



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 157 OF 2015

LIYAVO FARMERS CO-OPERATIVE LTD.....PLAINTIFF

VERSUS

1 JAMES ONDIEKI NYAKARU

2. KEZIAH M. KIGALI

3. MARK SIBOE

4. HELEZA MANASE UMBUYA

5. MAURICE LUKWABUBI

6. SIMON KIPTOO KETER

7. THOMAS NYAMORU MISOKA

8. IRENE CHELAGATI JUMA

9. LYNETTY NEKESA

10. SAMWEL WAINAINA

11. JUMA JOSEPH NYONGESA

12. ISAAC W. WEKESA

13. JOB SAMBURUMA.....DEFENDANTS

R U L I N G

1. The applicant brought an application dated 5/1/2017. In it it sought the following orders

(1)(spent)

(2) That this honourable court be pleased to issue an order preserving the status quo over Land Reference No. 5751 Trans-Nzoia County and especially public utilities to wit Plot Nos. 214 and 84 (cattle dip) and that there shall be no developments and/or constructions to continue being implemented thereon pending hearing and determination of this application.

(3) That pending interpartes hearing prayer No. 2 granted in the interim.

(4) That the plaintiff be granted leave to amend the plaint in the terms of the annexed proposed amended plaint.

(5) (sic) costs be provided for.

2. On the 16th February, 2017 when this matter came up in court Ms. Arunga for the applicant urged that it be disposed of by way of written submissions to which Mr. Wafula for the respondents agreed.

3. On the 15th March, 2017 Ms. Arunga prayed for extra time to file her submissions. By 5th April, 2017 no submissions for the applicant had been filed and Mr. Majanga who held brief for Ms. Arunga for the applicant indicated that the applicant would not be filing any submissions and urged the court to issue a ruling date. The defendants' submissions were filed on 1/3/2017.

4. The background of this application is that the plaintiff filed a plaint on 22/12/2015. In it the plaintiff sought an order of eviction of the defendants, their servants and/or agents from **Land Reference No. 5751, Trans-Nzoia County** as the main prayers.

5. In the body of the plaint the applicant averred that the Co-operative (plaintiff) was allocated Land Reference No. 5751, Trans-Nzoia County which parcel measures **2802 acres** for settlement of its members. Some portions were set aside for public utilities and roads. **7 ½ acres** were set aside for market plots for the applicants' members.

6. The plaintiff states that in the year 2011, a civil leader of Kapsitwet Ward irregularly and fraudulently allotted **12 of the market plots** to the defendants who are non members. It is stated that the defendants have no authority to occupy and/or work on the plots which were so fraudulently acquired and that they are illegally occupying the land. The applicant has supported the application with the affidavit of its Chairman sworn on 5/1/2017. The same exhibits photographs of what is said to be ongoing construction at **Plots No. 84 and 214** which latter plot is reserved for a cattle dip. It is not clear what No. 214 is set aside for, or if it has indeed been so set aside for anything. Two copies of letters to the Chief of Kapsitwet Location one dated 19/2/2016 and dated 22/12/2016, and one to the County Surveyor, Trans-Nzoia County are exhibited in the supporting affidavit. The letters to the Chief seek to stop any construction on Plot Number 84. The letter to the County Surveyor seeks that the boundaries to two plots, Plot No. 214 and Plot No. 84 be marked properly.

7. The application is opposed. The affidavit of one Job Samburuma, the 13th respondent has been filed in reply. He states that he is the area Chief. He states that the applicant has not shown by evidence that the Chief has offered any plots for sale. He also denies ownership of the ongoing developments, saying that the area members had agreed at a location development meeting that a Chief's office be set up to assist the public with requisite public service. He further states that a request had been made to the settlement office and that the same has been approved by the Area Assistant County Commissioner. The deponent avers that according to the "plaintiff annexure 3" what is coming up at the site is a Provincial Administration Office and therefore he cannot be sued in his personal capacity since it is a public utility which is funded by the CDF Kwanza Constituency that is being constructed.

8. There is an element of truth in the 13th respondent's averments. That it is a public utility funded by the CDF Kwanza Constituency. The applicant itself deemed it proper to copy annexure "SK3" to the "Fund Manager CDF Kwanza Constituency. Regrettably, the role of each of the 1st - 12th defendants in this matter has not been clearly outlined in any of the documents filed by the parties. The affidavit of the applicant's Chairman only describes them as non members with whom the 13th defendant, the area Chief, has colluded. However, the same affidavit points a finger at the area Chief as the person erecting a structure on Plot Nos. 214 and 84.

9. From the annexures marked "JS1" "JS2" attached to the replying affidavit of the 13th defendant, it is clear that the National Government Constituency Development Fund, Kwanza Constituency is deeply involved in the construction. The schedule of materials attached to exhibit "JS2" has been endorsed by the District Architect, Ministry of Public Works, Trans-Nzoia.

10. It is clear from scrutiny of the filed documents that the 13th defendant may not be putting up a personal development on the subject plots though the 1st - 12th defendants/respondents are said to be colluding with him in doing this.

11. It is not denied that the 13th respondent is a Public Officer. **Order 29 Rule 1 states that:-**

"Order against the Government" means any order.....made in Civil Proceedings brought by or against the Government....or against a Government Department or against a Public Officer as such".

Section 12(1) of the Government Proceedings Act states as follows:

"Subject to the provisions of any other written law, Civil Proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be".

Order 29 Rule 1 states that Civil Proceedings against the Government has the same meaning as in Part III of the Government Proceedings Act.

12. In the circumstances I find that the orders sought in the application amount to orders against the Government cannot issue as against the defendants/respondents in their private capacities. It behoves the plaintiff/applicant to enjoin the appropriate parties or bodies in this suit and seek appropriate orders against them.

13. The application dated 5/1/2017 is therefore not brought as against the proper parties and is hereby struck out with costs.

Signed, dated and delivered at Kitale on this 13th day of April, 2017.

MWANGI NJOROGE

JUDGE

Ruling delivered in open court in the absence of the parties who were notified but failed to attend.

Court Assistant - Isabellah.

MWANGI NJORGE

JUDGE

13/4/2017