



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

PETITION NO. 1 OF 2018

IN THE MATTER OF ARTICLES 22(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF VIOLATION OF THE RIGHT AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 40, 43, AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO PROPERTY UNDER ARTICLES 40, OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

SINENDET TEA MULTI-PURPOSE

CO-OPERATIVE SOCIETY LIMITED.....1st PETITIONER

KERICHO RURAL MULTI-PURPOSE

CO-OPERATIVE SOCIETY LIMITED.....2nd PETITIONER

VERSUS

HONOURABLE ATTORNEY GENERAL.....1st RESPONDENT

COUNTY COMMISSIONER, BOMET COUNTY.....2nd RESPONDENT

JUDGEMENT

1. The Petitioners' Petition dated the 4th September 2018 and filed on the 5th September 2018 seeks for the following orders;

i. Permanent injunction against the Respondents prohibiting, restraining and/or barring the Respondents either by themselves, agents or servants and/or their representatives in any way whatsoever from interfering by evicting or barring the Petitioners' from plucking and processing Tea in their parcels of land known as (i) Saosa (ii) Tentwet and (iii) Cheronge /Marmar.

ii. A Declaration that the suit parcels in (sic) land are not part of Government forest.

iii. Cost of the Petition.

iv. Any other relief this court deems fit to grant.

2. Alongside the said Petition, the Petitioners filed an application dated 4th September 2018 but filed on the 25th September 2018 seeking injunctive orders against the Respondents seeking that they be barred from interfering with their enjoyment of the suit property LR No. 20629 known as Saosa, Tentwet, Cheronge /Marmar, pending the hearing of the application inter- parties. The application was slated for hearing inter-parties on the 21st March 2019 on which day there was no attendance by either the Petitioners and/or their Counsel. Counsel for the Respondent then sought for a mention date for directions on the main Petition with service to the Petitioners.

3. On the 21st July 2021, Counsel for the Petitioners' formally withdrew the application and sought for directions on the hearing of the Petition wherein the court directed that the same shall proceed by way of written submissions. The time limit to which parties were to file and serve their respective submissions was the issued with leave granted to the Respondents to file their respective responses to the Petition. At expiry of the time set by the court, the court was been informed by Counsel for the Petitioners that there had still been no response to their Petition wherein she had sought that the Petition be deemed as unopposed at that point.

4. The State Counsel for the Respondent then sought for a further 14 days to put in their response. The court obliged him as there had been no objection by the Petitioners. The Respondents filed their Grounds of Opposition dated the 30th September 2021 to the effect that Article 69(2) of the Constitution provided that every person had a duty to co-operate with state organs and other persons so as to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The Petitioners therefore had a duty to co-operate with the state agencies to protect and preserve the environment as provided for under the Constitution. That the Petitioners had therefore not met the threshold for grant of the conservatory orders sought.

5. Their further Grounds of Opposition was that the Petitioners had not demonstrated in any way that the 2nd Respondent had ordered them to vacate from their parcels of land other than the allegation that the 2nd Respondent has been issuing threats through the media. That Mau forest was one of the most critical water towers in the county but had been severely threatened by encroachment and that it was in the interest of justice that any investigation which might be carried out lawfully to ascertain how the Petitioners acquired land within that area by the Respondents, ought not to be hindered.

6. The Respondent urged the court to bear in mind public interest, the constitutional values and the proportionate magnitudes and priority levels attributed to the relevant causes before issuing any conservatory orders. Lastly the Respondent averred that the application was an abuse of the court process and should be dismissed with costs to them.

7. Parties subsequently filed their respective written submissions to which I shall summarize as follows:

Petitioners' submissions.

8. The Petitioners, through their submissions filed on 17th November 2021 submitted that they were a Co-operative Society registered under the Co-operative Societies Act and that they both owned properties on behalf of their members who were over 10 individuals. That they engaged in commercial activities like tea industry and real estate where they had invested heavily.

9. That the Petition was based on the fact that on or about the 24th February 1995, the Kenyan Government vide Gazette Notice No. 864 had de-gazetted part of the South Western Mau forest, an area known as Saosa which was about 4 km from the then Kericho Municipality. That the process of excision had been approved by the Government vide its letter of 12th January 1995 which showed the Government had clearly planned the aforesaid excision with an intention to create farmland out of the forest. That the Petitioners had written to the Commissioner of Lands requesting to own land which by then was under the Nyayo Tea Zone Development Corporation, which was a public entity.

10. That through a sale agreement between the 2nd Petitioner and Nyayo Tea Zone Development Corporation and the subsequent payment of Kenya shillings 38,438,000/- being the full and final payment, on the 11th September 1995, the Petitioners' acquired full ownership of three blocks of parcels of land namely;

(1) Saosa, measuring 74.72 hectares

(ii) Tentwet, measuring 5.14 hectares

(ii) Cheronge /Marmar, Measuring 292.97 hectares

11. Pursuant to the sale and purchase of the said parcels of land, it was the Petitioners submission that they had established a legal right over the said property as good and adequate consideration had been passed on to the Government which was therefore estopped by the principles of estoppel from conducting itself otherwise.

12. That after acquisition of the properties, the Petitioners had, on the 1st July 2010, entered into a management agreement with Messrs. James Finlay (K) Ltd to provide management of the three parcels of land wherein both parties were to enjoy a profit sharing arrangements from the processing and sale of tea leaves. It was therefore in utter shock to the Petitioners when the 1st Respondent through the 2nd Respondent, and without any color of right, maliciously issued threats through media houses and daily newspapers such as the Standard and the Daily Nation, ordering the Petitioners to vacate from their parcels of land.

13. That both the Directorate of Criminal Investigations (DCIO) Bomet and the head of forest conservation in Nakuru thereafter subjected the officials of the Petitioner Mr. Paul Chirchir and Mr. Kimalel Kirui to unnecessary grilling and/or harassment and questioning seeking to establish from them as to how they had acquired the suit parcels of land despite there being no evidence in contravention of their ownership by the Respondents.

14. The Petitioners submitted that their accusation of title to the suit property was above board and could only be challenged on grounds of fraud and misrepresentation of which the Respondents had either alleged pleaded or proved.

15. That the provisions of Article 40 of the Constitution of Kenya protects individual rights to property and the Government could only claim it's right to compulsory acquisition as provided for by the Compulsory Acquisition of Land Act.

16. That their actions at the earliest opportunity had been inspired by the provisions of Articles 22 and 23 of the Constitution after receiving threats from the Respondents.

17. The Petitioners further relied on the decided case in **William Musembi & 13 Others vs Moi Educational Centre Co. Ltd. & 3 Others [2021] eKLR** to echo the findings of the Supreme Court of Kenya in relation to the provisions of Article 40 of the Constitution to wit that before an eviction can ensue, the National Land Commission must determine whether land is public or not. The Petitioners prayed that the court grants the prayers sought in their Petition.

Respondents' submissions.

18. In opposition to the Petitioners Petition, the Respondents filed their grounds of opposition and submissions to the effect that the matter before court was a matter of great concern to both the present and future generations. That climate change was a reality wherein its effects were being felt and if measures were not put in place to address it, it could be catastrophic to the country and the future generation.

19. That the Petition was an abuse of the court process since it sought to prevent future actions which may or may not happen. That the Petitioners were apprehensive of impending arrest by the Directorate of Criminal Investigations over the disputed parcel of land and the issue could therefore be conversed through an ordinary suit and not through the current Petition as framed. That the District Criminal Investigations were mandated by law to conduct investigations and interrogate persons of interest where they had reason to believe that crime had been committed. That the transaction of the suit parcel had occurred without the express authority of the President thereby questioning its validity.

20. That pursuant to the provision of the Government Land Act (now repealed), the Commissioner of Lands had no powers to allocate the suit parcel without the express power of the President as was held in the case of **James Nyaga & Another vs Attorney General & Another [2007] eKLR**.

21. That Article 69(2) of the Constitution provided that every person had a duty to co-operate with the state organs and other persons to protect and conserve the environment and to ensure that there is an ecologically sustainable development and use of natural resources. That the Petitioners herein could not claim a violation of their rights when called upon to do that which the Constitution required of them.

22. That the Petitioners did not tender any evidence to support the allegation of harassments by the Respondents as provided for by Section 107(1) of the Evidence Act and therefore the Petition was without legs to stand on.

23. The Respondents submitted that the County Commissioner was in charge of co-ordination of Government functions within their respective Counties and that Articles 62, 69 and 71 of the Constitution vested the management of public land, specifically forests and natural resources under the National Government. The assertion by the Petitioners herein that the 2nd Respondent did not have authority over the suit property, was misguided and without basis in law.

24. That it was not true that the Respondents had infringed upon the Petitioners' rights to fair administrative action as alleged because by the Petitioners' own averments, they had been summoned to shed light on the acquisition of the disputed parcel of land.

25. The Petition was filed way back in 2018, the Petitioners are still in occupation of the suit land, the Respondents have not evicted them and neither had the Petitioners submitted in evidence a notice of eviction. The Respondents then submitted that they respected the rule of law and could not evict anyone from their property without just cause and after following due process.

26. The Respondents opposed the prayers for injunctive relief sought by the Petitioners while placing their reliance on the Court of Appeal decision in the case of **Nguruman Ltd. vs. Jan Bonde Nielson & 2 Others [2014] eKLR** where the Court had reiterated the grounds for granting of injunctive reliefs. They submitted that the Petitioners had not met or satisfied the three pillars on which rested the foundation of any order of injunction, interlocutory or permanent and therefore the said prayers of injunction ought to fail. In conclusion, their submission was that the Petition did not raise any cause of action and ought to be dismissed with costs.

Determination.

27. I have carefully considered the contents of the Petitioners' Petition as well as their Supporting Affidavit. I have also considered the Respondents' Grounds of Opposition, the submissions by Counsel as well as the relevant provisions of the law and authorities herein cited.

28. The Petitioners' claim stems from an allegation that on 24th February 1995, the Government, vide Gazette Notice No. 864 de-gazetted part of the South Western Mau forest, measuring 372.83 hectares, in an area known as Saosa LR No. 20629, which was about 4km from the then Kericho Municipality. The boundaries of the said area were then altered and/or changed through Gazette Notice No. 152 of 8th October 2010 in a process that had been approved by the Government vide its letter through the Minister of Environment and Natural Resources dated the 12th January 1995.

29. That the decision was made pursuant to a letter dated the 2nd November 1994 issued by the Ministry of Land which showed that the Government had clearly planned the aforesaid excision with an intention to create farmland out of the forest.

30. On the 8th June 1995, the Petitioners had written to the Commissioner of Lands requesting to be allowed to own three parcels land being Saosa measuring 74.72 hectares, Tentwet measuring 5.14 hectares, and Cheronge /Marmar Measuring 292.97 hectares which lands were then under Nyayo Tea Zone Development Corporation.

31. Through a sale agreement of 26th January 1996, between the 2nd Petitioner and Nyayo Tea Zone Development Corporation, the 2nd Petitioner bought the said parcels of land for a consideration of Ksh. 38,438,000/- wherein it embarked on the process of developing the land.

32. Thereafter on the 1st July 2010, the 1st Petitioner entered into an agreement with Messrs. James Finlay (K) Ltd to provide management of the three parcels of land wherein both parties were to enjoy a profit sharing arrangements from the processing and sale of tea leaves grown thereon.

33. The 1st Respondent through the 2nd Respondent, without any color of right maliciously have now embarked on issuing threats through media houses and daily newspapers such as the Standard and the Daily Nation, while ordering the Petitioners to vacate from their parcels of land.

34. The Petitioners' stand as I understand it was that the suit land ceased being Government forest from the moment it was de-gazetted. That upon its purchase, they had gained ownership, the right to own property and protection of the same as enshrined by the law. That the Respondents' action thereof was contrary to the provisions of Articles 40 and 47 of the Constitution. That the Petitioners faced a major threat of destruction of the Tea growing on the suit land if the threats by the Respondents were carried out and which action would in turn cause irreparable loss to its members.

35. The Respondents' rebuttal and Grounds of Opposition on the other hand is to the effect that the Petitioners had not established that any of their rights had been infringed by the Respondents. That all that was there was that the transaction of the suit parcel of land had occurred without the express authority of the President and therefore its validity was being questioned by the Directorate of Criminal Investigations who are mandated by law to conduct investigations and interrogate persons of interest where they had reason to believe that crime had been committed. That the transaction of the suit parcel had occurred without the express authority of the President thereby they had a right to question its validity.

36. The Respondents also submitted that this was an issue over a disputed parcel of land which issue could therefore be conversed through an ordinary suit and not through the current Petition as framed.

37. That the Petitioners had not proved the allegation of an infringement to their right to fair administrative action since by their own averment, they had conceded to having been summoned for questioning by the Directorate of Criminal Investigations on how they had acquired the suit land. Further, the Petition having been filed way back in the year 2018, and the fact that the Petitioners were still in occupation of the suit land where no evidence had been tendered of any notices served upon them by the Respondents of the intention to evict them, that the Petition lacks merit and should be dismissed.

38. Having summarized the matter before me as above, I find the issues arising herein for determination as being:-

i. Whether the Petitioner's rights under Articles 19, 20, 21, 22, 23, 40, 43, and 47 of the Constitution were violated by the Respondents and what remedies if any are available to the Petitioner.

39. I have antagonized over this Petition, I must hasten to point out that it is for the Petitioner(s) to prove on a balance of probabilities that their fundamental freedoms and rights as protected by or under the Constitution have been violated. A Petitioner must establish this by not only clearly identifying the relevant and specific Articles of the Constitution but availing evidence, through affidavit or otherwise of such violation as per the required standard set out in respect of the Constitutional Petitions as set out in the case of **Anarita Katimi Njeru vs The Republic (196-1980) KLR 1272 where it was held**, in the words of the Justices Trevelyan and Hancox that;

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 should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

40. The Petition referred to infringement of Articles 19, 20, 21, 22, 23, 40, 43, and 47, of the Constitution in its title, however, the Petition provided little or no particulars as to the allegations and the manner of the alleged infringements save for the infringement of Articles 40, and 47 of the Constitution.

41. The Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR held as follows:**

We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the Constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

42. Having reviewed the Petition and supporting affidavit, I find that the same did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya, thus it did not meet the standard enunciated in the **Anarita Karimi Njeru** case (*supra*).

43. **From the body of the Petition, and submission herein, I find the Petitioners' main complaint as follows: that pursuant to purchasing the suit lands, which had been de-gazetted** on the 24th February 1995 vide the Kenya Gazette Notice No. 864 **from** part of the South Western Mau forest, the 1st Respondent through the 2nd Respondent, and without any color of right have maliciously issued threats through media houses and daily newspapers such as the Standard and the Daily Nation, ordering the Petitioners to vacate from their parcels

of land. That further both the Directorate of Criminal Investigations (DCIO) Bomet and the head of forest conservation in Nakuru have subjected the officials of the Petitioner Mr. Paul Chirchir and Mr. Kimalel Kirui to unnecessary grilling and/or harassment whilst questioning them in order to establish from them to how they had acquired the suit parcels of land yet they had acquired them through a legal and lawful process.

44. It is not in contention that the suit land herein, which formed part of South Western Mau forest measuring 372.83 hectares in an area known as Saosa LR No. 20629 was on the 24th February 1995, vide Gazette Notice No. 864 lawfully excised from the said forest. The boundaries of the said area were then altered and/or changed through Gazette Notice No. 152 of 8th October 2010 a process which had been approved by the Government vide its letter through the Minister of Environment and Natural Resources dated the 12th January 1995. The land having been de-gazetted became ordinary land wherein after, the 2nd Petitioner through a sale agreement of 26th January 1996, between themselves and Nyayo Tea Zone Development Corporation bought the said parcels of land for a consideration of Ksh. 38,438,000/-

45. The Petitioners have contended that the property having been lawfully acquired, they were entitled to protection accorded to title holders to land under Article 40 of the Constitution but instead they have been subjected to harassment by the Respondents which in turn infringed on their right to fair administrative action.

46. Article 40 of the Constitution provides as follows

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

47. First things first, it is trite that proprietorship to landed property can only come into existence after issuance of a title document, which in this case has not been provided in evidence. The Petitioners have also held that the Respondents are bent on evicting them from the suit land herein yet they have not availed any evidence in support, as the Respondents have submitted, they are still on the suit land and no notice or any action to suggest an eviction process has been served upon them or provided in evidence.

48. Further, Article 40(1) of the Constitution sets out the general right of every Kenyan to acquire and own property. There is no evidence adduced that the Petitioners have been denied the right, either individually or in association with others to acquire or own property of any description in Kenya. In the Petitioner's case, he has confirmed to having acquired the suit land although no title was provided for.

49. Article 40(2) limits the authority of Parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of Article 27(4) of the Constitution. The Petitioner did not complain of any such breach.

50. Article 40(3) and (4) deal with the deprivation of property by the state on terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. There is no complaint on this issue.

51. I find that in the circumstance, the Petitioners have not made out any case that their property is being acquired in the manner contemplated by Article 40 thus there has been no breach of the provisions of Article 40, of the Constitution. It is in this respect that the Petitioner's claim on this issue must fail. I however find that even though the Petitioners have not provided title to the suit lands, they appear to have certain interests in the properties they claim, the extent or validity of which would need determination in an appropriate forum which would afford them an opportunity to be heard in accordance with the rules of natural justice now enshrined in Article 47 of the Constitution

52. This then brings us to the second issue or complaint by the Petitioners which is that their right their right to fair and just administrative action had been contravened by the Respondents.

53. Article 47(1) of the Constitution provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

54. Article 47(1) of the Constitution is in mandatory terms that *every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair*. Sub Article 2 makes it even more forceful that *if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for that action*.

55. In the case of **Judicial Service Commission v Mbalu Mutava & another [2014] eKLR**; it was held that;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a Constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of Constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

56. Although the Petitioners claim that their rights as provided for under Article 47 of the Constitution had been violated, yet according to the paragraph 17 and 18 of their Petition, they confirm that their officials had been questioned by the both the Directorate of Criminal Investigations (DCIO) Bomet and the head of forest conservation in Nakuru, persons who are not parties to the Petition, in what they termed as unnecessary grilling and/or harassment while seeking to establish from them as to how they had acquired the suit parcels of land.

57. I find that such questioning in my humble opinion formed fair hearing that was accorded to the Petitioners before action if any was to be taken against them. There was no evidence adduced to the effect that such questioning was capricious, whimsical or that it had led to abuse by the authorities herein mentioned whilst exercising their administrative and quasi-judicial functions. This line of argument must also fail.

58. **The fact that the Respondents herein have questioned the manner in which the Petitioners acquired the suit lands herein** in my humble view, is not question that requires a resolution through a Constitutional Petition because a Constitutional Petition is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute.

59. Furthermore the Court of Appeal in **Commissioner Of Police & The Director Of Criminal Investigation Department & Another vs Kenya Commercial Bank Limited & 4 Others [2013] eKLR** held as follows-

*“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. **The courts must wait for the investigations to be complete and the suspect charged.**”*

60. *Indeed no evidence was adduced that the questing of the officials' hereinabove captioned was oppressive or vexatious, contrary to public policy unreasonable, made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification so as to enable the court to interfere with such investigation.*

61. In the case of **Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited [2013] eKLR** the court made the following observation:-

“it is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all.....the courts will not normally consider a Constitutional question unless the existence of a remedy depends on it. If a remedy is available to the 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”..

62. From the facts before me, I find that this Petition does not raise Constitutional issues and is hereby dismissed with costs to the Respondents.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 10TH DAY OF FEBRUARY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE