



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**PETITION NO. 7 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10,19,20,21,22(1)(2)(B),23,28,40,43(1)(F),46,47,53,57,60,61,62,63,64,67,73,258&259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27,28,40,43,46,47,50,53,57&60 OF THE CONSTITUTION OF KENYA,2020**

**BETWEEN**

**FAITH WAMBUI MUTUKU.....1<sup>ST</sup> PETITIONER**  
**DAVID MUTHOKA.....2<sup>ND</sup> PETITIONER**  
**PRISCILLA MUSYIMI.....3<sup>RD</sup> PETITIONER**

*(Suing on their own behalf and on behalf of all other members, household and land owners of land known as Wakiamba B Settlement Scheme Kaunguni Kiboko within Kibwezi West Sub County Makueni County who are threatened with eviction by the Kenya Agricultural and Livestock Research Organization, KALRO)*

**-VERSUS-**

**KENYA AGRICULTURAL AND**  
**LIVESTOCK RESEARCH ORGANIZATION.....1<sup>ST</sup> RESPONDENT**  
**NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**  
**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application for determination is dated 3<sup>rd</sup> July, 2020 filed by the 2<sup>nd</sup> Petitioner and 5 Others/Applicants under certificate of urgency on even date. It is brought under Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, 2010.

2. The Applicant seeks the following Orders:

***i) Spent.***

***ii) Spent.***

**iii) That the Orders made on 12<sup>th</sup> February, 2020 be reviewed and/or varied by ordering the 1<sup>st</sup> Respondent to compensate the Applicants for the developments they have carried out on the suit property and allow the Applicants a period of about six (6) months to look for an alternative and relocate thereto pending the hearing and determination of this matter.**

**iv) That the costs of this application be provided for.**

3. The application is supported by the affidavit of David Muthoka, the 2<sup>nd</sup> Petitioner/Applicant herein, sworn on 3<sup>rd</sup> July, 2020 on his own behalf and that of his co-applicants. The basis of the application is that the Applicants have no alternative parcels of land to relocate their families to after the Court disallowed their prayer for injunction vide its ruling dated 12<sup>th</sup> February, 2020. The Applicants also aver that some of the Petitioners herein like the 1<sup>st</sup> Petitioner have been compensated for their developments on the suit property by the 1<sup>st</sup> Respondent whereas they have been neglected and now face the prospect of being evicted.

4. The application is opposed by the 1<sup>st</sup> Respondent through the replying affidavit of Dr. Simon G. Kuria, the Centre Director, Kalro Kiboko Research Centre, sworn on 30<sup>th</sup> July, 2020. He avers that the application is totally misconceived, an abuse of court process and that the same is *res judicata*. The 1<sup>st</sup> Respondent also contends that the Applicants have not established any lawful grounds and or reasons for review of the impugned court orders. The 1<sup>st</sup> Respondent further avers that the Applicants are inviting this Court to sit on an appeal of its own Order of 12<sup>th</sup> February, 2020. It prays that the application be dismissed with costs.

5. The 1<sup>st</sup> Respondent further relies on the grounds of opposition filed in court on 6<sup>th</sup> August, 2020.

6. The 1<sup>st</sup> Petitioner filed her replying affidavit on 2<sup>nd</sup> October, 2020 wherein she has denied being compensated for her investments on the suit property by the 1<sup>st</sup> Respondent. She also confirms that the Petitioners have proceeded to file an Appeal (Civil Appeal No. 131 of 2020) against the Order of this Court dated 12<sup>th</sup> February, 2020.

7. The application was canvassed by way of written submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners/Applicants have argued that this court ought to proceed in a manner that promotes justice and equal protection in law. They rely on various authorities including Vipin Maganlal Shah & another -Vs- Investment & Mortgages Bank Limited & 2 others [2001] eKLR; and Mohamed Yakub and another -Vs- Mrs Badur Nasa and Others Civil Appeal No. 66 of 2000. However, the Petitioners/Applicants have not attached the authorities in question and I would disregard them in my determination.

8. In its submissions, the 1<sup>st</sup> Respondent has pointed out a copy of a charge sheet which has been unprocedurally attached to the Applicants' submissions should be disregarded. I do agree with the counsel for the 1<sup>st</sup> Respondent that the same should be disregarded and I hereby proceed to do so.

9. The 1<sup>st</sup> Respondent argues that the application herein is *res judicata* on account of prayer number 2 being substantially similar to prayers 2 and 3 in the disallowed application dated 8<sup>th</sup> July, 2019. It is further argued that the Applicants have not established the threshold under Order 45 Rule 1 in order to enable this Court to grant the prayers sought. It contends that the application is an abuse of court process and prays that the same be dismissed for want of merit.

10. The only issue for determination is whether the Applicants have established the requirements for review under Order 45 Rule 1 of the Civil Procedure Rules, 2010.

11. The requirements for review of a court order are stated as follows under the provisions of Order 45 Rule 1 of the Civil Procedure Rules 2010: -

**i) That there must be a discovery of new and important matter or evidence which was not within the knowledge or accessibility of the Applicants after the exercise of due diligence;**

**ii) That there was a mistake or error apparent on the face of the record;**

**iii) Any other reason sufficient to the Court.**

12. On thorough perusal of the application, I do not find any matter or piece of evidence that was not within the Applicants' knowledge at the time the order dated 12<sup>th</sup> February, 2020 was being delivered. No mistake or error has been brought to my attention. The Applicants have attached no evidence to countenance any of the prayers that are sought.

13. It is not lost on me that the Petitioners herein filed an appeal against the Order dated 12<sup>th</sup> February, 2020. That appeal has not been disposed of. In my previous Order, I dismissed the Petitioners' application dated 8<sup>th</sup> July, 2019 wherein a couple of injunctive and status quo orders had been sought. Similar prayers are now being sought under prayer (ii) of the application hereof. The prayers sought in the instant application can only be entertained in the Court of Appeal.

14. Whereas the instant application seeks for similar orders as the application dated 8<sup>th</sup> July 2019, strictly speaking, the application is not *res judicata* as the substantive suit between the parties herein is yet to be heard and determined.

15. The upshot of the foregoing is that the application is devoid of merit and is accordingly dismissed with costs to the 1<sup>st</sup> Respondent.

Signed, dated and delivered at Makueni via email this 29<sup>th</sup> day of **January, 2021**.

**MBOGO C.G.**

**JUDGE**

**Court Assistant:** Mr. Kwemboi