



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

PETITION NO. 4 OF 2019

IN THE MATTER OF ARTICLES 2 (1), 3 (1) AND 6 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF THREAT AND CONTRAVENTION OF THE RIGHT TO

FAIR HEARING UNDER ARTICLE 50 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF THE COUNTY BOUNDARIES

AND

IN THE MATTER OF THREAT AND CONTRAVENTION OF ARTICLE 188 (1) OF THE CONSTITUTION

BETWEEN

COUNTY GOVERNMENT OF KISUMU.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

ELIJAH KIMELY KESHIO

DAVID KIPTOO BUSIENEI

CHERUIYOT A. LIMO

(Suing as trustees of Nyando Valley Association).....INTERESTED PARTIES

JUDGMENT

The Petition dated 25th March 2019 was brought by the **COUNTY GOVERNMENT OF KISUMU** (as the Petitioner), against the **NATIONAL LAND COMMISSION** (as the Respondent).

1. It was provoked by **GAZETTE NOTICE NO. 1995**, which was published in the Kenya Gazette **Vol. C XX1 – NO. 27**. That gazette notice was published at the instance of the Respondent, as a recommendation, following an Investigative Hearing of a Complaint lodged by

the NYANDO

VALLEY ASSOCIATION.

2. The said Complaint was in relation to “*Historical Land Injustices.*”

3. The persons who were the Respondents to the Complaint were;

(a) *Richard Ochieng Olwenge –L.R. 3098, 3097, 3092;*

(b) *Chemelil Sugar Co.;*

(c) *Gulbing Singh Panjey;*

(d) *Utonga Geta Firm MV Plantations*

4. Having heard the Complaint, the National Land Commission allowed it, and referred it to the Privatisation Commission;

“..... for consideration of part of the land from Chemelil Sugar Company L.R NO. 11840 for the settlement of members of Nyando Valley Association and other communities using a predetermined formula or ratio between the people of Kisumu County and Nandi County.”

5. It was the understanding of the Petitioner herein that the decision made by the National Land Commission would result in the alienation and sharing of a part of the parcel of land known as **L.R. NO. 11840**, which is within Kisumu County, between the said Kisumu County and the Nandi County.

6. The Petitioner’s case was that if the land which was currently within the Kisumu County was shared with the Nandi County, that would imply that the boundary between those 2 counties had been reviewed.

7. When the Respondent was conducting the sessions which led to the determination being challenged, it is alleged that the Respondent denied the Petitioner its right to be heard.

8. And because the decision of the Respondent would effectively review the boundaries between 2 counties, the Petitioner submitted that the said decision contravened

Article 188 (1) of the Constitution.

9. The Petitioner submitted that the Respondent had no power to alter the boundaries of counties. In the event, the Petitioner contends that the decision was ultra vires the powers of the Respondent.

10. Accordingly, this court was invited to quash the said Decision, through an order of certiorari.

11. After the Respondent was served with the Petition, Messrs **NYANDO VALLEY ASSOCIATION** made an application to be enjoined to these proceedings as an Interested Party.

12. On 10th September 2019 the court ordered that Nyando Valley Association be enjoined to these proceedings, as an Interested Party.

13. Thereafter, all the parties agreed that the Petition would be canvassed through written submissions.

14. The Petitioner submitted that **L.R. NO. 11840** was Public Land, which is held in trust by the County Government of Kisumu on behalf of the residents of that county.

15. The Respondent and the Interested Party do not deny that the said parcel of land lies within Kisumu County.

16. As the Interested Party has stated in its submissions before me, the interest it had when it lodged the Complaint before the National Land Commission was;

“to reclaim their ancestral land comprised in land known as LR NO. 11840, where M/S Chemelil, Miwani and Muhoroni Sugar Companies are built.”

17. This court is not called upon to determine whether or not the decision made by the Respondent had merit.

18. As the parties all pointed out, the role of this court is to determine whether or not the Petitioner’s right to be heard was violated.

19. Secondly, this court is called upon to determine whether or not the decision made by the Respondent was ultra vires the powers and authority of the Commission.

20. As regards the constitutional right of a party to be heard, it is well settled that provided that the party had been accorded an opportunity to be heard, the Court or the Tribunal hearing the case will have discharged its Obligation, even if the party failed to utilize the opportunity accorded to him.

21. In this matter, the Petitioner was not one of the parties to the Complaint which the Interested Party had lodged before the Respondent.

22. Indeed, the Interested Party has indicated that they had only sued;

“..... the persons said to have acquired ownership and occupied the ancestral land belonging to the interested parties, before they were forced to move out of it during the colonial period.”

23. The Interested Party went on to make the following submission;

“The respondent found merit in the claim and ordered that part of the land be restored to them. The issue was never about a boundary dispute between the two counties to warrant alteration (of boundaries)”

24. The Interested Party said that the decision made by the Respondent;

“..... allowed (them) to reclaim their ancestral land.”

25. Elsewhere, the Interested Party said that;

“In allowing the claim, the respondent acknowledged that their land was that occupied by the respondents in the claim and that the same should be restored to them.”

26. Although the Interested Party submitted that the decision by the National Land Commission was not about Boundaries, the statements made by the said Interested Party clearly betray a different understanding.

27. They said that they had been forced out of their ancestral land, and that they now have an opportunity to reclaim the same. They said that the land should be restored to them.

28. If the land is restored to them, that would mean that those who were in occupation of the land would have to be removed from the said land.

29. As the Complaint was being heard, Counsel Odhiambo is on record as saying;

“So the only thing I would like to say before I sit down is that more so, this farms that Nyando Valley lays claim to, are all on the other side of the river; I will say Kisumu County, and I think the commission also ought to have put in place mechanisms so that those people on the Lake side of town are aware of this proceedings, so that it is not seen that there is a particular election agenda to be achieved.”

30. Commissioner Tororei responded by saying that the Commission had deliberately invited the County Government of Kisumu.

31. Counsel Odhiambo reiterated that very few people were aware of the proceedings. He added;

“It is important you see this particular properties cut across two counties, and that is why I am saying in the same; same way people have been enlightened to appear here in the same; same way, take time and also inform the people that may be affected.”

32. Commissioner Lenashuru noted the said comments, whilst Commissioner Tororei said;

“I think we shall do our best to do so, but you know I think our proceedings are limited to specific land owners or occupiers who are on that specific land.”

33. Later, during the said proceedings, Mr. George Tarus advocate informed the court that he, together with a team of lawyers were representing the County Government of Nandi.

34. He applied to have the County Government of Nandi enjoined to the proceedings, and the Respondent allowed them to be enjoined as an Interested Party.

35. Advocate Tarus then told the Commission that all the Claimants were residents of Nandi County, who were claiming;

“... Land which now lies on the other side of the boundary. So we are asking the Commission that in due course one of the recommendations as redress the County Government of Nandi is asking that the boundary be reviewed.

.....”
The Commission should recommend that the boundary between Nandi and Kisumu County should be reviewed

36. I have deemed it prudent to set out herein the excerpts from the proceedings because the same helps to put the whole thing within perspective.

37. In other words, whilst the Respondent now says that the matters it handled do not have anything to do with boundary dispute, I hold the considered view that the intent and purpose of the whole process comes out clearly from the record of the proceedings.

38. The Petitioner was now being told that this Petition was premature, as they should wait for the onset of the

“Settlement Process and raise their claims accordingly.”

39. I find that when the Petitioner was not named as a party in the proceedings before the National Land Commission, the invitation to attend proceedings pitting the Interested Party against a few named individuals, may not have constituted an informed notification to the Petitioner.

40. A person who is not served with a claim that requires him to respond thereto, cannot be deemed to have been given an opportunity to be heard in respect to that claim.

41. In this instance, the Respondent failed to demonstrate that the Petitioner was given notice of the case or the issues which it was required to respond to, so that he would have had a basis for appreciating the importance of attending the proceedings.

42. I also find that although the recommendation made by the National Land Commission did not expressly mention the issue of the boundary between Nandi County and Kisumu County, the parties who attended the proceedings understood the underlying consideration to expressly relate to the question of the said boundary.

43. I take Judicial Notice of the emotive nature of disputes appertaining to land.

44. In my considered opinion, justice can only be done to all persons who would be directly or indirectly affected by the decisions of the National Land Commission if and when all such persons are accorded a real opportunity to be heard on the issues.

45. As no such opportunity was accorded to the Petitioner, the decision arrived at is hereby quashed, by an order of certiorari.

46. However, as the Commission was carrying out its mandate, I decline to condemn it to pay the costs of the Petition.

47. And because the Commission would have to go through the hearing of the Complaint, once again, I find that justice demands that each party bears its own costs of these proceedings.

DATED, SIGNED and DELIVERED at KISUMU

This 26th day of **February** 2020

FRED A. OCHIENG

JUDGE