



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 487 OF 2011

FRANCIS GITHOGE KARUGU & 21 OTHERSPLAINTIFF
VERSUS
CITY COUNCIL OF NAIROBI DEFENDANT

R U L I N G

By an application dated 22nd January, 2013 and supported by the affidavit of Geoffrey Mwangi Meni sworn on the same day and supplementary affidavit by the applicant seeks to be enjoined as a second defendant to the suit herein.

He avers that the subject matter of the dispute which is LR No. 209/841 on Landhies road in Nairobi directly affects him. According to him, the position on the ground is that the property described as LR 209/841 on Landhies Road is LR 209/11916 which is registered in his names.

He has annexed a copy of the said title to the supplementary affidavit. His counsel Mr Wilson further submitted that once enjoined to the proceedings herein, there will be a clear direction on who owns the suit land. In addition, that the applicant is apprehensive that he might lose his right over his property contrary to Article 40 of the Constitution. He submitted that the parties to the dispute shall not be prejudiced by the orders sought and that the applicant only learnt of the dispute herein between the plaintiffs and the defendant a year after the dispute had been filed in court and that his bid to trace the court file did not bear fruit hence, the filing of the application herein much later, although the delay in lodging the said application, in his view, is not inordinate.

The application was not opposed by Mr Mosoti Advocate for the defendant the City Council of Nairobi, stating that in their view, the grant of orders being sought by the applicant will in no way prejudice the parties to the dispute herein and that it will go a long way to clarify the issues necessary to determine rights of parties to the disputed property.

Mr Wanjohi advocate for the plaintiffs vehemently opposed the applicant's application. He relied on the replying affidavit sworn by Francis Githoge Karugu, the first plaintiff. In the said affidavit, the deponent avers that the applicant Geoffrey Mwangi Meni is not the owner of the suit property as claimed. He further avers that the suit property is owned by the defendant City Council of Nairobi who allowed the plaintiffs to conduct business on it for over 20 years while paying fees.

He contends that the applicant has filed this application after inordinate delay which has not been sufficiently explained. According to them, the file herein has never been missing.

Counsel submitted that the plaintiffs do not claim ownership of the property in question but only contest their eviction and that the interim court orders issued to halt their eviction were overtly placed in the suit premises which are at a bus stage on 10th November 2012, 19th December 2011 and 1st December 2011. It is therefore in their view, not true to allege that the court file could not be traced as it has been available throughout. He prayed for dismissal of the applicant's application adding that the suit property is LR 209/841 and not LR 209/11916 as alleged by the applicant and that it is public not private property.

In response to the plaintiff's advocate's submissions, counsel for the applicant Mr Wilson contended that it had not been shown that any prejudice will be occasioned if the applicant is enjoined to the proceedings herein to assert his right. In his submissions, he pointed out that the court was being asked to determine the authenticity of the title hence the applicant must be given an opportunity to be heard on the same. He reiterated that there had been no delay in bringing the application. He mentioned that the replying affidavit that was relied on was in the first instance fatally defective as it was not dated and asked the court to strike it off the record as it offends Order 17 of the Civil Procedure Rules. Mr Mosoti asked the Court to ignore the technicalities affecting the proceedings and look at the merits of the matter as failure to date the affidavit was an oversight.

I have carefully considered the applicant's application dated 22nd January, 2013 as supported by the sworn affidavit of Geoffrey Mwangi Meni and a supplementary affidavit sworn by him on 10th June 2014.

I have also considered the submissions of all the three counsels appearing for the applicant, the plaintiffs and the defendant in response to the application. I have noted the facts of this case which was filed before the Environment and Land Court on 8th November 2011.

I have perused the entire record to establish when the matter herein became a matter for the High Court but I am unable to find any order from the Environment and Land Court referring this matter to the High Court for hearing and final determination.

The plaint clearly seeks declaratory orders, permanent injunction and general damages for unlawful eviction and or removal from a piece of land which the plaintiffs state that it belongs to the City County of Nairobi, but that they are lawfully occupying the same thus LR 209/841 Landies Road Machakos Country Bus Station and that the defendant has no colour of right to remove or evict them without giving them an alternative site since they have been paying to the defendant charges/fees in lieu of occupation on an annual basis.

The applicant herein on the other hand now wants to be enjoined to the suit as he has an interest in the matter and any orders being issued affect him directly. He claims that he owns parcel of land known as LR 209/11916 which he claims as one and the same parcel subject matter of the dispute on the ground although the plaintiffs lay claim to lawful occupation of LR 209/841.

No doubt, the issues to be determined in this matter relate to the use of occupation of ownership and title to land parcel No. LR 209/841 and or LR 209/11916. These are matters which the Constitution of Kenya 2010 contemplated under Article 162 (2) (b) should be in the preserve of the Courts to be established by an Act of Parliament.

In addition, Article 165 (5) of the Constitution specifically ousts the jurisdiction of the High Court from entertaining any matter which the courts contemplated in Article 162 (2) of the Constitution had exclusive jurisdiction to hear and determine.

The issues on the face of the record disclose claims of occupation, ownership and title to the suit land and although as initially filed, it was clear that this was Environment and Land Court matter, the Hon. Justice

Mwera was persuaded that it was a civil matter as the applicants were mere licensees, not claiming title or ownership to the suit land.

That may have been the case then but now it is different. My reading of the pleadings reveal that the plaintiff/applicants were from the onset complaining of being unlawfully evicted from the suit land which they have occupied for 20 years and beyond, eking a living out of it, without being accorded alternative site.

In my view, jurisdiction is everything. It does not matter that the parties to the suit have consented to the High Court entertaining the dispute. Parties do not confer jurisdiction. It is conferred by the Constitution and the statutes in this case.

Articles 162 (2), 165 (5) and the Land Act and the Environment and Land Court Act 2011 are very clear on what jurisdiction is conferred on the Environment and Land Court and the High Court [Art 165 (5)]. As I am not a designated Environment and Land Court Judge, but a High Court Judge, I refuse to entertain the claim and application by the intended second defendant.

I am persuaded that the facts which have now emerged following the application by the intended second defendant were not within the knowledge of Hon. Justice Mwera and the other judges who subsequently handled this matter.

Since the intended party claims that he owns title to the suit land, as his rights have to be determined through this suit, that claim of ownership to the suit land ousts the jurisdiction of this Court as it will be required to determine who owns the suit land. Accordingly I decline to make orders as prayed.

I further order that the file herein be placed before the Presiding Judge of the Environment and Land Court for further orders and directions as she may deem fit and such placement shall be effected with immediate effect.

Orders accordingly.

Dated, signed and delivered at Nairobi this 16th day of October, 2014.

R.E. ABURILI

JUDGE