



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

CONSTITUTIONAL PETITION NO. E003 OF 2021

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 19,20,21,22,23,40, 47,50 & 162 (2) (B) OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF AN APPLICATION FOR CONTRAVENTION OF THE RIGHT TO OWNERSHIP & PROTECTION OF
PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010.**

AND

**IN THE MATTER OF AN APPLICATION FOR THE CONTRAVENTION OF THE RIGHT TO FAIR ADMINISTRATIVE
ACTIONS UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22 OF THE
CONSTITUTION OF KENYA, 2010.**

BETWEEN

ALI MAALIM DAHIR.....PETITIONER

VERSUS

MANDERA COUNTY GOVERNMENT.....1ST RESPONDENT

CHIEF OFFICER, LANDS, SURVEY & PHYSICAL PLANNING.....2ND RESPONDENT

THE COUNTY SECRETARY, MANDERA COUNTY GOVERNMENT.....3RD RESPONDENT

AND

IBRAHIM ADAN MOHAMMED.....1ST INTERESTED PARTY

NURA ISAACK HACHE.....2ND INTERESTED PARTY

IBRAHIM EYMOI ISSACK.....3RD INTERESTED PARTY

HUSSEIN ADAN MOHAMMED.....4TH INTERESTED PARTY

MOHAMMED EYMOI ISAACK.....5TH INTERESTED PARTY

ALI ALJIROW MOHAMED.....6TH INTERESTED PARTY

JUDGEMENT

1. The Petitioner herein instituted this Petition on 18th March 2021 seeking the following Orders;

i. A declaration that the purported cancellation of the Petitioner's certificate of land ownership No. MCG/TKB/029/2019 as contained in the 2nd Respondent's letter REF. LHPP/VOL1/001 and dated 8th May 2020 is unconstitutional, illegal, null and void for all intent and purposes.

ii. An Order reinstating the validity of the petitioner's certificate of land ownership No. MCG/TKB/029/2019 as issued by the 1st Respondent.

iii. Cost of this petition be borne by the Respondents.

2. The petitioner averred that he has been the owner of **Farm 46 situated in Lag Warera Eldaso Road within Takaba Location** (*herein referred to as the suit premises*). The same was bequeathed to him and his 13 siblings by their father Maalim Dahir Ibrahim in 2004. That in July 2008 vide allotment No. 1235 Ref: CCM/36/ VOL.1 (35) (He annexed the letter of allotment as **AMD1**) the parcel was registered in his name by the defunct County Council of Mandera to hold in trust for the rest of the beneficiaries. That he had been paying rates to the defunct Mandera County Council (**AMD2**).

3. It was his further averment that with the advent of devolution, the County Government of Mandera issued him with a Certificate of Land Ownership No. 00066 dated 5th September 2016 through the land Administrator for Mandera West (**AMD3**). That he noted with concern that the certificate of Ownership contained information on the acreage of the subject parcel as 2 acres which did not represent the correct size of 3.8 acres as represented in the topographical plan. That vide a letter by the County Physical Planner Ref: LHHP/2019/VOL.1 (4) dated 13th May 2019 he sought to correct the error of the size of the subject parcel from 2 acres to 3.8 acres (**AMD4**). That the inconsistency was rectified by the County Government and he was issued with a Certificate of land Ownership No. MCG/TKB/029/2019 on 2nd July 2019. (**AMD5**)

4. That on or about February 2020 the 1st to 6th Respondent encroached on the suit premises, destroyed his perimeter wall and forcefully occupied his parcel of land. That he sought the intervention of the County Government's department of land and Physical Planner vide letter dated 25th February 2020 but the said department did not afford any assistance (**AMD6**). That he therefore sought the intervention of the **Magistrates Court vide Elc Case No. 1 of 2020** whereby the court issued temporary injunctive Orders (**AMD7**).

5. That the aforesaid injunctive Orders have since been vacated vide the court's Ruling delivered on 30th October 2020 (**AMD8**). That the set-back for the dismissal order was the fact that the Certificate of ownership of the disputed property by the County Government of Mandera.

6. He averred that the Respondent while working in cohorts with the Interested parties purported to cancel the petitioner's certificate of land ownership without affording him and his siblings a right to be heard. That the 2nd Respondents letter Ref. LHPP VOL1/001 dated 8th May 2020 (**AMD9**) contained unsubstantiated allegations of use of false information as levelled against him and the 2nd Respondent's action did not follow the due process of the law, particularly **Article 47 of the Constitution of Kenya, 2010**.

7. That he petitioned the County Assembly to consider the removal of the 2nd Respondent from the office for reasons of involvement in unlawful and unethical conduct and violation of the Constitution. That the County assembly refused to admit the petition. (**AMD 10 & 11**)

8. He averred that the aforesaid cancellation of his title has prejudiced his case against the trespassers and have led to him and his family to suffer loss of property.

9. The **1st, 2nd and 3rd Respondent** filed a joint response dated 25th June 2021 sworn by **Barre Mohammed Shabure, Chief Officer, Lands Survey and Physical Planning (Mandera County)**. He averred that the petitioner herein never owned Farm 46 and that what he did was to alter the receipt of Plot Number 46 to claim ownership of Farm No. 46. That the petitioner has violated the rights of the lawful owners of the property and infringed on their own property by obtaining forged documents.

10. That the petitioner was accorded an opportunity before the committee of land and present all his ownership documents verification, the petitioner appeared before the committee, stated his side of the story and presented documents which the committee took for verification. That the interested parties also appeared before the committee stated their side of the story and presented the documents for verification.

11. That the committee came up with a written report after verification of the documents presented by the parties and equally served the same upon the parties. That the petitioner was accorded a fair hearing and the committee applied the dictates of rules of natural justice presented to all the parties.

12. That the petitioner is not the owner of the suit premises. From the records held by the department of Agriculture, the said farm Number 46 is registered in the name of **Abdullahi Eldin Gede**.

13. That the letter of allotment presented by the petitioner is for a plot and not a farm. That he has equally searched the land records and found the documents are not authentic or genuine. That the name of the County Clerk who authorized and signed the allotment letter is missing and does not appear anywhere in the document. That the allotment fails to capture the site of the land as is the norm. The survey fees were not supported by any proof of payment. The petitioner also failed to present County Council minutes to support the allocation. That after verification of the alleged certificates issued by the County Council the same were found to be a forgery. The committee thereafter reached a unanimous determination that the documents presented by the petitioner are forged and non-existent in the record.

14. That the petition does not raise any Constitutional issues warranting determination by this Honorable Court.

15. He presented the following annexures **BMS 1 Authority from 1st and 2nd Respondent. BMS 2 Minutes of Land Resolution dated 2nd May 2020. BMS 3 Minutes dated 4th May 2020. BMS4 Letter revoking certificate dated 8/5/2020.**

16. The Interested party also replied to the petition vide Replying Affidavit dated 12th July 2021 sworn by **Ibrahim Adan Mohamed**. He averred that the suit property is owned by their fathers **Aliow Eymoi Issack, Adan Mohamed Alio and Yarey Isaack Hache and Kharsi Issack Hache**. That the ownership dates back to 1967. That the family of Aliow Eymoi Issack and Adan Mohammed Alio, Yarey Issack Hache, Kharsi Issack Hache had a boundary dispute over the said land between 2009 and 2016 which dispute was amicably resolved by the area Chiefs and community elders of Takaba. He annexed copies of minutes that resolved dispute as **IAM1**.

17. That the family of the late Aliow Eymoi Issack registered the farm with the divisional Agricultural office in Tabaka on 20th May 1998 and was issued a letter approving the ownership (**IAM2**). That the family of Aliow Eymoi Issack was also issued a letter of allotment on 19th October 2008 (**IAM3**). That they have also been equally remitting land rates to Mandera County Council (**IAM4**). That the records from the agriculture office, defunct county council and mandera county land office clearly show that the owner of Farm 36 as Aliow Eymoi Issack. (he annexed a copy of the sketch map from the agriculture office **IAM-5**). That Adan Mohamed Alo, Yarey Issack Hache and Kharsi Issack Hache are Joint registered owners of farm No. 91 known as Gambela Farm next to Eldaso. (He annexed a copy of the farm ownership documents from Ministry of Agriculture livestock and Fisheries, letter from County Council dated 22nd April 2002 and sketch map from agriculture office Takaba indicating ownership, size and boundary **AM6,7 & 8**). That the owners of Farm 91 have been remitting land rent to Mandera County Council from 2002 to 2012 (**IAM 8**)

18. That the records from the Agriculture Office Takaba, Farm 46 is owned by Abdullahi Edin Gede (**IAM-10**). That the petitioner altered the receipt for plot Number 46, crossed the placed indicated plot and wrote farm to claim ownership. That the petitioner deliberately and maliciously bypassed the office of the land administrator in Mandera West where the disputed land is situated and visited the land administrator Mandera East who fraudulently issued him letter dated 18th October 2018.

19. That the elders deliberated on this issue and found that the family of Adan Mohammed Aliow and Aliow Eymoi are the lawful owns of the land (minutes of meeting annexed as **IAM 11**). That they similarly lodged a complaint with the Director, Land and Physical Planning. The department invited both parties to the meeting. Conducted their own investigation and they resolved that he petitioner is not the lawful owner of the land. That they equally reported the matter to the Director of criminal Investigations.

20. That the petitioner unbuoyed filed Elc Case No. 1 of 2020 where he sought interim Injunction. That the court issued it at first but after hearing both parties delivered a Ruling on 30th October 2020 dismissing the petitioner's application. That the petitioner again filed an application for review without tendering additional evidence. The court again dismissed the aforesaid application. That the petitioner has now approached this court with the same evidence and seeks to fraudulently acquire the parcel that he has never owned.

21. The petitioner filed supplementary affidavit dated 23rd September 2021 claiming the Elders meeting had a predetermined outcome. He averred that he had no responsibility to prepare and keep minutes for the allocation of the suit land to himself. He restated that the documents he presented are actual documents granted by the defunct county council. He denied being invited to a meeting held by the Committee of Lands.

22. On 27/9/2021 this Court directed the parties to file written submissions to the petition. The parties have filed their respective submissions. The petitioner submitted that the Respondent did not issue a notice to the petitioner. That the meeting allegedly held on 2/5/2020 & 4/5/2020 are untrue and do not demonstrate that the petitioner was present during the hearing nor was he served with a written report and the reasons why his certificate of ownership was cancelled by the Respondent. He denied appearing before committee. He submitted that the same was an upfront to **Article 50 of the Constitution, Section 2 of the Fair Administration Action Act**. He cited the following authorities; **Ngoingwa Company Limited v National Land Commission & 2 Others [2021] eklr, Sabina Nyambura Githina & Another v Land Registrar, Thika Land Registry & 3 others; Real Capital Ltd (Interested Party) [2021] eklr.**

23. The Respondents submitted that the petitioner was afforded the opportunity but could not prove how he acquired the title. That by virtue of Section 6 of Community Land Act the County Government has the role of keeping land ownership documents therefore can verify the land owners as done in the present case. That the ownership documents held by the interested party were deemed to be genuine and the Interested parties were recognized as the legal owners of the subject property. That the petitioner cannot incline to the provisions of **Section 40 of the Constitution**. He cited the following cases; **Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] eklr, Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Anor, Eldoret Elc case No. 609 B of 2012.**

ANALYSIS AND DETERMINATION

24. I have considered the evidence of the parties and the submissions filed. The main issue for determination is *Whether the petitioner's rights under Article 47 and 50 of the Constitution was violated*. Or spelt our further, whether the petitioner was afforded a fair Hearing?

25. Article 47 of the Constitution provides as follows;

47. Fair administrative action

- 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
- 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the**

person has the right to be given written reasons for the action.

3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall

a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b. promote efficient administration.

26. Article 50 (1) of the Constitution provides as follows;

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

27. In **Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR** the Court held as follows;

“....Administrative Actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. According a party a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

41. This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void....”

28. **Section 6 Of The Community Land Act** vests Community land to the County Government. The same provides as follows;

6. (1) County governments shall hold in trust all unregistered community land on behalf of the communities for which it is held.

(2) The respective county government shall hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered community land.

(3) Upon registration of community land, the respective county government shall promptly release to the community all such monies payable for compulsory acquisition.

(4) Any such monies shall be deposited in a special interest earning account by the county government.

(5) The respective county government shall transfer the amount and the interests earned to the communities as may be prescribed.

(6) Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and any other applicable law.

(7) Upon the registration of any unregistered community land in accordance with this Act, the respective registered community shall, assume the management and administrative functions provided in this Act and the trustee role of the respective county government in relation to the land shall cease.

(8) A county government shall not sell, dispose, transfer, convert for private purposes or in any other way dispose of any unregistered community land that it is holding in trust on behalf of the communities for which it is held.

29. **Section 15 of the Community Land Act** provides as follows;

15. (1) A registered community shall have a community assembly which shall consist of all adult members of the community.

(2) The quorum for decision making by the community shall not be less than two thirds of the community assembly.

(3) The community assembly shall elect between seven and fifteen members of the community assembly to constitute the community land management committee.

(4) The functions of the community land management committee shall be to-

(a) have responsibility over the running of the day to day functions of the community;

- (b) manage and administer registered community land on behalf of the respective community;
- (c) coordinate the development of community land use plans in collaboration with the relevant authorities;
- (d) promote the co-operation and participation among community members in dealing with matters pertaining to the respective registered community land; and
- (e) prescribe rules and regulations, to be ratified by the community assembly, to govern the operations of the community.

(5) Any decision of a registered community to dispose of or otherwise alienate community land shall be binding if it is supported by at least two thirds of the registered adult members of the community, while all other decisions of the registered community shall be by a simple majority of the members present in a meeting.

30. Section 15 of the Community Land Act recognizes the Community assembly as the General arbiter with regards to issues related to community land. Decisions are made by two third of the members of the community of by a simple majority. Section 39 to 40 of the Act provides for dispute resolution mechanisms. Section 42 provides for judicial proceedings. The same provides as follows;

42. Where all efforts of resolving a dispute under this Act fail, a party to the dispute may refer the matter to court.

(2) The Court may-

- (a) confirm, set aside, amend or review the decision which is the subject of the appeal; or**
- (b) make any order in connection therewith as it may deem fit.**

31. I have looked at the pleadings. The minutes held on 16/2/2020 comprised considerable members as has been mandated in Section 15 of the Act. The petitioner herein was one of the complainants listed at Number 25 of the members list. The petitioner was given a chance to present his claim. After long deliberations the chairman and the 42 elders unanimously agreed that farm belong to the family of Adan Mohammed Allow and Alloy Eymoi. The petitioner did not move the court to set aside amend or review the decision.

32. The minutes dated 2nd May 2020 shows that the petitioner herein was present during the meeting. He testified and was given time to present his documents which were subjected to verification. Min/6/2020 of the minutes stated that the verification was to be conducted on 4/05/2020.

33. On 4/5/2020 a meeting was further held which arrived a determination in Min No. 3/5/2020 that the documents presented by the petitioner were not genuine. The petitioner was not present during the final determination. Min No. 3/05/2020 however resolved that the petitioner ought to be informed of the aforesaid determination. A letter was thereafter written to the petitioner dated 8/5/2020 informing him of the aforesaid determination.

34. Whereas the CECM Lands Housing and Physical Planning sat and re-deliberated on the matter, the same was clearly a nullity. The members present did not comprise members of the Community Assembly. The CECM could therefore not deliberate on the same but only confirm the decision made by the community assembly on 16/2/2020. The resolution made by the CECM was as follows at paragraph 3 of the decision;

3. The resolution of the minutes of the chief and community elders held on 16/2/2020 to solve the dispute is adopted and recommended for action.

35. Despite the re-analysis of the case by CECM there was nothing untoward with the decision. The decision had already been made and the same was for endorsement. The CECM was therefore right in arriving at the aforesaid determination.

36. I have done much to show that the petitioner was granted an opportunity to be heard not only during the decision making process but also when the resolution was being effected. His rights under Articles 47 and 50 of the Constitution was therefore not infringed.

37. The petition therefore lacks merit and the same is therefore dismissed with costs.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 17TH DAY DECEMBER, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Onsongo holding brief Yussuf Ali for Petitioner

2. Respondent/Advocate: absent

3.

Court

Assistant:

Ijabo