



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 11 OF 2016

SUMBEIYWO PRIMARY SCHOOL.....1ST PLAINTIFF

PAUL CHEBIEGO.....2ND PLAINTIFF

JACOB BARMAO.....3RD PLAINTIFF

MICHAEL MAIYO.....4TH PLAINTIFF

VERSUS

KIPSAT AIYABEI.....1ST DEFENDANT

KANGOGO CHEBIATOR.....2ND DEFENDANT

RULING

The application before me is dated 2.11.2016 brought by way of Notice of Motion by Callen Masaka, the Principal Legal Officer, National Land Commission seeking the enjoinder of the National Land Commission as either plaintiff or defendant and the Land Registrar as the defendant. The application is based on grounds that in view of the facts in issue in the suit, the proposed plaintiff/defendant is a necessary party for the determination of the dispute. That the participation of the proposed plaintiff/defendant will enable the court effectually and completely adjudicate upon and finally settle all the questions in the suit. The dispute before the court touches on ownership of L.R. No. Plateau/Chepkongony Block 2(Sumbeiywo)/65 between the plaintiffs and the defendants. The plaintiffs claim the land is a public utility land wherein the defendant claims to be the registered owners.

According to the applicant, the preliminary evidence prima facie indicates that at some point, the suit land was public property and had a public school which was subsequently closed. The administration, protection and management of public utility lands is a constitutional and statutory mandate of the intended plaintiff/defendant. The intended plaintiff/defendant is also clothed with powers to review grants and dispositions and initiate and investigate historical injustices to interests and rights in land, hence a necessary party to assist the court.

The applicant states that there exists a title to the disputed land whose legality is in question and hence the need to enjoin the Land Registrar in whom the duties of issuance of titles is invested. That without the input of custodian of public land and the institution that issues titles, this could will not effectually and completely determine the issue before it. There is no prejudice which will be caused to either to the plaintiff or defendants should the proposed parties be added but to the contrary the participation of the proposed parties will assist both parties in arriving at a just determination. This honourable court has inherent and unlimited power to grant the orders sought in the interest of justice.

Nuister Bitok Boor, the Principal Legal Officer of the National Land Commission in-charge of receiving and processing complaints in relation to legality of grant and the titles to public lands states that first proposed plaintiff/defendant is a constitutional commission with constitutional and statutory mandate among others, initiate investigations into historical land injustices, monitor the registration of all rights and interests in land and of specific relevant to this matter, manage and administer all unregistered community land on behalf of the county government as per Article 67 of the constitution. Under the National Land Commission Act, the 1st proposed defendant/plaintiff powers to gather any relevant information including requisition of documents and records to enable it review all grants and dispositions in land to establish its legality. In the instant case upon a complaint from both parties, the proposed defendant did conduct inquiries to the ownership of the land in dispute and has in its possession information over the suit land.

Kipsat Aiyabei opposes the application by stating that the application as drawn and filed is incompetent and bad in law as it offends the mandatory provisions of Article 67 and 68(c)(v) of the Constitution as read together with Section 14 of the National Land Commission Act and an abuse of the due process of this Honourable court and the defendants in *limine* apply for the said application to be struck out and or dismissed with costs. That contrary to the provisions of Order 1, Rule 10, the Commission has also not demonstrated in the application any identifiable interest or stake which they have in L. R. No. Plateau/Chepkongony Block (Sumbeiywo)/65 neither have they demonstrated that their presence is necessary to enable the court effectually and completely adjudicate upon and settled all questions involved in the suit for the Commission to merit being joined to this suit.

That further contrary to the averment in paragraphs 3, 4 and 5 of the application, the suit before the Honourable court revolves around the ownership of LR. No. Plateau/ Chepkongony Block 2 (Sumbeiywo)/65 (hereinafter subject parcel) which parcel is private land in accordance with Article 64 of the Constitution, the Defendants herein being duly registered as the absolute proprietors of all that parcel of land known as LR. No. Plateau/Chepkongony Block 2 (Sumbeiywo)/65.

The Defendants were duly registered as the absolute proprietors of all that parcel of land known as LR. No. Plateau/Chepkongony Block 2 (Sumbeiywo)/65 on the 2nd December, 1994 in the Eldoret District Lands Registry and title duly issued to them on the same day. That it is not in doubt that the Commission concedes at paragraph 8 of the Supporting Affidavit of Nuister Bitok Boor sworn on 2nd November, 2016 in support of the application that the Registrar issued title to the subject parcel of land to the Defendants. The Plaintiffs also through this suit concede that the Defendants are the registered owners of the subject parcel of land and as a result are seeking orders inter alia for "A declaration that LR. No. PLATEAU/CHEPKONGONY BLOCK 2 (SUMBEIYWO)/65 was fraudulently transferred to numbers PLATEAU/ CHEPKONGONY BLOCK 2 (SUMBEIYWO) 72 and 73 hence null and void and that the 1st plaintiff is the rightful owner."

That Article 64 of the Constitution stipulates that private land consists of registered land held by any person under any freehold tenure; land held by any person under leasehold tenure; and any other land declared private land under an Act of Parliament. That it is therefore not in dispute that LR. No. Plateau/ Chepkongony Block 2 (Sumbeiywo)/65 being registered in the name of the Defendants as the absolute proprietors in the Eldoret District Lands Registry on the 2nd December, 1994 is therefore private land in accordance with Article 64(a) of the Constitution. That title to LR. No. Plateau/ Chepkongony Block 2 (Sumbeiywo)/65 was issued to the Defendants pursuant to the repealed Registered Land Act Cap 300 Laws of Kenya which stipulated at Section 27 of the Registered Land Act that the registration of a person as the proprietor of land vested in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

Section 28 of the repealed Registration of Land Act stipulated that the rights of the Defendants as proprietors of the subject parcel whether acquired on first registration or subsequently acquired for valuable consideration could not be defeated except as provided for expressly in the Registered Land Act which provisions of the law are currently mirrored by Section 26 of the Land Registration Act. That further, Section 143 of the repealed Registration of Land Act and currently Section 80 of the Land

Registration Act states that only the court can order the rectification of the register directing that any registration of a person as an owner of land under Cap. 300 be cancelled or amended. As matters currently stand, no such order rectifying or cancelling the title to the Defendants has been made by the Honourable Court for the Commission to aver as it does at para 4 and 5 of the application that the subject parcel of land is a public utility.

That as a result of the foregoing, the Commission cannot purport to now brand the subject parcel of land as a public utility as alleged in para 4 and 5 of the application when there is no order in accordance with Section 143 of the repealed RLA or Section 80 of the Land Registration Act rectifying or cancelling the title issued by the Land Registrar to the Defendants herein over the subject parcel of land.

That arising from the foregoing, it is not in doubt that subject parcel of land is private land in keeping with Article 64 of the Constitution and that the Commission lacks the jurisdiction by virtue of Article 67 (2) (e) and 68(c) (v) of the Constitution to purport to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices into the subject parcel and recommend appropriate redress as alleged in para 7 of the application. Ultimately, the 1st defendant states that the National Land Commission should not be enjoined in the matter as it will not assist the court to settle the dispute.

I have considered the two applications, supporting affidavits and replying affidavits and do find that the issue for determination is whether to enjoin the National Land Commission, the Ministry of Education, Science and Technology and the County Land Registrar. The principles for enjoining a party are well set down in the case of *Kieran Day & 5 Others Vs Ceres Estates Ltd (in receivership) 2011 eKLR*. The gist of the decision is that under Order 1, Rule 3 of the Civil Procedure Rules, the condition precedent for the plaintiff to implement a person as a defendant in the suit is that the court must be satisfied that the presence of the party to be added would be necessary in order to enable the court to effectively and competently adjudicate upon and settle all question involved in the suit. To bring a person as a party to the suit is not a substantive right but one of procedure and the court has a discretion in its proper exercise. The object of the rule is to resolve the disputes relating to the subject matter without protracting the case and to avoid inconvenience and multiplication of the suit.

I do find that the plaintiff being a public primary school is a public body and that the 2nd and 3rd plaintiffs are officers of the public body. According to the plaintiff, the land in dispute is public land whilst the defendants claim that the same is private land allocated to the defendants. The question is, does the applicants have interest in this matter?

I do find that the school being a public school is entitled to representation by the Attorney General but can sue and be sued in the name of the school committee. The Principal Secretary, Ministry of Education can appear and testify on behalf of the school. Enjoining the Principal Secretary will not assist in the quick determination of the matter but might delay the fair hearing of the dispute. Moreover, enjoining the County Land Registrar will not assist in the quick disposal of the matter. The County Land Registrar can also be called as a witness. I do find that is it necessary to enjoin the National Land Commission as an interested party due to the fact that the National Land Commission is the custodian of public land. Since there is a dispute as to whether the land is public or private, it is necessary to enjoin the National Land Commission as an interested party. Ultimately, the National Land Commission is hereby enjoined as an Interested Party. The plaint to be amended to enjoin the National Land Commission as an interested party and be served within 7 days. The interested party to file his claim within 15 days' service.

Dated and delivered at Eldoret this 31st day of October, 2017.

A. OMBWAYO

JUDGE