



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

MISCELLANEOUS APPLICATION NO. 37 OF 2019

LESERU TEBESON FARMERS SOCIETY.....APPLICANT

VERSUS

CHIEF REGISTRAR OF TITLES, NAIROBI.....1ST RESPONDENT

CHAIRMAN, KENYA NATIONAL LAND COMMISSION.....2ND RESPONDENT

RULING

1. This ruling relates to two Notices of Motion dated the 5th November, 2019 signed by Peter Kuria and Felix Kioko respectively for the Attorney General. The Motion signed by Peter Kuria will be referred as the first application while that by Felix Kioko as the second application. The first application seeks for leave for the Attorney General to come on record for the Chief Registrar of Titles Nairobi, setting aside of the order of 24th October, 2019 and leave to file and serve their replying affidavit. The second application seeks for the Ministry of Defence to be enjoined as the interested party and striking out of the Motion dated 24th September, 2019. That in support of the two applications, are the grounds on their face and supporting affidavits sworn by Peter Kuria and Captain Bonface Maina Ombiro respectively.

2. The two applications are opposed by Leseru Tebeson Farmers Society, Respondent, through the replying affidavit sworn by Miriam Kubai on the 13th November, 2019.

3. The two applications were on the 5th November, 2019 certified urgent and directions on service given. The applications were mentioned on the 7th November, 2019 before Odeny, J who referred them to this court for hearing on the 18th November, 2019 and directed parties to maintain the status quo.

4. That during the hearing of the two applications, Mr. Kuria, Mr. Tuitoek for Kioko and Mr. Mukabane Advocates made their oral submissions for and against the applications. That in support of the applications, Counsel submitted that the Applicant had failed to comply with the mandatory provision of **Section 12 of the Government Proceedings Act** by failing to enjoin the Attorney General in their application. That the Applicant failed to disclose the 2nd Respondent's recommendations that had been effected by the 1st Respondent and that the order of 24th October, 2019 should therefore be set aside. That further, the Applicant had failed to disclose the existence of Eldoret ELC No. 23 of 2019 which is over the same parcel of land, and the order of 24th October, 2019 should be stayed pending the hearing and determination of that suit. That in opposition to the two applications, the learned Counsel submitted that the order of 24th October, 2019 was granted upon the court being satisfied that the Respondents had been served and had not filed any documents in opposition. That the Respondents should have filed an appeal if dissatisfied, instead of coming to this court, which is functus officio. That the Respondents have not demonstrated their interests over the restrictions which had been placed by the National Land Commission. That as no Certificate of Search has been availed, the claim that the Applicant's title has been cancelled cannot be true.

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

(a) Whether the Attorney General has made a reasonable case for setting aside of the order of 24th October, 2019.

(b) Whether the Ministry of Defence is a necessary party in the proceedings.

(c) Who pays the costs of each of the applications.

6. The court has after considering the grounds on the applications, the affidavit evidence, the submissions by Counsel and upon perusing the record come to the following determinations;

(a) That Leseru Tebeson Farmers Society, the Applicant, commenced this proceedings through the Motion dated 24th September 2019 against Chief Registrar of Titles Nairobi and Chairman Kenya National Land Commission, the Respondents, seeking for the following orders;

“1. That this application be certified urgent and heard exparte in the first instance.

2. That the restriction registered against L. R. No. 27206/3 and L. R. 27206/4 all situated in North West of Eldoret Municipality in Uasin Gishu County be lifted.

3. That raising orders do issue to order removal of restriction in L. R. No. 27206/3 and L. R. 27206/4 all situated in North West of Eldoret Municipality in Uasin Gishu by Chief Land Registrar, Nairobi.

4. That the costs of this application be provided for.”

(b) That the application was certified urgent on the 24th September, 2019 and directions for service in seven days issued, and inter-partes hearing fixed for 24th October, 2019. That on that date, the Counsel for the Applicant informed the court that the Respondents had been served with the application and order. That the application was unopposed and should be allowed as prayed. That the court being satisfied that the Respondents had acknowledged service by stamping, allowed the application as prayed in its ruling. That is the order or ruling that prompted the filing of the two applications set out in (1) above.

(c) That the court has perused the affidavit of service sworn by Christine Nyakio on the 3rd October, 2019 to which is annexed as a copy of the order issued on the 1st October, 2019 and certificate of urgency dated 24th September, 2019 being the stamp impressions of the Respondents inside which the date of 3rd October, 2019 is inserted. That the contents of the said affidavit of service have not been disputed through the applications dated 5th November, 2019 and the submissions by Counsel.

(d) That the provision of **Section 12(1) of the Government Proceedings Act Chapter 40 of Laws of Kenya** provides that ***“subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be.”*** That provision is in mandatory term by the use of the word ***“shall”***. That the court takes judicial notice of the fact that the Chief Registrar of Titles Nairobi, the 1st Respondent, is an office in the Government of Kenya while the 2nd Respondent is the Chairman of one of the Independent Commission under **Article 248(2) of the Constitution of Kenya**. That from the heading and body of the Notice of Motion dated the 24th September 2019, the Applicant did not enjoin the Attorney General as a Respondent and further, did not effect service upon the Attorney General. That this proceedings is undoubtedly of a civil nature and the Applicant was obligated to adhere and comply with **Sections 12(1) and 13 of the Government Proceedings Act**.

(e) That it is clear there exists Eldoret ELC No. 23 of 2019 in which the Applicant is the Plaintiff and the 2nd Respondent is the 1st Defendant. The other defendants are the Chief Land Registrar, Kenya National Highway Authority, the Ministry of Defence and the Attorney General in that order. That the plaint annexed to the second application leaves no doubt that the subject matter of that suit are L. R. No. 27206/3 and 4, and among the prayers sought is a declaration confirming that the Plaintiff is the registered owner of the two parcels. That the Applicant did not disclose in this proceedings that Eldoret ELC No. 23 of 2019, was pending before this court and that the subject matter was more or less the same as in this matter.

(f) That in view of the fact that the Ministry of Defence appears as the 4th Defendant in Eldoret ELC No. 23 of 2019 and has through the second application indicated its interest in participating in this proceedings as an interested party, and further as the Attorney General was not enjoined as a party in this proceedings, while they are the 5th Defendant in that other suit, the court finds that they are necessary parties to be enjoined in this proceedings to enable the court to deal with the issues raised exhaustively.

(g) That under **Order 45(1) of the Civil Procedure Rules** a party who is aggrieved by an order or decree from which an appeal is allowed, but from which no appeal has been preferred may apply for review. That such an application should be made before the Judge who made the order sought to be reviewed if still in the station. That though the Judge who made the order of 24th October, 2019 is still at the station, the said Judge has directed that the applications be brought to this court for hearing and determination, as the court is dealing with Eldoret ELC No. 23 of 2019 to which ELC No. 78 of 2019 and ELC Petition No. 11 of 2019 have since been consolidated. That though the Applicant in this proceeding is represented by a different Counsel in Eldoret ELC No. 23 of 2019, the court is of the considered view that the order of 24th October, 2019 should be set aside to allow the Ministry of Defence be enjoined as an interested party, and the Attorney General to come on record for the 1st Respondent and thereafter, file and serve their replies to the application dated 24th September, 2019.

7. That flowing from the foregoing, the court finds merit in the two applications and orders as follows:

(a) That the order of 24th October, 2019 is hereby reviewed and set aside.

(b) That leave is granted for the Attorney General to come on record for the 1st Respondent and to file and serve their reply to the Motion dated the 24th September, 2019 in fourteen (14) days.

(c) That the Ministry of Defence be enjoined in the proceedings as an interested party. That to this end, the Applicant do file and serve an amended Notice of Motion incorporating the Ministry of Defence as interested party in fourteen (14) days.

(d) That costs of the two applications be in the cause.

Orders accordingly.

Dated and delivered at Eldoret this 5th day of February, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

Mr. Mukabane for Applicant.

Mr. Kuria for 1st Respondent.

Mr. Tuitoek for Kioko for 2nd Respondent.

Christine: Court Assistant