



County Government of Kwale v National Land Commission & 3 others; Mwangele & 450 others (Interested Parties) (Petition 4 of 2022) [2024] KEELC 1166 (KLR) (5 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1166 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
PETITION 4 OF 2022**

**AE DENA, J
MARCH 5, 2024**

BETWEEN

THE COUNTY GOVERNMENT OF KWALE PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

GREATCOM LIMITED 3RD RESPONDENT

MARUMA HOLDINGS LIMITED 4TH RESPONDENT

AND

ABDALLA MWANGELE & 450 OTHERS INTERESTED PARTY

RULING

1. The County Government of Kwale hereinafter referred to as the Petitioner has vide a Notice of Motion dated 26/6/2023 as amended on 26/7/2023 sought to stay the proceedings in this case pending the hearing and determination of the petition by the Interested Parties before the National Land Commission (hereinafter referred to as the NLC). On 18/7/23 I allowed an oral application by Mr. Weru to amend the application. The amendment was to incorporate the information that there existed another petition before the NLC making two petitions instead of one.
2. The application is grounded on the grounds on its face and the affidavit of Salim Gombeni Suleiman the Kwale County Attorney who avers that the instant petition is on the process of acquisition of title by the 3rd and 4th Defendants over all that parcel of land known as plot LR. No 4752/2 (suit property). The Petitioner terms the acquisition process irregular and call for cancellation of the registration of the said title as the same is allegedly fraudulent.



- 3 It is deponed that during the pendency of this suit, the Petitioner has been served with a petition lodged at the National Land Commission by the Interested Parties where they are seeking to have the developments erected on the suit property by the 3rd Respondent demolished. The Petitioner states that the issues before this court and the ones before the NLC- are directly and substantially the same and as such this suit should be stayed to avoid duplicity and multiplicity of suit before the court. The said petition is attached.
- 4 The application is opposed by grounds of opposition dated 7/7/2023 and 1/8/23 by the 3rd and 4th Defendants as follows:-
1. That the Applicant having commenced this petition cannot properly seek to stay the same and defer to a non-judicial process.
 2. That the Applicant is in any event not a party to the proceedings to which he wishes this Honorable court to cede precedence
 3. That the supposed proceedings before the National Land Commission have not previously been brought to the attention or notice of the 3rd and 4th Respondents since inception in September 2021. The application for stay herein is therefore sought in bad faith.
 4. That the application and the objects sought to be secured thereby are a manifest abuse of the court process.
 5. That the amended Notice of Motion is in any case consistent with the Applicants dilatory conduct all around, filed outside the time ordered by the court.
- 5 The 3rd and 4th Defendants further filed a replying affidavit sworn by Robert Gathimbah Njoroge the 3rd Respondents property manager on 13/07/23 who reiterated the reasons raised in the grounds of opposition as to why the application for stay of proceedings should not be allowed including the fact that the NLC where the said petition is filed is the 1st Respondent in the present proceedings.
- 6 The Attorney General did not participate in the application after this court declined to give state counsel time to review the application to decide on whether they would participate. The application came late in time. The NLC did not respond to the application but supports the same.
- 6 The application was disposed of by way of written submissions. The Applicant filed its submissions dated 30/08/23. The 3rd and 4th Respondent filed theirs on 9/10/2023. The 1st Respondents indicates that it fully supports the motion before court and I have seen their submissions.

Applicants Submissions

- 7 The Applicants invoke the inherent jurisdiction of the Court under Section 3A of the [Civil Procedure Act](#) to hear the application and grant any orders it may deem just. Citing the case of Board of Management Kapletundo Secondary School Vs Lakeside Products Agencies (2022) eKLR and Christopher Ndolo Mutuku & Another Vs. CFC Stanbic Bank Limited (2015) eKLR on the discretion of the court in the grant of orders for stay of proceedings and the conditions for grant of such orders it is submitted that all the court needs to consider is whether it is in the interest of justice to order stay of proceedings. That under section 15 of the [National Land Commission Act](#) it is mandatory that upon receiving a claim of historical land injustices the NLC must admit, investigate the same and make recommendations. That it would be in the interests of justice to await the recommendations informed by investigations and where all parties will have been heard. That this will help the court in disposal of this suit. The court is referred to the case of Henry Wambega & 733 Others V. Attorney General



& 9 Others (2020) eKLR where it was stated that if the facts are contested with many parties involved and not easily verifiable and thorough investigation needed the court would probably not be the best forum to adjudicate the dispute but the NLC.

- 8 It is further urged that the application is made timeously and no prejudice will be suffered by the 3rd and 4th Defendants since they are in actual possession and who have not alluded to any prejudice to be suffered. In response to the allegation that the NLC process is a non-judicial process it stated that the NLC draws its mandate from articles 47 and 50 of the Constitution. That the application if allowed will not interfere with the right to be heard neither would it impede access to justice.

3rd and 4th Respondents Submissions

- 9 The 3rd and 4th Respondents Submissions were filed on 9/10/23. It is submitted the authorities cited by the Applicants largely relate to stay of proceedings pending appeal within the contest of Order 42 rule 6. That they relate to parties aggrieved by decisions sought to be appealed from. That in the present case the Applicant is seeking to have its proceedings stayed hoping there will be a favorable outcome at the NLC to aid its cause in the petition herein. This is termed as an opaque case of forum shopping. That the proposition by Justice Sila Munyao in Henry Wambega (Supra) is only persuasive and was a comment rather than a holding. That the case did not deal with issue of stay of proceedings before it but a substantive petition. It is submitted that there are no facts in the instant suit that call for thorough investigation since the history of the suit property is available at the appropriate agencies and the rights allegedly abridged have been well set out and only the relevant constitutional and legal provisions need be applied and which is not a province of the NLC. It is stated that allowing the petition would be tantamount to assisting the Applicant to source more evidential material before another forum in order to buttress its case.
- 10 It is further submitted the Applicant cannot seek to rely on the acts of third parties (the petitioners at the NLC) as a basis for stay when it has its own proceedings before this court which he must prosecute. It is further submitted that there is no competent proceedings before the NLC since the NLC mandate under section 14 has since lapsed. That even considering the 2016 amendments to section 15 of the NLC Act extending the mandate to 5 years the petition filed before the NLC is one day out of time as it ought to have been filed not later than 20/9/2021. That this is relevant as the court must take a prima facie view as to whether there is a worthy arguable case that should necessitate its deferring the alternative forum.
- 11 I have duly noted all the parties submissions on record.

Analysis and Determination

- 12 The court is called upon to stay the proceedings in the suit pending the determination of a petition by the Interested Parties herein before the National Land Commission. The application is brought under the provisions of Article 159 of the Constitution of Kenya 2010, Sections 1A(1), 1(B)(1), 3, 1A, 6 and 63 of the Civil Procedure Act and Section 15(1) of the National Land Commission Act. It is clearly not brought under the provisions of Order 42 Rule 6.
- 13 It is now established that the power to stay proceedings must be exercised sparingly. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. The test for stay of proceeding is high and stringent”. See Kenya Wildlife Service Vs James Mutembei (2019) eKLR where the court cautioned that the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.



- The rationale is that stay of proceedings impedes access to justice as it interferes with the right of a litigant to conduct his litigation.
- 14 It is important to note at the outset that in the present case it is not the adverse party who desires the proceedings to be stayed. On the contrary it is the Petitioner who seeks for a stay of its own Petition filed before the court. The same is on the basis that the Interested Parties herein have filed a historical injustice claim on the same suit properties before the NLC.
- 15 One of the grounds raised is that the issues in the petition filed by the Interested Parties and the issues in the petition before this court are directly and substantially the same and involving the same parties, cause of action and prayers. That it would be in the interest of justice that the proceedings be stayed to avoid duplication and inconsistency in court process and decision. These grounds seem to echo the provisions of section 6 of the *Civil procedure Act* on sub-judice which provide for stay but the Applicant does not come out clearly on this. But even in the case where a matter is subjudice, the outcome of the other proceedings are expected to with finality resolve the issues in the proceedings that have been stayed. In the instant suit it is the Applicant expectations that the determination of the NLC will conclude before the determination of this matter and then form material for consideration by this court. With due respect to Counsel for the Applicant I wonder how this would resonate in an adversarial court system where the parties are expected to put their best foot forward to present facts and material before the court in support of their claims.
- 16 For me the only circumstances under which I would invoke the courts discretionary power to grant stay of these proceedings would be where parties herein agree to utilize the NLC as a forum for mediation and which I would be enjoined to promote by dint of article 159(2)(d) of *the Constitution* of Kenya 2010 and nothing more.
- 17 I now will consider the Applicant's contention that the NLC has the first mandate to hear historical injustices claim both as per Article 67 (2) of *the Constitution* as read together with Section 15 of the *National Land Commission Act* No. 5 of 2012. This takes me to the doctrine of exhaustion which roots for the courts restraint, as a dispute is dealt with under a procedure provided for either in *the Constitution* or by statute. The doctrine of exhaustion anticipates that a party before invoking the jurisdiction of the court will first submit to the jurisdiction of the other available Constitutional or statutory forums as a first port of call. The applicant pleads interalia at paragraph 18 to 22 of the Petition to a petition that was filed before the NLC in the year 2013 by 'the legitimate residents of Tiwi and Diani locations', to look into allocation and subsequent transfer of the suit property herein from the 4th Respondent to the 3rd Respondent. It is disclosed that the 1st Respondent rendered a decision and which the applicant seeks to challenge before this court.
- 18 It is therefore my view that in fact the jurisdiction of the NLC was already invoked and exhausted as the 1st port of call and a decision rendered. Clearly I do not see the basis for stay of the proceedings before this court on the grounds that fresh proceedings have been filed at the NLC and which the Applicant admits is on the same issues and facts, involving the same parties to the petition before court. It is also noteworthy that the NLC is a party in these proceedings and have the opportunity to bring in whatever evidence they have to these proceedings in which they are a party. The Interested Parties are also parties to the present petition and have an opportunity to seek to present their claims as well, for the court's consideration. This then brings me to the issue of jurisdiction of this court.
- 19 Though the Applicants have not stated outrightly that they question the jurisdiction of this court, the same is camouflaged in the application. The 1st Respondent does not mince words that there is a doubt in the competency and jurisdiction of this court to proceed with a matter which is also pending before the National Land Commission.



20 The Court of Appeal in the case Safepak Limited v Henry Wambega & 11 others [2019] eKLR quoted with approval the decision in the Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR where the Court had stated as follows; -

On the question whether a Court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a Court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seized of the matter. Our conviction stems from our reading of Article 67(2) (e) of *the Constitution*. The Article provides that the NLC can investigate “present or historical” land injustices. We lay emphasis on the word “present.” If the NLC had initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not Courts of law. This would prima facie render the Environment and Land Courts redundant. We do not think this was intended to be so. Our view is fortified by Section 15 (3) (b) of the *National Land Commission Act* which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary Court system. Further, there is nothing in the 2010 Constitution or in the *National Land Commission Act* ousting the jurisdiction of the High Court or barring a person from presenting a petition before a Court in relation to a claim founded on historical injustice.”

21 Is the claim herein capable of being addressed through the ordinary court system? I think this is the right juncture at which this court should comment on the observations made by Justice Sila Munyao in Henry Wambega & 733 others v AG & 9 Others [2020] eKLR cited by the Applicants in support of the position that this matter requires the benefit of investigation by the NLC. I respectfully disagree with Counsel in this regard. The petition before me is a Constitutional Petition. The particulars of the violations have been outlined. There are also allegations of irregularity in the acquisition of the titles held by the 3rd and 4th Defendants attached to which is the prayer for cancellation of the titles and rectification of the register. Prerogative orders as well as permanent and mandatory injunction have been sought. I do not see anything extraordinary in the prayers sought and emerging issues. These are issues litigated upon in the course of litigation in the ELC court. In any case looking at the functions of the NLC as stipulated under Article 67 (2) (e) of *the Constitution* vis a vis the orders enumerated in the present Petition I foresee emerging jurisdictional challenges though I wish not to delve into the issue.

22 The upshot of the foregoing is that the Notice of Motion dated 26/6/2023 is not merited and the same is hereby dismissed with costs to the 3rd and 4th Respondents.

It is so ordered.

RULING DATED SIGNED AND DELIVERED THIS 5TH DAY OF MARCH 2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for the Petitioner/Applicant

Mr. Mwakisha for 3rd and 4th Respondents

Waga Holding brief for Ms. Langat

No appearance for NLC



D. Disii - Court Assistant.

