



REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA OF KENYA AT MIGORI

PET NO. 4 OF 2018

NYANGI JOHN JUMA.....1ST PETITIONER

CATHARINA JUMA WANGUB.....2ND PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MIGORI.....1ST RESPONDENT

ELPHAS OMOLO, DIRECTOR OF ROADS,

MIGORI COUNTY.....2ND RESPONDENT

MEREZA AKE.....3RD RESPONDENT

BOAZ NYAKITO.....4TH RESPONDENT

JOHANNES NYABOHA MAROA.....5TH RESPONDENT

SAMUEL CHACHA.....6TH RESPONDENT

NYAMATIKO TINGO NASHON.....7TH RESPONDENT

RULING

1. This Ruling concerns a Notice of Preliminary Objection to the Petition dated 17th October 2019 and filed in Court on even date. The Respondents through M/S, Okongo Wandango and Company Advocates, have raised the preliminary objection to the instant petition dated 22nd September 2016 and duly filed on 15th March 2017 on points of law which include that:

a) Land Parcel No. Bukira/Buhiringera/128 is registered to the proprietors-in-common below:

Wangubo Momanyi- owning a fifth of a share thereof.

Mwita Wangubo- owning a fifth of a share thereof.

Chuma Wangubo- owning a fifth of a share thereof.

Nyonganyi Wangubo- owning a fifth of a share thereof.

Kegocha Wangubo – owning a fifth of a share thereof.

b) Chuma Wangubo, the 3rd proprietor-in-common (of the suit land) is deceased.

c) None of the petitioners herein is a personal representative of Chuma Wangubo (deceased).

d) The petition dated 22nd September, 2016 discloses no reasonable cause of action, in law.

e) Therefore, this petition is fatally and irredeemably incompetent, and ought to be struck out.

f) This petition is an abuse of the due process of this court.

2. By the petition, the orders sought are as follows;

a) A declaration be issued, that the petitioners, jointly with others, are the legitimate owners of the parcel of land title number Bukira/Buhiringera/128.

b) A declaration be issued, that within the intendment of Article 30(b), the respondents have violated the petitioners' right to privacy.

c) A declaration be issued, that pursuant to Article 40, the petitioners' right to property has been violated.

d) An order for permanent injunction do issue, restraining the respondents by themselves, their agents, consultants, servants, employees or any other person or persons acting on their instructions and/or directions from entering into, seizing, confiscating, occupying, alienating, designing, remaining, visiting, or in any manner whatsoever dealing with land title number Bukira/Buhiringera/128.

e) An order of compensation be issued, compelling the respondents to compensate the petitioners as follows:

37 destroyed mature trees	Kshs. 1, 480, 000
130 metres of barbed wire and bamboo fence	Kshs. 86,000
Residential house	Kshs. 150,000
TOTAL	Kshs. 1, 716, 000

f) An order be issued, for damages for breach of constitutional rights.

g) An order be issued, for general damages.

h) Costs of the petition be awarded to the petitioners.

3. The 1st and 2nd Petitioners who appear in person complain, inter alia, that they are son and widow of Chuma Wangubo (Deceased) respectively. That the deceased is the registered owner, jointly with others, of the suit land, LR NO. BUKIRA / BUHIRINGERA / 128 measuring approximately twenty-eight decimals five hectares (28.5Ha) in area located in Bukira location within Migori County. That on 5th August 2016, the Respondents unlawfully entered into the suit land possessed and occupied by the petitioners and destroyed the petitioners' trees and house with a view to constructing a road thereon in violation of the petitioners' Constitutional rights to the suit land. So, the actions of the Respondents provoked the present petition.

4. In a supplementary affidavit sworn on 14th March 2019 and filed in Court on 15th March 2019, the 1st Petitioner deposed, inter alia, that in February 2019, he instructed Roack Consultant Limited, a licenced property valuer to advise on the market value of the suit land encroached by road construction activities carried out by the Respondents. That inspection and valuation was undertaken in consonant with the International Valuation Standards, Sales Comparison method and the Replacement Cost Method. That the exercise was done as per valuation report and assessment of damage report annexed to the affidavit and marked as "JJ-10, 11 and 12."

5. The Respondents' response to the Petition is in form of the preliminary objection as per paragraph 1 hereinabove.

6. The preliminary objection was argued by way of written submissions further to this court's directions of 17th October, 2019. Accordingly, the Petitioners filed submissions on 15th July 2021 in respect of the preliminary objection. They urged the court to dismiss the preliminary objection and relied on Articles 22 (1)31, 40 (1), 43 (1) 47 and 258 of the Constitution, *Mitu Bell Welfare Society vs= Kenya Airports Authority and 2 others (2021) eKLR and Mumo Matemu*.

7. The respondents did not file any submissions on the preliminary objection.

8. I have examined the entire petition, the preliminary objection thereto and Petitioners submissions. On that account, is the preliminary objection tenable?

9. It is noteworthy that a preliminary objection can dispose of a suit; See *Mukisa Biscuits Manufacturing Co. Ltd-vs-West End Distributors (1969) EA 696*. The terms "pleadings" and "suit" as defined under Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya, are noted accordingly.

10. In the case of **Mukisa Biscuits case (supra)**, Law JA held:-

“..... a preliminary objection consists of a point law which has been pleaded or which raises by clear implication out of the pleadings and if argued as a preliminary objection, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of Limitation or a submission”

11. It is established law that a preliminary objection is a threshold question and best taken at inception. The same calls for a definitive, determine and prompt pronouncement, see **Kakuta Maimai Hamisi =vs= Peris Pesi Tobiko and 2 others (2013)eKLR**.

12. In **Oraro =vs= Mbaja (2005) KLR 141** Ojwang, J (as he then was) applied the **Mukisa Biscuits case (supra)** and held thus;

“... A preliminary Oibjection A point of law which must not be blurred by factual details liable to be contested.....”

13. The Respondents asserted that none of the Petitioners is a personal representative of the estate of the deceased who is one of the proprietors in common of the suit land. I take into account the meaning of the term “personal representative” under **Section 3 of the Law of Succession Act Chapter 160 Laws of Kenya** as well as Sections 61 and 91 of the Land Registration Act, 2016 (2012) on transmission of death of a proprietor in common and the meaning of co-tenancies respectively.

14. In **Rajesh Pranjivan Chudasama =vs= Sailesh Pranjivan Chindasama (2014) eKLR**, the Court of Appeal held thus:-

”..... A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession...”

15. Therefore, the estate of the deceased person is vested in the legal representative who is mandated to originate legal proceedings as stipulated in **Section 82 (a) of the Law of Succession Act Chapter 160 Laws of Kenya**; see also **Trouistik Union International and another =vs= Jane Mbeyu and another (1992) eKLR**.

16. In the case of **Alfred Njau and others-vs-City Council of Nairobi (1982-88) 1 KAR 229**, the Court of Appeal remarked;

“...locus standi is the right to appear or be heard in court or other proceedings....”

17. In the instant petition, the petitioners not being personal representatives of the estate of the deceased have no locus standi to generate it as noted hereinabove. The petition is therefore, misconceived and a nonstarter Ab initio, it must fail.

18. Wherefore, I hereby uphold the respondents’ preliminary objection dated 17th October 2019 and duly filed in court on even date for being meritorious. I proceed to strike out the petition dated 22nd September 2016 with costs to the respondents.

Orders accordingly.

DELIVERED DATED and SIGNED at MIGORI this 28th day of JULY 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

1st Petitioner – Present

Tom Maurice – Court Assistant