



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 67 OF 2015

BETWEEN

DAVID KIPTUGEN... ..APPELLANT

AND

COMMISSIONER OF LANDS, NAIROBI.....1ST RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

HELDO STUFF LIMITED.....4TH RESPONDENT

DISTRICT LAND REGISTRAR, ELDORET.....5TH RESPONDENT

(An Appeal from the judgment the Environment & Land Court at Eldoret (Munyao, J.) dated 30th January, 2015

in

Environment and Land Case No. 787 of 2012

(Formerly Eldoret HCCC No. 213 of 2011)

RULING OF THE COURT

1. The dispute, which has given rise to this appeal, is over the ownership of a commercial piece of land situate in the central business district of Eldoret Town and known as **Title No. Eldoret Municipality Block 7/154** (the suit land). On 9th December 2011, the appellant filed a suit in the High Court at Eldoret and claimed that the Government allocated the suit land to him on 1st June 1999. On 22nd January, 2001, a lease in his favour was registered at the Lands office at Eldoret. On information he received in November 2011, he went the Lands Office at Nairobi and discovered that the records in respect of the suit land had been tampered with and that the 4th appellant was in the process of being issued with title to it. He therefore immediately filed a suit

and obtained an injunction, which restrained the 2nd respondent from issuing title to the 4th respondent. After hearing the case, Munyao, J. found that the appellant had fraudulently obtained and registered the lease of the suit in his favour, cancelled it and permitted the 1st respondent to allocate the suit land to whomsoever he deemed fit. This appeal, still pending hearing and determination, is against that judgment.

2. What we now have before us is an application filed on 26th October, 2015 under Section 3A of the Appellate Jurisdiction Act, and Rules 29, 31, 42 and 77 of the Court of Appeal Rules by one Chepkilot Kipsang, trading as Heldo Foodstuff, seeking to be enjoined as an interested party in this appeal. If that prayer is granted, he seeks a further order that the matter be remitted to the Environment and Land Court (the ELC) for hearing de novo to determine his claim over the suit land. The application is based on the ground that he is the rightful owner of the suit land, the same having been allocated to him vide letter of allotment dated 24th June 1999.
3. Relying on the averments in the applicant's affidavit in support of the application, his counsel, Ms Kirui, submitted that the applicant was fraudulently excluded from the proceeding giving rise to this appeal. As the rightful owner of the suit land, he is a person directly affected by this appeal and should, at least, have been served with the notice and record of appeal as required by Rule 77(1) of the Court of Appeal Rules and allowed to participate in the hearing of this appeal. Counsel concluded that if this application is dismissed, the applicant will be deprived of the suit land without being heard.
4. In response, Mr. Korir, learned counsel for the appellant, submitted that this application is incompetent and bad in law. He argued that Rule 77 of the Court of Appeal Rules does not permit joinder of parties at the appeal stage. In his view, a person directly affected in terms of that Rule is one who was a party to the case in the superior court. At any rate, by the applicant's own admission, the suit land was allocated to Heldo Foodstuff and not to him. He is and will not therefore be affected by this appeal.
5. Mr. Komen, learned counsel for the 4th respondent echoed the submissions of counsel for the appellant and added that having not stated whether he wants to cross-appeal or oppose the appeal, the applicant is a busybody who should not be enjoined into this appeal. He also urged us to dismiss this application with costs.
6. Though served, the other respondents did not participate in this application.
7. We have considered this application along with the averments in the affidavits in support and in opposition. We have also read the judgment impugned in this appeal. The issue in this application is whether or not the applicant is a person directly affected by the judgment of the ELC and should therefore be heard in this appeal.
8. Rule 77 of the Court of Appeal, under which this application is brought, states:

“An intended appellant shall, before or within seven days after lodging a notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be made ex-parte, within seven days of lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.” [Emphasis supplied]

9. This Rule does not define the term “affected.” This Court has, however, defined that term in **Centre for Rights Education and Awareness & Another v. John Harun Mwau & 5 Others**, CA No. 74 of 2014 (CA). Referring to the cases of **Kamlesh Pattni Vs Starwood Hotels and Resorts World Wide Inc. & 7 Others Civil Application No. NAI 330 of 2001 (UR 176/2001)** and **Commercial Bank of Africa Limited Vs Isaac Kamau Ndirangu, Civil Appeal No. 157 of**

1991, (CA); [1992] eKLR this Court held that the person referred to in the Rule is, at least, one whose property rights are affected by the judgment appealed against and that he need not have been party to the superior court case to be served and allowed to participate in the appeal. In the **Pattni** case, a foreign judgment, which had been registered in Kenya, affected the property rights of the applicant therein. He was allowed to challenge the foreign judgment in the Court of Appeal. In the case of **Commercial Bank of Africa**, an auction sale in exercise of a statutory power of sale under a charge was set aside in proceedings that excluded the auction purchaser. On appeal against that decision, the Court of Appeal, suo moto, allowed the auction purchaser to be heard in that appeal.

10. The scenario in this application appears to be one of triple allocation of public land. The appellant, the 4th respondent and now the applicant, each separately claims, through allocation, ownership of the suit land. As stated, the ELC has, in exclusion of the applicant who was not party to the suit before it, heard the appellant's and the 4th respondent's rival claims over the suit land and determined the dispute in favour of the 4th respondent. The appellant has appealed that decision.

11. We agree with Ms Kirui that whatever the outcome of the appeal, if the applicant is not joined in this appeal, he will be deprived of an opportunity to be heard on his claim to the ownership of the suit land. That will of course be unconstitutional and against the rules of natural justice. In the circumstances, we allow this application to the extent that Chepkilot Kipsang trading as Heldo Foodstuff is hereby joined in this appeal as an interested party. We direct that the appeal be set down for hearing on priority basis. Costs shall be in the appeal.

DATED and delivered this 10th day of March, 2016.

D.K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL`

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

DEPUTY REGISTRAR