



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**CONSTITUTION PETITION No. 10 OF 2017**

**IN THE MATTER OF ARTICLES 22, 23 AND 169 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS UNDER ARTICLES 40 AND 64 OF THE CONSTITUTION**

**BETWEEN**

**KITILAI OLE NTUTU.....PETITIONER**

**-VERSUS-**

**COUNTY GOVERNMENT OF NAROK.....RESPONDENT**

**RULING**

The Application before me is the Notice of Motion dated 20<sup>th</sup> December, 2018 in which the Applicant sought the following orders:-

1. That the court be pleased to direct the Chief Land Registrar, Director of Land Adjudication and Director of Survey to cause a report to be presented to court touching on:-

(a) What were the boundaries set out in the 1976 declaration of Nkareta Adjudication Section

(b) Whether a re-declaration of the adjudication section was made

(c) Whether the petitioners' titles in Petition No. 10 of 2017 and ELC Petition No. 306 of 2016 consolidated with Petition No. 11 of 2017 are within the boundaries of Nkareta adjudication section.

(d) Whether the petitioners' in Petition No. 10 of 2017 and Elc Petition No. 306 of 2016 consolidated with Petition No. 11 of 2017 were members with interests in Nkareta Adjudication Section.

(e) Whether the Land comprising of the Petitioners titles in the petition hereinabove referred are inside the Maasai Mau Forest.

(f) What is the status or current activities of the land comprising of the petitioners' land and

(g) Whether the Ntutu Commission Boundary affects all or any of the Petitioners' titles in the Petitions No. 10 of 2017 and Elc Petition No. 306 of 2016 consolidated with Petitions No. 11 of 2017

2. An order compelling the Chief Land Registrar, Director Adjudication and Director of Survey or their appointed agents on the hearing dates to produce all adjudication records, maps, green cards and all other relevant documents in respect of Petitioners titles in Petitions No. 10 of 2017 and ELC Petition No. 306 of 2016 as consolidated with Petition No. 11 of 2017.

3. Lastly an order directing the officials hereinabove mentioned to file and serve copies of the documents referred to in prayers (2) and (3) above.

The Application was based on the grounds that the Petitioners land is part of Public land and/or more specifically the Maasai Mau Forest and/or Forest Land and thus it is necessary for the aforesaid officers to prepare the aforesaid reports and if the said reports are availed, the Respondent will not suffer any prejudice.

The Application was further based on the Affidavit of Elizabeth Sanangoi Lolchoki which was sworn on the 20<sup>th</sup> day of December, 2018 in which she averred that she is the County Secretary to the Respondent/Applicant. In her Affidavit she deponed that the Petitioners parcels of land form part of land within the Maasai Mau and that it is necessary for the Government Officials stated in the Application to produce the documents requested and that the aforesaid reports will assist the court in determining the central question which is in dispute. The Applicants further averred that the orders sought will enhance the overriding objectives and will meet the end of Justice.

The Application was opposed by the Petitioner/Respondent by way of grounds of opposition and a replying affidavit sworn by Kitilai Ole Ntutu sworn on 11<sup>th</sup> day of February, 2019. On the grounds of opposition, the Petitioner stated that the Applicant is interfering with the judicial power vested in the honourable court, that the Applicant is abdicating the role to prove allegations that it makes, that no basis were laid for grant of the orders and no efforts were shown to have been made.

The Respondent further contended that the Applicant had previously been accorded an opportunity to file the aforesaid documents and the continued delay of the matter will greatly prejudice the Petitioner and lastly that the officers from whom documents are sought have offices within Narok and that they can come to court readily to avail the documents sought.

In his affidavit the Respondent averred that the issues that the Applicant raises are issues which the court can determine when evidence has been heard and it is the Applicant's responsibility to prove all allegations it makes in respect of the suit land and further that the Applicant must first lay basis and grounds for the court to issue the orders sought and thus for Applicant has not laid such grounds.

The Respondent further averred in opposition to the application that the documents sought are public documents which are available at the Narok/Adjudication and Survey offices which he can readily obtain and no efforts has been made that shows that the applicant attempted to obtain the documents herein and that he is greatly prejudiced by the delays in hearing of his petition and prayed that the Application be dismissed with costs.

I have read the Application and heard the oral submissions made by counsels in support of the Application and in opposition to the same and the issue for determination before me is whether the Applicant has laid sufficient grounds for the court to order a report be prepared by the Government Officers mentioned in the Application.

First and foremost, I must state that the instant application was filed on the date that the petition herein was set for hearing and prior to this and when directions were taken on the manner in which the Petition was to be heard the applicant never mentioned his inability to get the documents and the reports he seeks to be availed from the application and the submissions made.

I have not seen any attempts by the Applicant to procure the reports, documents, maps or plans and/or the refusal by the officers in denying him the said materials.

It is important to note that the Application before me remotely relates to access to information from a public entity, however, before one approaches the court for assistance, a party must show that he has sought the said information from the public entity and he was denied the same. From the application and affidavit in support thereof, I find no such effort and I thus agree with the Respondents' that the documents sought are available and no efforts has been made to procure them and no refusal that the court will not be of any help either.

This being a petition that involves land which is emotive, the Applicant can at the appropriate time during the hearing of the petition make an application to the court to call the said officers and request for the documents in issue.

In a nutshell I find that the Application before me is premature and thus dismiss the same with costs.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 26<sup>th</sup> day of June, 2019**

**Mohammed Noor Kullow**

**Judge**

**26/6/19**

In the presence of:

Mr Ouma for the petitioners

Mr Kiptoo holding brief for Kere for the respondent

CA:Kimiriny

**Mohammed Noor Kullow**

**Judge**

**26/6/19**