



Lake Basin Development Authority v Registered Trustees of the Agricultural Society of Kenya (ASK); County Government of Bungoma (Interested Party) (Environment & Land Case 46 of 2019) [2023] KEELC 15677 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15677 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 46 OF 2019
E ASATI, J
FEBRUARY 23, 2023
IN THE MATTER OF BUNGOMA MUNICIPALITY PLOT
MEASURING 13.4HA NEXT TO SANGALO INSTITUTE
AND
IN THE MATTER OF LETTER OF ALLOTMENT DATED
23/11/2016 FROM THE NATIONAL LAND COMMISSION

BETWEEN

LAKE BASIN DEVELOPMENT AUTHORITY PLAINTIFF

AND

THE REGISTERED TRUSTEES OF THE AGRICULTURAL SOCIETY OF KENYA (ASK) RESPONDENT

AND

THE COUNTY GOVERNMENT OF BUNGOMA INTERESTED PARTY

RULING

1. The Notice of Motion application dated 11th August 2022 was brought by the Defendant (the Registered Trustees of the Agricultural Society of Kenya (ASK) pursuant to the provisions of section 14 of the *National Land Commission Act* 2012, section 1A, 1B, 3A Order 51 (1) of the *Civil Procedure Rules* and article 159 of the *Constitution* of Kenya 2010. The application seeks for orders that:-
 - a. Pending the hearing and determination of the appeal by the Defendant against the ruling dated 29/4/2020, there be stay of proceedings.



- b. The honourable court be pleased to stay proceedings in this case pending referral of the dispute to the National Land Commission.
 - c. Such orders be made as just and expedient.
 - d. Costs be in the cause.
2. The grounds upon which the application was brought were that: -
- a. Aggrieved by the ruling dated 29/4/2020 the applicant lodged an appeal to the Court of Appeal namely *Kisumu Civil Appeal No. 83 of 2020* in which the record of appeal has already been filed and served.
 - b. That the appeal is seeking to set aside or vary the said ruling in which a mandatory injunction was granted.
 - c. That the appeal would be rendered nugatory should the suit proceed to full hearing before the appeal is heard and determined.
 - d. That the suit should be heard by the National Land Commission Tribunal in accordance with the provisions of section 14 of the [National Land Commission Act](#) before being brought to court.
3. The application was also supported by the averments in the Supporting Affidavit sworn by Caren Jaguya on 12th September 2022.
4. The application was opposed *vide* the contents of the Replying Affidavit sworn by Michael Okello Okuk on 16th December 2022. The Respondent's case is that the application is just a delaying tactic and that public policy demands that business of the court should be conducted with expedition. That the Plaintiff has always been ready to proceed with hearing of the case. That the prayer for stay of proceedings is fatally defective the same having been brought under the wrong provisions of the law and does not meet the basic threshold for grant of the orders sought. That the applicant has not indicated the steps it has taken to have the matter referred to the National Land Commission and that it has not been demonstrated why the applicant believes the court has no jurisdiction. The Respondent prayed that the application be dismissed with costs and that the main suit be set down for hearing.
5. The application was canvassed by way of written submissions. It was submitted on behalf of the applicant that the issues for determination in the application were; whether the court can grant stay of proceedings pending appeal and whether the court can refer the matter for determination by the National Land Commission. That the decision to grant or deny a stay of proceedings is discretionary and that the court under Order 42 Rule 6 (1) [Civil Procedure Rules](#) has discretion to stay proceedings. Counsel relied on the case of *Global tours & travels Limited*; Nairobi HC Winding up course No. 43 of 2000 as cited in [Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkirui](#) [2022] eKLR to emphasize the submissions. Reliance was also placed on the case of [UAP Insurance Company Ltd v Michael John Beckett](#) [2004] eKLR to submit that an applicant must demonstrate that he/she has an arguable appeal that is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted. Another case relied upon by the applicant was [Kiruti & Company Advocates v Nderi & Kiingati Advocates](#) (Civil Appeal 042 of 2021[2021] KECA 119 (KLR) (22 October 2021)(Ruling) to submit that an arguable appeal need only raise a single bona fide issue. That in the instant case, should the court not grant the stay of proceedings there is a high risk that the appeal would be rendered nugatory should the matter proceed to full hearing. That the applicant has met the requirements for the orders to be granted.



6. On whether the court should refer the matter to the National Land Commission for determination, it was submitted on behalf of the applicant that the Plaintiff has not exhausted all dispute resolution mechanisms provided by law before rushing to court. That section 14 of the [National Land Commission Act](#) has elaborate mechanisms of settling disputes. That where a written law provides for an avenue for settling a dispute, that avenue has to be exhausted first before a party can approach the court. For this submission reliance was placed on the case of *International Centre for Policy and Conflict & others v A-G & 9 others* [2013] eKLR and [Geofrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others](#) [2015] eKLR. Counsel submitted that the applicant has not exhausted the statutorily provided mechanisms or demonstrated that the existing mechanisms are not sufficient. That the court as at this stage lacks jurisdiction. Counsel prayed that the application be allowed.
7. Submissions were made on behalf of the Plaintiff/Respondent by the firm of Amondi & co. advocates, Counsel submitted that the application is meant to cause delay and is against the provisions of article 159 (2) (b) of the [Constitution](#) of Kenya 2010, sections 1A and 1B of the [Civil Procedure Act](#) given that the Plaintiff had complied with Order 11 of the [civil procedure Rules](#). That the application is meant to occasion delay in the administration of justice and cause case backlog.
8. On whether or not the application meets the threshold for grant of the order of stay of proceedings, Counsel submitted that the application is fatally defective having been brought under the wrong provisions of the law. That the Notice of Appeal was filed out of time under the provisions of Rule 75 of the [Court of Appeal Rules](#) and there has been no extension of time. That there is no valid appeal on record. That the appeal is hopeless and that the application was filed after much delay since the ruling complained of was made on 29th April 2020 and the application was filed more than two years later on 15th September 2022. Counsel relied on the case of *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR where the court held that

“ where the appeal may have serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may render the orders made nugatory and render the exercise futile stay... should be granted.”
9. On whether or not the case should be referred to the National Land Commission for determination, Counsel submitted that the suit land namely Unsecured Bungoma Municipality Plot Measuring 13.4 Hectares was allotted *vide* latter of allotment dated 23/11/2016 to the Plaintiff herein by the National Land Commission. That in the circumstances any dispute relating to the said land especially in respect of the process that was followed can only be properly canvassed at the Environment and Land Court which has jurisdiction under section 13 of the [Environment and Land Court Act](#). Counsel further relied on the case of [Cordison International Co. Ltd v Chairman National Land Commission, National Land Commission and others](#) on the steps to be followed when the NLC allocates land. Counsel prayed that the application be dismissed.

Determination

10. Stay of proceedings pending appeal is a remedy provided by law whose purpose is to ensure that the appeal is not rendered nugatory and that the trial court does not undertake in a futile exercise in engaging in proceedings that might be overturned by the outcome of the appeal. This to me means that for the remedy to be available the appeal before the appellate court must be of such a nature that the outcome thereof will impact the entire suit. In the present case the appeal to the Court of Appeal as clearly stated by the applicant, challenges a ruling that granted an interlocutory mandatory order of injunction compelling the applicant to stop its activities on and remove its items from the suit land. The appeal seeks to set aside and or vary the said order. The Respondent submitted that the appeal



is hopeless as it was filed out of time. This is a matter for the appellate court to decide. However, in my view even if the appeal was to be properly filed, meritorious and ultimately allowed, the outcome thereof will not be rendered nugatory by the fact that the case proceeded to hearing in the pendency of the appeal.

Further, the proceedings of the main suit that will have taken place in the pendency of the appeal will not be rendered futile or vain by the outcome of the appeal. The suit was filed in the year 2019 and ought to be finalized expeditiously. It is already part of backlog as submitted by the Respondent. I find that no grounds for stay of proceedings have been demonstrated.

11. As regards referral of the case to the National Land Commission for determination, firstly, there is no prayer in the application for referral of the matter to the Commission. The prayer before me is for stay of proceedings pending referral. It has not been demonstrated that there is a process of referral of the matter to the Commission already commenced. Secondly, the applicant relied on the provisions of section 14 of the National Land Commission Act. The section deals with review of grants and dispositions and provides: -

- (1) subject to article 68(c) (v) of the Constitution, the Commission shall within five, years of the Commencement of this Act, on its own Motion or upon complaint by the national, or county government, a community or an individual review all grants or dispositions of public land to establish their propriety or legality.
- (2) subject to articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1)
- (3) in the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned a notice of such review or an opportunity to appear before it and to inspect any relevant documents
- (4) After hearing the parties in accordance with subsection (3) the Commission shall make a determination.
- (5) whether the Commission finds that the title was acquired in an unlawful manner the Commission shall direct the Registrar to revoke the title.
- (6) where the Commission finds that the title was irregularly acquired the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.
- (7) No revocation of title shall be effected against a *bona fide* purchaser for value without notice of defect in the title.
- (8) in the exercise of its powers under this section, the Commission shall be guided by the principles set out under article 47 of the Constitution.
- (9) The Commission may, where it considers it necessary petition Parliament to extend the period for undertaking the review specified in subsection (1).

12. The applicant's case is that the Plaintiff did not explore the remedy provided for under section 14 National Land Commission Act before filing the suit in court. That where a statute provides a remedy, that remedy ought to be exhausted before going to court. Under section 14, the Commission has power to review grants and dispositions on its own motion or upon complaint by a party so as to establish the propriety or legality of such grants and dispositions. The case of the Respondent/Plaintiff is that it is the owner of the suit land after having been allotted the same by the Commission on 23rd November



2016 *vide* allotment letter Ref 209163 /A(VIII)34. And that the Applicant had trespassed onto the land and sought for mandatory order of injunction to stop the trespass, eviction of the applicant from the land and general damages for trespass. Hence had no reason to complain to the Commission. I have read the applicant's defence dated 7th July 2022 and notice that the applicant did not challenge the legality of the Respondent's title. Even if I was to treat prayer (b) of the application as a prayer for referral of the case to the Commission for determination, I find no grounds for granting the same.

13. The result is that I find no merit in the Notice of motion Application 11th August 2022. I dismiss the application. Costs to be in the main suit.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 23RD DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Ligami Advocate for the Defendants/Applicants

Nyamberi Advocate for the Plaintiff/Respondent

No appearance for the Interested Party.

