



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC PET. NO. 1 OF 2014**

REUBEN LOTIM ANISOMUK.....1<sup>ST</sup> PETITIONER  
SAMUEL LOSHALIMA LOMUKET.....2<sup>ND</sup> PETITIONER  
SAMUEL AKOMA NGURIA.....3<sup>RD</sup> PETITIONER  
SAMUEL KEMOI KAPEL.....4<sup>TH</sup> PETITIONER  
MICHAEL LIMANGOLE TAMAKAU.....5<sup>TH</sup> PETITIONER  
JOHN KAMOET DAIMOI.....6<sup>TH</sup> PETITIONER  
JOSEPH TOLIM KARURI.....7<sup>TH</sup> PETITIONER  
ONESMUS LOCHONGO KALPATAGH.....8<sup>TH</sup> PETITIONER

**VERSUS**

THE DIRECTOR OF KENYA FOREST SERVICE.....1<sup>ST</sup> RESPONDENT  
THE KENYA FOREST SERVICE.....2<sup>ND</sup> RESPONDENT  
THE ECO-SYSTEM CONSERVATOR WEST POKOT COUNTY.....3<sup>RD</sup> RESPONDENT  
THE DIRECTOR LAND ADJUDICATION SECTION.....4<sup>TH</sup> RESPONDENT  
HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

**RULING**

**The Application**

1. This ruling is in respect of an application by way of Notice of Motion dated 15/4/2021 and filed in court on 15/4/2021 brought under Article 50(1) of the Constitution, Sections 1, 1A, 3 and 3A of the Civil Procedure Act and Order 10 Rule 11 and Order 51 of the Civil Procedure Rules 2010.
2. That application has been brought by the petitioners/applicants seeking orders to asset aside the orders given *suo motu* by the court on 2/12/2019 dismissing the petition for want of prosecution and have the whole suit reinstated. They also ask for costs of this application be in the cause.
3. The application is premised on the grounds set out in the notice of motion and is supported by a sworn affidavit of **Reuben Lotim Anisomuk**, the 1<sup>st</sup> petitioner, sworn on 15/4/2021 on his own behalf and on behalf of the co-petitioners in this matter. The grounds relied on are that the petitioners have been keen to have the petition heard and determined; that the suit had progressed extensively and a colossal amount of money had been used up to come up with a boundary establishment report; that what is pending is for the parties to submit on the field survey report in order for the court to give directions on the hearing of the main petition.

## The Response

4. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are opposing the instant application and filed grounds of opposition and an affidavit sworn on 10/5/2021 by one **Laura Yego**, the Head Of Legal Services, at the office of the 2<sup>nd</sup> respondent and raised the following grounds:

**(1) The application is misconceived, incompetent and fatally defective for being made under the wrong provisions of law or invoking inapplicable provisions of law.**

**(2) The application has been made after a prolonged and inordinate delay of more than one year.**

**(3) The application has failed to meet the legal threshold for setting aside an order.**

**(4) By granting this application, this honourable court will be acting in vain and making purely academic orders that are outside of this Petition.**

**(5) This is not a Civil Suit, but a Constitutional Petition that is governed by special rules other than the Civil Procedure Act and the Civil Procedure Rules.**

**(6) This Petition has been in court for six (6) years before being dismissed for want of prosecution.**

**(7) The Survey Report the petitioners/applicants are alluding to had already been filed in court and was adverse to the petitioners/applicant since it confirmed that they had encroached on forest land and were therefore trespassers.**

**(8) Contrary to the petitioners' application, these proceedings are a Constitutional Petition and not a Civil Suit, and was filed on 11/3/2014 and not 11/3/2019.**

**(9) The alleged Kshs.4,003,900/= survey fees were paid by the respondents and not the petitioners hence the petitioners having not paid even a single cent are therefore not losing any money if this petition stands dismissed.**

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents pray that the instant application be dismissed with costs.

6. The 4<sup>th</sup> and 5<sup>th</sup> respondent did not oppose the application dated 15/4/2021.

## Submissions

7. The petitioners written submissions were filed on 15/6/2021. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their submissions on 22/6/2021.

## Determination

8. I have considered the application as well as the responses including the submissions of the parties. The main issue arising for determination in the instant application is whether the order dismissing the petition should be set aside.

9. It is admitted that on 2/12/2019 when the matter came up for hearing the petitioners and their counsel were absent. The petitioners aver that they were never informed of the mention date nor of the dismissal. No other reason is given. I have noted and I agree with the 1<sup>st</sup> -3<sup>rd</sup> respondents that the delay in lodging the instant application for setting aside is inordinate. The dismissal order having been made on 2/12/2019 and the instant application having been filed on 15/4/2021, a period of **28 months**. That delay has not been explained and that failure to explain it fatal to the application.

10. I have considered that this is a dispute in which a substantive decision as to the rights of the parties should be issued at the right forum so as to bring to an end the conflict between the residents and the institutions named herein as respondents. It is also vital that a firm adjudication be made concerning the boundaries to the forest land so that the watchdog institutions concerned may safeguard the environment without any apprehension that they may be exceeding their legal boundaries. However, there are salient facts about this petition as described hereinbelow that render it futile to reinstate the petition.

11. The background to the petition is that the 1<sup>st</sup> respondent issued an eviction notice dated 6/1/2014 giving notice of his intention to evict all people living within the forest reserve in West Pokot illegally. The petitioners lodged this petition claiming that the notice was ambiguous as it did not state the specific forest affected, the particular persons affected, the period when the eviction was to take place, the definition of who squatters are and their number, and that the notice was intended to intimidate and to harass the petitioners and was issued without public participation. After the deadline expired a task force, which the petitioners term as conflicted for involving the secretary to the forest department, was formed.

12. I note that the petition herein concerns some titles said to be held by some of the petitioners. Some copies of title deeds to land were exhibited in the petition, showing some residents appear to have been registered as owners of some land which can not be verified at this stage as to whether it was within the forest area or not. **Paragraphs 4, 5, 6 and 7** of the affidavit in support of the petition shows that matters relating to propriety of title shall arise in the petition if it is reinstated and it proceeds to hearing.

13. In this dispute therefore, there is reasonable foreseeability of challenge to title held by some parties and as stated before in many a

petition it is not the duty of a constitutional court to adjudicate over the propriety of title to land.

14. In this court's view matters that raise propriety of title ought to be dealt with at the appropriate forum, that is, an ordinary civil suit where the documents can be examined and the evidence of witnesses be subjected to cross examination for verification as to its veracity. (See the cases of **Petro Oil Kenya Limited v Kenya Urban Roads Authority [2018] eKLR**, and **Sanghani Investments Ltd -vs- Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 E.A 354**)

15. In the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** the court stated as follows:

**“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”**

16. It is therefore clear that the petitioners ought to channel their grievances to the appropriate forum at the right time.

17. The petitioners appear to place heavy reliance on the provisions of **Sections 27 and 28 of the Registered Lands Act (repealed) and sections 24 and 25 of the Land Registration Act 2012**. However the words in **Kitale ELC Petition No. 5 Of 2018 Justice And Peace Commission Vs The National Land Commission And Others, 2020 eKLR** are to be recalled as follows:

**“The petitioners have acknowledged that some of them have no title at the moment; and even for those who may profess to hold title much may await them in future as the Court Of Appeal has observed as follows in Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another, CA No. 298 of 2013:**

**“While we agree with the appellants that title registered under the Registered Land Act was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that the appellants claim it did. Section 143 of the Act, which granted the court power to order rectification of the register provided as follows...The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”**

18. The last pertinent point this court makes observations on is that it is the duty of the respondents, petition or no petition, to prepare the kind of report that they are now said to have prepared, and to implement it unless it is challenged in court. The notice given to the petitioners has long since expired and a new report having been generated by the respondents, it may precede the impugned report and activities of the Task Force formed on **28/1/2014**, and they may have new material to base their action on and it is quite doubtful that the respondents would rely on the old notice to enforce the boundaries.

19. For the foregoing reasons, this court does not think that this petition would serve any useful purpose if reinstated. It would take the much valuable judicial time that is required for the hearing on the merits of other matters. Now that the petition has already been dismissed for want of prosecution, this court is inclined to let that remain the state of affairs. I do not think that the dismissal of this petition renders the respondents unable to execute their duty in respect of the suit land in any manner whatsoever as they are empowered to do so by law, provided they keep within the law.

20. The upshot of the foregoing is that the application dated **15/4/2021** lacks merit and it is hereby dismissed with costs to the respondents.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 6<sup>th</sup> day of August, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**