



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC PETITION NO. 2 OF 2020

KEVIN KUNDU WAMBINGWA

(Personal representative of Estate

of HILLARIO WAMBINGWA).....PETITIONER

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

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

NATIONAL LAND COMMISSION.....3RD RESPONDENT

RULING

KEVIN KUNDU WAMBINGWA (the Petitioner herein) has moved to this Court vide his Notice of Motion premised under the Provisions of **Section 22** of the **Civil Procedure Act** and **Order 11 Rule 3 (2)** of the **Civil Procedure Rules** seeking the following orders: -

1. That the Respondents, the Hon. Attorney – General, the County Government of Bungoma and the National Land Commission be ordered to cause the Director of Land Adjudication & Settlement Department of Land Adjudication and Settlement and the Chief Land Registrar to produce and avail to the Petitioner for use in evidence the following documents: -

- (a) Aerial photographs of land title NO EAST BUKUSU/SOUTH KANDUYI/120 as originally adjudicated in the records.**
- (b) The original Land Adjudication register for the registration section in which the title NO EAST BUKUSU/SOUTH KANDUYI/120 is situate.**
- (c) The transaction/parcels file for title NO EAST BUKUSU/SOUTH KANDUYI/120.**
- (d) The Registry Index Map (RIM) for title NO EAST BUKUSU/SOUTH KANDUYI/120.**
- (e) Mutation Forms for title NO EAST BUKUSU/SOUTH KANDUYI/120.**

The application is based on the grounds set out therein and is also supported by the affidavit of **MR SAUL S. WASILWA** Counsel for the Petitioner.

The gravamen of the application is that the Petitioner has filed this Petition claiming, inter alia, that his Constitutional rights under **Articles 23, 40, 47 and 50** of the Constitution have been violated by the Government of Kenya which has since 1979 occupied a portion of his land measuring 5 acres out of the title **NO EAST BUKUSU/SOUTH KANDUYI/120**. That by a lease agreement dated 1st April 1979, the Government through the Department of Public Works took a lease of 3 years for a portion measuring 5 acres out of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/120** but the said land was never surrendered to the Petitioner and was instead converted for its own use by erecting structures including the Medical Training College. The Government has ipso factor compulsorily acquired the said 5 acres without following due process and is in possession, control and/or reach of the documents which the Petitioner requires to prove his case. That despite numerous efforts to obtain the said information, the last such communication being a letter dated 9th December 2020 (annexture

SSW 1) made to the County Surveyor, there has been no response.

When the application was placed before me on 24th May 2021, I directed that it be canvassed by way of written submissions to be served upon the Respondents within 14 days. The Respondent would then have 14 days from the date of service to file and serve their responses and submissions. The Petitioner would then have 3 days from the date of service, if need be, to file and serve any supplementary affidavit. The matter would then be mentioned on 23rd June 2021 to confirm compliance and ruling would be delivered on 7th July 2021 by way of electronic mail.

However, only the 2nd Respondent entered appearance through the firm of **CYRIL WAYONGO ADVOCATE** on 18th May 2021. Other than that, none of the Respondents has filed any response to the application which is therefore unopposed. The Petitioner did not file any submissions as directed and the Court shall therefore determine this application based on the grounds set out therein and the supporting affidavit.

The Petitioner cites both **Section 22** of the **Civil Procedure Act** and **Order 11** of the **Civil Procedure Rules**. I think only **Section 22** of the **Civil Procedure Act** is relevant for purposes of this application. It provides as follows: -

22 “Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party –

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects aforesaid;

(c) order any fact to be proved by affidavit.”

The Petitioner’s case is that the Director of Land Adjudicator & Settlement as well as the Chief Land Registrar are in possession of the documents listed herein but notwithstanding numerous efforts by the Petitioner to obtain them, the said documents have not been availed. Although the Petitioner has referred to a letter as annexure **SSW 1** being among the numerous requests made to obtain the said documents, no copy of such letter was annexed. As the application was not opposed, I have no doubt in my mind that such requests for information were indeed made but to no avail. The Petitioner claims that the documents being sought are important for his case as they will **“unmask the subtle transaction that were employed to extinguish the Petitioner’s rights over the 5-acre portion and how the portion became Government Land.”**

Basically, therefore what the Petitioner is seeking is the aid of this Court to access evidence that will be crucial to his case. Courts have previously been reluctant to descend into the arena of litigation by helping a party access evidence in support of his case. In **MUTUA & 51 OTHERS .V. EVEREADY BATTERIES (K) LTD 2005 eKLR**, the Court while resisting such an application held: -

“The plaintiffs should wait for the defendant to serve them with the list of documents that the defendant intends to rely on during the hearing of the case. It is then, and only then that the plaintiffs can make an application seeking an order of this Court to compel the defendant to make further discovery. The application made by the plaintiff is therefore premature. In any event, I do not think that the rule of procedure as related to discovery were meant to aid a litigant who does not have evidence to prove his case. Discovery is meant to assist in the fair disposal of suits and to save the costs of litigation.”

And in **AHMED ABDULLAHI ABDILLE .V. ABDILLE NUR ABDI & OTHERS 2019 eKLR**, the Court while rejecting a similar application stated that: -

“The application which the applicant has filed seeks to prove more evidence in his favour to the prejudice of the Respondent. This Court is an impartial umpire and cannot assist one of the parties to procure evidence to his advantage. This Court is an impartial umpire and cannot exercise its discretion to assist a party to procure evidence to the disadvantage of the opposite party.”

Although the Petitioner has not cited the provisions of **Article 35** of the **Constitution** which deals with access to information, it is abundantly clear from the application that crucial information which is relevant to this Petition is within the custody of the Director of Land Adjudication and Settlement and also the Chief Land Registrar. However, those organs of State have declined to avail that information upon request. **Article 35(1)** of the **Constitution** provides that: -

“Every citizen has the right of access to –

(a) information held by the state; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”
Emphasis added.

It is clear from the application that the Petitioner seeks information that is relevant to prove, inter alia, that his right to property has been violated. The Petitioner has also showed that the said information is within the custody of State organs to wit, the Director of Land Adjudication and Settlement and the Chief Land Registrar. The Petitioner's Counsel **MR SAUL WASILWA** in his affidavit dated 29th March 2021 has averred, inter alia, that several efforts have been made to obtain pertinent information relating to this case but in vain. And although the letter dated 9th December 2020 was not annexed to the affidavit, the application is not opposed and so those averments have not been rebutted. In **PROF. NJUGUNA S. NDUNGU .V. THE ETHICS & ANTI – CORRUPTION COMMISSION & OTHERS 2014 eKLR, ODUNGA J** declined as application to compel the Respondents to produce some correspondence because there was no evidence that a request for such evidence had been made. In **CHARLES OMANGA & OTHERS .V. A G 2004 eKLR**, the Court held that: -

“This case concerns Article 35(1). The Petitioner argues that this provision is self-propelling and that a person is entitled to apply to the Court directly for such information to be given. In my view, this is the wrong approach. Article 35 is part of the Bill of Rights and any person is entitled to enforce these rights under Article 22(1) claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. How is the right to information threatened unless a person has been requested and has been denied the information. A person moving the Court to enforce fundamental rights and freedoms must show that the right sought to be enforced is threatened or violated

Coercive orders of the Court should only be used to enforce Article 35 where a request has been made to the state or it's agency and such request denied. Where the request is denied, the Court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the State organs or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.”

In **ANDREW OMTATAH OKOITI .V. A G & OTHERS**

MUSINGA J (as he then was), held that: -

“Before an application is made to Court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed.

The Court cannot be the first part of call. The Petitioner herein did not demonstrate that he requested the JSC to avail him any information that he considered necessary and the same was not granted.”

In the circumstances of this case, and guided by the reasoning in the above persuasive authorities with which I agree, it is clear that the Director of Land Adjudication and Settlement Development and the Chief Land Registrar are in possession of documents which the Petitioner requires for use as evidence in this case. It is also clear that a request has been made for such information but has not been responded to. Indeed, this is further compounded by the fact that the Respondents did not even bother to file any response to the application. If there was any justification as to why the required information cannot be availed to the Petitioner, nothing would have been easier than for the Respondents to say so in clear terms. To deny the Petitioner the information sought will not only be a violation of his right to information but will also impede his right to the enjoyment of his property which is enshrined in **Article 40** of the **Constitution** and which is the basis upon which he has moved to this Court through this Petition. The application is therefore merited and is for allowing.

The up – shot of the above is that the Notice of Motion dated 20th March 2021 is allowed in the following terms: -

1. The Director of Land Adjudication and Settlement Department and the Chief Land Registrar are hereby ordered to produce and avail to the Petitioner within 14 days of this ruling, the following documents: -

- (a) Aerial photograph of land title NO EAST BUKUSU/SOUTH KANDUYI/120 as originally adjudicated in the records.**
- (b) The original land adjudication register for the registration section in which title NO EAST BUKUSU/SOUTH KANDUYI/120 is situated.**
- (c) The transactions/parcel file for title NO EAST BUKUSU/SOUTH KANDUYI/120.**
- (d) The Registry Index Map for title NO EAST BUKUSU/SOUTH KANDUYI/120.**
- (e) Mutation forms for title NO EAST BUKUSU/SOUTH KANDUYI/120.**

2. No orders as to costs.

Boaz N. Olao.

J U D G E

21st July 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 21st day of July 2021 by way of electronic mail in keeping with this **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

21st July 2021.