



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

PETITION NO. E002 OF 2020

IN THE MATTER OF: ARTICLES 3(1), 22, 23, 48, 50(1), 159, 162, 165, 258, AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 4(2), 10, 19, 20, 21, 24, 73, 75, 129 AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 27, 40 AND 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE VIOLATION OF SECTION 110(2) OF THE LAND ACT NO. 6 OF 2012, AND OF SECTION 19 OF THE REPEALED LAND ACQUISITION ACT (CAP 295)

IN THE MATTER OF: THE NATIONAL GOVERNMENT'S FAILURE TO OFFER THE ORIGINAL OWNERS OF THE 2,912 ACRES SHEEP AND GOAT MULTIPLICATION LAND (L.R.10029/2) IN MAOKO CONSTITUENCY, MACHAKOS COUNTY, OR THEIR SUCCESSORS IN TITLE, PRE-EMPTIVE RIGHTS TO RE-ACQUIRE THE LAND WHEN THE PUBLIC PURPOSE OR INTEREST JUSTIFYING THE COMPULSORY ACQUISITION OF THE LAND FAILED OR CEASED

IN THE MATTER OF: THE DECISION BY THE NATIONAL GOVERNMENT TO HIVE OFF AND ALLOCATE PARTS OF THE COMPULSORY ACQUIRED L. R. 10029/2 TO PRIVATE DEVELOPERS AND OTHER THIRD PARTIES

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE DECISION BY THE KENYA WILDLIFE SERVICE TO SURVEY, FENCE OFF, OCCUPY AND TAKE OVER THE WHOLE OR PART OF THE COMPULSORILY ACQUIRED L.R. 10029/2

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

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

THE MINISTRY OF AGRICULTURE, LIVESTOCK,

FISHERIES & COOPERATIVES.....2ND RESPONDENT

THE NATIONAL TREASURY..... 3RD RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

THE KENYA WILDLIFE SERVICE (KWS).....6THRESPONDENT

THE COUNTY GOVERNMENT OF MACHAKOS.....7TH RESPONDENT

RULING

1. In the Notice of Motion dated 23rd November, 2020, the 1st Petitioner has sought for the following orders:

- a) *That the Honourable Court be pleased to suspend the Title Deed the Government recently issued to the Kenya Wildlife Service over the suit property in contemptuous disregard of this court's conservatory orders.*
- b) *That the Honourable Court be pleased to issue an order of discovery ordering that within 14 days of the order being made, the 1st and 6th Respondents should produce and furnish the court and the Petitioner with the original and certified copies of the title deed in issue.*
- c) *That this Honourable Court be pleased to cite the following persons for contempt of court and consequently punish them according to the law:*
 - i. *Brig. (Rtd.) John Waweru, the Director General of the Kenya Wildlife Service.*
 - ii. *Ms. Farida Karoney, the Cabinet Secretary in the Ministry of Lands and Physical Planning.*
 - iii. *Dr. Nicholas Muraguri, tge Principal Secretary in the Ministry of Lands and Physical Planning.*
- d) *That until and unless the contempt is purged, this Honourable court be pleased to deny audience to the 1st and 6th Respondents.*
- e) *That the Honourable Court be pleased to enjoin the following individuals to these proceedings as co-petitioners:*
 - i. *JONATHAN K. LILAH..... PROPOSED 2ND PETITIONER*
 - ii. *JACKSON L. OIPUTA.....PROPOSED 3RD PETITIONER*
 - iii. *SIMON K. TARAYA.....PROPOSED 4TH PETITIONER*
 - iv. *STEPHEN N. LEKUIK.....PROPOSED 5TH PETITIONER*
 - v. *LAIRUMPE KOMPE..... PROPOSED 6TH PETITIONER*
 - vi. *DANIEL K. SUYIANKA.....PROPOSED 7TH PETITIONER*
 - vii. *GIDEON P. LILAH.....PROPOSED 8TH PETITIONER*
 - viii. *NELSON P. OIPUTA..... PROPOSED 9TH PETITIONER*
 - ix. *JAMES P. NKAPAAPA.....PROPOSED 10TH PETITIONER*
 - x. *WILSON M. NANKA.....PROPOSED 11TH PETITIONER*
 - xi. *THOMAS T. LEKUIK.....PROPOSED 12TH PETITIONER*
- f) *That the Honourable Court be pleased to enjoin the following bodies to these proceedings as respondents:*
 - i. *THE KENYA MEAT
COMMISHION.....PROPOSED 8TH RESPONDENT*
 - ii. *AFYA SACCO.....PROPOSED 9TH RESPONDENT*
- g) *That the Amended Petition dated 12th November, 2020 be admitted as having been amended, filed and served with the leave of the court.*
- h) *That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.*
- i) *That costs be in the cause.*

2. The Application is supported by the Affidavit of the 1st Petitioner who has deponed that on 3rd November and 4th November, 2020,

several media outlets reported that H.E. Uhuru Muigai Kenyatta, the President of the Republic of Kenya, had handed over to the Kenya Wildlife Service (**KWS**), a title deed for the suit property.

3. The 1st Petitioner deponed that on 4th November, 2020, the Ministry of Tourism and Wildlife issued a Press Statement confirming the issuance of a title deed to Nairobi National Park for the 2000 acres Government land that was formerly known as Sheep and Goat Research Facility thus enlarging the National Park from its current 29,000 acres to 31,000 acres.

4. It was the 1st Petitioner's disposition that on 29th September, 2020, this court issued temporary orders of prohibition prohibiting the Respondents and their agents from surveying, occupying and or taking over the Sheep and Goat Multiplication Land (LR 10029/2) in Mavoko Constituency, Machakos County and that the orders were served on all the Respondents.

5. The 1st Petitioner deponed that the 1st and 6th Respondents' disobedience of the court orders undermines both the authority of this court and the rule of law; that unless the contemnors are punished by this court, they will continue to disobey the court orders and that the court should intervene to stop the violation of the Constitution, statute and court orders.

6. According to the 1st Petitioner, it is necessary to suspend the title deed in issue so as to preserve these proceedings; that it is also necessary for the original or certified copies of the title deed in issue to be produced in these proceedings so that the court can have all the material it needs to determine the matter with finality and that he has come across new material evidence necessitating the amendment of the Petition.

7. The 1st Petitioner finally deponed that he has been approached by the members of Kaputiei Maasai of Empakasi who would like to join in these proceedings through their committee members; that the joining of the proposed Petitioners will enable the court to determine the case on merits and that the proposed amendments are necessary to avoid duplicity.

8. The Application was not opposed by the Respondents. The 1st Petitioner filed submissions together with the list of authorities which I have considered. I will first consider the prayer seeking to have Brig. (Rtd.) John Waweru, the Director General of the Kenya Wildlife Service; Ms. Farida Karoney, the Cabinet Secretary in the Ministry of Lands and Physical Planning and Nicholas Muraguri, the Principal Secretary in the Ministry of Lands and Physical Planning, cited for contempt of the court order.

9. Contempt of court consists of conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a Judgment or order of a court or breach of an undertaking of court. (Osborne's Concise Law Dictionary).

10. *Halsbury's Laws of England, Vol.9 (1) 4th Edition* provides as follows:

“Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury.”

11. In the case of *Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others (2015) eKLR*, Justice Aburili stated that:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

12. It is trite that for an Applicant to succeed in an Application for contempt, the Applicant must prove that the terms of the order were clear and unambiguous; the Respondent had knowledge of or proper notice of the terms of the order; the Respondent has acted in breach of the terms of the order; and the Respondent's conduct was deliberate.

13. In the case of *Sam Nyamweya & 3 Others vs. Kenya Premier League Limited & 2 Others (2015) eKLR*, the court held as follows:

“It is important however that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with the full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.”

14. The elements of civil contempt were laid out by the Law Commission of New Zealand in 'Contempt in Modern New Zealand' that was cited in *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR* as follows:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;

(b) the Defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.”

15. This Petition was commenced by way of a Petition dated 14th September, 2020. Together with the Petition, the 1st Petitioner filed a Notice of Motion dated 14th September, 2019 under a certificate of urgency. In the Notice of Motion, the 1st Petitioner sought for conservatory orders pending the hearing of the Application and the Petition.

16. When the Application was placed before this court on 16th September, 2020, the court certified it as urgent and directed the 1st Petitioner to serve the Respondents with the Application for hearing on 29th September, 2020. When the Application came up for hearing on 29th September, 2020, none of the Respondents' representative was in court. The court allowed the prayer for conservatory orders on an interim basis and directed that the Application be heard *interpartes* on 21st October, 2020.

17. When the Application came up for *interpartes* hearing on 21st October, 2020, it is only the 1st Petitioner and counsel for the 7th Respondent that appeared. The 1st Petitioner informed the court that he had served the Application and the extracted orders on all the Respondents. Counsel for the 7th Respondents sought for an adjournment to enable her file a Replying Affidavit, which adjournment was granted by the court. The Application was adjourned to 2nd February, 2021, and the interim orders were extended.

18. The interim conservatory orders that were issued by this court were as follows:

That a temporary order of prohibition be and is hereby issued prohibiting the respondents and their agents from surveying, occupying and or taking over the whole or part of 2,192 acres sheep and goat multiplication land (LR 100229) in Mavoko Constituency, Machakos County until 21/10/2020.

19. The 1st Petitioner has exhibited an Affidavit of Service showing that he served the 1st, 2nd, 3rd, 4th and 5th Respondents with the order of this court on 6th October, 2020, while the 6th and 7th Respondents were served with the order on 7th October, 2020. The Respondents have not denied that they were indeed served with the said order.

20. Although the 1st Petitioner has annexed on his Affidavit an unsigned press release purportedly by the 6th Respondent, and copies of photographs obtained from the internet showing the President holding what appears to be a title deed, the 1st Petitioner neither annexed a copy of the Title Deed that was issued to KWS nor an official search.

21. For this court to conclude that the Respondents acted in breach of the terms of the order, and that the Respondents conduct was deliberate, the 1st Petitioner should have obtained documents showing the date that the suit land was surveyed by the Respondents and the date that the title deed was issued to KWS.

22. I say so because before citing the Respondents for contempt, the court has to be certain that indeed the land was surveyed and a title deed was issued during the pendency of the order of the court. That information cannot be ascertained from the attached Press Statement and publications from the internet.

23. That being the case, it is my finding that the 1st Petitioner has not established to the required standard that the alleged contemnors are in contempt of the orders of this court.

24. The second issue I will deal with is whether this court should compel the Respondents to produce the original or certified copies of the title deed, and whether this court should suspend the Title Deed that was issued to the 6th Respondent. As I have already stated above, the Petitioner should a conduct an official search to ascertain the current legal status of the suit property.

25. If indeed a Title Deed in respect to the suit property exists, then the most the Petitioners can do is to amend the Petition and seek for the cancellation of the same pursuant to the provisions of the **Land Registration Act**. Suspension of a Title Deed is a term that is not known in our laws.

26. On the issue of compelling the Respondents to produce and furnish the court with the copies of the Title Deed, my answer is that the Respondents, while responding to the Petition, will have to annex a copy of the Title Deed. If they don't annex the Title Deed or the search, it will be upon the Petitioners to conduct an official search to ascertain the position of the suit land.

27. Considering that there is no evidence before me showing that the 1st Petitioner has requested for a copy of the Title Deed and the official search, which request has been turned down, I decline to grant the prayer compelling the Respondents to furnish to this court with a copy of the Title Deed.

28. **Rule 5 (d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides as follows:

“(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just-

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in

order to enable the court adjudicate upon and settle the matter, be added.

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.”

29. The 1st Petitioner has the right to include any party in these proceedings whose presence is necessary. The prayer for joinder and amendment having not been opposed, I shall allow the same.

30. For the reasons I have given above, the Application dated 23rd November, 2020 is allowed partially as follows:

a) The following individuals are hereby enjoined in these proceedings as co-petitioners:

xii. JONATHAN K. LILAH.....PROPOSED 2ND PETITIONER

xiii. JACKSON L. OIPUTA.....PROPOSED 3RD PETITIONER

xiv. SIMON K. TARAYA.....PROPOSED 4TH PETITIONER

xv. STEPHEN N. LEKUIK.....PROPOSED 5TH PETITIONER

xvi. LAIRUMPE KOMPE.....PROPOSED 6TH PETITIONER

xvii. DANIEL K. SUYIANKA.. ..PROPOSED 7TH PETITIONER

xviii. GIDEON P. LILAH.....PROPOSED 8TH PETITIONER

xix. NELSON P. OIPUTA..... PROPOSED 9TH PETITIONER

xx. JAMES P. NKAPAAPA.....PROPOSED 10TH PETITIONER

xxi. WILSON M. NANKA.....PROPOSED 11TH PETITIONER

xxii. THOMAS T. LEKUIK..... PROPOSED 12TH PETITIONER

b) The following bodies are hereby enjoined to these proceedings as Respondents:

iii. THE KENYA MEAT

COMMISSION.....PROPOSED 8TH RESPONDENT

iv. AFYA SACCO.....PROPOSED 9TH RESPONDENT

c) The Petitioner to file and serve an Amended Petition within 14 days.

d) Costs to be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 1ST DAY OF OCTOBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of;

.....for the Petitioner

.....for the Respondents

John Okumu - Court Assistant