



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 54 OF 2016

LANET HILL COMPANY LIMITED.....PLAINTIFF

VERSUS

THE SCHOOL MANAGEMENT COMMITTEE

LION HILL PRIMARY SCHOOL.....1ST DEFENDANT

HILLCEST SECONDARY SCHOOL.....2ND DEFENDANT

RULING

1. The Attorney General acting on behalf of the 1st and 2nd defendant, vide a Notice of Motion application dated 11th February 2021 and filed in Court on 18th February 2021 seeks orders that the National Land Commission be enjoined in the suit as a defendant and/or interested party in the suit with liberty to file and serve pleadings in answer to the plaint. The Attorney General further simultaneously with the application filed a Notice of preliminary on the ground that the suit offended the provisions of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya and sought that the suit be dismissed with costs. Although the plaintiff indicated they were not opposed to the Attorney General's application for joinder of the National Land Commission as a party in these proceedings, the Attorney General nonetheless sought the Court's ruling on the preliminary objection.

2. The Court directed the parties to canvass the preliminary objection by way of written submissions. On 15/6/2021 when the matter came up for mention to take a ruling date, the parties submissions had not been placed on record. The Court directed the parties to follow up with the Court registry and to ensure the submissions were on record on or before 25/6/2021. By the said dated only the plaintiff's submissions filed on 16/6/2021 were on record and the AG's submissions were not on record. At the time of the preparation of this ruling the Court has not had the benefit of perusing and considering the submissions of the AG, if any had been filed.

3. As observed earlier, the plaintiff was not opposed to the National Land Commission being enjoined to these proceedings. The National Land Commission is the authority vested with the authority to alienate and manage public land. In the present suit the defendants contend the suit land L R No. 20289 (IR 65176) was reserved for public purposes and was therefore not available for alienation to private investors.

4. The defendant's preliminary objection is founded on limitation of actions and hence goes to the jurisdiction of the Court to entertain the suit. The issue is one of law and can therefore be raised as a preliminary objection within the threshold established in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696* where the Court of Appeal as per Sir Charles Newbold, P stated as follows:-

“--- A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

5. The plaintiff vide the amended plaint filed on 31/5/2018 predicates its claims on the fact that it has been registered as the owner of land parcel L R No. 20289 (IR 65176) from 13th January 1995. The plaintiff alleges that during the 1990's the Municipal Council of Nakuru illegally took possession of the parcel of land and allocated the same to the 1st and 2nd defendants. The plaintiff avers the defendants are trespassers and seeks their eviction therefrom and/or in the alternative compensation for the land at the current market rate.

6. The 1st and 2nd defendants vide their amended statement of defence and counter claim filed on 8/7/2019 aver that the 1st and 2nd defendant are the lawful owners of the subject property the same having been set aside, by the plaintiff for public utility and surrendered to the government accordingly. The 1st and 2nd defendants contend the suit land having been surrendered for public purposes was not available for

reallocation and registration in favour of the plaintiff. They aver the plaintiff acquired title to the same illegally, irregularly, fraudulently and unlawfully and its title ought to be cancelled. In their prayers in the counter claim the defendants seek a declaration that the suit property is public land and for surrender and cancellation of the title issued to the plaintiff. The defendants have not pleaded limitation in their defence and counter claim.

7. The issues that arise as per the pleadings are whether or not the plaintiff surrendered the land occupied and developed by the defendants for public purpose; whether the registration and issue of to the plaintiff was illegal, irregular and fraudulent and therefore liable to be cancelled. If it is proved that the plaintiff did in fact surrender the suit property for public purposes, then the plaintiff would legally not have been entitled to be reallocated and registered as the owner of the land. There are therefore disputed facts/issues that can only be proved at the formal hearing. The preliminary objection taken by the defendants in my view is not well founded. The Court as observed would need to take evidence to determine the issues that are in dispute. The defendants stake claim to the suit property on the basis that it was public property, the same having been surrendered by the plaintiff when it subdivided its original land for use for public purpose of constructing a school.

8. Even if the preliminary objection was to be upheld, that would not resolve the issues that arise in the suit. The plaintiff suit would be struck out but the defendants counterclaim would still remain. The counter claim raises the same issues whether the suit property constituted public property and whether the plaintiff obtained registration of the same illegally and/or fraudulently. These are issues that must go to trial and formal evidence adduced by the parties.

9. In the result I find no merit in the preliminary objection and the same is accordingly rejected. The application for joinder of the National Land Commission is however allowed and the National Land Commission is ordered to be enjoined to these proceedings as an Interested Party. The plaintiff to serve the pleadings upon the National Land Commission within 21 days from the date of this ruling. The National Land Commission to have liberty to file any necessary pleadings within 30 days of being served with the pleadings.

10. Each party shall bear their own costs of the application for joinder and the preliminary objection.

RULING DATED SIGNED AND DELIVERED, VIRTUALLY AT NAKURU THIS 23RD DAY OF SEPTEMBER 2021.

J M MUTUNGI

JUDGE