



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT SIAYA

ELC PETITION NO. 1 OF 2021

BETWEEN

KENNEDY OMONDI OCHIENG'.....1ST PETITIONER

CHARLES ODHIAMBO OLIECH.....2ND PETITIONER

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

SIAYA COUNTY GOVERNMENT.....2ND RESPONDENT

THE CABINET SECRETARY FOR LANDS AND

PHYSICAL PLANNING.....3RD RESPONDENT

LAKE AGRO LIMITED.....4TH RESPONDENT

RULING

Introduction

1. Pursuant to the provisions of **Rule 13** of the **Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, the petitioners filed a motion dated **22/10/2021** seeking several orders. Prayers 1 and 2 of the motion are spent. The orders that are the subject of this ruling is one that seeks a conservatory order suspending the decision to allocate land parcel numbers **USONGA/USONGA/BLOCK 1/4** measuring 3698.1 HA, **USONGA/USONGA/BLOCK 1/7** measuring 419.5 HA and **USONGA/USONGA/BLOCK 1/8** measuring 2646.14 HA (**the suit land**) within Yala Swamp Farm as communicated vide a **NOTICE OF INTENTION TO ALLOCATE LAND** dated 14/10/2021 (hereinafter "**the notice**") and costs. The motion has been brought on several grounds set out on the face thereof and on the supporting affidavit of the 1st petitioner Kennedy Omondi Ochieng' dated 24/10/2021 who reiterated and adopted in *toto* the contents of the affidavit in support of his petition dated 24/10/2021.

2. The petitioners reside and work for gain along Yala Swamp catchment area within Siaya County.

3. The 1st respondent is a constitutional commission established under **Article 67** of the **Constitution** whose mandate among others is to manage and administer all unregistered trust land and unregistered community land on behalf county governments.

4. The 2nd respondent is a county government established under **Article 176(1)** of the **Constitution** whose mandate among others is to hold in trust all unregistered community land on behalf of the communities for which it is held.

5. The 3rd respondent is the cabinet secretary responsible for land and is mandated within the provisions of **Sections 11** and **48** of the **Community Land Act** to facilitate the process of registration of community land.

6. The 4th respondent is a private limited liability company and the intended recipient of the suit land.

Petitioner's case and submissions

7. The petitioners' case is contained in the motion and grounds contained therein, affidavit in support of the petition, supplementary affidavit

dated 6/12/2021 and several annexures. The main grounds of the petitioners' assertions are that; (i) the suit land is unregistered community land and could not be allocated to the 4th respondent and therefore the respondents were in violation of **Article 63(4)** of the **Constitution** and **Section 6(8)** and **15** of the **Community Land Act** and, (ii) in contravention of the law, the 2nd respondent's county assembly, did not resurvey the Yala Swamp Farm.

8. The petitioners filed written submissions dated 29/10/2021. They contended that in accordance with **Article 63(2)(d)** of the **Constitution**, the 2nd respondent held the suit land in trust for the communities that reside around Yala Swamp Farm and could not allocate the suit land to the 4th respondent because **Section 14** of the **Land Act** which the 1st respondent relied on in making its allocation to the 4th respondent was only applicable to public land. The petitioners contended that they had made out a case for the grant of conservatory orders and on this, they placed reliance on **Articles 22 and 23** of the **Constitution** and the authorities of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others (2015) eKLR** and **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR**. Its oral highlight of submissions on 20/12/2021 was a summary of their written submissions.

1st respondent's case and submissions

9. The 1st respondent's case is contained in its grounds of opposition dated 16/12/2021. It contended the suit land was public land having been set aside as public land vide *Gazette Notice No. 2570* dated 25/08/1970 and *Gazette Notices No. 9819,9820 and 9821* dated 1/12/2006. Flowing from this argument, they contended that the public participation process under **Sections 5 and 6** of the **National Land Commission Act** and **Section 14** of the **Land Act** was live by the time the petitioners filed the petition and that the petitioners had failed to exercise the principle of exhaustion of remedies and in any case the actions of the 1st respondent were backed by **Section 12(7)** of the **Land Act**.

10. The 1st respondent did not file written submissions. In its oral submissions of 20/12/2021, the 1st respondent contended that the petitioners could only institute legal proceedings if the 1st respondent failed to act on objections raised by the members of the public in accordance with **Section 14** of the **Land Act**. It submitted that courts cannot usurp the roles of quasi-judicial institutions and urged the court to allow it to undertake its mandate in accordance with this provision of law. It contended that in the absence of a classification of the land as private or community land, it therefore follows that the suit land was public land.

2nd respondent's case and submissions

11. The 2nd respondent's case is contained in its notice of preliminary objection and grounds of opposition both dated 9/11/2021 and a replying affidavit sworn by Jeconia Were dated 29/11/2021 together with several annexures.

12. The preliminary objection is premised on the ground that by dint of **Section 14** of the **Land Act**, this court did not have jurisdiction to hear and determine the matter.

13. The grounds of opposition were more or less similar to those proffered by the 1st respondent and the ground set out in its preliminary objection.

14. In its replying affidavit, the 2nd respondent contended that the 1st and 2nd respondents had received numerous objections against the notice which were yet to be analyzed, heard and determined. It contended that vide *Gazette Notice No. 2570* dated 25/08/1970 and *Gazette Notices No. 9819,9820 and 9821* dated 1/12/2006, 3700 hectares and 3200 hectares were respectively set aside after following due process. It submitted that the land set aside in 1970 was purposed for agricultural land. It stated that the suit land had been leased to Dominion farms and that the communities had been allocated a total of 5,309.75 acres of land. It averred that based on public participation, it conducted a survey of Yala Swamp and it created a part development plan which was approved. It contended that the 4th respondent is in possession of the suit land pursuant to an agreement between it and the Dominion Farm and that it followed due process in allocating the land to the 4th respondent. It urged the court to dismiss the motion and petition.

15. It filed written submissions dated 19/11/2021 on the preliminary objection. It contended that though this court has unlimited original jurisdiction on matters land and environment, its jurisdiction in the instant motion was ousted by **Section 14** of the **Land Act**. On this, they placed reliance on several authorities including **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors (1969) EA 696**.

16. It contended the suit land was set aside pursuant to **Sections 117 and/or 118** of the retired **Constitution** and **Part III** of the repealed **Trust Land Act** and actuated by various Gazette Notices and that the setting apart process has never ceased in accordance with **Sections 119** of the retired **Constitution**. That the act of setting aside land vests such land in either the government, state corporation or a registered company and pre-existing rights such as those of communities ceased to exist. It contended that pursuant to **Article 62(1)(m)** and **Article 62(3)** of the **Constitution**, the suit land was public land because it could neither be classified as private nor community land. It contended that by virtue of the principle of constitutional avoidance, this court did not have jurisdiction to hear and determine the motion and petition for the reason that a party is required to pursue legally available remedies as opposed to pursuing a dispute through a constitutional process. On this, it placed reliance on the decision of the Court of Appeal in **Gabriel Mutava & 2 others vs Managing Director Kenya Ports Authority & Another (2016) eKLR**. It submitted that the petitioners did not disclose the rights that had been violated. On this they placed reliance on the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**. It concluded that the motion had not met the threshold for the grant of conservatory orders. Its oral highlight of submissions on 20/12/2021 was a summary of its written submissions.

3rd Respondent's case and submissions

17. Despite being served with the pleadings and court's directions, the 3rd respondent failed to file any response or submissions to the

motion.

4th respondent's case and submissions

18. The 4th respondent's case is contained in its replying affidavit sworn by Onkar Singh Rai dated 4/11/2021 together with annexures. The replying affidavit is more or less similar to that of the 2nd respondent and because of this similarity, the court shall not restate the main grounds set out in the replying affidavit because it would be tantamount to a repetition.

19. In support of the preliminary objection of the 2nd respondent, the 4th respondent filed written submissions dated 13/12/2021. On **Section 14** of the **Land Act** which was the ground set on in the preliminary objection, it contended that this provision of law provided a remedy for the petitioners to challenge the notice in a prescribed manner and timeframe.

20. Further, it filed written submissions dated 5/11/2021 in which it contended that the petitioners had not met the threshold for the grant of conservatory orders and on this it relied on the authority of **Rutto Kapto Hillary v The Officer in Charge Naivasha Main Prison & 2 Others [2016] eKLR** among others. It contended that the petitioners had failed to demonstrate that they will suffer prejudice in the event the conservatory orders are not issued. It submitted that the petitioners had failed to exhaust the remedies available to them and had not shown any exceptional circumstances that would exempt them from this obligation and on this, they relied on the authority of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others 2015 eKLR**. They contended that the petition does not disclose a *bonafide* constitutional issue and on this, it relied on the Indian authority of **Re an application by Bahadur (1986) LRC(Const)307**.

Petitioners' supplementary affidavit and supplementary submissions.

21. The petitioners' supplementary affidavit dated 6/12/2021 is a rebuttal of the 1st, 2nd and 4th respondents' case. The petitioners averred that the preliminary objection is not on a pure point of law as it requires parties to produce evidence to prove the same.

22. It is the petitioners' position that by virtue of **Section 150** of the **Land Act** and **Section 13** of the **Environment and Land Court Act**, the Environment and Land Court had exclusive jurisdiction to hear and determine disputes in relation to land. The petitioners contend that in accordance with the notice, they wrote to the 1st Respondent requesting for relevant information which letter did not receive a response and consequently, they filed the petition. They contended it was common ground that at the outset, the suit land was trust land. It averred that the suit land set apart vide *Gazette Notice No. 2570* dated 25/08/1970 was purposively set aside for organized settlement of communities and consequently, it was not available for allocation to a private investor. On the process of setting aside of 3200ha vide *Gazette Notices No. 9819,9820 and 9821* of 1/12/2006, it contended that the process was unconstitutional for failing to adhere to **Sections 117 and 118** of the retired **Constitution** and **Sections 7, 8, 9 and 13** of the repealed **Trust Land Act**. They contended that even if the suit land was public land, the intended allocation was unlawful and unconstitutional and as a result, the suit land retained its trust land status and consequently became community land upon the promulgation of the Constitution in 2010.

23. The petitioners filed supplementary submissions dated 6/12/2021 which essentially was a reiteration of the supplementary affidavit. To bolster their case, they placed reliance on the authorities of **Gitson Energy Limited vs Francis Chachu Ganya & 6 others [2017] e KLR** and **Mohamud Iltarakwa Kochale & 5 others vs Lake Turkana Wind Power Limited & 4 others**.

Analysis and determination

24. The Court has considered the motion, the substance of the petition, the petitioners' affidavit in support of the petition and supplementary affidavit, grounds of oppositions, replying affidavits, the 2nd respondents notice of preliminary objection, the various parties' annexures, submissions and the applicable constitutional and legal framework and jurisprudence. The two main issues falling for determination are (i) whether by dint of **Section 14** of the **Land Act**, this court does not have jurisdiction to hear this motion and by extend the petition and, (ii) whether the petitioners have established a prima facie case that warrants the grant of conservatory orders.

The two issues will be dealt with in a sequential manner.

25. The 1st issue is whether by dint of **Section 14** of the **Land Act**, this court's jurisdiction to hear the motion and by extend the petition has been ousted. The case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** has long settled the principle of a preliminary objection as thus;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

26. As was settled in the case of **Owners of the motor vessel 'Lilian S' vs Caltex Oil Kenya Ltd [1989] KLR 1**, it is not in doubt that without jurisdiction, a court of law has no option but to down its tools. A question of jurisdiction is based on a pure point of law and therefore the court finds and holds that the said objection meets the description of what amounts to a preliminary objection.

27. **Article 162 (2) (b)** of the **Constitution** is the enabling provision that establishes this court which provides that there shall be established courts with the status of the High Court to hear and determine disputes related to the environment and the use and occupation of, and title to, land. **Section 13** of the **Environment and Land Court Act** gives this court original and appellate to hear disputes on environment and land. These two constitutional and legal provisions do not restrict or limit this court's jurisdiction to hear disputes on land including allocation of such land. Similarly, too, **Section 14** of the **Land Act** which is the provision of law alluded to in the preliminary objection has not in any way limited or restricted the jurisdiction of this court from hearing matters emanating from **Section 14** of the **Land Act**. Contrary to the assertion by the 2nd respondent that this court does not have jurisdiction, **Section 150** of the **Land Act** gives this court unlimited jurisdiction

to handle disputes derived from the **Land Act** including those emanating from **Section 14** of the **Land Act**. The *locus classicus* case **Owners of the motor vessel 'Lilian S' (supra)** settled the issue of jurisdiction as follows;

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited”. [Emphasis mine]

It is the finding of this court that this court has jurisdiction to hear and determine the motion and petition and therefore the preliminary objection fails.

28. The 2nd issue is whether the petitioners have established a prima facie case that warrants the grant of conservatory orders. The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of **Article 23** of the Constitution are well settled. In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court that which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it and to determine whether the petitioners have made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the petitioners will suffer prejudice. Conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest. These principles were outlined in a line of court decisions including the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, Platinum Distillers Limited vs. Kenya Revenue Authority [2019] eKLR, Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary - Ministry of Environment and Natural Resources & 3 Others [2017] eKLR and Centre for Rights Education and Awareness and 7 others v the Attorney General HCCP No. 16 of 2011.**

32. It is the considered view of this court that the main issue of contention is whether the suit land is public land or community land. Prior to their respective gazette, the suit land was trust land duly registered under the repealed Trust Land Act. A cursory look at *Gazette Notice No. 2570* dated 25/08/1970 which relates to a portion of the suit land shows that within the provisions of **Part IV** of the repealed **Trust Land Act**, this land was purposively set aside for organized settlement.

33. Within the provisions of **Section 134** of the **Land Act**, the intent of settlement programs is to provide land for shelter and food to squatters, persons displaced by; natural causes, development projects, conservation and internal conflicts. It is common ground that there were floods that took place in the suit land in the 1960s and the land was reclaimed. Was *Gazette Notice No. 2570* dated 25/08/1970 intended to settle this displaced community in an organized manner? Was this ever done? In the circumstances would **Section 14** of the **Land Act** which deals with public land be applicable to this portion of the suit land? It is the considered view of this court that these are pertinent issues that have to await the hearing and determination of this petition and as it currently stands, there is no evidence that has been adduced before this court to depict that such a settlement ever took place.

34. *Gazette Notices No. 9819,9820 and 9821* of 1/12/2006 which relates to a portion of the suit land shows that these parcels of land were set aside for agriculture. Equally too, there is no evidence presented before this court that the mandatory provisions of **Sections 117(4) and 118** of the retired **Constitution** and **Sections 7, 8, 9 and 13** of the repealed **Trust Land Act** were adhered to in setting aside these parcels of land for agriculture.

35. In the absence of evidence that due process was followed in the course of setting aside part of the suit land by the then Commissioner of Lands or settling the community in an organized manner in a part of the suit land, the petitioners' contention that the suit land is community land is not farfetched and at this point, this court is unable to make a determination whether the suit land is community or public land and the ultimate finding of this court on this critical issue will have to await the hearing and determination of this petition. It therefore follows that the petitioners will be prejudiced if the suit land is allocated to the 4th respondent.

36. As alluded to by the 2nd respondent, the 4th respondent is in occupation of the suit land by virtue of a personal arrangement between the 4th respondent and a 3rd party known as Dominion Farms and it is the considered view of this court that the 4th respondent will not be prejudiced if the orders sought are granted.

37. Due to the foregoing, it is my finding that that the petitioners have established a prima facie case against the respondents and there is no reason for this court to deny the conservatory orders sought.

38. Before this court issues the disposal orders, it wishes to raise an issue with a threat made on the independence of this court by paragraph 87 of the 2nd respondent's replying affidavit dated 29/11/2021. This court would like to caution advocates that they are officers of the court and they should exercise decorum in the manner in which they draft pleadings on behalf of their clients and this paragraph is hereby struck out or expunged from the court record.

Disposition

39. Consequently, the petitioner's motion is allowed in the following terms:

i) Pending the hearing and determination of this petition, conservatory orders be and are hereby issued suspending the notice dated 14/10/2021 that intended to allocate land parcel numbers USONGA/USONGA/BLOCK 1/4, USONGA/USONGA/BLOCK 1/7 and USONGA/USONGA/BLOCK 1/8 to the 4th respondent.

ii) Costs shall be in the cause.

iii) Mention for directions on 31/1/2022.

40. It is so ordered.

RULING DELIVERED VIRTUALLY. DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JANUARY 2022

In the presence of:

Mr. Wambola for the petitioner.

Mr. Kimani h/b for Mr. Ogola for 4th respondent

N/A for 1st, 2nd and 3rd respondent

Court assistant: Sarah Ooro

HON. A. Y. KOROSS

JUDGE

20/1/2022