



**REPUBLIC OF KENYA**

**IN ENVIRONMENT AND LAND COURT AT KERICHO**

**CONSTITUTIONAL PETITION NO. 2 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**IN THE MATTER OF ARTICLES 1,2,3, 19(2), 20(5), 21, 22, 23, 26, 27, 28, 29, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 1, 2 3 AND 19 OF THE CONSTITUTION**

**IN THE MATTER OF THE LAND ACT, 2012**

**BETWEEN**

**KERICHO MWALIMU ENTERPRISES LIMITED.....PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KERICHO.....2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, KERICHO.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....4<sup>TH</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. This ruling pertains to the Petitioner's application dated 20<sup>th</sup> March 2019 together with the Preliminary Objection dated 3<sup>rd</sup> May 2019 filed by the 2<sup>nd</sup> Respondent. A brief background of the matter is necessary before delving into the issues.

2. The Petitioner instituted this Petition on 20<sup>th</sup> March 2019 alleging that the Respondents by themselves or through their agents had aided squatters to encroach on the petitioner's parcel of land parcel known as L.R 631/1353 within Kericho Municipality by allowing the unnamed squatters to construct buildings and occupy the same without consulting the Petitioners thereby resulting in an infringement of the Petitioner's constitutional rights.

3. Contemporaneously with the Petition, the Petitioners filed an application seeking orders that the Land Registrar and County Surveyor Kericho be directed to visit the suit property and file a report of its current status. They also pray that the land Registrar Kericho be ordered to avail the parcel file and Registry Index Map for the suit property to aid the hearing and determination of the Petition.

4. As soon as the 2<sup>nd</sup> Respondent was served with the Petition and Notice of Motion, they filed a Replying affidavit and Notice of Preliminary Objection in which they raise the following issues:

a) That the application and petition as drawn and filed are fatally and incurably defective for want of substance and compliance with the relevant rules of procedure and should be dismissed in *limine*.

b) The said application and Petition proceeds on an incurable misconception that the encroachment of squatters on a parcel of land is the responsibility of the 2<sup>nd</sup> Respondent contrary to the provisions of the land Act, 2012, the Land Registration Act, 2012 and the Constitution of Kenya in so far as the ownership of the suit property is concerned.

c) The said application and petition are otherwise an abuse of the process of this Honourable Court.

d) In the premises the entire Petition is incompetent and should therefore be dismissed in *limine* with costs

5. The court directed that the Preliminary Objection be argued together with the application so that the two could be disposed of at once by way of written submissions. Counsel for the Petitioner filed his submissions but the Respondents did not file any.

#### ISSUES FOR DETERMINATION

- i. Whether the Preliminary objection is valid and if so, whether the application and Petition ought to be dismissed in *limine*
- ii. Whether the orders sought in the application ought to be granted.

#### ANALYSIS AND DETERMINATION

6. The starting point is to examine whether the Preliminary Objection meets the principles of a Preliminary Objection set out in the case of **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) E.A 696**. The court held as follows:

*So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....*

*A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary objections does nothing but unnecessarily increase the costs and occasions confusion of the issues. This improper practice should stop.*

7. Learned counsel for the Petitioners submitted that the preliminary objection does not raise pure points of law as it raises issues relating to the action of the 2<sup>nd</sup> respondent in aiding the encroachment of squatters by issuing the squatters with building permits. He argues that in view of the denial by the 2<sup>nd</sup> defendant, the facts need to be ascertained by adducing evidence and therefore it cannot be dispensed with by way of preliminary objection.

8. I note that the Preliminary objection raises a mixture of both points of law and facts. On the one hand the 2<sup>nd</sup> Respondent points out that the Petition is defective for want of substance and compliance with the relevant rules without elaborating the said rules. On the other hand, the 2<sup>nd</sup> respondent states that the petition has proceeded on the erroneous assumption that the 2<sup>nd</sup> respondent is responsible for the squatter problem on the petitioner's land. Unfortunately, the 2<sup>nd</sup> respondent did not file its submissions to elaborate its preliminary objection as this would have clarified the thrust of its objection. As matters stand, I am inclined to agree with the Petitioner that the Preliminary Objection does not raise pure points of law and I therefore dismiss it.

9. Moving on to the merits of the application, the Petitioner would like the court to order the Land Registrar and County Surveyor Kericho to visit the suit property and file a report of its current status. They also pray that the land Registrar Kericho be ordered to avail the parcel file and Registry Index Map for the suit property to aid the hearing and determination of the Petition.

10. In his supporting affidavit, one Richard Langat who is a director of the Petitioner depones that he is convinced that the respondents have a hand in the encroachment as they have never acted on any of the Petitioner's concerns. I find these allegations rather vague and I agree with the 2<sup>nd</sup> defendant that the petitioner is engaging in a fishing expedition by calling for documents from the 2<sup>nd</sup> respondent without demonstrating that it has tried to obtain the said public documents from the 2<sup>nd</sup> respondent without success. Of further concern to the court is that the Petition has not enjoined the alleged squatters to this Petition and the court cannot be used to assist the petitioner to beef up its case.

11. The cases cited by counsel for the Petitioner are distinguishable from the instant case as the matters referred to the Land Registrar and County Surveyor touched on their mandate under the provisions of the Land Registration Act. In the instant case it is premature for the applicant to require the respondent to visit the suit property and avail the parcel file as the issues in dispute and the necessary parties have not been fully disclosed.

12. In view of the foregoing, I find no merit in both the Preliminary objection and the application and I dismiss them with costs to the 2<sup>nd</sup> respondent.

Dated and signed this .....day of January 2020.

**J.M ONYANGO**

**JUDGE**

Dated, signed and delivered at Kericho this 10<sup>th</sup> day of February, 2020.

**ANTONY KANIARU**

**JUDGE**