



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC NO. 505 OF 2014
(Being a consolidation of
Nyeri HCCC 18, 19, 21, 22, 23, 24, 25 & 26 of 2009)

RICHARD MWANGI KAMAU PLAINTIFF

VERSUS

LELEREKO LENDIRA DEFENDANTS

AND NYERI HCCC NO.31, 32, 33,34, 35 & 36 OF 2012)

FRANCIS GITHIRI MAINA & 22 OTHERSPLAINTIFFS

VERSUS

DAVID MOIYARE MALIMALI & 60 OTHERSDEFENDANTS

RULING

1. This ruling is in respect of two applications brought by the defendants in Nyeri HCCC No. 152 of 2011. The 1st application seeks to enjoin Lasite Tingisha and 1215 other persons as defendants in this suit. The applicants also want the court to visit L.R NO. 13543 (hereinafter referred to as the suit property) for purposes of establishing the issues in dispute; the number of persons residing thereon and the state, nature and extent of the applicants' occupation of the suit property.
2. It is the applicants case, that they have been in communal occupation of the suit property for over 35 years; that on account of their occupancy and developments which they have effected on the suit property, they have legitimate and legal rights over the suit property and that owing to the suits concerning the suit property, they have suffered serious prejudice.
3. Explaining that the outcome of this suit will directly and materially affect them and that they possess information and facts that can help the court in proper determination of the suit, the applicants contend that enjoining them in the suit will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suits and give closure to the seemingly intractable dispute.

4. The application is supported by the affidavit of Lasite Tingisha in which the grounds thereon are reiterated.

5. The 2nd application, which bears an even date, seeks to consolidate Nyeri HCCC No. 152 of 2011 (hereinafter referred to as 152 of 2011) with this suit (ELC No. 505 of 2014). Vide the 2nd application, the applicants also seek to enjoin the plaintiff in 152 of 2011 (Machuma Farmers Company Ltd) and/or any other person claiming to hold title to any sub-divisions of the suit property as parties to this suit. The applicants pray that they be allowed to give notice of the suit to all persons claiming to hold title to any of the sub-divisions of the suit property by public advertisement in at least two newspapers of national circulation. The applicants also want the court to visit the suit property for purposes of establishing the number of persons residing thereon; the state, nature and extent of their interest in the suit property, among other issues orders.

6. The application is premised on the grounds that vide their statement of defence and counter-claim, the applicants are claiming entitlement to the suit property; that the suit property has been divided into various parcels and the sub-divisions registered in the names of various persons; that the plaintiff in 152 of 2011 claims to be the registered owner of one of the sub-divisions of the suit property and that the plaintiff in 152 of 2011 is misusing and abusing orders issued on 9th December, 2011 and varied on 16th December, 2013 in 152 of 2011.

7. Explaining that there are several other persons claiming to hold title to sub-divisions of the suit property and who are not parties to any of the ongoing suits, the applicants contend that consolidation of 152 of 2011 with this suit is necessary for proper and final determination of the real issues in dispute and will enable the court to effectually and completely adjudicate upon the issues in dispute. According to the applicants, consolidation of the suits will also advance the overriding objective of the court

8. In reply and opposition to the application, the plaintiffs (respondents in 505 of 2014) filed the grounds of opposition dated 26th October, 2015 in which they term the application misconceived and an abuse of the court process. Explaining that there has been inordinate delay in bringing the application for joinder and terming the application *res judicata*, the respondents have pointed out that the applicants had filed a similar application, which was rejected.

9. According to the respondents, in as far as the applicants' claim is based on historical injustices, the applicants need not join the suit because that claim is properly represented by the defendants already in the suit.

10. Arguing that enjoining the applicants in this suit will be prejudicial to them, the respondents contend that joinder will only serve to delay the matter.

11. In opposition to the applications herein, counsel for the plaintiffs (respondents), **Mr. Chweya**, in 152 of 2011 filed the replying affidavit he swore on 13th November, 2013 in which he contends that the applications are incompetent, *res judicata* and an abuse of the court process. In this regard, he explains that the parties in 505 of 2014 are distinct from those in 152 of 2011; that similar prayers were sought vide the a notice of motion dated 17th July, 2014 and denied and that the applicants want to re-open the issues of joinder and consolidation without giving sufficient reasons or reasonable cause for doing so and that the applicants having refused to comply with the orders issued in the application dated 17th July, 2014 should not be given audience. Terming the applications herein an attempt to review and/or circumvent the orders issued on 9th April, 2014, Mr. Chweya avers that the applicants have come to court with unclean hands.

12. Mr. Chweya further explains that the orders issued on 9th April, 2014 relate to 5 defendants and the 528 squatters who sought to be enjoined in the suit.

13. Whilst denying the applicants' contention that the plaintiff in 152 of 2011 is abusing the orders issued on 9th April, 2014, Mr. Chweya contends that the applicants have not demonstrated how the orders have been abused. He points out that the orders of 9th April, 2014 have neither been reviewed nor set aside.

According to Mr. Chweya, the applicants' rights have not been violated by the respondents.

14. When the matter came up for hearing, counsel for the applicants, **Mr. Saitabao** reiterated the grounds on the face of the applications and urged the court to allow the applications as prayed. Besides reiterating the grounds on the face of the application, Mr. Saitabao informed the court that there are many other cases touching on the suit property. He pointed out that those cases have already been consolidated for purposes of hearing and determination. He explained that 152 of 2011 was not consolidated with the other cases because it was not at the same stage with the other suits (service of summons had not been effected). Explaining that the orders issued in this suit are being used against persons who are not parties to the suit, Mr. Saitabao submitted that consolidation of the suits, at this stage, is paramount.

15. Mr. Saitabao further submitted that the orders issued in 152 of 2011 were against 5 defendants only (were in persona and not in rem). For that reason, he argues that the order cannot be used against persons who were not parties to the suit.

16. On the the issue of joinder, he reiterated the contention that multiplicity of suits would be avoided and make it easier for the court to fully and effectually determine the issues in question.

17. Concerning the prayer that the court visits the suit property, he explained that the site visit will enable the court to see for itself the status on the ground.

18. With regard to the application for joinder of the applicants in this suit, he stated that the applicants have demonstrated their interest in the suit property.

19. Counsel for respondents, **Miss Mwai** reiterated the contention that there has been inordinate delay in filing the application for consolidation and submitted that no reason has been given for the delay in filing the application.

20. With regard to the application to enjoin the applicants to this suit, she pointed out that the applicants had brought a similar application which was rejected and submitted that the current applications are *res judicata* that application.

21. Miss Mwai reiterated the contention that the applicants' claim as far as it relates to historical injustices can adequately be prosecuted by the current defendants.

22. On the claim that the applicant have become entitled to the suit property by adverse possession, she submitted that such a claim ought to be specific and not brought in an omnibus application.

23. On his part, Mr. Chweya, made reference to an application made in Nyeri 152 of 2011 and submitted that the current applications are *res judicata* that application. He explained that in that application, the applicants sought to consolidate 152 of 2011 with the other suits concerning the suit property. He pointed out that that prayer was rejected. Mr. Chweya also pointed out that the applicants sought to enjoin 500 other persons to the suit. That prayer was also denied. According to Mr. Chweya, when the other suits were being consolidated with the current suit, consolidation of 152 of 2011 was also considered.

24. With regard to the contention that the order issued on 9th April, 2014 is being used to evict persons who are not parties to the suit, Mr. Chweya submitted that the order is against the 5 defendants in the suit, their families or any body claiming under them. Contending that the plaintiff in 152 of 2011 knows the persons living in his land, Mr. Chweya submitted that the court order should be complied with.

25. Arguing that the real defendants in 152 of 2011 have vacated the suit property, Mr. Chweya contends that the applicants are attempting to introduce new persons to the suit.

26. On the prayer for the court to visit the suit property and ascertain the status on the ground, he contended that the suit property is so vast that this court would require an helicopter and three days to do

so!.

27. In a rejoinder, Mr. Saitabao maintained that the applications are not *res judicata* and that the orders issued in favour of the respondents cannot be executed because they affect persons who are not parties to the suit.

Analysis and determination

28. From the pleadings filed in this matter and the submissions by advocates for the parties, I find the issues for determination to be:-

- a) Whether the applications herein are *res judicata*?
- b) Whether the order issued in 152 of 2011 touch on persons who are not parties to the suit hence incapable of being executed?
- c) Whether the applicants have made a case for issuance of the orders sought?
- d) What orders should the court make?

Whether the applications herein are *res judicata*?

29. With regard to this issue, having perused the record in 152 of 2011, I can confirm that vide a notice of motion dated 17th July, 2012 the applicants sought to, *inter alia*, Consolidate 152 of 2011 with Nyeri HCCC No. 18 to 26 of 2009 and to have all persons who ought to have been enjoined as defendants in 152 of 2011 (as per attached list) and any other such person be added to the suit. (Nyeri HCCC No. 18 of 2009 has now been renamed ELC No. 505 of 2014).

30. From the ruling delivered by **Sergon J**, on 16th December 2013, it is clear that the two prayers captured herein above were rejected by the trial judge. See the said ruling which at the relevant part reads as follows:-

“The other prayer and submission which the defendants made is to the effect that there are many other families who occupy the land hence they should be enjoined as parties to this suit. The plaintiff was of the view that the prayer should not be entertained because the plaintiff knows the boundaries to its land, the squatters therein who in any case are the defendants and their families. With respect, I agree with the submissions of Mr.Chweya that this suit should not be consolidated with the other pending suits because those other cases relate to different parties....”

31. Contrary to the explanation offered by counsel for the applicants that the issue of consolidation of 152 of 2011 with other suits was not considered because summons had not been taken out and served, it is clear from the above portion of the ruling by **Sergon J.**, that the issue of consolidation of 152 of 2011 with this suit (ELC NO. 505 of 2014, which was formerly Nyeri HCCC No. 18 of 2009 and the other suits) was considered and determined.

32. It cannot be in dispute that the court seized with that issue was competent to hear and determine the issue of joinder and consolidation of the suits. Having determined that the question of consolidation of 152 of 2011 and this suit was heard and determined by a court competent to try and determine it, I return a positive verdict to the first issue.

Whether the order issued in 152 of 2011 touch on persons who are not parties to the suit hence incapable of being executed?

33. With regard to this issue, having read and considered the ruling by my brother quoted herein above, I note that the issue as to whether the order sought against the applicant could issue when it was going to affect persons who are not parties to the suit was considered by the trial judge. In that regard the judge

stated:-

“There is a submission by the defendants that the boundaries of LR. No.13543/13 and the squatters therein together with their family are not known to the plaintiff and the defendants. I have already stated that the plaintiff has specifically pleaded that it knows the boundaries of its land i.e LR. No. 13543/13 and the people squatting therein. For the above reason I decline to grant the defendants the order.”

34. The order which the defendants sought and which the trial judge refused to grant was that:-

“The plaintiff/respondent by itself, its members, servants, agents and otherwise howsoever be and his hereby restrained from evicting the defendants/applicants from Land L.R No.13543/13 (the suit property) and from howsoever interfering with the defendants/applicants’ quiet and peaceful enjoyment and possession/ occupation/ownership of the suit property pending the hearing and determination of the suit.”

35. It is also noteworthy that the trial judge was aware that the order issued on 9th December, 2011 and which the defendants/applicants wanted to be set aside extended to persons who were not parties to the suit. That fact can be discerned from the judge’s observation that:-

“... I have already stated that the plaintiff has specifically pleaded that it knows the boundaries of its land i.e LR. No.13543/13 and the people squatting therein.”

36. Having found that the issues as to whether the orders issued in 152 of 2011 could be extended to persons who were not parties to the suit was considered by a court of competent jurisdiction to hear and determine that issue, and cognisant of the fact that this is not an application for review or setting aside those orders, I find and hold that the issue is *res judicata*. If the applicants or any other person was aggrieved by the orders, they ought to have approached the court for review or setting aside or appealed against the orders. For those reasons, whereas it may be possible that the orders may affect persons who are not parties to the suit, my view of that issue is that it cannot be tackled through the orders sought.

37. The upshot of the foregoing is that the applicants have not made up a case for being granted the orders sought. Consequently, I dismiss the applications with costs to the respondents.

Orders accordingly.

Dated, signed and delivered at Nyeri this 23rd day of March, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Chweya for the respondents and h/b for Ms Mwai for other respondents

Mr. Abwoni h/b for Mr. Saitabao for the applicants

Court assistant - Lydia