



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CONSTITUTIONAL PETITION. NO. 11 OF 2021

DOMINIC KIOKO MUTUA..... PETITIONER

VERSUS

1. ELIZABETH MUTHINA MAKARAI

2. LAND REGISTRAR TAITA TAVETA

3. ASSISTANT DIRECTOR LAND ADJUDICATION AND SETTLEMENT, TAVETA

4. DIRECTOR OF PUBLIC PROSECUTION

5. THE HON. ATTORNEY GENERAL.....RESPONDENTS

RULING

1. This suit was commenced by way of a petition dated 25.2.2021 and simultaneously with the filing of the petition, the petitioner took out a notice of motion, of even date seeking orders inter alia: -

a. Spent

b. Spent

c. Spent

d. Spent

e. That this honourable court be pleased to order the 3rd respondent to provide petitioner the enumeration list and register of squatters entitled to land on Taita Taveta Ziwani Phase 1 Scheme.

f. That this honourable court be pleased to issue a conservatory order restraining and/or preventing the respondents or their agents or servants or any persons acting on their direction or authority from evicting, removing or in any manner interfering with the petitioners occupation, possession and use of the property known as Taita Taveta Ziwani Phase 1 Scheme/590 pending the hearing and determination of the constitutional petition herein.

g. That this honourable court be pleased to issue a temporary injunction restraining, preventing and restricting the 1st respondent or her servants or agents from trespassing, entering, farming, disposing leasing, charging or in any manner whatsoever dealing with or interfering with the petitioner's occupation and/or possession of plot 590/ZIWANI PHASE 1 SCHEME/TAITA TAVETA pending the hearing and determination of the constitutional petition.

h. That this honourable court be pleased to stay the criminal proceedings, in Taveta Law Courts MCCR/E095/2020 Republic vs Dominic Kioko Mutua pending hearing and determination of the constitutional petition herein.

2. The matter having been filed under certificate of urgency and the court directed that service be effected on the respondents. On 16.3.2020, the 2nd 3rd and 5th respondents were represented by Ms. Kiti Counsel who requested for 14 days to file a response to the application and the petition. On the said date, leave was thus granted to the 2nd, 3rd and 5th respondent to file their response to the application within 14 days and

the applicant was equally directed to serve the 1st and 4th respondents for hearing inter-partes on 16.6.2021. On 16.6.2021, there was no appearance for all the respondents and the applicant having filed his submissions and an affidavit of service duly filed, this court was satisfied that service had been effected on the 1st and 4th respondents, while the 2nd, 3rd and 5th respondents were not represented, even though the date was taken in the presence of Ms. Kiti. The 1st and 4th respondents equally did not file any replying affidavit nor submissions and the only submissions on record were the petitioner/applicants submissions.

3. The applicant seeks the orders enumerated above. It is the applicants contention that he is a genuine and bona fide squatter and occupier of the land parcel known as TAITA TAVETA/ZIWANI PHASE 1 SCHEME/590 which formed part of Gicheha farm out of which 2000 acres were donated for purposes of a settlement scheme but that fraudulently and without colour of right, the 1st respondent has now been registered as the owner of the suit property. This being an interlocutory application which is not opposed, the facts before the honourable court largely remain uncontroverted. Would the suit property change character by way of a charge or transfer if the orders sought by the applicant are not granted? Although there is only apprehension by the applicant at this point in order thus to preserve the status quo and to protect the suit property from changing character noting that from the affidavit, the applicant resides on the suit property, the applicant is granted orders, in terms of prayers (f) and (g) of the notice of motion application dated 25.2.2021.

4. The applicant had equally sought for an enumeration list and register of squatters from the 3rd respondent which is a reasonable request in order for the court to reach a just determination of the matter especially now that there is no replying affidavit by the 3rd respondent. Accordingly prayer (e) of the application is granted in that respect.

5. With regard to prayer (h) of the application, the applicant seeks the court to stay a criminal proceedings before Taveta law courts being MCCR E095/2020 **Republic vs Dominic Kioko Mutua**. This court declines to grant the same, noting that the petitioner has not demonstrated how his rights and freedoms have been impeded or put to risk. This court notes that in preferring criminal proceedings, the 4th respondent is only carrying out its constitutional and statutory mandate and this court cannot be asked to curtail that mandate where the petition has not demonstrated that the 4th respondent has exceeded its mandate or is interested in achieving a collateral purpose rather than the vindication of the offence of causing disturbance likely to cause a breach of peace. Moreover, the petitioner still has the opportunity to absolve himself in the criminal court. It certainly would not be in order to interfere in the 4th respondent's exercise of its mandate absent of a demonstration of abuse or violation thereof. In my view, public interest in this case would not be served by the grant of the conservatory order in favour of the petitioner in terms of prayer (h).

6. In the result, the application dated 25th February, 2021 is allowed in terms of prayers (e), (f) and (g) thereof. Costs of the application shall be in the cause.

7. Orders accordingly.

Dated, Signed and Delivered at Mombasa this 28th day of July 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE