



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC PETITION NO.3 OF 2019**

**IN THE MATTR OF ARTICLES 1210,2240,47 AND 50 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS AND FUNDAMENTAL FREREDOMS PRACTICE AND PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 10, 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTR OF THE DECISION TO REVOKE THE TITLES IN RESPECT OF THE LAND PARCELS KNOWN AS ELDORET MUNICIPALITY/BLOCK 10/187 AND ELDORET MUNICIPALITY/BLOCK 10/188**

**AND**

**IN THE MATTER OF INTERFERENCE WITH THE EXERCISE OF PROPRIETORSHIP RIGHTS INRESPECT OF THE LAND PARCEL KNOWN AS ELDORET MUNICIPLAITY/BLOCK 10/190**

**IN THE MATTER OF KENYA GAZETTE NOTICE NO.6862 OF 17<sup>TH</sup> JULY, 2017**

**BETWEEN**

**SAMMY ARAP KOGO.....1<sup>ST</sup> PETITIONER**

**KENNEDY KOGO.....2<sup>ND</sup> PETITIONER**

**KOGO FLATS COMPANY LIMITED.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup>RESPONDENT**

**THE OFFICER IN-CHARGE OF G.K. PRISON – ELDORET.....3<sup>RD</sup>RESPONDENT**

**ANNE LETTING.....4<sup>TH</sup>RESPONDENT**

**THE HON.ATTORNEY GENERAL.....5<sup>TH</sup>RESPONDENT**

**JUDGMENT**

The petitioners herein filed this petition dated 6<sup>th</sup> March 2019 seeking for the following reliefs:

a. THAT a declaration do issue that the decisions, acts and omissions by the respondents jointly and severally are in breach of the law and a breach of articles 10, 40, 47 and 50 of the Constitution of Kenya, 2010 in respect of the land parcels known as ELDORET MUNICIPALITY/ BLOCK 10/187 measuring approximately 0.9988 Hectares, ELDORET MUNICIPALITY/BLOCK 10/188 measuring approximately 1.000 Hectares and ELDORET MUNICIPALITY/ BLOCK 10/ 19 which measures approximately 1.000 Hectares are a nullity and of no legal effect.

b. THAT an order of certiorari do issue to forthwith remove into the Honourable Court and quash the decision of the 1<sup>st</sup>, respondent as contained in Kenya Gazette notice No. 6862 of 17<sup>th</sup>. July, 2017 in respect of the land parcels known as ELDORET MUNICIPALITY/BLOCK 10/ 187 measuring approximately 0.9988 Hectares and ELDORET MUNICIPALITY/BLOCK 10/ 188 measuring approximately 1.000 Hectares.

c. THAT an order of prohibition do issue to prohibit the 2<sup>nd</sup> respondent from revoking and/or cancelling the titles of the petitioners pursuant to the directives of the 1<sup>st</sup> respondent as contained in the Kenya Gazette notice no. 6862 of 17<sup>th</sup>. July, 2017 and/or in any other unlawful manner.

d. THAT the respondents by themselves, their servants and/ or agents are jointly and severally are perpetually restrained by an injunction from harassing, interfering with, or ejecting the petitioners from the land parcels known as ELDORET MUNICIPALITY/ BLOCK 10/ 187 measuring approximately 0.9988 Hectares, ELDORET MUNICIPALITY/BLOCK 10/ 188 measuring approximately 1.000 Hectares and ELDORET MUNICIPALITY/ BLOCK 10/ 190 which measures approximately 1.000 Hectares.

e. THAT an award of damages be made for the breach of the rights under articles 10, 40, 47 and 50 of the Constitution of Kenya, 2010 and an assessment of the compensation for the 33 felled blue gum trees @ sh.3,000.

f. THAT the costs of the petition be sourced by the respondents.

The petitioners amended the petition on the 25<sup>th</sup> March, 2019 to give the correct name of the 4<sup>th</sup> respondent as Ann Letting instead of Anne Chepsiror.

The respondents were duly served with the petition but the 1<sup>st</sup> respondent National Land Commission did not enter appearance. The 2<sup>nd</sup> - 5<sup>th</sup> respondents entered appearance on the 12<sup>th</sup> March, 2019 and filed a replying affidavit on the 15<sup>th</sup> April, 2019 through the 2<sup>nd</sup> respondent namely ACP. A. M. Musila.

The petitioners abandoned the interlocutory application and opted to prosecute the petition whereby the parties agreed to file submissions to the main petition which were duly filed. Subsequently the 2<sup>nd</sup> - 5<sup>th</sup> respondents filed a letter dated the 14<sup>th</sup> May, 2019 in court on the 16<sup>th</sup> May, 2019 which letter sought to introduce annexure 'AMM- 10' which is a copy of the Daily Nation newspaper of Friday 17<sup>th</sup> March, 2017.

### **PETITIONER'S CASE**

The 1<sup>st</sup> and 2<sup>nd</sup> petitioners claimed in the petition that they are the registered proprietors of the land parcels known as ELDORET MUNICIPALITY/BLOCK 10/ 187 measuring approximately 0.9988 Hectares and ELDORET MUNICIPALITY/BLOCK 10/ 188 measuring approximately 1.000 Hectares while the 3<sup>rd</sup> petitioner is the proprietor of the land parcel known as ELDORET MUNICIPALITY/ BLOCK 10/ 190 which measures approximately 1.000 Hectares.

The petitioners claimed that they duly acquired the aforesaid land parcels for valuable consideration and have so held leasehold interests from the Government of Kenya since the year 1993 to date which is over 25 years in respect of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and in-respect of the 3<sup>rd</sup> petitioner since the year 2015 for over 3 years.

In respect of land parcel known as Eldoret Municipality/ Block 10/187, it was the petitioners claim that it measures approximately 0.9988 Hectares and is valued at Ksh. 19,500,000/ as per a valuation report by Wamae Mureithi & Associates Valuers, Estate Agents and Property Consultants.

The petitioners attached a certificate of official search, a survey digital globe map data, certificate of lease, lease, receipt for Ksh. 100,005/= in respect of stand premium, receipt for Ksh. 10,360/= for registration, conveying, rent and stamp duty, letter of acceptance by Kosa Enterprises, letter of allotment dated the 11<sup>th</sup> November, 1993, physical development plan (PDP), special conditions, rent clearance certificate for 2018, rent clearance certificate for 2013, rent clearance certificate for 2019, payment slip dated the 13<sup>th</sup> February, 2019 and the certificate for the registration in-respect of Rosa Enterprises to confirm compliance with the terms of the allotment letter

The petitioners therefore stated that the documentation confirmed that they acquired the said land parcel in accordance with the existing legal regime then and that they were lawful owners.

In respect of Land Parcel No. Eldoret Municipality/ Block 10/188, the petitioners stated that the same measures approximately 1.000 Hectares and is valued at Ksh. 19,000,000/= as per the valuation report by Wamae Mureithi & Associates Valuers, Estate Agents & Property Consultants.

The petitioners attached a certificate of official search, a survey digital globe map data, certificate of lease, lease, payment receipt for registration conveying, rent, stand premium, stamp duty for Ksh. 126,840/=, acceptance letter, letter of allotment, physical development plan (PDP), special conditions, rent clearance certificate for the year 2018, rent clearance certificate for 2013, rent clearance certificate for 2019, payment slip dated 13<sup>th</sup> February, 2019, registration of Rosa Enterprises to confirm compliance with the terms of the allotment letter.

In the respect of land parcel No. Eldoret Municipality/ Block 10/190, the petitioners likewise stated that the parcel measures approximately 1.000 Hectares and is valued at Ksh. 19,500,00/= as per the valuation report by Wamae Mureithi & Associates Valuers, Estate Agents & Property Consultants which was acquired by way of purchase from Samuel Koross.

The petitioners further attached a certificate of official search, a digital survey globe map data, certificate of lease, lease, letter dated the 23<sup>rd</sup> January, 1995, stamp duty payment receipt for Kshs 305/=, stamp duty payment receipt for Kshs. 5,550/=, receipt for Kshs. 104,505/= for registration, conveying, rent, stand premium, stamp duty, acceptance letter, letter of allotment, physical development plan (PDP), special conditions, rent clearance certificate for the year 2017, rent clearance certificate for 2018, rent clearance certificate for 2016, rent clearance certificate for the year 2015, payment slip dated 13<sup>th</sup> February, 2019 and the sale agreement by Samuel Koross,

The 3<sup>rd</sup> petitioner claimed that it is a purchaser for value without any notice in defect of the title who fulfilled the obligations under the law was to confirm the status of the register at the lands office and it so did when acquiring the land.

It was the petitioners claim that on 2<sup>nd</sup> February, 2019 the petitioners while in the course of exercising their proprietorship rights on the aforesaid land parcels, the 3<sup>rd</sup> and 4<sup>th</sup> respondents including other persons acting on their instructions and directions unlawfully trespassed on the said land parcels and commenced to cut down 33 trees, destroyed the dwelling houses erected therein and ejected the petitioners' servants.

The petitioners stated that they enquired from the respondents the reason for the invasion and they were informed that the 1<sup>st</sup> respondent had made determinations that the aforesaid land parcels belonged to their employer namely the Kenya Prisons Service and upon perusal of the Kenya Gazette Notice No. 6862 dated the 17<sup>th</sup> July, 2017 in which the 1<sup>st</sup> respondent had allegedly in the exercise of its powers under article 68 of the Constitution of Kenya, 2010 and section 14 of the National Land Commission Act, 2012 received complaints from the National Government, County Governments and members of the public undertaken a review of grants and dispositions (titles) of public land to establish their legality or otherwise and had revoked the titles for the land parcels known as ELDORET MUNICIPALITY/BLOCK 10/ 187 measuring approximately 0.9988 Hectares and ELDORET MUNICIPALITY/BLOCK 10/ 188 measuring approximately 1.000 Hectares.

The petitioners stated that the notice by the 1<sup>st</sup> respondent also directed the 2<sup>nd</sup> respondent to actualize the revocation of the aforesaid two titles in tandem with section 14 (5) of the National Land Commission Act, 2012 together with attendant laws. That the Kenya Gazette notice had a column for reasons but none had been entered save for quotation marks as against the aforesaid two land parcels.

Counsel for the petitioners submitted that the petitioners cannot be faulted for acquiring the said land parcel and relied on the case of **Machakos HCCC. No. 180 of 2011 - David Peterson Kiengo & 2 Other v Kariuki Thuo**, where the Court held that;

"The Registered Land Act is based on the Torrens System. Under this system, indefeasibility of title is the basis for land registration. The state maintains a Central Register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the state guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealings with the *and in question before acquiring an interest*".

Counsel further submitted that the petitioners enjoyed proprietorship rights devoid of interference or question from any person and so exercised their rights in tandem with the Independence Constitution, 1963, the Constitution of Kenya, 2010, the Registered Land Act, Cap. 300 (repealed), the Land Registration Act, 2012 and the Land Act, 2012.

Counsel further relied on the case of **The National Land Commission & Others Exparte Vivo Energy Kenya Ltd, (2015) eKLR**, in which the Court held;

"The impugned Gazette Notice seems to suggest that there was an illegality, involved in the registration of the suit land in the name of the Applicant. No doubt under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. Therefore, there must be a finding that the property in question was unlawfully acquired".

Mr. Wambua submitted that the 1<sup>st</sup> respondent failed in its mandatory statutory obligation under section 14 (3) of the National Land Commission Act, 2012 to give the 1<sup>st</sup> and 2<sup>nd</sup> petitioners who have an interest in the grant or disposition concerned in the land parcels known as ELDORET MUNICIPALITY/BLOCK 10/ 187 measuring approximately 0.9988 Hectares and ELDORET MUNICIPALITY /BLOCK 10/ 188 measuring approximately 1.000 Hectares, a notice of such review, an opportunity to appear before it and to inspect any relevant documents. In the letter filed in court with a public notice on review of grants and dispositions of public land. The notice only indicated that in respect of ELDORET MUNICIPALITY/BLOCK 10/ 188, Rosa Enterprise, Sammy Arap Kogo and Kennedy Kogo were named as interested parties.

Counsel also relied on the case of **Mwangi Stephen Muriithi v National Land Commission & 3 Others, [2018] eKLR** in which Justice W. A. Okwany observed;

26. The Petitioner has argued that he was not accorded fair administrative action by the 1<sup>st</sup> Respondent. This the Petitioner attributes to the refusal by the NLC to furnish him with the Complaint, failure to carry out proper investigations and to render a decision and reasons subsequent to the hearing, instead of secretly replacing the Petitioner as the proprietor of the subject land. Having perused the documents placed before this Court, it is apparent that notice to the interested parties was issued through print media.

27. The 1<sup>st</sup> Respondent on its part argues that it issued a public notice in print media and informed all interested parties of the intention to institute review proceedings to ascertain the legality of the title in question. The 1<sup>st</sup> Respondent asserts that it is a standard operating procedure that it publishes hearing dates in the dailies for matters scheduled for hearing and that it therefore complied with the provisions of Article 50 of the constitution a section 14 (3) of the act. Section 14(3) of the Act provides: "In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect a relevant documents."

28. The next issue for interrogation is whether the notice allegedly given was sufficient and/or adequate. What is before this Court is the notice issued by the 1<sup>st</sup> Respondent in print media (marked as MSM 10). The said notice cites L.R numbers and names of interested parties, who are subsequently invited through the same notice to make representations before the 1<sup>st</sup> Respondents. The notice does not outline details of any complaint. At this juncture I am inclined to give meaning to the term adequate notice in the context of the principles of natural justice. In *Revs. Ontario Racing Commissioners (1969) 8 D.L.R. (3d) 624 at 628 (Ont. H.c.)* Mr. Justice Haines emphasized that a notice that complies with the principles of natural justice means: -

"a written notice setting out the date and subject-matter of the hearing, grounds of the complaint, the basic facts in issue and the potential seriousness of the possible result of such hearing. "

29. Taking a cue from the above decision I find that the mode of service of notice adopted but the 1<sup>st</sup> Respondent does not meet the threshold of the principles of natural justice and Articles 47 and 50 of the constitution hence cannot be said to be adequate/sufficient notice. "

Counsel submitted that in ELDORET MUNICIPALITY/BLOCK 10/ 187, the interested party is indicated in the notice as David Kirwa Uns. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners were not named in the said notice, thus the 1<sup>st</sup> respondent failed in the duty to inform them of the intended review of the grant.

Counsel further cited the case of Isaac Gathungu Wanjohi & ano.v Attorney General & 6 others (2012) Eklr where the court held that

"Where the state contended a property was acquired illegally, the state must follow due process to establish the illegality"

Counsel also cited the case of Sceneries Limited v National Land Commission, [2017] eKLR where Justice Mativo held;

"I have carefully analyzed the facts of this case. I note that no notice was served upon the applicant or the second interested party. Details of the complaint were not availed to them in advance, yet their rights were bound to be affected by the decision. The alleged publishing of Land Reference numbers in a local daily is in my view not proper notice. I find no difficulty in concluding that the Respondents violated the rules of natural justice by failing to serve the applicant with adequate notice and details of the complaint and on this ground alone, I am inclined to allow the originating summons before me."

Mr. Wambua submitted that there was no evidence tendered before the court of the compliance by the 1<sup>st</sup> respondent of regulations 8 and 9 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017 as the annexure 'AMMIO' to the replying affidavit related to land parcels in Nairobi County as opposed to Uasin-Gishu County thus any decision arrived at over revoking the titles of the petitioners fails to comply with article 47 of the Constitution of Kenya, 2010.

Counsel also cited the case of Republic v National Land Commission Ex parte Satellite Industrial Supplies Limited, [2018] eKLR in which Justice E.K.O. Ogola held that:

*"37. Under Section 14 (3) of the National Land Commission Act, the procedure for review of the grants and dispositions is provided as follows:*

*(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.*

38. The above Section only states that the Respondent shall issue a notice to the person who has an interest in the land of the review and the person shall be given an opportunity to appear before it. This Section does not embody or reflect the right to a fair administrative action. In this case, the Respondent issued the notice of the review in a local daily. In my view, personal service of the notice would have been more appropriate in the circumstance.

39. The notice that was issued by the Respondent has been annexed to the affidavit of SIMON KAMUIRU sworn on 2<sup>nd</sup> March, 2017 and marked as "SK2". The said notice identifies the complainant as Nairobi County Government. However, the notice does not include the nature of the complaint or the reasons for the notice. The notice simply requires the applicant to submit copies of its representation and an relevant document to the Respondent before the hearing date. The Court is left to wonder how the applicant is meant to submit its representation without being informed of the complaint.

This makes it very difficult for the applicant to prepare a response to the complaint. Although the applicant is granted an opportunity to be heard on the date of the hearing, this right seems to be superficial as the applicant is not informed in the first place of the complaints "

Counsel therefore submitted that no notice was given to the petitioners hence the process was flawed.

## **2<sup>ND</sup> TO 5<sup>TH</sup> RESPONDENT'S CASE**

The 2<sup>nd</sup> respondent relied on records which dated back to pre-independent Kenya, Legal Notice no. 371 of 22<sup>nd</sup> June, 1961 set apart and gazetted part of the land parcel L.0 778 as government land for the exclusive use by the Department of Prison. Section 2 of the Legal Notice no. 751 — Kenya Order in Council, 1963 of 8<sup>th</sup> December, 1963 vested all land described in the schedule of Kenya (Designated Land) Regulations, 1963 in the Governor hence public land and the Eldoret Prison Farm is so identified at page 1978 of the Regulation.

The respondent explained the process of delineating L.0 778 as public land began vide F/ R 10/42 dated 2-12-1911 by identifying four beacons of L.0 778 clearly marked as 64a, 63a, 64b and 64c designated and reserved the said parcel of land measuring 2,779 acres for public purposes and institutions. Vide F/ R 28/30 dated 14.1.1929 L.0 778 was resurveyed and beacons for the parcel of land measuring 2,779 acres for public purposes and institutions placed. Vide F/ R 28/30 dated 14<sup>th</sup> January, 1929 L. 0 778 was resurveyed and beacons for parcel of land measuring 2770 acres was reserved for Government Departments such as Kenya Forest Service (KFS), prison, aerodromes and the Kenya Meat Commission. Vide Topo - Cadastral sheet of Eldoret no. 89/ IV done by the Government of Kenya which culminated in Eldoret Municipality Block 10 all land above the railway line was reserved as R. L. N L. N no. 233/74 for public use and was not available for allocation.

That in January, 1968, the Government through Sichangi and Wamalwa Soil Conservation Service, Nakuru and traced by S. Egala S. C. S; Eldoret developed a map for Eldoret Municipality Prison farm measuring 498 acres thus delineating the Prison Farm as defined in the gazette notice. The 498 acres of Eldoret Prison Farm arose as a result of various surveys of the original L.0 778 measuring 2,779 acres where portions of it were set aside.

The 2<sup>nd</sup> - 5<sup>th</sup> respondents therefore allege that the parcel of land described by Legal Notice nos. 371 and 751 as prison land measuring 498 acres is the land reserved and alienated for the Department of Prison hence for public use only. Being alienated government land, the prison farm measuring 498 acres was not available for allocation and the titles issued in respect of any portion created from the said 498 acres are null and void abinitio.

It was submitted by the respondents that since its establishment the Eldoret G.K. Main Prison has been in possession of the whole of the 498 acres using it for large scale animal and crop farming to feed its inmates and other inmates from elsewhere in the country and also to generate income for the Department. However, in the 1990's the Eldoret G.K. Main Prison experienced one of the worst forms of encroachment by persons claiming to have been allocated land and held titles within Eldoret Municipality Block 10, Upon enquiring from the Department of Surveys they learnt a substantial part of the gazetted prison land had been irregularly, illegally unlawfully and un-procedurally alienated. It was discovered that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners were registered as proprietors of the land parcels known as ELDORET MUNICIPALITY/BLOCK 10/187 and 188 while ELDORET MUNICIPALITY/BLOCK 10/ 190 was registered in the name of Luka Chemweno. The petitioners forcefully entered the land and built structures thereupon.

In December, 2016 or thereabouts, the Prisons Department lodged a complaint to the 1<sup>st</sup> respondent seeking a review of grant and deposition under section 14 of the National Land Commission Act, 2012. In a publicized public notice appearing in the Daily Nation newspaper of Friday 17-3-2017 the 1<sup>st</sup> respondent invited interested parties to a public hearing on review of grants and dispositions on 30-3-2017 at Eldoret County Hall and further invited interested parties to submit representation and documents on or before 24<sup>th</sup> March 2017. The public notice clearly identified the petitioners and their parcels of land. The petitioners chose not to attend or submit to it their representation or documents.

The respondents submitted that the review of grant and dispositions to establish their propriety or legality contemplated by section 14 of the National Land Commission Act was undertaken during a public hearing where the facts surrounding a grant or disposition were analyzed to establish whether due process was followed and therefore whether the grant or disposition was proper or legal. To the extent that a public hearing was conducted, a review of grant was thus conducted on 30<sup>th</sup> March, 2019 in accordance with the provisions of section 14(1) of the Act.

That the requirement of the conduct of such review of grant within 5 years of coming into effect of the Act, the same was complied with notwithstanding the impugned notice was published on 17<sup>th</sup> July, 2017. Upon hearing the parties who attended and analyzed documents before it, the 1<sup>st</sup> respondent found that among other petitioners' titles were issued over the land reserved for prison and subsequently revoked them forthwith but what delayed was the publication of the finding.

That upon publication of the decision, the Department of Prisons implemented the decision as the titles of the land parcels known as ELDORET MUNICIPALITY/BLOCK 10/ 187 and 188 had been revoked. The respondents submitted that with the implementation of the decision and titles having been revoked, the claim is overtaken by events and that the petitioners could not allege that they were condemned unheard when they failed without reason to utilize the opportunity given.

Counsel submitted that Section 152 of the Land Laws (Amendment) Act, no. 28. of 2016 allowed for the removal of any encroachers of public land by issuance of notice of eviction. A notice was served and the petitioners amongst others by a letter dated 26<sup>th</sup> August, 2018 requested for indulgence to be allowed to move out of Lumumba Farm by 31<sup>st</sup>. January, 2019 of which they voluntarily moved out.

Counsel further submitted that ELDORET MUNICIPALITY/BLOCK 10/ 187, 188 and 190 were unlawfully, illegally and un-procedurally created over gazetted prison land. The petitioners were not only guilty of laches but had come to a court of equity with soiled hands thus not entitled to equitable relief. That the petition does not raise any valid constitutional grounds, prayers or issues to warrant intervention hence, no reasonable basis for granting the orders sought existed. The balance of convenience, public interest and scales of justice militated and tilted against granting reliefs.

Counsel for the respondents filed a judgment in ELC 253 of 2012 which was a test case for this petition, ELC No 336 of 2012 which had been stayed pending the hearing and determination of ELC No 253 of 2012. The judgment was delivered on 5<sup>th</sup> February 2020. Counsel urged the court to be guided by the said judgment as it was in respect of the suit land Block 10. The court declared that the suit land belonged to prisons and was not available for alienation.

### **ANALYSIS AND DETERMINATION**

This petition was filed by the petitioners alleging violations of fundamental rights to property and orders of prohibition and certiorari with costs to the petitioners. Similar cases were filed by the petitioners and other parties namely in ELC No 336 of 2012 and ELC No 253 of 2012. It was agreed by consent that ELC case No. 253 of 2012 be a test case and the other cases be stayed pending the hearing and determination. The same was done and a judgment was rendered in ELC No 253 of 2012 on 5<sup>th</sup> February 2020 where the court declared that the suit land Block 10 which is the subject matter in all the 3 cases belongs to the Prisons department as it was not available for alienation.

Section 2 of the Government Lands Act provides;

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

Under section 3 of the Government Lands Act states;

The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

(a)\* subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;

...

The Act further states;

The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)

a. for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;

In the case of **James Joram Nyaga & Another –v- Attorney General & Another [2007] eKLR** the court referring to section 3 and 7 of the GLA observed thus:

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18<sup>th</sup> December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap. 281 of the Laws of Kenya.”

The court held that on 22<sup>nd</sup> June 1967, the suit land in ELC 253 of 2012 was gazetted as prison land vide Gazette Notice No. 751 dated 18<sup>th</sup> December 1963. The suit land in this suit was part of the block in ELC 253 of 2012 and therefore the judgment in that suit directly applies to the suit land in this suit.

The court having determined the test case which suit land is similar and was declared to be prison land, this court has very little to do as it will adopt the judgment in ELC No 253 of 2012 which also concludes the case in ELC No. 336 of 2012. Even if the test case was not done, the court would still have come to the same conclusion as there was evidence that the suit land was reserved for prisons and therefore was not available for alienation.

I therefore find that the petition has no merit and is therefore dismissed with costs to the respondents.

**DATED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF APRIL, 2021**

**M. A. ODENY**

**JUDGE**