



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KITALE

ELC PETITION NO. 7 OF 2016

PETER NJOGU KARANU

ANNE NJOKI NJOROGE

MARGARET WAMBUI KIMITA

CHARLES NJAMA WANGAI

MARTIN MITHEO & OTHERS.....PETITIONERS

VERSUS

NYAKINYUA MUGUMO TREE CO. LTD.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

DIRECTOR OF SURVEYS.....3RD RESPONDENT

ATTORNEY GENERAL.....INTERESTED PARTY

RULING

1. This ruling is with regard to an application by way of Notice of Motion dated **19/9/2019** brought under **Article 159(2) of the Constitution, Section 18(c) and 19 of the Environment & Land Act**. The petitioners seek the following orders:-

(a) ...spent

(b) ...spent

(c) That the petitioners/applicants be allowed to file more documents and this matter do proceed to hearing by way of viva voce evidence.

(d) That pending the hearing and determination of this application and the petition the survey carried out by the members of the 1st respondent be preserved.

2. The application is premised on the grounds set out in the notice of motion and is supported by a sworn affidavit, also dated **19/9/2019**.

3. The grounds relied on are that initially it was agreed that the petition be disposed of on the basis of the pleadings and written submissions; that the 2nd and 3rd respondents have violated the *sub judice* rule and are threatening to cancel the members' survey plus all consequential indentures which number over **200**; that the leaders of the petitioners have been summoned to Ardhi House, Nairobi and ordered to surrender the indentures issued to some members; that there is no legal basis to cancel a survey that is validly registered and allocate resources from tax payers' money to repeat the survey; that there are clearly ulterior motives in the 2nd survey; that in **Kitale ELC No. 103 of 2015** the respondent's had filed an application to be allowed to issue titles to members but they shelved their application following the applicants' objection; that in the area list generated after the 2nd survey several non-members and strangers have been allocated several acres of land to

the detriment of members; that some dishonest members who own only 1 share (i.e. 1 acre) have been allocated more than 5 - 10 times their entitlement; that the applicants want to include all their evidence to support their petition that indeed a violation of their rights under **Article 47** of the Constitution and that the respondents have grossly violated **Chapter 6** of the Constitution and that granting the orders sought will serve the ends of justice.

4. The 1st respondent through one of their directors, **Mary Wangare Githu**, filed replying affidavit on **15/10/2019** and opposed the application. The deponent states that the application has been overtaken by events as the survey sought to be preserved has already been declared illegal and subsequently cancelled and a caveat placed on the land; that the survey was done by strangers without the express instructions of the 1st respondent; that the perpetrators of the illegal survey was charged in **Kitale Criminal Case CMCR. No. 4685 of 2015**; that the Ministry of Lands and Physical Planning had investigated the matter and concluded that the survey was illegal and therefore the instant application is incompetent.

5. The 2nd, 3rd and 4th respondents filed grounds of opposition on **7/10/2019** and opposed the application. The 2nd, 3rd and 4th respondents also filed replying affidavit dated **16/10/2019**. The gist of their response is that this court delivered a ruling on the issue of processing of titles on **28/7/2017** observing that the processing of titles for bona fide shareholders was long overdue; that following that ruling and upon request by the 2nd respondent the 3rd respondent directed that registration “based the RIM” do proceed and the RTA records be cancelled; that thereafter the 2nd respondent recalled the RTA titles upon hearing all interested parties to pave the way for registration and issuance of titles “based on the RIM”; that the 2nd respondent after assessing the status of the suit land confirmed that the issue affecting the 1st respondent is leadership wrangles; that the petitioners were guilty of perjury by claiming in a false affidavit that the original title was lost and were charged and convicted in **Kitale CMCR No. 4685 of 2015**; that the court is *functus officio* owing to the ruling of **28/7/2017**; that the 2nd respondent acted within the law and should be allowed to finalize the administrative processes. Finally the deponent avers that no new evidence has been tendered to demonstrate a violation of the petitioner’s rights and that the instant application is premature as **Section 79 (3) (a)** allows only aggrieved parties to challenge the proceedings and verdicts of the 2nd respondent.

6. The petitioners filed their written submissions on **15/11/2019**. The 1st respondent filed its submissions on **14/11/2019**.

7. I have considered the application as well as the responses including the submissions of the parties.

8. In brief, it appears on the face of the application that the petitioners are seeking to file further documents in the matter and be allowed to call *viva voce* evidence in the matter and that the original survey said to have been carried out by the 1st defendant be preserved.

9. The main bone of contention in this petition is therefore the survey earlier conducted over the suit land, allegedly by the members of the 1st respondent which is approved of by the petitioners. However this survey was subsequently set aside by the respondents in preference of a second survey, much to the chagrin of the petitioners hence the petition. They maintain that the second survey exercise is a waste of taxpayers’ resources since the first survey has already been validly registered. They maintain that the 2nd survey was a corrupt scheme which granted over **126 acres** of land to non-members and excess acreage to some members. They were on **13/8/2019** asked by the Registrar of Titles to appear before the Chief Land Registrar on **3/8/2019** to surrender for cancellation the approximately **200** indentures which had been issued under the original survey. It is alleged that the intended cancellation is not based on any reasonable or lawful explanation and in any event it had been registered following the respondents’ approval. The petitioners aver that it has therefore become necessary to dispose of the petition by way of *viva voce* evidence as submissions alone may not bring out all the issues. For the foregoing reasons the petitioners avers that preservative orders should be granted.

Determination

10. The issues arising for determination in the instant matter are as follows:

(a) Whether this court should set aside its earlier directions ordering the petition to be disposed of by way of written submissions in preference for *viva voce* evidence.

(b) Whether pending the hearing and determination of the petition the original survey carried out should be preserved.

11. The issues are discussed as hereunder:

(a) Whether this court should set aside its earlier directions ordering the petition to be disposed of by way of written submissions in preference for *viva voce* evidence

12. Regarding the first issue hereinabove this court notes that on the **4/7/2019** this court directed as follows:

“This petition will be heard by way of written submissions. The petitioners to file their submissions strictly within 14 days and serve within the same period. The respondents to respond within 14 days of service. If the petitioners fail to file and serve submissions within 14 days of this order this petition shall stand automatically dismissed for want of prosecution. Mention for a judgment date on 30/7/2019.”

13. On the **30/7/2019**, Mr. Wanyama holding brief for Mr. Samba for the petition prayed for an extension of time within which to file submissions and this court granted him **21** days more and scheduled the judgment for **24/10/2019**. Before that date however, the instant application was filed seeking that the petition be heard by way of *viva voce* evidence.

14. The question that arises is whether the petitioners have disclosed a sufficient ground to warrant the grant of orders countermanding the earlier directive of this court on written submissions.

15. A look at the grounds on the fact of the application as well as the supporting affidavit does not reveal any new grounds that warrant such an order. I find that the petitioners' case remains the same: their petition seeks a declaration that the second survey is unlawful and in violation of their rights. I have not seen any contents in the supporting affidavit of *Peter Njogu Karanu* dated **19/9/2019** outlining in any greater detail than the first supporting affidavit filed with the petition, how such violation has occurred.

16. I have also not seen the list of persons said to be adversely affected by such exercise. In any event the mere fact that the constitutional rights of individuals have been violated does not necessarily call for the hearing of a constitutional petition by way of viva voce evidence just like an ordinary civil claim. In this court's view, there are supporting affidavits and replying affidavits filed in the instant petition by means of which allegations of violation may be established or countered. This is the usual procedure in constitutional petitions in our justice system.

17. Besides the instant petition was filed on **15/9/2016** seeking various orders. The petition was not immediately prosecuted. Contemporaneously with the petition was filed an application dated **13/9/2016** which sought conservatory orders to halt what the petitioners calls "*a parallel process of issuing title deeds commenced by the respondents*".

18. The deponent of the supporting affidavit to that application was the 1st petitioner who deponed that the petitioners are all shareholders of the 1st respondent. Upon considering that application, this court was not convinced that the orders sought were merited and it issued a ruling dismissing the application on **28/7/2017**. On its part, the court was in that ruling concerned by the delay occasioned by the petitioners' failure to set down the substantive petition for hearing despite the express orders of court issued on **19/9/2016**. It noted that the issuance of titles to the suit land had been delayed for a long period of time and that there was no concrete evidence of wrong doing on the part of the respondents to warrant the issuance at the interlocutory stage of conservatory orders which would further delay the issuance of titles to the members. The court also noted that the petitioners had not at that interlocutory stage demonstrated any prejudice that would occasioned to them by the second survey.

19. It must be noted that this is quite an old petition and any change of procedure as proposed in the instant application would further delay the hearing of this petition for long as the court would have to await the calling of witnesses in the matter. This delay may go on for years as it is not known how and when those witnessed will be availed. Surprisingly, the supporting affidavit does not indicate the name of even one person who is intended to be called as a witness, or the kind of new insight he may provide in the matter; it does not even annex any witness statements that would convince the court that there is a need to call *viva voce* evidence.

20. It is unfortunate that another proceeding, that is, **Kitale ELC No. 103 of 2015** which was earlier filed by petitioners was dismissed for want for prosecution on **6/9/2016** and soon thereafter on **15/9/2016** this petition was filed, again by the petitioners.

21. It would appear that by seeking to be heard by way of *viva voce* evidence the petitioners wish to accomplish what that they would have accomplished had land case **Kitale ELC No. 103 of 2015** been heard to completion. In my view that is the wrong approach because a constitutional petition must be preserved for constitutional issues only. If matters in the petition must be subjected to trial and verification by way of ordinary procedures of giving and taking evidence then a question might arise as to whether that petition has attained the threshold required for a constitutional petition.

22. In the case of **Gabriel Mutava & 2 Others -vs- Managing Director Kenya Ports Authority and Another [2016] eKLR** the court observed that the Constitution should not be turned into a thorough fare for resolution of every kind of grievance. The court in **Speaker of National Assembly -vs- James Njenga Karume [1992] eKLR** stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. I find no good ground to permit the applicants to import the normal procedures of hearing of ordinary civil suits in this constitutional petition.

23. In my view **prayer No. (c)** of the application must be rejected for the foregoing reasons.

(b) Whether pending the hearing and determination of the petition the original survey carried out should be preserved

24. **Prayer No. (d)** seeks preservation of the first survey. I have already outlined this court's position taken in its ruling dated **28/7/2017**. Since no further material has been given to court to warrant the change of the court's views in that ruling for the purpose of giving any contrary orders **prayer (d)** must be rejected.

25. Consequently I hereby dismiss the application dated **19/9/2019** with costs to the respondents.

26. Finally this court has observed some procrastinating tendencies on the part of the petitioners. The filing of this application cannot be interpreted in any different fashion for the reason that first, it seeks to reverse the gains made in the process of bringing the petition to a hearing, and, secondly it does not seek an extension of the period granted by the court for the filing of the written submissions ordered on **4/7/2019** and **30/7/2019**.

27. The period within which those submissions should have been filed as long expired.

28. I find that the order on filing of submissions should be complied with so that this matter may be finalised. Though the applicants did not apply for the extension of the time to file submissions I hereby exercise my discretion and order that they comply with that order, and **file** and **serve** their submissions on the substantive petition within the next **two (2) days**, failure to which this petition will stand automatically dismissed for want of prosecution.

It is so ordered.

Dated, signed and delivered at Kitale on this 10th day of February, 2020.

MWANGI NJOROGE

JUDGE

10/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Arusei holding brief for Samba for petitioner

Mr. Kuria for the 2nd - 4th respondents

Mr. Kuria holding brief for Chepkwony for 1st respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

10/2/2020