



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 373 OF 2016**

**BETWEEN**

**ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES....1<sup>ST</sup> PETITIONER**

**NDUNDE INVESTMENTS LIMITED..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION ..... RESPONDENT**

**AND**

**MBARI YA MBOGO .....1<sup>ST</sup> INTERESTED PARTY**

**KASARINI FARMERS CO-OPERATIVE SOCIETY..... 2<sup>ND</sup> INTERESTED PARTY**

**WORKERS OF KASARANI ESTATE.....3<sup>RD</sup> INTERESTED PARTY**

**KASARINI ANCESTRAL FAMILIES SELF-HELP GROUP.....4<sup>TH</sup> INTERESTED PARTY**

**SAMUEL GITHEGI MBUGUA.....5<sup>TH</sup> INTERESTED PARTY**

**GRACE MUTHONI GITHEGI.....6<sup>TH</sup> INTERESTED PARTY**

**MARGARET NYOKABI MBUGUA.....7<sup>TH</sup> INTERESTED PARTY**

**CHRISTINE MITHIRI MBUGUA ..... 8<sup>TH</sup> INTERESTED PARTY**

**RUTH WANJIKU, ESTHER NJERI & PAUL NDUNGU ALL**

**AS EXECUTORS OF THE ESTATE OF MARY**

**WARURII GAKUNJU ..... 9<sup>TH</sup> INTERESTED PARTY**

**RULING**

## Introduction

1. The 1<sup>st</sup> Petitioner, the Assumption Sisters of Nairobi Registered Trustees, describes itself as a body corporate incorporated under the provisions of the **Trustees (Perpetual Succession) Act, Chapter 164** of the **Laws of Kenya**; and the 2<sup>nd</sup> Petitioner, Ndunde Investments Limited, describes itself as the registered owner of the parcel of land known as 12825/15. They instituted the present proceedings against the 1<sup>st</sup> Respondent, the National Land Commission, a constitutional body established pursuant to **Article 67** of the **Constitution, 2010** alleging violation of the Constitution as a result of its actions in undertaking investigations in relation to certain parcels of land, which the Petitioners claim they are the rightful owners.

2. Subsequently, the Interested Parties were enjoined to these proceedings.

3. In their Petition dated 6<sup>th</sup> September, 2016, the Petitioners seek the following orders:

*(a) A declaration that the Respondent is in gross violation of Article 67 of the Constitution by entertaining matters touching on private lands and hence, its actions are unlawful and a nullity.*

*(b) An order of certiorari do issue to bring forth to this Court to quash the decision of the Respondent to hear the claim before it.*

*(c) That an order of prohibition do issue directed to the Respondent prohibiting, barring and/or stopping it from further proceeding with the dispute before it or in any other manner conducting proceedings touching on the suit lands.*

*(d) A declaration do issue to the effect that the violation of the clear and mandatory provisions of Article 40, 67 and 165 of the Constitution by the Respondent is unconstitutional and hence invalid.*

*(e) The costs of the suit be borne by the Respondent.*

4. The Petition was filed under a certificate of urgency and on 7<sup>th</sup> September, 2016, this Court not only certified the matter as urgent but also granted an order prohibiting the Respondent from proceeding with the dispute before it or in any other manner conducting proceedings touching on various parcels of land, namely, L.R Nos. 7153/1, 7153/2, 12825 and I.R No. 35930 (hereafter jointly 'suit property').

5. Then the 4<sup>th</sup> Interested Party raised a Preliminary Objection dated 21<sup>st</sup> September, 2016, contesting Petition.

### The 4<sup>th</sup> Interested Party's Preliminary Objection

6. In the Preliminary Objection, the 4<sup>th</sup> Interested Party stated that the Application and Petition are an abuse of Court process as there are multiplicity of proceedings already before this court in the High Court at Nairobi **Misc. J.R. No. 153 of 2016, Misc. J.R. No. 321 of 2016, and ELC Misc. No. 582 of 2016** and that the present Petition seeks the same orders, to prohibit the Respondent from hearing the case on the same lands.

7. That the issue of the Respondent's jurisdiction requires evidence and investigation into the status and history of the land and can be properly raised before the National Land Commission Tribunal. Finally the 4<sup>th</sup> Interested Party states that the Petition is defective, incompetent and bad in law.

8. According to the 4<sup>th</sup> Interested Party, based on the definitions of 'public land' under **Article 62** of the **Constitution**, the issue is one that requires an investigation of the laws that were enacted prior to the Constitution and hence, the issues pertaining to history and status of land cannot be raised in the present

Petition. Further, that the Petition is misconceived as the issues pertaining to jurisdiction raised herein, do not form any basis for a constitutional Petition.

9. The 4<sup>th</sup> Interested Party stated further that the issue of public land and private land cannot be determined based on a title that is sought to be revoked due to illegality or an alleged forgery. Accordingly, that **Article 68 (v)** of the **Constitution** provides for review of all dispositions of public land and this Court therefore ought to defer the present matter and allow the Respondent to undertake its constitutional mandate and that in any event, the jurisdictional issues pertaining to the mandate of the Respondent ought to be raised before its Tribunal in the first instance and not in the present Petition.

10. It was the 4<sup>th</sup> Interested Party's other contention that the review of grant of public land essentially means a review of how public land ended up in private hands and in the present dispute, the complaints relate to land that had been gazetted as public land or by law had reverted to the Government pursuant to **Section 340** of the **Companies Act, Chapter 486** of the **Laws of Kenya**. Furthermore, that the registration of the suit properties under the **Government Lands Act, Chapter 280** of the **Laws of Kenya (Repealed)**, meant that the properties were originally public land and within the jurisdiction of the National Land Commission.

11. Learned Counsel Mr. Gatitu argued the Preliminary Objection, on behalf of the 4<sup>th</sup> Interested Party, he reiterated the above assertions. Counsel further submitted that as the previous matters were filed under **Order 53** of the **Civil Procedure Rules, 2010**, all the parties ought to have been served and they are prohibited from raising the same issues in their own case. Counsel added that in any event the Petitioners who have also appeared before the Respondent are aware of all the cases.

12. It was Counsel's argument that the Petitioners are playing lottery with the Courts as they are moving from Court to Court seeking similar orders. Counsel highlighted on the various suits before the Courts filed in the present matter and concluded that the matters raised herein ought to be canvassed in another forum.

13. While conceding that indeed the Court has the jurisdiction to entertain the matter, Counsel argued that this jurisdiction ought to be properly invoked and as such, he urged the Court to allow the Preliminary Objection and strike out the Petition.

## **The Response**

### *The Petitioners' Case*

14. The Petitioners opposed the Preliminary Objection and Learned Counsel Ms. W.G Wambugu argued their case. It was Counsel's submission that their case is clear and that neither the Respondent nor the other Parties have shown that they (the Petitioners) have participated in the previous proceedings.

15. Counsel argued that the Petitioners have a specific claim to be determined from a specific title and that there is nothing placed before the Court to show that the Court lacks the jurisdiction to entertain the Petition. Accordingly, that the Constitution empowers the Court to hear matters before it and it has original jurisdiction to hear and interpret the Constitution and also to determine whether the Respondent has the powers it seeks to exercise in the present matter.

16. Furthermore, that the appearance before the Respondent does not mean that they submitted to the Respondent's jurisdiction and that in any event, the present Preliminary Objection is bad in law as it does not meet the threshold to warrant the striking out of the Petition and the discharge of the conservatory orders that were granted.

17. While urging the Court to dismiss the Preliminary Objection, Counsel submitted further that the same does not meet the standards set out in the case of **Mukisa Biscuit Co. vs. West End Distributors Ltd, [1969] EA**.

### *The Respondent's Case*

18. Learned Counsel Mbutia argued on behalf of the Respondent, who supported the Preliminary Objection. Counsel was in agreement with the submissions by the 4<sup>th</sup> Interested Party. Counsel contended that the Petitioners and the 5<sup>th</sup> to 9<sup>th</sup> Interested Parties are trying to re-litigate on the same issues that have already been addressed by Courts of competent jurisdiction and that they are merely raising them in isolation. Counsel highlighted the cases in which similar issues have been raised and concluded that they can raise the present issues in **J.R 582 of 2016** or the Respondent and that there must be an end to litigation.

### *The 5<sup>th</sup> – 9<sup>th</sup> Interested Parties' Cases*

19. In response to the Preliminary Objection, Learned Counsel Mr. Njagi appeared on behalf of the 5<sup>th</sup> to 9<sup>th</sup> Interested Parties, and argued in opposition.

20. Their case was that the genesis of the present litigation is **ELC Civil Case No. 557 of 2009**, and that the facts of the remedies sought herein are on all fours as the remedies sought before the Respondent in regard to L.R No. 12825. That the Plaintiffs in that suit are now the Petitioners before the Respondent but have now split into amorphous groups who are all acting for a common purpose to wrestle the ownership of the land and that unfortunately, they did not bother to prosecute the case and that as the defendants therein, they filed an application for the dismissal of the suit.

21. It was their contention that during the pendency of the said Application, the 1<sup>st</sup> to 4<sup>th</sup> Interested Parties, filed a constitutional Petition, being **Petition No. 462 of 2012**, with an Application for conservatory orders under Certificate of Urgency and they therein centered their claim on ancestral claims to the land registered in their (the 5<sup>th</sup> to 9<sup>th</sup> Interested Parties) names and other numerous innocent third Parties who had purchased subdivisions of the land. That the said suit was however struck out by Majanja J.

22. Further, that following the disposal of the said suit, the 1<sup>st</sup> to 4<sup>th</sup> Interested Parties registered a new entity known as Kasarini Ancestral Families Self-help Group on 29<sup>th</sup> September, 2015 and filed a Petition at the Respondent seeking a renewal of titles to the parcels of land known as L.R Nos. 7153/1, 7153/2, 12825 and sub-divisions therein.

23. In their Affidavit, they largely deponed as to the events surrounding the present matter and they stated that the Preliminary Objection herein is argumentative and the facts raised therein are not assumed to be agreed by the Parties herein. As such, it was their contention that the present matter cannot be finally settled by the same and that there are weighty constitutional issues that need to be canvassed through a full hearing.

24. Learned Counsel Mr. Njagi, on their behalf, highlighted on the various existing suits touching on the suit properties and distinguished them from the present matter. It was his argument that the 5<sup>th</sup> to 9<sup>th</sup> Interested Parties are not abusing the Court process and that it is the 1<sup>st</sup> to 4<sup>th</sup> Interested Parties who have occasioned the present situation.

25. Counsel reiterated that the Petitioners have never taken part in any of the aforesaid proceedings and that in any event, the present Preliminary Objection is bad in law as it does not meet the threshold set out in the **Mukisa Biscuit Case (supra)**.

### *The 10<sup>th</sup> Interested Party's Case*

26. Learned Counsel Mr. Otenyo appeared on behalf of the 10<sup>th</sup> Respondent and reiterated the submissions by the Petitioners and the 5<sup>th</sup> to 9<sup>th</sup> Interested Parties. In that regard, Counsel urged the Court to dismiss the Preliminary Objection with costs.

## Determination

27. Based on the Parties' respective submissions, the key issue for determination is whether the Preliminary Objection ought to be upheld. The first contention however raised by the Petitioners and the 5<sup>th</sup> to 9<sup>th</sup> Interested Parties is that the present Preliminary Objection is bad in law and that it does not meet the threshold set out in the **Mukisa Biscuit Case (supra)**. On that note, it should not be lost to the Parties that a Preliminary Objection must be founded on the law as it was stated in the **Mukisa Case** where Law JA pointed out that:

*“So far as I’m 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. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

Similarly Sir Charles Newbold in the same case stated thus:

*“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”*

28. The Supreme Court has however broadened the grounds upon which a Preliminary Objection may be upheld by acknowledging, in **Lady Justice Kalpana H. Rawal and 2 Others vs. Judicial Service Commission and 6 Others [2016]eKLR**, (as per Mutunga CJ.) thus:

*“[28] I have already stated that Mr Omtatah’s Preliminary Objection is not anchored on jurisdiction although it is labelled as such. Does that disqualify it as a Preliminary Objection? Mr Pheroze says yes. It is important to note that although Preliminary Objections are, more often than not, based on lack of jurisdiction, it is not the only ground. It is for that reason that, Law JA in Mukisa Biscuit Co. gave jurisdiction and limitation of time only as examples of the grounds of raising a Preliminary Objection. The list should not therefore be regarded as closed. Depending on the facts and circumstances of a particular case, they may be other grounds for raising a Preliminary Objection. The instant case is a good example. It is a case that has arisen in the post 2010 Constitutional era and the unique and exceptional facts, which all parties have attested to, will require this Court to interpret Mukisa Biscuit Co., in light of the provisions of the Constitution.” (Emphasis added)*

29. The Supreme Court thus contemplated the existence of such circumstances that may warrant a Court to examine the circumstances of a case in addressing its mind to a Preliminary Objection raised in a matter before it. It therefore follows, that this Court is under an obligation to examine the present matter in light of the materials placed before the Court, including the pleadings filed by the Parties, in order to satisfy itself on whether the Preliminary Objection ought to be upheld. Rather it is the purpose not nature of the preliminary object that matters.

30. On that note, at the core of the Applicant’s case is that the matters raised in the Petition have been duly addressed and or are pending in other suitable forum and hence, the Court ought to strike out the present Petition. It is uncontested that the suit properties herein have been the subject matter of various proceedings including **Misc. J.R. No. 153 of 2016**, **Misc. J.R. No. 321 of 2016**, and **ELC Misc. No. 582 of 2016**. It is also not in dispute that the Petitioners are not parties to any of the said suits. The question then that begs for answers is whether this is the appropriate forum for addressing the issues raised in the Petition. My answer to that question must be in the negative. I hold so because, as per the materials before this Court, the present claim is limited to a portion of the greater property which is the subject matter in a

dispute pending before another Court of competent jurisdiction. As far as the Petitioner's case is concerned, their argument is that the Respondent does not have the mandate and jurisdiction of examining the validity of their title to their property which forms part of the larger parcel of land.

31. I note that in **ELC Civil Case No. 557 of 2009**, the Plaintiffs therein sought certain orders in regard to various parcels of land, namely, L.R Nos. 12825/7, 12825/26, 12825/11, 12825/6, 12825/23, 12825/23, 12825/22, 12825/24, 12825/15, 12825/18, 12825/2, 12825/5 and 12825/8. Nyamweya J. on 5<sup>th</sup> March, 2015 granted orders of stay, maintaining the status quo of the said properties pending the hearing and determination of the Notice of Motion Applications dated 9<sup>th</sup> July, 2012, and 20<sup>th</sup> February, 2015, that had been filed before the Court.

32. In **Misc. J.R. Application No. 582 of 2016**, the Plaintiffs therein were granted leave by Gacheru J. on 13<sup>th</sup> June, 2016, to apply for orders of prohibition against the Respondent prohibiting it from hearing, either by itself or a committee of itself, a petition, complaint or dispute referred by Kasarini Farmers Co-operative Limited or its officials in ELC Civil Case No. 557 of 2009 and/or reviewing or in any way encumbering, interfering with or revoking or recommending for revocation to the Registrar the titles to Land Reference Nos. 12825/10, 12825/14, 12825/9, 12825/17, 12825/19, 12825/16, 12825/7, 12825/26, 12825/11, 12825/6, 12825/23, 12825/22, 12825/24, 12825/15, 12825/18, 12825/25, 12825/21, 12825/5, 12825/8, 12825/20, and 12825/16.

33. In **Petition No. 462 of 2013**, the Petitioners therein had sought for declarations to the effect that their right to property under **Article 40** of the **Constitution** had been violated in regard to the property known as L.R No. 7153/R, which was acquired by the Respondents therein, upon the de-registration of the Kasarini Farmers Co-operative Society Limited. The said suit land subsequently became to be known as L.R No. 12815.

34. The foregoing cases highlight on the unfortunate scenario underlying the issue surrounding the suit property, namely L.R No. 12825, which has been sub-divided into various portions.

35. At the heart of the aforementioned disputes is however, the question in regard to the jurisdiction of the National Land Commission in regard to investigating the titles to the suit properties. In the circumstances, it would not be in order for this Court to address itself on the issues raised in the Petition as the best forum for doing so would be in **ELC Civil Case No. 557 of 2009**. The ELC is well seized with the matter, and being a Court of competent jurisdiction, it retains the jurisdiction to determine the questions raised in the Petition, including whether there has been any violation of the Petitioners' constitutional rights.

36. It will further be absurd for this Court to give conflicting orders pertaining to the suit properties in light of the decision that shall be reached in **ELC Civil Case No. 557 of 2009**, which is properly seized of the matter pertaining to the larger parcel of the suit property. In the circumstances, it would not be in order for this Court to address its mind to a smaller portion, the Petitioners' parcel, of the larger parcel. In any event, the order in regard to the mandate and jurisdiction of the Respondent in investigating title to the suit properties is also sought in the said suit and hence, it would not be in the interest of justice for this Court to sit and address the same issue which is well before another court of even and competent jurisdiction.

37. Additionally, it is clear that what is at stake in this suit as well as ELC Civil Case No. 557 of 2009 ultimately revolve around the remedies sought before the Respondent which touch on and concern Land Reference No 12825 (No. IR 35930)- original No 7153/R and 7153/1. The parties are not the same but the subject matter and the substratum of the suits, including the instant Petition, is substantially the same.

38. The above findings notwithstanding, Learned Counsel Ms. W. G Wambugu, appearing on behalf of the Petitioners, failed to inform the Court of the existence of the other suits touching on the mandate of the Respondent in regard to the same suit property, and as this Court is now well apprised of the material facts of this case, it is therefore necessary that the interim orders issued on 7<sup>th</sup> September, 2016 be

vacated. It is not that counsel was not aware of the existence of the suits. She was. The 4<sup>th</sup> Interested Party's counsel demonstrated that the contest has been raised before the Respondent where all the parties before me are already embroiled. It would be inappropriate to allow the orders to subsist.

39. As I conclude, I must reiterate the holding by Aburili J. in **Samuel Githegi Mbugua and Others vs. the National Land Commission and Others, Misc. J.R App. No. 321 of 2016**, where the Learned Judge while addressing her mind to the issues surrounding the suit properties herein pointed out thus:

*“I also note that in ELC JR No. 582 of 2016, the pleadings did not specifically name the officials of Kasarini Ancestral Family Self-help Group, which officials are named herein. Nonetheless, this Court finds that the option available to the applicants herein was to revert back to ELC 557/2009 or ELC JR 582/2016 to obtain a specific order for stay proceedings pending before the National Land Commission between the same parties hereto and not file a separate Judicial Review matter in the High Court seeking for stay. To duplicate proceedings in my humble view, is to seek to confuse the cause of justice and to conflict the Court which are likely to issue contradictory orders and in the end, this could embarrass the Judicial Officer making such orders. The application for stay is therefore found to be wanting in merit and I decline to grant stay orders as prayed. The prayer therefore is dismissed.”*(Emphasis added)

40. It is therefore in the interest and course of justice that the present matters raised in the Petition be canvassed in one forum where the whole suit property is the subject of adjudication.

41. I would however not strike out the Petition as I had been urged by Mr. Gatitu. Instead, I would let the Petitioners advance their case before the same court already adjudicating over the same parcel(s) of land and that is the Environment and Land Court at Nairobi. That will avoid a situation where two courts of equal status end up with asymmetrical determinations.

### **Disposition**

42. For the above reasons, I order that :

**(1)The present matter, being Petition No. 373 of 2016, be transferred to the Environment and Land Court at Nairobi and be placed before the presiding judge , with a view to further directions on the hearing thereof, if possible, alongside ELC Civil Case No. 557 of 2009.**

**(2)The interim orders granted on 7<sup>th</sup> September, 2016 are hereby discharged and vacated.**

**(3)I make no order as to costs on the preliminary objection.**

**Dated signed and delivered at Nairobi this 31<sup>st</sup> day of October 2016**

**J.L. ONGUTO**

**JUDGE**