



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO. 37 OF 2008**

**(CONSOLIDATED WITH CIVIL SUIT NOS. 38, 40, 41, 42, 43,44, 45, 46, 47**

**AND 48 OF 2008 AND ELC NOS. 27, 28, 29,30, 434 AND 436 OF 2013**

**KENYA ANTI-CORRUPTION COMMISSION..... PLAINTIFF**

**VERSUS**

**MAGUT AGENCIES LTD ..... 1<sup>ST</sup> DEFENDANT**

**SOMOG LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**WILLIAM SAMOEI RUTO .....3<sup>RD</sup> DEFENDANT**

**WILSON GACANJA.....4<sup>TH</sup> DEFENDANT**

**RULING**

**[NOTICES OF MOTION DATED 7<sup>TH</sup> OCTOBER 2020 AND THE 21<sup>ST</sup> OCTOBER 2020]**

1. The notice of motion dated 7<sup>th</sup> October, 2020 is by the 1<sup>st</sup> defendant and seeks for the following orders *inter alia*:

(i) That the determination made by the National Land Commission on 20<sup>th</sup> April, 2018 over title **No. Eldoret Municipality Block 5/574 – 588**, and **Eldoret Municipality Block 8/540**, originally Eldoret Municipality Block 8/83, be received in this Court and judgment be entered according to the award; and

(ii) Upon prayer 1 above being granted, the Plaintiff's suit herein be struck out/dismissed with costs to the Defendant.

The application is based on the five (5) grounds on its face marked (a) to (e), and supported by the affidavit sworn by **Josiah Kiprotich Magut**, a director of the 1<sup>st</sup> defendant, on the 7<sup>th</sup> October, 2020. It is the 1<sup>st</sup> defendant's case that the subject matter of this suit was originally Eldoret Municipality Block 8/83, that was subsequently subdivided into Eldoret Municipality Block 8/574 – 583 and Eldoret Municipality Block 8/540. That the National Land Commission has already made a determination dated the 20<sup>th</sup> April, 2018 that has fully resolved the issues raised in the plaintiff's suit. That the National Land Commission award was transmitted to the Chief Land Registrar, Uasin Gishu County Government, the parties herein, and should be adopted as an order settling this suit.

2. In opposition to the aforementioned application dated 7<sup>th</sup> October 2020, the Plaintiff and 2<sup>nd</sup> Interested Party filed grounds of opposition dated 4<sup>th</sup> March, 2021, and 19<sup>th</sup> March, 2021 respectively. That it is their case that the five (5) year mandate of the National Land Commission under **Section 14(1) of the National Land Commission Act** to review grants and dispositions commenced on the 2<sup>nd</sup> May, 2012 and lapsed on the 2<sup>nd</sup> May 2017, and was therefore without jurisdiction to make the award dated the 20<sup>th</sup> April, 2018. That there was no order made by this court referring the dispute to the said Commission, and its jurisdiction over the matter that was referred there by the 2<sup>nd</sup> defendant and the 1<sup>st</sup> Interested Party was objected to by the plaintiff and 2<sup>nd</sup> Interested Party. That the Commission's recommendations offend the doctrine of *subjudice*, and cannot be adopted by the court. That the Commission had no power to determine issues relating to validity of title in respect of the suit land and its decision is not binding on the court.

3. The court gave directions on the 27<sup>th</sup> September, 2021 on filing and exchanging submissions on the application among others, and set the date for the ruling. The following are the issues for the court's determinations;

(a) Whether the court should enter judgment in accordance with the award of the National Land Commission Award issued on 20<sup>th</sup> April, 2020.

(b) Who pays the costs of the application?

4. That after careful considerations of the grounds on the application, affidavit evidence and the grounds of opposition by the two sides, I have come to the following determinations;

(a) That the award by the National Land Commission, hereinafter referred to as the Commission, that is in issue herein, was annexed as “JKM 1” to the supporting affidavit sworn by JOSIAH K. MAGUT. That the findings and decision of the commission are as set out herein below;

#### **“FINDINGS OF THE COMMISSION**

*Having reviewed all the submissions and documents of all the parties, the Commission finds as follows;*

*Section 25(1) of the Land Registration Act No. 3 provides that “The rights of a proprietor are indefeasible except as provided under the Act. Under section 26, the certificate of title is prima facie evidence of ownership and cannot be challenged except on ground of fraud or where it is shown the title was acquired illegally, unprocedurally or through corruption. Neither the EACC nor the County Government of Uasin Gishu adduced evidence to prove that the claimants obtained their titles fraudulently, illegally, unprocedurally or corruptly as is required under the law.*

*The Commission observed that all the procedures for the allocation of public land, as provided for under the Local Government Act (Cap 265) now repealed were followed including obtaining the consent of the Minister for Local Government.*

*The Commission also observed that in HCC No. 145 of 2004, it was found that Ravji Devji Vekaria and Lilji Shivji Kerai, who bought L.R. No. Eldoret Municipality Block 8/576 a portion of the Eldoret Municipality Block 8/83 were found to be legal owners of the land. The subject properties under review L.R. No. Eldoret Municipality Block 8/574 – 588 and Block 8/540, are subdivision of L.R. No. Eldoret Municipality Block 8/83, the mother title for all the properties.*

*The Commission is curious as to why the EACC and the County Government have resorted to administer selective justice which could easily be discerned as being discriminatory. However, this likely indication of abuse of powers is better judged in another forum.*

#### **DETERMINATION OF THE COMMISSION**

*Upon perusing all the documents presented by the parties including the records held at the Ministry of Lands and Physical Planning and listening to all submissions from the parties, the Commission hereby determines as follows;*

*In view of the Court case HCC NO. 145 of 2004 that found that Eldoret Municipality Block 8/576, as a subdivision arising from Eldoret Municipality Block 8/83 to be legal, the Commission hereby upholds the titles Eldoret Municipality Block 8/574 to 588 and Eldoret Municipality Block 8/540 which are subdivisions arising from the same Eldoret Municipality Block 8/83.*

*In his judgement of 13<sup>th</sup> November, 2007, Judge M. K. Ibrahim ruled that and I quote “on the basis of the foregoing and on a balance of probability, I do find and hold that the Plaintiffs have proved their case. They are the registered owners of the suit property and the legitimate proprietors. They duly acquired the said property in good faith for value without any knowledge of any defect in the title. The Defendant did not object or obstruct the said acquisition yet they were aware when it was on-going.”*

That the decision by the Commission in (a) above, is the one the 1<sup>st</sup> defendant seeks to be adopted vide the notice of motion dated 7<sup>th</sup> October 2020, as a settlement of the issues in the plaintiff’s suit.

(b) That the plaintiff’s suit was commenced through the plaint dated the 18<sup>th</sup> April, 2008 and it is still pending. The 1<sup>st</sup> defendant contention that the parties had obtained the court’s concurrence when referring this dispute to the Commission culminating to the award of 20<sup>th</sup> April 2018 has been disputed by the plaintiff and the 2<sup>nd</sup> Interested Party through their grounds of oppositions. That I have taken time to peruse the court record, especially the typed proceedings running from the 23<sup>rd</sup> April, 2008 to the 19<sup>th</sup> May 2020, and I have not seen any order or direction issued by the court referring the dispute in this suit to the Commission for review or arbitration. That in the order of the 15<sup>th</sup> December 2015, the court directed as follows;

*“This is a very old matter that should be concluded urgently. However, in the interest of ADR, I do give the parties an opportunity to negotiate. The plaintiff to file and serve submissions within 7 days, the defendants and Interested parties to file and serve within 7 days of service. Highlighting on 26<sup>th</sup> January, 2016.”*

There is nothing in the above order that is capable of being construed to be a reference by the court of the dispute to the Commission. That the proceedings show that the first information about the Commission having heard the matter was made by Mr. Njuguna, counsel for some

of the Interested party on 11<sup>th</sup> April 2017. The learned counsel for the plaintiff then informed the court that they had applied to be discharged from the proceedings before the Commission, and were therefore not a party.

(c) That the proceedings further show that on the 19<sup>th</sup> May 2020, Mr. Ngigi Mbugua, the learned counsel for 1<sup>st</sup> defendant sought for time to file an application, through which the Commission's determinations would be brought to the attention of the court. The application dated the 7<sup>th</sup> October, 2020 was subsequently filed. That attached to the said application is a letter dated the 20<sup>th</sup> April 2018, by the Vice Chairperson/Chair, Review of Grants Committee, for the Chairman National Land Commission, and a copy of the proceedings and determination for review in respect of Eldoret Municipality Block 8/574-588 and 540 [originally Block 8/83] Eldoret town, dated the 20<sup>th</sup> April 2018. That paragraph 2 of the said letter indicates that **"The Commission received a complaint in respect of the above stated property... and exercised its mandate under section 14 of the National Land Act"**, while paragraph 2 of the Commission's proceedings states that **"... the National Land Commission upon receipt of the ruling from the high court in Eldoret directing the Commission to arbitrate on the matter pursuant to a consent by all the parties in the case, undertook the review of the Grants and Dispositions of the above property..."**. That page 2 of the Commission proceedings shows that the parties in the dispute were County Government of Uasin Gishu as the complainant, and Somog Limited as the respondent. That at page 4 of the proceedings are submissions by EACC raising their objection to the Commission's jurisdiction in the matter, and pointing out the existence of this suit, hence making the Commission's proceedings subjudice among others. That the Commission appear to have proceeded to make its findings and decision on the legal status of the title to the suit property without making any determinations on the EACC's objections.

(d) That it is noteworthy that the claim before this court was instituted approximately about two (2) years before the promulgation of the Constitution of Kenya, 2010, and four (4) years to the enactment of the **National Land Commission Act No. 5 of 2012**. That even though the Commission proceedings does not disclose the date the complaint it acted upon was filed, it is clear the hearings took place in or around February, 2017, which is about nine (9) years after the filing of this suit in court. That the existence of this suit was brought to the attention of the Commission and it is baffling how it proceeded to hear and purport to determine the dispute in the absence of any specific order by the court referring the matter to it.

(e) That in the case of **ROBERT MUTISO LELLI AND CABIN CREW INVESTMENTS LTD V NATIONAL LAND COMMISSION & 3 OTHERS [2017] eKLR**, the court was faced with a situation where the Commission made a determination of a claim that was before the court, and made the following observation;

*"...whereas I need not over emphasis that the National Land Commission has power under Section 14 of the National Land Commission Act derived from Article 68 of the Constitution to review titles and dispositions to public land to establish the legality of the titles, that power is not absolute.*

*It must be exercised within the confines of known legal boundaries. Where a court of law is already seized of a dispute of ownership of the disputed land, the National Land Commission must exercise restraint. It can only avail evidence before the court of law hearing the dispute, to demonstrate that the title was illegally and or irregularly acquired, and not to oust the court's jurisdiction by taking upon itself the mandate of hearing and determining the dispute.*

*In my humble view, therefore, the National Land Commission exceeded its jurisdiction in taking over proceedings pending before a court of competent jurisdiction and in purporting to hear and determine the same when National Land Commission was a party to those proceedings. It cannot, therefore, be said that the exparte applicants came to court because they had an unfavourable outcome before National Land Commission and or that they refused to appear before the National Land Commission to make representations concerning the legality of their respective titles.*

*I reiterate that the National Land Commission must not usurp the powers of a court of competent jurisdiction in as much as it has the power to inquire into how a title or disposition in public land was acquired. In this case, what the National Land Commission did, in my humble view, was in effect to remove the pith of litigation from a court of competent jurisdiction and leave only a shell. The Court of Appeal principle in *Dr Alfred Mutua v Ethic and Anti-Corruption Commission & Others Civil Application Nairobi No. 31 of 2016* citing the Nigerian Court of Appeal decision in *Olusi & another V Abanobi & Others suit No. CA/B/309/2008* stated:*

*"It is an affront to the rule of law to... render nugatory an order of court whether real or anticipatory. Furthermore... parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of (sic) equity."*

In other words, parties who have submitted themselves to the court's jurisdiction to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the court would be of no use.

It is for that reason that I also agree with the Nigerian Court of Appeal decision in ***It United Cement Company of Nigeria Vs Dangote Industries Ltd & Minister of Solid Mineral Development/CA/A/165/2005***, that the court ought to ensure that **"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgment or order."**

(f) That from the available evidence, I find that the National Land Commission's readiness to hear and purport to determine a matter relating to the subject matter of the suit in the case, and between more or less the same parties, without the same being pursuant to a verifiable court order, contravened the provisions of **Section 6 of the Civil Procedure Act Chapter 21 of Laws of Kenya**. The Commission had no powers to oust the jurisdiction of this court that is derived from **Article 162(2) b of the Constitution** and **Section 13 of the Environment and Land Court Act No. 19 of 2011**.

(g) That as the **National Land Commission Act No. 5 of 2012** commenced on the 2<sup>nd</sup> May 2012, the Commission's five (5) years powers under section 14 (1) of the said Act, to review grants or dispositions of public land to establish their propriety or legality lapsed or expired on or about the 2<sup>nd</sup> May, 2017. That as jurisdiction is conferred by the Constitution and or the statute(s), and not assumed, even by consent of parties or some of the parties to the dispute, it follows that the Commission was without jurisdiction to make a determination on title to the suit land, as it pretended to do vide their report dated 20<sup>th</sup> April, 2018. That the said report having been made by the Commission without jurisdiction is null and void, and hence a nullity ab initio. That the application dated 7<sup>th</sup> October, 2020 is therefore without merit and is hereby dismissed with costs.

5. That the application dated the 21<sup>st</sup> October, 2020 was filed by the Plaintiff, and seeks for the following orders;

(i) *The Plaintiff be granted leave to amend the Plaint; and*

(ii) *Costs of the Application be in the cause.*

The application is based on the seven (7) grounds marked (a) to (g) on its face and supported by the affidavit of **James K. Mokuia**, advocate for the plaintiff sworn on the 21<sup>st</sup> October, 2020. That it is the plaintiff's case that they seek to be allowed to amend their plaint to accommodate the consolidation of the several suits that was made by the court.

6. That in opposition to the application dated 21<sup>st</sup> October, 2020, the 1<sup>st</sup>, 2<sup>nd</sup> defendants, and 5<sup>th</sup> to 11<sup>th</sup> respondents filed their grounds of opposition. It is their case that the application is superfluous since the court has already ordered the consolidation of the various suits. That the surrender, allocation, subdivision and acquisition of the suit properties in issue took place at different times by different players, and since each stage of the said transaction constitutes a cause of action, it would be improper to consolidate all those into a single block cause. That the application and the prayers thereof are time barred, the cause of action having arisen in the year 1995, and the court's discretion to allow the amendment has not been earned or deserved. That the intended amendment would grossly prejudice the 5<sup>th</sup> to the 11<sup>th</sup> Respondents' case as they are innocent purchasers without notice of any defect in title.

7. That the learned counsel for the plaintiff filed submissions dated the 10<sup>th</sup> February, 2021 in support of their application dated the 21<sup>st</sup> October, 2020. The counsel relied on the Court of Appeal decisions in **ELIJAH KIPNGENO ARAP BII V. KENYA COMMERCIAL BANK LIMITED (2013) eKLR** and **CENTRAL KENYA LTD V. TRUST BANK LTD & 5 OTHERS (2000) eKLR**, and among others submitted that the application has been made in good faith, and that the proposed amendments are consistent with the Plaintiff's claim. That the land in issue is public land therefore it is not subject to the provisions of **Section 7 of the Limitation of Actions Act** by virtue of **Section 42(1)(k) of the Limitation of Actions Act**. The counsel cited the High Court decision in the case of **KENYA ANTI-CORRUPTION COMMISSION V. J.S.K (CARGO) LIMITED & ANOTHER (2009) eKLR**.

8. The following are the issues for the court's determinations;

(a) *Whether the plaintiff has made a reasonable case for amendment of the plaint.*

(b) *Who pays the costs of the application?*

9. That I have considered the grounds on the application, affidavit evidence, grounds of opposition, written submissions, superior courts decisions cited, and come to the following findings;

(a) That before delving into the merits of the application for amendment, it is crucial to restate in *verbatim* the court order issued on 8<sup>th</sup> July, 2008 as relates to consolidation of the various related suits. The order directed as follows;

**“1. Having been satisfied that all the Respondents to the Application have been served and there being a consent by all counsel present today, I do hereby order that Eldoret HCCC No. 37 of 2008 and Eldoret HCCC Nos. 38, 40, 41, 42, 43, 44, 45, 46, 47 and 48 of 2008 be and are hereby consolidated.**

**2. That the pilot file shall be HCC No. 37 of 2008 in which hence forth all proceedings in the consolidated suit shall be taken and continued.**

**3. Costs of the application shall be in the consolidated suits.**

**4. The application for consolidation is opposed by some respondents in HCCC No. 7 and HCCC No. 39 of 2008. Application herein shall be prosecuted in respect of the said suits as to be directed by this court”**

That though the application at hand does not seek orders of consolidation, it is important to note that the following features have to be established before a court orders consolidation of suits:

a. *“Some common question of law or fact arises in both or all of them; or*

b. *The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or*

c. *For some other reason it is desirable to make an order for consolidating them.” See MUNICIPAL COUNCIL OF MOMBASA*

(b) That I take cognizance of the fact that the instant suit was filed on 18<sup>th</sup> April, 2008; the order for consolidation in this file was issued on 8<sup>th</sup> July, 2021, and the application for amendment was filed on 21<sup>st</sup> October, 2020. That the threshold to be met in an application for leave to amend pleadings was aptly captured by the court in its observation in JUJA COFFEE EXPORTERS LIMITED V NATIONAL BANK OF KENYA LIMITED [2021] eKLR, wherein the following was stated:

***“I understand the law, in both statute, the rules and stare decisis to indicate that an application to amend a pleading before evidence is led should be allowed freely, at any time including on appeal provided the intention is to bring all facts and issues in controversy between the parties to the suit for effective and just determination of the issues in controversy, provided that no prejudice or injustice is seen to be visited upon the respondent to such an application. With such established principles in mind, a respondent is expected and indeed obligated to demonstrate to court that the intended amendment would visit upon it a prejudice or injustice that cannot be compensated by costs like taking away an accrued defense to the claim grounded upon limitation of time. The other scenario is where such prejudice to the other side or the course of justice is evidently inevitable and obvious to court.”***

That from the foregoing, the onus to prove the existence of prejudice lies with the party who is opposed to the application to amend pleadings. The parties that are opposed to the grant of leave to amend pleadings must demonstrate that if the proposed amendment was allowed, it would result in prejudice that cannot be compensated with costs. From the responses filed in opposition of this application for leave to amend, it is not apparent what prejudice, and or inconvenience, will befall the parties that are opposed to the leave of court to amend being granted.

(c) That while making a determination of an application for leave to amend pleadings in the case of KULOBA V ODUOL [2001] eKLR, the court made the following observation:

***“The question of amendment of pleadings has been considered widely by the Courts and been the subject of wide discussion by legal scholars. In Eastern Bakery v Castellino [1958] EA 461, Sir Kenneth O’Connor, P sitting with Gould JA and Sir Owen Corrie, Ag JA in the former Court of Appeal for Eastern Africa enunciated the following principles as governing the Court in deciding whether or not to allow amendments:***

***(a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs.***

***(b) The Court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit.”***

That as the hearing of the main suit in this case that was filed in 2008 has not commenced, I am persuaded to agree with the court in the aforementioned case that leave to amend the plaint ought to be allowed since no evidence has been adduced in court to show what injustice will be occasioned to the defendants and the Interested Parties/Respondents.

(d) That although the 5<sup>th</sup> to 11<sup>th</sup> Respondents, and the 2<sup>nd</sup> Defendant contend that the delay occasioned in the filing of the application for amendment herein militates against the Plaintiff being granted leave to amend the plaint, I find that argument does not hold water in view of the finding in the case of ANDREW OUKO VS KENYA COMMERCIAL BANK LIMITED & 3 OTHERS (2014) eKLR, where the court held that:

***“the sole purpose of amending pleadings is to give the Court an opportunity to adequately consider the issues in dispute. This means that the court must very cautious while denying a party an opportunity to ventilate its case sought to be achieved through amendment of pleadings. A court should only deny such party leave to amend its pleadings as a last resort and with good or sufficient cause.”***

Further, it was held that;

***“the overriding consideration in applications for leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite side beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless allowing them the opposite side would be prejudiced or suffer injustice which cannot be property compensated by costs.”***

(e) That even though an application to amend pleadings can be filed at any stage of proceedings, any proposed amendment will only be allowed if it is deemed to be necessary for the just determinations of the issues before the court. This court finds that it is unfortunate that the plaintiff took approximately 12 years to file the application to amend its plaint, but in view of the fact that the matter has never progressed to hearing of the main suit, I find that no prejudice will be occasioned upon the opposing parties. I find no compelling reasons to decline to grant leave to the plaintiff to amend the plaint dated 8<sup>th</sup> April, 2008.

10. That having found merit in the plaintiff’s application dated the 21<sup>st</sup> October 2020, I allow the same in the following terms;

(a) That the plaintiff shall file and serve their amended plaint within fourteen (14) days.

(b) That the defendants and Interested Parties are at liberty to file their amended statements of defence within fourteen (14) days from the date of service.

(c) That the matter be mentioned on a date to be agreed when hearing dates of the consolidated suit will be fixed.

(d) The costs be in the cause.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 27<sup>TH</sup> DAY OF OCTOBER, 2021.**

**S. M. KIBUNJA**

**ENVIRONMENT AND LAND COURT JUDGE**

**IN THE PRESENCE OF;**

PLAINTIFF: ABSENT

DEFENDANTS: ABSENT

INTERESTED PARTIES/RESPONDENTS: ABSENT

COUNSEL: M/S GITHINJI FOR MOKUA FOR PLAINTIFF,

M/S WAWERU FOR KATWA FOR 2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS,

MR. NJUGUNA FOR 5<sup>TH</sup> TO 11<sup>TH</sup> DEFENDANTS/RESPONDENTS,

MR. LETTING FOR ODONGO FOR LAND REGISTRAR/INTERESTED PARTY,

M/S CHESOO FOR UASIN GISHU COUNTY GOVERNMENT/INTERESTED PARTY AND

MR. NGIGI FOR 1<sup>ST</sup> DEFENDANT.

CHRISTINE: COURT ASSISTANT.