



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

PETITION NO. 7 OF 2021

IN THE MATTER OF ARTICLE 10 (1) & (2), 23(3), 40(6), 47(2) 50(1), 62,

67(2) (b) to (h) AND 162(2) OF THE CONSTITUTION OF KENYA, 2020

IN THE MATTER OF ILLEGAL, ALIENATION OF PUBLIC LAND PURSUANT TO

SECTION 9(2) (b) OF THE LAND ACT 2012, AND SECTION 13 OF THE ELC ACT

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

IN THE MATTER OF LR NO KISII MUNICIPALITY/BLOCK 3/491 AND 492

IN THE MATTER OF THE REVIEW OF GRANTS AND DISPOSITION OF

PUBLIC LAND IN KISII COUNTY FINDINGS DATED 28TH APRIL, 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

IN THE MATTER OF GICHERU RULES AS THEY MAY HAVE BEEN AMMENDED

BETWEEN

BENARD NYAMANYA MOGAKA.....PETITIONER

-VERSUS-

NATIONAL LAND COMMISSION.....1ST RESPONDENT

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

THE LAND REGISTRAR.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

BELINDA ONGUSO MOKAYA.....5TH RESPONDENT

MARGRET BOSIBORI MOKAYA.....6TH RESPONDENT

RULING

INTRODUCTION

1. On 8th May 2021, the Petitioner filed this suit vide a Petition seeking a declaration that the transactions leading to the alienation of land parcel number KISII MUNICIPALITY/BLOCK 3/491 and 492 (hereinafter referred to as “the suit property” and the transfer of the same to the 5th and 6th Respondents respectively was null and void and that the letters of allotment issued to them should be revoked.

2. In support of his Petition, the Petitioner swore an affidavit dated 3rd May 2021, in which he averred that he is the Chairman of Jogoo, Kereri, Getare, Iteresi, Kanyakwara, Kianyabinge, Nyakongo and Kanganyo communities in Central Ward of Kisii County and that he filed this Petition on behalf of the residents of those communities and in public interest.

3. He further contended that the residents of the said communities had through the Councilor one Mr. Oresi petitioned the Mayor of the then Kisii Municipality to be allocated land for the establishment of a Health Centre at Jogoo area in Kisii Town. The approval was granted and the residents were allocated land parcel **KISII MUNICIPALITY /BLOCK 3** meant for the mechanical department of the Municipal Council and they constructed thereon a hospital now known as **ORESI HOSPITAL**. It is his averment that since the allocation of **KISII MUNICIPALITY /BLOCK 3** to the residents for purposes constructing the hospital, the same remained public land.

4. The Petitioner averred that the suit property was later illegally alienated to the 5th Respondent. Sometime in the year 2017, the 2nd Respondent filed an unspecified complaint regarding the alienation of the suit property to the 1st Respondent. He further stated that the 1st Respondent using its authority under section 14 of the National Land Commission Act made findings that the 5th Respondent was the rightful owner of the suit property without specifying how it arrived at the said findings. The 2nd Respondent despite being given the said ruling by the 1st Respondent refused to appeal or review the decision.

5. It is the Petitioner’s contention that rather than exercise the wide powers conferred on it under its Constitutive Act, the 1st Respondent relied on a Development Plan in arriving at its decision.

6. He contends that despite the 5th Respondent’s own admission that it transferred the Allotment letter of suit property to the 6th Respondent, the 1st Respondent did not safeguard the due process that once an allotment letter has been issued the same is not transferable to a third party. The Petitioner holds the view that the allotment of the suit property to the 6th Respondent which was without the approval of the 2nd Respondent was contrary to section 9 (2) (b) (3) of the Land Registration Act and the 2nd Respondent should be indicted for not protecting public land.

7. The Petitioner avers that in its decision the 1st Respondent held that the 5th Respondent had been in quiet and uninterrupted possession of the suit property from 2002 yet it is a matter of public knowledge thanks to the famous **Ndungu Report** that there had been misappropriation of public land by government agents which was why the office of the 1st Respondent was created during the clamour for the new constitution.

8. It is the Petitioners’ fear that since the Hospital is constructed on the suit property, there is imminent danger that the 6th Respondent in whose favor the suit property has been transferred might demolish the Hospital to the detriment of the residents.

9. The Petitioner avers that the 6th Respondent is working in cohorts with the 2nd and 5th Respondents by allowing the development of the suit property despite the complaint he preferred to the 1st Respondent, which is epitomized by its reluctance to enforce the building by-laws and rules and has left the construction on the disputed property to extend to a road reserve.

10. In response to the Petition the 5th and 6th Respondents filed a Notice of Preliminary Objection on 26th May, 2021 where they raised the grounds that;

i. This court is devoid of jurisdiction to adjudicate the Petition.

ii. The Petition and the Notice of Motion attached thereto is contrary to the provisions of section 14 of the National Land Commission Act, 2012 as read together with Article 67 of the Constitution of Kenya, 2020.

iii. The matter that is substantially or directly in dispute in the Petition having been dealt with by the National Land commission, the same is therefore *res judicata*.

iv. The Petition does not raise justifiable claims and hence is barred by the doctrine of mootness.

v. The Petition and the Notice of Motion attached thereto do not disclose any reasonable cause of action whatsoever.

vi. The Petition constitutes an abuse of the process of the court.

11. The court directed that the Preliminary Objection be disposed of first by way of written submissions. The Petitioner filed his written submissions on 9th June, 2021 and supplementary submissions on 15th June, 2021 while the 5th and 6th Respondents filed their written submissions on 9th June, 2021.

ISSUES FOR DETERMINATION

12. Having considered the Preliminary Objection and the submissions filed by both parties the issues for determination are:

a) Whether this court has jurisdiction to hear and determine the Petition.

b) whether the Petition meets the threshold of what constitutes a constitutional Petition.

ANALYSIS AND DETERMINATION

Whether this court has jurisdiction to determine the Petition

13. The Jurisdiction of this court has been challenged by the 5th and 6th Respondents on two grounds. First, they argue that the Petition is *res judicata* given that the main issue contained therein has already been disposed of by the National Land Commission vide its decision contained in the report dated 28th April, 2017 following a complaint filed by the 2nd Respondent. Secondly, the Respondents contend that this court is barred from handling this matter by the provisions of section 14 of the National Land Commission Act, 2012 as read together with Article 67 of the Constitution of Kenya, 2010 since the issues raised in the Petition have already been handled by the National Land Commission.

14. Learned counsel for the 5th and 6th Respondents substantially submitted on the two grounds in his bid to demonstrate that this court lacks jurisdiction to entertain this Petition. Counsel submitted that the National Land Commission had pursuant to the complaint filed by the 2nd Respondent determined that the 5th Respondent was the genuine owner of the suit property. He argued that the National Land Commission carried out investigations and/or interrogated the propriety of the alienation of the suit property to the 5th Respondent as detailed in its report dated 28th April, 2017 which the Petitioner annexed to his affidavit.

15. He further argued that the 1st Respondent made a decision in favor of the 5th Respondent after listening to all parties and their witnesses. Counsel contends that since the decision of the National Land Commission was neither challenged nor impeached, the said decision remains valid and lawful.

16. It is his contention that since the 1st Respondent had reviewed the legality of the allocation of the suit property to the 5th Respondent, the only option open to anybody including the Petitioner whose interest were being protected by the 2nd Respondent was to challenge the decision of the 1st Respondent by way of Judicial Review so that the same could be quashed and the dispute referred back to 1st Respondent for interrogation.

17. Counsel concluded that the issues in the Petition having been adjudicated by a constitutional body established by the Constitution under Article 67 and the said body having carried out its mandate stated under section 14 of the National Land Commission Act, this court should decline to entertain this Petition in accordance with the doctrine of avoidance.

18. It is common ground that a decision was rendered by the 1st Respondent on 28th April, 2017 and the same has not been challenged by way of Judicial Review. This Court has no business interfering with the decision of the National Land Commission in the manner proposed by the Petitioner. As correctly submitted by counsel for the 5th and 6th Respondents, this court takes cognizance of the doctrine of avoidance that urges the court to avoid interfering or directing constitutionally mandated bodies on how to carry out their duties. The Petitioner has argued that since the mandate of the 1st Respondent under section 14 of the National Land Commission was coming to an end on 5th of May, 2017, its decision made on 28th April, 2017 was an exercise in futility.

19. With all due respect, this argument by the Petitioner is not legally sound. This is because, if the mandate of the National Land Commission came to an end on 5th May, 2017, then the decisions made before the said date including the subject decision which was made on 28th April, 2017 cannot be affected. As correctly submitted by counsel for the 5th and 6th Respondents, the said decision can only be challenged by way of Judicial Review not through a Constitutional Petition.

Whether the Petition meets the threshold of a Constitutional Petition.

20. The threshold for a Constitutional Petition was summarized in the case of *Anarita Karemi -vs- Republic 1976-1980 KLR where Trevelyan & Hancox, JJ held* as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (emphasis added)

21. Further in *Ostenah Ogero Taracha v Ethics & Anti-Corruption Commission & Attorney General [2017] eKLR* the court held that:

“It is not however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved. Section 107 (1) of the Evidence Act Cap. 80 Laws of Kenya is clear in this regard and provides as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

The letter and spirit of the above provision has been captured in several decisions of the superior courts including but not limited

to the cases of Anarita Karimi Njeru –vs- Republic [1979] eKLR and Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR. Ancillary to the foregoing is the requirement that any prospective petitioner ought to set out his or her complaint with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed.

22. Although the Petitioner has mentioned various articles of the Constitution in the heading of the Petition, he has not demonstrated in any way how each or any of the said articles of the Constitution has been violated by the Respondents with clarity and precision to enable this court to ascertain whether or not a right has been infringed by the Respondents.

23. In view of the foregoing, it is my finding that this Petition does not meet the threshold of a Constitutional Petition and it is hereby struck out. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF NOVEMBER, 2021.

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J.M ONYANGO

JUDGE