REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPLICATION NO.1531 OF 2005 (O.S.)

BETWEEN

ABDUL WAHEED SHEIKIH AND ABDUL HAMEED SHEIKH AS TRUSTEES OF THE SHEIKH FAZAL ILACHI NOORDIN CHARITABLE TRUST…..DEFENDANTS/RESPONDENTS

VERSUS

COMMISSIONER OF LANDS……..……..1ST PLAINTIFF

THE MINISTER FOR LANDS & HOUSING…….……..2ND PLAINTIFF

THE MINISTER FOR FINANCE..…….…….3RD PLAINTIFF

REGISTRAR OF TITLES…….…….4TH PLAINTIFF

AND

UMOJA SELF HELP GROUP.....APPLICANT

RULING

1. Before me is an application seeking a number of Orders but this Ruling is limited to the question whether the Applicants, an entity known as Umoja Self Help Group, should be enjoined as an Interested Party to the proceedings herein. The Application is brought under **Order 1 Rule 10** of the **Civil Procedure Rules** and the argument made by the Applicants is that they have lived on land parcel No. L.R.209/193, Pangani, Nairobi, for an undisclosed number of years and they are entitled to the said land by fact of adverse possession, hence the need for them to be enjoined to the case.

2. The background to the Application is that on 18th May 2012, this Court delivered a judgment in favour of the Plaintiffs (now Respondents) and the gist of it was that the Commissioner of Lands should register the said Plaintiffs as proprietors of the land parcel in dispute.

3. It is the Applicant's case that had the Court had the benefit of hearing them, those orders would not have been issued. Their claim to the land in any event is based on their assertion that they have lived on it For decades and that the commissioner of Lands had even indicated to them in the year 2005 that allotment letters would be issued to them as a sign that their occupation of the

suit land would receive some sort of approval. Further, that attempts at procuring the said allotment letters did not succeed and so the Applicants filed H.C ELC No.102 of 2008 seeking certain orders leading to the registration of the suit land in their names but the judgment in the present proceeding caught them off guard as they were unaware of the proceedings at all. That when they sought orders to preserve the suit land within the above suit, the Court (Ougo, J) advised them to seek those orders within these proceedings hence the present Application.

4. It is also the case for the Applicants that their presence in these proceedings is necessary for a fair determination of all issues in contest and that if the decree obtained by the Plaintiffs is executed, they will not only suffer terrible loss upon their eviction from the land but their pending suit would also be rendered nugatory. The advocate for the Applicants in submissions added that no prejudice would be caused to any party if the orders are granted.

5. Only the Plaintiffs responded to the Application and their case is that the Applicants are not entitled to be joined in the present proceeding because looking at the cause of action as pleaded by the Plaintiffs, the presence of the Applicants is neither necessary nor useful in assisting the Court determine the same. Further, that the Applicants were indolent in pursuing their claim and that they have come to court with unclean hands since they knew of the existence of the present proceedings but went ahead to file separate proceedings relating to the same parcel of land.

6. It is also the case for the Plaintiffs that prejudice will be caused to them if their case is re-opened long after a judgment was rendered in their favour and that in any event, the Applicants' remedy, if at all, lies elsewhere than in these proceedings and therefore their Application should be dismissed with costs.

7. I have carefully considered the issues raised by the parties and my opinion is as follows;

Firstly, it is the law that for a party to be enjoined in existing legal proceedings, that party must demonstrate that its presence is necessary *"in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit".*

In the present Application, the claim made by the Applicants is that they are entitled to the suit land by adverse possession but sadly the present proceedings are of a constitutional nature and the litigation rotates around the doctrine of legitimate expectation. The issue was settled in favour of the Plaintiffs and to re-open the contest would serve no lawful purpose, however legitimate the claim by the Applicants may be. The position would remain the same even if the Applicants were to raise the application of that doctrine to their circumstances because the facts would be totally different.

8. In addressing the above issue, the Court in Departed Asians Custodian Board vs Jaffer Brothers Ltd [1999] EA 55 stated as follows;

"A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the Plaintiff seeks in the suit, would legally affect the interests of that person, and

that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person"

9. I wholly agree and in a case where a party claims an interest in the subject matter of suit, the law as I understand it, was well set out in the case of Agricultural Finance Corporation vs Lengelia Ltd [1985} KLR 766 where the court stated as follows;

"Under Order 1 Rule (2) of the Civil Procedure Rules, where it appears to the Court that any joinder of parties may embarrass or delay the trial of the suit, the court may on its own motion or on application of any party order separate trials or make such other order as may be expedient. Order 1 of the Civil Procedure Rules generally applies to parties to a suit who in normal circumstances are described as plaintiffs and the defendants. However, it is the courts view that the provision would apply, mutatis mutandi, to any other party who may be joined to a suit as interested party to the matters under consideration ...The need to maintain the interested parties in this suit ... would only serve to delay speedy disposal of the suit. If anything the interested parties are at this point busy bodies merely applying "gate-crushing" tactics under the pretext of having interest in the sale agreement subject of the suit... As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it... the affairs of the interested parties club ought not be introduced and sucked in a straightforward contractual transaction. It is only fair that the interested parties be "evicted" from this suit by setting aside the ex parte order granted in their favour."

10. The above holding applies squarely to the circumstances of the case before me and I should only add that the issues in contest between the parties in this case are unique to them and I settled them by the judgment earlier referred to. The issues in contest between the Applicants and either party cannot properly be settled by re-opening the present case.

11. Secondly, during the hearing of the Application, I pointed out to the advocate for the Applicants that from pleadings in ELC No.102 of 2008, it was apparent that the Applicants knew of the existence of the present case but did nothing until after judgment had been passed. That matter is important because David Kihara Chege is the deponent to Affidavits in both matters where in the former, he disclosed that fact and at paragraphs 12, 13, 14 and 15 of his Affidavit in support of the Application he stated as follows;

"12. That it has therefore come to us as a surprise that a judgment has been entered in this case affecting the land and place that we have always known as home.

13. That I believe that the Honourable Court was not notified that there were squatters living on the said since the colonial days and who depend wholly on the said land.

14. That I believe that had this Court heard us in opposition to the Judicial Review application it would not have made the orders of 18th May 2012

15. That as soon as we became aware of the judgment herein we filed an application dated 11th July 2012 in ELC No.102 of 2008 to preserve the suit land which application is yet to be determined."

12. Aside from the obvious lie that ELC No.102 of 2008 was filed after the judgment in this matter, there is the more fundamental issue that although the Applicants knew of the existence of this suit, they file their laurels and now want to benefit from the confusion that often arises where multiple suits are filed relating to the same subject matter. A party that not only lies on oath but abuses the court process cannot be allowed the benefits of equity.

13. Thirdly, prejudice would be caused to a party, who for more than 7 years struggles to have its case heard and upon judgment being delivered, has to face an indolent party that was busy elsewhere, well knowing of the pendency of the case. That is the position of the two parties to the Application and the indolent must suffer for the indolence.

14. The findings above would lead me to conclude that the Application before me is not only misguided but is also mischievous and is best dismissed with costs to the Plaintiffs.

15. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 6TH DAY OF JUNE, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Florence – court clerk

Mr. Wamoba for Respondents

Mr. Abidha for Plaintiff

No appearance for Applicant

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE