



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC PETITION NO. E005 OF 2021**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 47, 48 & 63 OF**

**THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: PRINCIPLES OF LEADERSHIP AND INTEGRITY UNDER**

**CHAPTER 6 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 15 (2) OF THE COMMUNITY LAND ACT, 2016**

**AND**

**IN THE MATTER OF THE COMMUNITY LAND REGULATIONS, 2017**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF LOSESIA GROUP RANCH MIGRATION TO COMMUNITY GROUP**

**BETWEEN**

LMAKIYA LESARGE.....1<sup>ST</sup> PETITIONER

ALOISE LEARIWALA.....2<sup>ND</sup> PETITIONER

KEN LOCHEDE.....3<sup>RD</sup> PETITIONER

ANANGAKI RONTE.....4<sup>TH</sup> PETITIONER

DANIEL KADEI.....5<sup>TH</sup> PETITIONER

JAMES LESINIR.....6<sup>TH</sup> PETITIONER

LENGILA SAMUEL LEDICAS.....7<sup>TH</sup> PETITIONER

KOMBERA LEMIRUNI.....8<sup>TH</sup> PETITIONER

SARAPHINO LESUPER.....9<sup>TH</sup> PETITIONER

- VERSUS -

LAND ADJ. OFFICER SAMBURU EAST.....1<sup>ST</sup> RESPONDENT

THE COMMUNITY LAND

REGISTRAR SAMBURU.....2<sup>ND</sup> RESPONDENT

ALOIS LEANWALA.....3<sup>RD</sup> RESPONDENT

PAULINE LONGOJNE.....4<sup>TH</sup> RESPONDENT

RAINDI LEPARTINGAT.....5<sup>TH</sup> RESPONDENT

KIPORO LENAIYASA.....6<sup>TH</sup> RESPONDENT

LBAKINOI LENGISHILI.....7<sup>TH</sup> RESPONDENT

LEKINYABA LEKUREIYA.....8<sup>TH</sup> RESPONDENT

LTISILA LEMASHOKOTI.....9<sup>TH</sup> RESPONDENT

LEMISAN LEADEKE.....10<sup>TH</sup> RESPONDENT

LETOLAS LEPARTINGAT.....11<sup>TH</sup> RESPONDENT

SAMUEL LEMOYOG.....12<sup>TH</sup> RESPONDENT

AJI LTAPIYIEN LEKALAU.....13<sup>TH</sup> RESPONDENT

ATTORNEY GENERAL.....14<sup>TH</sup> RESPONDENT

## RULING

### A. INTRODUCTION

1. By a petition dated 26<sup>th</sup> July, 2021 based upon **Articles 1, 2, 3, 10, 22, 23, 47, 48 & 63 of the Constitution of Kenya, Section 15 (2) of the Community Land Act, 2016, the Fair Administrative Action Act, 2015, and the Community Land Regulations 2017**, the Petitioners challenged the validity of the election of the Community **Land Management Committee of Losesia Group Ranch** held on 17<sup>th</sup> June, 2021.

2. The Petitioners contended that the election process was flawed for various reasons. It was contended that notice of the election date was not adequately published; that the Community Land Registrar failed to invite all members of the community; that some non- members were allowed to infiltrate the elections; that some *bona fide* members were turned away from the election venue; and that there was lack of quorum. The Petitioners consequently sought a declaration that the impugned elections were unprocedural, unlawful and unconstitutional.

### B. THE PETITIONERS' APPLICATION

3. Simultaneously with the filing of the petition, the Petitioners filed an application dated 26<sup>th</sup> July, 2021 for conservatory orders under **Articles 22 and 23 of the Constitution** staying the outcome of the elections. The Petitioners contended that unless the interim orders sought were granted, the petition shall be rendered nugatory if successful.

4. The application for interim orders was supported by an affidavit sworn by the 1<sup>st</sup> Petitioner, Lmakiya Lesarge on 26<sup>th</sup> July, 2021 together with the various exhibits thereto. In the supporting affidavit, the Petitioners simply referred to the petition and affirmed that they were relying on the same grounds set out in the petition and the affidavit in support thereof.

### C. THE RESPONDENTS' RESPONSE

5. The 3<sup>rd</sup> Respondent, Alois Leariwala filed a replying affidavit sworn on 12<sup>th</sup> October, 2021 on his own behalf and on behalf of the 4<sup>th</sup> and 12<sup>th</sup> Respondents in opposition to the application. The 7<sup>th</sup> Respondent, Lbakinoi Lenishili also filed a replying affidavit sworn similarly on 12<sup>th</sup> October, 2021 on his own behalf and on behalf of the 4<sup>th</sup> and 12<sup>th</sup> Respondent in opposition to the application. The said affidavits were

similar in content and shall be considered together.

6. The 3<sup>rd</sup> and 7<sup>th</sup> Respondents stated that they were members of Losesia Community Land Management Board who were elected on 17<sup>th</sup> June, 2021. The 3<sup>rd</sup> and 7<sup>th</sup> Respondents disputed the allegations contained in the petition and allegations contained in the application for *interim orders*. They contended that notice of the elections was adequately publicized including publication in the Nation Newspaper in May, 2021. They contended that notice of the election was also publicized during public *barazas*, church and mosque services and on market days. They stated that proper verification of members was undertaken at the venue prior to voting and that non-members did not participate in the voting.

7. It was further contended that the Petitioners were in attendance on the material date and that they tried to disrupt the election process before staging a walk out led by the former chairman who is the 1<sup>st</sup> Petitioner herein. It was further contended that the Petitioners had caused chaos in an earlier meeting thus occasioning postponement of elections to 17<sup>th</sup> June, 2021 and that the Petitioners were deliberately trying to delay the transition of the Group Ranch into community land under the new land laws for selfish reasons.

8. It was further contended that the Petitioners were not honest people because they had allegedly misappropriated group ranch funds hence their resistance to change of leadership was intended to avoid being held to account for their misdeeds. The Respondents contended that the Petitioners shall not suffer any loss or prejudice if the *interim orders* were denied hence the court was urged to dismiss the application with costs.

#### **D. DIRECTIONS ON SUBMISSIONS**

9. When the application was listed for *inter partes* hearing, it was directed that the same shall be canvassed through written submissions. The record shows that the Petitioners' submissions were filed on 15<sup>th</sup> November, 2021 whereas the 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 12<sup>th</sup> Respondents filed theirs on the same date. The rest of the Respondents did not file any responses or submissions in the matter.

#### **D. THE ISSUES FOR DETERMINATION**

10. The court has perused the Petitioners' notice of motion dated 27<sup>th</sup> July, 2021, the replying affidavits in opposition thereto as well as the material on record. The court is of the opinion that the main question for determination herein is whether or not the Petitioners have made out a case for the grant of the conservatory order of stay sought.

#### **F. ANALYSIS AND DETERMINATION**

11. The court has considered the submissions on record on the issue. The gist of the Petitioners' submission is that the impugned elections were conducted in violation of the **Community Land Act, 2016** and the **Community Land Regulations, 2017**. It was submitted that notice of the elections was not adequately publicized since publication of a notice in a national newspaper was not good enough where the target community was nomadic and pastoralist. It was further submitted that the requisite quorum of 2/3 of membership of the community was not achieved with respect to the impugned election.

12. The court is aware that at this interlocutory stage it is not required to make any definitive findings on the validity or legality of the elections held on 17<sup>th</sup> June, 2021 for that is the function of the trial court. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, it was held, *inter alia* that:

**“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”**

13. The court has noted that the impugned elections were not conducted pursuant to any provisions of the **Constitution of Kenya** but under the **Community Land Act, 2016** and the **Community Land Regulations, 2017**. Although in their submissions the Petitioners attempted to liken them to a general election conducted pursuant to the Constitution the court is unable to take the same view. The quorum for such elections is not stipulated in the **Constitution of Kenya** but an Act of Parliament. Similarly, the requirement for notification and publication of election notice is not a constitutional matter. Accordingly, the court is unable to see any constitutional issues in the impugned elections to warrant the institution of a constitutional petition under **Articles 22 and 23** of the **Constitution of Kenya**. However, the Petitioners shall be at liberty to persuade the court otherwise at the hearing of the petition.

14. In **Kenya Bus Services Ltd & 2 Others v Attorney General [2005]1KLR 787**, it was held that not every infraction of the law gives rise to constitutional issues. Nyamu J (*as he then was*) while dealing with an application alleging violation of fundamental rights under **Section 84 of the repealed Constitution of Kenya** observed as follows:

**“...In additional, although there is no direct local authority on the point, the holding No. 3 in the Trinidad and Tobago case of the Re application by Bahadur [1986] LRC (Const;) 297 at page 298 represents our position as well:**

**“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under**

**the law and not the Constitution. *Harrikson v Attorney General of Trinidad and Tobago* [1979]3 WLR 62 applied.”**

15. The court is thus not satisfied that the Petitioners have made out an arguable case for enforcement of Constitutional rights to warrant the issuance of a conservatory order in the circumstances of this case. The court is further not satisfied that the pending petition shall be rendered nugatory unless the conservatory order is granted. Should the Petitioners ultimately succeed in their suit, the court may still nullify the elections of 17<sup>th</sup> June, 2021 and order fresh elections at which the Petitioners may participate.

**G. CONCLUSION AND DISPOSAL**

16. The upshot of the foregoing is that the court is not satisfied that the Petitioners have made out a case for the grant of the conservatory orders sought. Accordingly, the Petitioners’ notice of motion dated 26<sup>th</sup> July 2021 is hereby dismissed. Costs shall be in the cause. It is so decided.

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM**

**In the presence of:**

Mr. Karweru for the Petitioners

No appearance for the 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 12<sup>th</sup> Respondents

No appearance for AG for the 1<sup>st</sup>, 2<sup>nd</sup> and 14<sup>th</sup> Respondents

No appearance for the rest of the Respondents

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**Y. M. ANGIMA**

**JUDGE**