



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION NO. 10 OF 2017

IN THE MATTER OF

ARTICLE 2, 3, 19, 20, 21, 22, 23, 40, 48, 50, 62 AND 67 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, NO.4 OF 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 40, 47, 48, 50 AND 60 OF

THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF INTENDED ALIENATION OF PUBLIC LAND AND ISSUANCE OF TITLE DEEDS IN RESPECT OF
KIRURUMI VILLAGE**

BETWEEN

MUCHEMI KINGARA

DEDAN NDIRITU

DANIEL WAMBUGU KARIUKI

STANLEY NDEGWA RUKWARO

(Suing on their own behalf of intended

Residents of Kirurumi Nyeri County).....PETITIONERS

-VERSUS-

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYERI.....2ND RESPONDENT

JUDGMENT

1. The petitioners herein, who have described themselves as members of the local community of Kirurumi area, Tetu Sub-County Nyeri County, filed the suit herein claiming that a public parcel of land measuring 10 acres or thereabout commonly known as Kirurumi village has been demarcated by the respondents into 70 portions or thereabout with the intention of issuing individual title deeds in respect thereof.

2. Contending that the demarcation of the land was done with the intention of giving title deeds to unknown individuals, the petitioners complain that the alienation was done in disregard of their plans to use the land for community development projects, which projects they have already identified and shared plans with the respondents in respect thereof for approval; that they were neither involved in the process of alienation of the land nor given any information concerning the alienation.

3. Terming the impugned actions of the respondents a violation of their Constitutional right to protection of their right to property; right to public participation, right to public information and right to fair administrative action, the petitioners seek the following reliefs:-

(i) A declaration that the actions of the respondents of alienating the land comprising Kirurumi village (“the village land”) are in breach of their fundamental rights and freedoms;

(ii) A declaration that any action by the respondents of alienating the village land contrary to the proposed use thereof is unconstitutional;

(iii) An order of certiorari removing to this court for purpose of being quashed the decision of the respondent of alienating the village land contrary to the proposals on community projects proposed by them as pleaded in paragraph 11 of the petition;

(iv) An order that alienation of the village land contrary to the alienation proposed by them as pleaded in paragraph 11 of the petition be set aside and the title to the village land reverted to the respondent, if already alienated;

(v) An order of mandamus directing the respondents to alienate the village land with due regard to proposed community projects as pleaded in paragraph 11 of the petition;

(vi) Costs and interest.

4. Despite having been served as attested by the affidavit of Service of C.M King’ori, advocate filed on 29th August, 2017, the 1st respondent neither entered appearance nor filed a response to the petition. The 2nd respondent entered appearance but filed no response.

5. On 12th March, 2018 directions were taken to the effect that the petition be disposed of by way of written submissions. Following issuance of those directions the petitioners and the 2nd interested party filed submissions which I have read and considered.

6. From the pleadings filed in this matter and the submissions, the sole issue for the court’s determination is whether the petitioners have made up a case for being granted the orders sought or any of them.

7. With regard to that question, I begin by pointing out that despite the petitioners’ case being undefended the duty imposed on them of proving the issues of fact pleaded in their case is not taken away by the fact that the suit is undefended. In that regard see **Sections 107 and 109** of the Evidence Act, Cap 80 Laws of Kenya which provides as follows:-

“107. Whoever desires any court to give judgment as to any legal right or liability dependent on facts which he asserts must prove that those facts exist.

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of the fact shall lie on any particular person.”

8. As can be deciphered from the averments contained in the petition the petitioners’ claim is premised on the allegation that the respondents have either alienated the suit property to undisclosed individuals and or are in the process of alienating the suit property to unknown individuals in disregard of the proposals given by the petitioners concerning how the suit property should be used.

9. Whilst the petitioners through the documents attached to the affidavit they swore in support of the petition have provided evidence of their plans on their desired use of the suit property, they have not attached any single document to show that they communicated their concerns to the respondents and the respondents failed to take any action or disregarded their concerns. Most importantly, whilst the petitioners claim that the property has been demarcated into 70 plots with a view of alienating it to private individuals no evidence of such dealing has been adduced. What emerges from their averment is fear that the suit property could have been alienated to private individuals without their participation.

10. Can the court grant the orders sought best on mere speculation? My answer is negative. As pointed out above the law imposes an obligation to prove the allegations on which the reliefs sought are premised.

11. In my view, the petition was rushed. The petitioners ought to have moved the relevant state institution for collection of evidence which would have justified their averments as the existing legal framework gives them an opportunity to do so as opposed to rushing to court on the basis of allegations they are unable to substantiate. In that regard see **Section 4** of the Access to Information Act, 2016 (hereinafter referred to as the Act) which provides as follows:-

“4(1) Subject to this Act and any other written law, every citizen has the right of access to information held by:-

(a) The state; and

(b) Another person and where that information is required for the exercise or protection of any right or fundamental freedom...”

12. **Section 8** of the Act provides for how an application for access to information shall be made. In this regard see the section which provides as follows:-

“An application to access information shall be made in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.”

13. In the circumstances of this case, the petitioners have not demonstrated that they in accordance with the provisions of **Section 8** *supra* applied for the information they could have relied on in support of the allegations and the respondents failed to supply them with such information.

14. For the foregoing reasons, I find no justification for the petitioners to base their petition on unsupported or unsubstantiated allegations and hope that merely because the respondents have not responded to the allegations the court would grant them the reliefs sought.

15. The upshot of the foregoing is that the petitioners have failed to prove their case as by law required of them. Consequently, I dismiss the petition but with no orders as to costs.

Dated, signed and delivered in open court at Nyeri this 4th day of October 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the petitioner

N/A for the 1st and 2nd respondents

Court assistant - Esther