



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 119 OF 2013

GEORGE NJERU

NAHASHON MUGO KABEU

ELIJAH NJERU GACHOKI

(Suing as the Representatives of the members of

UGACIKU, UNJIRU, UCERA, UNGUI, UITHERAANDU,

UICAKAMUYU, UGATHIGIA AND UMBUI CLANS).....PLAINTIFFS

VERSUS

HON. ATTORNEY GENERAL.....DEFENDANT

RULING

Background

The Applicant/Plaintiff has moved this Court vide the Notice of Motion under *Article 159 (2) of the Constitution of Kenya, Section 1A and 1B CPA, Section 3 and 14 of the Environment and Land Court Act* dated 11th October 2019 seeking the following orders:-

(1) Spent.

(2) That the Honourable Court be pleased to order the Honourable Attorney General to appear in Court and explain the steps taken to execute the decree of the Court given on 31st July 2014.

(3) That the Honourable Court be pleased to give such better or further relief as it may deem just and fit to.

(4) That the costs of this application be provided for.

Grounds upon which the Application is premised

(i) That the Honourable Court made its judgment in favour of the plaintiff on 31st July 2014.

(ii) That in the said judgment, the Government of Kenya was ordered to revert the L.R. MWEA/TEBERE/131 back to the plaintiffs.

(iii) That up to-date, the Government of Kenya has not done so despite being served with the judgment and decree of Court.

(iv) That it is meet and just to allow this application.

Applicants Statement of Facts

The 3rd plaintiff/Applicant in his supporting affidavit sworn on 11th October 2019 deponed as follows:-

(1) That judgment in this case was made on 31st July 2014 (Annexed hereto is a copy of the judgment marked "ENG 1").

- (2) That the Honourable Court made a declaration that the Government of Kenya holds L.R. MWEA/TEBERE/1314 in trust for the plaintiffs herein.
- (3) That the Honourable Court ordered the Government of Kenya to revert the land to the plaintiffs herein.
- (4) That it has been 5 years since the Government made ordered to revert the land to the plaintiffs but have failed to do so.
- (5) That its only just and fit the Attorney General be summoned to explain to this Court the steps he has taken so far and why he has failed to implement the said orders of Court.
- (6) That no prejudice will be occasioned to the respondent if this application is allowed.

Respondent's Statement of Facts

The respondent did not file any response to the said application despite service having been effected.

Legal Analysis and Decision

I have considered the Notice of Motion and the supporting affidavit dated 11th June 2019. I have also considered the annexures to the supporting affidavit. The prayer by the firm of TESS KIMOTHO & CO. ADVOCATES to come on record was allowed by consent on 28th June 2019. That prayer therefore is spent. The third prayer is an eviction of unidentified persons occupying land parcel No. MWEA/TEBERE/1314 and MWEA/TEBERE/290. According to the applicant, the unidentified persons described as 'strangers' who are occupying the two parcels of land were given authority by the Government of Kenya. The alleged 'strangers' were not parties to this suit. My understanding of the orders sought by the 3rd plaintiff is that the Hon. Attorney General gave out the suit land to third parties who were not parties to this suit. If that be the case, the orders of eviction cannot issue against persons who were not parties to this suit.

A decree cannot be enforced against persons who were not parties in the suit. The applicant has not even disclosed the identities of the 'strangers' occupying the suit land whom they seek to be evicted. It is a cardinal principal of law that a person cannot be condemned unheard. The appellant has not explained why he has decided to enjoin the strangers at the execution stage and not at the commencement of the suit so that they can give their side of how the Government authorized them to stay on the suit land. Before granting the orders sought, this Court is Constitutionally and statutory obliged to hear the 'strangers' before making any adverse orders against them. The right to notice and opportunity to be heard was put into perspective in the *Halsbury's Laws of England Judicial Review (Volume 6, (2010) 5th Edition* as follows:-

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than Judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a Court. Moreover, even the absence of any charge, the severity of the impact of an administrative decision on the interest of an individual may suffice in itself to attract a duty to comply with this rule However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations".

I agree with the above rule requiring that a party must be accorded an opportunity to be heard as a legitimate expectation before a decision affecting his/her rights is made. The orders which the applicant is seeking in the current application has the effect of depriving the 'strangers' an opportunity to be heard. The upshot of my finding is that the Notice of Motion dated 11th June 2019 lacks merit and the same is hereby dismissed with no order as to costs.

DATED DELIVERED physically and SIGNED in open Court at Kerugoya this 5th day of February 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Mwakazi for Applicant
2. Respondent/Advocate – absent
3. Kabuta – Court clerk.