



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. NO. 147 OF 2017

MAURICE OWUOR ANYANGO.....1ST PLAINTIFF/RESPONDENT

ROSEMARY AWUOR OMOLO.....2ND PLAINTIFF/RESPONDENT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST DEFENDANT/RESPONDENT

TOTAL SEC SERVICE COMPANY LIMITED...1ST DEFENDANT/RESPONDENT

RULING

1. The National Land Commission, the 1st Defendant, seeks vide the notice of motion dated 31st July 2017 to have the order issued on 22nd May 2017, following exparte hearing of the Plaintiff's notice of motion dated 2nd May, set aside and they be allowed to defend the suit. The application is based on the thirteen (13) grounds on its face and supported by the affidavit sworn by Mburu Fidelis Kamwana, the chief valuer with the commission.

2. The application is opposed by Maurice Owuor Onyango and Rosemary Awuor Omolo, the Plaintiffs, through the grounds of opposition dated 5th December 2017.

3. The application came up for hearing on the 20th March 2018 when Mr. Wambugu and Anyul, the learned counsel for the 1st Defendant and Plaintiffs respectively, made their oral submissions.

4. The following are the issues for determinations;

1. Whether the 1st Defendant has made a reasonable case for setting aside the order of 22nd May 2017.

2. Who pays the costs.

5. The court has after considering the grounds on the notice of motion, affidavit evidence, grounds of opposition, the learned counsel's submissions come to the following findings;

a) That the plaintiffs commenced this suit through their plaint dated 2nd May 2017 in which they pray for permanent injunction restraining the 1st Defendant from paying out any compensation arising out of acquisition of land parcel Kisumu/Kogony/4433 to Total Sec. Service Company Ltd, the 2nd Defendant; that the 1st Defendant be ordered to carry out a proper valuation on the suit land and the development thereon to ascertain its proper value; declaration that the plaintiffs are the registered owners of the said land and hence the ones to be compensated and costs. The Plaintiffs contemporaneously with the plaint filed the notice of motion of even date seeking for six prayers marked (a) to (f). The application was served and when it came up for hearing on the 22nd May 2017, no replying papers had been filed and the Defendants did not attend. The application was granted in terms of prayers (d) and (e) with costs in the cause.

b) That though the gazette notice on the intention to acquire the suit property indicated the 2nd Defendant as the registered owner, the Plaintiffs have availed copies of the title deed and certificate of official search issued on 20th April 2017 and both show that the Plaintiffs became the registered proprietors of the suit land on the 24th July 2007 under entry number 2. That in the absence of evidence of ownership of the suit land in favour of the 2nd Defendant, who were indicated as the owners under the gazette notice of 6th November 2015, it is only fair and just for the payment of compensation to be withheld pending the hearing and determination of this suit. That though the Plaintiffs' application dated 2nd May 2017 did not have such a prayer, as prayer (c) was for pending the hearing and determination of the application, the court finds that the issuing of such an order will ensure the parties concentrate at

complying with **order 11 of Civil Procedure Rules** to enable the main suit to be heard without undue delay.

c) That though there is no evidence of any new facts that has been proved to have been discovered by the 1st Defendant that was not within their knowledge by the time the order of 22nd May 2017 was issued, the court agrees that prayer (d) is similar to the second limb of prayer 11 (a) in the plaint and should not have been granted at the interlocutory stage.

6. That following from the foregoing, the court orders as follows;

a) That the notice of motion dated 31st July 2017 is partially granted by setting aside order (d) in the order of 22nd May 2017 and in its place granting prayer (c) of the notice of motion dated 2nd May 2017 to be in force pending the hearing and determination of this suit. That the costs be in the cause.

b) That though the orders of 22nd May 2017 was not sufficient reason why the 1st Defendant has not field their defence, the court grants the parties 30 days to comply with Order 11 of Civil Procedure Rules.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26th DAY OF September 2018

In the presence of:

Plaintiffs Absent

Defendants Absent

Counsel Mr. Anyul for the Plaintiff/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE