



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KITALE

ELC PETITION NO. 3 OF 2018

JOHN MASINDE KANCHENJA.....PETITIONER

VERSUS

LAND ADJUDICATION SETTLEMENT OFFICER,

TRANS-NZOIA COUNTY.....1ST RESPONDENT

THE DIRECTOR OF

LAND ADJUDICATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

JEREMIAH MARABU MIYORO.....INTERESTED PARTY

JUDGMENT

1. This is a petition arising from re-allocation of land to the interested party by the 2nd and 3rd respondents after the first allocation to a disinterested third party was cancelled and while the petitioner was still in occupation. The petitioner has clung to his long occupation of the suit land and his alleged act of applying for allocation of the land as well as the alleged reciprocal act of the respondents of cancelling the previous allocation and preparing a ground report showing that he was in possession and had developed the land as entitling him to precedence before any other party was considered for allocation of the same. On his part, the interested party claims to have purchased the suit land from the previous allottee, but his transaction appears to have occurred in 2015, much later than the cancellation of the allocation to that allottee. Whereas the petitioner's claim as admitted by the respondents (but denied by the interested party) dates back to 1985 the interested party admits that his interest in the land sprung up in the year 2015, and that his allocation was done in 2016, long after the applicant had allegedly applied for the allocation of the land in 2012.

2. In his petition dated 3/6/2018 the petitioner seeks the following orders:

a. A declaration that in allocating Plot Number 182 Kanyarkwat Settlement Scheme measuring approximately 5 acres the 2nd and 3rd respondents should have given precedence to the petitioner by virtue of his actual and long possession of the said land and that the said allocation should have been open public and transparent;

b. Costs of the suit and interest thereon

c. Any other order that this honourable court may deem fit and just to grant.

3. The petition is premised on the grounds which are set out in the supporting an affidavit of the petitioner sworn on 3/6/2018. To recapitulate them here, they are as follows: that the petitioner has occupied the land since 1985. that he was shown the land by the then District Settlement Officer Trans Nzoia to occupy on a temporary basis; that the land in question had been allocated to one David Rono who suffered the brunt of repossession by the SFT for default in compliance with the allotment conditions; that upon repossession the same was re-allocated to one Hannah Kirui in 1990; that Hannah has never showed up to claim the land to date; that on 20/8/12 the petitioner made an application to the SFT to be allocated the suit land; that following that application the 2nd respondent confirmed in writing the petitioner's

physical occupation and possession of the suit land and his developments thereon; that subsequently the 2nd respondent gave Hannah the second allottee notice to remedy the breach of allotment conditions but she never responded thereto in any manner; that on **11/2/2014** the 2nd respondent requisitioned a ground report from the 1st respondent to enable allocation to the petitioner which the latter availed; that in **March 2015** the interested party began claiming the suit land, alleging to have purchased the same from Hannah on **13/3/2015**; that the petitioner reported the matter to the police and the interested party was unable to produce Hannah hence this petition was lodged; that on **27/11/2017** the interested party fenced off the suit land; that the fencing denied the petitioner access to his home; that the petitioner lodged another complaint of trespass with the police at Kapkoi; that possession entitles him to the land; that he would suffer irreparable loss if the suit land he is settled on is occupied by the interested party and that the allocation of the land to the interested party is a violation of his constitutional rights.

The Response

4. In response to the petition, the interested party filed an answer to the petition dated **14/8/2018** and a sworn affidavit of the same date in support of that answer. In brief his answer is that the suit is an abuse of the court process as **Kitale ELC 89 of 2017** exists between the same parties; that the petitioner has not been in occupation of the suit land; that the interested party has been in occupation from **2015** to date; that the petitioner was not settled on the land by the District Settlement Officer as alleged; that the petitioner never made an application for allocation as claimed; that no notice to comply was issued to Hannah and her allotment was not cancelled as claimed; that no ground report was issued confirming the petitioner's occupation as claimed; that the interested party purchased the suit land from Hannah on **13/3/2015**; that the interested party has now been lawfully and without the use of fraud been issued with a title to the suit land now (renamed **Trans Nzoia/Kanyarkwat/182**) on **21/3/2017**; that the interested party is not aware of police investigations regarding the land and that no provision of the constitution has been violated with regard to the petitioner. The interested party thus denies having trespassed on the suit land; his averment is that the petitioner resides on a structure built outside the boundaries of the suit land.

5. This court dealt with an application for conservatory orders dated **7/8/2019** in this matter and, agreeing with the petitioner who was the applicant, granted him conservatory orders restraining interference with the suit land by the respondents.

Submissions

6. The 1st, 2nd and 3rd respondents filed their written submissions on **26/3/2021**. The petitioner filed his written submissions on **2/6/2021** while the interested party filed his on **3/3/2021**.

Determination

7. I have considered the petition and the responses as well as the submissions of the parties. The issues arising for determination in the instant petition are whether the constitutional rights of the petitioner under the cited articles, that is, **Articles 27, 29(c) (d) and (f) 39(3) 47(3)(a) and 60(1) (a) and (d)**, have been violated.

8. This court is convinced that the petitioner took possession of the land in **1985** as stated, that the land was allocated to two other people who never took up the offers; that though the interested party gives mere denials of the fact, there is enough evidence on admission by the respondents to support the petitioner's claim that the allotment to Hannah was cancelled vide the letter dated **14/11/2012** and in the same year, the petitioner lodged his application for allocation and that preparations were made to allocate the land to him. The report dated **20/1/2013** showing that the petitioner was in possession and had developed the land supports this fact.

9. This court is convinced that in the middle of that process the interested party parachuted into the scene and claimed to have purchased the land from Hannah whose allocation had already been cancelled.

10. It is inconceivable that the same Hannah could have had capacity to sell the land after she had been divested of any right to claim it by way of the cancellation of her allotment. Hannah was not produced before the police. Neither was she enjoined to these proceedings, a task that this court thinks was primarily incumbent upon the interested party and the respondents to undertake, though it appears that that burden lay to a greater degree on the shoulders of the interested party. It is not even known whether she exists.

11. Above all this court has already found at the interlocutory stage of conservative orders as follows:

"9. The 1st, 2nd and 3rd respondents in their replying affidavit sworn by the County Land Adjudication and Settlement Officer on 6/5/2019 state that all the actions taken were in compliance with the law. However they do confirm that the plot formerly was allocated to Hannah Kirui and that her allocation was subsequently cancelled; that however the said Hannah Kirui paid Kshs.50,000/= after the notice to remedy the breach;"

12. Further down the ruling of the court dated **28/1/2020** in this claim reads as follows:

"10. I have considered that the 1st - 3rd respondents being the administrators of the land which includes the suit land have conceded that the petitioner had developed the land before the interested party came along and planted crops on the land.

11. A perusal of exhibit "JMK6" in the petition creates the impression of land which had already been settled upon and utilized by the petitioner. It appears that the interested party does not have any structure on the land. In my view it is appropriate to preserve the subject matter of the suit land from the actions of the interested party pending the hearing and determination of this petition.

12. This court finds that the application dated 7/8/2019 is merited. I therefore grant the same and issue the following orders:

(a) A conservatory order restraining the interested party, whether by himself, his servants, agents and/or employees or any person acting on behalf of or on the instructions of the interested party from evicting the petitioner/applicant or otherwise interfering with status quo with regards to the suit land until the hearing and determination of the substantive petition thereof...”

13. No new facts have emerged after these findings were expressed that can change this court’s views. The facts relied on and elaborated on by the parties’ submissions remain those in the petition and the supporting and the opposing affidavits as well as the answer to the petition.

14. It matters not that the petitioner was settled on the suit land on a temporary basis. Though the respondents appear to be prevaricating over the issue at **paragraph 9** of their response, there is evidence that the petitioner applied for allocation before the interested party purported to buy the land and that the respondents took action in preparation for the allocation of the land to the petitioner; a ground report was made and Hannah’s allocation was cancelled for default. In this court’s view the respondents created a legitimate expectation that the land would be allocated to the petitioner.

15. In this court’s view, though the respondents state in their reply that the petitioner was not guaranteed allocation of the land, that position changed when the legitimate expectation of allocation was created in him by the respondents’ response to his allocation.

16. The respondents would have this court believe that the ground report was prepared only after the tussle ensued between the petitioner and the interested party but evidence shows the contrary. Despite the fact that the interested party purported that he purchased the land in **2015** and occupied it the same year the District settlement Officer’s letter dated **20th September 2012** exhibited by the plaintiff shows that the respondents were aware that the petitioner had resided thereon since **1985** and that he had applied in **2012** to be allocated the land. It is therefore not possible that the ground report was made purely pursuant to the report of the dispute to the police. That report had been expected as a matter of course since it had been requested for by the **2nd** respondent from the **1st** respondent after the petitioner applied for the land. The request for it dated **14/7/2015** also preceded the purported purchase of the land by the interested party. It is not possible that, unless there was collusion, an official report could be made to back up the purported purchase which was a private transaction.

17. The respondents have also tried to impress upon this court that they elected to allocate the land to the interested party and that they acted within their mandate. However, there is no good reason given as to why they favoured allocation to the interested party who had not been in occupation of the land; besides, the latter allocation occurred much to the prejudice of the petitioner who had been in lengthy occupation of and had applied for the land long before the interested party featured in the matter. This court observed as follows in a related situation in **Charles Opondo Ochieng & 2 others (All Suing on Their Own Behalf and on Behalf of Jacob Pepela & 112 others v Kabarak Farm Ltd & 19 others; County Government of Trans Nzoia & 7 others (Interested Parties) [2021] eKLR**:

“113. With regard to allegations of discrimination on ethnic basis under Articles 27(4) and 47 the petitioners rely on the list of beneficiaries and label them as of “Tugen” origin. The purported area list they exhibit also has nothing to show that it was prepared by the SFT, therefore the allegation that it was the SFT that allocated the alleged members of the Tugen Community plots within the suit land has not been proved. However, the petitioners’ very conclusory statement on ethnic orientation is hardly enough in a petition of this kind and the court is not expected in this day and age to decipher the ethnic orientation or other origin of persons purely by reading names on a list. It is the opinion of this court that discrimination on ethnic grounds has not been sufficiently proved for that reason. Nevertheless, this court finds no reason why the suit land was taken away from some persons in occupation only to be given to others not in occupation; all citizens are considered as equal by our Constitution and the Law, and whatever the origin or other connection of the allottees, this court finds that the petitioners were not fairly treated by the 6th and the 20th respondents. Article 27(1) of the Constitution provides that the state shall not discriminate directly or indirectly against any person on any ground and it sets out several grounds as examples. It has not been demonstrated that the newcomers purchased the suit land. In fact the petitioners aver that major irregularities in the process of subdivision and transfer compelled the newcomers to engage in deceit that their titles had been lost in order to acquire first title generation documents under the RLA regime over their parcels. The only appropriate conclusion would be that based on *some* preferred criteria known only to themselves, the masterminds of subdivision and transfer of the suit land favoured *some* other Kenyans and allocated them land at the expense of the petitioners who had been in occupation of the land for a long time; whatever criteria was applied by the respondents to prefer outsiders over the persons in occupation of the land for decades, I find that the petitioners’ right under Article 27 of the Constitution to not to be discriminated against has been violated.” (emphasis mine.)

18. The principles of governance in **Article 10** of the **Constitution** include equity and transparency which must run through decisions that the respondents make. It does not reflect well for the respondents to uproot a person in possession in favour of one not in possession. Why should one in occupation and who has developed land be compelled to go and start all over again on a fresh parcel while a newcomer replaces him on the former land? Why would not the respondents allocate the newcomer the alternative land for him to develop from a scratch just like the petitioner did on the suit land? The considerations of the respondents that would justify this kind of decision have not been given in their answer.

19. The petitioner has prayed for a declaration that in allocating **Plot Number 182 Kanyarkwat Settlement Scheme** measuring approximately 5 acres the **2nd** and **3rd** respondents should have given precedence to the petitioner by virtue of his actual and long possession of the said land and that the said allocation should have been open public and transparent. In this petition too, this court, applying the reasoning in the **Charles Opondo Ochieng case (supra)** finds that the respondents’ decision to allocate the suit land to the interested party, which would divest the petitioner of possession, to be irregular unreasonable and in violation of the principles of equity, inclusivity and transparency in **Article 10** and the petitioner’s right to non-discrimination under **Article 27** and also the right to fair administrative action under **Article 47**.

20. This court having found that the said allocation to the interested party was not done transparently it is incumbent upon it to grant suitable

reliefs. **Article 23** of the **Constitution** provides as follows:

“23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.” (Emphasis mine.)

21. It is the proper interpretation of **Article 23 (3)** that this court’s jurisdiction is not restricted to the remedies listed under **sub-articles (3) (a) to (f)**. This court may issue such a remedy as it deems fit and just in the circumstances and the petitioner has appreciated this and sought that the court do issue any such other remedy.

22. Indeed in the case of **Kenya Hotel Properties Limited v Attorney General & 5 others [2018] eKLR** the court held as follows:

“42. I entirely agree with His Lordship, the retired Chief Justice, that there is no remedy the High Court is unable to grant under the constitution. This fact emerges clearly from Article 23 (3) of the constitution on the remedies the court can grant. The court is empowered to grant appropriate relief, including declaration of rights, injunctions and conservatory orders among others, leaving no doubt that the reliefs grantable by the court are inexhaustible. They are at the discretion of the court depending on the facts and circumstances of each case.

43. As to what an “appropriate remedy” is I can do no better than refer to the definition adopted by the constitutional court of South Africa in the case of Fose v Minister of Safety and Security 1997(3) SA786 (CC) (7) BCLR 851 CC that;

“[A]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...In our context an appropriate remedy must mean an effective remedy”(emphasis)

44. And in Minister of Health & others v Treatment Action Campaign & others [2002] ZACC 15; 2002(5) SA 721 BCLR (CC), the same court observed that where a breach of any right has taken place, a court is under a duty to ensure that effective relief is granted, the nature of the right infringed and the nature of the infringement providing guidance as to the appropriate relief in the particular case. (emphasis mine.)

23. I adopt the reasoning of Mwita J in the **Kenya Hotel Properties Limited v Attorney General & 5 others [2018] eKLR** quoted above. It is within the jurisdiction of this court to craft a remedy that suits the situation at hand in this constitutional petition.

24. In the instant case the title has already issued in favour of the interested party. This case must be distinguished from a case in which two citizens not subject to the respondents’ administrative processes are in a dispute about purely private land that has already been registered in the name of one of them. By the time the instant dispute began the land had not been registered in any of the parties’ names. The parties herein are in a dispute regarding whether the shunting aside of the petitioner’s application in favour of the interested party violated the constitutional rights of the petitioner and the interested party has not yet assumed possession of the suit land. This can not be considered as a purely land ownership dispute. Thus whereas in disputes regarding title between individuals the court may pronounce itself as lacking in jurisdiction that is not the course this litigation should take.

25. I have found that the rights of the petitioner have been violated. The remedy he expressly seeks is deserved. The respondents had undertaken to grant him alternative land. However this court has found that if at all the respondents undertook to give him land, he deserved to be allocated the land he is occupying now; there is no plausible reason given by the respondents and the interested party as to why the respondents can not allocate the interested party the alternative land they are now offering the petitioner. It would be extremely oppressive to

compel the petitioner to leave the development he alone had established on the suit land to be enjoyed by the interested party who never contributed to the same only for him to start development from a scratch on the alternative land offered. I find that the allocation of the suit land to the interested party was therefore irregular and against the tenets of our constitution and so liable to cancellation.

What Orders should issue?

26. The upshot of the foregoing is that the petitioner's petition dated 3/6/2018 has merit. Consequently I hereby enter judgment in favour of the petitioner against the respondents and the interested parties jointly and severally and I issue the following final orders:

- a. A declaration that in allocating Plot Number 182 Kanyarkwat Settlement Scheme measuring approximately 5 acres by the 2nd and 3rd respondents should have given precedence to the petitioner by virtue of his actual and long possession of the said land and that the said allocation should have been open public and transparent;
- b. A declaration that the allocation of Plot Number 182 Kanyarkwat Settlement Scheme measuring approximately 5 acres by the 2nd and 3rd respondents to Jeremiah Marabu Miyoro the interested party herein was not conducted in an open equitable and transparent manner and that the allocation violated the constitutional rights of the petitioner to non-discrimination under Article 27 and to fair and equitable administrative action under articles 10 and 47 of the constitution and the said allocation is hereby cancelled;
- c. An order that the purported sale agreement dated 13/3/2015 is invalid and incapable of disposing of any interest in the suit land to Jeremiah Marabu Miyoro;
- d. That the purported letter of allotment dated 9/5/2016 issued by the 2nd and 3rd respondent to Jeremiah Marabu Miyoro and all other consequential administrative documents arising or resulting therefrom in favour of the interested party are irregular, illegal and void and incapable of disposing or supporting the disposal of any interest in the suit land to Jeremiah Marabu Miyoro;
- e. An order that the registration of land parcel No Trans Nzoia /Kanyarkwat /182 in the name of Jeremiah Marabu Miyoro is illegal null and void and it is hereby cancelled.
- f. An order that the title deed issued over parcel No Trans Nzoia /Kanyarkwat /182 on 21/3/2017 in the name of Jeremiah Marabu Miyoro is illegal null and void and is hereby cancelled.
- g. An order of permanent injunction restraining the respondents from allocating the land parcel No Trans Nzoia /Kanyarkwat /182 to any person other than the petitioner.
- h. An order that the petitioner shall be registered as the proprietor of the suit land forthwith.
- i. An order of permanent injunction is hereby issued restraining the interested party Jeremiah Marabu Miyoro from in any manner interfering with the petitioner's quiet possession of the suit land.
- j. The respondents shall pay the petitioner Ksh 200,000/- being damages for violation of his constitutional rights as set out in order (b) herein above.
- k. An order that the costs of the instant petition shall be borne by the interested party only.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 6th day of July, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.