



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 392 OF 2008

CITY COUNCIL OF NAIROBI.....PLAINTIFF

VERSUS

JOEL KANI OLE SIKAMOI.....DEFENDANT

RULING

1. On 15/8/2008, the City Council of Nairobi brought this suit seeking the following orders against the defendant:

- 1. A declaration that the plaintiff is the lawful proprietor of LR No. 4894/77.***
- 2. An order directed to the Registrar of Titles for cancellation of the Grant of LR No 11973 in the name of the defendant and re-registration of the same in favour of the plaintiff.***
- 3. A permanent injunction restraining the defendant whether by themselves or their servants, agents, employees or in any other manner whatsoever from interfering with the plaintiff's ownership and control of LR No 4894/77.***
- 4. Costs of the suit and interest.***
- 5. Any other or further relief that this honourable court may deem fit and just to grant.***

2. On 9/7/2012, the City Council of Nairobi (the Plaintiff) and Mr Joel Kani Ole Sikamoi (the defendant) through their respective advocates, filed a consent dated 30/4/2012. The advocates subsequently appeared before Honourable Gichohi, Senior Deputy Registrar, on 18/7/2012, and caused the consent to be adopted. The adopted consent provided as follows:-

“IT IS HEREBY ORDERED BY CONSENT OF THE PARTIES

1. That this matter be and is hereby marked as settled on the following terms.

(a) That the defendant as the registered proprietor do forthwith pay all outstanding rates on LR No. 11973 (Title NO. IR 88002) situate in Nairobi to the plaintiff.

(b) That each party to bear his own costs.”

3. On 18/6/2019, the Honourable Attorney General brought a notice of motion dated 29/5/2019 on behalf of the Boards of Management of Garden Estate Secondary School and Garden Estate Primary School. He sought four principal orders, among other prayers: (i) an order joining the boards of the two schools as parties to the suit; (ii) an order setting aside the consent decree issued on 19/7/2012; (iii) an order re-opening the suit for trial; and (iv) an order giving directions relating to this suit and Nairobi ELC No. 1057 which relates to the same suit property. That application is the subject of this ruling.

4. The application was supported by an affidavit sworn on 29/5/2019 by Patrick Waweru Gakungu, the Principal of Garden Estate Secondary School. It was premised on the grounds set out on the face of the application. The application was orally argued in court on 14/11/2019.

5. The case of the applicants is that the land subject matter of the impugned consent, LR No. 11973 (IR 88002), is public land set aside, planned, and reserved for public schools and the two schools run by the applicants are public school inbuilt and sitting on said land. The two schools are the owners of the said land and have developed the land. The secondary school has 734 Students, 23 Teachers and Non-teaching

staff housed on the land. The two schools were not made parties to the suit and were not aware of the suit at all material times. They became aware of the suit when they were served with pleadings relating to Nairobi ELC 1057 of 2016 in which the 1st applicant is the 2nd defendant. The applicants further contend that there are questions as to the validity of the allocation, acquisition and registration of the suit land in the name of the defendant and the questions ought to be determined by this honourable court on merits. Mr. Owange, counsel for the plaintiff supported the application at the hearing although the plaintiff did not file any replying affidavit.

6. The defendant opposed the application through a replying affidavit sworn on 28/6/2019. The case of the defendant is that it is not true that the suit land was set aside, planned and reserved for purposes of a school. The land was vested in the City Council of Nairobi. The school land that was set aside and vested in the City Council of Nairobi is LR NO. 4894/13 and LR No. 4894/12 and the two parcels of land are occupied by the two respective applicants. The two interested parties are intruders on the defendant's land and are in contempt of the consent order. The defendant further contends that the applicants are busybodies who seek sympathy over unfounded allegations with the intention of depriving the defendant the right to the suit property. He urges the court to dismiss the application.

7. I have considered the application together with the rival affidavits and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. Two key questions fall for determination in this application. The first question is whether the applicants have satisfied the criteria upon which this court exercises jurisdiction to grant an order of joinder. The second question is whether the applicants have demonstrated a sufficient basis to warrant the setting aside of the consent order recorded by the plaintiff and the defendant in 2012.

8. The first issue is whether the applicants have satisfied the criteria for joinder. The relevant criteria which this court exercises jurisdiction to grant an order of joinder is spelt out under Order 1 rule 10 (2) of the Civil Procedure Rules which provides as follows:

“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.”

9. The applicants are in actual possession of the suit property. They have developed the suit property and the suit property houses two public schools managed by the applicants. In law, the applicants are the body corporates vested with the mandate to sue or be sued on behalf of the two public schools. The dispute in this suit relates to ownership of the land on which the two schools sit. The applicants are successors to the boards of governors and school committees which existed prior to the enactment of the Basic Education Act. The substantive issues in this suit relate to the legitimate ownership of the land on which the two schools sit. In my view, the applicants were necessary parties for the purpose of enabling the court to effectually and completely adjudicate upon and settle all questions involved in this suit. I am therefore satisfied that the applicants were and are necessary parties to the suit. I am also satisfied that the applicants have satisfied the criteria for joinder.

10. The second issue is whether the applicants have demonstrated a sufficient basis for the setting aside of the consent order recorded by the plaintiff and the defendant in 2012. The impugned consent was recorded in 2012 after the Constitution of Kenya 2010 had been promulgated. The plaintiff brought this suit contending that the suit land was allocated to the plaintiff for the purpose of constructing a school and that purpose had been actualized. It sought cancellation of the title subsequently issued to the defendant in relation to the suit land, among other orders. While aware that the Constitution of Kenya 2010 had vested public schools and school properties in the National Government; and while aware that the transition was ongoing, the plaintiff and the defendant herein, without the concurrence or consent of the Transition Authority and or the Attorney General, entered into the impugned consent. The tenor and import of the impugned consent is that it purports to compromise a suit to which the applicants should have been parties by dint of the fact they were in occupation of the suit land and the Constitution of Kenya 2010 had vested the two schools and their properties in the National Government. Without saying much, this was irregular. I am therefore satisfied that there is a proper basis for setting aside the impugned consent so that the question of ownership of the suit land can be adjudicated upon and determined on merits in the presence of the two schools.

11. The net result is that the notice of motion dated 29/5/2019 by the Attorney General is disposed in the following terms:-

(a) The applicants are joined as 2nd and 3rd defendants and have leave to file defence and bring a counterclaim to ventilate any claim they may have in relation to the suit land.

(b) The consent adopted by the Senior Deputy Registrar on 18/7/2012 and the decree issued on 19/7/2012 are set aside and this suit is opened for trial and determination on merits.

(c) Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF FEBRUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

June Nafula - Court Clerk