



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC MISC. CIVIL APPLICATION (J.R) NO. 8 OF 2018

IN THE MATTER OF SECTION 152 C AND 152 F OF THE LAND ACT, 2012

AS AMENDED BY THE LAND LAW (AMENED) ACT 2016

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF PROHIBITORY

AND MANDAMUS DIRECTED AT THE NATIONAL LAND COMMISSION

REPUBLIC.....APPLICANT

Versus

THE LAND SETTLEMENT FUND BOARD OF TRUSTEES.....RESPONDENT

1.TOM AYATTA

2.NICHOLAS AYATTA.....EXPARTE

3.JOSEPH AYATTA

4.TIMOLYNE A. AYATTA

JUDGMENT

1. Pursuant to leave of the court granted on 17th September 2018, the ex-parte applicants through G.S Okoth and Co. Advocates mounted a notice of motion application dated 4th October 2018 and filed on 8th October 2018 under Order 53 Rule 3(1) of the Civil Procedure Rules, 2010. They are seeking that;

a) The Honourable Court do issue an order of **PROHIBITION** directed at the National Land Commission **PROHIBITING** the eviction of the applicants from the portion of Land Parcel No. **Kanyada/Kanyabala/1343** measuring approximately 1.6 hectares on which their homesteads and farm lands stand until and unless a subdivision is conducted dividing the land into two portions, one to be registered in favor of the applicants and the other to be registered in favour of the school (Lala Secondary School).

b) The Honourable Court be pleased to issue an order of **MANDAMUS** directed at the Land Settlement Fund Board Trustees **COMPELLING** the board to pay adequate and prompt compensation to all the persons occupying the portion measuring 1.6 hectares registered in the name of South Nyanza County Council on behalf of Lala Secondary School before requiring them to vacate the same **OR ALTERNATIVELY** surrender the 1.6 hectares back to the applicants.

c) The Honourable Court be pleased to issue an order of costs to be awarded to the applicants.

2. The application is premised on the grounds set out in the statement of facts accompanying the chamber summons for leave of the court to file the application and the annexed verifying affidavit sworn on 17th September 2018 by the 1st ex-parte applicant, Tom Ayatta. Authority to sue and act in a suit/application by the 2nd, 3rd and 4th ex-parte applicants, a letter dated 7th March 2017 from the National Land Commission (NLC) that a boundary resurvey which confirmed that the 1st to 4th ex-parte applicants homesteads were within Lala Secondary School, an

eviction notice dated 12th June 2017 issued by the said school to the 1st to the 4th ex parte applicants and a response thereto dated 13th July 2017 and marked as “TA – 1, 2, 3 and 4” respectively, are also in support of the application.

3. Briefly the ex parte applicants claim the suit land Kanyada/Kanyabala/1343 initially belonged to their father Mzee Elijah Ayatta who gave a portion of it to Lala Nursery School in 1967 on voluntary and ex-gratia basis. That the school developed to Lala Secondary School and clear boundaries marked over the years. That they received eviction notice and search which shows that the land is registered in the name of South Nyanza County Council on 8th June 1979 as it’s first registered owner. That their overriding rights as occupants thereon for over 70 years were never considered.

4. In view of the foregoing, the applicants commenced the instant matter. At paragraphs 15 and 16 of his verifying affidavit, the first applicant stated thus:-

i. THAT I consequently pray to the court to make an order rectifying the register for land parcel No. Kanyada/Kanyabala/1343 by deleting the name of South Nyanza County Council and subdividing the same into two portions wherein one portion will be registered in the name of the applicants to share equally and the other portion to be registered in the name of South Nyanza County Council as awarded to the school.

ii. THAT I pray to the Honourable Court that the County Land Registrar and Surveyor do proceed to Land Parcel No. Kanyada/Kanyabala/1343, measure the portions occupied by the school and that occupied by us in the presence of all parties as clearly demarcated on the ground file a report and the report to help in directing the size of land that the school and the plaintiffs will be awarded.

5. The respondent was duly served as shown on affidavit of service sworn on 11th December 2018. The respondent failed to file and serve any reply to the application or at all.

6. The application was canvassed by written submissions further to directions and order of this court given on 13th December 2018. So, the ex parte applicants’ counsel filed submissions dated 8th July 2019 which I note accordingly.

7. Learned counsel for the applicants urged this court to grant the orders sought in the application. Counsel gave the facts of the case and the applicable law including **sections 152(A), 152 (F) (1) & (2) and 98 of the Land Act, 2016 (2012)** as well as **Articles 27(1) and 40(1) of the Constitution of Kenya 2010** to buttress his submissions. Counsel further relied on the following authorities;

a) Ibrahim Sangor Osman -Vs- Minister of State for Provincial Administration and Internal Security e KLR (2011) [Constitutional Petition No. 2 of 2011].

b) Kenya Re-Insurance Corporation -Vs- National Land Commission (2018) eKLR.

8. I have duly considered the entire application as well as the accompanying documents. I also note the submissions including the authorities cited therein by counsel for the applicants. To that extent, I have the said ex parte applicants satisfied the threshold for the grant of the orders sought in the application?

9. The remedy of judicial review is concerned with the decision making process and not with the merits of the decision; **see Republic v Kenya Revenue Authority ex-parte Yaya Tours Ltd (2008) eKLR and also Kenya Reinsurance Corporation case (supra).**

10. The applicants stated that they have resided on the suit land, Kanyada/Kanyabala/1343 since 1930s. That their deceased father, Mzee Elisha Ayatta who was the owner of the entire suit land gave out a portion of the land to the school without compensation either from the school or the government. That the suit land has been registered in the name of the school without due compensation and regard to the rights of the applicants residing thereon.

11. The applicants further stated that a statutory notice of eviction has been issued against the applicants yet they have not been paid any compensation for the portion which was not given out to the school. That the notice has elapsed and the National Land Commission (NLC) intends to evict them therefrom.

12. **Articles 40 and 47 of the Constitution of Kenya 2010** provide for right to protection of property and fair administrative action respectively. The applicants alleged intended eviction from the suit land by the NLC. I am conscious of **sections 24, 25, 26 and 28 of the Land Registration Act 2016(2012) and section 152A of the Land Act, 2016(2012)**. It is abundantly clear that the intended eviction of the applicants from the suit land is not in consonant with **Article 152A (supra)** hence unprocedural and illegal.

13. Moreover, the eviction notice issued by the NLC does not amount to sufficient notice. The applicants were not heard on the likely effects of the notice; **see Sceneries Ltd v National Land Commission (2017) eKLR.**

14. I note that the application stands unchallenged. The respondent did not controvert it by way of affidavit evidence or at all. It is trite law that the burden was always on the plaintiff to prove his case on the balance of probabilities and such burden is not lessened even if the case was heard by way of formal proof; see the Court of Appeal decision in ***Kirugi & another v Kabiya & 3 others(1987) eKLR*** .

15. In the premises, I find that the applicants have proved that the intended eviction violates their constitutional rights to fair administrative action, dignity and secure protection to property under **Articles 47, 28 and 40 of the Constitution (supra)** respectively. They are entitled to the reliefs sought in the application.

16. Wherefore, I grant the orders of prohibition, mandamus and costs as sought in the applicants' notice of motion application dated 4th October 2018.

DELIVERED, DATED and SIGNED at MIGORI this 17th day of SEPTEMBER 2019.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Odondi Awino holding brief for G.S. Okoth learned counsel for the applicants.

Court Assistant – Tom Maurice