



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. CIVIL APPL. NO. 2 OF 2019

THE HON. ATTORNEY GENERAL.....APPLICANT

VERSUS

BENSON WEKESA MILIMO.....RESPONDENT

RULING

1. The applicant filed a motion dated **16/1/2019** seeking that pending the hearing and determination of the application there be a stay of proceedings in **Kitale CM Land Case No. 77 of 2018** and that that suit be transferred to this court for hearing and determination.

2. The grounds upon which that application is brought are that this court has jurisdiction to issue the orders sought and that the value of the subject matter is beyond the pecuniary limit of the Chief Magistrate's Court. The application is supported by the affidavit of **Mohamed Odongo** State Counsel in the Office of the Attorney General who is in conduct of the matter. He avers that the issues raised in the subordinate court case and those raised in **ELC JR. No. 1 of 2017** are not similar but by reason of them being so closely intertwined and interconnected it is only fair and just that suit be transferred to this court for hearing and final determination. Mr. Odongo depones that the open market value of **Trans-Nzoia/Sinyererere/66** which measures approximately **6.5 acres** and **Trans-Nzoia/Sinyererere/354** which measures approximately **3.5 acres** together with the value of special damages and the unspecified loss of user, General damages and exemplary damages if computed is likely to exceed the jurisdiction of the Chief Magistrates Court and there is no to transfer the matter to this court hence the instant application.

3. The application is opposed by the defendant vide an affidavit filed on **26/2/2019** in which he depones that the applicant being not a party to the subordinate court suit has no capacity to bring this application and it is fatally incompetent and should be struck out with costs. It is averred that the defendant has converted himself into a party in the subordinate court by means of unknown legal procedure hence that argument. I have examined the record in the subordinate court case and confirmed that the Attorney General is not a party therein and therefore the submission by the application is correct. However it is clear that the Attorney General has come into that suit to provide the defendants with legal services in defence of the suit. it is further deponed that **Kitale CM Land case no. 77 of 2018** concerns the unlawful acts of the defendant for which the plaintiff therein claims damages while the substance of **Kitale ELC JR No. 1 of 2017** was the allegedly unlawful manner in which the National Land Commission had issued an eviction notice against the respondent herein who was ex-parte applicant in the judicial review notice of motion which was decided sometime back therefore rendering this court to be *functus officio*. Further the deponent avers that the National Land Commission has revoked its notice dated **27/7/2017** which prompted that judicial review vide a letter dated **24/1/2019** and the issue is now rendered otiose and that **Kitale CM Land Case No. 77 of 2018** and **ELC JR No. 1 of 2017** are unrelated and there is no constitutional matter arising in the former. The deponent disputes the claim by the applicant that the jurisdiction in the magistrates court is in excess of **Kshs.20,000,000/=**.

4. The preliminary issue that this court will inquire into is whether the instant application is incompetent having been filed by the Attorney General in his own name as the applicant rather than by the defendants in **Kitale CM Land Case No. 77 of 2018** in which he is defendant's counsel.

5. I have examined the record in the subordinate court case and noted that the correct position is that the state counsel from the Attorney General's Chambers only appeared in the matter as counsel for the defendants. The Attorney General was not enjoined in the suit as a party.

6. There are many decisions in which the courts have stated that the Attorney General may represent any party he so desires in court. **Section 34** of the **Government Proceedings Act** seems to recognize that the Government, may have an interest in a matter in which it has not yet been enjoined as a party.

7. Submission has been made by Mr. Odongo for the applicant that the 1st and 2nd defendants are Police Officers while the 4th defendant is a Principal of a public school. Further submission is that the police officers were sued for providing security during an eviction exercise, and they were not involved in the exercise for private gain but in good faith and in their official capacities. Mr. Odongo relies on **Section 2(1)** and **Section 2(3) of Cap 40** and the cases of **Ponden Farmers Cooperative Society Ltd Vs Charles Mberia & 4 Others 2017 eKLR** and **John Muthoka Mutua & others vs Joyce W. Kiombe & 3 others 2017 eKLR**.

8. The **Pondeni** case (supra) is distinguishable because the objectors therein though represented by the Attorney General filed the application in their own names. The issue therein was also whether the applicants were shielded from personal liability by virtue of certain statutory provisions, and issue not live in the instant application. In the **John Muthoka case (supra)**, application was made seeking orders, *inter alia*, that pending hearing and determination of the application the Attorney General be allowed to participate as a party to the suit in the capacity of a defendant. That decision too can be distinguished on that account.

9. On the other hand the respondents cite **Sammy Makove, Commissioner of Insurance and Another Vs Kiragu Holdings Ltd 2013 eKLR** where the court observed that it is only after a party has been enjoined to proceedings that it can purport to participate and seek relief in such proceedings. I subscribe to this school of thought.

10. In view of the above decisions I hold the opinion that whether the proceedings are deemed “government proceedings” within the meaning of **Section 2(3)** of the Government Proceedings Act or not, there should be uniformity in reference to parties in related proceedings filed separately otherwise chaos would result if non parties were allowed to seek substantive orders.

11. In my view, as long as the Attorney General has only appeared as counsel for parties in the suit and not as a substantive party he may not be allowed to bring an application for any other relief save for his joinder in those proceedings as a substantive or an interested party; to hold otherwise is tantamount to ruling that an advocate in a matter may successfully make an application for substantive orders on behalf of his client but in his own name in a matter.

12. I find that the instant application by the Attorney General is not aimed at securing his joinder as a substantive party to the suit and that he is not entitled to make that application for the stated relief of transfer of suit in his name. I therefore strike out the application dated **16/1/2019** with costs.

Dated, signed and delivered at Kitale on this 8th day of May, 2019.

MWANGI NJOROGE

JUDGE

8/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ambutsi holding brief for Odongo for Attorney General

Ms. Bett for the respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

8/5/2019