



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**PET NO. 57 OF 2014**

**PARKIRE STEPHEN MUNKASIO & 14 OTHERS.....PETITIONERS**

**VERSUS**

**KEDONG RANCH LIMITED & 8 OTHERS.....RESPONDENT**

**RULING**

***(Constitutional petition citing various violations; petition also seeking declaration that petitioners deserve title by way of adverse possession; application to strike out petition as being incompetent; held that claim for adverse possession improper and such claim struck out; other aspects of petition to proceed)***

1. This suit is a Constitutional Petition that was filed on 19 August 2014 through Professor Tom Ojienda, Senior Counsel. In the petition, the 15 petitioners have described themselves inter alia as residents of the land parcel No. 8396 (I.R No. 11977) situated in Kedong in Naivasha, Nakuru County, which land is approximately 75,769 acres. The petitioners have stated that they present the petition on their own behalf and on behalf of their families and all other over 30,000 members of the Maasai Community residing on the suit land. The petitioners have invoked the jurisdiction of this court under Articles 10, 20, 27, 28, 29, 40, 53 (c) , and 63 of the Constitution of Kenya, 2010. They have further averred that they are members of the Maasai Community, which they have described as a minority and/or marginalized community, and hence a vulnerable group within the meaning of Article 21(3) of the Constitution. They have stated that they are empowered by Article 22 of the Constitution to institute court proceedings for the grant of the reliefs set out in Article 23 of the Constitution.

2. It is further pleaded in the petition, that the petitioners and the persons they represent, have a personal stake in the suit land which is said to be their ancestral land, having been in actual occupation of it since birth. It is pleaded that subsequent post-independence government driven initiatives have continued to alienate land from the Maasai community at large, and that private entities have also done likewise. It is averred that the 1st and 2nd respondents are currently in the process of resettling people from Olkaria and Narasha on the suit land, a process which it is claimed to violate the rights of the petitioners and the Maasai community that reside in the suit land, since the process is being undertaken without involvement of the Maasai community living in the suit land ( Kedong Ranch )

3. It is pleaded that the 1st respondent is currently subdividing and selling the land to the 2nd respondent and to other third parties which will disposses the petitioners and the persons they represent, as they will ultimately be dispossessed of their ancestral land upon which their livelihoods entirely depend, particularly, for grazing their animals and extraction of sand for sale. It is pleaded that the suit land sits on top of a potential geothermal power basin and that geothermal projects have been initiated by the Government and the 2nd and 3rd respondents. Owing to this, the petitioners aver, that them and persons they represent, have continually and intermittently been forced to move from portion to portion of the suit

land, and to be moved again every time a new project phase is initiated. This, it is said, reduces their grazing land. It is also pleaded that from time to time, the petitioners and the persons they represent have been evicted from the land, yet this land is very important to the petitioners and their families, as it is their means of livelihood, culture and religious and traditional practices.

4. It is pleaded that the 2nd respondent has asked the petitioners and persons they represent to leave the suit land by 21st August 2014 which is said to be an arbitrary forced eviction. It is stated that the 2nd respondent has already built 154 houses, schools, 3 churches and a police cell at Olosinyat area of the suit land to settle the persons from Olkaria and Narasha and have burnt currently unoccupied manyattas belonging to the Maasai community. It is averred that the resettlement of these persons will infringe on the petitioners' rights to property.

5. It is also averred that the geothermal developments are rapidly degrading the environment and that they have noted a sharp increase in nascent fumes, noise pollution, increased dust, gastronomic and skin diseases, stillbirths in cattle, premature death of livestock, and an increased risk of premature delivery in pregnant women, which are said to be clear signs of pollution. This it is pleaded, is in violation of the petitioners' rights to life, human dignity and property, and a clean and healthy environment.

6. The petition is said to be grounded on the following :-

- (a) Article 63 of the Constitution which recognizes community land;*
- (b) The right to housing under Article 43 of the Constitution;*
- (c) That in carrying out evictions, the State must ensure that all feasible alternatives are explored in consultation with the affected persons.*
- (d) That resettlement measures must be consistent with constitutional guidelines and internationally recognized human rights standards especially the right to life and security and the human rights of children.*

7. It is pleaded that the respondents have participated in one way or another in violating the constitutional rights of the petitioners and that they should be held accountable for their acts and omissions.

8. The petitioners have sought the following prayers in the petition :-

- (a) A declaration that the petitioners, their families and all the members of the Maasai Community residing on LR No. 8396 (I.R No. 11977) are in lawful occupation of the said land on account of it being their ancestral land and communal land.*
- (b) A declaration that the petitioners, their families and all the members of the Maasai Community residing on the suit land have acquired title to the suit land by adverse possession and/or prescription.*
- (c) A declaration that the acts and omissions of the 1st to 7th respondents violated the fundamental rights and freedoms of the Petitioners, their families and all the Members of the Maasai Community residing on the suit land, under Articles 27(1), (2), (4), (5) and (6); 28; 29 (c) (d) (e) and (f); 40 (3) and (4); 42; 43 (a) (b) (c) and (f); 44; 47 (1) and (2); 57 (c) and 63 of the Constitution of Kenya.*
- (d) A declaration that the 2nd, 3rd and 4th respondents either by themselves, their agents, servants or otherwise howsoever cannot drill any geothermal well on the suit land or undertake any related project without consulting and seeking the participation of the petitioners, their families and the people they represent.*
- (e) An order of permanent injunction restraining the respondents either by themselves,*

*their agents, servants or otherwise howsoever from evicting the petitioners, their families, and all other members of the Maasai Community residing on the suit land.*

*(f) An order of permanent injunction restraining the respondents, either by themselves, their agents, servants or otherwise howsoever from occupying, selling, charging, leasing or in any way alienating and/or disposing the suit land.*

*(g) An order directing the Chief Land Registrar to cancel any subdivision, titles and transfers made in respect of the suit land.*

*(h) Without prejudice to the foregoing, and in the alternative, a declaration that in the event that it is necessary for the Government and/or through the 2nd and 4th respondents to compulsorily acquire the suit land, such acquisition and/or settlement programme must comply with the requisite constitutional and legal requirements.*

*(i) Damages.*

*(j) Costs of the Petition.*

*(k) Any other and/or further relief that this Honorable Court may deem fit.*

9. The petition is supported by the Affidavit of Parkire Stephen Munkasio, the 1st petitioner. He has more or less reiterated the averments in the petition, which I have already set out above, and I see no need of repeating the same. To the petition, was annexed an authority to act, plead and swear affidavit, signed by the other petitioners, save for three, for which I have not seen signatures against their names. There is also annexed a list of persons who are said to be residing within the suit land. The list, from my count, is signed by 814 persons. There are also several photographs said to be of the said land which demonstrate various activities.

10. The 1st respondent, entered appearance through the law firm of M/s Kadima & Company Advocates, and filed a replying affidavit to the petition. The affidavit is sworn by Paschal Babu Wood, who has described himself as the managing director of Kedong Ranch Limited. It is stated that the petition is misconceived and has defied all statutes and rules of pleading in that the petitioners are not sure whether to invoke the jurisdiction of the Environment and Land Court or that of a Constitutional Court. It is also stated that there is another suit filed in the Environment and Land Court over the same subject matter and by the same community, the Maasai, who are the petitioners herein. It is inter alia stated that the Constitution gives sanctity to title; that the suit land has always belonged to the 1st respondent which has held it for the last 41 years having bought it from the previous owners, Magogo Estates Ltd who held a grant issued in the year 1950; that there are no ancestral shrines or graves on the land; that the petitioners do not reside on the suit land; that there is in existence the Geothermal Resources Act (Act NO. 12 of 1982) and the Geothermal Resources Regulations of 1990 which have guidelines to be followed; that the petitioners have all along had a conflict with the 1st respondent and numerous instances of strained relationship and thus prescriptive rights cannot apply; that the 1st respondent has no role to play in allocation of geothermal energy; and that it is actually the petitioners who always violate the rights of the 1st respondent. They asked that the petition be dismissed.

11. The 1st respondent also filed a Notice of Preliminary Objection on the grounds that :-

*(1) The Honourable Court lacks jurisdiction in terms of Article 72 of the Constitution of Kenya 2010, and Section 18 of the Geothermal Resources Act, 1982 and the Geothermal Resources Regulations, 1990.*

*(2) The petitioners' suit against the 1st respondent offends Section 6 of the Civil Procedure Act (CAP 21) Laws of Kenya.*

*(3) The petitioners' suit against the 1st respondent offends Section 12 of the Civil*

*Procedure Act.*

12. The 2nd respondent entered appearance through the law firm of M/s Mohamed Muigai Advocates. They filed Grounds of Opposition and a Replying Affidavit to oppose the petition. Inter alia, they have stated that the petitioners have invoked an improper procedure to ventilate their claim for adverse possession; that the petition does not raise any question meriting a claim of human rights and fundamental freedoms; that the petition is overtaken by events; and that the property in issue does not fall within the definition of Community Land as envisaged under Article 63 of the Constitution. The Replying Affidavit is sworn by Jennifer Oduor, the property manager of the 2nd respondent. It is inter alia averred that the 1st respondent is registered owner of the suit property; that the 2nd respondent (Kengen) entered into an agreement to purchase a portion of it and paid the full purchase price on 27 August 2012; that the transaction was approved by the Land Control Board of the area; that the property is not Community Land; that the petitioners have not been in occupation of the property, and if so, then they have been occupying it as squatters; that a constitutional petition is not the proper forum to agitate claims for adverse possession; that the petitioners have no locus standi as the process of instituting a representative suit has not been followed and that the identity of the persons represented has not been sufficiently identified; that it is not true to allege that Kengen is undertaking geothermal development without regard to the environment; that they have conducted Environment and Social Impact Assessments of the geothermal projects; that some persons needed to be moved and a resettlement action plan was put in place leading to the purchase of 1700 acres from the 1st respondent; that pursuant to the resettlement action plan, Kengen developed schools, housing units, churches and other social amenities; that the persons affected were moved into the area; that the time it took to develop the area was long enough to put anyone into notice; that the petitioners could not have resided in the area where several persons have been resettled; that the petition has no merit.

13. The law firm of LJA & Associates entered appearance for the 3rd respondent. They immediately filed a Notice of Preliminary Objection to the petition based on the grounds that :-

*1. The proceedings before the court do not seek interpretation of any constitutional rights or issues and do not seek declarations on any fundamental constitutional questions of law and this claim therefore ought not to have been brought to court by way of a petition.*

*2. The proceedings before the court seek determination of competing private rights to property between private persons, Government Agencies, and Ministries and private corporations and therefore can only be determined by a substantive suit for recovery of the said property and declarations of any rights thereto.*

*3. The petitioners herein have asked the court to make factual findings on issues of fraud and illegality as particularized in the petition and this end cannot be achieved or litigated through a Constitutional Petition but can only be properly determined through a substantive formal law suit where evidence will be heard and tested in cross-examination.*

*4. There is no constitutional matter between the State and its citizens to be determined in this Petition and therefore the Petitioners have come before the Court using an entirely erroneous process for determination of their grievances and this Court is not empowered to make any of the Orders sought or grant any of the reliefs sought in a Constitutional Petition.*

*5. There is no matter of public interest raised in the Petition that warrants or justifies the use of this procedure to articulate the plaintiffs' grievances and all reliefs sought by the petitioners are lawfully available through filing of a private suit.*

They asked that the petition be summarily dismissed.

14. The State so far has not filed any response on behalf of the 4th to 11th respondents.

15. When the matter first came before me on 17 November 2014, I was of the view that the preliminary

objections, since some of the issues raised went to jurisdiction, be disposed of first. I further directed that the issues in the preliminary objections be codified into an application to strike out the petition, so that the petitioners may have an opportunity to respond by way of affidavit to the matters raised in the preliminary objections. Pursuant to those directions, the firm of LJA & Associates for the 3rd respondent filed an application dated 20 November 2014, whereas the firm of M/s Kadima & Company Advocates for the 1st respondent filed an application dated 19 November 2014. In the latter application, the 1st respondent asked that this suit be stayed pending the outcome of the suit Nakuru ELC No. 21 of 2010 (OS). It was stated that the suit Nakuru ELC No. 21 of 2010 had been filed by persons who described themselves as "*suing on their own behalf and of their families and members of the Maasai Community living on land reference No. 8396 (I.R 1197)*". It was their view that this petition is therefore *res judicata*. It was averred that the said suit had been heard and determined and at that time was awaiting judgment. In the former application by the 3rd respondent, it was stated inter alia that the suit does not raise any constitutional matter and therefore ought to be struck out.

16. The petitioners replied to the two applications through the Replying Affidavit of Parkire Stephen Munkasio. He has stated that the petition seeks reliefs based on violation of various constitutional provisions which have been cited. They have also stated that they are not the plaintiffs in the suit ELC No. 21 of 2010 (OS), and even if so, the claim therein was limited to one of adverse possession. It is further averred that the issues in the preliminary objection are not purely of law and that there is no reason why the petition ought to be struck out.

17. I think I need to mention that in between, an application was filed by the Geothermal Development Corporation (GDC), through the law firm of M/s V.A Nyamodi & Company Advocates, to come on record as interested parties. That application was not contested and the same was allowed.

18. I heard the two applications of 19 and 20 November 2014 together with the preliminary objections on 5 February 2015. Counsels had filed written submissions in respect of these matters and I also took in oral submissions on the day. I have taken note of the submissions and the various authorities cited by counsel.

19. I think there are two issues that I need to determine.

(1) *Whether this court has jurisdiction to entertain this Petition.*

(2) *Whether this Petition is maintainable or ought to be struck out.*

20. In its preliminary objection, the 1st respondent has set out that this court has no jurisdiction owing to the provisions of Article 72 of the Constitution and Section 18 of the Geothermal Resources Act and The Geothermal Resources Regulations of 1990. I have looked at Article 72 of the Constitution but all it states is that "Parliament shall enact legislation to give full effect to the provisions of this Part." The Part being referred to relates to the environment and natural resources. I frankly, do not see where this provision fits into this petition, or how I can hold that this court has no jurisdiction because there is a Constitutional provision obligating parliament to enact legislation to give full effect to the areas of the Constitution concerning the environment and natural resources. I am completely unable to see the point sought to be argued therein.

21. I have also looked at the Geothermal Resources Act and Regulations made thereunder. The Geothermal Resources Act, CAP 314A was enacted for purposes of regulating the exploration of geothermal resources in Kenya. It inter alia provides for the licencing of the sinking of geothermal wells and compensation for those affected by the activities of a licensee. The Geothermal Resources Regulations, 1990 made under the said statute, provide for how one is to apply for a licence, drilling of geothermal wells and disposal of waste. I have not seen any provision in the Geothermal Resources Act, or the Regulations made thereunder, which oust the jurisdiction of this Court. Mr. Kadima in his submissions mentioned Sections 18, 19, 20, 21, and 22 of the said Act. I have looked at these sections. They provide for compensation for personal injury or damage to land. Under Section 18, compensation is to be determined by the Minister and there is a right of appeal to the High Court. I do not think that the mechanism of compensation therein has any relation to the nature of the Petition before me. The

petitioners are not claiming compensation for any personal injury or damage to land. They are claiming that there have been various violations of their constitutional rights. I therefore do not see how the provisions of the Geothermal Resources Act and the Regulations oust the jurisdiction of this court. But even if the claim of the petitioners was purely one of compensation under the Geothermal Resources Act, I do not think that they would not have had recourse to this court. Unless ousted by clear provisions in the Constitution or statute, recourse to a Court of law is a matter of right (See generally the Supreme Court decision in the case of **Judges and Magistrates Vetting Board & 2 Others vs The Centre for Human Rights and Democracy & 11 Others, Supreme Court Petition 13A of 2013 (2014) eKLR**). In my opinion, the mere mention of the Minister, in the Geothermal Resources Act, as the entity that can assess compensation, does not oust the jurisdiction of the court to hear a claim for compensation, for there is no ouster clause incorporated therein. Faced with such a suit, the Court can of course, in its discretion and taking into consideration the circumstances, defer the matter to the Minister in the first instance, but that wouldn't be a statement that the Court has no jurisdiction at all.

22. The other objections raised by the 1st respondent are that the suit offends Sections 6 and 12 of the Civil Procedure Act. First, it should be noted that this is a Constitutional petition under the Constitution and therefore it is the Constitution and the Rules made thereunder which apply. The Civil Procedure Act and Civil Procedure Rules, ordinarily would not apply, although the Court may in its discretion, adopt some general principles in the said statute or Rules, so long as they are not contrary to what is in the Constitutional Rules.

23. I do not know the point that the 1st respondent wanted to make by invoking Section 12 of the Civil Procedure Act, which relates to the place of filing suits, and Mr. Kadima in his submissions did not state why Section 12 of the Civil Procedure Act was cited in the preliminary objection. I can however see the point that the 1st respondent wishes to put across by citing Section 6 of the Civil Procedure Act, which together with Section 7, embody the common law principle of *res judicata* and bars the filing of a suit where the matter in issue is pending in a previously instituted suit. The principle of *res judicata* is a general principle of law which bars the subsequent litigation of the same issues that are either pending determination or have already been determined in another suit. It is a principle that must apply to a Constitutional Petition as well.

24. Mr. Kadima argued that the issues herein have been heard and determined in the suit Nakuru ELC No. 21 of 2010. The application dated 19 November 2014 filed by the 1st respondent, had sought a stay of this suit pending the outcome of the suit Nakuru ELC No. 21 of 2010. By the time the said application was being argued, judgment in the said suit had been delivered. That suit was a claim for adverse possession over the same land which is at the heart of this petition, that is, L.R No. 8396 (I.R No. 11977). The plaintiffs in that case instituted that suit "*on their own behalf and on behalf of the persons and families residing on what is commonly known as Kedong Ranch situate on L.R No. 8396...*".

25. Prof Ojienda SC, in opposing the applications herein, inter alia argued that the petitioners are not the same as the plaintiffs in the suit Nakuru ELC No. 21 of 2010. On my part, I am not convinced. In seeking to pursue a claim for adverse possession in this Petition, the petitioners herein are agitating the same claim that was pursued in the suit Nakuru ELC No. 21 of 2010. The claim herein is being pursued on behalf of the same people on whose behalf the claim for adverse possession was agitated. To me, it is irrelevant that the petitioners are different from the plaintiffs in the suit Nakuru ELC No. 21 of 2010. I am of the considered view that this Petition is incompetent in so far as it attempts to re-litigate the issue of adverse possession.

26. I think this is a good point to also address the argument that this Petition is incompetent for seeking to pursue a claim for adverse possession as a Constitutional Petition. I agree with this argument. Claims for adverse possession are adequately addressed by the Limitation of Actions Act, CAP 22, Laws of Kenya, and the Civil Procedure Rules, specifically Order 37 thereof. Claims of adverse possession are private law claims which need to be addressed through the private law legal channels provided. I do not see how the petitioners can assert a claim for adverse possession, a purely private law claim, through a constitutional petition. Indeed I doubt if there is a constitutional violation which one will point at, when pursuing a suit for adverse possession. It follows that even if I am wrong on the point that the issue of adverse possession

on behalf of the same parties herein has previously been litigated, the aspect of this Petition, that relates to pursuance of a right over land by dint of adverse possession is incompetent, for there are laid down procedures on how to pursue an adverse possession suit, which ought to be followed.

27. I agree with Mr. Musangi for the 3rd respondent that not every violation of proprietary rights ought to provoke a constitutional petition. I agree, that where there are private rights being agitated, the proper recourse is to file an ordinary suit, for determination and not to file a Constitutional Petition. Mr. Musangi's view was that the entire Petition pursues private rights. On my part, I hesitate to make a final conclusion of this argument at this preliminary stage, for on the face of it, the petitioners cite various constitutional violations, which appear to go beyond the agitation of private proprietary rights. I would rather hear the petitioners first, before concluding that the Petition agitates purely private rights.

28. Ms. Wairimu Njoroge for the interested party was of opinion that the petition does not meet the criteria of Rule 10 (2) of the Constitution of Kenya, Fundamental Rights and Freedoms Rules. She pointed me to various authorities annexed to her written submissions. This was supported by Mr. Imende for the 2nd respondent. It was the view of Ms. Wairimu that the Petition only sets out bare allegations. But as I have stated here above, on the face of it, there are various constitutional provisions cited and various facts alluded to. I think there could be substance in the pleadings herein that warrants a full hearing, rather than an outright summary dismissal of the Petition. Summary dismissal is a drastic action which should only be applied in the clearest of cases. I borrow the dictum from the case of **DT Dobie & Co vs Muchina (1982) KLR 1** where it was stated that :-

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

29. I am not saying that this Petition needs amendment, but I think there is some semblance of a cause of action that has been demonstrated. Whether or not the action will succeed, has to remain to be determined at trial.

30. My final conclusion on the two applications and on the preliminary objections is therefore as follows :-

- (1) *This court has jurisdiction to hear this Petition and the Petition may proceed before this court.*
- (2) *The aspects of the Petition that attempt to agitate a claim for adverse possession are incompetent, for being res judicata and/or for being wrongly pursued under a Constitutional Petition, and are hereby struck out.*
- (3) *Apart from the claim for adverse possession, which has been struck out, the Petition be argued on merits.*
- (4) *There will be no orders as to costs on the preliminary objections and preliminary applications.*

It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 19<sup>th</sup> day of February 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of :-**

Mr Biko holding brief for Prof Ojienda for petitioner

Mr Kadima for 1<sup>st</sup> respondent

Mr D M GAtonye holding brief for Mr Imende for 2<sup>nd</sup> respondent.

Mr Situma holding brief for M r Musangi for 3<sup>rd</sup> respondent

Ms Khatambi of state law office for 4<sup>th</sup> - 9<sup>th</sup> respondents

Mr C K Cheruiyot holding brief for M/S V A Nyamodi for interested party.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**