REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION 136 OF 2011

IN THE MATTER OF:CHAPTER 1, 4 AND 5 OF THE CONSTITUTION OF

KENYA WHICH PARTS RELATE RESPECTIVELY TO CITIZENSHIP AND THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOS OF THE INDIVIDUAL

AND OWNERSHIP OF PROPERTY AND LAND

IN THE MATTER OF: THE BILL OF RIGHTS UNDER CHAPTER FOUR OF

THE CONSTITUTION

AND

IN THE MATTER OF: THE RIGHTS OF RIGHTS AND FUNDAMENTAL

AND

IN THE MATTER OF: INFRINGEMENT OF RIGHTS AND FUNDAMENTAL

FREEDOMS

AND

IN THE MATTER OF: CITIZENSHIP AND ENFORCEMETN OF THE RIGHT

OF OWNERSHIP OF PROPERTY AND LAND

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS SECTION 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 27, 39, 40, 47, 258, 259 AND THE CONSTITUTION OF KENYA

CHARO KAZUNGU MATSERE & 273 OTHS……..……PETITIONERS

V E R S U S

KENCENT HOLDINGS LIMITED

KENYA NATIONAL ASSURANCE (2001) LTD……RESPONDENTS

JUDGMENT

BACKGROUND

(1) The Petitioners are tireless in their quest for the ownership of land known and described as MN/397(1) (the suitland) and see hope in the promise of The Constitution, 2010. The long and chequered history of litigation between the Petitioners and the Respondents began in May 2005. In that year the Petitioners filed **Mbsa HCC No. 81 of 2005** which they withdraw shortly thereafter.

(2) Then by Originating Summons in **Mbsa HCCC No. 110 of 2006 Mati C. Matsere & 33 Oths –Vs- Kenya National Assurance Co. (2001) Ltd** (***hereinafter called the 2006 suit***) the Petitioners sought to be declared owners of the suitland by way of adverse possession. After receiving evidence Justice Sergon dismissed the claim on 23rd February 2009.

(3) It was now the turn of the Respondents to go on the offensive and by a Plaint dated 27th April 2009, the Respondent sought to have the Petitioner evicted from the suitland. In that suit, being **No. 123 of 2009 Kencent Holdings Ltd & Another –Vs- Mati C. Matsere & 330 Others** (***hereinafter called the 2009 suit***), Justice J. B. Ojwang found favour in the claim and by a judgment dated 12th October 2011 declared the Petitioners as trespassers and ordered that they be evicted.

(4) So the Petitioners have now come to court by way of a Constitutional petition in which they seek the following prayers-

"(i) A declaration as unlawful, null and void the 2nd

Respondents purported sale of the suitland herein to the 1st Respondent.

(ii) A declaration that the Petitioners being in occupation of the suit premises herein have the first priority in the purchase of the suitland."

(5) The facts to the dispute present no difficulty. Vide a vesting order the suitland was on 26th July 2002 transferred from the defunct Kenya National Assurance Company Ltd (KNAC) to the 2nd Respondent. The 2nd Respondent subsequently sold the suitland to the 1st Respondent at a consideration of Kshs. 43,945,000/- and the land was duly transferred to it on 1st December 2006.

(6) The 1st Respondent was however not able to obtain vacant possession thereof as the Petitioners had occupied it. The Petitioners claim that they and their families occupied the suitland way before Kenya attained its independence. It is conceded by the Respondents that the Petitioners have put up structures on the suitland.

THE PETITIONERS CASE

(7) It is argued by the Petitioners that the 2nd Respondent ought to have given them first priority to purchase the suitland. That KNAC had recognized the Petitioners occupation of the suitland and had agreed to sell to them a portion and so the action of the 2nd Respondent infringed on their constitutional right to own land. Further that the 2nd Respondent has discriminated against them as they were, and are, ready and willing to pay for the suitland at the current market price.

(8) This court was referred to an article in the Havard Human rights journal entitled "***The Protection of Indigenous Peoples Rights over lands and National Resources under the Inter-American Human Rights System***." The Article discusses the legal practices among member states of the Organization of

American States in which States "***recognizes and in some measure affirms and protects indigenous people traditional land and resource tenure***." It is argued by the Author that there is sufficient common practice among OAS member states regarding indigenous peoples land and resource rights to constitute Customary International law at the regional level.

RESPONDENTS REPLY

(9) The Respondents have submitted that the Petitioners do not have any legal or equitable right over the suitland. That the decision in the 2006 suit settled the Petitioners claim. In addition the order of eviction granted by the court in the 2009 suit put paid to any hopes by the Petitioners. It is the position of the Respondents that the issues herein are Res Judicate those in the 2006 and 2009 suits and this action is an abuse of the court process.

(10) The 2nd Respondent adhered to the provisions of the Public Procurement and Disposal Act and could not to have entered into a private arrangement to sell the land to the Petitioners. The 2nd Respondent is a State Corporation and was therefore bound to sale the suitland in a competitive and transparent process.

(11) The Respondents contend that it is the Petitioners who are guilty of oppressive conduct as they have forcefully remained on the suitland. That the Petitioners have trampled on the 1st Respondent's right to property.

(12) I am asked to disregard the American position as the OAS members are party to the American Declaration on the Rights and Duties of Man. In particular because the treaty only binds its signatories. Needless to say Kenya is not a signatory.

(13) Even if I was to find that there is a property regime unique to the indigenous people which is either recognized or requires formal recognition, the Petitioners have not established that they are indigenous in respect to the suitland and that they have a historical connection to it.

ISSUES FOR DETERMINATION

(14) This court identifies the following issues for determination:-

(a) Is this petition Res Judicata the two suits?

(b) Have the Petitioners established a Constitutional or Statutory right to the suitland.

(c) If the answer to (b) is yes, have the Respondents infringed on this right.

RES JUDICATA

(15) The Petitioners have approached this court under Article 22 of the Constitution claiming that a right in the Bill of Rights has been violated. Article 23 gives this Court jurisdiction and authority to uphold and enforce the Bill of Rights. In exercise of this authority the court must not be unreasonably restricted by procedural technicalities so that it can be accessible without hinderance or let to persons who seek redress. This is the approach I will take in considering whether or not this Petition is Res Judicata.

(16) The question of ownership of the suitland has been the subject of two legal proceedings which have been heard and settled. In the 2006 suit the Petitioners claim was based on adverse possession. The Petitioners were unable to persuade that court and lost. My understanding is that the Petitioners claim therein was mounted on their supposed right to the suitland by way of prescriptive rights. The Petitioners Constitutional right to property was neither agitated nor determined. I am willing to find that this was a remedy alternative to the Petitioners constitutional claim and would be slow in holding that these proceedings are Res Judicata the Originating Summons.

(17) What about the latter proceedings?

In the 2009 suit the Respondent sought the following orders:-

(a) That the Petitioners be declared as trespassers.

(b) An Eviction Order

In response to this the Petitioners made the following specific averment-

"The Defendant further in reference to paragraph 7, state that they were not in anyway given priority to purchase the parcel of land, while the 2nd Plaintiff know their (sic) existence and this puts them in strict proof thereof."

(18) How does this compare with the current Petition? The core of the Petition is found in paragraphs 11 and 14 which reads:-

"11. That despite the Petitioners being in the suit premises the 2nd Respondent has gone ahead and offered the suit premises for the sale to the 1st Defendant which act infringes on the Constitutional rights of the Petitioners and in particular right to ownership of land."

"14. That the acts by the 2nd Respondent are tantamount to discrimination as the Petitioners are ready and willing to pay for the parcels of land at the current market rate."

Quite clearly the matters raised in this petition are substantially the same as those in the defence. Both pleadings raise the issue of an alleged violation of the Petitioners right to be given the first priority to purchase the suitland. It does not matter that it is now framed as a constitutional question, it is the same question. I have no hesitation in finding that this is a question that was alive for determination in the 2009 suit and was settled in the judgment of Justice Ojwang.

(19) The decision of the Judge makes this even more clear in the following passage-

"The question in this case is, rights of ownership of a parcel of land ie rights to private property which are some of the rights specially protected under the Constitutional Bill of Rights (Chapter Four – Articles 19-59). Article 40(1) of The Constitution provides that every person has the right, either individually or in association with others, to acquire and own property and all the evidence placed before this Court shows 1st Plaintiff to have complied with all the relevant legal procedure in acquiring the Suitland herein, the same now being duly registered in the 1st plaintiffs name."

(20) Even if I were to hold that the Petitioners defence was not pointedly a Constitutional plea, I would still find that this petition is Res judicata the proceedings in the 2009 suit in the broader context of that principle. The Petitioners claim that the Respondents have violated their constitutional right to property was an issue that properly belonged to that subject of the 2009 litigation. In the decision of **Greenhalgh –Vs- Mallard (1947)2 ALL E.R. 255** (at page 257), Somervell L.J says this, about Res Judicata in its wider sense-

"res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so closely part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

It would be contrary to public policy to allow parties to litigate in instalments or tranches.

(21) However generous this court may want to be, it cannot come to any other conclusion but that this

petition is Res Judicata the 2009 suit. In this regard I identify fully with the sentiments of the Court in **Booth Irrigation –Vs- Mombasa Water Products Ltd (Booth Irrigation No. 1) Nairobi HC Misc. Appl. No. 1052 of 2004** in which it held;

"Although Constitutional Applications should be heard on merit, I find that there is nothing that would prevent a challenger of the alleged contravention moving this court to demonstrate that the application does violate fundamental principles of law including public policy for example the matter raised was res judicata. Res Judicata is in turn based on the principle grounded on public policy that litigation at some point must come to an end. Res judicata is a fundamental principle of our law."

MERITS

(22) But I may be wrong on the issue of Res Judicata and must exam the Petitioners claim to see whether it has some merit. As I embark to do so, let me observe that the alleged violation of the Petitioners rights is said to have happened some time in 2005 and 2006 when the 2nd Respondent sold the suitland to the 1st Respondent. Unless expressly stated, the provisions of the Constitution 2010 do not have retroactive application. The rights of the Petitioners are therefore discussed in the light of the provisions of the former constitutional and more particularly Section 75 thereof on property.

(23) The scope of the promise guaranteed by Section 75 of the former Constitution was a central issue in **Nrb Petition No. 498 of 2009 Joseph Thuo Mwaura & 82 Others –Vs- The Hon. Attorney General & 2 Others**. Justice Majanja made this finding;

"The Constitution and more specifically Section 75 does not create proprietory interest nor does it allow the Court to create such rights by Constitutional fiat. It protects proprietory interests acquired though the existing legal framework." (*emphasis mine*)

(23) The suitland was previously registered in the name of the 2nd Respondent having acquired a vesting right from KNAC. KNAC in turn had purchased the suitland from one JAMES MWANGI GACHARU and FRANCIS WAITA. The history of registration shows that the suitland was first registered in the name of Emmanuel Burlo under the Land Titles Ordinance. It was subsequently transferred to his personal representative Emmanuel Andrew Burlo who transferred it to Suleiman Bin Ali and eventually to James Mwangi Gacharu and Francis Waita. This history reveals that the ownership of the 1st Respondent has the backing of statute and more particularly The Land Titles Act Chapter 252 (now repealed) and The Registration of Titles Act (Chapter 281) (now repealed). These transactions were upheld in the Judgments of Justices Sergon and Ojwang referred to earlier.

(24) An argument raised by the 2nd Respondent is that they were barred by the provisions of the Public Procurement and Disposal Act (Act No. 3 of 2005) from negotiating a private sale with the Petitioners. It may be that as a State Corporation, Government Policy required the 2nd Respondent to dispose of its assets in an open transparent and competitive process but the Public Procurement and Disposals Act had not come into effect at the date the property was put up for sale. The advertisement for sale of the suit property was published in the Daily Nation on 15th October 2004 while the commencement date of the Act was 1st January 2007. That notwithstanding I find that the public, overt and transparent nature of the sale gave the Petitioners an opportunity either to participate in it or to challenge its legality or constitutionality.

(25) The Petitioners say that they have always been ready and willing to buy the suitland at market rates. I have carefully looked at the 1st Petitioners affidavit in support of the petition and do not see any explanation by the Petitioners as to why they never put in their bid. Secondly there is no evidence that they legally, or by other means, challenged the intended sale The 2006 suit was filed after a contract of sale had been entered on 10th November 2004 between the 1st Respondent and the 2nd Respondent. It would be unjust, I think, to allow the Petitioners to use this petition to defeat the lawfully acquired proprietory interests of the 1st Respondent when they had an opportunity to mount a challenge of the sale

before it had happened.

(26) Central also to the Petitioners case is that owing to their indigenous connection to the suitland they have a proprietory expectation that cannot be defeated by the current legislative framework. They contend that they are victims of historical dispossession. This grievance is not unique to Kenya. Different governments have taken different approaches to this problem. Some countries, Australia and South Africa fall in this category, have taken steps to redress the wrongs of history.

(27) The former Constitution, in Chapter IX, gave some measure of recognition to traditional land tenure through the creation of Trust Lands. All Trust land vested in the County Council within whose area of jurisdiction it was situated. Section 115(2) provides as follows-

"Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual:

Provided that no right, interest or other benefit under African customary law shall have effect for the purpose of this subsection so far as it is repugnant to any written law."

(28) I would also think that some statutes recognized these rights and in some instances provided a procedure of formalizing them. These would include the Trust Land Act (Cap 288), The Land Adjudication Act (Cap 284) and the Land (Group Representatives) Act (Cap 287).

(29) Looking at these Statutes and the legal framework existing then, I am unable to find that the Petitioners have established any proprietory right over the suitland. In addition, inspite of their reference to the practice in the American States, the Petitioners did not demonstrate that there is Customary International Law affirming or protecting indigenous peoples traditional Land Tenure.

(30) Even if I was to hold otherwise, the Petitioners have not established, by way of evidence, that they have an indigenous or ancestral connection to the suitland. Upon analyzing the evidence presented by the Petitioners in 2006 suit Justice Sergon came to the following conclusion-

"A close consideration of the evidence of P.W.1, P.W.2, P.W.3, and P.W. 4 reveals that they all came to occupy the suit premises on the invitation of the original owner and his successor Emmanuel Burlo. <u>It would appear they were permitted to reside on the land as workers and or employees of the registered owner</u>." (emphasis mine)

<u>CONCLUSION</u>

(31) As it would now be apparent this petition cannot succeed. But I must observe that the debate raised by it will not go away. Fortunately, the new Constitution has by a greater measure sought to recognise Traditional and Ancestral Land Tenure and to address the historical injustices and difficulties caused by the current Land Law regime.

(32) Article 63 of The Constitution, 2010 is a compliment to traditional land tenure. For instance Article 63 (2)(d) provides Community land to include land-

"(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter- gatherer communities; or

(ii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2)"

(33) Article 67 of The Constitution establishes the National Land Commission. One of its functions is to "initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress." The National Land Commission Act 2012 (Act No. 5 of 2012) which commenced only a fortnight ago reaffirms this commitment and sets out a road map towards resolving these injustices. Section 15 provides-

"The Commission shall, within two years of its appointment, recommend to Parliament appropriate legislation to provide for investigation and adjudication of claims arising out of historical land injustices for the purposes of Article 67(2) (e) of The Constitution."

For the first time, persons aggrieved by historical land injustices have a real opportunity of obtaining redress. They must insist that these Constitutional and statutory provisions are fully implemented. Vigilant they must be!

(32) That said, I find that the petition lacks merit and I now hereby dismiss it.

No award on costs.

Dated and delivered at Mombasa this 17th day of May, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Muchai for Petitioners

Wachira for Oraro for Respondents

Court clerk - Moriasi

F. TUIYOTT
JUDGE