



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: WAKI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 45 OF 2017

BETWEEN

FANIKIWA LIMITED APPELLANT

AND

SIRIKWA SQUATTERS GROUP 1ST RESPONDENT

THE COMMISSIONER OF LANDS 2ND RESPONDENT

THE CHIEF REGISTRAR OF TITLES 3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATION

& SETTLEMENT..... 4TH RESPONDENT

DIRECTOR OF SURVEY 5TH RESPONDENT

DISTRICT LANDS OFFICER,

UASIN GISHU DISTRICT..... 6TH RESPONDENT

LONRHO AGRI BUSINESS (EA) LTD 7TH RESPONDENT

MARK KIPTARBEI TOO 8TH RESPONDENT

DAVID.K. KORIR 9TH RESPONDENT

HIGHLAND SURVEYORS 10TH RESPONDENT

KENNEDY KUBASU 11TH RESPONDENT

AND

AHMED FEREJ & 60 OTHERS 1ST APPLICANT

RICHARD KIRUI & 15 OTHERS 2ND APPLICANT

STANBIC BANK LIMITED 3RD APPLICANT

KCB BANK LIMITED 4TH APPLICANT

ECO BANK LIMITED 5TH APPLICANT

LILY CHEBET..... 6TH APPLICANT
NATIONAL BANK OF KENYA LIMITED 7TH APPLICANT
KENYA WOMEN MICROFINANCE BANK (PLC) 8TH APPLICANT
COMMERCIAL BANK OF AFRICA 9TH APPLICANT

(Being an application for joinder orders and joining the interested parties pending the hearing and determination of an appeal from the judgment of the Environment and Land Court of Kenya at Eldoret (Ombwayo, J.) dated 9th February, 2017

in

E & L Petition No. 4 of 2016)

RULING OF THE COURT

[1] **Fanikiwa Limited** is the appellant in Civil Appeal No. 45 of 2017 in which it seeks to impugn the judgment that was delivered on 9th February, 2017, by the Environment and Land Court (Ombwayo J) in Petition No. 4 of 2016. Following an application by **Prof. Ojienda**, counsel for the appellant, the Court made orders on 1st October, 2018, *inter alia*, that the appellant publish, within fourteen days, a notice to the public in one of the daily newspapers with a wide circulation of the existence of the judgment appealed from and its effect, and the existence of the appeal and two other appeals.

[2] As a result of the publication of the said notice, nine applications have been filed and canvased before us in which respective parties are seeking to be joined in the three appeals as interested parties under **Article 40(6), 50(1) & 159** of the **Constitution, section 3A** and **3B** of the **Appellate Jurisdiction Act** and **Rule 77 & 90** of the **Court of Appeal Rules**.

[3] The litigation resulting in the impugned judgment was initiated by Sirikwa Squatters Group, (the 1st respondent, herein referred to as “Sirikwa Squatters.” This was a registered self-help group with a membership of over 500 members. In the petition filed in the High Court, Sirikwa Squatters claimed, *inter alia*, that they were entitled to land parcels known as LR N0 9606, 9608, 742/2, 7739/7R, 12398, 10793, and 10794, all in Uasin Gishu District, hereinafter collectively referred to as the “suit property.”

[4] Sirikwa Squatters claimed that all the members of the society were descendants of persons who originally occupied the suit property, but who were forcefully evicted from the suit property by white settlers in the 1920’s. As a result, the members’ grandfathers, fathers, themselves, their children and grandchildren, worked as farmhands and labourer’s for the registered proprietors of the suit property. The registered proprietors of the suit property changed severally, and at the time of filing suit, the land was registered in the name of the 7th respondent Lonrho Agri-Business East Africa Limited (hereinafter “Lonrho”).

[5] Following a request made by Sirikwa Squatters to the former President of the Republic of Kenya, the President approved that the suit property be allocated to Sirikwa Squatters. This was confirmed by the Director of Land Adjudication and Settlement, and the Commissioner of Lands through correspondence. Sirikwa Squatters were, however, aggrieved that efforts to have the suit property subdivided and titles issued to them did not bear fruit. This was because the Commissioner of Lands (2nd respondent), the Chief Registrar of Titles (3rd respondent), the Director of Land Adjudication and Settlement (4th respondent), the Director of Survey (5th respondent) and the District Lands Officer, Uasin Gishu District (6th respondent) failed to implement the Presidential directive, or to execute the necessary conveyance, and/or issuance of titles to Sirikwa Squatters. Instead, they fraudulently issued titles to other individuals including; Lonrho and the 8th respondent Mark Cheptabei Too (Mark Too), without following any due process. Sirikwa Squatters complained that they had been deprived of their constitutional rights, protection of right to property, and rights to acquire and own property.

[6] Consequently, Sirikwa Squatters petitioned the High Court seeking, *inter alia*, a declaration that their rights and fundamental freedom and protection to right to property had been violated or infringed or was about to be violated in regard to the suit property through the arbitrary, issuance of titles to Lonrho and Mark Too amongst others; and seeking orders cancelling all the titles or any title issued and/or emanating from the suit property as well as damages for breach and/or violation of their constitutional rights.

[7] The 2nd, 3rd, 4th, 5th and 6th respondents objected to the petition through a replying affidavit sworn by R. J. Simiyu, the then District Land Officer, Uasin Gishu. Simiyu exhibited copies of original grants and respective deed plans contending that the suit property was originally registered under the Registration of Titles Ordinance (now repealed) under the parcel numbers that were given, but that subsequently, the titles were surrendered and new titles registered under the Registration of Titles Act. Simiyu traced the ownership of several of the plot numbers and confirmed that all the respective parcels of the suit property were transferred to East Africa Tanning Extract Company who subsequently changed its name to EATEC Limited and then Lonrho. Part of the land was compulsorily acquired by the Government for public purposes for the construction of Moi International Airport, and the rest of the suit property was private property and therefore the allegation of breach of duty and the declaration sought by Sirikwa Squatters were outside the scope of the 2nd to 6th respondents’ constitutional and statutory duties.

[8] Lonrho responded to the petition through a replying affidavit sworn by its Property Manager, one **David K. Korir (Korir)** who is also

the 9th respondent. Korir swore that the suit property, as per the numbers quoted by Sirikwa Squatters does not exist; that the land parcels were subdivided on registration and converted from Registration of Titles Act to Registered Land Act; that the properties were subsequently sold and transferred to 3rd parties with full Government approval, and that the land was set aside for squatters and allocation done to all genuine squatters.

[9] From the documents that were produced by Korir, the land parcels forming the suit property were originally registered under the Registration of Titles Ordinance Cap 160 (now repealed) and grants issued to a company known as Plateau Wattle Company Limited. The land parcels were subsequently sold and transferred to East Africa Tanning Extract Company between the years 1964-1965. East Africa Tanning Extract Company changed its name to EATEC Limited and later to Lonrho Agri Business (East Africa) Limited. The titles to the land parcels contained in the suit property were later surrendered to the Government, who later issued freehold titles to Lonrho under the Registered Land Act and the suit properties registered as Pioneer Ngeria Block 1 (EATEC) 707, 5903, 7068, 7739 and 3395 respectively.

[10] Mark Too who was a Director of the appellant company, also swore an affidavit in response to the petition, in which he averred that he is the registered owner of land parcels Pioneer Ngeria Block 1 (EATEC)/7079, 7080, 7073, 7075, 7074, 7076, 7077 and 7078, having lawfully purchased subdivisions of land parcels forming part of the suit property from Lonrho on a willing buyer/seller basis and paid the full consideration for the parcels of land.

[11] In his judgment, the learned judge found that Sirikwa Squatters had a legitimate expectation to be registered as the owners of the suit property. This was because the Director of Land Adjudication and Settlement, and His Excellency the then President of the Republic, had approved the resettlement and issuance of titles to the suit property to Sirikwa Squatters, and that the legitimate expectation gave Sirikwa Squatters the *locus standi* to challenge the action of the 2nd to 6th respondents in failing to allocate the suit properties to them. In addition, the learned judge found that the titles to the suit properties having been surrendered to the Government, the suit property reverted to the Government and was to be managed under the regime of the Government Lands Act and not the Registered Land Act. Consequently, the conversion of the registration of the suit property to the Registered Land Act and issuance of title to Lonrho was not lawful, and therefore all consequent transactions were null and void. The learned judge concluded that Sirikwa Squatters had established their claim under the principle of legitimate expectation, and directed, *inter alia*, that all the resultant titles or any title issued by or emanating from LR. No. 9606, 9607, 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu, issued to Lonrho and Mark Too or any beneficiaries be cancelled and the register rectified accordingly.

[12] Lonrho, being aggrieved by the judgment and orders, filed Civil Appeal No. 44 of 2017 in which it challenged the judgment in regard to, *inter alia*, the finding of the learned judge, that the conversion of the suit properties to the regime of the Registered Land Act (repealed) was unlawful; and the learned judge's failure to find that the suit property comprised land lawfully acquired by Lonrho and its predecessors, and hence was not available for alienation and/or allocation to Sirikwa Squatters.

[13] The appellant who was not a party to the petition filed by Sirikwa Squatters, but who is the registered proprietor of several of the titles under the Registered Land Act, was also aggrieved by the judgment, as it affected its proprietary interests in the suit property. The appellant therefore filed a memorandum of appeal dated 13th April, 2017, challenging the judgment. This is now Civil Appeal No. 45 of 2017. Similarly, Mary Jepkemboi Too and Sophie Jelimo Too, the joint administrators' *ad litem* in the estate of Mark Too (who is now deceased), also filed Civil Appeal No. 68 of 2017. By an order made by this Court, Civil Appeals No. 44 of 2017 and No. 68 of 2017 have been consolidated with Civil Appeal No. 45 of 2017, with Civil Appeal No. 45 of 2017 as the lead file.

[14] Among the applicants who sought to be joined in the suit were; **Ahmed Ferej & 60 others** (1st applicants), who were registered proprietors of subdivisions of the suit property derived from LR No. 9606, 9607, 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794. They contended that they were not parties in the suit filed by Sirikwa Squatters, and yet the learned judge made an order cancelling their titles, thus comprising their right to property without giving them an opportunity to be heard. They therefore sought to be joined in the appeal to enable them ventilate their case.

[15] **Richard Kirui & 15 Others** (2nd applicants), also sought to be joined as parties in the appeal, having derived their titles from some of the cancelled titles. They contended that they were innocent purchasers for value without notice, and that their right to natural justice was breached as they were not heard. **Lily Chebet** (6th applicant) was another party who sought to be joined in the proceedings as an interested party. Lily Chebet claimed to have purchased title number Pioneer/Ngeria Block 1(EATEC) 1064 from **Joseph Kiptanui Serem** whose original title was known as Pioneer/Ngeria Block 1 (EATEC) 2172 which he had purchased from Lonrho, and subdivided. She maintained that she was an innocent purchaser for value without notice, and the cancellation of the titles emanating from the suit property, adversely affected her title.

[16] Stanbic Bank Limited (3rd applicant), Kenya Commercial Bank Limited (4th applicant), Eco Bank Limited (5th applicant), National Bank of Kenya (7th applicant), Kenya Women Micro Finance Bank (PLC) (8th applicant), and Commercial Bank of Africa (9th applicant), also each sought to be joined in the appeal in order to protect their interests having advanced substantial sums of money to its customers on the strength of the cancelled titles. They contended that their interests as chargees are affected by the judgment and yet they were not parties to the suit nor were they heard.

[17] **Prof. Ojienda**, learned counsel for the appellant in Civil Appeal No. 45 of 2017 and Civil Appeal No. 68 of 2017, did not oppose the application as he appreciated that none of the parties seeking to be joined as an interested party was heard, and that they each stand to suffer prejudice as their titles have been nullified without them being given a hearing.

[18] **Ms Chesoo**, learned counsel for Lonrho, Mark Too and David K. Korir also did not oppose the application. Likewise, **Mr. Nyairo** who was appearing for the 10th & 11th respondents did not oppose the motion. **Mr. Wabwire** representing the 2nd, 3rd, 4th, 5th and 6th respondents also informed the court that they had no objection to the applications

[19] Sirikwa Squatters strenuously opposed the applications to enjoin the interested parties. In an affidavit sworn by its chairman, **Benjamin**

Chepng'otie Ronoh, Sirikwa Squatters maintained that none of the applicants have demonstrated any sufficient interest to warrant being joined in the appeal; that the applicants had a chance to defend themselves at the ELC as the suit proceeded, but none of them participated; that the applicants cannot all claim not to have been aware of the suit at the ELC yet the matter had been widely publicized as it proceeded during the trial; that the financial institutions are only financiers and lack any claim worth protecting, as the charged title documents are essentially a contract between the bank and the customer, the result of which is a totally different transaction that does not involve the dispute in this appeal.

[20] **Mr. Arusei**, learned counsel for Sirikwa Squatters submitted that none of the applicants had met the required threshold for being joined as an interested party; that the applicants derive their titles from Lonrho and Mark Too, whose defence the trial court had the opportunity to hear and consider; that the applicants would not therefore, have anything useful to offer to the Court should they be joined as interested parties. Counsel argued that since the main issue is before Court on appeal, the applicants can move to the ELC for other remedies. In addition, counsel faulted the applicants for not being candid by claiming that they were not aware of the existence of the suit, when the proceedings resulting in the judgment, received a lot of media coverage. Counsel therefore urged the Court not to grant the prayers sought.

[21] The issue here is whether the applicants should be joined in the appeal as interested parties. Under **Order 1 Rule 10(2)** of the **Civil Procedure Rules**, the High Court has powers to order any person to be enjoined as a party in a suit at any stage of the proceedings. The section is wide enough to cover joining an interested party. There is no equivalent rule under the Court of Appeal Rules. Nevertheless, **Rule 77** of the **Court of Appeal Rules** provides that an intended appellant must within seven (7) days of lodging the notice of appeal, serve copies of the notice on all persons directly affected by the appeal. It is in this regard, that the appellant sought and obtained leave to serve the notices by way of advertisement in the local daily, for the benefit of persons likely to be affected by the appeal.

[22] The question is whether the applicants who are seeking to be joined in the appeal as interested parties are persons likely to be affected by the appeal, as to justify their being joined and participating in the appeal. In *Attorney General vs Kenya Bureau of Standards [2018] eKLR*, this Court following *JMK V MWM & another [2015] eKLR*, observed that:

“... the Court can, at any stage of the proceedings, upon application by either party or suo motto, order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added/joined as a party. The guiding principle in joinder of parties is that:

‘all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.’ ”

[23] In *Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 others [2014] eKLR*, (Petition No. 12 of 2013), the Supreme Court adopting the definition of interested party in Black's Law dictionary, ninth edition, that is, “a party who has recognizable stake (and therefore) standing in a matter” concluded that:

“an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

[24] In *Communications Commission of Kenya & 3 others vs Royal Media Services Limited & 7 Others [2014] eKLR*, the Supreme Court having referred to the reasons for joining a party as stated by the High Court in *Meme vs Republic [2004] 1 EA 124*, pointed out the following as pertinent questions: First, what is the intended interested party's stake and relevance in the proceedings; and secondly, will the intended interested party suffer any prejudice if denied joinder?

[25] With the above in mind, we have considered the applications and the rival submissions. It is evident that all the applicants have one thing in common. They all claim to be affected by the judgment of the learned judge and seek to protect their interests over parcels of land from the suit property following the surrender of titles originally issued to Lonrho and the conversion of the titles to freehold titles being Pioneer & Ngeria Block 1 (EATEC) 707, 5903, 7068, 7739 and 3395, respectively and subsequent subdivisions which the court has ordered cancelled.

[26] The applicants who are seeking to be joined as interested parties fall into two main categories. First are those who are claiming proprietary rights acquired as innocent purchasers from Lonrho and Mark Too; and second are financial institutions who claim to be holding titles to the suit properties as securities for advances made to their customers.

[27] As regards the first category, it is evident that the judgment of the ELC is prejudicial to them, as their titles have been ordered cancelled. It was argued that their being joined in the appeal will not add any value as the ELC had the benefit of hearing Lonrho and Mark Too, from whom they derive title. While it is true that some of the applicants derive title from Lonrho or Mark Too, some derive title from third parties who had acquired Title from Lonrho and Mark Too. It is evident that all the applicants who fall into this category were not parties in the proceedings in the ELC and therefore did not have an opportunity of being heard. The effect of the judgment is highly prejudicial to them, as they stand to lose their property which is a protected right under the Constitution. Clearly, these applicants have a stake in the outcome of the appeal.

[28] On the flip side, Sirikwa Squatters who have strenuously opposed the application will not suffer any prejudice if the applicants who claim proprietary rights are joined in the appeal. This is an appropriate matter in which the Court must not only give an opportunity to these applicants to enable them pursue and exhaust their constitutional rights but also allow the application to enable the Court resolve all the matters in dispute.

[29] As regards the second category of applicants who are financial institutions, they claim to be holding some of the titles ordered to be cancelled (as security for financial advances made to their clients). It is evident that they have a stake in the outcome of the appeal, as the securities that they are holding, have been rendered worthless by the judgment of the ELC declaring the titles null and void. Considering the convoluted background of this matter, and the fact that the financial institutions relied on titles issued by the Commissioner of Lands and the District Land Officer under the Registered Land Act (now repealed), it is only fair and just that the financial institutions be given an opportunity to protect their interests by being heard on the propriety of the securities.

[30] Indeed, the purpose of a party being served with a notice under Rule 77 of the Court of Appeal Rules, is not only to bring the fact that there is a judgment affecting his/her interest, but also to give any such person an opportunity to take action to protect the interest. The applicants' rights as chargees, are anchored on the proprietary rights of its clients, to the respective titles. In seeking to be joined in the appeal, the applicants seek an opportunity of addressing the impugned judgment of the Court in regard to the propriety of the titles. Once the court is satisfied that a party is a person affected by the judgment subject of the appeal, and that their application is not frivolous, it is only fair and just that the application be granted.

[31] For the above reasons, we find that the applicants have all met the threshold for being joined as parties who will be affected by the decision in the appeal and effectively should be made respondents therein. Accordingly, we grant the prayers in all the nine (9) applications for the applicants to be joined in the consolidated appeals as respondents. Costs of the applications shall be costs in the consolidated appeals.

Dated and delivered at Eldoret this 17th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR