



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

OF KENYA AT NAIROBI

PETITION NO. 576 OF 2012

IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 27 28, 40, 47, 64, 67, 159, 258, & 259 OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER SECTIONS 40 OF THE CONSTITUTION OF KENYA

=AND=

IN THE MATTER OF THE LAND ACT, 2012 AND THE NATIONAL LAND COMMISSION ACT, 2012

=BETWEEN=

HON. BASIL RITICOS.....PETITIONER

=VERSUS=

THE HON. ATTORNEY GENERAL & 7 OTHERS.....RESPONDENTS

JUDGEMENT

Introduction.

1. The Petitioner is the registered owner of **LR NO.5827 IR NO.1056** (suit property) whose lease, expired on 1st January 2013. Prior to the expiry of the lease the Petitioner had on 25th October 2012 made an application for renewal of the lease to the Town Council of Taveta. The Town Council of Taveta which is the 4th Respondent delayed in processing the Petitioner's application for renewal forcing the Petitioner to file a Constitutional Petition on 18th December 2012. This Petition was amended following new developments and was later on re-amended. In the re-amended Petition dated 13th April 2016, the Petitioner seeks the following reliefs:-

1. A declaration that pending the determination of the application for extension of lease to be lodged before the National Land Commission the Petitioner remains the legitimate and beneficial owner of L.R No.5827,I.R No.1056 and is entitled to the extension of his lease in respect of L.R No.5827,I.R No. 1056 pursuant to Section 13 of the Land Act, 2012.

2. An order of prohibition be issued to prohibit the Respondents or any other state officials from taking any measure whatsoever from physically taking over the Petitioner's suit land LR No.5827, I.R No.1056.

3. A declaration that the 5th Respondent has no authority to usurp the role of the National Land Commission under Section 13 of the Land Act, 2012 when considering applications for extension of lease and that his public utterances urging the invasion of public land are a nullity ab initio.

4. A permanent injunction do issue restraining the 5th Respondent, his servants ,agents or employees from trespassing on any of the petitioner's parcels of land situate in the Taveta District and in particular L.R No.5827, IR No.1056, L.R 6731 and LR No.6732, holding public meetings to discuss or incite members of the public to invade the aforementioned parcels of land or encouraging trespassers to remain on site in contravention of various Court Orders issued by High Court in Nairobi Misc. Application No.1019 of 2004 Hon.Basil Cricos V The Attorney General, Milimani HCCC No.446 of 2009 Basil Criticos V The Agricultural Finance Corporation and Mombasa HCCC No.159 of 2005 Hon.Vassilis Criticos V Hon. Dr Naomi Shaban & 14 others.

5. A declaration that the Petitioner's former land comprising more than 39,524 acres should be utilized towards the settlement of the landless in Taveta District and that the Government of Kenya, the 7th, 8th and the 5th Respondent should establish equitable and fair distribution mechanisms to settle the landless on the land given up by the Petitioner.

6. An order directing the 1st Respondent and the Inspector General of Police to forthwith evict all invaders and trespassers situated on the Petitioner's property L.R No.5827, IR No.1056 and to maintain peace.

7. An order directing the 5th Respondent to forthwith pay the petitioner the sum of Kshs.12 Million for destruction of his banana plants and exemplary damages for inciting members of the public to invade the Petitioner's land and causing wide-spread destruction on the land.

8. An order of mandamus directing the 6th Respondent to produce all materials and information in its possession relating to its investigations and findings concerning the Petitioner's former lands that were given up for re-settlement of the landless.

9. The court should nullify the vesting of L.R No. L.R No.5827, IR No.1056 with the 8th Respondent and forthwith issue prohibitory orders against all Respondents save the 6th Respondent from sub-dividing, leasing, partitioning or in any manner whatsoever dealing with the suit land until the Petitioner's application for extension of lease has been dealt with in a fair manner.

10. A declaration that the 7th Respondent had breached Article 47 of the Constitution by failing to give the petitioner a fair hearing followed by written reasons for refusing to extend the lease.

11. An order directing the 7th Respondent to provide all information, minutes, approvals if any, from itself and any other government bodies pertaining to the Petitioner's application of extension of lease within 7 days of the Order of this suit.

12. An order of certiorari to quash the purported decision given by the 7th Respondent on or about 17th April 2015 or such other date when the 7th Respondent informed the 5th Respondent or such other party that the Petitioner's lease would not be extended.

13. An order of certiorari be issued quashing the vesting of L.R No. 5827, I.R No.1056 with the 8th Respondent.

14. A declaration that the petitioner has a legitimate expectation that the lease over L.R No.5827, I.R No.1056 would be extended as he has since 1986 donated, sold or been dispossessed of his land to the tune of 39,524 acres within Taveta and which said land is vested in the Settlement Fund Trustees for purpose of settlement of squatters.

15. An order of mandamus be issued compelling the National Land Commission to grant an extension of lease to the Petitioner over L.R No.5827, I.R No.1056 in accordance with Section 13 of the Land Act, 2012.

16. An order of mandamus be issued against the National Land Commission to ensure that genuine squatters be settled on the 39,524 acres that used to belong to the petitioner and to provide a report within 90 days or such time as may be prescribed by the Court stating the progress being made towards the settlement of squatters in the said parcels of land as factors to be considered when extending the Petitioner's lease over L.R No. 5827, I.R No.1056.

17. An order of Mandamus be issued directing the National Land Commission to forthwith make rules under Section 13(2) of the Land Act, 2012 regarding a Lessee's preemptive rights to allocation of land.

18. Costs of the Petition.

2. It is the Petitioner's contention that he applied for extension of the lease before its expiry but the Town Council of Taveta failed to approve the renewal in time. When the lease finally expired, residents of Taveta on instigation of the then governor of Taita Taveta County Hon. John Mtuta Mruttu invaded the suit property and destroyed his banana plantation. The invasion of the suit property followed public utterances by the then governor that as the lease had expired, the suit property had reverted to the County Government Taita Taveta and that the petitioner was a mere squatter on the suit property.

3. The Petitioner further stated that he had learned from newspaper reports that the 5th Respondent was saying that he had not made any application for renewal of the lease and further that the suit property had been vested in the County Government of Taita Taveta. The Petitioner further stated that the National Land Commission had failed to come up with rules for extension of lease as required under Section 13 of the Land Act.

4. The Petitioner stated that he had learned from newspaper reports that some paragraphs from the report of the Truth Justice and Reconciliation Commission which had stated that his family had offered about 30,000 acres of land to the government to settle squatters had been removed from the report.

5. It is on the basis of the above complaints that the Petitioner contends that he has been discriminated upon and that his constitutional rights under Articles 40 and 47 of the Constitution have been violated. The Petitioner contends that over time, huge tracts of his land in Taveta area have either been taken up or he has been forced to offer land for squatter settlement or has been forced to sell some parcels at highly discounted rates. He states that despite having surrendered over 39,524 through government acquisition and other models, there has been no settlement of the squatters who have now invaded the suit property.

The 5th Respondents' case.

6. The 5th Respondent opposed the Petitioner's Petition based on a replying affidavit sworn on 22nd July 2013. The 5th Respondent denies the allegation contained in the Petition. He states that he never went to the suit property to incite the squatters. He contends that contrary to the allegations that the suit property was invaded in 2013, the suit property had in fact been abandoned by the Petitioner 10 years ago and that when the squatters heard that the lease had expired, there were confrontations amongst squatters who were fearing about being evicted following reports that Petitioner had won a court case. He states that he went to the suit property to bring peace.

7. The 5th Respondent further states that the Petitioner is relying on newspaper reports which are unverified and that the Petitioner is out to hit him because the Petitioner lost his bid to become member of parliament for Taveta in the elections held in March 2013. The 5th Respondent further argues that the Petitioner is trying to challenge his election as governor through the petition rather than going through an election petition.

8. The 5th Respondent denies any knowledge of land surrendered by the Petitioner for settlement of squatters. He denies that a committee had been formed for purposes of sub-dividing the suit property. He denies destroying bananas belonging to the Petitioner and that if there was any destruction of any bananas, then the Petitioner should have resorted to civil claims and not file a constitutional petition.

6th Respondent's case.

9. The 6th Respondent filed a replying affidavit sworn on 22nd July 2013. The affidavit is sworn by Japhet Biegon, the Director of Research and Acting Director of Legal services of the 6th Respondent. The deponent of the affidavit states that the Truth, Justice and Reconciliation Commission (TJRC) handed over its report to the President on 21st May 2013 and therefore the Commission became functus officio. The 6th Respondent contends that the request for information from the Commission came a bit late when its activities had been wound up. The 6th Respondent denies the reports appearing on the Star Newspaper and calls the same falsehoods.

Analysis.

10. I have carefully considered the petition as well as the opposition thereto by the 5th and 6th Respondents. All the other Respondents did not file response to the petition. The Attorney General on behalf of the 1st, 2nd and 3rd Respondents only filed grounds of opposition challenging jurisdiction of the court. This petition had initially been filed at the Constitutional and Human Rights Division of the High Court but it was later transferred to the Environment and Land Court on 2nd May 2015. The only issues which emerge for determination are firstly, whether any constitutional rights of the Petitioner have been breached and secondly whether the Petitioner is entitled to the reliefs in the Petition.

Whether there should be an order of mandamus compelling NLC to renew the expired lease.

11. There are new developments which have taken place since 18th December 2012 which have overtaken most of the reliefs sought by the Petitioner. The Petitioner's major concern was renewal of his lease which had expired. The Petitioner was contending that there was refusal to extend the expired lease and that he had pre-emptory rights to renewal as provided under Section 13 of the Land Act. On 1st April 2018, the County Government of Taita Taveta held a meeting where the issue of renewal of the petitioner's lease was deliberated upon and approved. A notification of approval of the extension was subsequently issued on 17th April 2019 and a letter written on the same day to the National Land Commission stating that the County Government had no objection to renewal of the lease.

Whether the 5th Respondent should be stopped from usurping the function of NLC

12. The 5th Respondent who was the governor of the County Government of Taita Taveta is no longer the governor and that is why the current government under the new governor approved the renewal of the lease. The 5th Respondent cannot purport to usurp the roles of the National Land Commission when he is no longer in power and in any case there was no evidence that he had purported to do so.

Whether there should be a declaration that the Petitioner's 39524 acres should be utilised to settle the landless in Taveta.

13. The Petitioner wants a declaration that his former land comprising 39,524 acres should be utilized towards the settlement of the landless in Taveta District and that the 7th and 8th Respondents should establish equitable and fair distribution mechanisms to settle the landless. This prayer is the subject of **Constitutional Petition No.258 of 2011 (Hon. Basil Criticos Vs The Attorney General and 12 others)**. There is no evidence that this petition has been concluded or that it was withdrawn. It is therefore an abuse of the court process to litigate on same issues in different petitions.

Whether an order of eviction of squatters should be issued

14. The petitioner is seeking an order of eviction of squatters through this constitutional petition. There is no evidence which was tabled to show that there are squatters on the suit property. The Petitioner alleged that the squatters invaded the suit property in 2013. The 5th Respondent on the other hand states that there have been squatters on the suit property for the past 10 years. The petitioner tabled evidence of orders which were given in 2005 requiring squatters to be systematically removed from the petitioner's other properties. This order was not in relation to the suit property. There were orders granted by Justice Lenaola (as he then was) preserving the property. If there was no compliance with the same, then the petitioner should have followed the law. There are provisions in the Land Act on how squatters should be evicted. The petitioner should follow the process to remove them and not through an order in this petition which will infringe on the

squatters rights which are also protected in the law.

Whether the Petitioner is entitled to compensation from the 5th Respondent

15. The petitioner is seeking Kshs.12,000,000/=from the 5th Respondent as compensation for his destroyed bananas. This claim ought to have been filed in an ordinary suit where evidence would have been tabled by agricultural experts. The petitioner has only filed an online document about growing bananas. This is not a report of the alleged destruction. There is no evidence that the bananas to the extent that he is claiming were indeed destroyed. There is therefore no basis upon which an award of Kshs.12,000,000/= can be made.

Whether TJRC should be compelled to give Petitioner the reports he is seeking.

16. The petitioner is seeking an order of mandamus directed at TJRC to provide all materials and information in its possession relating to investigations and findings concerning his former lands that were given up for re-settlement of the landless. It is important to note that TJRC was enjoined in this petition pursuant to leave granted on 22nd July 2013. TJRC was brought in as the 6th defendant through an amended petition filed on the same day leave was granted. As at the time of joinder of TJRC , the TJRC had submitted its report to the president of the Republic of Kenya and was to stand dissolved in three months as per Section 52(1) of the Truth , Justice and Reconciliation Act of 2008 which provided as follows:-

“The Commission shall stand dissolved three months after submission of its report to the President”.

There is therefore no need of giving any orders against a non-existent entity.

Whether an order nullifying the vesting of LR No.5827 IR No.1056 should be nullified.

17. The Petitioner is seeking an order nullifying the vesting of the suit property with the 8th Respondents save for the 6th Respondent from sub-dividing , leasing, partitioning or in any manner dealing with the suit land until the Petitioner’s application for extension of lease has been dealt with in a fair manner . There was no order vesting the petitioners land given by any person. The Petitioner was relying on unsubstantiated press reports that the land had vested in the 8th Respondent. The law is clear that where a lease has expired, the land automatically vests in the County Government concerned or the Government whichever is applicable. As I have said before in this judgement, the County Government of Taita Taveta has already approved extension of the lease. There is therefore no need to give any order in the manner prayed for by the petitioner.

Whether the 7th Respondent has breached Article 47 of the Constitution

18. The Petitioner is also seeking a declaration that the 7th Respondent has breached Article 47 of the Constitution. The County Government of Taita Taveta has already approved extension of the lease. This approval has already been communicated to the National Land Commission. There is no evidence that the National land Commission has refused to extend the lease. There is therefore no basis upon which a declaration can be made in the manner prayed for by the Petitioner.

Whether the NLC should be compelled to make rules and regulations under Section 13(2) of the Land Act.

19. The Petitioner also wanted an order of mandamus to issue directing the National Land Commission to make Rules under Section 13(2) of the Land Act. This prayer has been overtaken by events in that on 1st December 2017, the National Land Commission published legal Notice No.281 providing for the Land (Extension and Renewal of Leases) Rules. There is therefore no need for giving any order of Mandamus.

Conclusion.

20. From the analysis hereinabove, it is clear that none of the Petitioner’s prayers can be granted. The Petitioner’s petition therefore fails. It is hereby dismissed with costs to the 5th and 8th Respondents.

Dated, Signed and delivered at Nairobi on this 12th day of March 2020.

E.O.OBAGA

JUDGE

In the Presence of :-

Mr Kabugu for Mr Gichuhi for Petitioner

Court Assistant: Hilda

E.O. OBAGA

JUDGE