



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO 166 OF 2011**

**JOSEPH WAIHARO KURIA..... 1ST PLAINTIFF**

**PETER GICHUHI MWETHERA.....2ND PLAINTIFF**

**=VERSUS=**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**RULING**

1. On 13/11/2011, the plaintiffs brought this suit against the City Council of Nairobi, contending that at all material times they were the registered proprietors of Land Title Numbers Nairobi Block 72/3094, 72/3101 and 72/3102. Between 2007 and 2010, the defendant settled traders on the said parcels of land, thereby denying them use of the land. Consequently, parties to this suit entered into negotiations and it was agreed that the defendant would compensate the plaintiffs or, in the alternative, give the plaintiffs another parcel of land of equivalent value. The plaintiffs further contended that it was agreed that the plaintiffs would surrender the suit land to the defendant for development of a modern market, an agreement which was endorsed by the full Council through a resolution. The plaintiff added that the Council having taken their land and settled traders thereon, subsequently failed to complete the transaction. Consequently, they sought the following verbatim orders against the Council.

***a) An order of specific performance compelling the defendant to either buy original Land Reference Number Nairobi/Block 72/2272 or swaps the land with another property equivalent in value.***

***b) Costs of this suit plus interest.***

***c) Any other or further remedy that the honourable court may deem just and expedient***

2. A subsequently, parties to the suit compromised and settled the suit through a consent dated 20/9/2013 and filed in Court on 25/9/2013. The resultant consent court order provided as follows:

***1) That the plaintiffs do surrender their title over Nairobi/Block 72/2272 to the defendant forthwith***

***2) That the plaintiffs do accept a partial settlement LR No 209/1498/15 in place of Nairobi/Block 72/2272***

***3) The defendant do identify another parcel of a value that compensates the plaintiffs fully.***

***4) That the terms herein above (ii) and (iii) are offered on strict condition that the plaintiffs do forthwith surrender to the defendant title over Nairobi/Block 72/2272 and the Commissioner of Lands do issue requisite Grant in respect of Land Reference Number 209/1498/15.***

***5) That pursuant to obtaining the Grant in (iv) above and finalizing pertinent transfer over Land Reference Number 209/1498/15 and the parcel to be identified in (iii) above the suit herein be marked as settled with no order as to costs.***

***6) That the defendant do offer an alternative plot in event the Grant Land Reference Number 209/1498/15 is not obtained.***

3. Subsequent attempt by some third parties to be joined in the suit and to set aside the consent orders were declined by Mutungi J in a ruling dated 6/2/2015 in which the court held that the consent order was analogous to a final judgment and that the suit had been fully compromised. The Learned Judge further held that the Council was entitled to enter into a compromise, and having done so, it was entitled to have the consent orders executed and implemented.

4. On 31/7/2018, the plaintiffs, through the firm of Waweru Gatonye & Company Advocates, brought a notice of motion dated 31/7/2018

seeking summons compelling the County Secretary of the Nairobi City County Government to attend court to show cause why the defendant had failed, ignored and/or refused to satisfy the consent order dated 27/9/2013. That application is the subject of this ruling.

5. The application was supported by the affidavit of the 1st plaintiff sworn on 31/7/2018 in which he narrated the history leading to the institution of this suit and the subsequent compromise that culminated in the consent orders dated 27/9/2013. He added that the plaintiffs had spent the preceding seven years making attempts to get compensation from the defendant but their efforts had been in vain despite the defendant having taken their land and having made budgetary provisions in its 2016 and 2017 budget. They urged the court to issue the orders sought in the application.

6. The defendant opposed the application through a notice of preliminary objection dated 15/1/2019 in which it contended that: (i) the application offended Order 1 rule 3 and Order 8 of the Civil Procedure Rules; (ii) there had been no amendment to include the County Secretary as a party to the suit; and (iii) the due procedure in law had not been adhered to before filing the application.

7. On 17/1/2019, the court directed that both the preliminary objection and the notice of motion were to be disposed together. The preliminary objection and the notice of motion were subsequently canvassed on 13/5/2019.

8. I have considered the grounds set out in the preliminary objection and the arguments presented in support of the preliminary objection. It is true that the suit herein was instituted against the now defunct City Council of Nairobi. The consent which the plaintiffs seek to enforce was procured by the defunct Council.

9. The first and second grounds of objection relate to substitution and need to bring on board the proper party against whom enforcement should ensue. It is true that the County Government is not a party to this suit. The defunct City Council of Nairobi was established as a local authority under the repealed Local Government Act. Under Section 134 of the County Governments Act, the Local Government Act stood repealed upon the final announcement of the first election under the Constitution of Kenya 2010. The county governments established under the Constitution are the constitutional and statutory successors of the local authorities which existed prior to the first election under the Constitution of Kenya 2010.

10. What the plaintiffs therefore needed to do prior to seeking enforcement of the consent order was to bring on board the Nairobi City County Government in place of the defunct City Council of Nairobi. I therefore agree with the counsel for the defence that for proper enforcement of the judgment to take place, there is need to substitute the Nairobi City County in place of the City Council of Nairobi. In my view, because the succession is anchored in the law, the court can properly issue an order for substitution without the formalities of a formal application. There is, however, no basis for joining the County Secretary as a party to the suit. It suffices when the County Government is a party.

11. The third ground of preliminary objection relates to the procedure adopted by the applicant. In my view, that is a ground to be considered once the proper coram is constituted.

12. In light of the above findings, I will dispose the preliminary objection in the following terms:

***a) The preliminary objection is upheld to the extent that there is need for joinder of the party against whom the consent orders herein are to be enforced.***

***b) Consequently, the Nairobi City County, as successor to the City Council of Nairobi, is hereby substituted as a defendant in place of the defunct City Council of Nairobi.***

***c) The plaintiffs shall amend the notice of motion dated 31/7/2018 to reflect Nairobi City County as the defendant; provide for what it is that the defendant has failed to do; and spell out the penal consequences for non-compliance by the defendant.***

***d) Directions on the amended application will be given on a date to be set by the court at the time of delivering this ruling.***

**DATED, SIGNED AND READ AT NAIROBI ON THIS 25 TH DAY OF JULY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Muchiri for the plaintiffs/applicants

Court Clerk - June Nafula