

portions of the land, and sold the same, had no legal authority to do so. In the event, the petitioners will be asserting that the sales by the concerned respondents were a nullity.

Any titles issued to the persons who purchased portions from the 6th, 7th and 8th respondents are said to be a nullity. Therefore, the petitioners intend to ask the court to cancel the said titles.

Ultimately, the petitioners intend to persuade the court to declare them to be the persons who were lawfully entitled to the land in issue. They will also be asking for compensation.

The 6th, 7th and 8th Respondents issued a Notice of Preliminary Objection to the Petition. It is that Objection which is the subject matter of this Ruling.

The Preliminary Objection is premised on the fact that the Petitioners had already filed **JUDICIAL REVIEW NO. 44 OF 2011**, before the High Court at Eldoret.

As far as the 6th, 7th and 8th Respondents were concerned, the subject matter of this Petition was the same as that in the Judicial Review. Secondly, the remedies being sought in this Petition were said to be the same as those being sought in the Judicial Review.

In those circumstances, the 6th, 7th, and 8th Respondents submitted that the Petitioners were engaged in gambling, by filing and prosecuting parallel proceedings over the same subject matter. I was therefore invited to hold that the Petition herein was an abuse of the process of the court.

In answer to the Preliminary Objection, the Petitioners have argued that the prayers or reliefs sought in this Petition are completely different from the reliefs sought in the Judicial Review.

In any event, only the Commissioner of Lands is the respondent in the Judicial Review, whilst in this Petition, there were 10 Respondents.

The Petitioners emphasize that the alleged Preliminary Objection cannot stand the litmus test because the facts alluded to by the parties are disputed by other parties.

Furthermore, urged the Petitioners, the Judicial Review is not concerned with the merits of the decision but with the process through which the decision in contention was arrived at. That position was said to be completely different from that in the Petition, wherein the Petitioners were asking the Court to protect their Constitutional rights.

As far as the Petitioners were concerned, the Petition constitutes the sum total of their agitation for their grievances and their desire for remedies in law.

The petitioners also noted that the existence of other remedies was no bar to an application for Judicial Review.

It was also pointed out that the 6th Respondent, LONRHO AGRI BUSINESS (E.A) LIMITED, was already a party to the Judicial Review proceedings.

In the considered view of the Petitioners;

“..... there is nothing wrong in law, for a party to approach the judicial review court and the constitutional court because each will provide a different remedy.”

If that is taken literally, then there would be a real danger that the court handling the judicial review and the court handling the constitutional petition could reach different and inconsistent conclusions.

The petitioners wish to have their opportunity to:

“unmask the ugly skeletons lying in the respondents closets, as regards the violation of the petitioners rights to protection of private property.”

Therefore, I was urged to let the respondents undergo a thorough scrutiny in full public glare.

I do not, even for a single moment, think that the respondents have done anything that can be said to suggest that they wish to hide from the public glare. By raising a preliminary objection, the 6th, 7th and 8th Respondents cannot be vilified. They have a right to raise the said objection, whether or not the same is upheld.

Their right to raise a preliminary objection is not any lesser than the Petitioners right to come to this court to agitate for the upholding of their constitutional rights.

A close scrutiny of the reliefs sought in the Judicial Review reveals that ultimately the Petitioners want the High Court to compel the Commissioner of Lands to issue title deeds of the land in question, to the Petitioners herein.

In my considered opinion, that is the very same remedy which is sought as prayer (1) in the Petition.

Similarly, the interim injunctive relief being sought in the Petition is basically the same as was sought and obtained in the Judicial Review.

I am not suggesting that just because the Petitioners had commenced the proceedings for Judicial Review, they ought to be barred from instituting the constitutional petition.

However, if the Judicial Review concluded that the order of Mandamus should issue, directing the Commissioner of Lands to issue title deeds to the Petitioners, so that they could settle their members on the land in dispute, because of the undertakings which the Government had given to them earlier, that may not necessarily be in tandem with the Petitioners quest for declarations that their ownership of the said land was premised on their constitutional right.

I am not purporting to pre-judge the issues. I am only suggesting that it is possible for the courts hearing the two cases arriving at conclusions which are inconsistent. If that were to happen, the credibility of the Court would be eroded.

I have also given due consideration to the possibility of hearing both this Petition and the Judicial Review together.

As the Petitioners have said, the Judicial Review Jurisdiction is a special one. It is invoked in the name of the state; and is neither civil nor criminal.

In contrast, the Petition is brought in the name of the Petitioners.

Judicial Review addresses concerns about the manner in which the decision being challenged was arrived at. Of course, that is when the said decision is being challenged.

On a prima facie basis, there is no direct or express challenge in the Judicial Review proceedings shown to me. As far as I can see, the relief sought is one of MANDAMUS, to compel the Commissioner of Lands to abide by the terms of a letter from the Director of Land Adjudication and Settlement.

Whether or not that relief presupposes that there is a decision which has to, first, be revoked, is not clear.

And whether or not it is possible, in law, to make any preumptions in proceedings for Judicial Review, is another issue for consideration.

On the other hand, in the constitutional petition, the petitioners are invoking their rights. They are asserting that they are entitled to the land because of the Constitutional rights. In effect, they would be seeking to prove the merits of their case. That in my considered legal opinion, is a whole new ball-game, compared to the one prevailing in Judicial Review.

Once again, I do agree with the Petitioners that on a strict interpretation of the law on Preliminary Objections, the issues raised by the 6th 7th and 8th Respondents do not constitute a Preliminary Objection.

I say so because the facts asserted by the Petitioners are disputed by the Respondents.

Also, the said issues cannot serve as a basis for striking out the Petition or the Judicial Review.

Accordingly, the Preliminary Objection is hereby overruled. It simply could not be sustained.

Nonetheless, I wish to make it clear that it is imperative for the Petitioners to choose which of the two cases they will prosecute first. The interests of justice demand that I put the Petitioners to an election, as the Judicial Review cannot be heard together with the constitutional petition, nor is it prudent that they be heard concurrently.

Once the petitioners make an election, the other case will be held in abeyance until the court hears and determines the case which the petitioners herein will have chosen to prosecute first.

I order the 6th, 7th and 8th Respondents to pay the costs of the Preliminary Objection.

DATED, SIGNED AND DELIVED AT ELDORET

THIS 29, DAY OF APRIL, 2013

FRED. A. OCHIENG
JUDGE