



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC PETITION NO. 1062 OF 2015

PRESBYTERIAN FOUNDATION LIMITED.....PLAINTIFF

VERSUS

THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR & CO-ORDINATION

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

SUPREME COUNCIL OF KENYA MUSLIMS.....2ND RESPONDENT

THE COMMITTEE OF AL AQSA

MOSQUE AND ISLAMIC CENTRE.....3RD RESPONDENT

NATIONAL HOUSING CORPORATION.....PROPOSED 1ST INTERESTED PARTY

THE PRINCIPAL SECRETARY MINISTRY OF

LANDS AND HOUSING.....PROPOSED 2ND INTERESTED PARTY

THE CHIEF LANDS REGISTRAR.....PROPOSED 3RD INTERESTED PARTY

THE COMMISISONER OF LANDS.....PROPOSED 4TH INTERESTED PARTY

THE HONOURABLE ATTORNEY GENERAL...PROPOSED 5TH INTERESTED PARTY

RULING

The application for determination before the court is a Notice of Motion dated 9th May 2016 brought by the 2nd and 3rd respondents seeking the following orders:-

1. That leave be granted for the joinder of the proposed interested parties as interested parties in the suit.
2. That the interested parties be directed to file comprehensive affidavits on the history, acquisition by the petitioner and the current position of Nairobi/Block 61/639, the subject matter of this petition.

3. That the petitioner be granted leave to cross examine the deponents of the affidavits filed by the interested parties on their respective affidavits.
4. That the court makes any other order it deems fit and just for the effective, expedient and fair determination of this petition.
5. That the costs of the application be costs in the petition.

The application is premised on grounds that the 2nd and 3rd respondents filed replying affidavits herein dated 15th December 2015 stating inter alia that the petitioner's title was obtained fraudulently. The 2nd and 3rd respondents have contended that they would not be able to prove the alleged fraud satisfactorily and the court would not be able to make a just determination on the issue without the input of the proposed interested parties. The 2nd and 3rd defendants have contended that the proposed interested parties are necessary and proper parties whose joinder in the suit would enable the court to effectively and completely adjudicate upon and settle all the matters in question in the petition.

The application was supported by the affidavit of Juma Obeid Hassan, the chairman of the 3rd respondent. The 2nd and 3rd respondents averred that the petitioner was adversely mentioned in the Ndung'u Report on Illegal/Irregular Allocation of Public Land as having illegally acquired LR No. 11239 which was reserved and intended for public use. They stated that in 1904, the British colonial government allocated Kibra to the Nubians and that in 1961, the said colonial government came up with a plan of putting up 65 housing units to be purchased by Nubians.

They averred that it was term of the agreement for the purchase of the said houses that the purchasers who were residents of Kibra would forfeit the houses which they occupied to the government for demolition. They averred that the said housing project was passed down from the colonial government to the Ministry of Lands and Housing, the proposed 2nd interested party and eventually to the proposed 1st interested party. The applicants have contended that the proposed 1st interested party issued discharge of charges over the houses which had been purchased by Kibra residents. The 2nd and 3rd Respondents have contended that the Kibra housing project had set apart the suit property for public utility use. They contended that the suit property was in the circumstances not available for allocation to individuals and/or organisations.

The 2nd and 3rd respondents have sought to join the proposed 3rd and 4th interested parties to the suit because the proposed 3rd interested party issued a certificate of lease to the petitioner on 27th January 1995 while the proposed 4th interested party has been adversely mentioned by the petitioner in the proceedings before the court. The 2nd and 3rd respondents have sought to join the proposed 5th interested party in the suit in his capacity as the legal advisor to the government.

The application was opposed by the proposed 1st interested party only who filed a replying affidavit sworn by Kennedy Nyariki Nyabare on 26th May 2016. The proposed 1st interested party stated that it had no interest in this suit and that its joinder was not necessary for the determination and disposal of the issues in dispute between the parties. The proposed 1st interested party averred that it developed Kibera phase I and II Estate on land parcel Numbers 61/50 and 61/52 and that it had no connection with the suit property and had no knowledge of the history of its acquisition by the petitioner. The proposed 1st interested party contended that its joinder would be highly prejudicial since it would be required to participate in these proceedings in which it has no interest. The proposed 1st interested party averred that its joinder in the suit would not be in the public interest as it would involve the use of public funds to engage an advocate to represent it in the matter when there is no accusation or allegation of any wrong doing on its part. Finally, the proposed 1st interested party contended that its joinder would not add any value to the proceedings and would unnecessarily lead to delay and wastage of judicial time and cost.

The application was argued orally on 4th October 2016. The advocate for the 2nd and 3rd respondents

submitted that the 2nd and 3rd respondents were seeking the joinder of the proposed interested parties to the suit to enable the court determine the matter effectively. He submitted that the 2nd and 3rd respondents had indicated that the title of the suit property was acquired fraudulently and to enable them prove fraud, it was necessary for the proposed interested parties to be joined in the suit. He submitted that the suit property had been adversely mentioned in the Ndung'u Report aforesaid and had been listed therein as public land. He submitted that the 2nd and 3rd respondents had demonstrated that each of the proposed interested parties had played a significant role in the creation of the suit property and were therefore necessary parties to the suit. Counsel contended that the application had been brought to save judicial time and would obviate the need to bring another suit.

In reply, the advocate for the proposed 1st interested party submitted that the proposed 1st interested party was not involved in the issuance of land titles and was a stranger to the alleged acts of fraud. He submitted that the joinder of the proposed 1st interested party to the suit was not necessary. He averred that the proposed 1st interested party would be happy to appear as a witness in the suit and that its joinder to the suit would be a waste of time and money. The advocate for the proposed 4th interested party indicated that the National Land Commission had no objection to its joinder in the suit but was opposing the other prayers in the application.

I have considered the 2nd and 3rd respondents application together with the affidavit filed in support thereof. I have also considered the 1st proposed interested party's replying affidavit in opposition to the application. Finally, I have considered the submissions that were made before me by the advocates for the parties on 4th October 2016. The application was brought under Order 1 Rule 10(2) of the Civil Procedure Rules. I am of the view that this being a constitutional petition, the provisions of the Civil Procedure Rules on joinder were inappropriately invoked. The application should have been brought under Rules 5(d) as read with 7 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides for the joinder of parties to a constitutional petition. The 2nd and 3rd respondents have sought leave to join the proposed interested parties not as respondents or petitioners but as interested parties to the suit.

Under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, an interested party is defined as;

“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”.

What I need to decide in this application therefore is whether the 2nd and 3rd respondents have established that the proposed interested parties are interested parties in these proceedings within the meaning set out above. The dispute before the court concerns the ownership of all that parcel of land known as Nairobi/Block 61/639 which is registered in the name of the petitioner and which the 2nd and 3rd respondents have claimed to have been acquired by the petitioner irregularly. After reviewing the affidavits and other pleadings filed herein by the parties, I am satisfied that the Chief Land Registrar, the National Land Commission and the Attorney General have a duty in these proceedings to assist the parties and the court in coming to a just determination of the dispute before it. They are therefore proper parties to be joined herein as interested parties. If the said parties are joined in the suit, I am of the view that it would be unnecessary again to join the proposed 2nd interested party to the suit. As concerns the proposed 1st interested party, I am not satisfied that the 2nd and 3rd respondents have made out a case for its joinder in these proceedings as an interested party. I believe that the 2nd and 3rd respondents should be satisfied with its offer to provide any evidence which they may require.

The 2nd and 3rd respondents had also sought orders that the parties joined as interested parties be ordered to file affidavits and the 2nd and 3rd respondents be allowed to cross examine them on the same. The 2nd and 3rd defendants have not laid any basis for these prayers. The court cannot force parties to file pleadings. Orders for cross-examination of deponents of affidavits are also not granted as a matter of

course. A proper basis has to be laid for the same. The 2nd and 3rd respondents cannot obtain an order to cross-examine deponents of affidavits which are yet to be filed. I find no merit in the limbs of the application which seeks orders to compel the filing of affidavits and cross-examination of the deponents thereof.

For the foregoing reasons, the 2nd and 3rd respondents' application succeeds in part. The same is allowed in terms of prayer 1 thereof as concerns the 3rd, 4th and 5th proposed interested parties who are joined in the suit as 1st, 2nd and 3rd interested parties respectively. The interested parties shall be at liberty to file affidavits in response to the petition and to participate generally in the proceedings. The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 31st day of March, 2017

S. OKONG'O

JUDGE

In the presence of

Mr. Busiega h/b for Mungai for the Petitioner

N/A for the 1st Respondent

N/A for the 2nd and 3rd Respondent

N/A for the 1st proposed Interested Party

N/A for the 4th proposed interested Party

N/A for the 2nd, 3rd and 5th proposed interested parties

Kajuju Court Assistant