



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 258 of 2011

HON. BASIL CRITICOS.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

**MINISTER OF STATE FOR PROVINCIAL ADMINISTRATION AND
INTERNAL**

SECURITY.....2ND RESPONDENT

MINISTER FOR AGRICULTURE.....3RD RESPONDENT

SETTLEMENT FUND TRUSTEES.....4TH RESPONDENT

COMMISSIONER OF LANDS.....5TH RESPONDENT

PUBLIC SERVICE COMMISSION.....6TH RESPONDENT

**THE DIRECTOR, LAND ADJUDICATION AND SETTLEMENT.....7TH
RESPONDENT**

**THE CHAIRMAN OF THE TAVETA LAND CONTROL BOARD.....8TH
RESPONDENT**

**THE DISTRICT COMMISSIONER, TAVETA DISTRICT.....9TH
RESPONDENT**

AND

**AGRICULTURAL FINANCE CORPORATION.....1ST INTERESTED
PARTY**

**A.H. MALIK AND COMPANY ADVOCATES.....2ND INTERESTED
PARTY**

**ALEXANDROS PANAYOTAKIS.....3RD INTERESTED
PARTY**

**WATER RESOURCES MANAGEMENT AUTHORITY.....4TH INTERESTED
PARTY**

RULING

1. The Chamber Summons Application dated 11th July, 2012 seeks the following Orders;

- (i) Pending the hearing and determination of this Petition, conservatory orders be issued restraining any of the Respondents or Interested Parties, their servants, agents or assigns or otherwise howsoever from alienating, transferring, disposing, attaching or in any manner whatsoever dealing with the Petitioner's land parcels LR. Nos. Numbers 6731 and 6732 situated in Taveta District.**
- (ii) Pending the hearing and determination of this Petition, conservatory orders be issued restraining the Respondents. their servants, agents or assigns from processing any letters of allotment, issuing any title deeds or accepting any money from persons issued with or in the process of being issued with letters of offer in respect of Taveta Phase 1 Settlement Scheme in Taveta District arising out of the Petitioner's former land parcel, L.R No. 5865/2 measuring 15,524.65 acres.**
- (iii) The present Application be consolidated with the Chamber Summons dated 21st November 2011 and applications be heard on a priority basis.**
- (iv) The 4th, 5th and 7th Respondents do within 7 days of the order of this Court provide documentary evidence under oath of;**

 - (a) minutes of all meetings between February and July 2012 of the Committee's deliberations leading to the issuance of letters of offer in respect of Taveta Settlement Scheme L.R No. 5865/measuring 15,524.65 acres,**
 - (b) a detailed account of all persons issued with letters of offer/allotment;**
 - (c) an account of the criteria used and if priority was given to persons who had lived on the Petitioner's former land parcel L.R No.5865/2 measuring 15,524.65 acres and the amount paid by each allottee.**
- (v) The 1st Respondent be ordered to forthwith gazette the Land Control Act Chapter 302 of the Laws of Kenya in the Schedule of Repealed Laws pursuant to Section 109 of the Land Registration Act 2012 and to omit the Land Control Act from the annual supplement to the Laws of Kenya.**
- (vi) Leave be granted to Amend the Petition dated 21st November 2011.**
- (vii) The 4th, 5th and 7th Respondents and in particular the Taveta District Lands Adjudication and Settlement Officer Stephen Ngugi and Mpenbe Hiribae Nkaduda the District Commissioner of Taveta District be summoned to Court to explain why they acted in contempt of the consent order dated 17th February 2012 or allowed any meetings to be held leading to the issuance of Letters of Allotment without leave of the Court.**
- (viii) Costs be paid by the Respondents.**

2. The Application is premised on **Articles 22, 27, 23, 35, 68, 156(6) and 159** of the **Constitution**, the sixth schedule of the **Constitution**, **Rules 20 and 21** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules of 2006**, **Sections 5, 8 and 13** of the **Revisions of Laws Act** and **Section 109** of the **Land Registration Act, 2012**. It is supported by an Affidavit sworn by Basil Criticos on 6th July 2012.

3. In opposing the Application, the Respondents filed Grounds of Opposition dated 1st August 2012 and the 1st Interested Party filed a Replying Affidavit sworn by Rashid Ngaira on 15th August 2011. The Application was argued before me on 27th July 2012.

4. To put the matters into perspective, by a Petition dated 21st November 2011, the Petitioner sought the following Orders;

(a) An Order of Mandamus be directed to the Chairman of the Taveta Land Control Board to forthwith grant consent to sub-divide the Petitioner's Land Reference Nos. 6731 and 6732 situated in Taveta District and to expeditiously hear and grant consent to all of the sub-divisions arising out of LR. Nos.6731 and 6732 as and when presented.

(b) An Order of Mandamus be directed to the Public Service Commission and the Minister of State for Provincial Administration and Internal Security to investigate the conduct of the District Commissioner of Taveta District H.M. Nkaduda, the Police officer-in-charge of Taveta District and any other public officer for their roles in disobeying Court Orders, aiding and abetting the invasion of the Petitioner's private land, refusal to remove the invaders and trespassers on the Petitioner's private land and frustrating the Petitioner's efforts to obtain Land Control Board consent.

(c) A declaration that the 8th and 9th Respondents have infringed the Petitioner's fundamental rights and freedoms to own land and discriminated against the Petitioner's right to human dignity and access to fair administrative justice.

(d) A declaration that Part 11 of the Agriculture Act setting up the Settlement Funds Trustees is unconstitutional to the extent that it does not meet the Principles of Article 60 of the Constitution in that there are no published rules setting out how the citizens of Kenya are to be settled on land acquired by the Settlement Funds Trustees or a data bank showing all land owned by Settlement Funds Trustees in Kenya.

(e) An order of Mandamus directing the 3rd, 4th, 5th and 7th Respondents to immediately commence the exercise of settling all genuine squatters in Taveta District in a fair, equitable, democratic and transparent manner on the 39,524 acres of land vested in the Settlement Funds Trustees and acquired from the Petitioner and provide the Court with the report within 30 days of the Order of the Court of the formula and rules to carry out the exercise.

(f) An order of Mandamus be issued directing the Minister of State for Provincial Administration and Internal Security to immediately transfer the H.M. Nkaduda from his position as District Commissioner of Taveta District for abuse of office.

(g) Declarations that the 9th Respondent is not fit to hold office as a public servant for violating the Petitioner's fundamental rights and freedoms and that public servants and officers must observe the Petitioner's fundamental rights and freedoms enshrined in Chapter 4 and 5 of the Constitution and uphold the provision of the Constitution as set out in Article 10 regarding national values and principles of governance whenever he seeks any assistance from them in future on any matter touching his private land.

(i) A stay of proceedings be issued in respect of the following suits and matters filed before the Water Appeals Tribunal:

(ii) Milimani HCCC No.446 of 2009 Basil Criticos vs The Agricultural Finance Corporation.

(iii) Bankruptcy Notice No.8 of 2009.

(iv) Nairobi HCCC No.288 of 2006 Alexandros Panayotakis vs Agro Development Company Limited and Basil Criticos.

(v) Water Appeal No.2(WR) of 2010 AgroDevelopment Company Limited vs. WaterResources Management Authority.

(vi) Water Appeal No.1 (WR) of 2011 Hon. Basil Criticos & Agro Development Company Limited vs.

Water Resources Management Authority.

(h) Pending the sub-division an sale Land Reference Numbers 6731 and 6732 whose proceeds of sale will be used to settle all decrees and seek an amicable solution to pending [all] suits.

(i) A declaration that the Settlement Funds Trustees has failed in its mandate to settle landless people in Kenya and should be prohibited from dealing with the suit l and L.R. No.5865/2 Taveta until rules have been set up providing for equitable and fair distribution of land with priority being given to the landless citizens of Kenya.

(j) Exemplary damages against the Respondents and costs of the Petition be awarded to the Petitioner.

5. Concurrently with the Petition, a Chamber Summons Application dated 21st November 2011 seeking the following Orders was filed;

(1) The Application be certified as urgent and service thereof be dispensed with in the first instance.

(2) A stay of proceedings be issued in respect of the following suits and matters filed before the Water Appeals Tribunal:

(a) Milimani HCCC No.446 of 2009 Basil Criticos vs The Agricultural Finance Corporation.

(b) Bankruptcy Notice No.8 of 2009.

(c) Nairobi HCCC No.288 of 2006 Alexandros Panayotakis vs Agro Development Company Limited and Basil Criticos.

(d) Water Appeal No.2(WR) of 2010 Agro Development Company Limited vs. Water Resources Management Authority.

(e) Water Appeal No.1 (WR) of 2011 Hon. Basil Criticos & Agro Development Company Limited vs. Water Resources Management Authority.

pending the hearing of this Application *inter partes*.

(3) Pending the hearing and determination of the Application, a conservatory order do issue restraining the 3rd, 4th and 7th Respondents by themselves, agents or assigns or any other Government department or agency from sub-dividing, allotting or in any manner dealing with the Petitioner's former land, LR.No.5865 situated in Taveta District pending the hearing of this Application.

(4) An Order of Mandamus be directed to the Chairman of the Taveta Land Control Board to forthwith grant consent to sub-divide the Petitioner's Land Reference Nos.6731 and 6732 situated in Taveta District and to expeditiously hear and grant consent to create sub-divisions out of Land Reference Nos.6731 and 6732 as and when presented.

(5) An Order of Mandamus be directed to the Public Service Commission and the Minister of State for provincial Administration and Internal Security to investigate the conduct of the District Commissioner of Taveta District H.M. Nkadua, the Police Officer in charge of Taveta District and any other public officer for their roles in disobeying Court Orders, aiding and abetting the invasion of the Petitioner's private land, refusal to remove the invaders and trespassers on the Petitioner's private land and frustrating the Petitioner's efforts to obtain land control board consent.

(6) A stay of proceedings be issued in respect of the following suits and matters filed before the Water Appeals Tribunal.

(a) Milimani HCCC No.446 of 2009 Basil Criticos vs The Agricultural Finance Corporation.

(b) Bankruptcy Notice No.8 of 2009.

(c) Nairobi HCCC No.288 of 2006 Alexandros Panayotakis vs Agro Development company Limited and Basil Criticos.

(d) Water Appeal No.2(WR) of 2010 Agro Development Company Limited vs. Water Resources Management Authority.

(e) Water Appeal No.1 (WR) of 2011 Hon. Basil Criticos & Agro Development Company Limited vs. Water Resources Management Authority.

pending the hearing of the Petition.

(7) Pending the hearing and determination of this Petition, a conservatory order do issue restraining the 3rd, 4th and 7th Respondents by themselves, agents or assigns or any other government department or agency from sub-dividing, allotting or in any manner dealing with the Petitioner's former land, L.R. No. 5865 situated in Taveta District pending the hearing of the Petition.

(8) Any such relief as the Court may deem fit.

(9) Costs in the cause.

6. On 17th February 2012, the parties herein appeared before me and they recorded a consent in terms of the following Orders;

“(i) That the Application dated 3rd February 2012 be heard on 7th March 2012.

(ii) That a conservatory order be and is hereby issued restraining the 3rd, 4th and 7th Respondents by themselves, agents or assigns or any other government department or agency from sub-dividing, allotting or in any manner dealing with the Petitioner's former land, L.R No. 5865 situated in Taveta District pending hearing on 7th March 2012.”

7. Thereafter, the Petitioner filed the Chamber Summons Application now before me seeking the orders mentioned above. Upon hearing advocates for the Petitioner and the 1st-9th Respondents on 11th July 2012, Mumbi, J. recorded a consent granting the following interim Orders;

(a) That conservatory orders be and are hereby granted restraining any of the Respondents or Interested Parties, their servants, agents or assigns or otherwise howsoever from alienating, transferring, disposing, attaching or in any manner whatsoever dealing with the Petitioner's land parcels Land Reference Numbers 6731 and 6732 situated in Taveta District, pending the hearing and determination of the Petition.

(b) That conservatory orders be and are hereby granted restraining the Respondents their servants, agents or assigns from processing any letters of allotment, issuing any title deeds or accepting any money from persons issued or in the process of being issued letters of offer in respect of Taveta Phase 1 Settlement Scheme or any other Scheme in Taveta District arising out of the Petitioner's former land L.R No. 5865/2 measuring 15,524.65 acres pending the hearing and determination of the Petition.

(c) That the present application be and is hereby consolidated with the Chamber Summons dated

21st November, 2011 and the applications be heard on a priority basis.

(d) That counsel for the respondents shall communicate this consent order to the Respondents.

(e)"

8. From the above follows that prayer 1, 2, 3 and 4 of the Application before me have been spent. I am now called upon to adjudicate the matter in favour of Prayers (v), (vi), (vii) and (viii) and also the Chamber Summons Application dated 21st November 2011.

9. For convenience, I will first deal with the issue of contempt. The Petitioner seeks that the 4th, 5th and 7th Respondents be summoned to explain why they have acted in contempt of conservatory orders granted on 17th February 2012, restraining the 3rd, 4th and 7th Respondents from subdividing, allotting or in any manner dealing with his former land, LR NO. 5865 situated in Taveta District which was illegally sold to the Settlement Fund Trustees.

10. The Petitioner claimed that the 3rd, 4th and 7th Respondents have contravened the said Orders and contemptuously proceeded to issue letters of allotment to 3rd parties. In support of his claim, the Petitioner produced newspaper reports of diverse dates as evidence wherein it is reported that government officials are resettling squatters in the Petitioner's 'land'. He also produced letters of allotment allegedly issued by the 7th Respondent, requiring various persons to make payments in respect of the said land within 90 days despite the existence of the conservatory order dated 17th February 2012.

11. Mr. Gichuhi in presenting the Petitioner's case urged me to find that the 4th, 5th and 7th Respondents are in obvious contempt of Court since grounds of opposition filed by the Respondents are not an answer to the contempt Application.

12. Mr. Kiage in opposing the Application submitted that the parcels of land subject of the Petition herein are parcel Nos. 6731 and 6732 and in Petition No. 325 of 2011 is parcel No. 5865/2. He claimed that the alleged contempt is in regard to parcel number 5865 which parcel is unknown to the Respondents. He also submitted that all the documents filed are in regard to parcel no 5865 which is strange to the Petition.

13. I have perused the Petition filed herein and I am in agreement with Mr. Kiage that this Petition is in regard to LR No. 6731, 6732 and 5865/2. LR. No. 5865 was first mentioned in the Notice of Motion application dated 21st November 2011 particularly in Prayers 3 and 7. The consent orders issued on 17th February 2012 were also issued and referred to LR. No. 5865 in the following terms;

“That a conservatory order be and is hereby issued restraining the 3rd, 4th and 7th Respondents by themselves, agents or assigns or any other government department or agency from sub-dividing, allotting or in any manner dealing with the Petitioner's former land, LR. No.5865 situated in Taveta District pending hearing on 7th March 2012”

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14. I must now address my mind to the issue as to whether the Petitioner has satisfied the benchmark for citing the 4th, 5th and 7th Respondent for contempt of Court orders. This would be clear after examining the applicable law. There is a conservatory order in place issued on 17th February 2012. Thus the law applicable to cite one for contempt for violating this conservatory order would be the law relating to civil contempt under the **Judicature Act**.

• 15. The law of civil contempt under the **Judicature Act** is provided for under **Section 5(1)** of the **Judicature Act** which I reproduce as follows:

“5.(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of Subordinate Courts.”

16. Two issues arise from the above provisions. Firstly, only the High Court and the Court of Appeal can entertain an application for contempt. Secondly, while the substantive law and power to punish for contempt are granted by the Judicature Act, the procedural law is to be found in the contemporary English law of civil contempt as it changes from time to time. Presently, this law is retained in the Rules of the Supreme Court in Schedule 1 of the Civil Procedure Rules.

17. The question I must answer is whether the procedure of instituting and prosecuting contempt of court application has been adhered to by the Petitioner. Over the years, the courts have been very strict in entertaining an application for civil contempt of court. Such an application can only be allowed only if the particular order of court has been served on that person and the copy of that order must be endorsed with a notice informing the person whom the copy is served that if he disobeys the Order, he is liable to the process of execution to compel him to obey the order - See Mwangi Wangondu v Nairobi City Commission CA 95/1988 (Unreported), Jacob Zedekiah Ochino and another v George Aura Okombo CA 36 of 1989 (unreported).

18. Mr. Nyakundi for the 1st Interested Party in opposing the Application argued that the Petitioner has not then satisfied law of contempt in citing the 4th, 5th and 7th Respondents for contempt of Court. He submitted that the parties who have been named as contemnors have not been shown to be aware of the orders of the Court since there was no penal notice that was served upon the contemnors.

19. A perusal of the record reveals that the orders of 17th February 2012 were given by consent of the parties. There is a penal notice attached to the order. Did the 4th, 5th and 7th Respondents have knowledge of these orders? Mr. Gichuhi urged me to find that the contemnors had knowledge of the orders as the issue of the Court orders issued on 17th February 2012 was captured in the print media more than once. He relied on the newspaper cuttings exhibited in the affidavit of the Petitioner. Even if I was to assume for a moment that the 4th, 5th and 7th Respondents had knowledge of the orders of 17th February 2012, would that satisfy the requirement of personal service as provided for in our law? In Re Tuck Murch v Loose More (1906) Ch 692 it was observed that, “...knowledge is higher than service...service is unnecessary where there is knowledge”

20. The issue of knowledge of orders as being sufficient was until recently, alien in our jurisprudence. In Kariuki and Others v Minister for Gender, Sports, Culture and Social Services and Others, (2004) I KLR 588, it was held;

• “...but in our law, service is higher than knowledge and since the service here was frustrated...I shall hold in accord with the existing law that there was no service”. This was made following the decision in Wangondu (*supra*).

However the law has changed and as it stands today knowledge supersedes personal service and for good reason. This has recently been held in Kenya Tea Growers Association vs Francis Atwoli & 5 Others, Petition No.64 of 2010 where I opined as follows;

“In the case before me, I am more than satisfied that even at the higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the Court Order had stopped it. He went further to interpret it as made without jurisdiction and that only the “Workers Court”, (the Industrial Court) had jurisdiction to determine the matter. He did not do so once but on a number of occasion as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding.”

The point above is that where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it.

21. The Orders of 17th February 2012 were issued on consent basis and in the presence of the parties advocates. Accordingly, the 4th, 5th and 7th Respondents ought to have had knowledge of those orders for the obvious reason that they were presumed to have been party to the consent before and after it was recorded. Having satisfied myself that the 4th, 5th and 7th Respondents had knowledge of the consent order, I must now determine whether they are in contempt of that order.

22. Clearly, the consent order was in regard to LR No. 5865 and the Petitioner alleges that the 4th, 5th and 7th Respondent have violated the consent orders by issuing letters of allotment.

However, the Petitioner has failed to demonstrate which parcel of land the letters of allotment refer to. Is it LR Nos. 6731, 6732, 5865 or 5865/2? The letters produced in evidence bear various plot numbers, and the obvious question is; what is the nexus between the plots being allotted to third parties with LR No. 5865, the subject of the Court order of 17th February 2012. It must be clear that any contempt against the Respondents has to be in regard to LR No. 5865 since this parcel was the subject of the consent order dated 17th February 2012 and were the only orders in place at the time of filing the Application before me. Neither the Petitioner in his affidavit nor Mr. Gichuhi in his submissions addressed me on the correlation between these letters of allotment and the court order of 17th February 2012. Accordingly, I am not satisfied that there is contempt of court in regard to orders of 17th February 2012 with the ambiguities that I have pointed out. It is the Law that contempt can only attach where the order is ravenly flouted in all its material particulars. This is not the case here and I decline to issue any orders against the named alleged contemnors.

23. I will now address the second issue relating to the prayer requesting the Attorney General to gazette the repeal of the Land Control Act, Chapter 302 Laws of Kenya. Mr. Gichuhi submitted that the Land Control Act was one of the Acts that were repealed by **Section 109** of the **Land Registration Act** of 2012. He claimed that the continued existence of this Act as part of the Laws of Kenya violates the Petitioner's constitutional rights and it is in public interest that ought to be gazetted as repealed. He relied on the Hansard report of 26th April, 2012.

• **Section 109** of the **Land Registration Act** of 2012 provides as follows; **The written laws set out in the Schedule are repealed.”**

The Schedule provides;

SCHEDULE (s. 109) REPEALED LAWS

The Indian Transfer of Property Act 1882

The Government Lands Act, (Cap 280)

The Registration of Titles Act, (Cap 281)

The Land Titles Act, (Chapter 282)

The Registered Land Act, (Cap 300)

24. It is clear that the Land Control Act is not part of the repealed laws as stipulated in the Schedule under the Land Registration Act. Mr. Gichuhi referred this court to the Parliamentary Hansard proceedings of 26th April 2012 where he alleged that the National Assembly amended the Schedule of the Land Registration Bill by inserting the Land Control Act, Cap 302 in the schedule of repealed laws. I reproduce here for clarity purposes the Hansard proceedings of 26th April 2012, in regard to the Land Control Act;

“Schedule

The Temporary Deputy Chairman (Mr. Imanyara): Mr. Musyimi, did you have some amendments to make on the Schedule? It is on page 4370?

Mr. Musyimi: Mr. Temporary Deputy Chairman, Sir I beg to move:-

THAT, the First Schedule of the Bill be amended by inserting the following-

The Land Control Act, Cap 302

This is, again for clarity.

(Question of the amendment proposed)

The Temporary Deputy Chairman (Mr. Imanyara): Mr. Minister have you seen it?

The Minister for Lands (Mr. Orengo): Mr. Temporary Deputy Chairman, Sir, I support.

(Question, that the words to be inserted be inserted, put and agreed to)

(Schedule as amended agreed to)

(Title agreed to)

(Clause 1 agreed to)”

25. The Petitioner has sought an order directed at the 1st Respondent herein to gazette the Land Control Act as a repealed law pursuant to the National Assembly debate as seen above. Does the 1st Respondent has such powers? To answer that question, I will first address my mind to the role of Parliament in enacting legislation. **Article 109** of the **Constitution** grants Parliament powers to exercise its legislative power through Bills passed by Parliament and assented to by the President. **Article 116 (1)** of the **Constitution** provides that a Bill passed by Parliament and assented to by the President shall be published in the *Gazette* as an Act of Parliament within seven days after assent. The President assented this Act on 27th April 2012 and its commencement date was on 2nd May 2012.

26. The Bill was therefore assented by the President and subsequently published by the 1st Respondent. This means that what is actually the law today does not include the **Land Control Act Cap 302** in the Schedule of the repealed laws.

27. Clearly, the Parliamentary Hansard proceedings of 26th April 2012 reveal that the Schedule to the **Land Control Act** was amended and the **Land Control Act** was incorporated into the schedule of repealed laws. This was the intention of the legislature in enacting the **Land Registration Act of 2012**. Can this court therefore order the Attorney General to gazette the said **Land Control Act** as a repealed Act? I do not think so. The Powers of the Attorney General to rectify formal errors in law is stipulated under **Section 13** of the Revision of Laws Act. This Section reads:

“13. The Attorney-General may, by order in the Gazette, rectify Rectification of any clerical or printing error appearing in the Laws of Kenya, or rectify formal errors in a manner not inconsistent with the powers of revision conferred by this Act any other error so appearing. ”

28. The omission of the **Land Control Act** in the repealed schedule of laws does not fall under a clerical, printing or a formal error which the 1st Respondent has powers under **Section 13** to rectify. It is an omission and in my view this is not within the powers of the Attorney General under **Section 13** of the **Revision of Laws Act**. It therefore appears that the only remedy available, would be for the Attorney General to move a Miscellaneous Statute Amendment Bill to Parliament for consideration. I see no prejudice if this Court makes a specific order directed as the Hon. The Attorney-General to move with haste and address that obvious error.

29. I now turn to consider the issue of leave to amend the Petition dated 21st November 2012. The Respondents opposed the application to amend the Petition. They argued that the Petitioners have failed

to specify the nature and extent of the amendment and in any event an amendment would only delay further the hearing of the Petition herein. **Rule 4 of Order 8 of the Civil Procedure Rules** governs amendment of pleadings and it provides that;

”...the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

30. To my understanding, this rule applies only where leave has been sought by a party just as the petitioner has done. The aim of amending pleading has been in order to set clearly the issues in controversy. In **General Manager E.A.R &H.A v Thierstein, (1961) EALR 355**, The court held that;

“It is incumbent upon the court under O.6, r.18 to ensure that the pleadings are in a suitable form to enable the 'real questions in controversy' between the parties to be determined; so that the court should consider the matter”.

31. However, it is a cardinal principle of procedural law that amendments should not be allowed or ordered if they would cause an injustice to the other side - See **Wareham t/a A F Wareham &2 Others v Kenya Post Office Savings Bank, CA No. 5 and 48 of 2002, Weldon V Neal (6) (1887), 19 Q.B.D. 394**.

32. In the matter at hand, the Respondents though opposing the Application have not shown the prejudice they would suffer if Petitioner is granted leave to amend his petition. They claimed that the amendment would delay the hearing of the petition. In **Eastern Bakery v Castelino, Civil Appeal No. 30 of 1958,(1958 EALR 461)**, the court held that amendments to pleadings so sought before the hearing should be freely allowed if they can be made without injustices to the other side, and that there is no injustice if the other side can be compensated by costs.

33. The Respondents also took issue with the fact that the Petitioners have not disclosed the amendment they are contemplating but the Petitioner has alleged that leave should be granted to amend the petition in order to allow the court to fully adjudicate on the issues that also raise matters of fundamental importance. In **Eastern Bakery v Castelino, Civil Appeal No. 30 of 1958,(1958 EALR 461)**, the Court of Appeal held that a court will refuse leave to amend where the amendment would change the action into one of a substantially different character. Further the court opined that there is no power in amendments which would enable one distinct cause of action to be substituted for another, nor to change by means of amendment the subject matter of the suit.

34. I wholly agree with the above reasoning. I would therefore grant the Petitioner leave to amend his petition so long as it does not change the subject matter of the Petition. For clarity, the Petitioner may amend his Petition to bring in the alleged matters of importance necessary for determination of his Petition and since Court has discretion to allow a party to amend its pleading on such terms as it may deem fit, I order the Petitioner do so amend within 14 days of this ruling.

35. With regard to prayer 5, the Respondents submitted that the same could not issue because Land Reference No. 5865/2 is not the subject of the Petition herein. As stated somewhere else in this ruling, the Petition herein is in regard to LR Nos. 6731, 6732 and 5865/2 and not LR No. 5865. I am therefore satisfied that prayer 5 is in respect of the parcels of land subject of the Petition herein being LR Nos. 6731, 6732 and 5865/2. The 4th, 5th and 7th Respondents have not demonstrated any prejudice they would suffer in supplying the documentary evidence in form of the minutes of the Committee's deliberations leading to issuance of letters of offer in respect to LR No. 5865/2, a detailed account of all persons issued with letters of allotment in regard to that parcel of land and the criteria adopted in issuing those letters. If this evidence will be useful in the determination of the dispute herein, I accordingly order the 4th, 5th and 7th Respondents to produce the same within 21 days of this ruling.

36. Having so held, I must revert back to the Application dated 21st November 2012. I recall that the

parties herein have not addressed me on that Application, accordingly I dismiss it with no order as to costs so as to enable the parties herein set the Petition dated 21st November 2011 for hearing on priority basis after the necessary amendments have been made.

37. In conclusion, the final Orders to be made are the following;

- (1) *The Application dated 21st November 2011 is dismissed.*
- (2) *The Petitioner is granted leave to amend the Petition dated 21st November 2011 within 14 days hereof.*
- (3) *The Hon Attorney-General is directed to move with speed and address the non-repeal of the Land Control Act in spite of Parliament's decision to that effect.*
- (4) *The Application dated 11th July 2012 is dismissed.*
- (5) *Let each party bear its own costs.*

38. Orders accordingly.

**DATED, DELIVERED AND
SIGNED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2012**

**ISAAC LENAOLA
JUDGE**

In the presence of:

*Coram: Irene – Court clerk
Mr. Nyachiro for 1st Interested Party*

Mr. Oyunge hold brief for Mr. Nyakundi for 5th Interested Party

No appearance for Applicant

Order

Ruling duly read.

**ISAAC LENAOLA
JUDGE**

Further Order

Mention on 16th November 2012. Notice to issue.

**ISAAC LENAOLA
JUDGE**