REPUBLIC OF KENYA

High Court at Machakos

Petition 38 of 2011

ROBINSON KIOKO MUTUKU.....PETITIONER

VERSUS

THE COUNTY COUNCIL OF MAKUENI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. In some ways, this is a curious case: the Petitioner has filed this Petition on behalf of his community – as the New Constitution entitles him – with the singular aim of stopping what he fears is a plan to sub-divide, allocate, and alienate land which is set aside as a public utility. The land in question is parcel no. Nzau/Matiliku/753 ("Suit Property"). The Petitioner claims the land is used as a communal market and a sporting/recreational field for the youth in the area. He states that he has used the Suit Property as a playground and recreation field since he was a young child. The Petitioner is now all of thirty-two years. He still uses the Suit Property as a place to meet up with his compatriots to catch up on local and national news and politics. He makes it clear that he and his colleagues – and the Community at large -- will be sorely bereaved if the 1st Respondent proceeds with its plans to sub-divide, allocate and alienate to individuals the Suit Property.

2. The 1st Respondent is charged by the Constitution with the duty to hold the Suit Property in trust for the benefit of the local community – including the Petitioner. In response to the Petition and concomitant application for interlocutory relief, the 1st Respondent raised an interesting defence: it concurs with the Petitioner that the Suit Property is a public utility. It denies that any plans are afoot to sub-divide, allocate and alienate the Suit Property to individuals. What about the allocation receipts copies of which are annexed to the affidavit of the Petitioner in support of his application for interlocutory relief? Those, the 1st Respondent says through the affidavit of its Town Clerk, Maina Gathura, do not unequivocally indicate that the 1st Respondent has unalterably decided that the land in question will be so sub-divided! In other words, the 1st Respondent implies, it might or might not execute the sub-division in the future. The receipts of monies from members of the public who are paying for the allocation of those plots should not, the 1st Respondent seems to be saying, worry the Petitioner. Those lawfully paying these sums to the 1st Respondent in order to be allocated these plots might simply be disappointed if the 1st Respondent elected not to go ahead with the plans. It would sound fictional if it were not straight from the affidavit of Maina Gathura, the Town Clerk:

8. That I have seen some Application Forms for Stalls and receipts for Kshs. 1,200/= for such application which I wish to state that the same remains as mere applications with no approved development plans and which may be rejected or approved after the relevant legal procedure is followed.

3. On the basis of this, the 1st Respondent says both the suit and the application for interlocutory relief by the Petitioner are premature and speculative. It wants the application for interlocutory injunction dismissed.

4. So does the 2nd Respondent who has filed papers on behalf of the Director of Physical Planning. The

2nd Respondent's version is more plausible: there are no plans to sub-divide the Suit Property, and therefore the Director of Physical Planning has never prepared nor approved any part development plan demarcating and alienating the plot into various land uses. The Director has never, in any event, approved any change of use of the Suit Property. As such, the 2nd Respondent argues that none of the Petitioner's rights have been infringed since the requirement for publication under section 26(1) of the Physical Planning Act is not triggered until after a development plan has been prepared by the Director of Physical Planning. Since the Director has prepared no such part development plan, no duty has been triggered for him to publish a notice.

5. All this seems to make sense. Except that there is physical evidence in the form of still photographs which evidently show building materials and signs of excavation on the Suit Property. Neither Respondent denies that these still photographs depict the truth on the ground. Indeed, Maina Gathura, the Clerk confirms that "there [are] ground marks and building materials namely sand and ballast on the site for intended development." However, the 1st Respondent says it is "not party to the said illegal 'subdivision' and 'allocation' of the suit premises to individuals."

6. To my mind, then, it appears there is little divergence between the positions of the Petitioner and the Respondents in the matter. Both are united in their position that the on-going activities on the Suit Property are illegal and should be stopped. Both are united in their perspective that the Suit Property is a public utility and must be preserved as such. Both are united in their position that, as a public utility, before any part development or subdivision and alienation is done, the Director of Physical Planning must, first, develop a physical development plan and publish it in the Kenya Gazette and in such other manner as he deems expedient in order to give adequate notice to the local residents of the development plans.

7. Where, then, do the parties disagree? It would appear that they diverge only on the question of ripeness of the suit: the Petitioner believes that sub-division and alienation is imminent or has already occurred and provides physical evidence to that effect; the Respondents say that they have formally done no such thing. Yet, the 1st Respondent can hardly explain coherently its receipt of monies for allocation of stalls to be built on the Suit Property.

8. In my view, it would be a farce to ask the Petitioner and those on whose behalf he has brought the claim to go back and wait until the Respondents have formally acted to divest the community of the public utility when the evidence all around them suggest imminent *de facto* divestment of the community property. If the Respondents were acting in good faith, nothing would have been easier than for them to give an undertaking that they would not do the subdivision and alienation without adherence to the due procedures which, under the New Constitution, must include public participation and involvement. No such undertaking was forthcoming from them.

9. In my view, therefore, it is important that the Court acts to protect the rights of the community and prevent the contravention of the Constitution. The land in question here is, no doubt, public land as covered under Article 62 of the New Constitution. As such, it vests in and is held by the 1st Respondent in trust for the people resident in the area. According to Article 62(4), the Suit Property cannot be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use. Neither Respondent has claimed to have adhered to duly laid down rules for disposal of the public land. A correct reading of the New Constitution might include a requirement of public participation before such disposal.

10. Consequently, it is in keeping with the protection of the Constitution and its values for the Court to order the 1st Respondent to exercise due diligence to ensure that any illegal "grabbing," sub-division and allocation taking place on the Suit Property is halted and that the Suit Property is preserved until the hearing of the main Petition. It follows that neither the 1st Respondent nor the 2nd Respondent shall be permitted to do the sub-division or alienation of the Suit Property without following the letter of the law including but not limited to adhering to the terms of sections 16 and 26 of the Physical Planning Act. To this extent, therefore, the application for interlocutory relief hereby succeeds.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **17TH** day of **OCTOBER, 2012**.

J.M. NGUGI

JUDGE