



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC JUDICIAL REVIEW NO. 1 OF 2020

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, FAIR ADMINISTRATION ACTIONS ACT, NO. 4 OF 2015; THE NATIONAL LAND COMMISSION ACT, NO. 5 OF 2012; THE LAND ACT, NO. 6 OF 2012; THE PHYSICAL PLANNING ACT CAP 296

AND

IN THE MATTER OF ENVIRONMETN AND LAND COURT ACT, 2012; LAND REGISTRATION ACT, NO. 3 OF 2012; SECTION 8 OF THE LAW REFORM ACT CAP 26, LAWS OF KENYA; ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES 2010, LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE PARCELS OF LAND L.R. NO. 3977 AND L.R. NO. 3978

IN THE MATTER OF APPLICATION BY THOMAS ORIEDO

REPUBLIC.....APPLICANT

VERSUS

THE MINISTRY OF LANDS AND PHYSICAL PLANNING...1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

EXPARTE.....TOM ORIEDO OWUOR

JUDGEMENT

Tom Oriedo Owuor, hereinafter referred to as the exparte applicant comes to this court by way of Notice of Motion dated 17th February 2020 praying that this honourable court be pleased to issue an order of Mandamus compelling the 1st Respondent to plan, survey and resettle the Kogula Community members on land parcels LR. NO. 3977 and LR 3978 located within Kisumu County forthwith and that the respondents to pay costs.

The application is based on grounds that:

- 1. Koguta Land Reclamation Committee in an endeavour to reclaim back their parcels of land petitioned the National Land Commission (NLC) sometimes in 2013 over their historical land injustices.**
- 2. Upon hearing the complaint of the Koguta Community, the National land Commission (NLC) vide Gazette Notice of 1.3.2019 VOL. CXXI-NO. 27 made a determination to the effect that the said land parcels LR. No. 3977 and L.R. No. 3978 is given back to the rightful and original owners, the Koguta Community.**
- 3. The National Land Commission consequently recommended in the said decision that the Privatization Commission and the 1st Respondent do assist in Planning, Surveying and resettling the Koguta Community on the said parcels LR. No. 3977**

and LR. No. 3978.

4. Since the National Land Commission made and published their finding in 1.3.2019, the claimants have made several, consistent and persistent efforts to have the decision of the National Land Commission implemented, however, all the efforts have been in vain.

5. The Kaguta Community continue to live in abject poverty as squatters in a very inhumane manner as they are congested beyond human habitation simply because of the actions of the Respondents which are now hell-bent in perpetuating human rights violations against the successful claimants.

6. This is an old matter of historical land injustices tracing from the year 1968 and should now be brought to an end by issuing the Orders as prayed so that the Koguta Community can realize and enjoy the fruit of their claim and the families be resettled back to their ancestral land.

7. By law and by dint of the decision of the National Land Commission, the Respondents are under legal duty to act in relation to the matter in issue and their inordinate delay and omission to act is unreasonable and unjustifiable and is gross violation of legitimate expectation of the Ex-parte Applicant and indeed the entire members of Koguta Community.

8. Justice delayed is justice denied and without the service of the Respondents, the decision of the National Land Commission is bound to be nugatory and of no practical value.

9. The Respondents will suffer no prejudice if the said orders are granted.

10. If the orders sought are not granted, then the applicant and indeed the Koguta Community at large shall suffer irreparable loss not recoverable in costs.

The application is supported by the supporting affidavit of Tom Oriedo Owuor who states that he is Chairman of the Land Reclamation Committee and therefore he has knowledge of this matter. The Koguta Community Members live on LR. No. 3977 of the Nucleus estate illegally owned by Muhoroni Sugar Company (MUSCO) Ltd. The deponent states that in 1900 or thereabouts Koguta Community migrated from greater Nyakach and settled on parcels currently known as L.R. No. 3977 measuring approximately 2,339 acres and L. R. No. 3978 of 1,960 acres or thereabouts located in South West of Muhoroni Town within Muhoroni Sub-County, Kisumu County.

That shortly before Kenya attained independence, a firm known as Nyando Sugar Company Limited now known as Muhoroni Sugar Company Limited acquired proprietary rights over land parcels known as L.R. Nos. 11684 and 11685 where the sugar factory rests for purposes of erecting the said sugar factory.

That the acquisition of the parcels of land mentioned at paragraph 4 did not affect the settlement arrangement of the Koguta Community on parcels L. r. Nos. 3977 and 3978.

That on 03.12.1968, Nyando Sugar Company in conjunction with the government of Kenya without any justifiable cause, passed a resolution to illegally evict the Koguta community members from parcels L. r. Nos. 3977 and 3978 that the community had occupied for more than seven decades.

That eventually from the said resolution in the year 1969, the Koguta Community were forcefully evicted and relocated to arid parts of land parcel L.R. No. 3977, portioning only at their mercy a meagre 2 acres to each Koguta family member that to date we are living in as squatters.

That I know as of personal knowledge that there are no social amenities within the village because of lack of land for erecting such and now members of Koguta Community have to travel miles away in search for such and related services.

That the said parcels were illegally and forcefully acquired without any compensation.

That the illegal and/or unlawful acquisition of the said land parcels by Muhoroni Sugar Company and displacement of the Koguta Community has exposed the community to a strenuous life style of extreme poverty and untold suffering.

That the following establishment of National Land Commission under Article 67 (2) of the Constitution of Kenya, 2020. We, the Koguta Community filed a complaint on 9.9.2013 to the National Land Commission seeking remedy for our historical land injustices.

That upon receipt of our complaint by the national Land Commission, investigation was commenced on parcels L.R. Nos. 3977 and 3978.

That a report was made by the Kisumu County Land Officer confirming the position that the community had unlawfully been evicted from the parcels L.R. Nos. 3977 and 3978.

That the National Land Commission upon undertaking independent investigations and upon hearing our complaint, made a final determination in our favour with a recommendation that the Privatization Commission and Ministry of Lands and Physical Planning assist in the Planning, Surveying and our resettlement on the said parcels LR. No. 3977 and LR. No. 3978.

That the said decision of the National Land Commission giving back the said parcels of land to us, Koguta Community was published vide

Gazette Notice of 1.3.2019 vol. CXXI-NO 27.

That since the gazette of the said decision, my advocate on record has written to both the Privatization commission and Ministry of Land and Physical Planning assist in the Planning, surveying and our resettlement but all his calls to expedite the matter have received no response.

That the Koguta Community are living in deplorable state and are continuing to languish in poverty several months after the decision of the National Land Commission.

That it is in the interest of justice that the Respondents should be compelled to assist in the planning, surveying and court resettlement.

That litigation must at some point come to an end, and that it is only proper, fair and just that the issue of Koguta Land reclamation be brought to rest by quick resettlement of the community.

The basis of the application is that in 2013 the Koguta Community filed a complaint within the National Land Commission, seeking a remedy for Historical land injustices that they had suffered from 1968 to date.

In 2013 the National Land Commission asked for a report from the District Lands Officer, Kisumu on issues raised in the complaint.

The National Land Commission upon undertaking its independent investigations and upon hearing the complaint by the Koguta Community, made a final determination in favour of the Koguta Community with a recommendation that the Privatization Commission and Ministry of Lands and Physical Planning assist in the Planning, Surveying and our resettlement on the said parcels LR. No. 3977 and LR. No. 3978. The same was published vide Gazette Notice of 1.3.2019 VOL. CXXI-NO. 27.

Since then, the Koguta Community through their representatives, have made numerous attempts to get the Privatization Commission and Ministry of Lands and Physical Planning assist in the Planning, surveying of the said parcels to enable them resettle in their lands that they are legally entitled to. Their attempts have not borne any fruits.

Consequently, the Koguta Community members continue living as squatters despite there being a directive by the National Land Commission to have the said people resettled in the land belonging to them upon a survey being conducted. It is the continuous failure by the Ministry of land and physical Planning to assist in the Planning, surveying of the said parcels, that they have been unable to resettle back into their lands, thus this instant application and suit.

The ex parte applicant submits that the respondents have an obligation to comply with the recommendations of the National Land Commission.

I have considered the application, supporting affidavit and submissions on record and do find that there is no contention that the National Land Commission in case number NLC/HCI/045/2017 AT Kisumu County in a complaint by the Koguta Land reclamation committee against Muhoroni Sugar Company allowed the complaints claim and recommended that the Privatisation Commission and the Ministry of Lands and Physical Planning assist in planning, surveying and reselling the claimants on the parcels of land numbers LR. No. 3977 and LR No. 3978.

According to the Government report L.R. No. 3977 is within the Mohoroni Sub-county, Kisumu County.

The lease document in respect of the property was issued on 19/11/1912 for 999 years under government Lands ordinance confirmed by Henry Edwards Watts and Thous Riply Nohidge as proprietors. The lease expired in 2012 as per articles 65 (1) (2) of the Constitution.

I do find that the lease having expired in 2012, the land was available for allocation by the National Land Commission in consultation with the County Government. The property in dispute was owned by non-citizens.

Article 65 of the constitution that provides for land holding by non-citizens provides that

“65.(1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.(2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more.(3) For purposes of this Article—(a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and

(b) property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens. (4) Parliament may enact legislation to make further provision for the operation of this Article.”

The implications of the above Article on the parcel of land is that the lease expired after 99 years and reverted to the state and therefore was available for allocation. I do find the application for mandamus well placed as the applicants have been residing on the land as a community.

I do grant an order of Mandamus compelling the 1st Respondent to plan, survey and resettle the Koguta Community members on land parcels LR. NO. 3977 and LR 3978 located within Kisumu County forthwith. Costs to the applicants. Orders accordingly.

DATED AT KISUMU THIS 30th DAY OF APRIL, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE