



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.321 OF 2014

BETWEEN

PAUL MUTWIWA WAMBUA.....PETITIONER

AND

KOMAROCK RANCHING & FARMING SOCIETY.....RESPONDENT

JUDGMENT

1. The Petitioner, Paul Mutiwa Wambua, is allegedly member number 234 of the Respondent, Komarock Ranching and Farming Society, a Cooperative Society duly incorporated under the **Co-operative Societies Act (Chapter 490 of the Laws of Kenya)**. The Respondent was apparently registered in 1963 and its primary purpose is the acquisition and allocation of land to its legitimate members. It also empowers its members economically by engaging in businesses for their benefit.
2. The Petitioner has filed this Petition claiming a violation of his property rights as provided for under **Article 40** of the **Constitution** and contends that the Respondent is the registered owner of a property known as Land Reference No.8825 comprising 27, 195 acres (the suit property) which was purchased in 1963 through finances from members' contributions. Upon transfer of the said property, each of the Respondents' members was allocated 20 acres and the remainder was left as property of the 1st Respondent to be held in trust for its members aforesaid.
3. He further alleges that pursuant to a resolution dated 31st July, 1983, the Respondent's land was further subdivided amongst the members and each was allocated 100 acres. It is the Petitioner's contention that pursuant to that resolution, he was entitled to 100 acres out of the suit property but the Respondent has failed to allocate him the aforesaid land. That he then instituted a civil case being **HCCC No.2861 of 1991** in which he sought orders that the Respondent be compelled to allocate him the said 100 acres of land but the Respondent disregarded the said orders.
4. It is the Petitioner's further claim that he has on many occasions implored the Respondent to comply with the judgment of the Court but in vain and that sometimes in the year 1996, in the process of trying to get the Respondent to comply with the Court order, another suit was instituted being **Arbitration Case No. 36 of 1996, David Muasya Ngusya and 5 Others vs Henry Nzioka and 4 Others** and on 23rd March, 1999 the arbitral award was issued. The gist of the Award was that the management of the Respondent under the chairmanship of Mr. Henry Nzioka Muli, was ordered to hand over the affairs of the Respondents to a new management team and in addition, that the Petitioner be immediately given what he was entitled to i.e 100 acres of land. He also

states that the Arbitral Award was subsequently confirmed and adopted by the High Court in 2001 in **Miscellaneous Civil Application No.210 of 2000** and further that to date, despite all his efforts, he has not been allocated his 100 acres of land as ordered by the Court and also in disregard of the advise of the Ministry of Co-operative and Marketing Development through the Office of the Commissioner for Co-operative Development.

5. It is therefore the Petitioner's submission that this Court is the perfect forum to remedy the fundamental breach of his right to property by the Respondent and he further seeks an interpretation of the Petitioner's right to property as envisaged under **Article 40** of the **Constitution**. He also claims that the non-compliance of the two Court orders by the Respondent has contravened his rights under **Article 27** of the **Constitution**.
6. It is his additional submission that this Court has the power to remedy the Petitioner's breach of **Article 40** of the **Constitution** and he relies on the cases of **Judicial Service Commission vs Speaker of the National Assembly and Another [2013] eKLR** and **Minister of Health and Others vs Treatment Action Campaign and Others (2002) 5 LRC 216** where the Court emphasized the importance of issuing appropriate orders and remedies under the Constitution to deserving litigants such as himself.
7. The Petitioner therefore urges that this Court ought to grant him the following orders;

“(a) A declaration that the Petitioner possesses a fundamental and an inalienable right to property and to benefit and enjoy all rights under it as envisaged under Article 40(2) (a) & (b) of the Constitution of Kenya.

(b) A declaration that the failure by the Respondents to allocate the Petitioner the one hundred (100) acres entitled to him is a violation of the Petitioner's fundamental right to property and the non-compliance of two separate Court orders by the Respondent contravenes Article 27 of the Constitution which provide that every person is equal before the law and has the right to equal protection and equal benefit of the law. It especially holds that equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(c) An order that the Respondent promptly and without fail allocate one hundred (100) acres of land and any other property entitled to the Petitioner since the year 1973 within a period of 14 days thereof and failure to which be found in contempt of Court.

(d) An order that the Deputy Registrar of the high Court supervises the said sub-division and allocation of the one hundred (100) acres to the Petitioner and any other portion/property the Petitioner is entitled to.

(e) An order of compensation, for the Respondent's having breached the Petitioner's right to property as enshrined in Article 40 of the Constitution.

(f) An order of compensation for the loss incurred by the Petitioner for not having the said property to use and deal with.

(g) Interest on (e), (f) and (g) above at Court rates from 1996 until payment in full.

(h) Costs of this Petition.

(i) Any further Relief or Orders that this Honourable Court shall deem just and fit to grant.”

8. In reply to the Petition, the Respondent filed a Replying Affidavit sworn on 30th October, 2014 by Bernard Maembe, the Respondent's Chairman and its member No.244.

9. Mr. Maembe deponed that when he took over the management of the Respondent, he initiated investigations into the Petitioner's claim over the suit property. That upon perusal of the Respondent's Members Register it was discovered that Member No.234 was Tumbo Ngulli, a man who was well known by Mr. Joseph N. Kioko, the Secretary to the Respondent. That upon visiting Ngulli's home, he was informed that Ngulli had since died and he also discovered that the late Tumbo Ngulli had brought his interests in the Respondent's land from J. Musembi Kikuvi who had also bought it from the late John Mutwiwa.
10. He further deponed that the District Co-operative Officer, Machakos, sometime in 2012 had appointed a committee to investigate and give its findings on the Petitioner's claim and the said committee did so and its findings were that the Petitioner had never been a member of the Respondent and had no interest in its land. That upon the said finding being made, the Petitioner was invited by the Respondent to appear before it and substantiate his claim. He was also requested to take documents in proof of his membership but he failed to do so.
11. It was also Mr. Maembe's contention that every member of the Respondent has a membership card as well as an allotment letter for the portion of land allocated to him together with share certificate for shares held. That the Petitioner was however not in the Respondent's members register and so had no authentic claim to pursue over the 100 acres of land. He further claimed that the documents he relied upon as evidence of membership were not authentic as they do not bear the Respondent's stamp, neither have they been executed by its Secretary or at least three of its officials as per the Society's by-laws. He also stated that the Minutes relied upon by the Petitioner are not genuine because page 2 thereof is missing and he also averred that the Petitioner had failed to demonstrate that he was a beneficiary of the initial 20 acres of land allocated to all members of the Respondent.
12. It was Mr. Maembe's further contention that there does not exist a single judgment of any competent Court against the Respondent requiring it to transfer 100 acres of land to the Petitioner and as regards **HCCC No. 2861 of 1991**, he claimed that the Respondent was not a party to that suit, was not served with the pleadings thereto; the orders of the Court did not refer to the suit property; the decree is not authentic as it does not have the seal of the Court and the Petitioner has failed to produce the proceedings and pleadings related to that suit.
13. In respect to the alleged **Arbitration Case No.36 of 1006** he stated that the Petitioner was not a party to that case and had no knowledge of it.
14. It was Mr. Maembe's other contention that the Respondent has allocated all its available land to all its members as per the Society's Resolutions and as such the Petitioner cannot claim the suit property as he is not entitled to the same and no land exists to be given to him in any event.
15. In its submissions, the Respondent further claimed that the Petitioner has not demonstrated before the Court with some degree of precision the manner in which his rights under **Article 40 of the Constitution** have been infringed and that for a person to institute a Petition claiming that his rights had been violated under **Article 40 of the Constitution**, he needs to prove ownership of the land in dispute and such a right cannot be enforced if the ownership of the land is in dispute. In that regard, it submitted that share number 234 claimed by the Petitioner does not belong to him but to another individual, a Mr. Tumbo Ngulli or his survivors.
16. It also submitted that in **HCCC No.2861 of 1991**, the Petitioner had sued the wrong party as the Respondent has never been referred to as Komarock Ranching Society and therefore it would be wrong for a party to be allowed to enforce a judgment against another which was not a party to those proceedings. It also reiterated that it was not a party in the Arbitral Proceedings.
17. Lastly, it submitted that the dispute at hand should have been referred to the Co-operative Tribunal and not the High Court as it is a dispute between an alleged member and a society and on that submission it relied on the case of **Kenya Planters Co-operative Union Ltd and Others vs**

Minister for Co-operative Developments and Marketing, Petition No. 345 of 2012.

18. The Respondent concluded by arguing that the Petitioner's rights under **Article 40** of the **Constitution** had not been violated as the Petitioner had failed to utilize avenues provided for under Statute to settle the dispute between himself and the Respondent and so the Petition should be dismissed with costs.

Determination

19. Having read the Parties' pleadings and considered their respective submissions, I am of the view that the principal issue for determination in this Petition is whether the Petitioner's right to property under **Article 40** of the **Constitution** have been violated. If the answer is in the affirmative, then the next issue to determine is whether the orders sought can be granted.

20. **Article 40** of the **Constitution** provides for rights to property in the following terms;

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

2. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

i. requires prompt payment in full, of just compensation to the person; and

ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

3. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

4. The State shall support, promote and protect the intellectual property rights of the people of Kenya.

5. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

21. In order to enforce this right, a party must demonstrate that it is entitled to the property in issue and clearly show the proprietary interest sought to be protected. Thus in **Joseph Ihugo Mwaura and 82 Others vs Attorney General Petition No.498 of 2009**, the Court stated as follows with regard to the right to property in the **Repealed Constitution**;

“Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically Section 75 does not create proprietary interest nor does it allow the Court to create such rights by constitutional fiat. It protects proprietary interest acquired through the existing legal framework.” (Emphasis added)

22. The same holding properly applies to any claim under **Article 40** aforesaid and further, the nature and extent of the right to property under **Article 40** has been well expressed in **Philma Farm Produce & Supplies & 4 Others vs Attorney General & 6 Others, Petition No.194 of 2011** where the Court stated as follows;

“Article 40(1) sets out the general right of every Kenyan to acquire and own property. There is no allegation in the pleadings that the Petitioners have been denied the right, either individually or in association with other to acquire or own property of any description in Kenya. In the petitioners' case they were given an opportunity to own land when they were issued with allocation letters but they failed to comply with the terms thereof.

Article 40(2) limits the authority of parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of Article 27(4) of the Constitution. The petitioners do not complain of any such breach.

Article 40(3) and (4) deal with the deprivation of property by the state on terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. There is no complaint in this matter to trigger the application Article 40(3) or entitle them to compensation.”

The Court then concluded thus;

The Petitioner has not made out any case that their property is being acquired in the manner contemplated by Article 40 of the Constitution to trigger application of Article 40(3) and (4). I must therefore conclude that there has been no breach of Article 40”.

23. The point made is that a party invoking **Article 40** must bring itself squarely within its expectations and to my mind the said **Article 40** of the **Constitution** also upholds and protects the sanctity of title and the primary consideration for a Court to enforce that right is that the property in question must have been lawfully obtained and the Petitioner has title to the property in question. Where title and entitlement to land are disputed, the right can hardly arise. From the evidence tendered in this Petition, it is clear that the Petitioner has no title over the suit property. His membership to the Respondent and his entitlement to the 100 acres has been disputed and the legal proceedings leading to the claim are also disputed.

24. Having found as I have, it is obvious that this Court cannot address the issue as to whether the Petitioner's rights under **Article 40** of the **Constitution** have been violated and I must therefore agree with the Respondent that the Petitioner cannot enforce his alleged fundamental rights under **Article 40** of the **Constitution** while his title or entitlement to the suit property is controverted and strongly so.

25. If any advise is needed, and as was also correctly pointed out by the Respondent, let the Petitioner

canvass the issue of his membership and entitlement to the 100 acres of the suit property before the Co-operatives Tribunal as is established under **Section 77** of the **Co-operative Societies Act**. The jurisdiction of the Tribunal is provided for under **Section 76** in the following terms;

“76.(1) If any dispute concerning the business of a co-operative society arises—

a. among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal.

76(2) A dispute for the purpose of this section shall include;

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.”(Emphasis added)

26.It is my view therefore that the issue as to whether the Petitioner is a member of the Respondent and whether he is entitled to the suit property can only be resolved in the first instant by the Cooperatives Tribunal. This is in furtherance of the principle in **Narok County Council vs Trans Mara County Council and Another, Civil Appeal No.25 of 2000** where the Court of Appeal expressed itself as follows in that regard;

“Where the law provides for a procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute.”

I am guided and to my mind, the above case lays down an important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists another organ or body vested with the mandate of determining the dispute, then it is desirable that such a procedure/remedy should be pursued first. In the instant case, the jurisdiction of the High Court can only be invoked by a party to proceedings before the Tribunal who is aggrieved by an order of the Tribunal and even then such remedy would only be pursued in the Court established under **Article 162(2)** of the **Constitution** because under **Article 165(5)(b)** as read with **Article 162(2)(b)** of the **Constitution**, this Court has no jurisdiction to determine any dispute as regards title to land.

27.Having so found, I recall that the Petitioner claimed that the Respondent had failed to comply with Court orders directing that he be allocated 100 acres out of the suit property. That therefore the Respondent is in contempt of Court. In response, the Respondent claimed that it was not a party to the proceedings in **HCCC No.2861 of 1991** neither was it a party to the **Arbital Case No.36 of 1991**.

28.My short answer to the above contentions is that if indeed the Petitioner was successful in all those cases, there are other mechanisms for enforcing the favourable decisions other than a

petition under the Constitution. One such mechanism is contempt of Court or an order of mandamus to have his interests registered by the relevant authority. He has failed to do so and those judgments cannot be enforced through the present Petition.

Conclusion

29. Turning back to the prayers sought, prayer (a) is a restatement of **Article 40** of the **Constitution** and I see no value in granting it.

30. Prayer (b) was not well canvassed and **Article 27** on non-discrimination cannot be granted where no obvious evidence of the Petitioner's discrimination has been tabled before this Court. I have explained why this Court is not the right forum to address contested issues of title to land and therefore prayer (c) cannot be granted.

31. Prayers (d), (e) and (f) are consequential orders and cannot be granted once the substantive prayers have been dismissed.

32. On costs, although the Petitioner has not succeeded, I see no reason to tax him with costs. Each party should therefore bear its own costs.

Disposition

33. For the above reasons, the Petition is dismissed but each party shall bear its own costs.

34. Orders Accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JANUARY, 2016.

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – court clerk

Mr. Ndhiwa for Respondent

Mr. Deya for Petitioner

By Court

Judgment duly delivered.

A copy of the Judgment to be supplied.

ISAAC LENAOLA

JUDGE