



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 239 OF 2017

(FORMERLY MACHAKOS HCCC NO. 133 OF 2011

AS CONSOLIDATED WITH HCCC NO. 162 “B” OF 2011)

THE PRESBYTERIAN FOUNDATION.....PLAINTIFF

VERSUS

JACOB WANGORA AND 2 OTHERS.....1ST DEFENDANT

ONGATA RONGAI ENVIRONMENTAL DEVELOPMENT

ORGANIZATION.....2ND DEFENDANT

KENNEDY GITAU.....3RD DEFENDANT

MUUGANO WAS RIFT VALLEY PROVINCE

ON ENVIRONMENT AND NATURAL RESOURCES

DISTRIBUTION ORGANIZATION.....SUING THRO’

DANIEL MWARIA KANYINGI (CHAIRMAN)

THOMAS KIONJORE MACHARIA (SECRETARY)

PATRICK KINOTI M. NJOGI (TREASURER)

SUING AS SUCH OFFICIALS.....APPLICANTS

RULING

What is before Court is Applicant’s Notice of Motion dated 1st December, 2015 brought pursuant to Section 3A of the Civil Procedure Rules, Order 51 Rule 1 of the Civil Procedure Act and Section 5 & 6 of the National Land Commission Act 2012.

The application is based on the following grounds, which in summary is that HCCC No. 162 “B” of 2011 was filed by the Applicants sometimes on 20th October, 2011 together with a Notice of Motion filed on the same date while the Respondents filed HCCC No. 133 of 2011 against Jacob Wangora & 2 others in the same year. These two suits were consolidated on the 27th April, 2012 since the subject matter is the

same LR No. NGONG/NGONG/528 hereinafter referred to as the 'suit land'. The County Council of Ol Kejuado was registered as Trustees on behalf of the Ongata Rongai Community which has developed through their own efforts the following projects on the suit land which include Ongata Rongai Primary School built in 1950; Nakeel Secondary School built in 1955; Nkaimurunya Secondary School built in 1999; Ongata Rongai Nursery School built in 1964; Ongata Rongai Health Centre built in 1988 (Government); Matumaini Save the Children Centre built in 1988; Oloolaiser Water Supply started in 1978; Government Administration Offices in occupation of DO, Chief and Assistant Chief and other government Departments; Ongata Rongai Playground; Recreational Field, Local Stadium started in 1960s; and PCEA School Chapel built in 2002 on half acre.

On or about 18th December, 1999 the suit land was transferred to the Respondent **THE PRESBYTERIAN FOUNDATION** without consulting the applicants or the Ongata Rongai Community, the recipients and beneficiaries on the 152 acres land. The transfer of the suit land from the Ol Kejuado County to the Respondent was fraudulent and illegal. The former Ol Kejuado County and the current County Council of Kajiado deny any knowledge on the alleged transfer with the District Land Registrar Kajiado confirming they are not aware on how the suit land changed hands. No agreement exists between the Applicants, the Ongata Rongai Community and the Government of Kenya sanctioning the transfer of the suit land to the Respondent. No consideration has been paid by the Respondent to the interested parties but they have only obtained title to the suit land in its already existing developed state and now want to replan it and are asking the existing institutions to pay them rent. The National Land Commission, County Land Management Board will be better placed to investigate and determine how the illegal transfer was done to a private entity while the suit land was reserved for educational purposes and held in Trustee by the Ol Kejuado County. Complaint has already been lodged by the Applicants to the National Land Commission Kajiado Chapter.

The application is supported by the affidavit of THOMAS KIONJORE MACHARIA who is a Secretary of the Applicant where he avers that until 15th December, 1999 the suit land was registered in the name of the County Council of Ol Kejuado as trustees of the Ongata Rongai Community made up of various tribes and or people from different communities. He states that on 19th December, 1999 the Respondent fraudulently, illegally, without any justifiable cause caused the suit land to be transferred to itself without any consent, nor any Agreement between it and the Ongata Rongai Community, Government of Kenya and or the County Council of Ol Kejuado. He claims that the projects on the suit land are enormous and worthy of billions of shillings, have been developed for the benefit of the Ongata Rongai Community with assistance of the Government of Kenya over the years from the colonial years to date. He avers that the Respondent without any vigour of rights now has the title deed in its name and has written letters to the various projects demanding to be paid rent for projects, which have been in existence long before they fraudulently obtained the title deed. He contends that the Respondent has forwarded proposed sub division plan for approval of the suit land which will affect the existing projects that it has not developed while the Government of Kenya and County Council of Ol Kejuado not having knowledge on how the Respondent managed to get the suit land transferred to it. He reiterates that the projects and or developments lying on the suit land have never been advertised to be sold by the owners nor have been sold to the Respondent. Further that on 21st November, 2014 the Honourable Court made an order maintaining status quo. He reaffirms that it will be fair and just if the matter is referred to the National Land Commission, Kajiado Board to investigate and report back on how the suit land was transferred to the Respondent without consideration and without the consent of the Applicants, Ongata Rongai Community and the Government of Kenya. Further that the Applicants have already lodged a complaint with the National Land Commission Kajiado Board, which cannot handle the same until so authorized by Court.

The application is opposed by the Respondent who filed grounds of opposition dated 25th January, 2016 where it stated as follows:

1. The application has been brought in Mala Fides as the Applicant had already abandoned and or withdrawn their suit. The other grounds are raised in the alternative.

2. The application has no basis in law as there is no mutual agreement to refer the case to alternative dispute resolution.
3. The application is misconceived as the suit premises are not public land or connected thereto.
4. The applicant has no legal capacity to bring either the suit or any other proceedings on behalf of any society.

The Respondent filed a replying affidavit sworn by ELIJAH KINYANJUI KARERI who is the Presbytery Clerk of PCEA Kajiado Presbytery where he deposes that the Applicant is being mischievous and the application ill advised as through a letter dated the 4th June, 2015 they withdrew their suit in its entirety and gave a duly signed consent to the Respondent's advocates. Further that the applicant are but mere self seekers who were not elected or appointed by the people they purport to represent. He claims when the suit was scheduled for hearing on 22nd April, 2015 but the Applicant sought an adjournment on flimsy grounds, which case was adjourned and Applicant ordered to pay costs before the next hearing date which they have not paid. He insists there has been no agreement or even consultation on resolution of the matter to any alternative dispute resolution and the suit property is not public land or connected with historical injustices.

The Applicant, Respondent and 1st and 2nd Defendants filed their respective written submissions with only the 1st and 2nd Defendants' Counsel who highlighted theirs on 13th July, 2017 that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 1st December, 2015 including the supporting /replying affidavits plus the annexures thereon as well as the submissions herein, I find that the only issue for determination at this juncture is whether the suit herein should be stayed until the complaint lodged with the National Land Commission (NLC) Kajiado chapter over the suit land is heard and determined.

I note that the honourable Court already gave an order on 21st November, 2014 for status quo to be maintained pending the hearing and determination of the suit. I further note that the Applicant lodged a complaint with National Land Commission (NLC) on 7th October, 2015 over the suit land after the suit herein had been filed and the status quo order granted. The Applicant has relied on the case of **Shaban Mohamud Hassan & Others vs The Attorney General and Others Civil Appeal No. 281 of 2012** where it was held that courts should never fall to the temptation of usurping powers of other constitutional state organs and independent bodies.

Section 6 of the Civil Procedure Act provides as follows: **'No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.'**

A reading of this section which is couched in mandatory terms, provides the parameters for staying of suits, is indicative that there has to be a suit. I note the Applicant is seeking for the suit to be stayed because of the complaint it lodged within the National Land Commission (NLC). However I find that a complaint is not a suit.

Section 5(1) (e) & (f) of the National Land Commission (NLC) Act provides as follows: **'(1) Pursuant to Article 67(2) of the Constitution, the functions of the Commission shall be— (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;**

From this proviso, it is evident the National Land Commission's (NLC) role is to initiate investigation and recommend appropriate redress. In the instant case, I find that the National Land Commission's (NLC) findings after investigation can be used by the Court to make a proper determination of the dispute. However, the findings cannot be deemed to determine the suit. It is only the Court that can make a final determination of the suit. In the circumstances I find that the complaint before National Land Commission (NLC) cannot supersede the suit herein.

Section 13 (1) of the Environment and Land Court Act confers jurisdiction to the ELC and stipulates as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

Section 13 (2) (c) & (d) further stipulates that ' in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land'

The above provisions are distinct in terms of jurisdiction of the Environment and Land Court. In the instant case, the dispute relates to ownership of the suit land. In so far as there is a complaint lodged at the National Land Commission (NLC), this cannot deter the case from proceeding. The National Land Commission (NLC) as a commission has its mandate and can be called upon at any time to be an expert witness to provide evidence which will aid the court to make a proper determination of the dispute at hand.

I disagree with the Applicant who maintains that to proceed with this matter as it is, without full investigation by National Land Commission (NLC) is a waste of precious and scarce judicial time which could be addressed to more deserving cases. I find that by the ELC hearing and determining the instant case while the complaint at National Land Commission (NLC) is still pending does not amount to usurping powers of the said National Land Commission (NLC).

In the circumstances I find the application dated 1st December, 2015 unmerited and I dismiss it with costs.

Parties are urged to set the suit down for hearing and determination.

Dated, Signed and Delivered in Kajiado this 13th day of December 2017

CHRISTINE OCHIENG

JUDGE

Present:

Githuka for 1st and 2nd Defendant

Githuka holding brief for Plaintiff

N/A for plaintiff /Applicants in a consolidated suit

Cc - Mpoye