



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC JUDICIAL REVIEW NO 1 OF 2019

(FORMERLY NAIVASHA HCJR NO 6 OF 2015)

WAIRIMU NGIGI AND 30 OTHERS.....APPLICANTS

VERSUS

DIRECTOR OF SURVEY OF KENYA.....1ST RESPONDENT

DISTRICT LAND REGISTRAR2ND RESPONDENT

COMMISSIONER OF LANDS.....3RD RESPONDENT

AND

KIAMBU NYAKINYUA FARMERS CO. LTD.....INTERESTED PARTY

AND

ELIJAH NJUGUNA MUTITU & 1697 OTHERS..... PROPOSED INTERESTED PARTY

RULING

BACKGROUND

1. These proceedings have their origin in the suit instituted vide Nairobi HCCC No.2286 of 1993: **Wairimu Ngigi & 30 others -vs- Kiambu Nyakinyua Farmers Co Ltd**. In the suit P J Ramsley, J (as he then was) rendered a judgment inter alia declaring that the defendant company comprised of a total of 1403 members and that the plaintiffs were lawful members of the defendant company and were entitled to share the defendant's assets equally with the other shareholders thereof.

2. The present proceedings commenced by way of Judicial Review were directed against the Director of Surveys, the Land Registrar Nakuru and the Commissioner of Lands essentially to compel them to act in compliance with the court's Decree in Nairobi HCCC No.2286 of 1993. On 15th February 2011 Ouko, J (as he then was) having considered the substantive Motion filed herein on 9th December 2009 issued orders as follows :-

1. That the respondents are compelled by an order of mandamus to consider the Decree issued on 31st March 2003 in Nairobi HCCC No.2286 of 1993 in the discharge of their respective statutory duties and the respondents are prohibited from continuing to issue any titles in disregard of the said decree

2. That there shall be no order as to costs.

3. Further to an application dated 19th April 2011, Kiambu Nyakinyua Farmers Company Limited was enjoined to these proceedings as an interested party. The now enjoined interested party and the applicants on 5th October 2011 recorded a consent varying or clarifying the order /Decree issued by Ouko, J on 15th February 2011 in the following terms:-

(a) The responsibility of complying with decree issued on 31st March 2003 in HCCC No.2286 of 1993 lies with Kiambu Nyakinyua

Company Limited.

(b) That Kiambu Nyakinyua Company Limited will have complied with the decree when it acknowledges that it has 1403 members and determines membership based on the register presented in evidence in HCCC No.2286 of 1993.

(c) That Kiambu Nyakinyua company Limited will have complied with the decree when it allocates each of the 1403 members an equal share of the land available for distribution.

(d) That District Land Registrar of Nakuru is under statutory obligation to continue to issue titles in respect of subdivisions of Longonot/Kijabe Block 6 (Kiambu Nyakinyua) and that this is not disregarding the decree.

(e) Kiambu Nyakinyua Company Limited will present a register of 1403 members to the Nakuru District Land Registrar to serve as basis for confirming that titles are issued to genuine members except where third parties have purchased shares from genuine members in which case the third party will be deemed as the member upon production of letter from Company acknowledging transfer of shares.

(f) By taking into account (a) to (e) the Respondents will have considered the decree issued on 31st March 2013 in Nairobi HCCC No.2286 of 1993.

4. On 13th August 2014 the Applicants, no doubt being not satisfied with the manner the respondents and the interested party were going about implementing the consent order, made an application that sought to have all the titles so far issued in respect of land parcel **Longnot/Kijabe Block 6 /Kiambu Nyamakinyua** belonging to Kiambu Nyakinyua Farmers Company Ltd quashed; the 1st and 2nd respondents to produce the list of all persons issued with titles, and the Registry Index Map (RIM) against which the titles were issued respectively; and that the issuance of titles be carried out by duly elected directors of the Company and after the subdivision of all the land taking into account of all the 1403 member of the company as earlier ordered by the Court.

5. Hon Lady Justice Meoli after considering the application vide the ruling delivered on 25th November 2016 granted the applicants the prayers that sought the production of the records held by the 1st and 2nd Respondent's respectively. By the same ruling the learned judge also held that matters relating to the management of a limited liability company are not amenable to judicial review and that it was the provisions of the companies Act that would be applicable. The judge was of the view that if there were issues of the bonafides of the directors of the interested party's directors currently in office, any redress lay in another forum and not in these proceedings.

The applicants application dated 7th December 2017

6. Against the foregoing back ground the applicants filed the Notice of Motion dated 7th December 2017 expressed to be made under Sections 3,3A and 3B of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The application inter alia sought the joinder of over 1,690 interested parties as per the list exhibited as "KNLTH2"; and under prayers 4,5,6,7 and 8 the following orders were sought:-

4. That pending the hearing and determination of this application, this honourable Court be pleased to issue conservatory orders to protect the land owned by Kiambu Nyakinyua Farmers Company Limited comprised in land registration block Longonot Kijabe Block 6 (Kiambu Nyakinyua) subdivided into approximately 3289 titles and transferred to the persons named in the list annexed in the list annexed to this application.

5. That pending the hearing and determination of this application, this honourable Court be pleased to issue orders prohibiting issuance of any further titles for Nyakinyuas Farmers Company Limited comprised in land registration block Longonot Kijabe Block 6 (Kiambu Nyakinyua) now numbering approximately 3289 titles

6. That pending hearing and determination of this application, this honourable Court be pleased to issue orders prohibiting dealing with any and all titles emanating from the subdivision of the parcel of land owned by Kiambu Nyakinyua Farmers Company Limited comprised in land registration block Longonot Kijabe Block 6 (Kiambu Nyakinyua) approximately 3289 titles.

7. That this honourable Court be pleased to cancel all titles emanating from the subdivision of the parcel of land owned by Kiambu Nyakinyua Farmers Company Limited comprised in land registration block Longonot Kijabe Block 6 (Kiambu Nyakinyua) approximately 3289 tiles.

8. That this honourable Court be pleased to order that fresh subdivision be undertaken of the parcel of land owner by Kiambu Nyakinyua Farmer Company limited comprised in land registration block Longonot Kijabe Farmers Company Limited comprised in land registration block Longonot Kijabe Block 6 (Kiambu Nyakinyua) respecting and taking in to account the decree issued in Nairobi HCCC No. 2286 of 1993 and the Court orders issued herein on 11th October 2011, by planning for a share of land for 1403 members.

7. The application was supported on the grounds set out on the body of the application and the affidavit sworn in support by one Lucy Francis Gathoni Mwituria dated 7th December 2017. Inter alia the applicants predicated the application on the following grounds:-

1. That the 1st respondent and the interested party subdivided the land improperly into portions that cannot accommodate the 1403 members of the company thus disenfranchising the members.

2. That there was no balloting or any basis provided for the distribution of the plots.

3. That the 2nd respondent was issuing titles at the prompting of persons who were not directors of the interested party and to people who were not members of the interested party.

4. That the process of subdivision and title issuance was flawed, opaque and executed in bad faith to the prejudice of the genuine member of the interested party.

5. That the subdivision and issuance of titles was not in compliance with the decree and order of the Court and all titles issued ought to be cancelled and the process commenced a fresh in conformity with the decree of the court.

8. The Court at the *ex parte* stage granted the order for the enjoinder of the parties sought to be enjoined as interested parties and directed service of the application by way of advertisement. The court further granted prayer 4 of the application which was in the following terms:-

4. That pending the hearing and determination of this application this honourable court be pleased to issue conservatory orders to protect the land owned by Kiambu Nyakinyua Farmers Company Limited Comprised in land registration block Longonot Kijabe Block 6 (Kiambu Nyakinyua) subdivided into approximately 3280 titles and transferred to the persons named in the list annexed to this application.

9. The interested party, Kiambu Nyakinyua Farmers Co. Ltd; filed a replying affidavit sworn by one Michael Kamore Kigotho dated 22nd January 2018 in opposition to the applicants application. The interested parties opposed the joinder of the interested party arguing there was no demonstration that they had an interest in the suit and further contended the joinder of the parties after more than 20 years since the suit was commenced would be prejudicial and not in the interest of justice. By the applicants won admission approximately 3,280 titles had already been issued to person who have not been identified

10. The interested party further contended that the conservatory orders and the order seeking to prohibit the 2nd Respondent from processing and issuing titles could not be granted as there were already earlier orders by the Court directing the issuance of titles in compliance with the decree of the Court issued by consent on 15th October 2011. These orders had neither been reviewed, varied or vacated and were in force. The interested party in response to the prayer seeking the cancellation of all titles already issued stated that the court had previously dealt with a similar request and the Court *Vide* a ruling delivered on 25th November 2016 declined to grant such an order. The interested party argued titles had been issued to third parties who were not parties to the suit and granting an order cancelling their titles would be contrary to the rules of natural justice as they would not have been accorded an opportunity of being heard.

11. Besides the interested party stated the issues in contention was the Respondents failure in implementing the Court decree in Nairobi HCCC No.2286 of 1993 which this Court by the orders of Ouko J, of 15th February 2011 as further clarified by consent of the parties on 5th October 2011 dealt with finally. The interested party stated the applicants had *vide* their application dated 13th August 2014 ruled upon on 25th November 2016, sought virtually similar orders and that to deal with the matter on the same issues would amount to this Court sitting on appeal against its own orders. The interested party further averred the applicants in the present application were raising issues respecting the bonafides of the current directors which are issues not within the jurisdiction of this Court.

12. The interested party further averred that they were committed to complying with the court decree in Nairobi HCCC No.2286 of 1993 but roadblocks had been placed on the way in that the land registrar had frozen all transactions respecting the suit lands and as a consequence whereof the interested party had filed a contempt application against the 2nd Respondent for failing to comply with the decree of the Court issued on 31st March 2003 by Ransley, J in Nairobi HCCC No.2286 of 1993. The interested party stated the contempt application remained pending and that the acts of the applicants and the 2nd respondent had frustrated the implementation of the Court decree.

13. That following advertisement of the *ex parte* order for joinder of interested parties, various persons appeared and applied to be enjoined as parties to the suit. Several of them filed grounds opposing the applicants application dated 7th December 2017 while others filed replying affidavits in opposition. Amongst the grounds raised were that this Court was "*functus officio*" as the issues and parties were the same as in Nairobi HCCC No.2286 of 1993; that the enjoined interested parties were innocent buyers who had either purchased land from the interested party as members or persons who had purchased land from members of the interested party; that the enjoined interested parties had been issued titles, had occupied and developed their respective parcels of land. The enjoined parties contended that the Court would have no jurisdiction to cancel titles issued to the interested parties in a judicial review application as sought by the applicants.

14. The 2nd respondent, the District Land Registrar did not file any replying affidavit in response to the applicant's Notice of motion dated 7th December 2017 but had sworn a replying affidavit in response to the interested party's contempt application dated 28th August 2017. In the replying affidavit the Land Registrar had confirmed she has frozen all land transactions relating to the interested party's land parcels **Longonot/Kijabe Block 6 (Kiambu Nyakinyua)** owing to complaints received by her office and lack of a register of members showing how the allocation was made. She stated the list of members supplied to her office did not contain the necessary details relating to parcel number and acreages. The Land Registrar stated she was ready to unfreeze the transactions if an appropriate list of members was supplied

15. Hon Justice Munyao handled this matter immediately it was transferred to this Court from the High Court at Naivasha as from 12th February 2019 and engaged the parties considerably seeking to have the parties have a negotiated settlement. In his endeavor he directed the interested party to compile a schedule of the 1403 persons of Kiambu Nyakinyua Ltd who ought to get land for their shares. In compliance the interested party on 13th May 2019 filed a schedule annexed to an affidavit sworn by Michael Kigotho Kamore marked "MKK2" indicating the original 1403 members of the Company. The applicants stated that they were not satisfied with the schedule as no survey Map was produced to show the basis of the allocations. The negotiations collapsed and hence the directions for the Notice of Motion dated 7th

December 2017 to be heard on merits.

16. The Court on 1st October 2019 directed that all interested parties who had appeared and had applied to be enjoined as interested parties be so enjoined and allowed them to file their pleadings setting out their positions. The Court further directed the applicants application dated 7th December 2017 to be argued by way of written submissions. The applicants filed skeleton submission dated 8th October 2018 outlining the dispute before the court. The interested party filed a summary of the nature of the dispute pending before the Court on 17th August 2018 and further submissions dated 27th September 2019 on 1st October 2019. Various interested parties also filed their submissions. I have reviewed the pleadings and the submissions by the parties and now turn to consider the merits of the application before me.

Analysis and determination

17. Without any doubt the main protagonists in this matter are the applicants on the one part, and the interested party (Kiambu Nyakinyua) on the other part. The other interested parties are mere collateral damage in the long drawn dispute between the two parties. The applicants make their claim by virtue of being members of the interested party (as shareholders) while the other interested parties claims arise either through having been members, successors to members and/or third party purchasers either from members or the company. The origin of the applicants claim is predicated on the judgment and decree in Nairobi HCCC no. 2286 of 1993 issued on 31st March 2003. The decree of the Court was in the following terms.

1. That it is hereby declared that the said resolution of the 16th November 1983 purporting to limit the number of its members to 1950 is null and void and of no legal effect.
2. That it is hereby declared that there are a total of 1403 members of the defendants Company.
3. That it is hereby declared that the plaintiffs are lawful members of the Defendant Company and are entitled to share the defendants assets equally with the other shareholders hereof.
4. That the Defendants do pay to the plaintiffs cost of this suit to be taxed and certified by the taxing officer of this court.

18. The judicial Review application commenced before this Court merely sought an order compelling the 1st, 2nd and 3rd Respondents to abide by the decree of the Court in the processing and issuing of titles in regard to the interested party's land at Longonot Kijabe Block 6. Ouko, J granted the order of mandamus as sought under prayer (2) of the Notice of Motion and subsequently on 5th October 2011 issued a clarification with the consent of the parties as earlier indicated in this ruling. The clarification issued was intended to effectuate the implementation of the decree in Nairobi HCCC No.2286 of 1993 issued on 31st March 2003.

19. By the amended varied order issued on 11th October 2011 the interested party undertook to ensure compliance with the decree in HCCC No.2286 of 1993; was to furnish the Land Registrar with the list of 1403 members based on the register presented in evidence in HCCC No. 2286 of 1993; was to have been deemed as having complied with the decree once it allocated the 1403 members land. The land Registrar was to continue to issue titles in respect of the subdivisions of the suit land. It does appear following the recording of the consent order, the judicial review application was for all purposes settled and nothing else was left for the Court to do in regard to the application. The application had been determined earlier on 15th February 2011 by Ouko, J before he was moved by the parties and he made a variation of the final orders he had made by consent of the parties. A perusal of the Notice of Motion dated 9th December 2009 originating the Judicial Review, the grounds of opposition dated 15th July, 2010 by the Attorney General on behalf of the respondents, the decree dated 5th February 2011, and the subsequent order issued by consent clarifying and/or varying the decree issued on 5th February 2011 clearly shows that the Judicial Review application was finally dealt with and a decree/order issued.

20. Indeed all the various applications that have been lodged after the determination of the judicial review relate to the execution of the judgment/ decree in HCCC No.2286 of 1993. In that case it would appear there was a register of members of Kiambu Nyakinyua Company Ltd presented in evidence which indicated there were 1403 members of the Company against which judgment was based. That register apparently was not exhibited in these proceedings. Quite evidently the appropriate Court to execute its decree judgment ought to be the same Court that issued the decree/judgment.

21. Presumably the applicants invoked the jurisdiction of the Court (High Court) since they were seeking orders of mandamus and prohibition against the respondents that could not be issued in the same suit where the judgment was issued. This Court naturally became *functus officio* once it determined the judicial review and could not properly seek to execute the decree in HCCC No. 2286 of 1993.

22. The applicants by their application dated 7th December 2017 clearly are seeking reliefs that would ordinarily not be available in a judicial review application. The application was virtually a fresh application for prerogative orders within a cause that had already been concluded. The Court in the decree of 15th February 2011 and the modified order of 5th October 2011 did not reserve unto itself the power to supervise the implementation of the decree issued in Nairobi HCCC No.2286 of 1993.

23. Under Order 53 Rules 1 and 3(4) of the Civil Procedure Rules pursuant to which the application for judicial review was made by the applicants, the Court is only mandated to issue orders of certiorari, mandamus and prohibition. The Court properly issued the order for Mandamus on 15th February 2011 and further modified and amplified the order with the consent of the parties on 5th October 2011. Under paragraphs 1 (c) (d) (e) of the order issued on 5th February 2011 it is clear that the interested party was to furnish the list of 1403 members; The Land Registrar was to continue issuing titles in respect of the subdivisions in conformity with the decree in HCCC No.2286 of 1993 and additionally those third parties who had purchased land from genuine shareholders would be deemed to be members upon the company confirming the transfer of shares. The orders did not relate to the cancellation of any subdivision and/or titles and all that was called for was a verification exercise.

24. In the applicants application under consideration, the applicants seek the joinder of numerous interested parties who were not party to the suit when it was commenced and finalized on 5th October 2011 vide the consent order referred to. The applicants further seek a prohibition against issue of further titles; an order prohibiting all dealings with regard to all titles that have been issued; cancellation of all issued titles emanating from the subdivision of the Company land Longonot Kijabe Block 6 (Kiambu Nyakinyua). These are not prayers that can be said to flow from the decree/orders issued by this Court when it disposed of the judicial review application. The prayers arise from what probably are new causes of action which would invite a fresh action. As indicated the Applicants interalia seek the cancellation of the survey done and the cancellation of all titles issued arising from the survey and for a resurvey to be ordered.

25. The Applicants are seeking substantive orders which would have far reaching consequences. It is evident thousands of titles have been issued to many persons including the interested parties who have appeared and have raised objection to the application. For the Court to issue such drastic orders there must be clear evidence that the survey that was done and against which titles have been processed and issued was illegal and unlawful. Titles issued are in the hands of third parties or interested parties some of whom who have occupied and effected developments on their parcels of land. To issue an order for cancellation of those titles evidence has to be led to demonstrate the titles were irregular or illegally procured or were obtained fraudulently by the persons who hold them. No evidence of any survey was availed and in particular no survey records or maps were availed. It is not clear how the Land Registrar would have issued any titles to the numerous persons unless there was a registered Registry Index Map (RIM). To establish the validity or otherwise of any survey process or titles that may have been issued in this matter the Court would need to take evidence from the affected parties. That goes way beyond the ambit of this matter which as already stated was commenced as a judicial review and has been concluded.

26. Meoli, J in her ruling of 25th November 2016 on the application of 13th August 2014 plainly stated the Court lacked jurisdiction to cancel the titles that had been issued to third parties and further observed that the order recorded by the parties by consent on 5th October 2011 expressly allowed the issuance of titles in respect of the suit property. On what basis then would the same titles be cancelled?

27. What is evident in this matter is that although the parties litigated in Nairobi HCCC No.2286 of 1993 and the Court issued a decree that should have seen this matter resolved fully, the parties have for unclear reasons failed to do what was essentially an administrative function to implement the decree. When the applicants approached this court by way of judicial review they were granted their wish and the Land Registrar was ordered to process titles in compliance with the court decree. When the parties required further assistance of the Court, the Court accommodated them and a comprehensive consent was recorded by the parties on 5th October 2011. This consent virtually concluded the matter and it is this order that the parties should be focusing on implementing rather than engage in endless applications and counter applications. The interested party has filed what they state is the register of 1403 members who are supposed to be allocated land. It is not clear whether this is the same register that was tendered in evidence in HCCC No.2286 of 1993 and which the parties referred to in the consent order of 5th October 2011 under paragraph (b), where the order stated:-

(b) That Kiambu Nyakinyua Limited will have complied with the Decree when it acknowledges that it has 1403 members and determines membership based on the register presented in evidence in HCCC No.2286 of 1993.

28. My reading and understanding of Orders (c) and (d) of the consent was that the 1403 members were to be allocated equal share of the land that was available for distribution presumably as at the time of the consent while under order (d) the Land Registrar was mandated to continue to issue titles in respect of subdivisions of the suit land in conformity with the decree.

29. Any titles that were issued in furtherance of the consent order would in my view not be deemed irregular and/or unlawful and cannot be cancelled at the instance of the applicants unless a valid reason is established for the cancellation.

30. While the issues that have bedeviled the timeous conclusion of this matter may have everything to do with issues of Management of the interested party, this Court lacks the locus to deal with such issues, but like my sister Meoli, J I must express my concern that a matter whose judgment was entered way back in 2003 is still doing the rounds in the corridors of justice merely because parties cannot agree on the modalities of implementing a Court decree. It is a travesty of justice but regrettably the Court can do only that it is permitted to under the law. The parties have a judgment and a decree and an elaborate order that spelt out how the judgment was to be implemented. For reasons that have not been made clear, obstacles have been placed and the parties only appear to be skirting the real issue which is the implementation of the judgment in Nairobi HCCC No.2286 of 1993. The present suit by way of Judicial Review was merely incidental to issue a mandamus order for the Land Registrar to process and issue titles. That was done and indeed many titles were issued.

31. Having reviewed and considered the applicants Notice of Motion dated 7th December 2017. I am satisfied the same cannot be granted and I order the same dismissed. The conservatory orders issued exparte herein are not sustainable and the same are hereby vacated and discharged.

32. As I am of the view that all the parties have contributed one way or the other to the state of things that persist in this matter, it is my considered opinion that none merits the award of any costs. Each party will bear their own costs of the application.

RULING DATED SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF FEBRUARY 2020.

J M MUTUNGI

JUDGE