



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 77 OF 2016

SAMUEL KIPKURGAT SULO.....PLAINTIFF

VERSUS

JOHN KEMBOI.....1ST DEFENDANT

SAMUEL KANYONG.....2ND DEFENDANT

WILLIAM KINICA.....3RD DEFENDANT

RULING

The application before court is dated 7.5.2018 wherein the plaintiff seeks orders that this Honourable court be pleased to enjoin the Director of Land Adjudication and Settlement, the Director of Surveys and the National Land Commission as the 4th, 5th and 6th defendants respectively and that this Honourable court be pleased to grant leave to the plaintiff to amend the Plaint dated 5th April, 2016 as per the draft annexed amended plaint. The annexed amended plaint be deemed filed upon payment of the requisite court fees.

The application is based on grounds that the plaintiff filed suit against the defendants vide a plaint dated 16th April, 2016.

That it is now necessary for the Director of Land Adjudication and Settlement, the Director of Surveys and the National Commission to be enjoined as the 4th, 5th and 6th defendants respectively in this suit for the effectual and complete adjudication and settlement of the questions involved in the main suit.

The plaintiff was awarded land parcel Uasin Gishu/Charar/23 in Charar Settlement Scheme by the Director Land Adjudication and Settlement and that upon the said award, the plaintiff was taken to the ground and shown his parcel of land which measures approximately 3.4 Ha.

That pursuant to the said award, the plaintiff faithfully paid the loan to the Ministry of Lands that the said land was subject under the arrangement of the Land Settlement Fund Trustees.

That upon completion of payment of the said loan, he was issued with a discharge from the Director of Land Adjudication and Settlement.

That the plaintiff presented the said discharge to the Land Registrar, Uasin Gishu County, pursuant to which he was issued his title deed on 23rd October, 2014.

That in the said title deed, his land is supposed to measure approximately 3.4 Ha or approximately 8.4 acres.

That however, the Director of Surveys drew the area map in such a manner that Plot No. 1 in Charar Settlement Scheme belonging to Emsilies Primary School encroached on his parcel of land resulting in substantial reduction of his land.

That the National Land Commission is the custodian of Plot No. 1 in Charar Settlement Scheme as the same is public land.

That from the pleadings, the court is likely to draw adverse inferences as against the intended defendants and in the event, they are not enjoined in these proceedings they will be condemned unheard.

That their constitutional right to be heard would be infringed upon if they are not made parties to this suit.

That the proposed amendment shall not prejudice the rights, position and interests of the other parties to this suit.

That the omission of the proposed defendants and the real issues in controversy in the plaint was inadvertent and not mala file.

That it is fair, just and expedient that this application be allowed.

That it is in the interest of justice that this application be allowed.

The supporting affidavit reiterates the grounds.

The Attorney General filed grounds of opposition stating that the Notice of Motion is incompetent, untenable, frivolous, scandalous and devoid of substance and supporting affidavit is full of falsehoods, misrepresentations, inconsistent and unsupported conclusions tailored to hoodwink this court.

That the provisions of the Government Proceedings Act Cap. 40, Laws of Kenya militates against joinder of the intended 4th, 5th and 6th defendants as such action against Government lies against the Attorney General as the protector of the rule of law and defender of public interest. The Notice of Motion is a mere grope in the dark and the persons sought to be enjoined are potential witnesses.

The applicant submits that the parties to be enjoined are adversely affected and therefore the application is merited. That amendment is important to effectively determine the issues in controversy.

The Attorney General argued that this is a boundary dispute which has been determined by the County Land Registrar. There is no need to enjoin the Director of Surveys as the boundary has been delivered. The State Counsel argues that it would be unnecessary to enjoin the Director of Land Adjudication and Settlement.

I have considered the application and grounds of opposition and rival submissions and do find that the plaintiff has not demonstrated that the Director of Land Adjudication and Settlement, the Director of Survey and the National Land commission are necessary parties as the prayers sought are for a declaration that the plaintiff is the uncontested absolute registered owner and lawful proprietor of Plot No. 23 of Charar Settlement Scheme which measures 3.4 Ha. It is not necessary to enjoin the three because the declaration is not sought against the intended parties. The Director of Land Adjudication and Settlement became functus officio on the registration of parties as owners of various parcels of land.

The property has been surveyed and boundaries determined and therefore, it is not necessary to enjoin the Director of Surveys.

The National Land Commission has been served but no substantive allegations have been made against him. Allowing the amendment and enjoining the 3 parties will be a departure from the cause of action and will be an attempt to change the cause of action to defeat the defendants' defence.

I do find that the persons sought to be enjoined are necessary witnesses and not parties. Application is dismissed. Costs in the cause.

Dated and delivered at Eldoret this 30th day of May, 2019.

A. OMBWAYO

JUDGE