



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.139 OF 2011
(consolidated with HCCC No. 71 of 2008 os)

SHAMSHER KENYA LIMITED.....PLAINTIFF

=VERSUS=

- 1. FAYARD ABDULRAZAK SHIKH**
- 2. COMMISSIONER OF LANDS**
- 3. DISTRICT LANDS REGISTRAR, KILIFI DISTRICT**
- 4. THE ATTORNEY GENERAL**
- 5. MWENDWA KADENGE JEFWA**
- 6. STEPHEN KIRAMANA ILONGI**
- 7. NATIONAL LAND COMMISSION**
- 8. THE ESTATE OF BENJAMIN RAPHAEL NDUBAI.....DEFENDANTS**

R U L I N G

1. The Application before me is the one dated 9th November, 2015. In the Application, the National Land Commission is seeking for the following orders:-

- (a) THAT leave be granted to enjoin the National Land Commission in this suit as the 2nd Defendant in place of the Commissioner of Lands, the present 2nd Defendant in ELC Civil Suit No. 139 of 2011.**
- (b) THAT corollary to 1 above, the National Land Commission be allowed to fully participate in the proceedings of the suit herein by being served with all appropriate pleadings.**
- (c) THAT the 2nd Defendant in ELC Civil Suit No. 139 of 2011 be granted leave to file defence out of time.**

2. The Application is premised on the grounds that the 2nd Defendant is the defunct office of the

Commissioner of Lands, which office was a statutory office created under the now repealed Government Lands Act; that by virtue of the provisions of Section 32 of the NLC Act, the Commission inherited all the assets and liabilities of the 2nd Defendant and that prior to the coming into force of the National Land Commission, the 2nd Defendant had not filed its defence.

3. It is the Applicant's case that the National Land Commission holds vital information in relation to the subject matter having inherited all records in relation to the allocation, adjudication, transfer and transactions of the suit property; that the information held by the Commission is critical in the effectual and complete adjudication of the suit and that no party stands to suffer prejudice if the Application is allowed.

4. The 1st Defendant opposed the Application by filing the Grounds of Opposition in which he averred that the National Land Commission was enjoined in this matter by the court on 30th September, 2013; that the Commission was thereafter served with all the pleadings and that since 30th September, 2013, the Commission has had ample time within which to file its Defence but has failed to do so.

5. The 1st Defendant averred that the Application before the court is defective, bad in law and otherwise an abuse of the process of the court.

6. The Plaintiff and the 2nd Defendant supported the Application.

7. The Applicant's counsel submitted that the Commission should be allowed in the suit in place of the Commissioner of Lands; that the Commission should be granted leave to file a Defence out of time and that the Commission should be allowed on board so as to produce all the relevant documents in the matter.

8. The 1st Defendant's counsel on the other hand submitted that leave had already been granted for the Applicant to be enjoined in the suit; that the allocation of the land was done prior to the establishment of the Applicant and that it is not possible to exclude the Commissioner of Lands from the proceedings.

9. In its Complaint dated 6th September, 2011, the Plaintiff sued only the 1st Defendant. In the Complaint, the Plaintiff is seeking for a declaration that the 1st Defendant does not have a lawful or valid right, claim or interest in the suit property.

10. On 24th October, 2011, the 1st Defendant filed his Defence and counterclaim. The 1st Defendant then sought the leave of the court to join the Commissioner of Lands and the District Land Registrar vide his Application dated 4th April, 2012. That Application was allowed.

11. The 1st Defendant then filed the Amended Defence and Counterclaim, in which he enjoined the Commissioner of Lands, the District Land Registrar, Kilifi and the Attorney General as the 2nd, 3rd and 4th Defendants respectively.

12. The record shows that the Attorney General entered appearance for the 2nd, 3rd and 4th defendants on 11th October, 2012 and filed a Defence for the three Defendants on 18th March, 2013.

13. On 22nd July, 2013, this suit was consolidated with HCCC No. 71 of 2008 (OS).

14. On 30th September, 2013, the 1st Defendant's counsel applied for the joinder of the National Land Commission in the suit, which application was allowed by the court. This allowed the joinder of the National Land Commission. The court also directed the National Land Commission to file its pleadings. The court further directed the Plaintiff's advocate to extract the order and serve it on all the parties who were not in court on that day, including the National Land Commission.

15. When the matter came up for Mention on 21st November, 2013, the Plaintiff's counsel informed the court that he had extracted the order of the court and served the same on all the parties.

16. I have perused the court record and noted that the National Land Commission was served with the order of this court of 30th September, 2013 on 22nd October 2013 at 10:15 am.

17. The order of this court of 30th September, 2013 that was served on the Applicant on 22nd October, 2013 clearly stated that the Applicant had been enjoined in the suit and was required to file pleadings "it may deem fit". That order also indicated that the matter was to be mentioned on 21st November 2013 for a pretrial conference.

18. When the matter came up for mention on 21st November, 2013, the Applicant was not represented. The court then fixed the matter for hearing on 25th February, 2014.

19. For one reason or the other, the matter did not proceed for hearing on the scheduled dates until 5th November, 2014 when PW1 testified. The Applicant was not represented in court on that day although its representative had been served with a hearing notice by the Plaintiff.

20. The Applicant was not represented again when the matter came up for further hearing on 9th June, 2015, a date that had been communicated to its representative.

21. Having been enjoined in the suit in the year 2013, The Applicant cannot wait until September, 2015 to file the current Application to be enjoined in the suit and to be allowed to file a Defence out of time.

22. The Applicant has not informed the court why, even after being served with the order of the Court for joinder, it never complied with that order. Consequently, the current application can only amount to an abuse of the court process considering that the Applicant was required to join in these proceedings way before PW1 testified.

23. In any event, if the Applicant's case is that it should be enjoined in these proceedings because it is the successor in law of the 2nd Defendant, then it need not file a Defence because the 2nd Defendant had already filed a Defence. The most it can do, if indeed it is the Successor in title to the office of the Commissioner of Lands, is to proceed with the Defence that is already on record.

24. In the circumstances, and for the reasons I have given above, I dismiss the Application dated 9th November, 2015 with costs.

Dated, signed and delivered in Malindi this 15th day of **July**, 2016.

O. A. Angote

Judge