



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC CASE NO. 17 OF 2014

JOHN MWANIKI MAKENGE.....1<sup>ST</sup> PLAINTIFF

HARRISON MWANIKI.....2<sup>ND</sup> PLAINTIFF

VERSUS

NJERU M'NGWIKO & 68 OTHERS.....DEFENDANTS

AND

NATIONAL LAND COMMISSION.....INTENDED INTERESTED PARTY

RULING

1. By an originating summons dated 7<sup>th</sup> February 2002 brought under the provisions of **sections 14 and 28 of the Registered Land Act (Cap 300), sections 3 and 5 of the Land Adjudication Act (Cap 284) sections 7 and 38 of the Limitation of Actions Act (Cap 22), Order XXXVI Rules 3D and 3F of the Civil Procedure Rules** and all the attendant enabling provisions of the law, the original Applicant, Obadiah Irere Makenge, sought the following reliefs;

a. That the Defendants herein either by themselves, agents and/or servants be restrained by a permanent injunction from alienating and/or interfering with the quiet possession and occupation by the beneficiaries of the Estate of the late Timothy Makenge of the land parcels delineated in the schedule "A" herein below.

b. That the Plaintiff be registered as proprietor of all the aforesaid land parcels delineated in schedule "A" herein below in place of the respective Defendants thereof having become entitled to the same by adverse possession.

c. That this honourable court declares unlawful, unprocedural and irregular the purported adjudication of interests in the land parcels delineated in schedule "A" herein below prior to the application of legal notice No. 169 of 1970 and the creation of the Kiamuringa Adjudication Section.

d. That the costs of this suit be awarded to the Plaintiff.

2. The said originating summons was grounded upon the supporting affidavit sworn by Obadiah Ireri Makenge on 6<sup>th</sup> February 2002. Although the main relief sought in the summons was based upon adverse possession of the various suit properties listed in schedule A to the said summons, the supporting affidavit mainly sought to show that the suit properties constituted the ancestral land of the Applicant's father and that the adjudication process on the basis of which the Defendants were registered as proprietors was irregular and unlawful.

3. It would appear from the record that by the time of filing the said originating summons a good number of the Defendants were deceased judging by the markings and remarks against the names of about 20 Defendants. However, some of the Defendants who were still alive filed affidavits in opposition to the said summons. It was essentially contended that the Defendants were lawfully registered as proprietors pursuant to a land adjudication and consolidation process undertaken pursuant to *Legal Notice No. 517 of 1956 and Legal Notice No. 238 of 1959*.

4. The Defendants also contended that some of the reliefs sought in the summons were the subject of Embu *HCCC No. 362 of 1977* which was filed by the Applicant's late father. It was contended that the said suit abated by operation of law upon the death of the Applicant's late father, hence the instant suit was an abuse of the court process.

5. The record shows that the said originating summons has never been prosecuted over the past sixteen (16) years. The parties have basically been dealing with various interlocutory applications and counter applications. The record also shows that the original Applicant died during the pendency of the suit and he was replaced by the two administrators who were granted letters of administration *ad litem* limited to the

prosecution of the instant suit.

6. On or about 23<sup>rd</sup> November 2017 the Plaintiffs herein filed a notice of motion dated 23<sup>rd</sup> November, 2017 seeking the following orders;

- a. That the National Land Commission be enjoined as interested parties to these proceedings. (sic)
- b. That upon the admission of the intended interested parties, this honourable court be pleased to refer the dispute to the said interested parties for purposes of adjudication with a view of reaching an out of court settlement.
- c. That the said adjudication be carried out under the supervision of this honourable court.
- d. That any other consequential and/or incidental relief(s) be made to meet the ends of justice.
- e. That the costs of this application be provided for.

7. The said motion was based upon the several grounds enumerated on the face of the motion. It was contended, *inter alia*, that the suit raises issues of historical injustices which can only be resolved by the National Land Commission (hereinafter *NLC*); that orders may be issued in this suit which may be required to be implemented by NLC; that the joinder of NLC will assist the court to effectually and completely adjudicate on all the issues in controversy; and that the Plaintiffs would suffer irreparable loss and damage unless the orders sought were granted.

8. The said application was supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff on 23<sup>rd</sup> November 2017. The said affidavit simply reiterated some of the grounds set out in the motion in totality.

9. The 50<sup>th</sup> Defendant, represented by Ms Njeru Ithiga & Co Advocates filed a replying affidavit sworn on 28<sup>th</sup> December 2017 in opposition to the said application. It was contended that the said application was merely a tactic to further delay the hearing and conclusion of the suit. It was contended that the Plaintiffs had never previously joined the Ministry responsible for matters relating to land or the Land Adjudication Officers who were involved in the impugned adjudication process. It was contended that the NLC had no legal mandate to deal with private land and had no mandate to arbitrate in land disputes over private land.

10. When the said application was scheduled for hearing on 8<sup>th</sup> March 2018 the Advocates who were present consented to dispose of the Plaintiffs' said application through written submissions. The parties were given 45 days to file and exchange their respective submissions and the matter was fixed for mention on 30<sup>th</sup> May 2018 to confirm compliance and fix a ruling date. When the matter was mentioned on 30<sup>th</sup> May 2018 only the Plaintiffs and the 50<sup>th</sup> Defendant had filed their submissions.

11. The court has considered the Plaintiffs' said application dated 23<sup>rd</sup> November 2017, the replying affidavit in opposition thereto as well as the submissions on record. The main question for consideration is whether or not the Plaintiffs have made out a case for the joinder of the NLC as a party to the originating summons dated 7<sup>th</sup> February 2002.

12. The Plaintiffs submitted that the NLC has a mandate to investigate historical land injustices under **Article 67 (2) of the Constitution of Kenya** and the **National Land Commission Act**. It was further submitted that the instant case presented some form of historical injustice relating to the Plaintiffs' claim for their ancestral land. The Plaintiffs relied on the case of **Kiluwa Limited & Another Vs Commissioner of Lands [2015] eKLR** and the case of **Ledidi Ole Tanta & Others Vs Attorney General & 2 Others [2015] eKLR**.

13. The Plaintiffs further submitted that the court has a wide discretion to join additional parties at any stage of the proceedings cited the provisions of **Order 1 Rule 10 of the Civil Procedure Rules** which provide that;

**“10 (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.”** (Underlining added)

14. The 50<sup>th</sup> Defendant submitted that the mandate of the NLC was well articulated in **Article 67 of the Constitution of Kenya** which restricted its activities to management of public land on behalf of the national and county governments in addition to the other functions of a public nature. It was further submitted that the mandate of the NLC under **section 14 of the National Land Commission Act** was restricted to review of grants on disposition of public land. It was contended that the suit properties constituted private land which did not require the intervention of NLC.

15. The court is not satisfied that the presence of the NLC is necessary for the purpose of adjudicating the Plaintiffs' originating summons for adverse possession or for the purpose of impugning the land consolidation and adjudication process pursuant to which the Defendants were registered as proprietors. The court is of the view that the Plaintiffs can prosecute their case without dragging the NLC into the proceedings. The Plaintiffs shall, of course, be at liberty call any of the officers of the NLC as witnesses at the trial hereof.

16. Even if the court were to agree that the Plaintiffs' suit raises matters of historical injustice within the meaning of **Article 67 (2) (e) of the Constitution of Kenya**, the NLC may still take up the relevant complaint and investigate it without being joined as a party to these proceedings. It was never intended that the NLC would have to be sued or joined in legal proceedings every time an investigation into

alleged historical injustice was undertaken or intended to be undertaken. The court is of the view that involvement of the NLC in numerous, needless legal proceedings may hamper the discharge of its constitutional mandate and deplete its limited resources. The Plaintiffs are, however, at liberty to take administrative measures to lodge their complaint on alleged historical injustices with the NLC.

17. Although the court appreciates that it has a wide discretion to join additional parties to legal proceedings under **Order 10 Rule 2 of the Civil Procedure Rules**, such discretion must be exercised judiciously and upon good reason. It is not intended to be exercised arbitrarily, capriciously or upon sympathy. Solid grounds must be demonstrated before judicial discretion can be exercised in favour of an Applicant. See **CMC Holdings Ltd Vs Nzioki (2004) eKLR; [2004] 1 KLR 173**.

18. The court has also considered the Plaintiffs' prayer for referral of the dispute to the NLC for alternative disputes resolution. The court is aware that the NLC being a constitutional commission within the meaning of **chapter 15 of the Constitution of Kenya** is empowered to facilitate and promote the application of ADR. It is also specifically empowered **under Article 67 (2) (f)** to encourage the application of traditional disputes resolution mechanisms in the resolution of land disputes.

19. The court must, however, be alive to the enabling provisions of the Civil Procedure Rules relating to the application of alternative disputes resolution. The process of ADR must be a voluntary process. All the concerned parties should embrace it in order for it to have a chance of success. It cannot be imposed upon the disputing parties against their will. That is why the provisions of **section 59C of the Civil Procedure Act (Cap 21)** require the consent of the parties before a dispute can be referred to ADR unless the court considers it desirable to impose it upon the parties.

20. It is evident in the circumstances of this suit that the parties are not agreed on the pursuit of alternative dispute resolution. Even though the Plaintiffs appear eager to engage in alternative dispute resolution, the 50<sup>th</sup> Defendant is opposed to the idea. In those circumstances, it would not be prudent for the court to impose alternative dispute resolution on the parties.

21. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 23<sup>rd</sup> November 2017. The said is accordingly dismissed. Costs of the application shall be in the cause.

22. In view of the age of the suit, the court shall fix a mention date upon delivery of the ruling for the purpose of taking directions on the hearing of the Plaintiffs' originating summons dated 7<sup>th</sup> February 2002 which has been pending for over 16 years.

23. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **22<sup>nd</sup> day of NOVEMBER, 2018**.

In the presence of Mr Kamunda for the Plaintiffs and Ms Mutegi holding brief for Mr Ithiga for the 50<sup>th</sup> Defendant and in the absence of the rest of the Defendants.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**22.11.18**