



**Legai & 2 others v Six Zero Six Investments Limited & 7 others (Environment & Land Petition 2 of 2022) [2023] KEELC 16533 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16533 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT & LAND PETITION 2 OF 2022**

**AK BOR, J  
MARCH 13, 2023**

**BETWEEN**

**RAMISON TUMBES LEGAI ..... 1<sup>ST</sup> PETITIONER  
KERESEI MBATIA KITONGA ..... 2<sup>ND</sup> PETITIONER  
KEEN MARAI OLE SAITABAU ..... 3<sup>RD</sup> PETITIONER**

**AND**

**SIX ZERO SIX INVESTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT  
CONSERVATION EQUITY LIMITED ..... 2<sup>ND</sup> RESPONDENT  
COUNTY LAND REGISTRAR, LAIKIPIA ..... 3<sup>RD</sup> RESPONDENT  
COMMUNITY LAND REGISTRAR, LAIKIPIA ..... 4<sup>TH</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF LAIKIPIA ..... 6<sup>TH</sup> RESPONDENT  
MANAGEMENT AUTHORITY ..... 7<sup>TH</sup> RESPONDENT  
JONATHAN KIPKORIR NTEERE ..... 8<sup>TH</sup> RESPONDENT**

**RULING**

1. The 8<sup>th</sup> Respondent pointed out that the power to constitute a three-judge bench was discretionary and must be exercised judiciously and not on whim. He argued that the decision of the three-judge bench was not superior to that of a single judge while pointing out that a three-judge bench exercised the same jurisdiction as a single judge. The 8<sup>th</sup> Respondent was of the view that constituting a three-judge bench was a waste of the court's scarce resources and would lead to further delays. He relied on Article



- 159 of the Constitution in support of his contention that constituting a three-judge bench to hear the petition would delay the just, expeditious, proportionate and affordable resolution of the dispute.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on JHarrison Kinyanjui v The Attorney General and Others, Petition No 74 of 2011 in support of their contention that for a bench to be constituted, the petition had to show that a right had been violated and it must raise an issue which required further interpretation. The Petitioners, who are members of IL Ngwesi Community of Laikipia County filed this petition in court on November 25, 2022 against the Respondents in relation to the land known as Laikipia/ IL Ngwesi II/1 owned by the Community, measuring approximately 8,675.5 hectares (ha). They pleaded that the IL Ngwesi Community was rich in indigenous culture that was inseparable from their environment, and that they were keen to preserve the integrity of their indigenous environment while engaging in legitimate income generating opportunities for the Community which would focus on reduction in over reliance on livestock and the promotion of conservation friendly eco-tourism.
  3. They averred that the IL Ngwesi Community continues to experience the effects of severe drought and climate change generally, and has had to shift from over reliance on pastoralism to agriculture as one of the strategies to reduce the impact of drought and the unpredictable rain patterns. Further, that the Community developed a holistic land use management approach which has the IL Ngwesi conservancy that is a member of the Northern Rangelands Trust; and which is divided into settlements and conservation areas to reduce the impact of drought with pastoralists being allowed into the conservation areas to graze their livestock during the dry season.
  4. The Petitioners' claim is that on or about December 6, 2019, the officials of IL Ngwesi Community Land Management Committee negotiated and signed a lease agreement on behalf of the IL Ngwesi Community over a 200-ha portion of Laikipia/ IL Ngwesi /II/1 giving the 1<sup>st</sup> Respondent exclusive tourism rights over the entire conservancy of 21,000 ha for 50 years without the Community ratifying the lease as required under the Community Land Act. The lease granted the 1<sup>st</sup> Respondent the right to construct and maintain a new air strip within the conservancy and to use the conservancies natural water resources. The lease also allows the 1<sup>st</sup> Respondent to construct and maintain a fence around the portion of land within the conservancy which would exclude the Petitioners and other members of the IL Ngwesi Community from using that part of the Community land. They contended that information regarding the lease was not provided to the Community.
  5. They also claimed that the 7<sup>th</sup> Respondent conducted an environmental impact assessment (EIA) and granted an EIA license to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to commence construction on the Community land without public participation.
  6. The Petitioners cited various articles of the Constitution in support of their petition including Articles 10, 20, 27, 28, 35, 40, 42, 47, 63, 69 and 70. They also the provisions in the Community Land Act and the Climate Change Act upon which their claim is premised and gave particulars of violations of their constitutional rights and fundamental freedoms under Articles 35, 40 and 42 of the Constitution.
  7. Contemporaneously with the filing of the petition, the Petitioners filed an application seeking conservatory orders and leave to advertise the petition. This ruling is in respect of the fourth prayer in the application urging this court to find that the petition raises weighty and fundamental constitutional issues warranting reference to the Honourable Chief Justice to constitute a three-judge bench to hear and determine the petition. The application was supported by the affidavit of the 1<sup>st</sup> Petitioner who gave details of the claim and exhibited a copy of the lease and the Constitution of IL Ngwesi Community.



8. When the matter came up in court on November 25, 2022, the court granted the Petitioners leave to serve the petition through substituted means following which the Respondents entered appearance. The Chairperson of IL Ngwesi Community land, Kip Ole Polos filed an application on December 19, 2022 seeking to be joined to the Petition as an interested party. That application was allowed by the court and he was added to the proceedings as the 8<sup>th</sup> Respondent.
9. The court directed parties to file submissions on the aspect of referral of the petition to her Ladyship the Honourable Chief Justice to set up a bench of three judges to hear and determine the petition. The Petitioners submitted that Article 165 (4) of the Constitution empowered this court to certify that the petition raised substantial questions of law worthy of reference to the Chief Justice to empanel a bench of more than one Environment and Land Court (ELC) Judge to hear and determine the dispute. They relied on Okiya Omtata Okoiti and Another v Anne Waiguru, Cabinet Secretary, Devolution and Planning and 3 Others (2017) eKLR, where the Court of Appeal held that for a matter to be certified as one raising substantial points of law, it had to be shown that the issue to be canvassed was one the determination of which affected the parties and transcended the circumstances of that case and had a significant bearing on the public interest. Further, it must be shown that there was a state of uncertainty in the law and that the matter fell within Article 165 (3) (b) (d) of the Constitution. They also relied on Esther Awuor Adero Angawa v Cabinet Secretary Responsible for Matters Relating to Basic Education & 7 Others, Kenya Private Schools Association (KPSA) & 4 Others (2021) eKLR where they argued that the High Court certified the petition as one which raised substantial issues of law because it brought to the fore questions of infringement of rights and fundamental freedoms under the bill of rights, as well as questions of whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of the Constitution.
10. The Petitioners submitted that their petition was premised on questions of violation of fundamental rights and freedoms enshrined in the bill of rights under the Constitution and abuse of public office as defined under Article 165 (3) (d) (ii) of the Constitution. Further, that it raises questions of violation or threatened violation of the fundamental rights and freedoms of members of the IL Ngwesi Community. Additionally, it challenged the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents' decision to register the lease in favour of the 1<sup>st</sup> Respondent without regard to Article 10 (2) of the Constitution and other laws; and in the absence of public participation in the negotiation, ratification and registration of the lease agreement. They relied on Amos Kiumo and 2 Others v the Cabinet Secretary, Ministry of Interior and Coordination of National Government and 3 Others (2014) eKLR, in support of the question whether all members were involved in the negotiation, ratification and registration of the lease to satisfy the requirement for public participation.
11. They submitted that the transfer of the proprietary rights in the 200-ha piece of land would exclude the IL Ngwesi Community members from accessing and using that area of the conservancy which would directly affect their way of life and deny them the important resources in the 200-ha piece of land. They urged that there was no denial that the subject matter of the petition was of great importance to the members of the IL Ngwesi Community because it seeks to enforce the proprietary rights of the Community over the 200-ha parcel of land.
12. The 8<sup>th</sup> Respondent filed submissions in which he submitted that the ELC was a specialised court with jurisdiction to handle all matters relating to the environment and land and that the wisdom for creating specialised courts was to enable litigants get fair, just, and expeditious judgments on their matters as well as build jurisprudence and knowledge around an area of law. He submitted that the issues raised in the petition were not complex, weighty or overwhelming and that they were ordinary matters which the court handled on a daily basis. He argued that the Petitioners had failed to identify or clearly set out the substantive questions of law to be addressed and relied on Mike Mbuvi Sonko and Another v



*Clerk County Assembly of Nairobi and 9 Others* (2021) eKLR, where it was held that for a case to be certified as one involving a substantial point of law, the applicant had to satisfy the court that the issue to be canvassed was one whose determination affected the parties and transcended the circumstances of that particular case and had a significant bearing on the public interest. In addition, the applicant was obligated to identify and concisely set out the specific substantial question or questions of law which was attributed to the matter for which the certification was sought.

13. Further, that even if a substantial question of law was disclosed, it was not sufficient unless the Petitioners demonstrated how their rights were violated. They submitted that this petition did not meet that criteria because the substratum of the petition was whether or not the lease and the EIA Licence were lawfully acquired, and that these were matters which have already been determined in previous cases. The Respondents contended that this court's decision would bear similar weight to that of a multiple-judge bench exercising similar jurisdiction.
14. The issue for determination is whether this court should refer this matter to the Honourable Chief Justice to constitute a bench of three judges to hear and determine the petition.
15. The petition seeks to have the Respondents provide details relating to the registration of the lease to the 1<sup>st</sup> Respondent; production of materials and documentation regarding the process followed in granting the EIA licenses; a declaration that the registration of the lease violated Articles 63 and 40 of the *the Constitution* regarding the protection of the Community's right to property. Further, they seek a declaration that the lease agreement constituted a threat to the Petitioners' rights and that of the IL Ngwesi Community to a clean and healthy environment. They also seek orders to quash the lease and restrain construction of the airstrip on the Community's land.
16. The Petitioners did not identify or set out the specific substantial questions of law for which they sought the certification of as requiring determination by a bench of three Judges. The crux of their claim is whether or not the lease over the Community's land was lawfully leased to the 1<sup>st</sup> Respondent.
17. The Petitioners failed to demonstrate that the issue to be canvassed in the petition is one the determination of which not only affects the parties, but that it transcends the circumstances of this case and has a significant bearing on the public interest. They have also not shown that there is a state of uncertainty in the law or that the matter falls within the parameters set out in Article 165 (3) (b) (d) of the *Constitution*.
18. The court declines to grant the Petitioners' application to refer this matter to the Honourable Chief Justice to constitute a three-judge bench to hear and determine the petition.

**DELIVERED VIRTUALLY AT NANYUKI THIS 13<sup>TH</sup> DAY OF MARCH 2023.**

**K BOR**

**JUDGE**

**In the presence of: -**

**Mr A Barack holding brief for Mr J Kariuki for the Petitioners**

**Mr Samuel Njuguna for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**Ms Mumbi Kiarie for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

**Mr Timothy Larpei for the 8<sup>th</sup> Respondent**

**Stella Gakii - Court Assistant**

