allow the orders sought in the application. The consent on the part of the Respondent was signed by the Land Registrar and not by the Attorney General who entered appearance in the matter to represent the respondents. That was rather unusual as the Land Registrar would have been expected to seek advise from the state counsel. It is instructive that when the liquidator attempted to give effect to the orders issued pursuant to the consent thus provoking these two applications, the state counsel acknowledged that the consent was not validly obtained.

16.The court in granting the orders it did on 28th November 2019 placed reliance on the consent entered between the applicant and the respondents. The emergence of the Applicants/interested parties to challenge the consent and the orders threw a sharp focus on the validity of the consent and the resultant orders. The interested parties as observed earlier in this ruling clearly have a tangible interest in the subject matter of the application. The orders issued no doubt affect their interests as their titles are liable to be cancelled. I stated earlier that it was not apparent whether the applicants/interested parties who are numerous were aware that the National Land Commission was dealing with a

claim that affected their rights and/or interests and therefore they needed to be involved and/or given the opportunity of being heard. Under Article 47 of the constitution every person is entitled to fair administrative action such that if the National Land Commission was making inquiries which had the potential of affecting the rights and interests of the applicants, they had a right to be given notice and a hearing.

17. Article 47 (1) & (2) of the constitution provides thus:-

47. Fair administrative action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

18. The Fair Administrative Action Act, 2015 Section 4 (3) provides as follows: -

(3) Where administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) Notice of right to a review or internal appeal against an administrative decision, where applicable;

(d) statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where Applicable

(f) Notice of the right to cross-examine Or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

9. It is a cardinal rule of natural justice that no person should be condemned without being given an opportunity of being heard. Articles 47, 48 and 50 (1) of the constitution speak to that and the Fair Administrative Action Act 2015 lays out the procedure for attainment of fair administrative action.

20. In the present matter if the applicants were not party to the action instituted by applicant/liquidator in this court and prejudicial orders affecting them were made against them without being given a hearing they are entitled to have those orders set aside. The orders would be a nullity for being in contravention of the rules of natural justice. A party cannot be condemned unheard.

21. Having come to the conclusion that the consent between the applicant and the respondent and the resultant court orders made on 28th November 2019 cannot stand by reason of the fact that the interested parties were not party to the proceedings, it is imperative that these proceedings cannot be appropriate for the parties to ventilate their concerns. It is apparent it is the recommendation of the National Land Commission that the interested parties have a quarrel with. The National Land Commission is not a party in these proceedings and at any rate no proper challenge of the National Land Commission recommendations can be made in these proceedings. In essence what is before this court is an implementation/execution process of the decision made by the National Land Commission which the court has found to be wanting. The parties in the circumstances will have to determine how to ventilate their issues by perhaps initiating alternative actions.

22. Be it as it may be, the court is satisfied that the two applications dated 24th August 2020 and 21st September 2020 have merit.

23. Accordingly the consent dated 15th October 2020 adopted by the court on 28th November 2020 is hereby set aside. The orders made by the court on 28th November 2020 and all other consequential orders flowing there from are hereby set aside and vacated. The Kenya Gazette Notices Nos. 5385 of 30th July 2020 and 3756 dated 29th May 2020 are hereby ordered cancelled for all purposes.

24. The parties shall bear their own costs of the applications.

25. For the avoidance of any doubt, this ruling disposes of the proceedings in the instant miscellaneous application as no purpose will be served in keeping the file open. The court file as accordingly marked as closed.

26. Orders accordingly.

Ruling dated signed and delivered virtually at Nakuru this 15th day of July 2021.

J M MUTUNGI

JUDGE