



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC PETITION CASE NO. 9 OF 2018

IN THE MATTER OF: ARTICLE 10(2) (c), 22(2) b, 23 (1), 27(1),(2) & (4), 47(1) 50(1) 60(1)(b), 67(2) (c), 162 (2)(b) 259(1) & 260 OF THE CONSTITUTION

AND

IN THE MATTER OF : SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF: SECTION 12, 24 &30 (1) OF THE LAND REGISTRATION ACT NO. 6 OF 2012

IN THE MATTER OF: SECTION 2 OF THE LAND ACT NO. 6 OF 2012

IN THE MATTER OF : SECTION 2 OF THE FAIR ADMINISTRATION ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

BETWEEN

ISAAC ISIAHO FARO

MUSA SHIVALU

SAMSON ASUMIRA INANGA

BENJAMIN KALIA.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF LANDS AND SETTLEMENT.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR ARTHI HOUSE.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....4TH RESPONDENT

JUDGMENT

THE PARTIES

The petitioners herein are male adults residing in Sirwa Yala area of Nandi County who have brought this petition on their own behalf and as representatives of 183 persons who are in occupation of parcel of land known as LR No. 1763/3 situated in Nandi County.

The 1st respondent is the Honourable Attorney General of the Republic of Kenya an office established under Article 156 of the Constitution who is enjoined in the proceedings pursuant to Article 156(4) a & b of the Constitution of Kenya.

The 2nd respondent is a public officer whose office is established pursuant to Article 155(1) of the Constitution of Kenya and is enjoined to these proceedings as an officer accountable on behalf of the government with regards to execution of government policy, enforcement of law, rules and regulation and adherence to the principles enunciated in the Constitution of Kenya.

The 3rd respondent is a public officer under the Public Service Commission pursuant to section 12 of the Land Registration Act, No. 3 of 2012, and is enjoined to these proceedings pursuant to the provisions of the said Act, particularly under section 30(1) thereof as well as other sections.

The 4th respondent is a public officer under the Public Service Commission pursuant to section 12 of the Land Registration Act, No. 3 of 2012 and is enjoined to these proceedings pursuant to the provisions of the said Act, particularly section 30(1) thereof.

The 5th respondent is a Constitutional body set up pursuant to Article 67 of the Constitution of Kenya and is enjoined in these proceedings owing to its dereliction of duty as imposed under Article 67(2) c of the Constitution.

PETITIONERS' CASE

The petitioners herein filed this petition dated 20th December 2017 seeking for the following reliefs:-

- a) That the honorable court be pleased to declare that the respondents have violated the provisions of Article 60(1) b of the Constitution of Kenya insofar as they have failed to register the petitioners and the members on whose behalf they have sued as proprietors of the respective parcels where they are settled upon the land known as L.R No. 1763/3.
- b) That the honorable court be pleased to make orders of mandamus to compel the 3rd and 4th respondents to register the 183 members as the absolute proprietors of the respective parcels where they are settled upon the land known as LR No.1763/3.
- c) That the honorable court be pleased to issue any other or further remedy it shall deem fit.

The respondents entered appearance but never filed any response to the petition. Directions were taken and it was agreed that the petition be canvassed by written submission. The petitioners filed written submissions but the respondents did not file any response to the submissions.

It is the petitioners' case that they have brought this petition on their behalf and as representatives of 183 persons who were members of a company known as Yala Farmers Company Limited and are now in occupation of the parcel of land, pursuant to Article 22(2)(b) of the Constitution of Kenya, to enforce their members' rights enshrined under Article 60(1) of the Constitution.

The petitioners averred that Yala Company was incorporated for the sole purpose of buying part of the land known as KAKAMEGA MUNICIPALITY/ESTATE/LR1763/R and upon the purchase of the said property the company's purpose was spent and members took possession of their respective parcels.

It was the petitioners' case that they together with 180 other individuals have lived on their respective parcels of land that collectively form Land Reference Number 1763/3 situated within Nandi County. They stated that the members have over the years attempted to get titles over the said land and have carried out their duty to facilitate issuance of the title but the respondents have failed to carry out their duty as envisaged under the law.

The petitioners further aver that the land has been surveyed and parcels have been demarcated by the Survey of Kenya whereby they paid Kshs 43,640/ for the Registry Index Maps to be created which they believe are now available paving way for registration of 183 title deeds.

It was the petitioners evidence that prior to the titles being registered, the area list was prepared to ascertain that the persons being registered were bon fide owners of which was authenticated by the Area Chief and forwarded to the 3rd respondent. The petitioners further averred that sometime in 2005 the 4th respondent wrote a letter to the 3rd respondent requesting that the 3rd respondent furnishes the 4th respondent with RIM, the Area list and a letter authorizing the 4th respondent to issue title documents to the members.

The petitioners therefore aver that they have made several attempt to seek recourse from the 5th respondent but the respondent has not made any serious efforts to resolve issue hence the necessity of filing this petition as their right to property has been violated.

Counsel for the petitioners laid the Constitutional foundations upon which the petition is anchored. Counsel relied on Article 10(2) c of the constitution of Kenya which provides for good governance, integrity, transparency and accountability as core national values which the 2nd, 3rd and 4th respondents are supposed to adhere to in the course of rendering service to the members whose behalf the petitioners have moved this court. Further that the Attorney General has the mandate to advise the government to issue titles to the petitioners and having failed to do so, and the petitioners having sued him, the 1st respondent is therefore required to represent them in these proceedings.

On the issue of the petitioners' capacity to bring this suit, counsel relied on the provisions of Article 22 (2) b of the Constitution that provides that a person acting as a member of an interest group or class of persons has a right to institute court proceedings claiming that a right or fundamental freedom in the bill has been infringed. Therefore the petitioners have a right to bring this petition on their behalf and on behalf of 183 members in occupation of the suit land.

Counsel further cited the provisions of Article 23(1) as well as Article 162(2) (b) of the Constitution of Kenya that gives the court requisite jurisdiction to hear and determine applications for redress, denial or violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights whereas Article 23(3) provides for the appropriate reliefs.

The other relevant Article that Counsel relied on are Articles 27 (1), 2 & 3, 40, 47, 50, 60 67 and 259 on every person's right to equality before the law, right to acquire property, right to fair administrative action, right to have any dispute to be resolved by application of the law and decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body, land to be managed equitably, efficiently and sustainably in accordance with the principle of security of land rights, functions of the NLC which includes advising the government on a comprehensive programme for registration of titles in land throughout Kenya and finally the interpretation of the constitution respectively

Counsel therefore urged the court to compel the 3rd and 4th respondents to register the 183 members of the now defunct Yala Farmers Company Limited as the absolute registered owners of the respective parcels of land they have settled on LR No 1763/3 situate in Nandi County plus costs of the petition.

ANALYSIS AND DETERMINATION

From the onset it is important to note that the respondents were served with the petition, filed a memorandum of appearance but did not file any replying affidavit in opposition to the petition. Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 prescribes the manner in which a Respondent may respond to a Petition. Essentially this petition is unopposed.

In the case of **Israel Otieno Agina v. the Attorney General (2011) eKLR** Majanja J. observed that the effect of failure to file replying affidavit on evidence is to render the facts raised in the petition and affidavits uncontroverted and consequently to be taken as true and correct as they are.

The issue for determination is whether the petitioners' rights have been violated as enumerated in the petition and who is to pay costs of this petition. I have considered the petition together with the constitutional foundations of the petition which were elaborately explained.

The petitioners aver that their right to property has been violated as they bought the suit land, paid for the purchase price, took possession of their respective portions, paid for survey of the land, and followed all the requisite procedures to enable them get their title deeds in their name but the respondent have not done their part. The petitioners attached all the documentation to show the processes that they have gone through with the approval of the relevant offices which are occupied by the respondents who have frustrated their efforts to enjoy their right to property as per Article 40 of the constitution.

Article 40 (3) of the Constitution prohibits the State from depriving any person of any property unless such deprivation is for a public purpose in public interest and for which prompt and just compensation will be made.

There is no reason why the petitioners should not be issued with their titles as there has been no objection on how they acquire the suit land and have never been evicted or threatened with eviction for the period of over 40 years that they have been in occupation. The petitioners have followed due process in the acquisition of the suit parcel with the relevant approvals from the government agencies concerned with land acquisition, surveying and registration. Why are the 2nd and 4th defendants not fulfilling their mandate of issuance of title deeds or certificate of leases in the prescribed form? This amounts to a violation of the petitioners' right by not issuing such titles to ensure security of tenure.

The 3rd and 4th respondents are responsible for registration and are therefore bound by Article 10 of the Constitution to take into account the principles of non-discrimination and if it fails to do so or exercises its mandate in a discriminatory manner, then the court is invited to enforce rights that have been violated.

The equitable principle of mandamus is invoked to compel the performance of a public duty. The petitioners have a legal right to be issued with title deeds. They have done all what they were required to do but the 3rd and 4th respondents have failed to perform their duties as imposed by Section 30 of the Land Registration Act.

In the case of **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543** where Goudie, J expressed himself, inter alia, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature”...

In this case the respondents have refused to perform a public duty of issuance of titles to the petitioners even after the petitioners have fulfilled their part of the bargain. The duty to be performed arises out of the official status of the respondents which is provided for under section 30 of the Land Registration Act which authorizes the Registrar to issue a certificate of title to a proprietor where no title has been issued. This is a statutory duty which must be performed for the benefit of the citizens in accordance with the law and the laid down

procedures. If an officer does not do his or her duty as mandated, then an order of mandamus can be issued to compel such officer to perform the duty.

Similarly the remedy of mandamus was enumerated in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89** thus:

"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

I have considered the petition in its entirety and find that the petitioners' right to property has been violated hence cannot enjoy security of tenure as provided for under Article 40 read together with 27 (4) of the Constitution which provides that the state shall not discriminate directly or indirectly on any grounds. No reason has been given why the petitioners have not been issued with titles all these years.

Having said that I find that the petition has merit and is therefore allowed as prayed. I find that the respondents have failed to perform their duties to register the petitioners as proprietors of the suit land hence have violated their right to property. I therefore issue an order of mandamus compelling the 3rd and 4th respondents to register the 183 members as the absolute proprietors of the respective parcels where they are settled upon the land known as LR No.1763/3.

The respondents to pay costs of the petition.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE