REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CONSTITUTIONAL PETITION NO. 45 OF 2014

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONTRAVENTION AND OR ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10 2(b), 27, 28, 41, 47, 50, 176 AND 236(b) OF THE CONSTITUTION, 2010

SEREYA SAIKA.....APPLICANT

VERSUS

NAROOSURA GROUP RANCH.....RESPONDENT

RULING

1. The applicant Sereya Saika moved this court on the 19th June 2014 by way of a petition and simultaneously filed an application for conservatory orders to restrain the Respondent, Naroosura Group Ranch from presenting the Group Ranch register to the Land Registrar and Land Adjudication Officer from proceeding with the land adjudication process.

2. In her petition, she stated that the respondent had failed to register her as a member of the group ranch following the death of her father who was a member and whereupon her brothers were duly registered and were to be given shares to her exclusion on the ground that she is a female and under custom, she was not entitled to own or be given land, which action she termed as unconstitutional and discriminatory, unfair as a member in the register.She thus prayed for a declaration that the action of the Respondent Group Ranch in failing to register and include her was unlawful and unconstitutional and against Articles 10 2(b), 28, 41, 50, 176, 236(b). She further prayed for a permanent injunction against the Respondent for presenting the register to the Land Registrar and the Land Adjudication Officer from proceeding with the adjudication process.

3. In support of her application, she filed an affidavit and also a statement, where she stated that if was her right not to be discriminated upon and that she had a right to be registered as a member of the respondent.

In opposing the application and in reply to the petition the respondent filed a replying affidavit on the 15th October 2014 that stated that the applicant had not been discriminated upon on grounds of being female and that the group ranch was in the process of ascertaining and including 207 persons who had

been omitted from the register including the applicant, and as at the time of going to court, the petitioner had been issued with a membership identification card No. 2672.

4. It was further stated by the respondent that at all material times, and particulars on the 23rd May 2014 was aware that a resolution by the Group Ranch had been passed that all the 208 omitted members be admitted into the group ranch, hence her action to file the petition was made in bad faith. It was further stated that there were no constitutional issues raised in the petitioners petition as what was allegedly in issue was the petitioners title to land, and under Article 162 (2)(b) of the constitution, the matter was the preserve of the Land and Environment court and not the Constitutional court.The respondent sought that the petition be dismissed with costs as it was bad in law as there was no genuine dispute between the petitioner and the respondent that need the courts intervention.

5. On the 14th July 2014, the petitioner was granted interim orders restraining the respondent from presenting the Group Ranch Register to the Land Registrar.

When the matter came before this court for interpartes hearing on the 6th October 2014, parties sought time to negotiate a settlement and indeed on the 22nd October 2014, an amicable settlement was recorded by consent of both parties. One of the terms of the recorded consent was that this court do make a determination on which party bears the costs of the petition and each party was to file submissions on the issue of costs. Both parties have filed their submissions.

6. **The Applicants submissions**

Mongeri & Company Advocates for the petitioner filed their submissions on the 14th November 2014 and it is their submissions that the petition was prompted by the failure of the respondent to include the petitioner and her son's names in the Group Ranch register and that it was due to the petition that the respondent agreed and conceded to the prayers by the petitioner. It is her submission that she succeeded in her petition and as costs follow the event, the respondent ought to pay costs for the petition.

7. **The Respondent's submissions**

Bowry & Company Advocates representing the respondent filed their very detailed submissions on the 15th December 2014.

It is submitted for the respondent that as at the date of filing the petition on the 19th June 2014, the petitioner had already been issued with a certificate of membership dated 23rd May 2014 and was therefore a bona fide member of the group ranch and that she was fully aware of the fact, and of all the resolutions passed by the respondent to include her and other 207 members who had been omitted. To prove the above, the respondent on the 11th June 2014 wrote to the Registrar of Group Representatives and sought to include the 208 omitted names, including the petitioner. As such, it is submitted, that as at 19th June 2014, the petitioner had no legitimate and genuine grievances against the respondent.

8. The respondent submits further that when the court granted the interim orders, it was not aware of the status of the matter and acted in the interest of justice and in order to preserve the subject matter.

Following disclosure in its replying affidavit in opposition to the petition, the parties upon discussion, recorded a consent order that brought the matter to an amicable conclusion. So then, and in view of the chronology of events, which party should pay costs of the petition and the interlocutory applications?

9. In its submissions, the court is urged to take into account that the case did not go to full trial, hence no significant costs were incurred by either party, and the nature of the matter, that it raised no compelling issues and that none of the applications were canvassed, hence no costs should be awarded.

The respondent further submits that the filing of the petition was pre- mature, was not of a

constitutional nature but merely administrative that was easily resolved by negotiation.

10. It is submitted that the Petitioner is a member of the Respondent Group Ranch and that the Group has no money of its own, and relies on members contributions, the petitioner being one such member, and an award to one member will likely strain the members relationship, and that in that event, the petitioner will too contribute to the costs.

11. In addition to the above, the respondent submits that the petition was incompetent and would not have succeeded if it went for full trial in that, the Group representatives as registered should have been the ones sued as provided under section 7(3) of the Land (Group Representatives) Act, Chapter 287 Laws of Kenya that provide that upon registration and issuance of a certificate of incorporation, the persons named in it as the group representatives shall thereupon become representatives of the group.

12. Section 7(3)(3) also provides that the certificate of incorporation confers on the group representatives power to sue and be sued in their corporate name. It is stated that in view of the above provisions, the group representatives ought to have been named, and sued in their capacity as group representatives.The petitioner failed to follow the above procedure that makes the petition incompetent and bad in law and would have been struck out for being incompetent had it proceeded to full hearing. It is therefore the respondents submission that the petitioner should not be awarded any costs.

13. **The Law and analysis of submissions**

It is said that costs follow the event. This was stated in the case **Jasbir Singh Rai & 3 others -vs- Tarlochan Singh Rai & 4 others (2014) e KLR.**

14. In the present case, the case was compromised even without hearing of either of the two interlocutory applications by both parties. In the circumstances, in my view, neither party could be said to have been successful. Both parties put in some effort which brought about the amicable settlement. It is not easy or even possible for the court to measure what effort each of the parties to the case put in so as to quantify what costs ought to be paid to each party. It is joint effort.

15.As stated in the case **Rufus Njuguna Miringu & Another -vs- Martha Muriithi & 2 others (2012) eKLR,**

> ***"...consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the defendants' favour, the successful determination of the dispute is still attributable to both the plaintiff's and the 1st and 2nd Defendants … In the circumstances it would be just for the parties to bear their own costs of the proceedings."***

16. I totally agree with the above sentiments of the Learned Judge, and unless there are exceptional circumstances in the present case to persuade me to depart from the same, that would be the most fair and just determination of the question of which party ought to pay costs for the petition and the interlocutory applications.

17. I have carefully considered the petition, the interlocutory applications by both parties together with all supporting and opposing affidavits. I have also looked at the submissions by both counsel.

The rule that costs follow the event should not be used to penalise the losing party in a dispute. It is merely made and used to compensate or reimburse the successful party in the prosecution or defending the suit. However, where a matter is settled through joint efforts through negotiations then both parties come out successful through giving and taking where most times, a middle ground is reached, and an amicable settlement reached.

18. In prosecuting as well as defending, some financial input is made by either court fees, taking instructions, preparing pleadings and court attendances. In such instances, to point out that one of the

parties is successful would be to miss out both on the facts and law, and would be unfair and unjust, to reward or penalise either party for agreeing to talk and reach a consent. Such a settlement also saves court's time and too, the parties time and further costs. It ought to be encouraged.

19. Indeed Article 159 (2)(c) of the constitution encourages parties to explore other means of settlement of court disputes for expeditious settlement.

20. It is noted that costs of a suit are awarded at the discretion of the court, which should be exercised judicially and judiciously and upon defined legal principles, and upon circumstances of each case.

21. The circumstances of this present case are such that each party contributed to the successful conclusion of the case and this brought about the consent order recorded by both parties on the 22nd October 2014. That being the case, this court refuses to be bound by the legal principle that costs follow the event, blindly and having stated as above, it is my finding and decision that each party shall bear its own costs. It is so ordered.

Dated, signed and delivered at Nakuru this 21st day of May 2015

JANET MULWA

JUDGE

In the presence of:

Karanja holding brief for Mongeri - for Petitioner/Applicant

Karanja for Bowry - for Respondent

Lina - Court clerk