



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

MISC APPLICATION NO 123 OF 2015

REPUBLICAPPLICANT

VERSUS

COUNTY GOVERNMENT OF NAROK1ST RESPONDENT

NATIONAL LAND COMMISSION2ND RESPONDENT

EX-PARTE

PAUL TAPUKAI MERBARNE

MOKONYO OLE LETTIET

RULING

(Application by persons seeking to be enjoined as interested parties; judicial review motion questioning appointment to Land Board; interested parties being the nominees; clear interest established; application allowed).

1. The application before me is that dated 21st September 2015. It is titled a Chamber Summons application brought pursuant to the provisions of Sections 1 A (1) (2) and (3) and Section 3A of the Civil Procedure Act, 2010 and Order 1 Rule 10 (1) and (2) and Order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. It is an application by five persons who wish to be enjoined to this suit as interested parties.

2. The suit itself is a judicial review motion seeking the following orders :-

1. *Prohibition restraining the Chairman, National Land Commission from proceeding with the exercise of recruitment and/or gazetting of the Narok County Land Management Board as now constituted.*

2. *Prohibition restraining the Chairman, National Land Commission from giving effect and/or acting on the illegal communication of the Narok County Government and purporting to endorse particular persons as duly nominated as members of Narok County Land Management Board.*

3. *Mandamus compelling the Chairman, National Land Commission, to call for, advertise and carry out fresh, fair, transparent and procedural interviews for candidates to serve in the Narok County Land*

Management Board.

3. The motion is based on the following grounds:-

(a) *That the interviews for the membership of the Narok County Land Management Board were never conducted; and if so, the same were done in secret, illegally and thus null and void.*

(b) *That the persons purportedly recommended to sit in the Board are not impartial, are political appointees, tainted with bias and will not serve the people of Narok as envisaged in the constitution and the National Land Commission Act.*

(c) *That the appointment as forwarded to the Chairman, National Land Commission leaves room for abuse as the list is incomplete.*

(d) *That the appointments offend the provisions of the constitution on gender equality and ethnic balance as well as the interest of persons with special needs.*

4. The five applicants are the persons who were nominated for appointment as members of the Narok County Land Management Board. It is their view that they are necessary parties to this litigation.

5. The ex-parte applicants have opposed the application to have the five persons enjoined to this suit. Through their counsel on record, they filed a Notice of Preliminary Objection and Grounds of Opposition. They raised the following issues in their Preliminary Objection :-

(1) *The application is bad in law, incurably defective and that it ought to be struck out.*

(2) *The application is founded on a defective affidavit which ought to be struck out. Being thus unsupported the application lacks substratum and ought to be struck out with costs.*

(3) *The application will not serve any useful purpose in the proceedings herein and will only delay, prejudice and embarrass the fair adjudication of the issues herein.*

6. In their Grounds of Opposition, the ex-parte applicants raised the following grounds :-

(1) *The application is mala fides, serves no useful purpose and is only made to delay the fair trial and conclusion of this matter.*

(2) *The ex-parte applicants have no issues with the proposed interested parties and their inclusion in the matter will only compound the issues raised including the issue of costs.*

(3) *The application itself is a confirmation of the matters raised by the ex-parte applicants that the process complained of was totally tainted.*

(4) *The application seeks to introduce personal issues in a matter of serious interest and the inclusion of the interested parties will only confirm this.*

(5) *The issues raised herein have nothing against the proposed interested parties.*

7. Mr. Wambua Musembi for the ex-parte applicants in opposing the application, submitted that the application is incompetent since it is a Chamber Summons application and not a Notice of Motion as provided by Order 51 of the Civil Procedure Rules, 2010; that the supporting affidavit is incompetent as it offends the law on the jurat; that the ex-parte applicants have not demonstrated any claim; that there are other implications such as costs; and that the issues herein can properly be addressed by the respondents.

7. Mr. Kamwaro for the intended interested parties, submitted on his part that the five applicants will be affected by the orders made in this suit and have material that can assist this court. He submitted that

Order 19 Rule 7 permits the court to accept a defective affidavit and that Article 159 of the Constitution should be applied.

8. I have considered the application and arguments of counsel. I do agree with Mr. Musembi that the application ought to be a Notice of Motion and not a Chamber Summons application. Order 51 provides as follows :-

Procedure [Order 51, rule 1.]

All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

9. The rules under which this application is brought do not provide for such application to be by way of Chamber Summons. The application as drawn is therefore defective. But I do not think that this is such a defect that would make me dismiss the application. No prejudice has been caused to the ex-parte applicants as the application was heard in open court. It was heard as a Notice of Motion should and I do not see what prejudice they have suffered. I therefore decline to dismiss the application owing to this defect.

10. On the affidavit, the quarrel that the ex-parte applicants have is that the last paragraph of the affidavit, which provides inter alia that "what is deponed is true..." is on a separate page only with the deponent's signature, without any other substantial paragraph. I personally have no problem with such affidavit. I wonder what difference it would make to any respondent if there are other substantive paragraphs together with such paragraph. It changes nothing in the affidavit and does not alter in any way the mode of response by the respondent. If there is a defect, of which I doubt, such defect does not mean that the affidavit cannot be accepted by court. At most it would be an irregularity in form or a technicality and Order 19 Rule 7 does permit the court to accept such affidavit. The provision is drawn as follows :-

Irregularity in form of affidavit [Order 19, rule 7.]

The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

11. I see no merit in the submissions that the supporting affidavit should be struck out.

12. Going to the substance of the application, I am of the view that the application should be allowed. The applicants are the persons who were nominated to sit in the Narok County Land Management Board. This suit seeks to nullify their nomination. I think that they deserve to be heard as they will be the most affected by this suit. They have, through this application, shown an interest to be heard and I will be the last to shut them out. I am of the view that they are necessary parties to this litigation and they may have some material that will assist this court in arriving at a just determination.

13. I therefore allow this application and order that the five applicants be enjoined to this suit as interested parties. I also give them permission to file any affidavit/s that they may deem suitable for the determination of the issues in this suit. The said affidavits to be filed and served within 7 days.

14. I make no orders as to costs.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22ND day of October 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Ondande holding brief or Mr. Wambua Musembi for ex-parte applicant.

No appearance on part of M/s Kamwaro & Co for intended interested parties/applicants

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU