



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION NO. 10 OF 2021

IN THE MATTER OF

CONTRAVENTION OF THE CONSTITUTION OF KENYA 1963

CAP. 6 THEREOF (NOW REPEALED)

IN THE MATTER OF

THE CONSTITUTION OF KENYA 2010,

ARTICLES 20, 21, 23, 24, 27, 40, 42, 48, 50, 60, 63, 67

AND

IN THE MATTER OF

THE LAND (GROUP REPRESENTATIVES) ACT

CAP. 287 (NOW REPEALED)

AND

IN THE MATTER OF

THE LAND ADJUDICATION ACT CAP. 284 LAWS OF KENYA

AND

IN THE MATTER OF

EAST WASO ADJUDICATION SECTIONS

AND

IN THE MATTER OF

COMMUNITY LAND ACT 2016

AND

IN THE MATTER OF LOSESIA GROUP RANCH

AND

IN THE MATTER OF

TITLE NUMBERS SAMBURU/EAST WASO/2 TO 43

LOSESIA GROUP RANCHPETITIONER

VERSUS

KAMANGA HOLDINGS LIMITED & 43 OTHERS.....RESPONDENTS

RULING

1. By the Notice of Motion application dated 28th May, 2021, Losesia Group Ranch (*the Petitioner*) prays for orders:

(b) That this Honourable Court be pleased to order prohibition and or restrictions to be placed against titles No. Samburu/East Waso/2 to 43 barring alienations, waste and or any registrations whatsoever affecting the registers of the said titles repositied with the Land Registrar, the 43rd Respondent herein until further orders of this Court.

(c) That conservatory orders of injunction do issue, directed against the Respondents herein singularly and or severally from in any way alienating, charging, transferring, fencing, wasting and or in any way barring the Petitioners herein and the larger Samburu Community from free and uninhibited access to all these parcels known as Samburu/East Waso/2 to 43 until determination of the Petition herein and or further orders of this Court.

(d) That the Court do issue such further orders and directions as shall ensure the honest and expeditious disposal of the Petition herein.

2. The application which is supported by an affidavit sworn by the Petitioner's Chairman Lemakiya Lesarge is based on the grounds:

(a) That the Petition challenges the legality of alienations contained in the aforesaid titles which constituted community trust land under the old and new constitutional dispensations;

(b) That the Samburu Community at large and as more particularly represented by the Losesia Group Ranch stands to suffer irreparable loss through loss of valued grazing land which are of last resort during the dry seasons;

(d) That there is a real risk of communal/civil strife; and

(e) That it is in the interest of justice that the orders sought be granted as the petition may be rendered nugatory if the same are not granted.

3. The application is opposed by the 1st Respondent – Kamanga Holdings Limited. In their Replying Affidavit sworn by the Head of Legal Affairs David Kinuthia Mburu and filed herein on 19th July 2021, the 1st Respondent avers that it is the registered proprietor of Title Numbers Samburu/East Waso/30 and 31. The 1st Respondent further avers that prior to its purchase of the said properties, the Company conducted extensive due diligence and was convinced that the titles in the name of the seller, one Lekiraya Letitoya Fredrick were authentic.

4. The 1st Respondent further avers that the application is an abuse of the court process as in the year 2016, some of the Petitioners filed Nyeri ELC No. 74 of 2016 seeking similar determinations against the 1st Respondent and other parties. That Petition was struck out on 18th January, 2017 and the petitioners appealed the decision. On 17th May, 2017, their application for conservatory orders was dismissed by the Court of Appeal.

5. The 2nd to 40th Respondents are similarly opposed to the application. In a Replying Affidavit sworn on their behalf (*excluding the 30th Respondent*) by the 2nd Respondent Albis Lesuan Efreh Leriwala and filed herein on 9th September, 2021, the Respondents aver that the matters raised in the Petition and the application are *sub-judice* and therefore the Court is being asked to venture into issues already determined in another Court being Nyeri ELC No. 74 of 2015.

6. The Respondents further assert that the said case was dismissed and some of the Petitioners herein filed Nyeri Civil Appeal No. 130 of 2018 wherein they also sought an application for injunction which was declined.

7. The Respondents aver that the present Petition and application are brought by a body corporate claiming ownership of land that is already alienated and allocated to private persons after a lawful adjudication process that commenced in the year 1981. The process was concluded in the year 2008 and the Petitioner or its members never filed any objection as required by law.

8. The estate of the 30th Respondent named in the Petition as Patrick Kitamonge Leparleen is equally opposed to the application. In a Replying Affidavit sworn by the personal representative of the estate Alice Cheronon Leparleen, the 30th Respondent disputes the Petitioner's claim that they intend to sell or fence off the land and avers that the Petitioner has been repeating the same narrative since they first filed an Originating Summons in 2016 in a different suit.

9. The 30th Respondent further avers that it was properly allocated Land Parcel No. Samburu/East Waso/33 through a transparent process after applying for the same in 1987. The Petitioner previously tried to challenge the same but its Originating Summons was dismissed and an

attempt to get injunctive orders in the Court of Appeal was equally dismissed.

10. In addition to the Replying Affidavit the 30th Respondent has by a Notice of Preliminary Objection dated 17th August, 2021 objected to both the Petition and the application on the grounds:

1. That the Petition together with the Notice of Motion seeking conservatory orders are an abuse of the Court process as:-

(a) Losesia Group Ranch through Daniel Lomagul Kande, Raphael Lelkiwai and Lembian Lasangurukuri filed Originating Summons serialized as Nyeri Civil Case No. 74 of 2016 seeking the same orders as in this matter;

(b) The said Civil Suit was struck out by the ELC Court at Nyeri;

(c) Losesia Group Ranch acting through the same persons filed an Appeal and an application for injunction under **Rule 5(2)(b) of the Rules of the Court of Appeal**. The application for injunction was dismissed.

(d) The appeal against the striking out of the suit is pending in the Court of Appeal and the Petitioners have admitted as much. The Petitioners have pleaded that they have filed this Petition because the matter in the Court of Appeal has delayed;

(e) Further the Petitioners have filed two Petitions at the National Land Commission as the Constitutional body entrusted with management of public land. Those Petitions are yet to be considered;

(f) The dispute herein is in rem to the extent that it deals with the status of the parcel of land known as Samburu/East Waso. To this extent, changing the participants in a civil dispute and proceeding to file the same matter in different forums is abuse of the Court process;

(g) This court has inherent powers to prevent abuse of its procedures and process and in the instant matter, the same can only be exercised by striking out this Petition.

2. That on the basis of the circumstance pleaded in paragraph 1 above, the Petition is *res sub-judice*.

3. That the petition is an ordinary land dispute which can and ought to be determined through the ordinary civil process. Resort to constitutional Petition to determine ordinary civil suit is (an) abuse of process and the entire Petition should be struck out.

4. That the petition is bad in law for lack of specificity.

5. That the Petitioner is not a natural person and has no juridical/legal character:-

(a) Under the Land (Group Representatives) Act legal status is bestowed on the group representative and not the group ranch;

(b) Losesia Group Ranch has not been registered as a community under the Community Land Act. The group ranch has no heritage of rights under the constitution which can be enforced by way of a Petition.

(c) An entity which is neither a natural person nor a corporate entity cannot approach (the) court for enforcement of right to life, right to property, culture or environment;

(d) The purported legal character of the Petitioner is derived from a repealed statute which cannot bestow any status upon the Petitioner.

6. That the Petition herein is bad in law for failure to exhaust mechanisms of dispute resolution established under the Land Adjudication Act. The entire Petition ought to be struck out with costs.

7. That the Petitioner is a beneficiary of the adjudication process which it seeks to challenge. The Petitioner is therefore guilty of approbating and reprobating in the same cause.

11. The Land Adjudication Officer – Samburu East (the 41st Respondent) is similarly opposed to the application. In a Replying Affidavit sworn by the Samburu County Land Adjudication and Settlement Officer Edward Okoth, the 41st Respondent avers that the Petitioner herein is a Group Ranch formerly registered under the Land (Group Representatives) Act Cap. 287 now repealed.

12. The 41st Respondent avers that the East Waso Adjudication Section was established on 23rd September, 1981. Contrary to the Petitioner's claim, the main purpose for the creation of the adjudication section was to ascertain and record all rights and interest on the land within the section.

13. The 41st Respondent further avers that contrary to the Petitioner's assertions, the District Land Adjudication and Settlement Officer (DLASO) did not create any private ranches within the adjudication section. The Respondent further refutes the claim that the DLASO

changed the Land Adjudication committee without consultation with the Community and asserts that a public baraza was held to elect another committee.

14. The 41st Respondent asserts that upon finalization of the process, the Land Adjudication Officer issued a notice of completion of the adjudication register vide a letter dated 5th March, 2008 which gave a 60 days public inspection period and for filing of any objections. All objections made were heard and determined before the Adjudication Register was forwarded to the Director Land Adjudication on 2nd November, 2009. A Certificate of Finality was subsequently issued by the Director on 29th October, 2009 after which the records were forwarded to the District Land Registrar for registration and issuance of title deeds. The Petitioner was one of the beneficiaries of the process.

15. Following directions given on 21st October, 2021 it was agreed that both the Petitioner's application and the 30th Respondent's Preliminary Objection be disposed of together by way of written submissions. I have accordingly considered both the application and the objection as well as the submissions and authorities placed before me by the Learned Advocates for the parties.

16. The first ground of objection herein is that this Petition is *res sub-judice* as the matters raised herein are the same ones pending adjudication in Nyeri ELC 74 OF 2015; Daniel Lomagul Kandeji and 2 Others -vs- Kamanga Holdings & 49 Others as well as in Nyeri Civil Appeal No. 130 of 2018 between the same parties.

17. The doctrine of *sub-judice* is captured under **Section 6 of the Civil Procedure Act** as follows:

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

18. Discussing the doctrine of *sub-judice* in **Republic -vs- Paul Kihara & 3 Others Ex-parte Law Society of Kenya (2020) eKLR**, Mativo J., observed as follows:

“There exists the concept of *sub-judice* which in Latin means “under Judgment.” It denotes that a matter is being considered by a Court or Judge. The concept of *sub-judice* is that where an issue is pending in a Court of law for adjudication between the same parties, any other Court is barred from trying that issue so long as the first suit goes on. In such a situation, an order is passed by the subsequent court to stay the proceeding and such an order can be made at any stage.”

19. Considering the same concept in the case of **Kenya National Commission on Human Rights -vs- The Attorney General and 17 Others (2020) eKLR**, the Supreme Court of Kenya stated as follows:

“The term “sub-judice” is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matters so as to avoid abuse of the Court process and diminish the chances of Courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before Courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that: there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

20. In the matter before me, it is not in dispute that some three individuals namely: Daniel Lomagul Kandeji, Raphael Lekilwai and Lembian Lasangurukuri had previously instituted Nyeri ELC Case No. 74 of 2016 (OS) against a majority of the Respondents herein. The Originating Summons which is attached to the Petitioners Supporting Affidavit reveals that the three Applicants therein had sought a determination of the following issues:

(a) Whether Losesia Group Ranch comprises of 940 members who are duly registered under Land (Group Representatives) Act Cap 287 Laws of Kenya;

(b) Whether Losesia Group Ranch Land measured over approximately 154,013.61 hectares of land;

(c) Whether the membership of the Losesia Group Ranch ever deliberated upon and or ratified any decision to hive off and alienate part of the land belonging to the group ranch to legal persons named as defendants No. 1 to No. 43 in the Summons herein;

(d) Whether the said beneficiaries of the said alienation are members of the Losesia Group Ranch;

(e) Whether the group representatives from the 2nd defendant to 10th Defendants had fiduciary trust powers over the said land with the same only exercisable only for the benefit of Losesia Group Ranch members and upon consultation and consent by the membership for any such exercise of power over the land;

(f) Whether the laid down procedures under the Land Adjudication Act were adhered to in the alienation of Losesia Group Ranch Land, totaling over 39841.62 Hectares;

- (g) *Whether any consideration was paid to Losesia Group Ranch for such alienation of the said land;*
- (h) *Whether community land is capable of alienations without the consent of the membership;*
- (i) *Whether the aforesaid alienations of land belonging to the Group Ranch meets the constitutional threshold as set out under Article 63 of the Constitution of Kenya.*
- (j) *Whether all the stated titles should not be declared unlawfully, illegally and unconstitutionally obtained and be nullified and cancelled with all the land reverting back to the ownership of Losesia Group Ranch;*
- (k) *Whether the Land Registrar and the Land Adjudication Officer, Samburu acted in collusion, connivance, recklessly, illegally, without care, unlawfully and without reasonable diligence in issuing the titles of land clearly known to be group ranch land, to the other defendants; and*
- (l) *Whether the defendants should pay the costs of this case plus interest.*

21. Following a Preliminary Objection raised by the Respondents in the said Originating Summons, the same was struck out on 18th January, 2017. Aggrieved by the said decision, the three Applicants instituted Nyeri Civil Appeal No. 130 of 2018 which remains pending determination to-date.

22. In the Supporting Affidavit to the Originating Summons the three Applicants deponed that they are members of the Losesia Group Ranch. That position has not been denied by the Petitioner herein. On the contrary it is apparent that the Petitioner was fully aware of the proceedings. That much is clear from Paragraph c on the facts leading to the Petition wherein the Petitioner pleads at sub-paragraphs xiv to xviii thereof as follows:

“xiv. That the members of the community herein have previously filed challenges to these illegal and unlawful alienations vide High Court Nyeri ELC No. 74 of 2016 (OS) as per appendix 4 thereto.

xv. That an appeal against the striking out of the said suit on a preliminary objection has been preferred and is yet to be determined as per appendix 5 to the annexed Notice of Appeal and memorandum of appeal vide Nyeri Civil Appeal No. 130 of 2018;

xvi. That a Petition had been filed with the National Land Commission in 2018, seeking the determination of the issues of illegal and unlawful alienations of the community land as per appendix 6 hereto.

xvii. That the Respondents filed responses as per appendix 7 to the Originating Summons vide Nyeri HCC ELC 74 of 2016; and

xviii That both matters above stated have pended before the aforesaid forums without determination for a long time owing to institutional difficulties and inordinate laches and marked as appendix 8 are letters to both Court of Appeal and the National Land Commission.

23. Having so laid the grounds for the Petition, the Petitioner herein proceeds to pray for the following orders:

- (i) That this Honourable Court do declare the alienation of community land comprised in 40,925.54 Ha. within the East Waso adjudication Section to the Respondents herein unconstitutional unlawful and unprocedural;*
- (ii) That the said alienation be declared null and void and the titles thereof be cancelled;*
- (iii) That the land comprised in the said 40,925.54 Ha. be decreed to belong to the Losesia Group Ranch as the registered community Group;*
- (iv) That the said 40,925.54 Ha. be ordered to be registered as community land within the meaning of Community Land Act and vested in Losesia Group Ranch membership; and*
- (v) That the Respondents do bear the costs of this Petition.*

24. A perusal of the above prayers reveals to me that the same are concerned with the very same subject matter of the petition herein.

Both the Petitioner herein and the three Applicants in the Originating Summons are questioning whether the declarations of the concerned parcels of land as an adjudication section was lawful, procedural and constitutional and whether the procedures laid down under the Land Adjudication Act were adhered to. The said parties are similarly questioning whether the beneficiaries of the land said to have been alienated were members of the Losesia Group Ranch.

25. That being the case, it was clear to me that apart from the fact that the Losesia Group Ranch has filed the Petition under its name, the same relates to the very same subject matter that is currently pending determination before the Court of Appeal.

26. While I am in agreement that the Petitioner herein is a body corporate and that as such body corporate it was not a party in Nyeri ELC Case No. 74 of 2018, it was clear to me that the three Applicants acted as its representatives in instituting the Originating Summons. That

much is clear from Paragraph C(xx) of the Petition where the Petitioner pleads that it was previously unable to sue in its name due to vested interest as its management was previously in the hand of the unlawful beneficiaries of its land.

27. In the result I am persuaded that the Petition herein is *res sub-judice* and that the same ought to be stayed pending the determination of Nyeri Civil Appeal No. 130 of 2018.

28. Having so found I did not deem it appropriate to delve into the other grounds raised in the Preliminary Objection.

29. The Preliminary Objection accordingly succeeds to the extent that this Petition is *res sub-judice*. The same shall accordingly stand stayed pending the determination of the said Nyeri Civil Appeal No. 130 of 2018.

30. The costs of this application shall be borne by the Petitioner.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 27TH DAY OF JANUARY, 2022.

IN THE PRESENCE OF:

MR. KARWERU FOR THE PETITIONER

MR. GITHUI FOR THE 30TH RESPONDENT

MS ADE FOR THE 1ST RESPONDENT

NO APPEARANCE FOR THE 2ND – 40TH RESPONDENTS

COURT ASSISTANT - MUGAMBI

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J. O. OLOLA

JUDGE