



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 340 OF 2015**

**KENYA AIRPORTS AUTHORITY.....PLAINTIFF**

**VERSUS**

**NAKURU TEACHERS HOUSING**

**CO-OPERATIVE SOCIETY LTD.....1<sup>ST</sup> DEFENDANT**

**THUO COMMERCIAL AGENCIES LIMITED.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> defendant by an application dated 29<sup>th</sup> January 2018 applied to be struck out of this suit and the Court vide a ruling delivered on 25<sup>th</sup> September 2018 allowed the application. The Court directed the 1<sup>st</sup> defendant be struck out of the proceedings as it did not have any interest in the subject matter of the suit.

2. The plaintiff/applicant though served with the 1<sup>st</sup> Defendant's application seeking to be struck out from the suit apparently did not file a response to the application and the same proceeded *ex parte*. The plaintiff vide a Notice of Motion dated 30<sup>th</sup> June 2020 expressed to be brought under section 1A, 1B, 3, 3A & 80 of the Civil Procedure Act, Orders 45 and 51 of the Civil Procedure Rules, Article 159 (2) (d) of the Constitution has applied to have the Court ruling reviewed and/or set aside. The plaintiff/applicant *inter alia* prays for the following substantive orders:-

- 1. That there be a review by setting aside forthwith from the record a Ruling delivered by this Court on 25<sup>th</sup> September, 2018.*
- 2. That this Court be pleased upon review of its ruling delivered on 25<sup>th</sup> September 2018 reinstate the respondent into the proceedings of this suit.*
- 3. That for conclusive determination of this suit the Respondent be ordered to participate in the proceedings of this suit as the 1<sup>st</sup> Defendant.*

3. The plaintiff/Applicant's said application is supported on the grounds set out on the body of the application and on the annexed supporting affidavit of Prof. Kithure Kindiki, counsel for the plaintiff/applicant. Nakuru Teachers Housing Co-operative Society Ltd who before the ruling of 25<sup>th</sup> September 2018 were named as the 1<sup>st</sup> defendants in the suit opposed the plaintiff's application through a replying affidavit sworn on 21<sup>st</sup> July 2020 by Solomon Kibaki, their secretary.

4. In support of the application the plaintiff averred that there was failure on the part of the plaintiff's advocates to oppose the defendant's application dated 29<sup>th</sup> January 2018 that had sought the striking out of the 1<sup>st</sup> defendant on the basis that the 1<sup>st</sup> Defendant had no interest in the properties **LR No.4731/2** and **6282/2** which were the subject matter in the suit. The plaintiff attributed the failure to oppose the 1<sup>st</sup> defendant's application to what counsel stated was a communication gap when the advocate who was handling the matter on behalf of the plaintiff left the law firm of Kithure Kindiki & Associates and urged the Court not to visit the mistake of counsel on the party in the interest of justice. More significantly the plaintiff/applicant averred that the 1<sup>st</sup> defendant in its application dated 29<sup>th</sup> January 2018 did not make full

disclosure which led the Court to believe the 1<sup>st</sup> defendant did not have any interest in the properties the subject matter of the suit yet they had interest.

5. The plaintiff/applicant further stated the 1<sup>st</sup> defendant's application to be struck out proceeded on the misleading information that the 1<sup>st</sup> Defendant's interest in **L.R No.4731/2 and L.R No.6282/2** was limited to 5.2 hectares and 1.62 hectares respectively which were the sizes of the land that the Government had compulsorily acquired vide Gazette Notice Nos **353** and **354** of 20<sup>th</sup> January 1983 for purposes of establishing a Civilian Airstrip. The 1<sup>st</sup> Defendant's position was that it was compensated for these portions of land by Kianjoya Enterprises Ltd from whom they had bought the land following a decree in Nakuru HCCC No.208 of 2004 and hence did not have any further interest in the suit properties. The Applicant however averred that the 1<sup>st</sup> Defendant had interest over the whole of land parcels **L.R No.4731/2 and L.R No.6282/2** which measured 82.72 hectares and 40.47 hectares respectively and consequently the 1<sup>st</sup> Defendant misled the Court as to the actual acreages/sizes of the subject properties. The applicant thus avers that the Court in rendering the ruling of 25<sup>th</sup> September 2018 was under the misapprehension that the suit parcels were only 5.2 hectares and 1.62 hectares respectively when in actual fact they comprised 82.72 hectares and 40.47 hectares respectively. The plaintiff/applicant avers the 1<sup>st</sup> defendant was registered as the beneficial owner of land parcels **LR No.4731/2 and LR No.6282/2** measuring 82.72 hectares and 40.47 hectares respectively as per annexures "**KK5**" and "**KK6**" respectively which illustrated they had interest over and above the portions of 5.2 hectares and 1.62 hectares that they were compensated for by Kianjoya Enterprises Ltd. It is the plaintiff's contention that the subject parcels of land constituted public land upon which the 1<sup>st</sup> Defendant encroached and hence the 1<sup>st</sup> defendant remains a relevant party to the proceedings and it was therefore essential for the ruling that struck the 1<sup>st</sup> defendant out from the proceedings to be reviewed and the 1<sup>st</sup> defendant to be reinstated as a party to the proceedings so that they can participate in the proceedings to enable the Court to conclusively adjudicate and determine all the issues finally.

6. The 1<sup>st</sup> defendant in opposing the application by the plaintiff for review and / or setting aside of the Court's ruling of 25<sup>th</sup> September 2018 avers that the application was not brought without unreasonable delay and that the plaintiff has not demonstrated any valid reasons/grounds to warrant review of the ruling. The 1<sup>st</sup> defendant averred in the replying affidavit that the plaintiff did not advance any cogent reason and/or explanation why it failed to file any response to the 1<sup>st</sup> defendant's application dated 29<sup>th</sup> January 2018 and/or why it took plaintiff over one year to seek to review the ruling that ensued therefrom. The 1<sup>st</sup> Defendant further contended that contrary to the averment by the plaintiff that it misled the Court that LR No.4731/2 measured 5.2 hectares while LR No.6282/2 measured 1.62 hectares, it had merely stated it had purchased the two parcels from Kianjoya Enterprises Ltd but later learnt that portions of 5.2 hectares from LR No.4731/2 and 1.62 hectares from LR No.6282/2 had been compulsorily acquired and Kianjoya Enterprises Ltd had received compensation for the same. Nakuru HCCC No.208 of 2004 was in respect of the portions compulsorily acquired which the 1<sup>st</sup> defendant wanted Kianjoya Enterprises Ltd to compensate them for at market rates and/or offer suitable alternative land in lieu of compensation. The 1<sup>st</sup> defendant thus denied there was any concealment of any relevant information that may have operated to mislead the Court. The 1<sup>st</sup> defendant averred they had not encroached onto the land reserved for the Civilian Airstrip insisting that in their utilization of land parcels LR No. 4731/2 and LR No. 6282/2 they have left out the areas earmarked for the airstrip.

7. The plaintiff and the 1st defendant, canvassed the plaintiff's application dated 30<sup>th</sup> June 2020 by way of written submissions. I have read and considered the submissions filed by both parties and the issue for determination is whether the plaintiff/applicant has made out a case to warrant the Court to exercise its discretion to review and/or set aside the order striking out the 1<sup>st</sup> defendant from these proceedings. The Court in the exercise of its discretion is obliged to consider the attendant facts and circumstances and to act judiciously to ensure justice is done to all the parties in the matter. The plaintiff/applicant admits that it was properly served with the 1<sup>st</sup> Defendant's application dated 29<sup>th</sup> January 2018 but did not, for reasons that are not entirely evident in the supporting affidavit file a response to the application. Equally, and the plaintiff conceded as much in the submission filed it was not evident that the 1<sup>st</sup> defendant misled the Court that land parcels **LR No.4731/2 and LR No.6282/2** were 5.2 and 1.6 hectares respectively. The 1<sup>st</sup> defendant correctly stated that those were the portions they had purchased but which turned out to have been compulsorily acquired and in respect of which they were compensated after they sued Kianjoya Enterprises Ltd who had sold the land to them.

8. The plaintiff however appears to anchor its application for review on the discovery of new and important materials and/or evidence in that records at the land registry and survey of Kenya and investigations conducted by the plaintiff revealed that land parcels **LR No.4731/2 and LR No.6282/2** were in fact 82.72 and 40.77 hectares respectively. Whereas by the plaint the plaintiff avers that land parcels formerly known as **LR Nos 9363/3, 4731/2,6282/2 and 11373** were amalgamated to create LR No.23166 measuring 208.5 Hectares now registered in the plaintiff's name, it is unclear whether the whole of LR. No.4731/2 and LR No.6282/2 formed part of the amalgamated plot or it was the 5.2 hectares and 1.6 hectares out of the said plots that were included in the amalgamated parcel LR No.21366. As per the Gazette Notices No.353 and 354 relating to the compulsory acquisition parcel LR.No.4731/2 shown to be 5.2 hectares was to be acquired while a part of parcel LR No. 6282/2 measuring 1.62 hectares was to be acquired. It is thus unclear whether land parcel 4731/2 at the time of the compulsory acquisition was only 5.2 hectares or it was bigger. The title now in the name of the 1<sup>st</sup> defendant issued on 30<sup>th</sup> August 1991 shows LR No.4731/2 to be 82.72 hectares.

9. From the ruling rendered by my brother Justice Munyao, it is evident he also was unclear as to what became of the portions that were compulsorily acquired. Under paragraph 8 of the ruling he observed as follows:-

*8. "What is not clear to me is whether the applicant ever managed to procure titles in its name, and if so, whether they were surrendered to the plaintiff. If the position is that the applicant has titles in its name, then it needs to surrender these to the plaintiff. I will need a confirmation of this at a date that I will give upon delivery of this ruling".*

10. Apparently on the day the ruling was delivered, Ms Nancy Njoroge advocate for the 1<sup>st</sup> defendant in response to a question by Munyao, J responded that the 1<sup>st</sup> defendant did not obtain a title (presumably of the acquired portion) in its name. If that be the case what happened to the portion that was acquired considering that the 1<sup>st</sup> defendant now holds title to land parcel LR No.4731/2 from which supposedly the portion of 5.2 hectares was to be hived?

11. Under Order 45 Rule 1 of the Civil Procedure Rules a review of a decree or order may be granted if a party satisfies either of the following conditions:-

(a) Discovery of new and important matter or evidence that was not available at the time the decree was passed and/or order made; or

(b) The existence of a mistake or error on the face of the record; or

(c) Any other sufficient cause; and

(d) The application of review is made without unreasonable delay.

12. In the instant matter apart from considering the factors that may warrant a review I think it is also necessary to consider whether the 1<sup>st</sup> defendant is a necessary and an essential party to the proceedings to enable the Court to effectually and completely adjudicate on all the issues arising in the suit. While it can be asserted there was no new discovery of any new and important matter or evidence that could not have been available on exercise of appropriate due diligence, it is equally arguable that the 1<sup>st</sup> defendant remains a necessary and essential party to these proceedings. As I have observed it is not clear whether Land Parcel LR No.4731/2 was acquired compulsorily wholly or only a portion of 5.2 hectares was acquired. Additionally it is not clear if it was only portions that were compulsorily acquired, whether such portions were actually excised and titles issued. Besides the plaintiff under prayer 1 of the plaint prays for an order as follows:-

1. That a declaration that the plaintiff is the rightful owner of the parcel known as LR Nos 4731/1, 6282/1 and LR No.23166 (formerly LR Nos.9363/3,4731/2, 6282/2 and 11373)

13. As is evident the plaintiff is claiming ownership of LR No.4731/2 which is registered in the 1<sup>st</sup> defendant's name. If the plaintiff is successful it would mean the Court would among other parcels of land award the plaintiff **LR No.4731/2** which as I have indicated is registered in the name of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant would need to have been heard before a decision depriving it of a property registered in its name can be reached. The 1<sup>st</sup> defendant would be affected by such a decision and the rules of natural justice demand that a party be not condemned without being heard. I am in the premises satisfied the 1<sup>st</sup> defendant has an identifiable legal interest in one of the properties the subject of the suit and is thereof a necessary party in these proceedings.

14. Notwithstanding that the 1<sup>st</sup> defendant's name was struck out of these proceedings, the Court upon being satisfied that the 1<sup>st</sup> defendant is a necessary party in these proceedings can under the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules nonetheless order that the 1<sup>st</sup> defendant be reinstated as a party to enable the court to effectually and completely adjudicate on all the issues.

15. In the context of the plaintiff's application under consideration, I hold and find that there is sufficient cause to warrant a review and the setting aside of the order of 25<sup>th</sup> September 2018 striking out the 1<sup>st</sup> defendant from these proceedings. It is the Court's view that no prejudice will be visited on the 1<sup>st</sup> defendant who at any rate have a defence on record. The ends of justice demand that the 1<sup>st</sup> defendant participates in these proceedings as a party as they stand to be affected by the decision that the Court may make at the conclusion of the case.

16. I accordingly allow the plaintiff's Notice of Motion dated 30<sup>th</sup> June 2020. I set aside the ruling delivered by this Court on 25<sup>th</sup> September 2018 and order the reinstatement of the 1<sup>st</sup> defendant to the proceedings to participate as the 1<sup>st</sup> defendant.

17. As the plaintiff could have averted the instant application if only it had replied and/or responded to the 1<sup>st</sup> defendant's application dated 29<sup>th</sup> January 2018, it is only fair and just for the plaintiff to shoulder the costs of the application.

18. I award costs of the application to the 1<sup>st</sup> defendant and I assess the same at Kshs.15, 000/= to be paid to the 1<sup>st</sup> defendant's advocates within 45 days from the date of this ruling.

19. Orders accordingly.

**Ruling dated signed and delivered virtually this 29<sup>th</sup> day of October 2020.**

**J M MUTUNGI**

**JUDGE**