



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 253 OF 2012

(Formerly Eldoret Hccc No. 56 of 2006)

KEIYO TEACHERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY.....PLAINTIFF

VERSUS

ANDREW OJAI.....1ST DEFENDANT

DISHON NDIMULI.....2ND DEFENDANT

HOSEA BETT.....3RD DEFENDANT

KENNEDY TOMNO.....4TH DEFENDANT

HON. COMMISSINER OF PRISONS.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

THE BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND.....7TH DEFENDANT

MOI TEACHING & REFERRAL HOSPITAL.....8TH DEFENDANT

RULING

Keiyo Teachers Co-operative Savings and Credit Society has brought an application to court seeking orders that the Director (land administration) of the Ministry of Lands at Nairobi be compelled to come to court and testify before the court with a view of shedding light on the issue of allocation of the subject matters of this suit. Moreover, that the testimony of the Director be adduced after the close of the defence case. The application is based on grounds that the plaintiff has obtained documents and other pieces of information on 3,000 acres of land as compensation in exchange for 500 acres of land within Eldoret Town for Eldoret town expansion and urban planning. According to the applicant, the acquisition of the suit land by the plaintiff was legal and the Director should shed light of the legality. The defendants do not want compensation.

The application is supported by the affidavit of Fidelis Kimutai who states that he has obtained information that is necessary to come on record to enable the court make an informed decision and that they do not pray for compensation of the land but pray that they be declared the legal owners of the property.

The Attorney General on behalf of the 1st – 6th defendants filed grounds of opposition stating that the orders sought in the Notice of Motion cannot be granted as the documents sought to be relied upon are neither new pieces of evidence nor do they refer or relate to the suit parcels of land or the plaintiff specifically. The plaintiff has not explained how and when the said documents came into their possession of what evidential value are the documents in the circumstances of this case. The orders sought have already been overtaken by events as the plaintiff already closed its case and no explanation has been given why the witness could not be called at the opportune time and that the documents do not prove de-gazettement of prison land. The documents are neither original nor certified copies hence their source is suspect. According to the Attorney General, the plaintiff is indolent and now engages in a fishing expedition and that the application is defective, incompetent, devoid of merits and an abuse of judicial process.

The 8th defendant filed grounds of opposition stating that the plaintiff's application is frivolous, vexatious, devoid of merit and an abuse of the court's process hence devoid of merit. That the orders sought by the plaintiff in the application are prejudicial to the defendant's case considering the fact that the defendants have given a substantial part of their testimony and the pleadings herein were closed a long time ago. That there is no nexus between the alleged 3000 acres of land given to the Prisons department to the plaintiff's claim hence re-opening the plaintiff's case to address the said issue of compensation shall not address any issues in contention in the suit more particularly whether the suit parcels were available for allocation to private entities. That the orders sought by the plaintiff in the application are untenable and shall occasion great injustice to the defendants should the same be granted.

Accordingly, the National Land Commission mandated under the law to review grants and Titles of Land had already considered the plaintiff's claim and the documents annexed to the plaintiff's application and in the exercise of its powers determined that the plaintiff's title should be revoked vide gazette Notice Number 6862 of 2017 and that the plaintiffs have not established any reasonable cause for the grant of the orders sought as they have not given a reason as to why the documents sought to be produced are being brought to court belatedly.

The gravamen of the submissions by Mr. Cheptarus, learned counsel for the plaintiff is that the application is premised on Articles 35, 40, 48, 50 and 59 of the Constitution. The Director should be called to shed light on the transaction between the Prison department and the Ministry of Lands.

Mr. Odongo, learned counsel for the 1st – 6th defendants argue that the plaintiff testified and closed his case and is not seeking to re-open the plaintiff's case and therefore there is no legal basis for the application. According to the Attorney General, the plaintiff seeks to fill gaps which he detected upon DW1 testifying and that the defendants No. 1 to 6 will be prejudiced if the evidence is allowed. Lastly, Mr. Odongo submits that the issue before court is whether the land in dispute is Prison property and whether there was de-gazettement before subdivision and allocation to the plaintiffs.

Mr. Lagat, learned counsel for the 8th respondent argues that the documents sought to be adduced do not imply any new evidence and it is not clear how the documents were obtained. Moreover, that the application is misconceived and mischievous as there is no prayer to re-open the plaintiff's case.

I have considered the application and the responses and the submissions by counsel and do find that the plaintiff testified and closed his case and therefore for such application to succeed, he needs to re-open his case. The plaintiff has not prayed for an order re-opening his case. Strangely, the plaintiff prays that the Director (Land Administration) Ministry of Lands do testify immediately after the defence case, this will be prejudicial to the defendants because the documents sought to be introduced for their worth will not be verified by the defence witnesses as they would have testified.

The plaintiff had ample opportunity to produce the documents he seeks to compel the Director (land administration) Ministry of Lands at Nairobi to produce but never took the opportunity to do so. The Director is not a witness of any of the parties to the case and therefore, cannot be compelled to attend court and give evidence in a vacuum. The plaintiff has not given the court the reasons why the evidence could not be adduced at the hearing of the plaintiff's case.

The plaintiff relies on the provision of Article 35 of the Constitution that provides for access to information. The documents sought to be produced are photocopies of public documents that are not certified. The plaintiff does not state how he procured them. Article 35 envisages a situation where the plaintiff requests for documents held by the state. The plaintiff has not demonstrated that he requested for documents from the state and the same was declined. In any event he has the documents and therefore he accessed the information.

The plaintiff further relies on Articles 48 and 50 that provides for access to justice and fair hearing. The only way the plaintiff can benefit from this Article is when he applies to re-open the plaintiff's case but not by calling a stranger to come and testify in vacuum.

In conclusion, the application is dismissed for being incompetent as it does not seek leave to re-open the plaintiff's case, it is misconceived as it seeks to have the Director testify as the last witness in vacuum after the defence case and is otherwise without basis as the plaintiff has been given an opportunity to be heard and has been heard. Costs to the defendants.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF OCTOBER, 2017.

A. OMBWAYO

JUDGE