



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 28 OF 2013

IN THE MATTER OF ARTICLES 23(1) 40 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULE 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES

AND

IN THE MATTER OF FRAUDULENT SALE OF LAND REFERENCE NO. TRANSMARA/INTONA/2 MEASURING APPROXIMATELY 2000 ACRES BY AGRICULTURAL FINANCE CORPORATION

BETWEEN

MOSES NAULA & 358 OTHERS PETITIONERS

VERSUS

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR, KILGORIS 2ND RESPONDENT

AGRICULTURAL FINANCE CORPORATION LTD ..3RD RESPONDENT

INTONA RANCH LIMITED 4TH RESPONDENT

JOHN KINE OLE MASHURU & 95 5TH RESPONDENT

RULING

The Introduction

1. Briefly, the relevant history of this case is that the Petitioners, **Moses Naula** and **358 others** are from the Uasin Gishu Clan of the Maasai community who occupy, use and claim ownership over their ancestral land known as Transmara/ Intona/2 (hereinafter referred to as “the suit land”). In 1978, the 4th Respondent embarked on large scale ranching on the suit land and borrowed money from the 3rd Respondent without the Petitioners knowledge. The 4th Respondent defaulted on the

- loan repayment and the chargor sold the suit property to itself.
2. In their Petition dated 28th June, 2013 the Petitioners alleged that their constitutional rights to own property had been denied and violated through the respondents illegal charge and transfer of their ancestral land. They seek the following orders in that regard:
 1. **There be a declaration that the purported sale of Land Reference Number Transmara/Intona/2 to Agricultural Finance Corporation was fraudulent, illegal, unlawful, unconstitutional and null and void.**
 2. **A declaration that the transfer of the suit premises to Intona Ranch Limited was illegal, unlawful and unconstitutional as it deprived the Petitioners of their constitutional right to own their land.**
 3. **A further declaration that Land Reference Number Transmara/Intona/2 belongs to the Petitioners absolutely and order evicting John Kine Ole Masharu & 98 Others through Kilgoris Division Police command be issued.**
 4. **Costs of this Petition be awarded to the Petitioners.**
 3. The Petition was served upon the Respondents herein. The 5th-100th Respondents filed a Notice of Preliminary Objection dated 15th July, 2013. The Preliminary Objection is the subject of this ruling. It is premised on the following grounds *inter alia*:
 1. **The court has no jurisdiction as the issues raised are non-justiciable in a Constitutional Petition;**
 2. **The Petition is res judicata following the decision in Nakuru HCCC No. 104 of 2004 (O.S.) which has been determined.**
 3. **The Petition is a disguised civil suit to cheat the law on limitation.**
 4. **The Petition and application are vexatious, frivolous, scandalous and abusive of the court process.**
 5. **The Petitioners are busy bodies in wild goose chase who are shooting into the dark**
 4. In response, the Petitioners filed a Reply to the Notice of Preliminary Objection raising five grounds which can be summarized as hereunder:

1. **The objection is frivolous, lacks merit and otherwise calculated to waste the precious time of this Honorable court on the basis that under article 4 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 where any right of fundamental freedom provided for in the constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.**

2. **The 1st, 2nd, 3rd to 100th Respondents have failed to comply with mandatory provisions of Article 15 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 whereupon the Attorney General or any other state organ shall within fourteen days of service of a petition respond by way of a replying affidavit.**

3. **The rules do not provide for Notice of Preliminary Objection and in any case the issues raised in the Petition are of a Constitutional nature quite different from the issues raised in Nakuru HCCC No. 104 of 2004 (O.S.)**

5. The Preliminary objection was argued before me on 23rd January, 2014.

The 4th-100th Respondents' Case

6. The Respondents case was presented by the learned counsel, **Mr. Kipkoech**. He submitted on two main issues being jurisdiction and Res judicata.

7. On Jurisdiction, it was counsel's submission that the issue in dispute is a suit land which was subject to a court case in Nakuru HCCC No. 104 of 2004; that the respondents herein are similar to the litigants

involved in the previous litigation; that the presiding judge, Ouko J (as he then was) delivered his judgment on 29th July, 2011 where he made a finding as to ownership of the suit land. The court therefore cannot through this Petition make further determination on ownership nor can it sit as an appeal to the High Court. This is an ordinary suit disguised as a petition because the prayers seek a determination on alleged fraud in the sale and transfer of the suit land.

8. Counsel further submitted that once a determination was made by Ouko J (as he then was) another court cannot revisit the matter touching on the same subject matter and involving the same parties. The petitioners ought to have applied to be enjoined in those proceedings to enable court make a final determination. He contends that the petitioners were aware of the proceedings of Ouko J. as the court visited the suit land. He thus urged the court that the matter is *res judicata* and in an attempt to prosecute the same, the petitioners have clothed an ordinary suit with the bill of rights.

The 1st , 2nd & 3rd Respondents' Case

9. The 1st and 2nd Respondents did not object to the application. They however associated themselves with the arguments of the 4th-100th Respondents.

10. There was no representation by the 3rd Respondent.

The Petitioners' Case.

11. **Mr. Wachakana**, submitted that **Article 23** as read with **Article 165** of the **Constitution** empowers this court to constitute itself as a constitutional court where a denial of a basic right is alleged. Therefore the court has jurisdiction to hear and determine the matter before it as it raises constitutional issues. Article 63 of the Constitution defines community land and it is the contention of the Petitioners that the suit land was registered in the name of Intona Ranch but belongs to the late Murumbi and the Uasin Gishu community.

12. Further, counsel submitted that the Respondents did not comply with Article 15 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. According to counsel this rules do not provide for a preliminary objection in a constitutional petition.

13. It was his submissions that the decision of the superior court was erroneous as it isolated one community thereby infringing their constitutional rights. This could result to serious tensions among the volatile communities. He thus urged the court to allow the Petition to proceed.

14. I have considered the preliminary points. In my view three issues need to be determined here to cover the preliminary points.

1. Whether this court is *functus officio* on the issue of jurisdiction in the circumstances of this case;

2. Whether the petition is *res judicata* and an abuse of the court process;

3. whether the preliminary objection contravenes Article 15 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013

4. Whether the suit is an ordinary suit disguised as a constitutional petition.

15. As to whether this court is *functus officio* on the issue of jurisdiction, Mr. Kipkoech for the 4th-100th Respondents contended that the matter before the court was heard and determined by **the Ouko J** in Nakuru HCCC No. 104 of 2004 and a judgment delivered on 29th July, 2011. In his view, the Environment and Land Court (ELC) being of the same status as the High Court cannot sit on appeal on matters decided by the High Court and therefore has no jurisdiction to hear this petition.

16. The jurisdiction of the ELC is provided in **Articles 162 (2) (b)** of the **Constitution** and **Section 13** of

the **Environment and Land Court Act**. The two provisions respectively provide as follows:

Article 162 (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a) employment and labour relations; and**
- b) the environment and the use and occupation of, and title to, land.**
- 3) parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).**

The Environment & Land Court Act, S. 13 (1) provides as follows:

The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to Environment and Land.

(2) In exercise of this jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes:-

- a) relating to Environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- b) relating to compulsory acquisition of land;**
- c) relating to land administration and management;**
- d) relating to public, private and community land and contracts, choses or other instruments granting any enforceable interests in land; and**
- e) any other dispute relating to Environment and Land.**

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

17. From the above two provisions, it is my view that this court can hear any constitutional petition under any provision of the constitution so long as the matter relates to the environment and the use and occupation of, and title to, land.

18. The question that flows from this is whether this court is *functus officio* following the decision of Ouko J. on 29th July, 2011?

19. Once a Court of competent jurisdiction has determined a matter relating to private rights, that judgment is valid and the Constitutional Court will not on the principle of *res judicata* which applies to the final and conclusive determination of the dispute, reopen it unless it is shown that due process was not adhered to the decision challenged or is in some other respect unconstitutional. See the cases of **Booth Irrigation vs Mombasa Water Products Limited (H.C. Misc. Application No. 1052 of 2004)** and **Kenya Bus Service Ltd & Others v Attorney General & 220 others (Nairobi H.C. No. 413 of 2005)**.

20. Counsel for the Petitioners' in his submissions stated that the decision of **Ouko J.** was erroneous as it on the one hand recognized the Uasin Gishu clan as one of the habitats of the suit land but failed to make any provisions for them on the other resulting to filing of this constitutional petition. It is my humble view, that such an argument would require further evidence and interrogation of such evidence during the full hearing. The preliminary objection on this ground is therefore premature as petitioners have established the gist of their case to one founded on the right to own property.

21. The second argument raised against this petition is whether the preliminary objection contravenes Article 15 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. It provides for the 1st Respondent to within fourteen days of service of a petition respond by way of a replying affidavit. It was the petitioners contention, due to their failure, that the court should proceed under rule 16 to hear and determine the petition in the respondent's absence.

22. In my view, where the Respondents determine that the petition raises no constitutional issue, and claims for other reasons, for example, that the matters raised in the petition are *res judicata*, then the court is bound to inquire, not in the alleged contravention of fundamental rights merely but also into the issues raised by the Respondents that the petition does not lie or is not maintainable under the constitution. This is the position and thus rule 16 is of no avail to the petitioners.

23. The last issue raised is whether the suit is an ordinary suit disguised as a constitutional petition. My first observation of this ground is that it is not a pure point of law. It shall as I have previously observed, require more evidence and interrogation of such evidence. However, I have perused the consequential orders sought by the petitioners. Though they have a striking resemblance to matters of an ordinary suit, the petitioners have established in their submission that they have an indigenous or ancestral connection to the suit land. This was also appreciated in the decision of **Ouko J.** when he stated that:

“It is a matter of historical fact that the late Murumbi served as the vice president for only a few months between May and December, 1966. No doubt, because of his Maasai background and his status in the society, he was welcome to live among the Maasais. Olalui area is occupied predominately by the Uasin Gishu community and the Moitanik clans of the Maasai community”

24. In view of the above, I do find that it is prudent for this court to allow the petitioners to ventilate their case and if their intention is to indirectly ask this court to re-open the same issues that were before **Ouko J.**, then at that point the respondents may object.

25. For this reasons, I do find that the preliminary objection has failed and is hereby dismissed. Costs be in the course.

Dated ,signed and delivered in open court this 16th day of May 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Mbaka holding brief for Ms Katambi for 1st and 2nd Respondents

N/A for petitioners

Emmanuel Maelo: Court Clerk

L N WAITHAKA

JUDGE