



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO.1 OF 2014

IN THE MATTER OF PETITION UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL FREEDOMS AND RIGHTS OF THE PETITIONERS UNDER ARTICLES 27, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF HISTORICAL INJUSTICES AND CONTINUOUS DENIAL OF RIGHT TO PROPERTY AND COMMUNITY LAND

BETWEEN

1. ALFRED KAMAAMIA
2. JULIUS KILUSI SERPEPI
3. MORNİKASO KOMOIRO
4. KIRANTO OLE KAMOIRO
5. DAVID SANAET KAMOIRO
6. JOSEPH NAIMODU
7. RICHARD TEKUNA KAMAAMIA
8. SHOPINA KIDONG'OYIA
9. JACKSON MURIUKI MUNGA

10. LEYOLA OLE MAATANYA (On their own behalf and on behalf of Enaibor-Ajijikoloomunyi living at Natooli Farm in Ndabini Location at

Naivasha(Sub-county) PETITIONERS

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION 1ST RESPONDENT

NATOOI ENAIBOR AJIJK COMPANY LTD. 2ND RESPONDENT

RULING

The chamber summons dated 17/1/14, among other prayers, seeks to restrain the respondents from advertising for sale, selling, transferring, charging, sub-dividing or in any other manner howsoever dealing with L.R Nos. 7281 and 7265 (“the suit properties”) pending the hearing and determination of the application and the petition.

The application is supported by the affidavit of Leyoya Ole Maatany and is premised on the grounds that the respondents have issued the petitioners with notices to vacate the suit properties; that the notices to vacate were done in bad faith and in utter disrespect of their interest in the suit property. Further that the respondents have embarked on allocation and sub-division of the suit properties which action, unless restrained, will render more than 2000 persons homeless and destitute. The actions of the respondents are said to have emanated from historical injustices.

The application is opposed through the grounds of opposition filed by the 1st respondent on 14th February, 2014 and the replying affidavit filed by the 2nd respondent on 4th February, 2014.

In the grounds of opposition filed by the 1st respondent, particularly, ground 1 and 9, the 1st respondent has challenged the instant application on the grounds that it is similar to an earlier one filed in Nakuru High Court Petition No.21 of 2012 which is still pending in this court. The 1st respondent contends that paragraphs 2-16 of the affidavit sworn in support of the instant application is similar to an earlier affidavit sworn by Shadrack Metekei Kamaamia, in support of the application in Nakuru High Court Petition No.21 of 2012, hereinafter referred to as “*the former petition*”.

Being satisfied that grounds 1 and 9 of the grounds of opposition raised preliminary issues regarding the competency of the application and the petition herein, I invited the advocates for the respective parties to address me on the preliminary objection.

Consequently, Mr. Nyaencha, for the 1st respondent, reiterated that the instant application and the petition is similar to an application filed in the former petition and which is pending for hearing and determination before this court. He explained that the only difference between the current and the former petition is the description of the 2nd respondent and contended that the suit properties, even though described differently, are in actual fact, the same. He pointed out that the affidavits sworn in support of the application herein and that in the former petition are similar in many paragraphs. Wondering why the petitioners herein failed to amend the former petition to incorporate the alleged changed circumstances, the 1st respondent has termed the instant application and petition a waste of judicial time and an abuse of the process of the court.

On his part, Mr. Kipkoech, counsel for the 2nd respondent adopted the submissions by Mr. Nyaencha and added that the instant petition is an ordinary suit disguised as a petition. He termed the filing of the instant petition an attempt to defeat the Limitation of Actions Act. He contended that the current petition was informed by the realization that the former suit was unsustainable.

Mr. Kipkoech also faulted the instant application and petition on the ground that the petitioners have failed to enjoin the Attorney General, yet he is the custodian of public interest under the Constitution. He also challenged the petition on the ground that the evidence sought to be relied on is incapable of availing the petitioners the orders sought. In this regard, he pointed out that the petitioners claim to have been denied an opportunity to purchase the suit property, a claim he submits to be irreconcilable with their claim that they own the suit property.

Concerning the alleged historical injustices, Mr. Kipkoech was of the view that such an issue can be addressed by the National Land Commission and/or by the National Assembly through the Truth Justice and Reconciliation Report (TJRC Report) and not the court.

In a rejoinder, Mr. Kamau for the petitioners maintained that the parties and the subject matter in the instant application and petition are different. In this regard he explained that the communities represented in the two suits are different and that the 2nd respondent has no relationship with the former petition.

Contrary to the 2nd respondent's contentions that L.R 7281 and 7265 do not exist, Mr. Kamau maintained that those properties exist. He also explained that those properties are different from those in the former petition.

Regarding the affidavits sworn in support of the applications hereto, Mr. Kamau conceded that the affidavits are substantially similar but explained that the similarity is attributable to the similarity in the alleged historical injustices.

Concerning the contention that the petitioners ought to have enjoined the Attorney General to the instant application and the Petition, Mr. Kamau sought to draw a distinction between proceeding against the Government, to which the Attorney General ought to be made a party, and proceeding involving other Government agencies, like the 1st respondent, to which the Attorney General should not necessarily be a party.

Citing the definition of Community land under Article 63 of the Constitution, Mr. Kamau submitted that the suit property herein is Community land as envisaged under the aforementioned article of the constitution. He also submitted that as persons aggrieved by the actions and/or conduct of the respondents the petitioners were entitled to move to court and enforce their rights under Article 22 and 23 of the Constitution.

As regards the suggestion that the petitioners claim can be addressed by the National Land Commission and/or the National Assembly, Mr. Kamau submitted that the National Land Commission cannot avail the petitioners the orders sought because their claim is based on Historical Injustices.

On examination by the court, Mr. Kamau admitted that the parcels of land which are the subject matter of the instant application and petition initially formed one parcel of land before they were excised.

Issues for determination

Although the 2nd respondent has challenged the instant petition on among other grounds, its chances of success, availability of other avenues through which the dispute can be addressed; and the petitioner's failure to enjoin the Attorney General to the petition, upon reading the preliminary objection by the 1st respondent, I perceive that the same is premised on Section 6 of the Civil Procedure Act.

That section prohibits a court from proceeding with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

It is the 1st respondents case that the Chamber Summons application herein together with the petition are similar to an earlier one filed in Nakuru High Court petition No. 21 of 2012 which is ongoing and not resolved yet; and that the affidavit sworn in support of the instant application is similar in many paragraphs, in particular, paragraph 2-16 to an earlier affidavit sworn by one Shadrack Metekei Kamaamia, an occurrence he contends to be an impossibility in any two distinct cases.

Clearly by raising the foregoing concerns, the 1st respondent wanted this court to make a determination as to whether its objection satisfies requirements of Section 6 of the Civil Procedure Act. This is so because if the court determines that the application offends that Section, it will be under an obligation to terminate and/or stay that suit until the former suit is heard and determined.

From the foregoing observation, and the test for *sub judice* in Section 6 of the Civil Procedure Act, the questions for determination are:-

1. Whether the matter directly and substantially in issue in the former petition is similar to the matter directly and substantially in issue in the current petition? If yes,

2. Whether the parties in the current petition are similar and/or represented in the former petition?
3. What orders should the court make?

Whether the matter directly and substantially in issue in the former petition is directly and substantially the same as the matter in the current petition?

The respondents identify the substantial that matter to be plot No.6233 originally owned by Mr. Gilbert Corville. That property was subsequently transferred to the 1st respondent who in turn sold portions thereof to the 2nd respondent. Although counsel for the petitioner's maintained that the subject matter in the two suits is different, on examination by court, he admitted that the suit properties were originally the same before they were excised.

Upon considering the submissions by the opposing sides and the evidence adduced in respect thereof, I find as a fact that the two petitions are in respect of the same matter, that is, plot No.413 originally owned by Mr. Gilbert Corville before it was transferred to the respondents.

Whether the parties in the current petition are similar or represented in the former petition?

Whereas the 1st respondent maintained that the communities represented in the two petitions are different and that the 2nd respondent is not a party to the first petition, upon review of the pleadings filed in the two petitions, I find as a fact that the same are brought in respect of the same community and not individual groups of the community. For instance, in both petitions it is contended that the course of action emanates from historical injustice suffered by a particular community and that unless capped before further injustice, a community of more than 2000 Kenyans will be rendered homeless and destitute.

Clearly the petitions herein are for all purposes and intents representative suits. None of the petitioners claims the suit on an account other than the alleged historical justice.

A cursory look at the affidavit sworn in verification of the former petition, inter alia, reveals that the petitioner (Naibor-Ajjik Group Ranch), is composed of 2000 members. In the affidavit sworn in verification of the current petition, the deponent, while acknowledging the existence of the former petition has inter alia, deposed:-

“That the Naibor-Ajjik Group Ranch officials filed a petition in High Court petition No. 21 of 2012 against the 1st respondent over land parcels numbers L.R No. 410/1, No. 410/2 and L.R 6322 and did not factor in the suit land herein as we had not deciphered the eminent threat we currently are facing.

That any attempt to evict our members who are over two thousand (2000) amounts to infringement of rights to basic human dignity....”

From the foregoing, it is clear that both petitions relate to one and the same subject matter. The principal parties thereto are the same; i.e. the community of about 2000 members allegedly subjected to the historical injustices and the persons who allegedly subjected them to the historical injustices and/or who are involved in perpetuation of the historical injustices.

That being the case, I find and hold that the parties in the two petitions are principally the same.

What orders should the court make?

From the above observations, and in particular, the observation regarding the changed circumstances that led to the filing and prosecution of the current petition, and taking note of the overriding objective of this court under Section 1A of the Civil Procedure Act, and the power granted to this court under **Order 1 Rule 10(2)** of the **Civil Procedure Rules**, I make the following orders:-

1. That the issues and parties in the current petition (petition No. 1 of 2014) being directly and substantially similar to the issues and parties in the former petition (Petition No. 21 of 2012), the current petition be and is hereby terminated.
2. That the cost of the current petition to abide the outcome of the former petition.

Dated, Signed and Delivered at Nakuru this 16th day of May, 2014.

H.A OMONDI

JUDGE