



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION 47 OF 2010

LEDIDI OLE TAUTA & 500 OTHERS..... APPLICANT

V E R S U S

THE ATTORNEY GENERAL & ANOTHER..... RESPONDENT
RULING

1. The parties to this petition have applied for the petition to be referred to the Chief Justice under Article 165(4) of the Constitution to constitute a bench of an uneven number of judges to hear it as it raises a substantial question of law. Both parties had filed skeletal submissions on the reasons why the matter raised a substantial question of law that merited reference to the Chief Justice which they highlighted on the 13th of December 2011.

2. Mr. Koech for the petitioners submitted that the petitioners are 500 members of the Maasai community representing several households residing around Ngong Hills. The petitioners allege that they have been in occupation of the land since time immemorial or before colonization of Kenya. They have therefore invoked the Constitution seeking for the land to be vested in them by virtue of continuous and uninterrupted state. He submitted that the petitioners are raising a serious and weighty constitutional matter that is ownership by virtue of native title. This is a right that is derived from inheritance. The British colonialists and successive governments had recognised the petitioners' stay on this land.

3. He submitted further that there was now a threat by the 2nd respondent of evicting the petitioners from the suit land despite their being on the land since time immemorial. The land being claimed by the 2nd respondent is not forest land. The issue raised by the petitioner pertaining to the land is so weighty that it should be heard by a 3 judge bench. He relied on the Australian case of **Mabo -v- Queensland (No 2) ("Mabo Case") (1992) HCA 23** which dealt with the issue of native title with regard to the rights of indigenous inhabitants to support his submission that the issues raised in this case are substantial issues of law regarding the rights of the Maasai to the land in dispute. He also relied on the decision of the Indian Supreme Court in **Sir Chunilal V. Mehta & Sons Ltd-v- The Century Spinning and Manufacturing Company (1962) AIR 1314 SCR** with regard to what the term '*a substantial question of law*' refers to.

4. Mr. Mwaniki for the 2nd respondent, the Kenya Forest Service, agreed with the petitioners that the matter should be referred to a 3 judge bench, even though, from the 2nd respondent's perspective, the petitioners' claim is unmerited in law and in fact. He argued that the petitioners have ridden on matters of

law that are in themselves serious. They have cited various alleged infringement of their rights under the constitution and the UN Declaration on the Rights of Indigenous People which are uncharted areas of law under the new Constitution. The 2nd respondent has also cited various provisions of the Constitution to advance the argument that the land in question, vested in the 2nd respondent, is public land as opposed to the claim that it is communal land. Matters of constitutional protection of public land are serious matters. The danger that this petition portends of seeking to legitimise blatant encroachment of public land on the basis of community claims is one that the 2nd respondent asks the court to take very seriously in ultimately dismissing the petition.

5. Mr. Mwaniki submitted further that the constitutional issues regarding protection of the environment and principles of land policy under Article 69 and 60 respectively have been raised by the 2nd respondent. He argued that the court will be called upon to determine serious matters in particular the danger that this petition portends not just in respect of Ngong Hills Forest. He also cited the case of **Sir Chunilal V. Mehta & Sons Ltd-v- The Century Spinning and Manufacturing Company (1962) AIR 1314 SCR** determined by the Supreme court in India on what amounts to a substantial question of law which he submitted is in *pari materia* with Article 165(4) which he proposed that the court should adopt. The test set out in that case is whether a matter is of general public importance and he contended that a threat to claim a forest which is public land is a matter of general public importance. Whether it affects the rights of the parties substantially – in this case public rights and environmental issues; the other issue is whether the matter has been finally settled by the court. He argued that we now have a new Constitution that expands and expounds the rights of citizens and the state. Whereas a matter similar to this had been decided by Etyang J in **Kinyanga & 2 Others –v- Isiolo County Council and 3 Others KLR (E&L) 1**, the spirit of that decision would need to be re-emphasised under the new Constitution and the spirit is that annexing or dividing the country into tribal or community interests is unconstitutional and unacceptable.

6. Finally, he submitted that it was the respondent's contention that the petition, though unmerited, raises substantial questions of law and the protection of public interests relating to public land, forests and the environment to merit the constitution of a 3 judge bench.

7. I have considered this petition and the submissions of both parties on whether the petition raises a substantial question of law to merit the constitution of a 3 judge bench to hear it. The petitioners seek:

(i)

(ii) Declaration that the petitioners and the Maasai Community of Ngong Hills are entitled to all that parcel of land known as known as Ngong Hills measuring approximately 577 hectares or there about as it is community land solely belong to the petitioners of the Maasai Community.

(iii) A permanent injunction order directed at the respondents or any other party from interfering with the petitioners and the Maasai community of Ngong Hills from their ownership, occupation, use, and interest over the suit land or otherwise from evicting or attempting to evict the Petitioners and other residents from the suit land or from issuing title deed or in any other way alienating the suit land other than to the Petitioners and other Residents.

(iv) An order that the said land is community land and/or held under native title in terms of Article 63 and (2) of the Constitution of Kenya belonging to the Petitioners, Successors and other Bona fide Maasai residents.

(v) An order directed to the government of Kenya to immediately survey the suit land and proceed to issue title deed to the Petitioners and other Bona fide Maasai residents of Ngong Hills or of the suit land.

(vi)

8. The court will be called upon to consider and weigh the interests of the petitioners as members of one

indigenous community in Kenya against the wider public interest and the needs of environmental conservation in Kenya. The decision reached by the court is bound to have far reaching consequences in view of the fact that there are many other communities in Kenya with similar historical claims to land which may now be vested in the public. In light of the provisions of the constitution and the nature of rights for both individuals and communities that are recognised in it, I am of the view that this petition raises a substantial question of law that merits consideration by an uneven number of judges. The decision in the matter will hopefully balance the competing interests that this claim brings to the fore.

9. I therefore refer the matter to the Chief Justice to constitute a bench of an uneven number of judges as provided under Article 165(4) of the Constitution.

Dated and Delivered at Nairobi this 27th day of January, 2012.

Mumbi Ngugi
Judge