



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 32 OF 2013

JAMES KURIA WAIRAGU & 11 OthersPLAINTIFF

VERSUS

TRANSITION AUTHORITY 1ST DEFENDANT

BUSIA COUNTY2ND DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 13/7/2015 and filed on 15/7/2015. It was brought by the two Defendants - **TRANSITIONAL AUTHORITY** (1st Defendant) and **COUNTY GOVERNMENT OF BUSIA** - (2nd Defendant) - with the aim of enjoining NATIONAL LAND COMMISSION as a party in this suit. Precisely, the National Land Commission is intended to be the third Defendant or Interested Party.

2. The application is expressed to be brought under Section 8 of the Land Act, Article 62 (1) of the Constitution, Section 155, 158 (sic) Order 1 Rule 10 (2), Order 40 Rule 10 (i) (1) of Civil Procedure Rules, and Sections 1A, 1B, and 3A of Civil Procedure Act (Cap 21). The application has three prayers but only two are for consideration at this stage. The prayers for consideration are as follows:

Prayer (2): That pending the setting down of the suit herein for hearing, the honourable Court be pleased to order, allow or permit, and it is hereby ordered that the NATIONAL LAND COMMISSION is enjoined in this suit as a Defendant and/or Interested Party.

Prayer (3): That the costs of this application be in the course (sic).

3. The two Defendants have a tussle with twelve Plaintiffs – **JAMES KURIA WAIRAGU, JOSEPH G. NDUNGU GITU, MILLICENT MULICAH WAKONYO, MARY WANJIRU JOSEPH, SAMWEL NJENGA NDUNGU, DUNCAN GITU NDUNGU, JOHN GIBSON MWANGI KIMARI, STEPHEN WAMBUI KAJUDU, TERESA WAMBUI MAINA, ESTHER MUTHONI GITHAKWA, and JOSEPH WANYIRI GITHAKWA** – who claim, *inter alia*, that the Defendants have unlawfully entered into their private parcels of land and engaged in unauthorized use. The parcels of land are stated to be BUKHAYO/BUGENGI/3081, 3078, 3977, 3079, 3080, 2556, 1604, 2789, and 3146.

4. According to the Defendants, it is necessary to enjoin the intended party because the government of Kenya and the predecessor of the County Government of Busia have held, used or occupied the parcels of

land at one point or another. It would appear that the position of the Defendants is that of the Plaintiffs parcels of land are actually not private but public. Put differently, the Plaintiff's parcels of land are public land. The intended joinder of the National Land Commission is deemed necessary because it is the body charged with responsibility for public land.

5. The Plaintiffs opposed the application vide a replying affidavit filed on 26/4/2016. They maintained that their parcels of land are private and the intended 3rd Defendant is of no relevance or help to the proceedings. The Plaintiffs view the intended joinder as meant to delay the matter. They stated that all the relevant official documents show the parcels of land as their own, not as public land.

6. The application was meant to be canvassed by way of written submissions. But as I write this ruling, only the Plaintiffs have filed their submissions. The Defendants have had ample time to file submissions but have not done so. Infact their submissions were supposed to precede those of the Plaintiffs.

7. In the Plaintiffs submissions much is reiterated that is also in their replying affidavit. It was emphasized, for instance, that the Plaintiffs parcels for land are private, not public. The 2nd Defendant was singled out for intending to arbitrarily deprive the Plaintiffs of their land. The Plaintiffs stated that they have not been wronged by the National Land Commission and enjoining it as a party therefore would be irrelevant and a waste of precious judicial time.

8. I have considered the application and the response made to it. I have also considered the Plaintiff's submissions. And in order to have a proper appreciation of the whole matter, I have had a look too at the suit as filed.

9. The Defendants did not help their application when they failed to file submissions. It is in the submissions that one articulates the law in light of facts deemed to be supportive of the desired end. As things stand, the Defendants remain inarticulate when compared to what the Plaintiffs have offered as a rebuttal.

10. It is significant to realise that when Plaintiffs' bring parties to Court, they, alone, know their case. They know who has wronged them. When it dawns on them later that persons supposed to be included as Defendants have been left out, it is relatively easier to enjoin such parties. And all this is so because the Plaintiffs' alone know the scope of their case. It is not very much so for the Defendants when they seek to enjoin parties to the suit. It is easy to understand that they are trying to re-define for the Plaintiffs the scope of the case. It is partly for these reasons that the law seems to take the position that a person cannot be added as a Co-defendant against the wishes of the Plaintiff.

11. I also think that the Defendant intended to be enjoined needed to be served with the application. And this is so because joining a party to a suit has implications on costs and time. If the intended Defendant for instance incurs costs, who will foot the bill? Is it the Plaintiffs, who never enjoined it in the first place or the Defendant, who may have enjoined it unjustifiably? It seems to me that the Defendants wants to drag the intended defendant to Court without informing it. In all fairness, the intended defendant is not only entitled to know of the intended joinder but also to have a say concerning the intended action.

12. As further concern also, one wonders whether the Defendants herein ever considered treating the intended defendant as a witness. An approach like that is less time – consuming and less costly. And most of the time, such approach can ensure that all the information required from such intended party is availed easily and more conveniently.

13. When all this is considered, I am persuaded that the Defendant has NOT demonstrated merit in enjoining the intended defendant as a party. I therefore dismiss the application herein with costs.

Dated, signed and delivered at Busia this 19th day of July, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs:

1st Defendant:

2nd Defendant: