



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 32 OF 2017

KELLY MALENYA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF LAND AND PHYSICAL

PLANNING.....2ND RESPONDENT

AND

COUNCIL OF GOVERNORS.....INTERESTED PARTY

JUDGMENT

1. Kelly Malonya, the petitioner, has filed this petition against the Attorney General, the legal representative of the National government in Civil Proceedings in which the National government is a party and the Cabinet Secretary Ministry of Lands and Physical Planning, the 1st and 2nd respondents herein. Also joined in these proceedings as the Interested Party, is the Council of Governors, established under Section 19 of the Intergovernmental Relations Act, 2012.
2. The petitioner challenges constitutionality of certain provision of the Community Land Act, No. 27 of 2016. He avers that Section 2 is unconstitutional in its definition of the Community Land. According to the petitioner, the definition is at variance with regard with the manner or basis of identifying community land as envisaged by Article 63 of the Constitution.
3. The petitioner further challenges the constitutional validity of Section 8(4) and (6) of the Act. He contends that the section contravenes function 8 of Part 2 of the Fourth Schedule to the Constitution with regard to county planning and development including mapping and survey, boundaries and fencing by purporting to assign survey functions to the Cabinet Secretary yet these are county functions.
4. The petitioner again avers that Section 9 of the Act is also constitutionally invalid. It is the petitioner's case that the section violates the aims and objects set out in Articles 10, 63, 174, 186 of the Constitution and the Fourth Schedule by failing to give formal recognition of the role of county governments, including their role in the initial registration of community land.
5. It is also the petitioner's case that Section 15 of the Act is unconstitutional too for the reason that it creates an agency known as the "assembly" leaving out the county governments in disregard of Articles 10, 63, 174, 186 and the 4th Schedule to the Constitution.
6. The petitioner again assaults Section 21 for the reason that it contravenes function 14 Part 2 of the Fourth Schedule for failing to involve counties on their responsibility of ensuring participation of communities in land governance. He also contends that the section is unconstitutional for appropriating one role of county governments in the community land protection regime thereby giving room to oppression of communities by majorities or dominant minorities.
7. According to the petitioner, section 38 also fails constitutionality for introducing other criteria for qualifying and limiting the right to property for communities other than as contemplated by Articles 40 and 24 of the constitution. With regard to Section 48, the petitioner avers that the section fails constitutional muster of validity for giving the Cabinet Secretary power to make regulations for purposes of implementing the Act, without involvement of county governments.

8. On the basis of the above contentions, the petitioner sought the following reliefs:

- a. **A declaration or order that sections 2 and or 6 and or 8(4) (6) and or 9 and or 11 and or 15 and or 21 and or 38 and or 48 of the Community Land Act are unconstitutional.**
- b. **An order of suspension of sections 2 and or 6 and or 8(4) (6) and or 9 and or 15 and or 38 and or 48 of the Community Land Act.**
- c. **Any other order r directions as to but not limited to the reliefs sought in petition which the court will deem fit to grant.**
- d. **Costs of this petition.**

Interested Party's Response

9. The interested party filed a replying affidavit by Jacqueline Mogeni its Chief Executive Officer, sworn on 16th February 2017 in support of the petition. Ms Mogeni deposed that impugned provisions of the Community Land Act are unconstitutional and that they are contrary to the objectives, values and principles underpinning devolution and Section 8(4) (b) of the Fourth Schedule; that section 9 violates aims, objectives and obligations set out in Articles 1, 63, 174 and Part 2 of the Fourth Schedule to the Constitution and that section 15 violates Articles 10, 63, 174 and 186 as well as Part 2 of the Fourth Schedule for creating an institution known as "Assembly" with the role to manage land without the involvement of the county governments.

10. The deponent further states that section 21 contravenes section 14 in Part 2 of the Fourth Schedule for failing to involve county governments in facilitating participation of communities in land governance. She also agrees with the petitioner with regard to the unconstitutionality of section 48 for giving the Cabinet Secretary power to make regulations for implementation of the Act without involving county governments.

11. It is Ms Mogeni's contention that although the Interested Party sent a memorandum on the contentious issues during the legislative stage of the Act, the memorandum was ignored.

1st and 2nd respondents' response

12. The 1st and 2nd respondents filed grounds of opposition dated 6th June 2017 in opposition to the petition. They contend that the provisions of the Act are constitutional; that the petition has not met the threshold of constitutional petition in line with the principles set out Anarita Karim Njeru v Republic [1979] 154 for failing to set out with reasonable degree of precision the provisions infringed and the manner of infringement.

13. The respondents further contend that the definition of community land in Section 2 of the Act is in line with Article 63 of the Constitution on the identification of a community. According to the respondents, section 8(4) (6) does not contravene function 8 in the Fourth Schedule and that section 9 recognizes the office of the Chief Land Registrar to keep and maintain a register of land registered under Section 7 of the Land Registration Act.

14. They further contend that the community assembly established under Section 15 does not disregard county governments but recognizes the importance and participation of members of the community who are beneficiaries of the community land.

15. Regarding section 21, the respondents argue that it gives effect to section 14 Part 2 of the Fourth Schedule where the county government is tasked with the responsibility of ensuring and co-ordinating participation of communities and assisting them develop administrative capacity for effective exercise of the functions, powers and participation in governance at the local level.

16. With regard to Section 38, the respondents contend that the section is in line with Article 66 of the Constitution which empowers the state to regulate use of any land or interest in or right over any land in the interest of defence, public safety, public order, public morality, public health or land use ...planning. In their view, section 38 does not deprive protection of the right to property guaranteed by Article 40 of the Constitution.

17. The respondents also defends constitutionality of section 48 which gives power to the Cabinet Secretary to formulate regulations, contending that it is constitutional.

Petitioner's submissions

18. The Petitioner submits, highlighting his written submissions dated 25th July 2017, that several sections of the Community Land Act are unconstitutional. He has sought invalidation of section 2 on definition of community land; as well as sections 8(4) (6), 6, 9, 11, 15, 21, 38, and 48. According to the petitioner, these sections are inconsistent with the Constitution.

19. Regarding section 2, he argues that the definition of the word "**community**" has been extended beyond that in the Constitution. As to section 8(4) and (6), he contends that the mandate of survey and mapping has been placed in the office of the Cabinet Secretary which contradicts section 8 Part 2 of the Fourth Schedule to the Constitution, a function placed in the county government.

20. With regard to section 9, the petitioner contends that it creates the office of community land Registrar appointed by the Chief Land Registrar under the central government without involving the county governments. In so far as section 15 is concerned, the petitioner

contends that the section establishes a community management committee without stating how it is to be appointed. He also argues that community land assembly which has been placed in charge of community land to manage and register land on behalf of respective counties contravenes Article 63(2) of the Constitution and section 14 Part 2 of the Fourth Schedule to the Constitution.

21. The petitioner further assaulted section 21 contending that under this section, community land can be converted into other forms of land, a role to be exercised by the assembly. He contends that before the land is converted, there has to be a vote in the assembly by a two thirdly majority which is in contravention of Article 63(3) of the Constitution and section 14 Part 2 of the Fourth Schedule to the Constitution.

22. The petitioner expresses fear that there is mischief in the impugned provisions in that if county governments do not protect community land, the land may be taken by other parties and to avoid this, county governments are right organs to be in charge of administration of community land.

Interested Party's submissions

23. Mr. Okubasu, learned counsel for the Interested Party submits, associated himself with the petitioner's submissions. He also highlights their written submissions dated 22nd November 2017, arguing that when the legislation was passed, the Interested Party submitted a memorandum but its views were not taken into account.

24. According to counsel, county governments have a role to play in the administration and regulation of community land since all un alienated land vests in county governments. In learned counsel's view, county governments have the responsibility to facilitate participations of communities in governance but despite this, county governments have been excluded in the governance of community land. He submits that the power to administer community land under the Act has been left to the Cabinet Secretary whose effect is that county governments have been left with no role to play in community land management.

25. He contends that the role of survey and mapping falls under the county governments but has now been given to the central government through the Cabinet Secretary. According to counsel, the same thing is replicated in section 48 which gives the Cabinet Secretary mandate to formulate regulations, a role of the county governments.

Respondents' submissions

26. Mr Githinji, learned counsel for the respondents, submits also highlighting their written submissions dated 5th February 2018, that there is no inconsistency between section 2 and Article 63 of the Constitution. He contends that the definition expands the meaning of socio economic interests. In counsel's view, sections 8, 9, and 21 address issues of process of demarcation and registration of community land and are, therefore, constitutional.

27. Mr Githinji further submits that land planning is a shared responsibility between both the national and county governments and relies on section 21 Part 1 as read with section 8 Part 2 of the Fourth Schedule to the Constitution. Counsel relies on the Supreme Court decision in **Re the matter of National Land Commission** [2015]eKLR on the issue of survey.

28. Regarding sections 15(1) and 21 of the Act, counsel argues that the institutions created under these sections are in line with Article 63 of the Constitution and appreciate the fact that community land vests in counties.

29. Counsel admits that there is no doubt that county governments hold un registered land in trust for the communities. He contends, however, that the purpose of the sections is to protect community land rights by facilitating registration of that land from unregistered to registered regimes. He further contends that once the land is registered under the community land Act, the role of county governments ceases. He points out that section 6 of the Act provides for the role of county governments over community land.

30. Regarding section 38, counsel contends that the section is aligned with Article 66(c) of the Constitution to the effect that the state may regulate the use of any land in any interest, or right over any land in certain respects. He argues that section 38 has borrowed verbatim from the provisions of Article 66 (1) of the Constitution and, therefore, the petitioner and Interested Party are estopped by virtue of Article 2(3) of the Constitution from challenging the constitutionality of Article 66(1) which has been reproduced in section 38 of the Act.

Analysis and Determination

31. I have considered this petition; responses; submissions and the authorities relied on by both sides. The issue that arises for determination is whether the impugned provisions are inconsistent with the Constitution. The petition challenges constitutionality of sections 2, 8(4), 9, 15, 21, 38 and 48 of the Community land Act. I must point out here that although the reliefs also seek invalidation of sections 6 and 11 of the Act neither the petition nor the supporting affidavit explains why these sections are unconstitutional. For that reason, I shall say no more about them.

32. The Petitioner, who is supported by the Interested Party, contends that the impugned provisions fail the constitutional muster of validity and should, therefore, be declared invalid. The respondents on their part argue that the impugned provisions are consistent with the Constitution and are valid. They argue that some of the impugned provisions are directly sourced from the Constitution and declaring them unconstitutional will be tantamount to declaring constitutional provisions unconstitutional. They hold the view that the petition is unmeritorious.

33. When a statute or a statutory provision is challenged on grounds of unconstitutionality, the court has an obligation to embark on a discourse to determine whether or not a petitioner's concerns are true. In doing so, the court has taken into account the principles applicable in determining the constitutional validity of a statute or statutory provision

34. There is a general but rebuttable presumption that a statute or provision is constitutional and that the person alleging unconstitutionality bears the burden to prove that the claim of unconstitutionality. This principle presumes that the legislature being the peoples' representative understands the problems legislation is intended to solve. This was stated in *Ndynabo v Attorney General of Tanzania* [2001] EA 495 where the court held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the contrary.

35. The court should also consider whether the purpose or effect of the impugned provision is unconstitutional. The purpose of enacting legislation or the effect of its implementation can lead to an unconstitutional purpose or effect which would render the provision constitutionally invalid. In *Olum and another v Attorney General* [2002] EA, the court held that;

“To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”

36. In *The Queen v Big M. Drug mart Ltd.*, [1986] LRC (Const.) 332, the Supreme Court of Canada stated that;

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.”

37. And in *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the court stated that in determining whether or not a statute is constitutional the court must determine the object and purpose of the impugned Act which is to be discerned from the intention expressed in the Act itself.

38. The petitioner first attacks the constitutionality of section 2 of the Community Land Act. He contends that the definition of community land extends beyond that given by the Constitution. In his view, there cannot be any other definition assigned to community land beyond that contemplated by the Constitution. He argues that the section contradicts the Constitution and is therefore invalid, a position supported by the Interested Party. The respondents disagree contending that there is no inconsistency and urge the court to decline the invitation to declare the section unconstitutional.

39. Section 2 in so far as is relevant to this petition, is in the following words; **Community land means includes:**

a. Land declared as such under Article 63(2) of the constitution,

b. Land converted into community land under any law.

Section 2 has two ways of defining community land, namely; land as defined in Article 63(2) or land converted into community land under any law. Article 63(2) states, in so far as community land is concerned, that **community land consists of land lawfully registered in the name of groups representatives under the provisions of any law; land lawfully transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; and land that is lawfully held, managed or used by specific communities, (i) community forests, grazing areas or Shrines (ii) ancestral lands and lands traditionally occupied by hunter gatherers communities or (iii) lawfully held as trust land by the county government.**

40. From the above definition, community land is land that falls within the categories mentioned in Article 63(2), is held and used by communities, and or trust land held by the county governments. From the above definition, can it be said that the definition in section 2 is inconsistent with this definition?

41. The answer must be in the negative in so far as the definition is concerned. The Constitution defines community land broadly and section 2 merely states that community land is that land declared as under Article 63(2) and **“land converted into community land under any law”**. A proper reading of section 2 shows that the definition repeats the words in the Constitution. The addition of (b), land converted into community land under any law, does not add or change anything. It is at best superfluous since it falls under **“any other land declared to be community land by an Act of Parliament”**.

42. What I find interesting, however, is that section two uses the words **“means”** and **“includes”** in defining community land. The Constitution uses the word **“consists”** which is close to means. The Constitution does not use the words **“includes”** which is infinitive. Article 259(4) (b) is clear that when the word **“includes”** is used in the Constitution, it means; **“includes but not limited to”**. By using two words **“means”** and **“includes”** section 2 renders the definition of community land vague. It is not clear whether community land means the land as defined in the Constitution or it includes some other land apart from that defined in the Constitution.

43. The Act cannot use both words in the definition section as doing so creates confusion. A provision is vague if it is capable of two interpretations. In the context of section 2, it is not clear whether the definition of community land **“means” Land declared as such under Article 63(2) of the constitution;** or **“includes” Land declared as such under Article 63(2) of the constitution,** The two words cannot be used at the same time or interchangeably. This makes the provision vague and therefore unconstitutional to that extent.

44. The Petition again challenges section 8(4) of the Act which provides that the Cabinet Secretary shall issue a public notice of intention to survey, demarcate and register community land. The petitioner's argument is that the mandate of survey falls under the county governments

and that in giving power to the Cabinet Secretary, the county governments have been left out. In counsel's view, under the Fourth Schedule, survey of land is a mandate of the county government.

45. Section 8 of the Fourth Schedule places planning and development including land survey and mapping under the county governments. On the other hand, section 8 of the Act talks about procedure for recognition, adjudication and registration of community land. Community land is land found in the counties, held in any form and communally used.

46. Adjudication of this land includes surveying and mapping, a function that is reposed on the two levels of government, national and county governments. Section 21 of Part 1 of the Fourth Schedule places general principles of land planning and the coordination of planning by the counties in the national government. On the other hand, section 8 gives counties planning and development including land survey and mapping. This is a shared function between the two levels of government.

47. In order to determine the meaning including constitutionality of a provision, the whole provision has to be read. Meaning cannot be attributed to a provision by reading only a portion of it. Such a discourse may lead to distortion. The statute or its provision must also be looked at both textually and contextually, for both are important in statutory construction.

48. In *The Engineers Board of Kenya v Jesse Waweru Wahome & others*. Civil Appeal No 240 of 2013, the Court of Appeal held that:

“One of the canons of statutory interpretation is a holistic approach.... no provision of any legislation should be treated as ‘stand -alone’ An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.”

49. The Petitioner argues that the impugned section does not involve county governments in any way during the survey exercise. The petitioner refers to section 8(4) only. He does not make reference to subsection (1) which states that the cabinet Secretary should act in consultation with county governments. Similarly he does not refer to subsection (2) which provides that the Cabinet Secretary shall, in consultation with the county governments ensure that the process of documenting, mapping and developing of the inventory of community land shall be transparent, cost effective and participatory.

50. In that regard therefore one cannot read subsection (4) in isolation of subsections (1), (2) and (3) and argue that the subsection is unconstitutional. A holistic reading section 8(4) does not, in my view, reveal any constitutional invalidity when section 8 is read as a whole.

51. Section 9 is also challenged on grounds that a function that falls under the county governments has been placed under the control of the central government through the Chief Land Registrar who appoints a Registrar for community land without involving the county government. The section provides that the Chief Land Registrar shall designate a qualified registrar to be the community land Registrar responsible for registration of community land.

52. The section merely requires the Chief Land Registrar to designate a qualified registrar to be Registrar of community land. I do not see any constitutional invalidity in this provision. Once community land is identified and registered, all the registrar should do is maintain a register of the community land and be responsible for the community land. In my respectful view, the registrar is merely an administrator who keeps the record that county governments have access to, given that they were consulted and that way involved in the process of identification, adjudication mapping and registration of the community. The section does not appear to confer on the registrar of community land any other powers save those of registration and maintaining the register.

53. The petitioner further challenges the constitutionality of section 15 of the Act contending that it too fails the constitutional muster of validity. According to the petitioner, the section creates an amorphous body known as “*community assembly*” without providing how the assembly will be identified. In the petitioner's view, this is inconsistent with the Constitution.

54. The section provides that a registered community shall have a community assembly consisting of all adult members of that community. The quorum of the assembly will not be less than two thirds of the assembly and that the assembly is to elect between seven and fifteen members to constitute land management committee. The section goes on to provide for the functions of the land management committee.

55. Section 15 is clear that the assembly is that of the registered community. That is the community registered to be owner of the community land. That community will have known members. The adult members shall form the assembly and they will elect a management committee of between seven and fifteen members. These are people known within the community and will be responsible for the management of their land. The Constitution was not expected to give details of the community land administration. The section has therefore given the manner in which the assembly is to be identified and the committee will be elected and its quorum. That being the case, I do not see how this section is inconsistent with the Constitution to render it constitutionally invalid.

56. The petitioner also attacks constitutionality of section 21 of the Act. He contends that under this section, community land can be converted into some other forms of land, a role exercised by the assembly. The respondents do not agree with the petitioner's view.

57. Section 21 provides that (1) The Community land register shall, in addition to the particulars set out under section 8(1) of the Land Registration Act, 2012, contain the particulars of all conversions involving community land; and (2), A registered community shall, before the conversion of registered community land into any other category of land, seek and obtain approval from two thirds of the assembly in a special meeting convened for that purpose.

58. The section requires that should contain particulars as are in section 8(1) of the Land Registration Act and any all particulars of conversion of the community land. Section 8(1) of Land Registration Act provides that;

Subject to the legislation on community land made pursuant to Article 63 of the Constitution, there shall be maintained in each registration unit, a community land register in which shall be kept—

- (a) a cadastral map showing the extent of the community land and identified areas of common interest;
- (b) the name of the community identified in accordance with Article 63(1) of the Constitution and any other law relating to community land;
- (c) a register of members of the community;
- (d) the user of the land;
- (e) the identity of those members registered as group representatives;
- (f) the names and identity of the members of the group; and
- (g) any other requirement as shall be required under the law relating to community land.

59. Section 21 requires that the history of the land be documented possibly for reference. Subsection (2) makes it mandatory that community land can only be converted into any other category of land with majority of the assembly in a meeting called only for that purpose. This is to ensure that a decision to convert a registered community land into any other category should not be done easily. It is a form of insurance that community land is not available for conversion as matter of course. Secondly the meeting will only be called for that purpose to avoid taking members by surprise. In that regard, I do not see any unconstitutional purpose of enacting or effect of implementing section 21 of the Act.

60. The petitioner has also argued that the sections 38 fails constitutionally for introducing other criteria for qualifying and limiting the right to property for communities other than as contemplated by Articles 40 and 24 of the constitution. section 38 provides that;

(1) Pursuant to Article 66 of the Constitution, the State shall have the power to regulate the use of any land, or interest in or right over land, in the interest of defence, public safety, public order, public morality, public health or land use planning.

(2) Despite the provisions of Part 1 and pursuant to section 22 of the Fourth Schedule to the Constitution, the management of community land shall be subject to national and county government laws and policies relating to-

- (a) fishing, hunting and gathering
- (b) protection of animals and wildlife;
- (c) water protection, securing sufficient residual water, hydraulic engineering and safety of dams;
- (d) forestry;
- (e) environmental laws;
- (f) energy policy; and
- (g) exploitation of minerals and natural resources.

61. Section 38(1) reproduces provisions of Article 66(1) of the Constitution. There cannot obviously be anything unconstitutional about it and it does not limit the right to property guaranteed under Article 40 of the Constitution. The two Articles must be read as supporting each other but not destroying one another. On the other hand, subsection (2) recognizes the role of the two levels of government, the national and county governments in so far as management of resources is concerned. I do not read the section as limiting the right to property either.

62. Finally, there is a challenge to the constitutionality of section 48 of the Act. The petitioner contends that the section gives the Cabinet Secretary mandate to formulate regulations which is a role of the county governments. Section 48 provides that (1) The Cabinet Secretary, ensuring public participation may make regulations generally for the better carrying into effect of this Act.; that (2) Without prejudice to the generality of subsection (1), the Cabinet secretary, ensuring public participation may make Regulations prescribing- (a) the procedures of recognition and registration of all parcels of community land rights; (b) procedure for settlement of disputes arising from the community land registration process.

63. The Petitioner's argument is that the role of making regulations for the management of registered community land is that of county governments and should not have been given to the Cabinet Secretary. It must be noted that this is a national legislation. The Constitution defines community while Article 63(5) required the National Assembly to enact legislation for giving effect to Article 63 with regard to community land for purposes of identifying registration and administration of community land. This being a national legislation, only the Cabinet Secretary can formulate regulations for its implementation. That being the case, I do not see any constitutional invalidity in this section.

Conclusion

64. In conclusion, having given due consideration to the petition responses and submissions and laid the impugned provisions against the Articles of the Constitution, I am not persuaded that the impugned provisions fail the constitutional muster of validity. I take the view, however, that only section 2 has a problem in defining community land. The section uses words “means” and “includes” at the same time. The section is not clear whether community land means land declared as such under Article 63(2) of the Constitution or community land “includes” land declared as such under Article 63(2) of the Constitution. The words “means” and “includes” used together cause confusion. For that reason, by using the two words, section 2 is vague and, therefore, unconstitutional. I therefore allow the petition to that extent and make the following orders;

a. A declaration is hereby issued that section 2 of the Community Land Act is unconstitutional in its definition of community land for vagueness.

b. The declaration of invalidity is however suspended for twelve months to enable the National Assembly take steps to resolve the ambiguity. In default, the declaration of unconstitutionality shall take effect after twelve months.

c. The rest of the prayers are dismissed.

d. No order as to costs.

Dated Signed and Delivered at Nairobi this 7th Day of June 2019

E C MWITA

JUDGE