**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT MAKUENI**

**CONSTITUTIONAL PETITION NO.7 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 19, 20, 21, 22(1)(2), (B) 23, 28,40,43(1)(F), 46,47,53,57,60,61,62,63,64,67,73,258 & 259 of the CONSTITUTION OF KENYA,2010**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 40, 43, 46, 47, 50, 53, 57 & 60 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**FAITH WAMBUI MUTUKU.....1ST PETITIONER**

**DAVID MUTHOKA.....2ND PETITIONER**

**PRISCILLAH MUSYIMI.....3RD PETITIONER**

*(Suing on their own behalf and on behalf of all other members, household and land owners of land known as Wakiamba B Settlement Scheme Kaunguni Kiboko within Kibwezi West Sub County Makueni County who are threatened with eviction by The Kenya Agricultural and Livestock Research Organization, KALRO)*

**VERSUS**

**KENYA AGRICULTURAL & LIVESTOCK**

**RESEARCH ORGANISATION.....1ST RESPONDENT**

**NATIONAL LAND COMMISSION.....2ND RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3RD RESPONDENT**

**R U L I N G**

1. The Petitioners/Applicants claim to have settled on Kaunguni Wakiamba 'B' Settlement Scheme *(the scheme)* for over 40 years. The scheme is a portion of land within the 1st Respondent's parcel number LR 25379 *(suitland)* and the Petitioners'/Applicants' grievance is that they have been issued with notices to vacate their homes by the 1st Respondent which notices they consider to be unreasonably short, oppressive and unlawful.

2. For convenience, the 1st Respondent will be referred to as *'KALRO'*, the 2nd Respondent *'NLC'* and the 3rd Respondent *'the AG'*.

3. In the petition, the Petitioners/Applicants are seeking, *inter alia*, declarations that the Respondents have violated their rights to fair administrative action, property, education, human dignity, social security and gainful economic activities as protected by the Constitution. They are also seeking a permanent injunction to restrain the Respondents from evicting them as well as a mandatory injunction compelling KALRO to withdraw the eviction notices and rescind any communication seeking to remove them from the suit land.

4. Together with the petition, the Petitioners/Applicants filed an application for conservatory orders.

5. The Notice of Motion is dated 08/07/2019 and seeks the following reliefs;

***a) Spent.***

***b) That pending the hearing and determination of this application and or petition, the honorable Court be pleased to issue a conservatory order to restrain the respondents jointly and severally from evicting or otherwise interfering with the Petitioners' occupation of the parcels of land they have settled on measuring approximately 79.89 ha and being a portion of and or abutting LR Number 25379, whatsoever.***

***c) That pending the hearing and determination of this application and or petition, the honorable Court be pleased to issue a conservatory order of injunction directing the respondents to maintain the status quo on the suit property known as LR Number 25379 obtaining as at 8th July 2019.***

***d) Costs of the application be provided for.***

6. The application is supported by the grounds on the face of it and the affidavit of Faith Wambui Mutuku sworn on the same day. She deposes that the Petitioners/Applicants and 200 others settled on the scheme on diverse dates from 1971 where they have historically derived their source of food and livelihood and have known no other home. That on 26/06/2019, KALRO issued notices to the Petitioners/Applicants directing them to vacate their homes by 09/07/2019. She has also deposed that the reason given in the notice to vacate is that KALRO, the National Government and County Government of Makueni are in the process of establishing beacons on land parcel No. 25379 *(suit land)* with a view of erecting an electric fence thereon.

7. It's also her deposition that the Petitioners/Applicants are not aware of how and when the decision to beacon the suit land was arrived at thus not afforded a fair hearing. She has also deposed that the Petitioners'/Applicants' claim over the suit land is historical and supersedes any claim by KALRO. That the intended eviction is inhuman, cruel, oppressive and will deprive the Petitioners/Applicants of their human dignity contrary to the dictates of the Constitution of Kenya 2010.

8. She has also deposed that in or about 2017, the Department of Surveys personnel visited the disputed land and proceeded to carry out land adjudication with a view to completing the process of formal allocation of the land to the Petitioners/Applicants and they were subsequently issued with plot numbers but the process stalled for reasons unknown to them.

9. **KALRO** filed a replying affidavit sworn on 29/07/2019 by its Centre Director, Dr. Simon G. Kuria. The gist of the opposition is that the petition does not establish any violation of the Constitution as the Petitioners/Applicants have acknowledged and admitted lack of title to any of the portions of land they are currently allegedly squatting. According to KALRO, the Petitioners/Applicants are trespassers and their sole purpose is to use this honorable Court to sanitize and legalize their otherwise illegal claim without following the due process and procedure of converting public land to private land.

10. It has also deposed that, KALRO is the successor of Kenya Agricultural Research Institute *(KARI)* which inherited and obtained transfer of ownership and possession of the KARI-Research Centre-Kiboko from the defunct Agricultural Research Department of the Ministry of Agriculture and Livestock which under the requirement of the Government of Kenya, entered and occupied the suitland in 1969 as an Agricultural Research station. It has also deposed that the research station was under the Range Management Division of the Ministry of Agriculture and at the time of entering the suitland, there were no private individuals.

11. KALRO has also deposed that it has already accommodated the claims of members of public including the Petitioners/Applicants by establishing and gazetting the following settlement schemes; Kiboko 'A' *(10,500 acres)* in 1991, Kiboko 'B' *(6,909 acres)* in 1997 and Kiboko 'C' *(5.972 acres)* in 2005. It has also deposed that it is not in a position to excise and give out any more portions of its land owing to the requirement of its national research mandate.

12. The **NLC** entered appearance on 06/08/2019 but did not file any response.

13. The **AG** filed the following grounds of opposition;

*a) That the petition does not disclose any cause of action against the AG.*

*b) That the Petitioners have not demonstrated how the AG has violated their Constitutional rights.*

*c) That the petition is misconceived, mischievous and an abuse of the Court process hence subject for dismissal.*

14. The application was canvassed by way of written submissions.

15. In their submissions, the Petitioners/Applicants have cited the three judge bench decision in **Centre for Human Rights and Democracy & 2 others –vs- Judges and Magistrates Vetting Board & 2 others (2012) eKLR** where the principles to consider in deciding whether to grant conservatory orders were discussed. The principles are;

*a) The credentials of the Petitioners.*

*b) The prima facie correctness or nature of information before the Court.*

*c) Whether the grievances expressed in applying for conservatory orders were genuine, legitimate, deserving and appropriate.*

*d) Whether the Applicant had shown or demonstrated the gravity and seriousness of the dispute and whether the Petitioners had engaged in wild vague indefinite or reckless allegations against the respondents.*

16. They submit that the purpose of conservatory orders is to give interim protection against continued or threatened violation of the Petitioners'/Applicants' Constitutional rights pending the hearing of the Constitutional petition. It's also their submission that in order to avail themselves the discretionary powers of the Court, they have to demonstrate;

*a) A prima facie case with probability of success at full hearing.*

*b) The irretrievability or irreparability of the loss if conservatory orders are not issued and that the entire suit will be rendered nugatory if conservatory orders are not granted.*

*c) That the grant of the orders sought is in the public interest.*

17. The Petitioners/Applicants submit that they have demonstrated the fact of their settlement on the scheme together with other interested or affected parties and even KALRO has admitted that at least 49 individuals have settled on the contested area. It is however their contention that the figure of 49 is grossly understated in light of exhibit A- the list signed by all settlers together with their national identity card numbers for ease of verification.

18. The Petitioners/Applicants went on to submit that KALRO has conceded that the actual boundaries of its land are unknown and as such, it was premature to issue notices without establishing whether the contested area falls within its title. According to the Petitioners/Applicants, they have satisfied the criteria for grant of conservatory orders.

19. On whether a *prima facie* case has been established, the Petitioners/Applicants submit that the Constitution requires the Respondents to undertake lawful and legitimate decisions which affect the rights and welfare of others and that the Respondents have not demonstrated that they involved the Petitioners/Applicants before deciding to resurvey the suitland.

20. It is also the Petitioners/Applicants submission that a survey exercise was carried out and they were issued with plot numbers in anticipation of titling and as such, it was necessary to consider whether harmonization of the various surveys was necessary to establish the true boundaries.

21. The Petitioners/Applicants further submitted that the proportionality of the competing interests favors the issuance of conservatory orders pending the full hearing. They contend that being evicted from the land they have called home for years will occasion them irreparable harm particularly considering that the disputed portion is a tiny fraction of the whole. They rely *inter alia* on **Judicial Service Commission –vs- Speaker of the National Assembly & Anor (2013) eKLR** where it was held that;

*"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."*

22. The Petitioners/Applicants have also cited the case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 others** where the Supreme Court of Kenya opined that;

*"Conservatory orders bear a more decided public law connotation; for these are orders to facilitate ordered functioning within public agencies as well as uphold adjudicatory authority of the Court, in the public interest……..conservatory orders consequently should be granted on the inherent merit of the case, bearing in mind the public interest, the Constitutional values on the proportionate magnitude and priority levels attributable to the relevant cause."*

23. It is the Petitioners/Applicants submission that a conservatory order should be issued in order to uphold the adjudicatory authority of the Court.

24. KALRO submits that the application is premised on a claim of ownership and/or proprietary interests in an undetermined and unspecified part of its land being LR No. 25379. They have reiterated the guiding principles as set out in **Centre for Human Rights case *(supra)*** and proceeded to submit that the Petitioners/Applicants have not met any of those requirements and as such, the Court cannot exercise discretion in their favour.

25. KALRO further submitted that the application is premised on unsubstantiated affidavit evidence hence a *prima facie* case has not been established. Secondly, it submits that while there is evidence to show that it is the registered owner, there is no documentary evidence from the Petitioners/Applicants showing their interest over the suitland. It contends that the Petitioners'/Applicants' grievances are not genuine, that they are illegitimate, undeserving and inappropriate for being placed in this Court instead of a Civil Court.

26. KALRO went on to submit that the petition lacks any form of specificity as required of Constitutional petitions, does not state the provisions of the Constitution which have been violated and does not state the manner in which it has violated the said provisions. KALRO contends that this is a fatal mistake/omission which makes it difficult for the Court to determine with certainty the rights and fundamental freedoms which have been violated.

27. KALRO submits that the rights and fundamental freedoms pleaded by the Petitioners/Applicants are not absolute and must be enjoyed and exercised within the limitations under Article 24(1) of the Constitution which include the need to ensure that their enjoyment does not prejudice the rights and fundamental freedoms of others.

28. On whether the Petitioners/Applicants will suffer prejudice as a result of the alleged violation, KALRO submits that the likelihood of prejudice must be weighed against the public interest. It contends that the application is premised on alleged long duration of trespass and occupation of a portion of the suitland and as such, no legally recognizable rights and interests have been established. It also contends that the Petitioners'/Applicants' claim of long duration of occupation is yet to be established by any Court of law. It submits that the Petitioners/Applicants have no protectable rights over the suitland as they have admitted that it belongs to KALRO.

29. KALRO also submits that its public mandate of erecting a perimeter fence around the suitland far outweighs the unsustainable and far fetched claim of ownership by the Petitioners/Applicants. According to KALRO, it's against the public policy of Kenya to sustain acts of trespass to land through Court orders.

30. KALRO submits that there will be no irreparable loss as the Petitioners/Applicants have not erected any permanent structures of the suitland which in any case were erected illegally and unlawfully. On the other hand, they contend that continued trespass will affect its research mandate and undermine its public mandate. It also contends that the funds to erect the perimeter wall were secured from donors and there is a risk of the funding being recalled if the conservatory orders are granted, to the great detriment of the public.

31. There were no submissions from **NLC** and the **AG.**

32. Having looked at the application, responses, annextures and the rival submissions, it is my considered view the only issue for determination is whether the threshold for grant of conservatory orders has been met.

33. The rival parties have aptly captured the guiding principles as discussed in the **Centre for Human Rights case *(supra).***

34. While KALRO has exhibited a title document *(SGK-1)* to prove ownership of the suitland, the Petitioners/Applicants have not tabled anything to prove ownership of the portions they have settled on. Indeed, they have readily agreed that they have been waiting upon KALRO to issue them with titles to those portions. Further, the Petitioners/Applicants claim to have been on the suitland for more than 40 years since 1971 and on the other hand, KALRO has claimed ownership of the suitland since 1969.

35. Annexure **SGK-7** is a letter from the District Officer Makindu dated 23/03/2004 and it is titled; *'Eviction of Unauthorised Entrants in KARI land Kiboko.'* This clearly shows the lack of consent. Evidently, the only reason why the Petitioners/Applicants have not asserted ownership through adverse possession is because they have been there with the full knowledge but without consent of KALRO or its predecessors.

36. I have also seen annexture **SGK-6** which is an undated letter addressed to KALRO from the Petitioners/Applicants representatives. It was received by KALRO on 08/07/2019 and is a reaction to the quit notices dated 26/06/2019. The relevant phrase in the letter states as follows;

> *"I wish to state that this is a short notice to the residents. <u>We have been here for 15 years</u>. We have built permanent houses. We have planted trees. We have children and people to take care …." (emphasis mine)*

37. This is an express admission by the Petitioners/Applicants that they have been on the suitland for 15 years contrary to the period of 40 years stated in their pleadings and submissions. Looking at this period vis-à-vis **SGK-7** *(supra)*, this must be the group of people whose eviction was being sought because it is exactly 15 years from 2004 to 2019. In as much as KALRO claims to have accommodated the Petitioners/Applicants in its already established settlement schemes, there is no evidence to that effect and I find it illogical for KALRO to claim as such and still issue quit notices to the Petitioners/Applicants. In my view, the Petitioners/Applicants do not belong to any of the established schemes and their aim is to ensure that more land is excised from the suitland in order to accommodate them.

38. Annexture **SGK-4** is a letter dated 16/09/2014 from KALRO-Kiboko to the acting Director General of KALRO outlining the history of the settlement schemes and explaining that KALRO has actually given out more land than initially requested. Part of it states as follows;

> *"Therefore, more land was taken than initially requested, implying that there is no more land….in addition, as the minutes here attached show, the Kiboko C settlement scheme was barely squeezed in because almost all habitable land was taken. In fact, we had to close several research facilities such as wildlife domestication infrastructures as well as staff quarters and water reticulation. The wildlife component had zebra and elander which had to be released to the wild; the programme has never taken off since. We are now left with mostly the area covered by volcanic ash and generally a rugged rocky terrain. The little portion with fair soils is where we raise our cattle……the reference to 'Mikukulo' area is actually a KWS issue where they conserve Rhinos though the community had targeted it for ranching. We had recommended that the area be given to us in compensation for the excisions above but the idea came to a cropper since it is a gazette rhino conservancy under KWS. Some of the community members are still squatting on our land hoping that someday, KWS will relent and allow them to settle there."*

39. From the foregoing, it is evident that the Petitoners/Applicants have no proprietary rights to be protected by the Constitution and without such rights, it is hard to see why the registered owner should have consulted them when it decided to embark on a process of re-establishing beacons on the suitland.

40. On the other hand, the Petitioners/Applicants have exhibited some documents marked 'C' which they say are survey records showing their plots. From paragraph 18 of the supporting affidavit, their deposition is that in or about 2017, the Department of Surveys personnel

visited the disputed land and proceeded to carry out land adjudication with a view to completing the process of formal allocation of the land to the Petitioners/Applicants. That the Petitioners/Applicants were subsequently issued with plot numbers but the process stalled for reasons unknown to them.

41. I have looked at the said annextures and the visible content does not show their origin thus the Petitioners'/Applicants' deposition remains unsubstantiated. Further, the authenticity and clarity of the annextures is paramount in light of KALRO's correspondence which shows that it has been consistent in resisting any more excision of its land.

42. I have also looked at annexture 'E' which shows the proceedings of Makueni County Assembly on 18/06/2019 where the Assembly urged the County Executive Committee (CEC) member responsible for matters relating to land to;

> *"…submit a request to the National Land Commission by way of application confined to residents of Wakiamba 'B' to allocate, adjudicate or settle the people of Wakiamba 'B' in the said land in order to improve their disadvantaged position of being squatters, pursuant to the provisions of section 12 of the Land Act, 2012."*

43. Through a letter dated 29/05/2019, the CEC member for Lands in Makueni County wrote to the NLC requesting the Commission to work with KALRO in order to alienate the portions occupied by the Petitioners/Applicants for purposes of allocating land to them. It's interesting to note that this letter was written before the assembly deliberated on the issue. Be that as it may, do the Petitioners/Applicants have a legitimate expectation?

44. In **SC Petition Nos. 14, 14A, 14B & 14C of 2014**; **Communication Commission of Kenya & 5 Others –vs- Royal Media Services & 5 Others** the Supreme Court stated that: -

> *"Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."*

45. **Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000** at pages 449 to 450, addresses the subject of legitimate expectation as follows:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate…. **First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation, whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

46. Further, the requirements for the existence of such an expectation in South African law *(whose legislation is similar to ours)* were restated in **National Director of Public Prosecutions –vs- Philips 2002 (4) SA 60 (W) at paragraph 28**. They include;

> *a) that there must be a representation which is "clear, unambiguous and devoid of relevant qualification",*
>
> *b) that the expectation must be reasonable in the sense that a reasonable person would act upon it,*
>
> *c) that the expectation must have been induced by the decision-maker and*
>
> *d) that it must have been lawful for the decision-maker to make such representation.*

47. Looking at the totality of the evidence before Court, my considered view is that KALRO has been consistent in its resistance to further excisions of the suitland. In fact, it swung into action and tried to evict the Petitioners/Applicants sometimes in 2004 shortly after they settled on the suitland. As opined herein above, the alleged survey records do not show the origin or date of issuance, hence it is impossible to say whether it was within the powers of the issuer to allocate the suitland to the Petitioners/Applicants and in turn give rise to legitimate expectation.

48. As for the deliberations at the County Assembly, evidently it is not within its power to allocate the land to the Petitioners/Applicants otherwise there would have been no need for the CEC member to write to NLC requesting it to work with KALRO. My considered view is that the Petitioners/Applicants cannot clutch on *'legitimate expectation'*.

49. The upshot is that the Petitioners/Applicants have not satisfied the threshold for grant of conservatory orders.

50. On the flipside, my considered view is that public interest will be better served by allowing the electric fence to be erected without further delays. KALRO's deposition is that the estimated cost of erecting the fence is 90 million and has annexed correspondence showing that the expensive project is being funded by the David Sheldrick Widlife Trust. The application has no merit and same is dismissed with costs to the 1st Respondent.

Signed, Dated and Delivered at Makueni this **12th** day of **February, 2020.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Hassan holding brief for Mr. Denis Mung'ata for the Petitioners/Applicants present

No appearance for the 1st, 2nd & 3rd Respondents

Ms. C. Nzioka – Court Assistant

**MBOGO C. G., JUDGE,**

**12/02/2020.**