



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 3 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ARTICLE 19(1), 21(1), 22(1), 28, 29, 40 AND 43 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ABUSE AND INFRINGEMENT OF THE PETITIONER'S HUMAN AND FUNDAMENTAL
CONSTITUTIONAL RIGHTS**

AND

**IN THE MATTER OF TITLE NO. KIPLOMBE/KIPLOMBE/BLOCK11(FORMERLY KNOWN AS LAND PARCEL NO. L.R
NO.9723(LR15449) SERGOIT RIVER FARM.**

ERICK KIBIWOTT TARUS & 51 OTHERS.....PETITIONERS

VERSUS

DONALD JAMES GEAR & 2 OTHERS.....RESPONDENT

RULING

1. The petitioners filed this petition dated 25th January, 2019 seeking for orders that:-

a. A declaratory order do issue that each and every petitioner is the bonafide proprietor and owner of their individual land holdings being subdivision of title No.

KIPLOMBE/KIPLOMBE/BLOCK II.

b. A declaratory order do issue that each petitioner has acquired registrable rights of their individual land holdings being sub divisions of Title No.

KIPLOMBE/KIPLOMBE/BLOCK II.

c. A declaratory order do issue that each petitioner has the legal right to persue and obtain registration of title deed for each individual land holding being sub division of Title No. KIPLOMBE/KIPLOMBE/BLOCK II.

d. A Declaratory Order do issue that the Respondents, their personal representative or anybody claiming under them be estopped from dispossessing, evicting and/or interfering with the Petitioner's user and possession of their individual land holdings being sub divisions of Title No. Kiplombe/Kiplombe/Block 11.

2. In response to the petition, the 2nd Respondent filed a notice of Preliminary Objection dated 6.05.2019 raising the following issues;

a. That the Honourable Court lacks the requisite Jurisdiction to hear and determine this matter in light of the dictate of the law at Article 162(2) of the Constitution of Kenya, 2010 and Section 13 (1) and (2) of the Environment and Land Court Act No. 19 of 2011

b. That the Civil Procedure Act, Cap 21 Laws of Kenya and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 does not make provision for the transfer of a suit to a Court of similar status.

3. The 3rd Respondent opposed the petition through a notice of preliminary objection that this Honourable Court lacks the requisite jurisdiction to hear and determine this petition as the issue raised is a preserve of the Environment and Land court.
4. Secondly, that the petition contravenes the provision of *Article 162 (2) of the Constitution of Kenya 2010* and *Section 13(1) and (2) of the Environment and Land Court*.
5. Thirdly, the purported violation of the Fundamental Rights and Freedom touches on the issue of proprietorship of land. The 3rd Respondent also filed a reply to the petition that the petitioners are illegally residing on that Parcel of land known as L.R. NO. 9723 (SERGOIT RIVER FARM) and the descriptions of the land known as **KIPLOMBE/KIPLOMBE/ BLOCK II** does not exist within the Uasin Gishu County Land Registries.
6. That the conversion of the purported title holding done pursuant to a Gazette Notice No. 95 of 8th July, 2005 was granted illegally without following the due process. Conversion and compulsory land acquisition are different legal process where the former is done by the Hon. Minister (CS) and later by the National Land Commissioner and the Commissioner of Lands.
7. That the vesting order issued on the 16th February, 2005 vesting individual registrable rights to the petitioners on L.R. NO 9723 were cancelled, vacated or set aside and declared null and void vide the court order issued on 23/11/2005 and 16/03/2005.
8. That the petitioners have never been beneficiaries of the Government of the Republic of Kenya and the purported sponsored exercise by the state organs was tainted with a lot of irregularities, illegalities and/or forgeries.
9. That the Land Control Board consents given on the 9th April, 1985 were marred with fraud as the then powerful provincial Administration officers in the previous regime convened land control Board meeting at Moiben Division and fraudulently and/or through forgery prepared minutes and passed resolutions or consents sub dividing the parcels of land to the petitioners. The rightful owners were never in attendance during the passing of the resolutions and the consents.
10. That it is the 3rd Respondent's position that the Government of Kenya has neither acquired any parcel of the suit land nor been registered owners of the suit land measuring 377 Acres hence the Government of Kenya could not pass the alleged title to the petitioners.
11. The initial owners *Mr. Bahadhurali Lalji Nurani* and the *Mr. Nyongio Kimiti* refunded the 1st petitioner through their Advocate D. Green and the said *Erick Kibiwott Tarus* undertook to forthwith vacate and leave vacant possession.
12. That the 1st petitioner moved and left vacant possession till the year 1980 when he used his position being a paramount chief to forcefully enter and grab almost 80 Acres of the suit land.
13. That the Board sitting on 9th April, 1985 and the 1st petitioner working in cohorts with other powerful then provincial commissioner applied to the Moiben Division Land control Board for the approval and consent on the subdivision of the suit land where the 1st petitioner consented to be transferred 80 Acres.
14. The original owners *Mr. Nyongio Kimiti* and *Mr. Bahadhurali Nurani* were not in attendance. The decision of the Rift Valley Land Control Board appeal tribunal's decision awarding the 1st petitioner 80 Acres received a lot of public outcry especially from the Estate of Nyongio Kimiti.
15. The petitioners have never enjoyed peaceful and quiet enjoyment of their purported individual holding title for over 40 years as alleged. The petitioners have been in court for decades ventilating for their perceived proprietary rights.
16. That on 10/02/2005 the petitioners herein then the plaintiffs obtained 'vesting orders' signed or issued on the 16/03/2015 vesting individual registrable rights to the petitioners in their respective land parcels of L.R. NO. 9723/1 up to 9723/72 and that Applicants claimed to have acquired registrable rights' by way of Adverse possession and/or prescription.
17. The petitioners have illegally been on the land for over 30 years and they have unlawfully built homes and developed the farm to the detriment of the family of the 3rd Respondents.
18. The petitioners cannot insinuate to contend that they have acquired registrable rights under adverse possession. It is evident that the petitioners have never had any peaceful and quiet possession over the land for the last 30 - 40 years.
19. There is no evidence that the Government ever acquired the land. It has remained a private land since then belonging to the 3rd Respondent.
20. The *Constitution of Kenya – 2010* under *Chapter 4 (Articles 19(1), 21,22,28,40 and 43* does not protect the rights of individuals who unlawfully takes away someone's properties using their positions in the Government. In every fundamental rights and freedoms there are exceptions or limitations.

21. The 1st petitioner used his position as a paramount chief to forcefully enter and grab and/or invade the property of the 3rd Respondent. The other petitioners were either officers in the local administration or holding big offices within the Government of Kenya.
22. The purported right to own a property pursuant to Article 40 of the constitution is misconceived and /or misplaced. This Honourable court cannot protect grabbers or individuals tainted with corruption.
23. It is not contested that the orders being sought are in respect of land known as L.R. 9723 (original Number. 897/6 on land survey NO. 69210 measuring 795 Acres. That the present petition is based on claim for land disguised as a Constitutional Petition.
24. The Petitioners have been on the land for nearly 40 years. They have built permanent homes and developed their individual holdings on which they farm and have been earning their livelihood over the last 40 years, and for 55 years as regards the 1st Petitioner.
25. It is the petitioners' case that they have acquired registrable rights under prescription and/or adverse possession for each of their individual land holdings. They are entitled to the protection by this Honourable court under the bill of rights against dispossession of their land holdings and the infringement of their Human and fundamental constitutional rights, and in particular their rights under *Article 19(1) 19(2), 21(1), 22(1), 28, 29, 40 and 43 of the Constitution of Kenya, 2010*. Further, the petitioners' plea is that their rights could be guaranteed by a declaration that they are entitled to the processing of title deeds in their names for their individual land holdings so as to protect their acquired rights over the land.
26. The Petitioners further contend 'that their rights and fundamental freedoms to own, continue in possession and use of the individual land holdings is under severe threat unless the Honourable Court rises to their defence and protection.'
27. The Petitioners claim is based on the right to protection of property. Based on the fact that they are seeking declaratory orders in respect to parcel no. **Kiplombe/Kiplombe/Block 11**.
28. The petitioners are equally seeking for injunctive orders to have the Respondents stopped from dispossessing, evicting and/or interfering with the Petitioners' user and possession in respect to parcel no. **Kiplombe/Kiplombe/Block 11**.
29. *Section 4 of the Land Court Act No. 19 of 2011* established the *Environment and Land Court* which under *Article 162(1)* of the *Constitution of Kenya* is a superior court of record with the same status of the High Court.
30. The general jurisdiction is set out in *Section 13(1)* of the *Environment and Land Act* which emphasizes that the *Environment and Land Court* has both original and appellate jurisdiction to hear and determine all disputes in accordance to *Article 162 (2)* of the *Constitution of Kenya 2010*.
31. The claim in its entirety is for use and possession of land. That the orders are entirely within the discretion/ambit of the *Environment and Land court (ELC)* court as stipulated in *Section 13(7) (a) and (h)* of the *ELC Act*.
32. The main issue for determination is the question as to whether the *Environment and Land Court* established under *Article 162(2)(b)* of the *Constitution* as read together with *Sections 4 and 13* of the *Environment and Land Court Act* has jurisdiction to hear and determine the petition.
33. The broad jurisdiction of the *Environment and Land Court* is donated by *Article 162* of the *Constitution* which establishes the three tiers of Kenya's Superior Courts. It provides that:-

1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)

2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

a) employment and labour relations; and

b) The environment and the use and occupation of, and title to, land.

3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)

4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

34. In the discharge of the mandatory obligation placed on it by the Constitution, Parliament enacted the *Environment and Land Court Act* and set out in details, the jurisdiction of the Court. *Section 13* of the Act outlines the jurisdiction of the court as follows:

13 Jurisdiction of the Court

1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and

determine disputes-

- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
 - b) relating to compulsory acquisition of land;
 - c) relating to land administration and management;
 - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
 - e) any other dispute relating to environment and land.
- 3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.
- 4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court
- 5) Deleted by Act No. 12 of 2012
- 6) Deleted by Act No. 12 of 2012
- 7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-
- a) interim or permanent preservation orders including injunctions;
 - b) prerogative orders;
 - c) award of damages;
 - d) compensation;
 - e) specific performance;
 - f) restitution; or
 - g) declaration; or
 - h) costs

35. The petitioners in Christopher Ngusu Mulwa & 28 Others -vs-

County Government of Kitui & 2 Others (2017) eKLR moved the court on the premise that the construction in parcel No. Kyangwithya/Misewani/112 is unconstitutional. The the trial court, *Hon Justice Justice A. Angote* held that;

‘..consequently and considering that a dispute relating to land and/or the environment can be commenced by way of a Constitutional Petition, it is only the Environment and Land Court that has jurisdiction to entertain such matters. The two courts cannot have concurrent jurisdiction in such matters because they are two distinct courts.’

The court proceeded to hold that;

‘...for those reasons, the Respondents objection that this court does not have jurisdiction to determine the Petition is unmeritorious. Indeed, it is only this court that has the jurisdiction to hear land disputes, notwithstanding how those disputes are commenced...’

36. In light of the foregoing, I do find that it is only the Environment and Land Court that is clothed with the jurisdiction to hear and determine land matters relating to the use, occupation of and title to land. Hence the petition herein which is about ownership, occupation, dispossession, and adverse possession is a preserve of the Environment and land court and not this Honourable court (High Court). The current petition is therefore defective and untenable in law. It is struck out with costs.

37. The bottom line is that, the preliminary objection to the jurisdiction of this court has merit, the matter is a preserve of the Environment and Land Court.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 3rd day of March, 2020

In the presence of:

Mr. Ngigi holding brief for Mr. Gachara for the petitioner

Ms Kibichy for Mr. Omboto for the 3rd Respondent

Mr. Gregory – Court Assistant