



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CIVL APPLICATION NUMBER E028 OF 2021

ELIKANA KURASH KAKOOMPE.....APPLICANT

VERSUS

D.O OGOLA & OGOLA.....1ST RESPONDENT

KCB BANK KENYA LTD.....2ND RESPONDENT

AND

MBUKOE INVESTMENT.....1ST INTERESTED PARTY

KETRACO.....2ND INTERESTED PARTY

DIRECTOR DCIO.....3RD INTERESTED PARTY

R U L I N G

1. On 9th February, 2021 the learned *Chief Magistrate Hon. J. B. Kalo* delivered three Rulings in **Nakuru Chief Magistrate's Miscellaneous Application 132 of 2020**, with respect to applications dated 4th September, 2020, 19th June, 2020 and 25th June, 2020 respectively.

2. On 12th February, 2021, the applicant filed Memorandum of Appeal and Notice of Motion dated 11th February, 2021 seeking orders that the funds held in account number 1111405999 and Kenya Commercial Bank KICC Branch be preserved or in the alternative the sum of KShs. 16,000,000/= in that account be deposited in court pending the hearing and determination of the appeal. The applicant also sought stay of the proceedings before the learned trial magistrate.

3. The ground for the application are set out on the face of the application inter alia that; the effect of the rulings was that the funds in that account were at the risk of being utilised yet there was dispute among the property owners and pending appeals; that there was a pending suit at **High Court Environment & Land Court Petition 9 of 2019**; that there were ongoing investigations by the DCI with regard to the disbursement of the money to the said account.

4. The application was supported by the Affidavit of the applicant, Elikana Kurash Kakoompe (applicant). The gist of his affidavit is that the said Chief Magistrate set aside the injunction granted by *Hon. Muholi Senior Resident Magistrate* in June, 2020 without noting that the same had been referred to *Hon Gicheha Chief Magistrate* to hear. That *Hon. Muholi* had given the order in the public interest to protect the rights of 943 members of the Maasai Kitet Community who were in occupation of the property described as LR 8395, which was also under the investigation of the DCI, and if the injunction was not granted the money in the Kenya Commercial Bank account would be utilized to the detriment of the applicant. He annexed to his application *Hon. Kalo's* Ruling with respect to the application dated 19th June, 2021 in which the learned magistrate set aside *Hon Muholi's* injunctive orders.

5. On 16th February, 2021 I granted interim orders, reinstating the injunction that had been set aside and preserving the money in the bank account.

6. On 26th February, 2021 the 1st respondent filed Notice of Motion dated 25th February, 2021 seeking stay of proceedings herein pending the *inter partes* hearing of the application, and the setting aside of the orders. I issued on 16/2/2021 on the grounds that the applicant was guilty of non-disclosure of material facts. In addition the grounds were set out on the face of the application and the Supporting Affidavit of Daniel Ochieng Ogola.

7. The main grounds were that the said funds were paid as compensation for the acquisition of easements on LR 8395 by the 2nd interested party to Kedong' Ng'ombe Ranch Limited that the registered owner of the suit property; that this party were not joined in the suit despite being the 1st respondent in the **High Court Environment & Land Court Petition 9 of 2019**; that *Hon. Justice Ohungo* had issued a Ruling in the **Petition 9 of 2019**, on 5th February, 2020 where the issues were the same as those raised herein, and that applicant had appealed against the said Ruling; that the applicant had no registrable interest in the suit property and could not have a *prima facie* case with a probability of success for purposes of grant of injunction; that the order which dismissed the applicant's application was a negative order which was not capable of execution, and if set aside the appeal would not be rendered nugatory; that no Notice of Appeal /Memorandum of Appeal had been served by the applicant to bring the applicant within the statutory provisions of **order 42 (1),(2) of the Civil Procedure Code**; that the Appellant/Applicant had not demonstrated that he had permission by owners of the land to sue on their behalf; that there was no evidence that the DCI was investigating issues related to LR 8395 as they had never sought any information from the 1st Respondent.

8. On 12th March, 2021, the applicant filed another Notice of Motion dated 12th March, 2021 seeking orders that this *Misc. Application E 028/2021 between himself and D.O Ogola t/a Ogola & Okelo & Co. Advocates and 4 others* be consolidated with *NKR ELC Petition number 9/2019 between Joseph Karatina Torris &24 others vs The Chief Land Registrar & 6 others* for purposes of being heard determined together.

9. The grounds on the face of the application and the affidavit of Elikana Kurash Kakoompe are that the two suits relate to the same property LR 8395, are by the same parties, and the same orders are sought. That the subject or cause of action is based on the parties respective claim or ownership or beneficial interest as regards the same property

10. The application dated 11th February,2021 was opposed by the 2nd interested party through the Replying Affidavit of Johnson K. Muthoka a senior manager Way Leave Acquisitions at the 2nd interested party's company. His position, as advised by the 2nd interested party's advocates was that the applicant had not established any locus to warrant the orders sought, as he had not demonstrated by way of documentary evidence any interest in the suit land LR 8395 and could therefore not purport to restrain the lawful owner from the compensation arising from the limited loss of the use of land. That the 2nd interested party had carried out all due diligence in giving compensation to Kedong' Ng'ombe Ranch Limited, the registered proprietors of the land, and annexed copy of the title deed, copy of CR 12, copies of easements, copy of identity by the said Kedong Ng'ombe Ranch Ltd in favour of the 2nd interested party, that the applicant had not demonstrated any wrong doing on the part of the 2nd interested party.

The applicant swore a Supplementary Affidavit filed on 29th March 2021, to the effect that the 2nd interested party had sworn an Affidavit through one Moses Ngaywa of Ngaywa & Kibet Partners who had descended into the arena of conflict. His provisions in the affidavit reiterated the prayers in the application dated 12/3/2021, further that the issue as to how Kedong Ng'ombe Ranch Limited granted an easement to the 2nd interested party will be tried by the court trying the facts, and that it will be up to that party to demonstrate how this happened while there was a suit in High Court Environment and Land Court 9/2019 pending before the court. He urged the court to consolidate the APPEAL herein, and the suit in ELC 9/2019.

11. The applicant opposed the 1st Respondent's application dated 25th February, 2021 vide the Replying Affidavit sworn 12th March, 2021. He reiterated that the property LR 8395 was property of Maasai Kitet Community and not Kedong' Ng'ombe Ranch Limited, and that the dispute on ownership had not been determined, that the ownership by Maasai Kitet Community would be established by title documents, and registry documents in the Ministry of Lands, that he had pre-requisite permission from the community members to institute this suit.

12. It is noteworthy that I did not see the affidavit said to have been filed by Mr. Ngaywa Advocate. Neither were there any papers filed by the Attorney General or the DCI.

13. The applicant filed written skeletal submissions with regard to the two (2) applications. However the applications were argued orally by Mr. Lagat for the applicants, and Mr. Ochieng for 1st, 2nd and 3rd Respondents.

14. I have carefully considered the rival arguments and the authorities cited by the parties.

15 The issues for determination are whether;

a. The application dated 11th February, 2021 brought under order 42 rule 6 is merited.

b. Whether the application is subjudice.

c. Whether the intended appeal can be consolidated with HC ELC 9/2019 Nakuru.

16. I start with the 3rd issue, the applicant argues that the issues raised in Misc. E 028 of 2021 and HC ELC 9 of 2021 are the same, the parties are the same, and orders sought are the same. It appears to me that the applicant is confusing issues. There is a constitutional demarcation of the jurisdiction of the High Court and the ELC court when it comes to land matters as clearly set out under **Article 165 5(b) of the Constitution**.

It is evident that the applicant has been consistent in his pleadings, the affidavits and the submissions that there is a dispute on the ownership of LR 8395 between Kedong' Ng'ombe Ranch Limited (whom the applicant has not enjoined in his application) and Maasai Kitet community (who are again not parties to this application). In the authority cited by the applicants authority, *Nairobi ELC No. 1000 of 2012 Joseph Okoyo vs Edwin Dickson Wasunna (2014) eKLR*, citing *Mombasa HCC 492 of 1994 Nyati Security Guards & Services in Municipal Council of Mombasa* where the court stated;

“The situations in which consolidation can be ordered include where there are two more suits or matters pending in the same court where”

The emphasis here is **the same court**. These two (2) matters are not pending before the same court, one is in the ELC, and the other is in the High court. In addition, they are, one is an appeal, the other is in ELC matter, and the other one is in the subordinate court.

This court does not have jurisdiction over ELC matters, how then can this court direct that a matter in which it bears no jurisdiction be consolidated with another in the court with jurisdiction? The applicant being aware of the similarities of the two (2) matters ought not to have filed this matter before this court. The applicant ought to have sought to join the ELC suit. In any event the applicant claims to be suing on behalf of the members of the Maasai Kitet Community, who are the Petitioners in ELC Petition 9 of 2019, how then can he come before the High Court, file a Miscellaneous Application then seek to consolidate it with the ELC petition? He ought to have filed the Miscellaneous Application before that court in the first place otherwise, he is clearly admitting being guilty of abuse of process for multiplicity of suits in different courts seeking the same orders. Surely that is not tenable. The same provision of the law he seeks to apply in his favour actually frowns upon actions such as this. Hence while the authorities cited are sound on the principle on the consolidation of suits, they are not applicable to the circumstance of this case.

17. On the second issue, by dint of his own admission vide his application of 12th March 2021, the issues the application is raising here are the same issues as those in High Court ELC Petition 9 of 2021. These issues were dealt with *Ohungo J* in his Ruling of 5th February 2020 where he dismissed the application by the Maasai Kitet Community. He said;

“...As matters stand now the 5th Respondent [Kedong’ Ng’ombe Ranch Limited] has title and I have not seen evidence that supports the applicant’s claim that they have been on the suit property since pre-colonial times and that it is ancestral land. I am not persuaded that the applicants have demonstrated a prima facie case... Notice of Motion dated 14th February, 2019 is dismissed with costs to the 5th Respondent”.

18. Evidently whatever dispute there exists over the ownership of the suit land is before a court of competent jurisdiction which has pronounced itself on the issue. This issue cannot be re-litigated before this court, hence the matter is not only *sub judice*, and the specific issue is *res judicata*. To this extent I agree with the submissions of Mr. Ochieng. He submitted further that the key party in this application was Kedong’ Ng’ombe Ranch Limited. They were not joined in this matter yet they are the ones who are and will be most affected by the orders of this court if granted. They will therefore be prejudiced without being heard yet their title, which forms the crux of the applicant’s application remains unimpeached.

19. On the main issue whether the applicant has complied with the provisions of **order 42 rule 6**, the applicant argued that he was likely to suffer substantial loss, because “the funds in the KCB, KICC Account were disbursed irregularly contrary to the ongoing petition ELC 9 of 2019 exposing the conspiracy between the 1st Respondent and 2nd Respondent to divert public funds to a party who is before court and who has not proved ownership of Kedong LR 8395... Subject of the ongoing petition before Hon. Justice D. Ohungo”.

It is evident from the record that *Ohungo J* dealt with the issue and the applicant ought to have raised the issue of these funds before they said Judge. In any event counsel’s submissions raise grave aspersions against the respondents yet no evidence was placed before court to demonstrate that the DCI had made such findings. The court is not the place to simply throw words, and accusations without basis. It was upon the applicant to place the requisite evidence in support of his allegations of a conspiracy to divert public funds before this court. The reason the applicant is here is because the subordinate court found that the applicant had not laid out a *prima facie* case to warrant the injunctions he had been granted ex parte. So did *Ohungo J*. The same arguments as placed before the subordinate court and before *Ohungo J* have been as placed before me. What stands out in the applicant’s applications and submissions is an uncertainty as to what the applicant is seeking before the court and the basis for his claim. Is the applicant here as a representative of his community of as an individual? Is it about the land, the compensation or the disbursement of money? He is consistent that there is a dispute between Kedong Ng’ombe Ranch Limited and Maasai Kitet Community, an issue squarely before the ELC court.

20. However the applicant has not demonstrated any interest in said property, to that extent there can be no basis to argue that the applicant will suffer the substantial loss. The 2nd interested party clearly demonstrated the process it went through before paying out the money to Kedong Ng’ombe Ranch Limited, and it was satisfied that the said Kedong’ Ng’ombe Ranch Limited was the registered proprietor of the land. Without any evidence to the contrary no amount of submissions can persuade the court otherwise.

21. The applicant argues further that he has an arguable appeal, it is submitted that the title deed in question herein is capable of being cancelled, and should that happen, he will suffer loss. He also argues that there is evidence that the said title was obtained by fraud and is a forgery. He urges the court to find that if the injunction is not granted the substratum of the appeal will be lost and the court will have nothing upon which to make determination. The applicant relies on **Turbo Transportation vs Absalom Dova [2013] eKLR** where it was stated:-

“By law, it is the obligation of the court to preserve the subject of the suit which is inherent in the administration of justice. If the appellant is successful in the appeal, there will be a barren result unless the subject of the appeal is preserved in whatever way the court may deem fit”

22. While that in the true position, the applicant must first establish the conditions set out under **order 42 rule 6 (2)**, There is no evidence that the applicant will suffer substantial loss, the applicant has not established what interest he has in Kedong’ Ranch, or Maasai Kitet Community, and if he was to suffer loss it is not demonstrated that he cannot be compensated by way of costs.

23. It is noteworthy that the applicant has not offered any security. In any event, the applicant had sought an injunction, the application was found to be without merit. The application was dismissed.

24. It is my view that the applicant has not satisfied the requirements of **order 42 rule 6(2) (a) and (b)**.

25. As regards the 2nd Respondent's application, it is clear that the application by the applicant were filed in the wrong court. The issue of ownership of land is a matter before the ELC court. Issues arising out of that dispute ought to have been brought together in the same suit before that court. The *Hon. Ohungo Judge* has pronounced himself on the said issue which issue by dint of the applicant's affidavits and submissions is intertwined with the issue before the ELC court.

26. The upshot is that I find that the applications dated 11th February 2021 and 12th March 2021 by the applicant herein are without merit and each is dismissed with costs to the respondents.

27. The 1st respondent's application dated 25th February 2021 is allowed with costs to the 2nd respondent.

28. The orders of 16th February 2021 be and are hereby vacated.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 2ND SEPTEMBER, 2021

MUMBUA T. MATHEKA J

CA Edna

Ham & Hamsley Advocates for applicant

info@hhadvocates.co.ke

Ogola Okello Advocates for 1st 2nd Respondents

info@ogolaokello.co.ke

Ngaywa & Kibet Partners LLP Advocates for 2nd interested party

nnkadvocates@gmail.com info@nnkadvocatesco.ke