REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. PETITION NO. 1 OF 2014

IN THE MATTER OF ARTICLES 62 (2), 63(1), (2), (3), (4) AND 67 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF

KENYA 2010

AND

THE LAND ADJUDICATION ACT, CAP 284, LAWS OF KENYA

AND

IN THE MATTER OF CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION

OF MBEERE COMMUNITY RIGHTS AND INTEREST IN LAND IN ALL THAT TRUST LAND

KNOWN AS MWEA WITHIN THE AREAS KNOWN AS KARABA, WACHORO, RIAKANAU,

GATEGI AND MAKIMA, UNDER ARTICLES 62(2), 63(1), (2), (3), (4)

AND 67 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

MBEERE ELDERS ADVISORY WELFARE GROUP (NGOME).....1ST PETITIONER

DAVID MITI NJUKI.....2ND PETITIONER

NJERU BANDA.....3RD PETITIONER

ESTON NYAGA NTHIGA.....4TH PETITIONER

SERAPHINO NGARI.....5TH PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

DISTRICT LAND REGISTRAR MBEERE.....5TH RESPONDENT

THE COUNTY COUNCIL OF MBEERE.....6TH RESPONDENT

THE NATIONAL LAND COMMISSION.....7TH RESPONDENT

THE COUNTY SECRETARY LAND AND .

PHYSICAL PLANNING EMBU COUNTY.....8TH RESPONDENT

NAOMEY MUTHONI NYAGAH & 293 OTHERS.....9TH – 303RD RESPONDENTS

AND

AMBROSE KITHAKA KARIUKI & 233 OTHERS.....1ST – 234TH INTERESTED PARTIES

AND FURTHER

JUSTINE NYAKI NGURE & 14 OTHERS.....235TH – 249TH INTERESTED PARTIES

BENSON MUTHIKE WARUI & 5799 OTHERS.....250TH–6049TH INTERESTED PARTIES

RULING

A. INTRODUCTION

1. By a notice of motion dated 28th October 2019 expressed to be brought under **Sections 1A, 3A** and **80 of the Civil Procedure Act (Cap. 21), Order 45 Rule 1** of the **Civil Procedure Rules 2010** *(the Rules)* **and all other enabling provisions of the law,** the 250th – 6049th Interested Parties *(the Applicants)* sought the following *orders:*

a) That this honourable court be pleased to review, vacate, vary and/or set aside the consent issued on 12th January 2016 by this honourable court.

b) That this honourable court be pleased to order the cancellation of the titles issued pursuant to the consent of 12th January 2016.

c) That this honourable court be pleased to order that the exercise of title issuance in regard to Mwea Settlement Scheme do start afresh and upon verification of the beneficiaries as per the law.

d) That the costs of this application be provided for.

B. THE APPLICANTS' CASE

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the partial consent dated 12th January 2016 was irregularly recorded since Mwea Settlement Scheme *(the suit land)* had already been gazetted as a Settlement Scheme vide *Gazette Notice No. 577 of 2004* dated 30th January 2004 in line with the provisions of **Section 117 (1)** of the repealed **Constitution of Kenya** and **Section 13 of the Trust Land Act** (repealed). Accordingly, it was contended that the suit land had ceased to be community land and had become public land to all intents and purposes.

3. It was contended that as a result of the setting apart the Mbeere Community or any other community for that matter had no legal mandate to identify and prepare a list of beneficiaries of the suit land since that was the preserve of the sub-county selection committee as stipulated under **Section 134** of the **Land Act, 2012.** It was, therefore, contended that due to the failure to follow the laid down legal process, the suit land was irregularly allocated to the 39 clans of the Mbeere tribe to the exclusion and detriment of other communities who had resided on the suit land for over 50 years.

4. The Applicants further contended that they were not made parties to the proceedings prior to the recording of the said consent even though they were in occupation and the consent orders adversely affected their legal interest in the suit land.

5. The said application was supported by the affidavit of Benson Muthike Warui sworn on 28th October 2019 and a supplementary affidavit sworn by him on 3rd March 2020 which reiterated and expounded upon the grounds set out in the notice of motion. It was contended that the said partial consent in effect conferred ownership rights exclusively upon members of the Mbeere tribe to the prejudice of members of other communities who had inhabited the suit land for over 50 years.

6. Finally, the Applicants contended that the partial consent was recorded under a fundamental mistake of fact that the suit land was not inhabited whereas it was already inhabited by the Applicants. The Applicants considered that such a mistake vitiated the consent hence it ought to be reviewed and set aside to pave way for fresh allocation of the suit land.

C. THE PETITIONERS' RESPONSE

a) The 1st – 5th Petitioners

7. There is no material on record to demonstrate that the 1st – 5th Petitioners filed any response to the said application.

b) The 6th – 9th Petitioners

8. The 6th – 9th Petitioners filed a replying affidavit sworn by Peter Nyaga Elisha Mitaru on 20th February 2020 in opposition to the said application. It was contended that the application had been overtaken by events due to the court's ruling dated 6th February 2020. It was also contended that the Applicants' community was at all material times represented in the discussions leading up to the recording of the consent as a result of which their community referred to as the "Mwea Community" was to get 30% of the suit land.

9. It was further contended that the application was *res judicata* on account of the judgement in *Embu ELC Petition No. 2 of 2016 – Nickson Mutinda Musyoki & 9 Others Vs The NLC & 2 Others.* The 6th – 9th Petitioners considered the application as frivolous and vexatious hence the court was urged to dismiss the same.

D. THE RESPONDENTS' RESPONSE

a) 1st – 5th Respondents

10. The Attorney General filed grounds of opposition dated 10th February 2020 on behalf of the 1, 2, 3, 4 & 5th Respondents raising the following grounds:

a) That the application was res judicata.

b) That the application was frivolous, mischievous and an abuse of the court process.

c) That the partial consent was recorded with the full consent of the parties and stakeholders.

The Attorney General, therefore, urged the court to dismiss the said application with costs.

b) The 8th Respondent

11. The 8th Respondent filed a replying affidavit sworn by Josphat Kithumbu on 13th March 2020 in opposition to the said application on several grounds. It was contended that in *Embu ELC Petition No. 2 of 2016* the court had determined that the Respondents had complied with all the provisions of the Constitution and other relevant statutory laws in the allocation of the suit land. It was contended that several consultative meetings were held in the course of public participation before the consent was recorded and minutes of the relevant meetings were annexed to the affidavit. It was also contended that public participation involved the leaders and representatives of the Mbeere, Aembu, Agikuyu and Akamba ethnic groups hence the Applicants were adequately represented.

12. It was contended that **Section 134** of the **Land Act, 2012** was faithfully observed and that a selection committee was appointed by the National Land Commission. The 8th Respondent contended that **the Land Regulations 2017** were not in existence in 2016 when the consent was recorded hence they could not be applied retrospectively.

13. It was contended that the suit land was not inhabited at the time of recording the consent and that if there were any occupants thereon then such occupants were considered by the selection committee and found to be ineligible. It was further contended that if the Applicants were by any chance in occupation then they were illegally in occupation.

14. The 8th Respondent further contended that as the Applicants were not parties to the partial consent they had no legitimate reason to complain about it. The 8th Respondent took the view that such consent was sacrosanct and legally binding hence the same ought not to be disturbed since the allotees had already obtained indefeasible titles under the **Land Registration Act 2012.**

15. It was also contended that the allegation that some people had been allocated huge parcels of land to the detriment of the Applicants was baseless since there was no law in Kenya prescribing the maximum acreage one individual could hold hence there was nothing wrong with the impugned allocations. The court was consequently urged to dismiss the said application with costs.

E. RESPONSES BY THE INTERESTED PARTIES

a) The 1st – 234th Interested Parties

16. The 1st – 234th Interested Parties filed a replying affidavit sworn on their behalf by Ambrose Kithaka Njeru on 20th February 2020 in opposition to the said application. It was conceded that the suit land was inhabited by members from other communities apart from the Mbeere Community. It was stated that public participation was undertaken prior to the recording of the impugned consent and that the formula of distribution was agreed as follows:

a) Mbeere Community -40%

b) Akamba Community -30%

c) Embu Community -20%

d) Agikuyu Community -5%

e) The disabled -5%

17. It was further contended that members of the Applicants' Akamba Community benefitted from the allocation and that the Mbeere Community was not favoured in any manner. It was further contended that all the persons who were in occupation of the suit land were considered for allocation save that the land was not sufficient to satisfy every person. It was, therefore, contended that the Applicants had not made out a case for review or setting aside of the said consent order hence the court was urged to dismiss the said application.

b) <u>The 235th – 249th Interested Parties</u>

18. The 235th -249th Interested Parties filed a replying affidavit sworn by Justin Nyaki Ngure on 28th February 2020 in opposition to the said application. It was contended that the Applicants were mainly members of the Akamba Community who were fully involved in the discussions and consultations leading up to the recording of the partial consent. It was contended that the consensus reached in the distribution of the suit land was as follows:

a) Mbeere (39 clans) - 40%

b) Mwea (Akamba) -30%

c) Embu (Manyatta & Runyenjes) -20%

d) Agikuyu -5%

e) Disabled -5%

19. It was contended that the suit land was community land as contemplated under **Article 63(2) (d) (iii)** of the **Constitution of Kenya** and that it was not a settlement scheme or under a settlement programme as contemplated under **Sections 134 and 135** of the **Land Act, 2012.** It was consequently denied that the **Land Regulations 2017** were applicable to the suit land.

20. The Interested Parties conceded that the suit land was set apart under **Section 117** of the retired **Constitution of Kenya** and **Section 13** of the **Trust Land Act** but asserted that the land remained in the name of the County Council of Mbeere at all material times prior to the recording of the partial consent. The court was consequently urged to dismiss the said application.

F. <u>DIRECTIONS ON SUBMISSIONS</u>

21. When the said application was listed for directions on 6th February 2020 it was directed that the said application shall be canvassed through written submissions. The parties were consequently given timelines for filing responses and submissions thereto before 18th March 2020. Although the parties were given the option of highlighting their written submissions on 18th March 2020 the court had to dispense with such highlighting due to the prevailing Covid-19 situation.

22. The material on record indicates that the Applicants filed their submissions on 4th March 2020, the 1st, 6th, 7th, 8th & 9th Petitioners filed theirs on 9th March 2020 whereas the Attorney General for the 1st -5th Respondents filed his on 11th March 2020. There were, however, no submissions on behalf of the rest of the parties at the time of preparation of the ruling.

G. <u>THE ISSUES FOR DETERMINATION</u>

23. The court has considered the Applicants' notice of motion dated 28th October 2019, their supplementary affidavit, the grounds of opposition, and the replying affidavits in opposition thereto. The court is of the opinion that the following issues arise for determination in this matter:

a) Whether the instant application is res judicata.

b) Whether the application has been overtaken by events.

c) Whether the application is frivolous and otherwise an abuse of the court process.

d) Whether the Applicants have made out a case for the review or setting aside of the consent order dated 12th January 2016.

e) Whether the Applicants are entitled to the orders for cancellation of titles and fresh allocation of the suit land.

f) Who shall bear costs of the application.

H. ANALYSIS AND DETERMINATIONS

a) Whether the application is res judicata

24. The court has considered the material and the submissions on record on the issue of *res judicata*. It was contended that the instant application is *res judicata* on account of the judgement of the court in *Embu ELC Petition No. 2 of 2016 – Nickson Mutinda Musyoki & 9 Others V The NLC & Others* and *Embu ELC Petition No. 2 of 2016 – County Government of Kirinyaga V Cabinet Secretary of Lands & Others.*

25. According to **Black's Law Dictionary, 9th Edition,** *res judicata* is a Latin phrase meaning "a thing adjudicated". It defines the phrase at page 1425 as follows:

> **"1. An issue that has been definitively settled by judicial decision.**
>
> **2. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not –raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgement on the merits, and (3) the involvement of the same parties or parties in privity with the original parties …"**

26. The principle of *res judicata* is codified in **Section 7** of the **Civil Procedure Act (Cap. 21)** as follows:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

27. In the case of **Kamunye & Others Vs The Pioneer General Assurance Society Ltd [1971] EA 263** at page 265 the test for *res judicata* was summarized as follows:

> **"The test whether or not a suit is barred by *res judicata* seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time. Green-halgh Vs Mallard, [1947] 2 All E.R 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply Jadva Karsan Vs Harnam Singh Bhogal (1953), 20 E.A.C.A 74,"**

28. The court is far from satisfied that the instant suit is *res judicata*. In fact, none of the requirements for *res judicata* have been satisfied in the instant case. The parties in *Embu ELC Petition No. 3 of 2016* were totally different from the instant petition. The Petitioner in that case had sued on behalf of the 9 Agikuyu clans from Kirinyaga County known as the *Mihiriga Kenda* and not the Applicants in the instant application. The court is also unable to agree that the judgement in *Embu ELC Petition No. 2 of 2016* could render the instant application *res judicata*. The court is not satisfied that the matters directly and substantially in issue in the instant application were also directly and substantially in issue in that petition. There was no prayer for review, variation or setting aside of the consent order in that petition. The plea of *res judicata* had also been raised in that matter but the court found and held that the matters raised therein were not *res judicata.* Accordingly, the court finds that the instant application is not *res judicata.*

b) Whether the application has been overtaken by events

29. It was submitted that the instant application had been overtaken by events by the court's ruling dated 6th February 2020 which found that the partial consent had been irregularly and fraudulently executed. The court is unable to find anything on record to support such submission. The ruling of 6th February 2020 arose from the notice of motion dated 24th December 2018 by the 235th – 249th Interested Parties challenging the manner of implementation of the consent order. There was no prayer for review, variation or setting aside of the consent order. The court did not set aside or review that consent order. In those circumstances, there is no legal basis upon which it may be held that the instant application has been overtaken by events. Accordingly, the 2nd issue is answered in the negative.

c) Whether the instant application is frivolous and otherwise an abuse of the court process

30. The court has considered the material and the submissions on record on this issue. In the case of **Trust Bank Limited V Amin & Company Ltd & Another** Onyango - Otieno J (as then was) described the terminologies by making reference to *Bullen & Leake and*

Jacobs Precedents of Pleadings (12 Edition) as follows:

> **"In Bullen & Leake and Jacobs precedents of pleading (12th Edition) on the chapter dealing with striking out pleadings at page 145 it stated:**
>
> **'A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense ...'**
>
> **'...and lastly a pleading which is an abuse of the court really means in brief a pleading which is a misuse of the court machinery or process."**

31. There is no material on record to demonstrate that the instant application is groundless or merely fanciful. There is equally no material to demonstrate that it is a misuse of the court machinery or process or that it was actuated by some improper motives. Accordingly, the court is unable to hold that the application is frivolous or otherwise an abuse of the court process.

d) Whether the Applicants have made out a case for review of the consent order

32. The court has considered the material on record and the submissions of the parties. The court is aware that the instant application is based upon **Section 80** of the **Civil Procedure Act (Cap 21)** and **Order 45** of the **Rules. Order 45 Rule 1** of the **Rules** stipulates as follows:

> **"(1) Any person considering himself aggrieved –**
>
> **(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
>
> **(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

33. The Applicants submitted that the partial consent of 12th January 2016 was based upon misapprehension, ignorance, or insufficiency of material facts in that the suit land had already been set apart for a settlement scheme vide Gazette Notice No. 577 of 2004. It was submitted that it was wrong for the Respondents to have proceeded with the allocation on the basis that the suit land was still community land.

34. The court is of the view that there is no demonstration of a case falling within **Order 45 Rule 1** of the **Rules.** There is no evidence of a mistake of fact or error of law apparent on the face of the record to warrant a review. Assuming, but without deciding the point, that the status of the suit land had changed from community to public land, that was a matter which was well known to the Respondents. There is some evidence on record to demonstrate that Gazette Notice No. 577 of 2004 was within the possession and knowledge of the concerned government officials. The gazette notice was published by the Commissioner of Lands whose successor, the National Land Commission *(the NLC),* was represented in the petition. It must be remembered that in order to be sufficient to vitiate a consent, the mistake in question must be a common mistake by all the concerned parties. A unilateral mistake will not normally be sufficient to vitiate a contract which is otherwise valid. Accordingly, the court finds no evidence of a mutual mistake capable of invalidating the partial consent dated 12th January 2016.

35. The Applicants further submitted that the consent should be reviewed because it violated mandatory provisions of the law. It was submitted that the right legal procedure was not followed in the identification of the beneficiaries of the suit land. The Applicants submitted that a sub-county selection committee under **Section 134** of the **Land Act, 2012** was never established. It was further submitted that it was a violation of the law for the Respondents to have allowed the community or clan representatives to agree on the list of beneficiaries.

36. The Applicants have submitted that under **Section 134 (4)** of the **Land Act** it was the Cabinet Secretary responsible for lands to appoint the selection committee and not any other authority. The court has noted that the current **Section 134** of the **Act** was introduced by the **Land Laws (Amendment) Act No. 28 of 2016.** The amendment Act was assented to by the President on 31st August 2016 and it came into operation on 21st September 2016. Prior to the amendment Act coming into force the NLC was the entity responsible for settlement programmes and it was the one responsible for appointing the sub-county selection committee. The court has noted that the 8th Respondent exhibited a copy of such letter of appointment from the NLC dated 11th December 2015.

37. The court is of the opinion that there would be nothing wrong with members of various communities or clans discussing and agreeing on the mode of identification of beneficiaries or allocation of the suit land even where a sub-county selection committee is in existence. Allocation through negotiations may achieve greater consensus and satisfaction amongst the concerned beneficiaries. Moreover, alternative dispute resolution of disputes is encouraged by **Article 159 (2) (c)** of the **Constitution of Kenya 2010.** The court is thus not satisfied that there is a legitimate reason to disturb the consent whether the suit land was community land or public land reserved for a settlement scheme.

38. The Applicants further submitted that there was "other sufficient reason" to warrant a review of the consent order. It was submitted that the task of identifying beneficiaries of the suit land was left entirely upon leaders of the Mbeere tribe to the exclusion of other communities which were also entitled to a share of the land. They disputed that there was an agreed formula for distribution of the suit land as contended by the 6th – 9th Petitioners and the 234th – 349th Interested Parties. They stated that although other communities were mentioned in the

petition to the NLC the signatures of their leaders were not appended thereto.

39. The court is not satisfied from the material on record that there is any other sufficient reason to review the consent. Whereas the court is aware that the Applicants were not personally party to the consent, there is sufficient material on record to demonstrate that the interests of their community were taken into account by the reservation of 30% share of the suit land. There was nothing wrong in the leaders of the Mbeere Community participating prominently in the consultative meetings. They were the petitioners in the matter and they were entitled to actively participate in the process of resolution of the land dispute. Conversely, the Applicants and their community leaders were not precluded in participating in the process.

40. There is another reason why the Applicant's notice of motion must fail. The material on record shows that public participation took place for about 3 years before the partial consent of 12th January 2016 was recorded. There was no explanation rendered as to why the Applicants did not apply to be joined in the petition much earlier. Even after the consent of 12th January 2016 was recorded, it took the Applicants more than 3 years to apply for joinder and review of the consent order. That is clearly contrary to the intendment of **Order 45 Rule 1** of the **Rules** which requires that an application for review should be filed without unreasonable delay. The court finds that there is no plausible explanation for such delay hence the court finds that the Applicants have not made out a case for review of the consent order.

e) Whether the Applicants are entitled to the orders for cancellation of titles and fresh allocation of the suit land

41. These are consequential orders which the Applicants were seeking. They are wholly dependent upon the Applicants' success in the application for review. The court has already found that the Applicants have failed to make out a case for review or setting aside of the consent order. It would, therefore, follow that the Applicants are not entitled to the consequential orders sought.

f) Who shall bear the costs of the application

42. Although costs of an action or proceeding are usually at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21).** As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. The court has considered the nature of the proceedings and the interest of the parties. The court is also aware that litigation amongst the various parties is not yet concluded. The court is of the opinion that each party should bear his own costs of the application.

I. SUMMARY OF THE COURT'S FINDINGS

43. In summary, the court makes the following findings on the issues for determination herein:

a) The instant application is not res judicata on account of any previous proceedings.

b) There is no material on record to demonstrate that the application has been overtaken by events.

c) It has not been demonstrated that the instant application is frivolous or otherwise an abuse of the court process.

d) The Applicants have not made out a case for review or setting aside of the consent order dated 12th January 2016.

e) The Applicants are not entitled to the consequential orders for cancellation of titles and fresh allocation of the suit land.

f) Each party shall bear its own costs of the application.

J. CONCLUSION AND DISPOSAL ORDER

44. The upshot of the foregoing is that the court finds no merit in the Applicants' notice of motion dated 28th October 2019. Accordingly, the same is hereby dismissed in its entirety. Each party shall bear his own costs. It is so decided.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **28TH DAY** of **MAY 2020.** Ruling delivered via zoom platform in the presence of Ms. Mutegi holding brief for Ms. Kithaka for the 1st, 6th, 7th, 8th & 9th Petitioners; Mr. Githaiga holding brief for Mr. Kinyua Njagi for the 6th & 8th Respondents and in the absence of the rest of the parties.

Y.M. ANGIMA

JUDGE

28.05.2020