



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 1 OF 2019

(Being heard under Petition No. 6 of 2011 and including Petition Nos. 289 of 2013 and No. 30 of 2016)

**IN THE MATTER OF ARTICLES 3(1), 22(1), (2) (b) & (d), AND 258 (1) & (2) (b) & (d) OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA, 2010**

AND

**IN THE MATTER OF ARTICLES 1, 2(1) (2) (4) (5) & (6), 3, 10, 21, 22, 23(1) & (3), 27(1) (2) (4) & (5), 40 (1) & (3), 159 (1) & (2),
162 (1) (2) & (3), 165 (5) (b), 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

BETWEEN

MWANGANZA L.P.O SELF-HELP GROUP PETITIONER

AND

THE HONORABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

KENYA AIRPORTS AUTHORITY..... 3RD RESPONDENT

ISILO COUNTY GOVERNMENT 4TH RESPONDENT

RULING

1. Mwangaza L.P.O Self –Help Group instituted this petition against the respondents on 6.1.2019. The petitioner is a registered self-help group which represents the interests of a section of Kenyan citizens who currently reside within Isiolo County and who were previously displaced from their homes after their original land parcels were compulsorily acquired by the government for the expansion of the then Isiolo Airstrip into the present Isiolo International Airport. The respondents are the Attorney General, the National Land Commission, the Kenya Airports Authority and the Isiolo County Government.

2. The petitioners allege that the specific place for resettlement of their members was identified by the County Council of Isiolo to be the Mwangaza Area within Isiolo town. They were shown their respective plots but were denied the opportunity to take possession of the same. Their land was then invaded by third parties who not only took possession of it but went ahead to settle on it. The government is now in the process of issuing title deeds, yet the ownership of the land remains viciously contested.

3. On 16/05/2019 the 2nd respondent (National Land Commission) filed a preliminary objection dated 10/05/2019 on the grounds that the petitioner is not an entity that is capable under the Laws of Kenya of instituting an action in its own name.

4. It is noted that the petitioners had filed the petition contemporaneously with an application seeking conservatory orders. The petition and the application are yet to be prosecuted. The parties have however submitted with regards to the petitioner’s application for conservatory orders as well as the Preliminary Objection. Vide the court orders/directions of 11/12/2019, it was directed that the court will first determine the preliminary objection. Therefore, this court will look at what parties have submitted with regard to the preliminary objection.

5. Another aspect to note in this matter is that the same is running alongside other matters namely Petition 6 of 2011, ELC no.289 of 2013 and Petition 30 of 2016. The matters are not consolidated but since the subject matter is the same, the files are handled simultaneously

whereby hand written proceedings are recorded in Petition 6 of 2011, they are then typed and placed in the rest of the files.

The preliminary Objection dated 10.5.2019 by National Land Commission

6. The preliminary objection by the 2nd respondent has been supported by 1st and 3rd respondents in this petition as well as by petitioners/interested parties in ELC petition 6 of 2011. The 2nd respondent submitted that under **Article 260 of the Constitution** unincorporated bodies are ‘persons’, but they can only institute proceedings in court if they go through an entity that has legal capacity. This is because they have no legal capacity to sue or be sued in their own name. Moreover, the petitioner has not raised any legitimate issues against the 2nd respondent neither can the prayers sought by the petitioner be enforced against them. They relied on **Kipsiwo Community Self Help Group v Attorney General and 6 others [2013] eKLR** and **Kituo cha Sheria v John Ndirangu Kariuki & another [2013] eKLR** case law to support their objection.

7. Supporting the objection, the 1st and 3rd respondent submitted that the petitioner is not a legal person recognized by law for a self-help group does not fall within the definition given to a person under **Article 260**. Thus, the petition is incurably defective. Parties are usually clearly defined not only for purposes of enforcement but to prevent parties from coming back to court over the same issue clothed under different names. If a court does not know who the litigants are, then it is impossible to enforce court orders for it is unclear who the beneficiaries are and who has obligation to obey or enforce the order. That the failure to bring an action by a recognized judicial person is one of law and substance and cannot be accommodated within the latitude of **Article 159 (2) (d) of the Constitution**. Just like the mover of the preliminary objection, these respondents relied on the cases of **Kipsiwo Community Self Help Group (supra)** and **Kituo cha Sheria (supra)**.

8. The petitioner/interested parties in ELC Petition No. 6 of 2011 submitted that the petition has no merits for the petitioner which is an unincorporated entity has no legal capacity/*locus standi* to sue. They have urged the court to strike out the petition for lack of capacity on the part of the petitioner to sue. They relied on the case of **Dennis Oloigo & 2 Others v The Art of Ventures Ltd & 2 others [2006] eKLR** and **Kipsiwo Community Self Help Group (supra)** to support their position.

9. The petitioner has opposed the preliminary Objection stating that it has *locus standi* pursuant to **Article 22, 258 as read together with Article 260 of the Constitution**. It can therefore institute court proceedings for violation of rights or fundamental freedoms in the bill of rights. The petitioner is an unincorporated body of persons which, by dint of express intention of the definition of person under **Article 260 of the Constitution**, is a person and therefore has a right under **Article 22 (2) (d) and 258 (2) (d) of the Constitution** to institute this petition in its own rights and name without any handicaps. That the instant petition seeks to enforce the rule of law, human rights and fundamental freedoms in the bill of rights. Thus, this court is charged with the jurisdiction of enforcing the obligations of the Constitution pursuant to **Article 259 (1) (b)**. Hence, this court ought to exercise its duty as stipulated under **Article 159 (2) (d)** of administering justice without undue regard to procedural technicalities. Thus, the objection has no merit and ought to be dismissed. On this point, the petitioners have relied on the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2014)eKLR**.

10. The issue for determination is *whether the petition has been instituted by an entity with the capacity to institute an action in its own name such as this petition*.

11. The petitioner in this case is a self-help group and according to its certificate of registration, it is duly registered with the Ministry of East African Community, Labor and Social Protection and with the department of social development officer in the County. The question that arises is whether Mwangaza L.P.O Self Help Group can institute proceedings of this nature. **Article 22** as read together with **Article 260** of the **2010 Constitution of Kenya** define who a person is, which includes a company, association or other body of persons whether incorporated or unincorporated, and such a person may institute proceedings asserting a violation of a right in the Bill of Rights. The petitioner being an unincorporated entity has the right to institute court proceedings. The question is how?. Is it vested with the legal capacity to sue or be sued?

12. This question was aptly answered by Munyai Sila J in **Kipsiwo Community Self Help Group v Attorney General and 6 others [2013] eKLR** where he stated as follows:

“38. I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.

...

42. Self Help Groups having no legal personality, cannot therefore institute proceedings in their own name.

43. Kipsiwo Self Help Group had no capacity to institute action in its own name. A person recognized in law had to sue on behalf of members of Kipsiwo Self Help Group and such members had to be named and identified with precision. The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor,

but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order. ”

13. Similarly, in the case of Kituo Cha Sheria v John Ndirangu Kariuki & another [2013] eKLR Kimondo J stated as follows:

“In the end, I have reached the conclusion that Kituo Cha Sheria is not a competent legal person as known under article 258 of the constitution, section 12 (3) of the Non-governmental Co-ordination Act or any other statute. Its capacity to bring an action in its own name and a petition to challenge an election does not find support in the law or precedent. In the result, there is no petitioner in Court or a valid petition. It follows as a corollary that the petition is incurably defective. It has no legs to stand on. It is hereby struck out and dismissed.”

14. Based on the foregoing, I am of the view that the petitioner is not a competent legal person who has the capacity to sue and be sued. It is not lost to this court that although the petitioner’s claim is anchored on a resettlement exercise which occurred in the years 2004 and 2005, the entity identifying itself as Mwangaza L.P.O. Self Help Group came into existence on 23.11.2018 when it was registered. The issue raised by the 2nd respondent is not one of procedural technicality which can be ignored by the court. This is because the issue of the petitioner’s *locus standi* goes to the root of the matter. For if a court does not know who the litigant is, then it becomes impossible for the court to enforce its own orders as it is unclear who the beneficiary of the order is.

15. Can this court perhaps allow the petition to stand and be amended?, which begs the next question; Are the petitioners precisely known? . Adan Jirma Duba, in his affidavit sworn on 15/01/2019 stated under paragraph 3 as follows and I quote:

“THAT I know of my own knowledge that this Petition has been brought on behalf of nearly three hundred (300) consenting members of the Petitioner.”

16. The document annexed and marked AJD 002 shows a list of two hundred and sixty (260) members. The list shows their names, ID numbers, list of documents, date, date of allocation and parcel allocated. Apart from that, the document has no heading nor is it signed and it appears to have no nexus with the petitioner. The document marked AJD 005 contains the list of persons who were displaced by the Isiolo Airport expansion programme of which one list has 700 persons while another has 588 persons. This document unlike “AJD 002”, is the one bearing the stamp of the petitioner, “Mwangaza Legal Plot Owners Association”. The averments made by Adan Jirma have certainly not shed light on who precisely is the petitioner.

17. This clearly shows how an issue can become convoluted if the issue of standing is shrouded in mystery. Thus, if substitution is to be allowed whom will the court substitute the petitioner with, is it the 260 persons, the 700 or the 588 who in any event have not given their specific proof of authorization in the institution of the suit.

18. In Kipsiwo Community Self Help Group Case (supra) Munyao Sila J further held:

“50. I could probably have allowed the petition to stand, and be amended, if I had known who precisely the petitioners are. But I do not know who they are and even if I am to allow a substitution, with whom will I substitute the plaintiff? Substituting the initiator of a claim is always more difficult than substituting the defendant/respondent. The court in absence of an application, finds it difficult to assume that a particular person, is the true plaintiff. It is much easier to substitute a defendant/respondent because in most cases, the person intended to be sued can be identified, though probably, wrongly described.”

19. From the foregoing, I am of the view that this court has no alternative but to strike out the petition having been filed by an entity not capable under the Laws of Kenya of instituting an action in its own name. Moreover, it is also not clear who the precise persons who intend to benefit from this petition are. Each party to bear their own costs of the preliminary Objection.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. L. MBUGUA

ELC JUDGE