



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 401 OF 2017**

**LEONARD RIOPA RORIAN PASHA.....PLAINTIFF**

**VERSUS**

**ELIJAH TIENDE OLE KULA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH NKOSHEHE TOMBO.....2<sup>ND</sup> DEFENDANT**

**TIMA OLE MPAASHE.....3<sup>RD</sup> DEFENDANT**

**MRS RAHAB NYANGENA.....4<sup>TH</sup> DEFENDANT**

**AND**

**TIGER FARM (ISENYA LIMITED).....INTERESTED PARTY/APPLICANT\_**

**RULING**

The application for determination is the Intended Interested party's Notice of Motion dated the 2<sup>nd</sup> November, 2017 brought pursuant to Article 31 and 40 of the Constitution; Section 19 (3) (f) and (h) of the Environment and Land Act; Section 14, 1B & 63 of the Civil Procedure Act; Order 1 (10) , Order 40 and Order 51 of the Civil Procedure Rules and all other powers and enabling provisions of the law.

The application is based on the following grounds which in summary is that TIGER FARM (ISENYA) LIMITED (company) is the registered proprietor of land parcel number KAJIADO/KAPUTEI – NORTH / 1117 which it purchased from ELIJAH TIENDE OLE KULA. A Court Order to resurvey an area encompassing the Company land was made on the 27<sup>th</sup> September, 2017 and issued on 2<sup>nd</sup> October, 2017 and it is envisaged that a beacon will be planted on the Company's property with the consequence of alienating part of the said property. The Company has not been party to previous proceedings which give rise to these orders and the application for review is meritorious and has a chance of being reviewed in a manner favourable to the Applicant. The Company through its directors are apprehensive that its interest on land reference number KAJIADO/KAPUTEI – NORTH/1117 may be interfered with and/or eroded by the Court Order so far. That it is in the interest of justice that the Court grants audience to allow the Company participate in these proceedings in order to safeguard its interests over the said land.

The application is supported by the affidavit of SURINDER SINGH BIRDI who is the Managing Director of the intended interested party where he deposes that the company is the registered proprietor of land parcel number KAJIADO/KAPUTEI – NORTH/1117 which it purchased for valuable consideration and obtained a title deed on 25<sup>th</sup> November, 1994. He avers that prior to the transfer he was shown the boundary survey beacon of the property which is 'L' shaped and has maintained the same since then. He

claims the Company has since carried out developments notably sinking two water boreholes and some undertook other developments, which are in an advanced stage. Further that he received reports from the caretaker of the land that a group of people who identified themselves as officers from the Ministry of Lands and Physical Planning with an intention of trespassing on its property to survey and install a beacon were denied access but he saw a letter from an advocate suggesting forceful entry on 8<sup>th</sup> November, 2017. He affirms that he has since established the officers were carrying out an order of the court given in this instant suit which the company has not been a party to. He states that the company property is a sub division from land parcel number KAJIADO/KAPUTEI – NORTH/917 and that there has been a boundary dispute between land parcels numbers KAJIADO/KAPUTEI – NORTH/20, 705, 917 and 721 that had been settled by the Land Registrar. Further that the instant case was subject of court case NAIROBI HCCC NUMBER 6368 of 1990 by DAVID RORIAN PASHA who died and the case lapsed, while LEONARD PASHA the Plaintiff herein is the son to the deceased. He reiterates that when the company bought the suit land there was nothing adversely affecting it and that due to the number of official surveys carried out touching on the company property, the claim by the Plaintiff appears farfetched and cannot be sustained at this point. He insists the company is a stranger to all orders made in court and the same should be reviewed and or appropriately vacated, its rights to property being protected and it be allowed to be enjoined in the suit.

The Plaintiff opposed the application and filed a replying affidavit where he deposed that the dispute in respect to parcels number KAJIADO/KAPUTEI NORTH/20, 917, 721 and 705 was first raised with the Kajiado Land Registrar who determined the matter on 11<sup>th</sup> May, 1990. He avers that as a result of the findings by the Kajiado District Land Registrar, his late father DAVID RORIAN OLE PASHA filed a Civil Case No. 5363 of 1990 in Nairobi High Court against the Defendants herein challenging the said findings seeking the Court's intervention on rectification of boundaries. He states that the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants herein were parties to the said suit and raised a Preliminary Objection contesting it but the Court ruled against them on 15<sup>th</sup> July, 1997. Further that the father died on 9<sup>th</sup> February, 2001 and the said suit abated. He claims he filed the instant case because in 1999 his late father allocated him parts of his parcel of land KAJIADO/KAPUTEI – NORTH/20 which borders the Defendants' parcels of land and now is parcel of land is KAJIADO/ KAPUTEI – NORTH/ 6687 which he subdivided. He reiterates that the fact that the matter had been lodged in the High Court of Kenya in 1990 and against the 1<sup>st</sup> Defendant amongst others in the area is common knowledge and the Applicant cannot claim it was not aware of this when it allegedly bought part of the disputed land from the 1<sup>st</sup> Defendant. Further that it was the 1<sup>st</sup> Defendant's duty to ensure he does not sell to an innocent person any land that he had been found to have unlawfully acquired or was still in dispute. He insists failure of the 1<sup>st</sup> Defendant to disclose to the Applicant any defects in his title relating to the parcel of land that he was selling to the Applicant cannot bar him from recovering land that was wrongfully taken away from him or his late father. He avers that the Applicant having been aware of this matter being in court as it shares the same Counsel with the 1<sup>st</sup> Defendant cannot now be heard to complain against Orders of the Court to fix the proper boundaries between the parcels in question. Further that the Applicant has not shown any good reason for not making the instant application earlier than it did in this matter and in any case the beacon has already been fixed as ordered by the Court on 8<sup>th</sup> November, 2017 by the District Land Registrar, Kajiado. He further reiterates that no sufficient reasons have been advanced by the Applicant to warrant a review of the orders of the Court granted on 27<sup>th</sup> September, 2017 and any other earlier orders affecting the fixing of boundaries in respect of the parcels of land named herein.

The Plaintiff also filed grounds of opposition dated 23<sup>rd</sup> November, 2017.

Both the Applicant and the Plaintiff's Counsels submitted on the application on 4<sup>th</sup> December, 2017 where they all reiterated the facts of their respective claims as stated above. The Applicant's Counsel submitted that he was only restricting himself to the application seeking to enjoin the applicant in the suit. The Counsel for the Plaintiff insisted that the beacon in dispute was fixed by the Land Registrar on 8<sup>th</sup> November, 2017 and that if the Applicant feels its rights have been violated, it has the 1<sup>st</sup> Defendant to blame. Further that the Plaintiff's Counsel insisted the Applicant was well aware of this suit which was filed in 2007 and failed to seek to be enjoined earlier. The Applicant's Counsel reiterated that the suit had

not been concluded and the Applicant should be allowed to participate in the proceedings, and they only knew about the fixing of the beacons when he received a letter from the Plaintiff's Counsel asking the OCPD Isinya to provide security to the surveyor and does not know what happened thereafter.

### **Analysis and Determination**

Upon perusal of the intended interested party's Notice of Motion application dated the 2nd November, 2017 including the supporting affidavit, and upon hearing submissions from the Counsel for the Plaintiff and Intended Interested Party, the only issue for determination at this juncture is whether the intended interested party should be enjoined in this suit.

I note the suit herein was filed in 2007 after the Applicant had purchased his land in 1994 from the 1<sup>st</sup> Defendant. The Plaintiff insists it is too late for the Applicant to be enjoined in the suit while the Applicant insists the suit has not been concluded and it should be allowed to participate in the proceedings since orders granted affect it.

The question we need to ask is who is an interested party. Black's Law Dictionary 9th Edition, page 1232 defines an interested party as:

***"A party who has a recognizable stake (and therefore standing) in the matter"***

Order 1 Rule 10 of the Civil Procedure Rules stipulates as follows:

***'(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'***

In the case of ***Joseph Njau Kingori vs. Robert Maina Chege & 3 others*** [2002]eKLR Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party is seeking to be enjoined in a suit: ***' When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.'***

I note that the Applicant is the absolute proprietor of land parcel number KAJIADO /KAPUTEI - NORTH /1117 which he bought in 1994 through valuable consideration. I note that it claims to have been adversely affected by the orders of the Court granted on 27<sup>th</sup> September, 2017. In relying on the facts presented, Order 1 Rule 10 of the Civil Procedure Rules and Case Law above, it is evident that the Applicant indeed meets the criteria set out for an interested party and its involvement in these proceedings will be necessary to enable the court effectually and completely adjudicate upon this suit. Further that the ultimate orders and decree made in the suit herein will not be enforced without its presence in the matter. I find that the Applicant has a constitutional right of being heard in a Court of law and will allow it to be enjoined as the interested party to this suit. I further find that no prejudice which will be suffered by the Plaintiff or the Defendants herein if the Applicant is allowed to be enjoined in this suit.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 17<sup>th</sup> day of January, 2018.

**CHRISTINE OCHIENG**

**JUDGE**

**Present :**

**CC Mpoye**

**Aswan for Respondent/Plaintiff**

**Masee for Applicant/ Defendant**