



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. EO17 OF 2021

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOM UNDER ARTICLE 27, 20, 47, 50, 258, 259 AND

260 OF THE CONSTITUTION OF KENYA

SIMON IKANGATU M'THIBWA.....PETITIONER

VERSUS

ATANASIO KABOTOLE KIBAARA.....1ST RESPONDENT

GEORGE MAILUTHA.....2ND RESPONDENT

MUGAMBI RIBI.....3RD RESPONDENT

LIBUKE WABEA.....4TH RESPONDENT

THE LAND ADJUCIATION OFFICER

TIGANIA EAST.....5TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....6TH RESPONDENT

HON. ATTORNEY GENERAL.....7TH RESPONDENT

RULING

1. The petitioner has brought an application dated 17.2.2021 seeking for:

a) Stay of the proceedings in Tigania Criminal Case No. 450 of 2020 Republic-vs- Ikangatu pending hearing and determination of this suit.

b) Restraining orders against the 5th respondent for dealing with Land Parcel Karama Adjudication Section 6387 or any other parcel number excised from the aforesaid land pending hearing and determination of this petition.

c) Temporary orders restraining the 1st, 2nd, 3rd and 4th respondents whether or their agents, servants or assignees from in any way whatsoever interfering with the petitioner's occupation and the use of Parcel N. Karama Adjudication Section 6387 measuring 1.40 acres pending hearing and determination of this application.

d) The court do issue any further conservatory order or interim orders as may meet the ends of justice in this matter.

2. The application is supported by an affidavit sworn by Simon M'Thibwa on 17.2.2021.

3. The main grounds are the criminal process is being used to intimidate, unleash violence and threaten or silence the petitioner as the respondents conspire to alienate his land, no police action has been forthcoming; the petitioner has been a dedicated recorded owners since 1971; there are developments on the land. Further the petitioner stated the respondents are now colluding to charge him with unfounded charges.

4. The applicant filed his petition on 26.5.2021 claiming he is a recorded owner of **Parcel No. Karana Adjudication Section 6387 since 1971**. That the 1st respondent brought objection proceedings alleging encroachment on his Parcel No. 6025 Karama Adjudication Section which dispute was heard, but the 1st, 2nd, 3rd and 4th respondents colluded and hived off 0.10 acres from his land.

5. He claims the 5th respondent exceeded his powers by hiving off his land which only came to the knowledge of the petitioner in 2007.

6. While the raising claims, the petitioner avers the 6th respondent was brought on board, made flimsy charges against him in Criminal Case **No. 450 of 2020 in Tigania Law Courts**. Similarly the petitioner says his crops were destroyed by the 1st and 2nd respondents on 5.7.2019 but no charges were ever lodged against them despite complaints to the police.

7. He therefore claims his fundamental rights and freedoms to protection of property have been compromised, hence has been subjected to torture, anguish, lack of fair hearing, illegal entry into private land, unfair administrative actions lack of freedom and equality before the law. He prays for registration as the true owner of the suit land; declaration of unconstitutionality of his arrest, charges, alienation of his property and compensation for illegal prosecution.

8. By an affidavit of service filed on 19.7.2021, it is apparent the 1st, 2nd, 3rd, 4th, 5th and 7th respondents were duly served. That notwithstanding no reply to the petition or the application hereof has been filed.

9. From the petition and the application, what comes out, and which is not contested is the petitioner alleges to be a recorded owner of the suit land. The letter dated 10.8.2020 is neither a consent to sue nor does it exactly confirm ownership. It however states adjudication section is at the objection stage. The applicant cannot therefore sustain a case in a court unless he has a consent to sue in line with **Section 29 of the Land Adjudication Act** or **Section 26 (3) of the Land Consolidation Act**.

10. Secondly the alleged subdivision and or objection proceeding appear to have been determined on 22.11.2016. It is not clear what action the petitioner took to safeguard his rights under the adjudication law.

11. Similarly it is not clear why petitioner delayed in taking any action either in 2007 when he discovered the anomalies, or 2016 when the objections were determined and lastly 2019 when the trespass occurred and crop damages was assessed.

12. For a party seeking stay of criminal charges, it is important for the court to be supplied with a copy of the charge sheet to assess whether it is within its mandate as an ELC Court. The above notwithstanding it is my finding this court lacks jurisdiction to hear and determine prayer No. 1 herein.

13. Coming to the prayers 4, 6 and 7, a party seeking such orders must demonstrate a wrong over their rights which calls for a rebuttal from the other party as held in ***Mrao Ltd –vs- First American Bank of Kenya & 2 Others [2003] KLR 125***.

14. In this case whereas the applicant avers breach of his constitutional rights as to ownership of property, he has not explained whether he invoked the internal mechanisms as to appeal under the **Land Consolidation Act** or **Land Adjudication Act**. In absence of any evidence that there exists exceptional circumstances to overlook the internal redress systems thereof, I am not persuaded the petitioner deserves interim orders at this stage.

15. The application dated 17.2.2021 is hereby dismissed with costs.

16. The petitioner to list down the main petition for case conference.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

Kiogora Mugambi for petitioner – absent

Kieti for 5th & 7th for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE