



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC PET NO. 18 OF 2018

NGURUMAN LTD.....PETITIONER

-VERSUS-

THE HON. ATTORNEY GENERAL & ANO.....RESPONDENTS

JUDGEMENT

This is a Constitutional petition that was filed in court on 17/10/2018 by the Petitioner which is a limited liability company and was brought under Articles 19,20,21,22 and 258 of the Constitution of Kenya 2010.

BACKGROUND OF THE PETITION

The Petitioner is the registered owner of parcel of land known as LR Narok/Nguruman/Kamorora/1 which parcel measures 26,993 HA. The parcel of land was adjudicated in the early 1970's under the land adjudication Act and was allocated to Nguruman Kamorora Group Ranch in which they were registered as the absolute owners. On or about 13/1/1986 the land was subsequently transferred to the Petitioner herein and registered as the absolute proprietor thereof.

The Petitioner herein from 1986 developed and/or caused to be developed Tourist Lodges and Camps, carried out farming and ranching activities, water reticulation system, two airstrips and an extension road network of about 45 km. the Petitioner contends that as at 31/10/2014 the following camps were in existence on the said property namely: -

- a. Olduvai camp with a bed capacity of 12
- b. Nkereketi camp comprising of Eiti camp, Enkashoe camp and Nkareketi camp with a combined bed capacity of 36
- c. Lara camp with a bed capacity of 16

The petitioner further contends that despite living on the land the above touristic camp developed to world class stands those existed on the suit land a variety of fruit trees and various crops which were completely fenced off with a combined electric and barbed wire fencing.

The Petitioner averred that having acquired the land, developed the same its right to acquire and hold the property was guaranteed under section 75 of the repealed constitution of Kenya which right was transitioned pursuant to Articles 40 as read with Article 260 of the Constitution of Kenya. However, in complete disregard of its rights under the constitution of Kenya there took place various invasion in and trespass 1991,2000,2014.

The petitioner contends that in 1991 armed members of the Shompole Group Ranch trespassed on the land and despite the existence of an order of the court in favour of the petitioner which remains in force to date the armed trespassers refused to vacate the Petitioner's land and they continue to violate the Petitioner's constitutional right and the Respondents in the instant petition have neglected and refused to ensure due compliance with the orders of the court. The Petitioner enumerated the said orders as:-

- a. An order of the court dated 25/11/1991
- b. An order dated 13/10/2000
- c. An order dated 1/10/2002

The Petitioners further averred that in then 2000 members of the Shampole Group Ranch, Ol Kiramatian Group Ranch and others unlawfully and without any authority trespassed and encroached on the Petitioners land and yet again filed a number of suits namely HCCC No. 145 of 2001 Nguruman Ltd Versus Shampole Group Ranch and others and Nairobi HCCC No. 146 of 2001 later renamed Kericho HCCC No. 66 of 2009 Nguruman Ltd Versus Ol Kiramatian Group Ranch and that in both cases the Petitioner obtained Judgement in its favour and the Petitioner contends that in both cases the court categorically ordered and directed the Government to assist the Plaintiff to evict the illegal occupiers and to secure the proprietary rights of the petitioners.

The petitioner contends that despite the Judgement of the court which no party had appealed against the Respondent and/or their agents have refused to protect the rights of the petitioners as ordered by the High Court was a failure by the Government to protect and uphold the petitioners this resulted in the petitioner going back to court vide Kericho HCc No. 65 of 2009 Nguruman Limited –Versus-Shompole Group Ranch and others and Kericho HCCC No. 66 of 2009 Nguruman Limited –Versus-Ol Kirimatian Group Ranch and others and Petitioner procured further orders dated 3/7/2014 directing the Officer Commanding Police Division, Kajiado North Sub-County Commander Kajiado North to assist in the eviction of the illegal occupiers.

The Petitioner averred that upon procuring the aforesaid orders the same were served on the Inspector General of the police who acknowledged receipt of the said orders and directed its deputies to expeditiously execute the same and despite service of the said order they were never executed.

The petitioner further averred that on or about 23/10/2014 subsequent to a meeting that was held by elected leaders and other state actors members of the local community and other illegal occupiers were mobilized with a view to undertaking a large scale invasion of the Petitioner's land and on 31/10/2014 the Kajiado County Commissioner informed the Petitioner that an invasion of his property was imminent and he should abandon the property and we to the said call on 31/10/2014 the property was invaded by armed groups of people who violently ejected the petitioners staff from Oldurai camp and Nkareketi camp and commenced looting and destruction of property and despite the petitioners making a report of the invasion, looting and destruction of the property on 3/11/2014 the petitioner returned to court vide Machakos ELC No. 149 of 2014 Nguruman Limited –versus-David Nkedienny in which the court ordered that the Inspector General of the police should ensure that the Petitioner's property is adequately protected from the invasion and destruction and the invaders be moved forthwith.

While compliance with the order of the court in Machakos Elc 149 of 2014 was pending the invaders on 8/11/2014 burnt down the petitioner's Laro Lodge and on 10/11/2014 the Petitioner reported the ongoing invasion and looting to both Ololulunga police station and Ngong police station.

The petitioner avers that as a result of the inaction of the Respondents and more particularly the Inspector General of the Police to ensure due compliance with various court orders that were issued the petitioner's property continue to be occupied by invaders who have taken absolute control over the property and sub-divided the land amongst themselves, the petitioner as the registered and lawful proprietor has effectively and constructively lost the same and thus exists no chance whatsoever to reclaim the land and further that despite the loss of the actual land the Petitioner has lost all his investment and earnings from the said investments.

The petitioner has enumerated the particulars of loss he incurred which comprise of the value of the land, permanent improvements, assets, furniture and consumables, motor vehicles, fruit trees destroyed or died because of the invasion. The Petitioner has further enumerated lost of potential agricultural revenue from 1050 acres of maize and further lost potential revenue from the Eco-tourism facilities that existed on the Petitioner's property.

The Petitioner claimed that in the circumstances of the case even though he remains the registered owner of the property the culminative result of the wrongful acts and omissions of the Respondents and their agents, officials and servants is that the petitioner has been deprived off his right of possession, use and all other components of his right to ownership of the land which amount to arbitrary deprivation of the property and in violation of the right to property and its protection thereof.

The Petitioner averred that a duty was placed on the Government to halt the infringement of his rights more so when lawful court orders were granted and thus he states inaction violated the principle of the Rule of Law under Article 10,21,23 of the constitution.

The Petitioner further contended that their right to property and the safeguard against its interference thereof as envisaged under Article 40 of the Constitution of Kenya was infringed upon and the conduct of the state on the instant petition amounted to deprivation of its property.

The petitioner in view of the above sought for a declaration: -

- a. A declaration that the Petitioner's right to protection guaranteed under Article 40 of the constitution of Kenya and under the Universal Declaration of Human Rights 1948 were violated by the state
- b. A declaration that the Petitioner's right not to be subjected to any form of violence either by public or private sources guaranteed under Article 29 (c) and further guaranteed under Articles 238,239,244 was and continues to be violated by the state.
- c. A declaration that the conduct of the state violates the principles of the Rule of Law enshrined as a national value under Article 10 of the Constitution of Kenya and prejudices the administration of justice.
- d. A declaration that the Petitioner's right to have disputes resolved by application of the law decided in a fair and public hearing before a court guaranteed under Article 50 continues to be violated.
- e. A declaration that the Petitioner's fundamental right to equality and protection against discrimination guaranteed under Article 50 (1) was and continues to be violated by the state

- f. Compensation for land LR No. Narok/Nguruman/Kamorora/1 for kshs. 33,350,000 being the value of the land.
- g. General damages for the violation of the Petitioner's fundamental rights
- h. Aggregated damages of kshs. 1,000,000 for violation of the fundamental right of the Petitioner since 1991.
- i. Interest on (g) (h) and (i)
- j. Special damages under Article 23 of the Constitution of Kenya 2010
 - i. Kshs. 340,000,000 being compensation for the lodges and ancillary buildings on LR No. Narok/Nguruman/Kamorora/1 that were unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31/10/2014.
 - ii. Kshs. 162,000,000 being compensation for electric power, water supply and reticulation infrastructure on LR No. Narok/Nguruman/Kamorora/1 that was unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31/10/2014.
 - iii. Kshs. 510,000,000 being compensation for transport infrastructure on LR NO. Narok/Nguruman/Kamorora/1 that was unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31/10/2014
 - iv. Kshs. 61,177,196 being compensation for loose assets, furniture and consumables for the petitioner on LR No. Narok/Nguruman/Kamorora/1 that was destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31/10/14.
 - v. Kshs. 11,250,000 being compensation for motor vehicles on LR No. Narok/Nguruman/Kamorora/1 that were destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31/10/2014
 - vi. Kshs. 39,470,400 being the value of perennial trees cultivated on the property LR No. Narok/Nguruman/Kamorora/1 which were destroyed or died pursuant to the invasion and occupation thereof commenced on 31/10/2014
 - vii. Kshs. 34,672,600 per year from 1/11/2014 until date of judgement being compensation for loss of agricultural revenue by the petitioner from the parts of LR No. Narok/Nguruman/Kamorora/1 rendered unavailable to the petitioner pursuant to the invasion and occupation thereof commenced on 31/10/2014.
 - viii. Kshs. 170,100,000 per year from 25/11/1991 until date of judgement being compensation for loss of agricultural revenue by the petitioner from the part of LR No. Narok/Nguruman/Kamorora/1 that was unlawfully rendered unavailable to the petitioner by dint of the illegal occupation of the Pakase River basin commenced in 1991 and continuing to date;
 - ix. United States Dollars 9,198,000 per year from 1st November, 2014 until date of judgment being compensation for loss of potential ecotourism revenue by the petitioner from the tourism facilities on LR No. Narok/Nguruman/Kamorora/1 that were rendered unavailable to the petitioner pursuant to the invasion and occupation thereof commenced on 31/10/2014
 - x. Interest on (i) to (ix) above at court rates until payment in full
- k. Any other or further order (s) or beliefs as this court shall deem just
- l. Costs of the petition with interest thereon at court rates.

The 1st Respondent filed a cross-petition dated 5/11/2019 in which The Attorney-General sought for a recall and order for rectification of the Petitioner's title to Narok/Nguruman/Kamorora/1 under section 80 (1) of the Land Registration Act to reflect the correct acreage as at the completion of the Adjudication and registration which was 6,970 hectares. The 1st Respondent further sought that the court to order fresh adjudication of the 20,000 hectares to be excised from Narok/Nguruman/Kamorora/1 in order to establish, determine, ascertain and record the rights and interest over the land of all the people on the ground with regard to the area covered by the said land and the costs of the cross-petition to be borne by the respondents.

The Petition was further supported by the Affidavit of Mr Martin Richard Steyn who is a director of the petitioner and sworn on 17/10/2018 and through a Replying Affidavit to the Cross petition sworn on the 2nd December, 2019 in which he gave a detailed and substantial account of the facts material to and in support of the Petition and in substantiating the said fact the produced the following documents marked as M.R.S. 1 to M.R.S. 66.

THE RESPONDENTS' CASE

The petition was opposed by the Respondent through the affidavit of Harsama Kello who is the secretary Administrator in the state department for crop development in the Ministry of Agriculture and who served as the County Commissioner Kajiado County where the suit land is situated. He stated that the Petition was an abuse of the court process as the cause of action was addressed and determined in various courts. He averred that the various suits as set out under paragraph 24,26,31,33,34 and 37 of the petition and many other suits were currently

not mentioned by the Petitioner and thus making the Petitioner guilty of withholding material fact to the court. Mr Harsama further claimed that the government in the cases mentioned hereinabove were only ordered to supervise the removal of those who trespassed on the suit land by court bailiffs but did not task the government with the actual removal and thus it was incumbent upon the petitioner to see to it that the orders of the court were enforced. The deponent further argued that even though the cases were eventually determined by the court of appeal in finality there was nothing that could be done since the petitioner did not apply for orders of eviction.

The Respondent further averred that what led to the invasion of the petitioner's land was an attempt by the petitioners to auction land belonging to the two group ranches and there was no time that the government had attempted to defeat the execution of decree issued by the court in Kericho HCCC No. 65 of 2009 and 66 of 2009. He further denied that the government withdraw or caused to withdraw security personnel who were stationed at the Petitioners land to pave way for the invasion and stated that the utterances that were made by certain public figures were made in their personal capacities and thus cannot be attributed to the government and in any event the said individuals were later sued in their personal capacities vide Machakos HCCC No. 149 of 2014.

The respondent further averred that it was incumbent upon the petitioner to undertake the development of the suit land while respecting and accommodating the culture and the ways of the local people.

The deponent further stated that the right of the petitioner to the suit land has not crystallized since there exists a suit that is challenging the legality of the Petitioners title being Kajiado ELC 430 of 2017 formerly Kajiado ELC 171 of 2014 which suit is premised on how the acreage of the suit land was increased from 6970 Ha to 26993 Ha.

THE TRIAL

Because of the nature of the petition and by consent of the parties the petition went for full trial. Mr Martin Richard Steyn who is a director of the petitioner gave a detailed account of the circumstances surrounding the various cases involving the petitioner and the respondents and between the petitioner and others. He produced title to the suit land and relied on the supporting affidavit dated 17/10/208 and the further affidavit dated 17/4/2019. He stated that the suit land LR Narok/Nguruman/Kamorora/1 is private land as defined under section 64 of the constitution and that prior to the purchase or lease of the land the petitioner had conducted due diligence on the title and the land by a search carried out in 1984 it was confirmed to the petitioner that the suit land measured 6,970 Ha.

The petitioner in his oral testimony explained the various attempts they made to stop the invasion of the suit land and the various attempts they made to reach to the then Minister for Interior Mr Ole Lenku and the Inspector General of the police. He stated that on the eve of the invasion he filed a suit seeking injunctive orders in Elc No. 149 of 2014 Nguruman Ltd-versus-David Nkediye and 8 others where the court ordered the then Kajiado Police County Commander do provide security to the Plaintiff and the Petitioner's property and ensure that peace prevails. Despite the existence of the said order and the invasion took place.

PW 2 who testified was Mr Joseph Wanjau who is a valuer by profession. He authored a report on the valuation of the damages caused by the invaders.

The respondent called five witnesses.

DW1 Mr. Harsama Kello was the Kajiado County Commissioner when the alleged invasion took place. He relied on this replying affidavit on his replying affidavit that was filed in court on 14/3/2019. DW2 Mr George Seda was at the material time the Officer Commanding Police Division and in his testimony he stated that there was an invasion on the suit land but because of the sheer number of those who invaded the land were many and he had liaised with his superior in Nairobi on how to deal with the issue but he got no response.

SUBMISSIONS

The Petitioner filed submissions on 3/2/2021 and the respondents filed their submissions on 24/3/2021. I have considered the submissions of both the parties and even though both parties have framed difficult issues for determination it is my considered opinion the issues for determination are 2 fold.

- i. Whether the invasion of the petitioner's land constituted an act of deprivation of property contrary to Article 40 of the Constitution of Kenya 2010.
- ii. Whether or not the petitioners are entitled to compensation as prayed in the petition

On whether the invasion of the petitioner's land constituted an Act of deprivation of property contrary to Article 40 of the Constitution of Kenya 2010 during the trial of the petition herein it was not disputed that in 1991, 2000 and 2014 there were invasions of the petitioner's land by groups of individuals. Articles 40 (1) of the Constitution of Kenya 2010 provides

“Subject to Article 65 every person has the right either individually or in association with others to acquire, and own property of any description anywhere in the Republic of Kenya”.

The Petitioner contends that its right to own property is underpinned by the constitution and any attempt to deprive it of the same should not be entertained and the above provision provides total protection against the state or any other party from appropriating any property owned by any individual. The Petitioner contends that when the property was invaded by individuals the state had failed in its obligation to guarantee protection from the invaders despite the existence of various court orders.

Under Section 24 (b) (d) (e) of the National Police Service Act, the National Police had an obligation and duty to not only maintain law and

order but to stop the invasions from taking place but also ensure the protection of life and property which in my considered opinion they totally failed to discharge. Though the court issued orders, courts don't have their own police force to enforce the said orders and the court's will always call upon the National Police Service. Where specific orders have been issued and directed at a specific officer to ensure compliance and an invasion in the magnitude and the subsequent destruction takes place then that is an indictment on those who are charged with the responsibility to not only maintain law and order but also protect the lives and properties of the citizens.

In Arnacheny Limited –versus-Attorney General the court held that the state is liable where the property of an individual is at stake to be taken by others without due process.

From the above it is the finding of this court that the provision of Article 40 (1) and 40 (3) which protects the rights of persons to own property is in absolute terms and that protection can only be interfered with as stipulated in law and this as further buttressed under Article 17 of the Universal declaration of Human Rights 1948.

From the above then it is my finding that the respondents had violated and infringed upon the right of the Petitioner to own property and the protection thereof of not to be deprived of the said property as stipulated in law and in the circumstances I find that the petitioners have proved their petition on a balance of probabilities.

On whether the petitioners are entitled for compensation

The petitioner argues that since he lost property because of lack of the government agencies to stop the invasion of the destruction I find that the Petitioner has proved the same on a balance of probabilities and I accordingly issue the following orders: -

- a. A declaration do issue that the petitioner's rights to protection of property as guaranteed under Article 40 of the constitution of Kenya 2010 was violated by the state
- b. That an order of compensation of Land Reference Narok/Nguruman/Kamorora/1 of kshs. 33,350,000 is hereby issued.

Based on valuation report that was not controverted by the respondents I grant the following: -

- a. Kshs. 340,000,000 being compensation for the lodges and ancillary buildings on LR No. Narok/Nguruman/Kamorora/1 that were unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31/10/2014.
- b. Kshs. 162,000,000 being compensation for electric power, water supply and reticulation infrastructure on LR No. Narok/Nguruman/Kamorora/1 that was unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31/10/2014.
- c. Kshs. 61,177,196 being compensation for loss assets, furniture and consumables of the petitioner on LR No. Narok/Nguruman/Kamorora/1 that was destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31/10/14.
- d. Kshs. 11,250,000 being compensation for motor vehicles on LR No. Narok/Nguruman/Kamorora/1 that were destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31/10/2014
- e. Kshs. 39,470,400 being the value of perennial trees cultivated on the property LR No. Narok/Nguruman/Kamorora/1 which were destroyed or died pursuant to the invasion and occupation thereof commenced on 31/10/2014
- f. United States Dollars 9,198,000 per year from 1st November, 2014 until date of judgment being compensation for loss of potential ecotourism revenue by the petitioner from the tourism facilities on LR No. Narok/Nguruman/Kamorora/1 that were rendered unavailable to the petitioner pursuant to the invasion and occupation thereof commenced on 31/10/2014 and interest thereon until payment in full.

The cost of the petition to the petitioners.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 28TH DAY OF JULY, 0F 2021

MOHAMED N. KULLOW

JUDGE

28/7/2021

In the presence of:-

CA:Chuma

Ms Hannan El-kiey holding brief for Ahmed Nassir Senior Counsel for the petitioners

Ms Njagi holding brief for Erodi for the respondents