



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW APPLICATION NO 5 OF 2019

IN THE MATTER OF KENYA GAZETTE NOTICE NO.1995 DATED 1ST OF MARCH, 2019, REFERENCE NLC/HLI/025/2017 EMANATING FROM THE NATIONAL LAND COMMISSION DECISION DATED 7/2/2019

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP 26)

AND

IN THE MATTER OF ORIGINAL PARCEL OF LAND REFERENCE NUMBERS 13269 AND PLAN NUMBER 194969, 20737/6 LAND SURVEY PLAN NUMBER 217450, LR NOS, 20737/6, 20737, 20737/26, 20737/28, 20737/41 AND 20737/42.

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDER'S OF CERTIORARI, MANDAMUS AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION AND

SETTLEMENT.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

DISTRICT LAND REGISTRAR MERU4TH RESPONDENT

ONTULILI MT.KENYA FOREST SQUATTERS1ST INTERESTED PARTY

KIAMBOGO ONTULILI FARMERS SQUATTERS.....2ND INTERESTED PARTY

EVEREST ENTERPRISES LIMITED.....3RD INTERESTED PARTY

MT. KENYA SQUATTERS GROUP.....4TH INTENDED INTERESTED PARTY

RULING

1. This ruling is in respect of the application dated 27.9.2019 and filed on 30.9.2019 where by an entity known as Mt. Kenya squatters group prays to be enjoined in this suit as interested parties.

2. The brief background of this matter is that the ex parte applicants filed a substantive motion on 29.4.19 seeking orders of certiorari to

quash the decision of the National Land Commission of 1.3.2019 which purposes to revoke their land parcel title numbers 13269, 20737/7, 20737/6, 20737/42 20737/28 and 20732/41 (the suit parcels), orders of mandamus directing the chief land registrar and District land registrar Meru requiring them to reinstate the registration of the suit parcels into the hands of the exparte applicants and orders of prohibition to prevent future attempts to revoke the aforementioned titles. In the suit, the exparte applicants named;

- **National land commission as 1st respondent**
- **The director of land adjudication and settlement as the 2nd respondent**
- **The Chief land registrar as 3rd respondent**
- **District Land Registrar as 4th respondent and**
- **Ontulili Mt. Kenya forest squatters as the interested parties.**

3. On 2.4.2019, a group known as Everest Enterprises limited filed an application to be enjoined in this matter as interested parties. Thereafter on 22.5.2019, another application was filed by a group known as Kiambogo Ontulili farmers squatters who also sought to be enjoined in this suit as interested parties.

4. On 3.7.2019, the application of 22.5.19 by Kiambogo group and that of 2.4.2019 by the Everest group were allowed by consent of all the parties present. On 1/10/2019, the court gave directions on how the interested parties were to be identified as follows:-

- **1st interested parties are Mt. Kenya Forest squatters.**
- **2nd interested parties are Kiambogo Ontulili farmers.**
- **3rd interested parties are Everest Enterprises limited.**
- **4th intended interested parties are the Mt. Kenya squatters.**

Application dated 27/9/2019

5. This application is not opposed by the Attorney General for the 2nd – 3rd respondent, the Everest Enterprises Limited (3rd interested parties and, the ex-parte applicants (see proceedings of 31.10.2019). Like wise, the 1st interested party, Ontulili Mt Kenya forest are also not opposing the application for joinder – (see proceedings of 19.11.2019). Those who have opposed the application of 27/9/2019 are the National land commission (1st respondent) and the Kiambogo group (2nd interested party).

Submissions of the intended 4th interested party

6. The arguments of this party are anchored on the grounds set out on their application and in the affidavit of one Kithinji Erasto who is the chairman of this group.

7. The applicants contend as follows;

(a) “National land commission has directed that the plaintiff/applicants herein surrender part of the land originally registered in the names of the late Honourable J.H Angaine and in which the plaintiffs are the administrators and the legal representatives of the estate.

(b) The members of the intended interested party herein were allotted L.R NO’s 13269 and 12234 measuring 920.3 hectares or thereabout which properties form part of the land that the National land commission has directed that it be surrendered to 1st Interested party, Ontulili Mt. Kenya forest squatters.

(c) Vide legal notices numbers 60 of 1975 and 107 of 1977, the then minister for Natural Resources the late S.S.OLOITIPITIP excised 920.3 hectares out of Mt. Kenya forest under the forest act in favour of all the 453 intended interested party’s families.

(d) The said excision was done after the members of the intended interested party who were poor and landless successfully petitioned the then president of the Republic of Kenya, His Excellency Mzee Jomo Kenyatta to be allocated land to settle.

(e) The Government dully set aside the said land for the 453 families which land was allocated LR. NO’s 13269 and 12234.

(f) Each of the 453 families were allocated 2.5 acres where they settled from 1973 with full authority of the President and the Government of the Republic of Kenya.

(g) The intended interested party was not a party to the deliberations of the National Commission and the said decision, if

implemented, will lead to the intended interested party applicant herein right and title to the said properties being extinguished and will suffer heavily by the said decision of the National land commission.

(h) The members of the intended interested party are therefore the correct owners of the suit lands which unless they are enjoined in this suit they risk losing the land to opportunist third parties.

(i) It is necessary for the intended interested party to be enjoined in this suit to enable the court effectually and completely adjudicate upon and settle all questions involved in this suit.

(j) It is only fair and in the interests of justice that the present application be allowed.

(k) No party will be prejudiced by allowing this application which has been brought at the earliest opportunity”.

8. It has been submitted for the applicant that the presence of the applicant is necessary to enable this court effectually and completely understand the matter and settle and adjudicate all the questions involved and that they stand to be prejudiced if they are locked out from these proceedings. It is further argued that in 1973, the applicant through their leaders lobbied to have a part of Mt. Kenya de-gazetted and they were settled on the suit land as squatters as from 1973 but were forcefully evicted by the powerful minister known as Angaine.

9. They also aver that the National Land Commission did not conduct public participation so to have the applicant involved in their proceedings.

Submissions of the National Land Commission

10. In opposition to the application of 27/9/19, the NLC has relied on their grounds of opposition filed a 18/11/2019. There in, it is averted as follows:

(i) That the applicants said application is incompetent, mala fides, misconceived, mischievous, bad in law and is an abuse of the court process.

(ii) That the application is devoid of merit, misconceived, frivolous, vexatious and ought to be dismissed with costs.

(iii) That the 1st respondent is an independent commission established under article 67(1) of the constitution and is operational by the national land commission act No 5 of 2012.

(iv) That the application violates provisions of section 9(2) of fair administrative action act, 2015 that require internal mechanisms and all remedies available under any other written law be first exhausted.

(v) That further to the above, judicial review is concerned with the decision-making process and not the merits of the decision itself. The application is hence incompetent as it challenges the merits of the decision made by the 1st respondent dated 7th February 2019 and not the process that led towards the making of the impugned decision.

(vi) That from the evidence on record, the 1st interested party was given a fair and reasonable opportunity to be heard.

(vii) That it is further evidenced by the applicant's herein in their supporting affidavit sworn by Kithinji Erasto M'Murungi, that they did not participate whatsoever in the proceedings before the 1st respondent that resulted in the impugned determination.

(viii) That the application for joinder by the 4th intended interested party is only meant to unnecessarily disrupt these proceedings before this honorable court without any cause and greatly delay, if not to defeat the 1st interested party from deservedly enjoying the fruits of a legally well conducted investigation by the 1st respondent.

(ix) That the 1st respondent has jurisdiction in law under the provisions of the constitution specifically under article 67 (1) (e) of the constitution to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress resulting to the decision in question.

(x) That this honourable court can only be invoked in the event of an excess of jurisdiction by way of breach of the constitution and there has been no violation of the constitution. Further, judicial review is strictly limited to a review of the procedure of a public body; however, the application herein seeks for this honourable court to delve into the merits of the decision of the 1st respondent and therefore this honourable court ought to decline from sitting as an appellate court from the decision of the 1st respondent.

(xi) That from the foregoing the applicants' application is a clear abuse of the court's process and should never have been brought before this honorable court.

(xii) That the orders sought cannot issue as against the 1st respondent herein as the application is fatally defective as the same is grounded upon misconceived facts.

(xiii) That from the foregoing the applicant's application is clear abuse of the courts process and should never have been brought

before this a honorable court.

11. The submissions of the National Land Commission (NLC) are that applicants are trying to appeal the decision of NLC in this court. It is further argued that the 1st interested party are the ones who had lodged a complaint with NLC and on this note NLC invokes the equity maxim: **“equity aids the vigilant not the sleeping ones.....”**

12. It has also been argued that this court can only be involved in cases of excess of jurisdiction hence the court should not dwell on the issue as to whether applicants were occupants of the suit land or not.

13. On public participation, the NLC contends that their entity deals with a targeted process where there is a complainant and a respondent and NLC has no mandate or obligation to advertise to the public on what has been complained of.

14. In support of the arguments for NLC, the case of **Municipal council of Mombasa civil appeal No. 185 of 2001 and RV KRA exparte Towers Limited** was proffered.

Submissions of 2nd interested party (Kiambogo)

15. This group is relying on the affidavit of one Paul Kinoti filed on 15.10.2019 to oppose the application of 27.9.19. There in, it is contended that this group has been living as squatter on the suit land since 1970s, when the first president of the Republic of Kenya, Mzee Jomo Kinyatta allowed them to settle on that land. They took possession and they have developed that land where they lived from 1970 until 1986 when the minister of internal security illegally, unlawfully and forcefully violently evicted them from the suit land. During the eviction their homes and crops were damaged and they went to the road side to camp there with their live-stocks.

16. They sought reprieve through Meru High Court in Application No. 31 of 1994, and they also lodged their claim with the national Land Commission. They therefore claim that they are the rightful owners of the suit land.

17. It was submitted that the 4th Interested party is an outfit which was formed when the case was on going (barely 3 months ago) and their goal is to attack and injure the interests of 2nd interested party.

Determination

18. The issue for determination is **whether the applicants should be enjoined in this suit as interested parties.**

19. The **Black's Law Dictionary 9th Edition, page 1232** defines an interested party as;

“A party who has a recognizable stake (and therefore standing) in the matter”

20. **Order 1 Rule 10(2) Civil Procedure Rules** 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 to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

21. A party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty. In **Joseph Njau Kingori vs. Robert Maina Chege & 3 others [2002] eKLR** Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party is to be joined in a suit:

“..... it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit”.

22. In the case of **Trusted Society of Human Rights vs Mumo Matemu and 5 others (2014) eKLR**, the supreme court of Kenya held that:

“An interested party is one who has a stake in the proceedings through he or she was not party to the cause ab initio.....”

23. In **Nairobi Court of Appeal Civil Appeal No. 172 of 2006, Joseph Kamau Musa and 4 Others vs. Ereri Company Limited & 3 Others**, the court while allowing applicants to be enjoined in the appeal made reference to the case of **Ahn -v- Openda [1982] KLR 87**, where it was held that a party who has taken no part in the lower court's proceedings may nevertheless, be a person directly affected by the appeal and this was reiterated in the case of **Onjula Enterprises Ltd., -v- Sumaria [1986] KLR 651** where the said Court of Appeal held that **persons directly affected by an appeal need not be those who were parties to the proceedings.**

24. From the foregoing analysis it is clear that an intended interested party need not have participated in the previous cause for him/her to qualify as an interested party. In the present case the applicants did not participate in the proceedings before the National Land Commission which gave rise to the decision of 1.3.2019. This court cannot purport to delve into the merits of why the applicants were absent at this stage. That issue can be properly dealt with during the hearing of the suit.

25. This court has also taken into account the route taken by the parties herein in respect of the joinder of other interested parties (particularly 2nd and 3rd). For instance, a look at the claim of the 2nd interested party reveals that they are claiming the suit land on the basis of being the genuine owners since 1973. They have allegedly buried their Kinsmen there. But they were forcefully evicted by Jackson Angaine at some point- see paragraph 3-11 of the affidavit of Paul Kinoti filed on 22.5.2019. Likewise, the applicants (intended interested parties) are claiming to be the owners of the suit land though they were forcefully evicted by Jackson Angaine at some point.

26. For the 3rd interested parties they have claimed the suit land on the basis of purchase. They contend that they were not a party to the deliberations of the National Land Commission which decision if implemented will affect their rights to the suit land.

27. The applications for joinder by 2nd interested party (Kiambogo) filed on 22.5.2019 and that of the 3rd interested party (Everest) filed on 1.4.2019 were never opposed by any party and were therefore allowed on 31.7.2019. How comes the NLC did not raise the issue they are advancing now. Likewise for the Kiambogo group, now that they are on board this ship, they cannot be heard to object to the joinder of Mt. Kenya group yet both parties' interest on the suit land appears to be more or less similar.

28. **Article 50 (1) of the Constitution** provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

29. In the **Mombasa court of appeal case No. 15 of 2015 JMK VS Mwk and MFS** the court while emphasizing the rules of natural justice cited the case of **Mbaki and others vs Macharia and another (2005) 2 EA 206** where the court stated that:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

30. The line of argument advanced by the NLC is not in tandem with the rules of natural justice. It is only through the hearing or upon the raising of a preliminary objection can the issue of the mandate of the NLC and whether the applicant is challenging the decision itself and not the decision-making process can arise when a party is fully on board.

31. As at now, I do find that the application filed by the intended 4th interested party on 27.9.2019 is merited. The same is hereby allowed but with no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH FEBRUARY, 2020.

IN THE PRESENCE OF:-

C/A: Kananu

Atheru for applicant - present

Kiogora A for applicant – present

Wambugu for 1st Respondent present

Kithinji holding brief for Mwiti for 1st interested party- present

Riungu applicant for JR No. 7 of 2019

Thangicia for 2nd Interested party

Mereka for 3rd interested party- present

Kiongo for 2nd and 3rd Respondent

Exparte applicant present

1st, 2nd and 4th interested party present

HON. LUCY. N. MBUGUA

