



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT NAKURU**  
**JUDICIAL REVIEW NO 3 OF 2015**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**THE NATIONAL LAND COMMISSION.....RESPONDENT**  
**EX-PARTE**  
**LOMOLO LIMITED 1962**  
**AND**  
**MEMBERS OF KOKWEMBEI**  
**COMMUNITY....APPLICANTS/PROPOSED INTERESTED PARTIES**

**RULING**

*(Application for joinder as interested parties and for injunction; matter referred to National Land Commission by persons seeking to be enjoined as interested parties; persons being in land where it has already been held that they have no rights to; application for joinder allowed; application for injunction disallowed)*

1. The application before me is that dated 17 March 2015 filed by several persons and seeks two substantive orders which are prayers 2 and 4 in the application, being:-

(a) That the applicants be joined to these proceedings as interested parties.

(b) That pending hearing and determination of this judicial review, M/s Lomolo Limited 1962 and Deans Estates Ltd be restrained from evicting or in any way interfering with the applicants' possession and use of L.R No. 10939.

2. The application is based on the grounds that :-

(i) The applicants are the complainants in the case the subject of the proceedings herein.

(ii) The applicants have been in occupation and use of the land herein since colonial times and it is their ancestral land.

(iii) The applicants have exercised their constitutional rights to have historical injustices committed against them corrected by the National Land Commission as mandated by the Constitution.

(iv) The applicants are the people to suffer in case any order is made in these proceedings.

(v) The respondents herein have already started demolishing and burning their houses, killing their livestock and evicting them from their ancestral land.

3. The application is opposed and before I go to the gist of the objection, I think it is necessary that I lay a little background to this suit.

4. Through an advertisement placed in The Standard newspaper of 19 January 2015, the National Land Commission gave intention to make inquiries into several land titles, one of which is the land parcel L.R NO. 10939. That land is owned by Lomolo (1962) Limited, who are the ex-parte applicants in this cause, and the inquiry was to take place in the month of February 2015. Lomolo Ltd being aggrieved by the intention of the National Land Commission to inquire into its title, on 26 January 2015, filed an application for leave to commence judicial review proceedings inter alia for an order of prohibition, to prohibit the National Land Commission from making the intended inquiry. The application was canvassed before me on 27 January 2015 and I granted leave. I also ordered that leave do apply as a stay of the intended action of the National Land Commission (hereinafter NLC). Other matters have transpired thereafter, including an application for contempt, as it is alleged that the NLC still went ahead to make inquiries despite the stay order, but I do not think that these developments are in any way relevant to the proceedings before me, and I will therefore not dwell on them. However, it is noteworthy, that one of the reasons why Lomolo Ltd felt aggrieved by the decision of the NLC to inquire into its title, is because the said company had finalized litigation between itself and the occupants of the suit land, who are the intended interested parties herein. The intended interested parties had filed a suit for adverse possession which they lost.

5. It would appear that after losing the court case, the intended interested parties filed the complaint to the NLC, which prompted the NLC to commence inquiries into the title of ex-parte applicant.

6. That is indeed confirmed in the supporting affidavit of Shadrack Kimose, for he has deposed that it is the intended interested parties, who are 148 in number, who filed the complaint to the NLC. The supporting affidavit has averred that the intended interested parties have formed themselves into Kokwenbei Community Based Organization; that they are descendants of historical owners of the suit land; that they have lived on the suit land all their lives and know no other home. It is further averred that as these proceedings pend, Lomolo Ltd and Deans Estates Ltd have been demolishing their houses, burning their land, digging trenches and killing their livestock in an attempt to evict them from the suit land. That is the reason they want an injunction.

7. The ex-parte applicant has opposed the application through the Replying Affidavit of Githui John, who is also their counsel on record. It is stated inter alia that this is not a proper case for their joinder; that the applicants have not disclosed that they were plaintiffs in the suit Nakuru HCCC No. 36 of 2007 and Nakuru HCCC No. 98 of 2013 wherein they claimed that they were entitled to the suit land by way of adverse possession against Deans Estates Ltd and the ex-parte applicant, respectively; and that they lost they said suits. It is contended that the claims of the interested parties have already been determined in the two suits. It is further averred that this suit is not the proper forum to canvass their proprietary rights nor is it a proper case within which to seek a prayer for injunction.

8. At the hearing of the application, Mr. Ikua, learned counsel for the intended interested parties, withdrew the application, in so far as it touched on Deans Estates Ltd. On the first limb, of joinder, Mr. Ikua submitted that it is the intended interested parties who filed the complaint, the subject of these proceedings, to the NLC and that whatever order will ensue herein is bound to affect them. He submitted that the intended interested parties wish to justify their complaints and the actions of the NLC. On the second limb, that of injunction, Mr. Ikua argued that the intended interested parties are on the ground and

that they are being evicted. He submitted that it cannot be argued that an injunction cannot issue in a judicial review as a judicial review is a "suit" and Order 40 (dealing with injunctions) applies to any suit.

9. Ms. Patricia Mitei, learned counsel holding brief for Mr. Githui for the ex-parte applicant, submitted that the application for joinder ought to fail as the intended interested parties have not shown any right capable of being sustained. She submitted that joinder has to be on the principle that the party has a right to be canvassed in the suit. She submitted that any claims of the intended interested party have already been determined in the previous suits. On the injunction, it was her view that an injunction cannot be sought in a judicial review proceeding.

10. I have considered the application. As may be noted, there are two limbs to this application, the first is for joinder as interested parties and the second is for injunction.

11. On the first limb, it will be appreciated that it is the applicants who filed the complaint before the NLC. The issue in these proceedings is whether the NLC had the mandate to look into the complaints of the intended interested parties. The view of the ex-parte applicant is that the NLC cannot look into these matters, principally because the issue between the ex-parte applicant and the intended interested parties has been the subject of litigation before. The core question in these proceedings may very well end up being whether the NLC has jurisdiction to hear complaints of historical injustices where the courts have already heard and determined litigation where the facts are more or less similar. I think, that since NLC acted on a complaint by the intended interested parties, the latter do have an interest in the outcome of this litigation, and they may have some material that may assist the court in appreciating the issues and in arriving at a decision whether it was proper for the NLC to hear the complaint presented by the intended interested parties. I think they have made out a case that they deserve to be enjoined to these proceedings as interested parties. I therefore allow the first limb of the application which seeks joinder to these proceedings as interested parties. I will give further directions on their involvement in these proceedings including what they may file and what they may respond to.

12. The second limb to this application is the prayer for injunction. The interested parties want an order of injunction to stop Lomolo Ltd from evicting them pending hearing of this judicial review motion.

13. Applications for injunction are provided for at Order 40 of the Civil Procedure Rules. Rule 1 thereof, relied upon by Mr. Ikua, provides as follows :-

*Cases in which temporary injunction may be granted [Order 40, rule 1.]*

*Where in any suit it is proved by affidavit or otherwise—*

*(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*

*(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,*

14. It is true that Order 40 Rule 1 provides for an application for injunction in "any suit" and it is arguable that a judicial review proceeding is "a suit". But I think that for an injunction to issue, the subject matter in the proceeding has to be the property itself, and the essence of an injunction is to prevent its wastage, damage or loss, so as to safeguard against a paper judgment. In judicial review, the applicant usually applies for a stay of the action which is the subject matter of the judicial review proceedings, which for all intents and purposes acts as an injunction. That is why, an applicant for judicial review, does not seek the utility of Order 40 Rule 1, for his situation is well covered under Order 53 Rule 1 (4) which gives leeway for the grant of stay. It will in fact be pointless to go under Order 40 to seek an injunction, when Order 53 allows a stay. The reason for this is because in judicial review, the subject matter is an administrative action, an abstract, and not a tangible property. Order 40 would apply where a property is the subject matter of the proceedings. Therefore in judicial review, where it is an action which is the subject matter,

one would not come under Order 40, for an injunction but under Order 53 Rule 1 (4) for stay of the action.

15. Neither do I think that Order 40 would be available to the respondent, or to any party made an interested party, in proceedings such as these. The subject matter herein is not the property LR No. 10939. The subject matter is the decision of the NLC. In other words, it is the action of the NLC to make inquiries into the property which is the subject of these proceedings, not who should own or possess the property. The property, not being the subject matter of what these judicial proceedings are about, therefore cannot be captured by Order 40 Rule 1. What needs preservation is the action of the NLC to make inquiries before the substantive motion is heard and determined.

16. If the interested parties want an injunction, they need to file a case of their own, seeking to have the property, then the court may order that the property be preserved pending hearing of such suit. Even if I am wrong in my reasoning above, assuming that an injunction could issue in these proceedings, I would still not have granted it. The interested parties already seem to have litigated over the property in issue, asking that the property be granted to them under the doctrine of adverse possession, and they lost. If I issue an injunction, then it would be akin to an appeal against the decisions made in those cases. This second limb, seeking an injunction therefore fails.

17. The upshot of the above is that I only allow the application in so far as it seeks joinder to these proceedings as interested parties. The application for injunction is disallowed.

18. As to costs, I make no orders as to costs.

It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 12<sup>TH</sup> day of May 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT AT NAKURU**

**In presence of :-**

Mr Maina holding brief for Mr Ikua for proposed interested parties/applicants

Mr Githui for ex-parte applicant

CA: Janet.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT AT NAKURU**