



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELC PETITION No. 6 OF 2019**

**MAHINDA NDEGWA & 129 OTHERS.....PETITIONERS**

**VERSUS**

**THE FAMILIES CLANS OF KIPBOSON ARAP**

**SELUMBU AND KIPKILACH ARAP LEITICH.....1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By petition dated 30<sup>th</sup> April 2019, the petitioners herein describe themselves as residents and proximate neighbours of Metta Farm in Mau Narok on LR No. 8653 where they were settled by the government and title deeds issued. They bring the petition against the 1<sup>st</sup> respondents who are families of Kipboson Arap Selembu and Kipkilach Arap Leitich who they aver have been allocated the suit land pursuant to a determination of the 2<sup>nd</sup> respondent made on 7<sup>th</sup> February 2019. The 2<sup>nd</sup> respondent is a Constitutional Commission established under **Article 67** of the **Constitution of Kenya** whose mandate includes investigations into present or historical land injustices.

2. It is averred in the petition that the petitioners are original settlers of Metta Farm in Mau Narok of Njoro Sub-County and that the suit property L.R 8653 was allocated to them by the government and title deeds issued. They aver further that the 1<sup>st</sup> respondent made a claim for the suit property to the 2<sup>nd</sup> respondent and that the 2<sup>nd</sup> respondent made a determination on 7<sup>th</sup> February 2019 with the result that they risk losing ownership of their properties and eviction therefrom. That the determination was made without conducting due diligence and without involving them. They allege contravention of **Articles 40, 42 and 43** of the **Constitution** and therefore seek judgement as follows:

*1. A declaration that the determination of the National Land Commission dated 7/2/2019 is unconstitutional null and void for want of compliance with the Constitution.*

*2. A declaration nullifying the Gazette notice No. 1995 dated 1<sup>st</sup> March 2019 with respect to the suit land L.R 86553.*

*3. An order that the petitioners are rightful owners of the suit land L.R 8653 and restrain the respondents from interfering with their titles in any way whatsoever.*

*4. Such other order or orders as the Honourable Court might deem fit to grant in furtherance of the interest of justice.*

*5. An order for costs and interests thereon in favour of the petitioners.*

3. The petition is supported by an affidavit sworn by Timothy Kamiri Mahinda. He deposed that he was born on LR 8653 Metta Farm, where his parents were staying having bought the land from the government, that he has lived there his whole life and that he is settled there with his family. That his father passed away and was buried on the suit property in the year 2012 and that nobody has ever claimed it. He further deposed that the 1<sup>st</sup> respondents are strange to him and that the determination by the 2<sup>nd</sup> respondent is prejudicial to him, his family and the other owners of Metta Farm. He also added that at the time of the 2<sup>nd</sup> respondent making its decision, it did not notify or involve him and his co-petitioners.

4. The 1<sup>st</sup> respondent filed a replying affidavit and supplementary affidavit, both sworn by Jackson Sigei. He deposed that he is a member of the family of Kipkilach Arap Leitich and that his family together with the family of Kipboson Arap Selembu are the owners of LR No. 8653 (the suit property), LR No. 8652, LR No. 8654 and LR No. 8660 as they had been in occupation of the suit land before independence before they were forcefully evicted by the colonial government sometime in the year 1954. That on 22<sup>nd</sup> August 2016, he wrote a letter to the 2<sup>nd</sup> respondent requesting them to investigate the issue of historical land injustice in relation to the suit property. They later received a letter dated the 2<sup>nd</sup> October 2018 from the 2<sup>nd</sup> respondent inviting them to a commission session at the Kericho Teachers Training College to

present their claim. On 11<sup>th</sup> October 2018, they attended the commission session and presented their case and then wrote a letter dated 19<sup>th</sup> November 2018 to further clarify their claim.

5. He deposed further that on the 18<sup>th</sup> day of November 2018, the 2<sup>nd</sup> respondent held a site visit where each party was given a chance to present their case. He added that the representatives of the petitioners were present at both the site visit and another meeting that was set up for 21<sup>st</sup> November 2018. After that the 2<sup>nd</sup> respondent prepared a ground status report where they stated that the petitioners had failed to provide any evidence in support of the claim to the suit property and therefore made a finding that the 1<sup>st</sup> respondent had suffered historical land injustices and that they should have been considered for allocation of the suit property on surrender of the land to the government. He also added that the determination was then gazetted via Gazette Notice Number 1995 dated 1<sup>st</sup> March 2019. He deposed further that the rules of natural justice were adhered to as the petitioners were given a chance to present their evidence.

6. The 2<sup>nd</sup> respondent filed a replying affidavit sworn by Okenyi Samuel Odari, its Deputy Director, Adjudication and a member of the secretariat to the committee on Historical Land Injustices. He deposed that the 2<sup>nd</sup> respondent has the mandate to investigate historical land injustices and that it is on the strength of that mandate that it received the complaint from the 1<sup>st</sup> respondents. That the allegations in the complaint were that the parcels of land known as L.R No. 8652, LR No. 8654, LR No. 8655, LR No. 8660 & LR No. 8653 (the suit property) were the 1<sup>st</sup> respondents' ancestral land until the colonial government evicted them and gave the land to one Cecil Marshal Cox. After independence, they went back to the land but they found that it had already been allocated to other people without following the due process.

7. He deposed further that the parties were invited to the hearings at Kericho Teachers Training College and were later notified of a ground visit that was done on 18<sup>th</sup> November 2018 and a meeting of all the parties which was held on the 21<sup>st</sup> November 2018. He deposed that all the parties were present during the ground visit and that the commission conducted its own independent investigations which led to its determination dated 7<sup>th</sup> February 2019 and gazette notice VOL CXXI NO 27 of 1<sup>st</sup> March 2019. He further stated that the petitioners' claim that they bought land from the government could not be valid as the due process was not followed. He concluded by stating that it is only the 2<sup>nd</sup> respondent which has the jurisdiction to investigate historical land injustices and that the petition raises no cause of action.

8. An order was made that the petition be canvassed through written submissions. All the parties filed and exchanged their submissions. At the core of the petition herein is the determination of the National Land Commission dated 7<sup>th</sup> February 2019 which the petitioners wish to be declared unconstitutional, null and void for want of compliance with the constitution. Additionally, the petitioners seek nullification of the ensuing Gazette Notice No. 1995 dated 1<sup>st</sup> March 2019 with respect to the suit land L.R 8653.

9. In **Nakuru ELC Judicial Review No. 6 of 2019 Republic vs National Land Commission Ex Parte Erastus Githuku Njuguna & Others**, this court has had occasion to consider the propriety of both the determination and the gazette notice. Judgment was delivered in the said matter on 17<sup>th</sup> September 2020 as follows:

*i) An order of certiorari is hereby issued, bringing into this court and quashing the decision of the respondent published vide Kenya Gazette Notice No. 1995 of 1<sup>st</sup> March, 2019 page 876 allocating LR No. 8653 IR 13230 to Kipkilach Arap Leitich and Kipboson Arap Selemu families/clans for settlement and directing the Ministry of Lands and Physical Planning (Department of Land Adjudication and Settlement) to facilitate the said settlement.*

*ii) Costs are awarded to the ex parte applicants and shall be borne by the respondent.*

10. It is thus apparent that in **Nakuru ELC Judicial Review No. 6 of 2019 Republic vs National Land Commission Ex Parte Erastus Githuku Njuguna & Others**, this court quashed the 2<sup>nd</sup> respondent's determination dated 7<sup>th</sup> February 2019 as well as Kenya Gazette Notice of 1<sup>st</sup> March 2019 through which it allocated the suit property herein to the 1<sup>st</sup> respondent. That being the case, this petition is now moot.

11. In the result, the petition is marked overtaken by events. Each party shall bear own costs.

**Dated, signed and delivered at Nakuru this 8<sup>th</sup> day of March 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the petitioners

Mr Kipkoech for the 1<sup>st</sup> respondent

No appearance for the 2<sup>nd</sup> respondent

Court Assistants: B. Jelimo & J. Lotkomoi