



Kariuki & 6 others (Suing on their Behalf and as the Reps of Kasarini Farmers Co-op Society and Kasarini Self Help Group v Mbugua & 8 others (Environment & Land Case 557 of 2009) [2023] KEELC 19962 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19962 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 557 OF 2009
AA OMOLLO, J
SEPTEMBER 21, 2023**

BETWEEN

MACHETHA KARIUKI & 6 OTHERS (SUING ON THEIR BEHALF AND AS THE REPS OF KASARINI FARMERS CO-OP SOCIETY AND KASARINI SELF HELP GROUP) PLAINTIFF

AND

SAMUEL GITHEGI MBUGUA & 8 OTHERS DEFENDANT

RULING

1. The Plaintiffs/Applicants have brought to this Court the notice of motion application dated November 17, 2022 and premised on the provisions of sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, section 14 and 15 of the *National Land Commission Act* and Articles 67(2) & 152 (2) of the *Constitution*. The Applicants sought orders That;
 - a. The Court does stay proceedings in this case and thereafter refer for hearing and determination the issues the subject of this dispute to the National Land Commission.
 - b. The court does grant any other orders it deems necessary to grant.
 - c. Costs of the application be provided for.
2. The application is grounded on the supporting and supplementary affidavit of the 1st Applicant as well as the grounds listed on the face of the application stated hereunder;
 - i. The Plaintiffs claim is for the recovery of the property known as LR 7153/R now registered as LR 12825, IR 35930 and fraudulently registered in the names of the Defendants.



- ii. The Plaintiffs claim is premised on historical land injustices which the National Land Commission has jurisdiction to adjudicate and which is the best forum to adjudicate the issues raised by the parties herein.
 - iii. That the Plaintiffs have already invoked the provisions of section 14 of the [National Land Commission Act](#) by filing a complaint ref NLC/HLI/053/2017 Kiambu County requesting the Commission to review titles Numbers 7153/1, 7153/2, 12825
 - iv. That due to the pendency of this suit, the Commission has been unable to summon the parties for hearing and determination of the issues.
3. In the affidavit in support of the motion, Mr Kariuki deposed to the prayers sought in the plaint and stated that he is advised that since their claim is based on historical injustices, the National Land Commission has mandate in Statute and the [Constitution](#) to hear the dispute. He reiterated the facts set out on the face of the application inter alia, that a complaint was already lodged before the Commission but which cannot proceed because of the pendency of this suit.
4. The 8th and 9th Defendants opposed the application vide the replying affidavit of Esther Njeri Gakuyu who is the executrix of the estate of 9th Defendant. Ms Gakuyu deposed that the claim is not premised on historical injustices. She deposed on the advice given to her by their advocates that the NLC no longer has the mandate and jurisdiction to adjudicate on historical land injustices.
5. The 8th and 9th Defendants depose that despite their protests, the NLC summoned parties in the mentioned claims for review, heard and determined the claim and they have annexed copies of the said determination as annexure ENG3.
6. Ms Gakuyu deposed further that the orders sought in the application cannot be granted for the following reasons;
 - i. The suit as against the 8th and 9th Defendants has abated
 - ii. Vide a judgement delivered in JR 582 of 2016 issued a prohibitory order against hearing any claims raised by the Plaintiffs and or Kasarini Farmers by the NLC
7. The Applicants filed a supplementary affidavit to refute the issues raised in the replying affidavit stating that since the claim is a historical land injustice the Commission is exempted from the time bar under the [Limitation of Actions Act](#). On the allegation that the claim was already heard and determined, the Applicants aver that the outgoing Commission in the determination listed in the gazette notice of 1st March 2019 listed a number of anomalies which they recommended to the incoming Commission to investigate.
8. With regard to the orders issued in JR 582 of 2019, the Applicants contended that the judge appreciated the Commission had powers under section 14 to hear the cases but they could not do so at the time unless Parliament extended their mandate. That they are aware that Parliament has since extended the mandate of the new Commissioner hence they are empowered to hear the dispute. That the judgement in the JR 582 was not a bar but it gave them an option to elect where to prosecute their case hence this application.
9. The application was prosecuted by filing of written submissions. The Plaintiffs submissions are dated March 21, 2023, reiterated the facts pleaded in the motion and analysed the decision of Okongo J in JR 582 of 2019. They also cited the case law of Delmonte Kenya Ltd Vs National Land Commission and Others, Muranga ELC Petition no 3 of 2020 in support of their claim.



10. The 4th Defendant also filed his written submissions dated April 12, 2023 stating that the Plaintiffs are vexatious litigants and ardent forum shoppers. On jurisdiction of this Court to hear and determine claims relating to historical injustices, the 4th Defendant cited the case of *Safepark Ltd vs Henry Wambega & 11 others* where the Court of Appeal quoted the decision in *Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others* that held thus;

On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seised of the matter. Our conviction stems from our reading of Article 67(2) (e) of the *Constitution*. The Article provides that the NLC can investigate “present or historical” land injustices. We lay emphasis on the word “present.” If the NLC had initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and

Land Courts redundant. We do not think this was intended to be so. Our view is fortified by Section 15 (3) (b) of the *National Land Commission Act* which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.

Further, there is nothing in the 2010 Constitution or in the *National Land Commission Act* ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice.”

11. I have considered the application, the responses thereto and the submissions rendered by all the parties and the issue I frame as rising for determination is whether there is merit in the application seeking to stay this suit and also transfer the issue for determination to the National Land Commission. The Applicants acknowledged they filed a complaint before the NLC number NLC/HLI/053/2017. They also acknowledge that the NLC made some recommendations on the said complaint but they deny the award given was conclusive.
12. The 8th and 9th Defendants raised two substantive issues, first that the suit as against them has abated and secondly, that there is a court order barring the hearing and determination of the complaint by the NLC. I have perused a copy of the NLC determination annexed in the replying affidavit sworn by Ester Njeri Gakuyu which refers to the complaint no. NLC/HLI/053/2017. It listed Kasarini Farmers Co-op Society and Kasarini ancestral Families as the claimants. The heading is given as determination and the names of Commissioners presiding are given.
13. At paragraph 6 of the determination, it is stated that the Court allowed the Commission to hear the reviews over the Kasarini land but its mandate lapsed before it could conduct the said review. That the Commission sought for extension of time. The Commission besides giving a background of the claim before it, it also made reference to the finding in JR 582 of 2016 and at paragraph 41 they stated thus;
- it is clear from the decision that the Commission cannot exercise concurrent jurisdiction with the court as the matter is sub judice by dint of the two cases (NBI ELC 557 of 2009 and NBI Pet 1358 of 2016
14. The Commission concluded that the Claim before them failed and recommended to the Claimants to either proceed with the cases before the Court or withdraw those cases if they elect to go before the NLC for redress. From this recommendation, the NLC was clear that their door to the Applicants



was open but they had to make a choice, of either withdrawing or prosecuting the present suit. The Applicants have not made that election and has instead moved this court which in my view as an intention to make the court do the election on their behalf. The election must in my opinion must be taken by the parties individually or collectively.

15. Both parties have made reference to the determination in JR case number 582 of 2016 which was also annexed by the 8th and 9th Defendants. I have read the said judgement and note the two key findings made by Okongó J;
 - a. The National Land Commission could not exercise concurrent jurisdiction with this court over the same subject matter as it goes against the doctrine of sub judice.
 - b. The National Land Commission cannot review any grants under section 14 after the expiry of its mandate, that the powers were not saved by the provisions of section 26 as read with section 23(3) of the Interpretation and General Powers Act Cap 2 of the Laws of Kenya.
16. Section 25 of the *Civil Procedure Act* allows any party to withdraw their case at any stage of the proceedings subject to cost. Thus, the law allows the Plaintiff/Applicants to withdraw their suit and take any other steps including prosecuting the matter before the National Commission. Besides the law allowing the Applicant to withdraw their claims, they were told so by the National Land Commission in the recommendation of March 2017 as well as the decision in JR case number 582 of 2016 to elect to either prosecute the suit in court or withdraw it and prosecute it elsewhere.
17. It is the considered opinion of this court that the current application amounts to abuse of the court process for the reason that it is urging the Court to determine an issue that has already been dealt with. First, that the suit cannot be stayed pending determination of the issues in dispute by the NLC. Are the applicants implying that once the NLC renders itself on the matter, they will return to prosecute this case again? Secondly, the Applicants do not require an order of transfer as they were directed to either proceed with the cases before the court or withdraw them in order for the NLC to entertain the dispute.
18. The court of appeal in the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) e KLR 229, stated as follows;-

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive’
19. In light of the analysis made, I find no merit in the motion before me dated November 17, 2022 and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023

A. OMOLLO

JUDGE

