REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

PETITION NO. 1 OF 2015

(Formerly High Court Nakuru Petition No. 30 of 2015)

IN THE MATTER OF OLOKURTO ADJUDICATION SECTION

AND

IN THE MATTER OF RIGHTS AND FREEDOM AGAINST DISCRIMINATION AS GUARANTEED UNDER ARTICLE 40 OF THE CONSTITUTION

AND

IN THE MATTER OF THE THREATENED EVICTION FROM OLOKURTO ADJUDICATION SECTION

BETWEEN

MOILE YENKO & 7 OTHERS.....PETITIONERS

-VERSUS-

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NAROK.....2ND RESPONDENT

LAND ADJUDICATION AND SETTLEMENT OFFICER.....3RD RESPONDENT

DIRECTOR OF SURVEY.....4TH RESPONDENT

KENYA FORESTRY.....5TH RESPONDENT

KENYA WILDLIFE SERVICE.....6TH RESPONDENT

J U D G M E N T

The Petition

1. The eight Petitioners herein have approached this court seeking orders that:

> **"a) The adjustment of the boundaries of the Olokurto Adjudication Section proposed by the Respondent constitutes unfair discriminatory to the extent that it affects one section of the**

beneficiaries and not the other and no justification has been offered for the discrimination. (sic)

b) The adjustment of the boundaries of the Olkurto Adjudication Section is an infraction of the Petitioners' legitimate expectation. (sic)

c) The Respondent be restrained by way of an order of prohibition from adjusting the boundaries of the adjudication section to the prejudice of the Petitioners."

They also seek costs of the suit.

2. The Petition was initially brought against the **National Land Commission (1st Respondent**); **the County Government of Narok** (2nd Respondent), **the Land Adjudication and Settlement Officer** (3rd Respondent) and **the Director of Surveys** (4th Respondent) all in their respective constitutional and legal capacities. Subsequently the **Kenya Forest Service** and **Kenya Wildlife Services** were enjoined as the 5th and 6th Respondents respectively.

3. The Petitioners aver that in **1975** the 3rd Respondent declared **Mau West Division** which includes Olokurto, a land adjudication section. The adjudication process was completed in 1990. Several families, all members of the Maasai Community were identified as beneficiaries. The said families were: **Yenko**, **Saoli**, **Rotiken**, **Kuyoni**, **Setek**, **Mpusia**, **Nakola** and **Sanamwala** families whose respective sections were demarcated and marked with beacons within the Olkurto area.

4. The Petitioners aver that they are progenies of the **Yenko** and **Saoli** families. It is averred that the Petitioners were among the beneficiaries of the Olokurto adjudication section and were shown their parcels by the 3rd Respondent, the Surveyors and officials of the predecessors of 2nd Respondents. They aver that subsequent to the completion of the adjudication process the boundaries of the Petitioners' parcels were adjusted allegedly in order to accommodate forest boundaries of Olokurto forest. This reduced the parcels to which the Petitioners and other families were entitled to.

5. The Petitioners complain that infact the land given up by them and other families in the adjustment process was set aside for the settlement of members of the Ogiek Community. A further proposed adjustment allegedly swallowed up the entire land parcel identified for the benefit of the eight families. But following entreaties, the 3rd Respondent allowed all the other said affected families except the Petitioners herein to retain their respective parcels. The 3rd Respondent however resisted the Petitioners' plea to not interfere with the Petitioners' particular section insisting on the adjustment that would effectively take away all or drastically reduced the parcels identified for the benefit of Petitioners during the adjudication process.

6. The Petitioners assert that having organized their social and economic lives around the settlement areas shown to them during adjudication process, they had the legitimate expectation that they would not be discriminated but would receive similar treatment as other families who were beneficiaries of the adjudication section, and that their social and economic lives would not be disrupted thereafter. They complain that the actions of the Respondent (s) are discriminatory against them because the reason given to justify the adjustment, namely to adjust forest line, was not sincere as the land hived off benefited the **Ogiek Community**.

7. The Petitioners complain that other families in similar circumstances were allowed to retain their parcels in keeping with the original adjudication plan while the Petitioners currently face the threat of forceful removal. The foregoing is the gist of Petition and the Supporting affidavit sworn by the Petitioners.

Responses and Arguments

8. In the Replying affidavit sworn by Laura Yego, the 5th Respondent states that the **Ol Posimoru Forest**

was gazetted in 1957 and later declared a central forest **vide legal notice no. 174 of 20th May 1964.** That in 1975 a parcel measuring 20,115 hectares of the said forest was declared as adjudication section comprising **Kamkar**, **Kilaba** and **Olposimoru A & B** before excision.

9. That the Olokurto Adjudication section is distinct from Ol Posimoru Forest and the two do not share a boundary. That the 5th Respondent was not involved in any boundary alterations and further that the subject land is not within a state forest and is therefore under the management of the 2nd Respondent. Thus the Petitioners have no cause of action against the 5th Respondent, whose responsibility is State Forests.

10. The gist of the Replying affidavit filed by the 6th Respondent is that the pleadings do not disclose a cause of action against them. That Kenya Wildlife Services has no interest in the Olokurto adjudication section as it is not a National Park or reserve; that they have not in any way attempted to evict the Petitioners as that does not comprise part of their mandate under the Wildlife Conservation and Management Act. The 1st to 4th Respondents did not participate in the matter despite service.

11. The Petitioners' arguments are based on the Petitioner's alleged legitimate expectation and the protection against discrimination, based on the material deponed to in the Supporting affidavits. These were reiterated by Mr. Githui for the Petitioners at the oral hearing of the Petition. Miss Yego for the 5th Respondent also referred to the replying affidavit and asserted that Olokurto adjudication section does not fall under the jurisdiction of the Kenya Forest Service, and that there was nothing to connect the 5th Respondent with the Petitioners' complaint.

12. The Kenya Wildlife Service had filed written submissions on 23/6/2016. Relying on their replying affidavit, they pointed out that the Petition was never amended to demonstrate the cause of action or reliefs sought against them. Thus Kenya Wildlife Services is a stranger to the Petition. That the enjoinment application only involved the Kenya Wildlife Services, which application was spent upon determination.

Analysis and Determination

13. I have considered the Petition, affidavits for and in opposition thereto as well as rival arguments. The question whether or not the Petition discloses a cause of action against the 5th and 6th Respondents is an important one and requires to be addressed from the outset. These two parties were enjoined pursuant to the Notice of Motion filed on 21st September 2015. However, despite the leave granted to enjoin the 5th and 6th Respondents, the Petitioners did not subsequently amend the Petition, and thereby plead their complaint against the said Respondents. I note from the oral arguments by the Petitioners an attempt to rely on material contained in affidavits related to the Notice of Motion for joinder in a bid to prop up their case against the 5th and 6th Respondent.

14. In this regard I agree entirely with the arguments of the 6th Respondent that once the application of 21st September 2015 was disposed of, it was spent entirely. Besides, the affidavit thereto not constituting a pleading in the true sense of the word cannot be a substitute for averments in a Petition.

15. **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** in **(the Mutunga Rules)** provide for the manner in which Petitions are to be amended to enjoin a new party. Rule 5 (e) states:-

> **"The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties-**
>
> **(a) …….**
>
> **(b) …….**

(c) …….

(d) …….

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents."

16. Rule 10 in the **Mutunga Rules 2013** further prescribes the format of a Petition as follows:

"(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following-

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court."

17. One may be tempted to minimize the value of these provisions as merely technical, especially in light of the provisions of Article 159 (2) (d) of the Constitution. However it is a cardinal rule of justice and fairness that a party who has been sued is entitled to know the exact case he is called up to answer; in this case, the Respondents role in the alleged violation of the rights of the Petitioners. Indeed Article 50 (1) of the Constitution provides that:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

18. As any other dispute a Petition is not cloak-and-dagger affair. The case of **Anarita Karimi Njeru – Vs- Republic (No. 1) [1979] 1 KLR 154** is settled authority for the proposition that where a person is alleging a contravention or threat of contravention of a Constitutional right, he must set out the right infringed and the particulars of such infringement or threat. The starting point is obviously the pleadings that set out the Petitioner's case. The court stated:

"We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he shall set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

19. Further in **Trusted Society Of Human Rights Alliance Vs. Attorney General & 2 Others [2012] eKLR** the court of reflecting on the principle above stated:

"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."

20. Because the Petition was never amended no violation or threat thereof is pleaded against the 5th and 6th Petitioner therefore, in the Petition. The Petitioners cannot be allowed to make up for this serious omission by relying on affidavits sworn in respect of the application for the joinder of the said Respondents. For this reason alone, the case against the said Respondents is a non-starter.

21. But turning to the pleaded threats to violation and threats of violation in this Petition, namely the breach of legitimate expectation and the right to protection against discrimination, I note that the Petitioners have cited Article 51 of the Constitution. I believe the intended provision was Article 27 (4) of the Constitution which states:

"The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

22. Although legitimate expectation is not a right explicitly guaranteed as such under the Bills of Rights, the courts have in the past upheld the proposition that those who hold public power must be held to account for their actions. And that capricious actions of those who wield such power are amenable to review by the court in a relevant action. The doctrine of legitimate expectation was developed in English Courts with a view to holding rulers to their promises. The doctrine permeates the right to fair administrative action guaranteed in Article 47 and the provisions of the Fair Administrative Action Act the latter which gives effect to the Article.

23. Indeed under Section 7 (1) of the Fair Administrative Action Act a court is empowered to review an administrative action, defined in Section 2 as:

"(i) the powers, functions and duties exercised by authorities or quasi judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates"

24. Section 7 (2) goes on to provide that:

"A court or tribunal under subsection (1) may review an administrative action or decision, if:

a) ……;

b) ……;

c) ……;

d) ……;

e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

f) ……;

g) ……;

h) ……;

i) ……;

j) ……;

k) ……;

l) ……;

m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

n) ……;

o) ……;"

25. In **Keroche Industries Ltd –Vs- Kenya Revenue Authority & Others [2007] eKLR, Nyamu J** (as then was) stated that:

"Legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher interest beneficial to all…which is, the value of the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation….public authorities must be held to their practices and promises by the Courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

26. The Supreme Court distilled principles governing the successful invocation of the doctrine of legitimate expectation in **Communications Commission of Kenya & 5 Others -Vs- Royal Media Services Ltd & 5 Others [2014] eKLR** stating at paragraph 269 that:

"[269] The emerging principles may be succinctly set out as follows:

a. there must be an express, clear and unambiguous promise given by a public authority;

b. the expectation itself must be reasonable;

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution."

27. In the case of **Dyer Associates Limited –Vs- Capital Markets Authority & Another High Court Petition 328 of 2011**, the court held that Article 47 of the Constitution was intended to subject administrative processes to constitutional discipline. Therefore, relief in respect of a grievance in respect of an administrative action was no longer confined solely to the realm of common law. (See also **Kalpana H. Rawal -Vs- Judicial Service Commission & Others Petition No. 386 of 2015 [2015] eKLR**).

28. What then is the basis of the Petitioner's alleged violation and threat of violation? As I understood it, it is that the actions of the 1st to 4th Respondents in taking away the land parcel purportedly assigned to their respective families, and alleged subsequent threats to evict the Petitioners amount to discriminatory treatment, and a violation of their legitimate expectation to continue holding and using the land in question.

29. First of all, there can be no dispute that indeed the Olokurto Adjudication Section was declared sometimes in May 1970 and amended in 1990 in order to create a "new forest line", per annextures **MOYI** to affidavit of the Petitioners (in support of the initial Notice of Motion), there being none filed in support of the Petition. However, there is no evidence whatsoever that the Petitioners herein were some of the beneficiaries of the impugned adjudication process. Nor even other allegedly favoured families cited in the Petition. For the purposes of this Petition, the alleged assignment to the Petitioners of the adjudicated land comprises the promise allegedly made to them. No correspondence in this regard or other material was placed before the court.

30. Indeed, details of the particular land parcel or parcels to which the Petitioner's families and comparator families were found entitled pursuant to the impugned adjudication process were not provided. It matters not that the 1st to 4th Respondents have not filed any material to controvert the assertions of the Petitioners in that regard. The Petitioners having come to court ought to have laid before the court some basic evidence, by way of annextures to demonstrate the promise that is the basis of their asserted expectation and the advantage lost due to the impugned decision of the Respondents.

31. The court cannot act on bare assertions in a matter of this magnitude. As a minimum, the Petitioners were expected to show that based on the promise in respect of the specific parcel of land to which they lay claim by virtue of the adjudication process, the Respondents acted in a discriminatory manner against them vis-à-vis other families in the same circumstances. And that thereby the Respondents violated their legitimate expectation to owning and using the said land, by taking it away. So scanty was the Petitioner's material that when challenged by the 5th Respondent concerning the boundaries of the Olposimoru and Olokurto forests relative to the adjudication sections and their status, the Petitioners had no answer.

32. Devoid of a factual foundation to support Petitioners assertions, this Petition cannot be salvaged through mere legal arguments, notwithstanding the non-participation of the 1st to 4th Respondents herein. Secondly, it seems that the alleged alteration of boundaries happened over 25 years ago pursuant to the Land Adjudication Act. The Act has elaborate provisions for the ascertainment of interests in land and resolution of any disputes arising during the adjudication process. The last step in the adjudication process is the preparation and the finalization of the adjudication register, which is itself subject to objection and appeal by aggrieved parties to the minister. The decision of the Minister was final under the Act but could be challenged by way of judicial review within six months.

33. It is not clear to this court whether the Petitioners availed themselves of the mechanisms for the resolution of disputes as provided for under the Act. Or in any way challenged the decision contained in the 1990 letter which communicated the alteration of the boundaries of the forest in Olokurto

Adjudication Section and is now the basis of this Petition. Given the fact that the said decision allegedly adversely affected them one would have expected the Petitioners to use the mechanisms in the Land Adjudication Act to challenge the alteration of the boundaries of the adjudication section. Infact there is no support for the assertion that certain families were, subsequent to the said decision allowed to keep their portion of land affected by the alteration. Thus the basis of alleged discrimination is destroyed.

34. In my opinion, parties ought not to resort to a constitutional petition when there are other prescribed processes and procedures for dealing with disputes. In **High Court Petition No. 353 of 2012 (Consolidated with Petition No. 159 of 2012 Tom Kusienya & Others -vs- Kenya Railways Corporation & Others**, the Court cited with approval the decision in **International Centre for Policy and Conflict and 5 Others -vs- The Hon. Attorney-General & 4 Others [2013]eKLR** in which the Court observed that:

> **"[109] An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC's powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution. "**
>
> **[110] Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted…"**(Emphasis added)

35. The Court went on to cite the decision in ***Re Application by Bahadur*** **[1986] LRC (Const)** at page 307,

> **"The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the unwisdom of ignoring that advice....**
>
> **The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, "a general substitute for the normal procedures for invoking judicial control of administrative action." (See Harrikisson v A-G [1979] 3 WLR 62).**

36. Further, as was observed in the case of **Minister of Home Affairs -vs- Bickle & Others (1985) LRC Const** (per Georges C.J):

> **"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."**

37. **Lenaola J** in **Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011** after considering several authorities on the question observed:

> **"[24] All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes**
>
> **[27] I must add the following; Our Bill of Rights is robust. It has been hailed as one of the**

> **best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshall. <u>However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”</u>** (Emphasis added)

38. In light of all the foregoing it is my considered view that the Petition before me cannot succeed and I will dismiss it accordingly. Parties will bear own costs.

Delivered and Signed at **Narok** this **30th** day of **November, 2016**.

Mr. Yienko holding brief for Mr. Githui for the Petitioners

N/A for the Respondents

CC : Barasa

C. MEOLI

<u>JUDGE</u>