



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

PETITION NO. 29 OF 2019

KENYA AGRICULTURAL AND LIVESTOCK

RESEARCH ORGANIZATION (KALRO).....PETITIONER

-VERSUS-

EDISON SONJE TAURA

FUAD SAID

MASHA MRAMBA

JOSHUA KATANA JUBA.....RESPONDENTS

RULING

(Suit for trespass and permanent injunction against individuals commenced by way of a constitutional petition; case not well suited to be filed as a constitutional petition; suit struck out)

1. This suit was commenced through a Constitutional Petition filed on 23 July 2019. The petitioner has described itself as a public state organ (Corporation) established under the Kenya Agricultural and Livestock Research Act, No. 17 of 2013. The respondents are all described as male adults. In brief, the petitioner contends that the land parcel LR No. MN/III/1450 was owned by its predecessor, Kenya Agricultural Research Institute (KARI). It alleges that this land was illegally subdivided into 5 portions being LR Nos. MN/III/2944, 2945, 2946, 2947 and 2948, which portions were allocated to private individuals (not the respondents) around the year 1995. It is pleaded that KARI complained about the allocation and the Kenya Anticorruption Commission (KACC) also took up the matter and filed the suit *Mombasa High Court Misc. Application No. 27 of 2008 (OM) Kenya Anticorruption Commission vs Nathaniel Tum & Others*, seeking recovery of the parcels of land. While the suit was pending, the Registrar of Titles Mombasa, through Gazette Notice No. 15570 of 26 November 2010, revoked the certificates of titles issued to the five subdivisions. It is pleaded that none of those allotted the plots Nos. 2944, 2945 and 2946 challenged this revocation of titles but the allottees of the Plots Nos. 2947 and 2948 filed the suit *Mombasa ELC No. 580 of 2011 Baharini Developments Limited vs KARI*, which suit is said to be still pending. The petitioner has sued the respondents because it contends that sometimes in December 2018, the respondents, despite being aware of the petitioner's ownership of the Plots Nos. 2944, 2945 and 2946, forcefully entered the land, took possession, cleared and ploughed the land, and vandalized the buildings of the petitioners. It is pleaded that by virtue of this trespass, the petitioner's property is being wasted and the petitioner is suffering loss and damage.

2. In the petition, the petitioner has pleaded the following as constituting the violation of the Constitution by the respondents which are paragraphs 28 and 29 of the petition :-

28. Under Article 62(1) of the Constitution, the properties known as LR Nos. Mainland North/III/2944, Mainland North/III/2945, Mainland North/III/2946, the subject of this Petition, are public land the same being land lawfully held, used and or occupied by the Petitioner; a State organ.

29. The actions of the Respondents described in paragraphs 22-27 herein above are in violation of Article 40 (3) of the Constitution as read together with the provisions of the Land Act, 2012.

3. The prayers in the petition are as follows:-

(i) A declaration that the Petitioner is entitled to exclusive and unimpeded right of ownership, possession, occupation and use of all that property known as L.R Nos. Mainland North/III/2944, Mainland North/III/2945 and Mainland North/III/2946, comprised in the

Petitioner's Ocean Front Land being L.R No Plot No. MN/III/1450(original) measuring approximately 13.40 hectares.

(ii) A declaration that the Respondents, whether by themselves, servants agents or associates or otherwise howsoever and any other private individual or entity have/has no right, interest and or tile to the parcels of land known as L.R Nos. Mainland North/III/2944, Mainland North/III/2945 and Mainland North/III/2946 comprised in the Petitioner's Ocean Front Land being L.R No Plot No. MN/III/1450(original) measuring approximately 13.40 hectares and are wrongfully in occupation of the same, if at all and are accordingly trespassers on the same.

(iii) A declaration that the respondents, whether by themselves, servants, associates or agents or otherwise howsoever, and any other private individual or entity are/is not entitled to remain in occupation of or any portion or part of the parcels of land known as L.R Nos. Mainland North/III/2944, Mainland North/III/2945 and Mainland North/III/2946 comprised in the Petitioner's Ocean Front Land being L.R No Plot No. MN/III/1450(original) measuring approximately 13.40 hectares.

(iv) A permanent injunction restraining the respondents jointly and severally, whether by themselves, assigns, servants, agents, associates or otherwise howsoever, and any other private individual or entity from entering, accessing, occupying, remaining on or continuing in occupation of or any portion or part of the parcels of land known as L.R Nos. Mainland North/III/2944, Mainland North/III/2945 and Mainland North/III/2946 comprised in the Petitioner's Ocean Front Land being L.R No Plot No. MN/III/1450(original) measuring approximately 13.40 hectares and or occupying, possessing and or erecting and developing any structures thereon.

(v) Vacant possession of the parcels of land known as L.R Nos. Mainland North/III/2944, Mainland North/III/2945 and Mainland North/III/2946 comprised in the Petitioner's Ocean Front Land being L.R No Plot No. MN/III/1450(original) measuring approximately 13.40 hectares by the respondents and any other trespasser thereon.

(vi) General damages for trespass.

(vii) Costs of this suit.

4. On 22 March 2021, I pointed out to Mr. Oluoch Wauna, learned counsel for the petitioner, that I had my doubts whether this case is well suited to be heard as a constitutional petition, for in my eyes, the same sought private law remedies of eviction and permanent injunction against individuals. I directed the petitioner to show cause why the suit should not be struck out or show cause why the suit ought to be continued as a petition.

5. When counsel appeared on 7 June 2019, he applied that the petition be turned into an ordinary suit; that the proceedings do continue as if the petition had been begun by filing a plaint; that the petition do stand as the plaint and in that event, the respondents do file their defences in 14 days; that the parties thereafter comply with Order 3 Rule 2 and Order 7 Rule 5 respectively and Order 11 of the Civil Procedure Rules, 2010. It was his view that the proposed directions will not prejudice the respondents. Counsel also mentioned that the court has already made a ruling on an application for injunction that had been filed.

6. I have considered the above. It is apparent from the submissions of counsel, that counsel is conceding that this suit ought to have been instituted through a plaint. On my part, I have no doubt. The suit is against private individuals and seeks remedies in the exclusive domain of private law. I already set out what the petitioner pleaded as being the legal basis of the constitutional petition which was said to be Article 62(1) and 40 (3) of the Constitution. Article 62 does nothing more than describe what constitutes public land. It is merely a definition provision so it cannot be argued that it has been violated by the respondents. Article 40 (3) is drawn as follows :-

40 (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

7. It will be seen that Article 40 (3) above directs the State not to deprive a person of property unless certain parameters are met. The respondents herein are not the State. Neither are they part of the Government or employees of the State or any State organ. They are simply individuals acting on their own volition and have absolutely no connection with the State. I do not therefore see how it can be said that they have violated Article 40 (3) as claimed by the petitioner.

8. There is no escaping that what the petitioner is seeking has no constitutional underpin at all. This is an apparently simple case of trespass and permanent injunction. It appears to me a clear civil dispute alleging the tort of trespass. It should have been commenced through a plaint and not a constitutional petition. It has been said time without number that the constitutional procedure process should not be subjected to abuse, where persons file all sorts of mundane civil disputes under the constitutional procedure process. In the case of *Gabriel Mutava & 2 Others vs Managing Director, Kenya Ports Authority (2016) eKLR* the Court of Appeal stated as follows :-

“Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

9. What I need to determine is whether to strike it out, or whether to convert the petition into a plaint. On this, the court has wide discretion. I am alive to Article 159 (2) (d) of the Constitution, which has been cited to me by Mr. Oluoch. It provides as follows :-

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(d) justice shall be administered without undue regard to procedural technicalities.

10. I will reiterate that the court has wide discretion in making a determination whether or not a suit commenced by way of a petition may be converted, so that it may be deemed as one commenced by way of plaint. The principal consideration is the justice to the parties. I ask myself whether in this case justice can indeed be dispensed to both petitioner and respondents if the petition herein is converted into a plaint. I am not persuaded. Procedural justice is just as important as substantive justice. At times, when you get your procedure all wrong, it may be difficult to arrive at a just and fair determination on the merits. It may happen that when a wrong procedure is followed, some grounds of attack or defences may not be available to the other party. In this suit, the pleading herein is that the respondents have violated Article 40 (3) of the Constitution which I have shown is a provision of law touching on State and not individual violation. Even if I am to convert the petition into a plaint, the alleged constitutional violations still remain as part of the pleadings, yet these are not matters that the respondents can be said to have violated and cannot answer to. The defendants, in case they wish to raise a counterclaim, may also not be able to, given the nature of the procedure employed.

11. My view is that it is best in the circumstances that the petitioner goes back to the drawing board, and if it wishes, come to court through the correct procedure, so that all parties may be given a proper opportunity to ventilate their respective cases and a just determination of the dispute be made on the merits.

12. I am therefore constrained to strike out this petition. It is hereby struck out.

13. I will not make any orders as to costs taking into consideration all factors in this case.

14. Orders accordingly.

DATED AND DELIVERED THIS 17TH DAY OF JUNE 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.