



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PET CASE NO. 11 OF 2017

IN THE MATTER OF ARTICLE 2,3,19,20,21,22,23,40,47,

48,62 AND 67 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT

IN THE MATTER OF THE COUNTY GOVERNMENT ACT No.17 OF 2012

AND

IN THE MATTER OF THE NATIONAL LANDS COMMISSION ACT No.5 OF 2012

AND IN THE MATTER OF THE ALLEGED CONTRAVENTION OF

ARTICLES 35, 40, 47, 48, 50 AND 60 OF THE CONSTITUTION

AND

IN THE MATTER OF THE INTENDED ALLIENATION OF PUBLIC

LAND IN RESPECT OF LAND IN IRURI COLONIAL VILLAGE

BETWEEN

RICHARD MURIUKI KANUTHU.....PETITIONER

-VERSUS-

THE NATIONAL LAND COMMISSION.....1st RESPONDENT

THE COUNTY GOVERNMENT OF NYERI.....2nd RESPONDENT

AND

JOHNSON MWANGI MURIUKI.....INTERESTED PARTY

AND

HIUHU NGUNU.....INTERESTED PARTY

JUDGEMENT

1. The Petitioner filed his Petition dated the 4th July 2017 on an equal date which Petition was supported by an Affidavit sworn by the Petitioner on 4th July 2017, wherein he sought for the following orders;

i) A declaration that any alienation of land forming Iruri Colonial Village without the participation of, and disclosure of information to the Petitioner and other interested residents of the village is unconstitutional.

ii) A declaration that any alienation of the land forming Iruri Colonial Village to persons other than the residents of the village is unconstitutional.

iii) An Order of Mandamus directing the Respondents to disclose to the Petitioner the intended beneficiaries of alienation of the land forming Iruri Colonial Village.

iv) An order of prohibition restraining the Respondents from alienating any part of the land forming Iruri Colonial village to any person other than the residents of the village.

v) An order that any other alienation of the land forming Iruri colonial Village to persons who are not residents therein, if already done, be rectified by cancellation and the title deed to the village land do revert to the 2nd Respondent for proper alienation.

vi) Costs and interest.

2. Alongside the Petition, the Petitioner had also filed an Application seeking interim orders against the Respondents wherein on the 23rd October 2017, the Court observed from the record that although the County Government and the National Land Commission had been served, they had not responded to the Application. The Court observed that the suit property ought to be preserved pending the hearing and determination of the Application and allowed prayer (a) in the Notice of Motion dated 4th July, 2017 pending inter-parties hearing. The 2nd Respondent was then granted leave of 14 days to file their Replying Affidavit.

3. On the 27th November 2107, Counsel for the 2nd Respondent informed the Court that they would not file their Replying Affidavit because they had engaged the National Land Agency who needed time to file a response. Since the Application had been unopposed, interim orders had been extended and parties ordered to maintain the status quo pending the hearing and determination of the Petition.

4. On the 3rd October 2018, pursuant to information that parties were negotiating, the Court granted them 60 days to negotiate with a rider that if within the 60 days no settlement had been reached, directions would be taken on how to dispose of the Petition.

5. On the 21st February 2018, the Court gave directions that the Petition was to be disposed of by way of written submission wherein parties were granted 30 days to file and serve. Thereafter, parties failed to comply with the directions and after several mention dates, on the 4th March 2020 when the matter came up for another mention, the Court observed that directions had been issued on the 21st February, 2019 for the Petition to proceed by way of written submissions. Thereafter the said directions had been confirmed on the 9th October, 2019 and leave granted yet again to the interested party as well as to the Respondents to file and serve their response to the Petition and to comply with the orders of 21st February, 2019. On the 22nd January 2020, the Court gave directions that the matter would be mentioned on the 4th March 2020 for highlighting of the parties' written submissions wherein it had been noted that all parties, including the Petitioner had not complied yet again.

6. Pursuant to the provisions of Article 159(2)(b) of the Constitution, Section 1A and 3A of the Civil Procedure Act, the Court directed the parties to proceed with the matter as earlier directed wherein Counsel for the Petitioner submitted that they would rely on the contents of the Petition and the affidavits in support as well as the Constitutional provisions quoted in the Petition.

7. Counsel for the 2nd Respondent submitted that no orders adverse to the 2nd Respondent had been sought and therefore they would abide by the directions of the Court.

8. Counsel for the interested party's submission was to the effect that the dispute before the Court as advanced by the Petitioner had been whether there had been the inclusion of all the residents of colonial village in the process of allocation of the suit land.

9. His further submission was that the Interested Parties herein had sought audience of the Court on behalf of 103 other residents of colonial village. That they had approached the Court as citizens of the Republic whose property rights were protected under Article 40 of the Constitution. That the Interested Parties who were bonafide residents of the colonial village, some of who pre-dated the Petitioners, were aware that the land being sought by the Petitioner for purpose of social amenities had already been adequately provided for prior to the filing of the Petition herein.

10. That the Interested Parties were in agreement with the Petitioner that indeed there were executive orders to expedite issuance of title deeds to the residents of the Colonial village.

11. He further submitted that although the Petitioner had alleged that the Respondents had started demarcating land for issuance of title deeds whereby in the process they had given land to undeserving residents of colonial village, in an exercise which was done in secrecy and therefore the Court should, stop the 1st and 2nd Respondents from executing the executive order in respect of issuance of title deeds, the said allegations were without any justifiable cause save for apprehension on the part of the Petitioner.

12. That the Court had not been shown anything to prove that the 1st and 2nd Respondents were in violation of the provisions of the

Constitution of Kenya and neither were the 1st and 2nd Respondents in violation of the National Land Commission 2012, the Land Act and the Land Registration Act 2012.

13. That the rights of the Interested Parties had therefore been violated by dint of the filing of the Petition and therefore it was their prayer that the Court weighs the rights of the Petitioners as against the rights of the 105 villagers of the colonial village.

14. Counsel submitted that when the 1st and 2nd Respondents were in the process of demarcating the said land for purposes of issuance of title deeds, it had been an exciting moment for the villagers as their dream of owning their respective pieces of land had come true.

15. The residents of the colonial village had a legitimate expectation as was expounded by **Smith in the Judicial Review Administrative Action at page 609** to wit;

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

16. That the residents thus prayed that the honorable Court finds it just to direct the 1st and 2nd Respondents to proceed expeditiously with the process of demarcation and issuance of the title deeds and also to find that the land that had been set aside for social amenities to be maintained as it is. The Interested Parties relied on the decided case in **Sirikwa Squatters Group vs the Commissioner of Lands and 9 Others (2017) eKLR** to buttress their submission.

Determination

17. The Petitioner brings this Petition as a Chairman of the Iruri Village Squatters. It is worth noting that although the parties herein were served with the Petitioner’s Petition, the Respondents opted not to file any Replying Affidavit or Grounds of Opposition and therefore the Petitioner’s case is uncontroverted and unchallenged both in terms of facts and the law as against the Respondents. I shall therefore proceed to evaluate the Petition on the uncontroverted evidence in that regard.

18. Article 258 of the Constitution, which provides that:

(1)Every person has the right to institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2)In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by—

a person acting on behalf of another person who cannot act in their own name;

a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d)an association acting in the interest of one or more of its members.”

19. Today, by dint of *Articles 22 and 258* of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest.

20. Pursuant to *Article 22 (3) of the Constitution*, the Chief Justice made rules vide Legal Notice No. 117 of the 28th June 2013 referred to as (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 whose overriding objective was to facilitate access to justice for all persons.

21. Where a legal wrong or injury is caused or threatened to a person or class of persons by reason of violation of any Constitutional or legal right, and such person or group of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an Application for an appropriate direction, order or writ in the High Court under *Articles 22 and 258* of the Constitution. In filing this Petition, the Petitioner was acting not only on his behalf but on behalf of all those interested residents of Iruri Colonial Village.

22. It was therefore for the Petitioner to prove, on a balance of probabilities that the fundamental freedoms and rights of the residents of Iruri village as protected by or under the Constitution had been violated, by not only clearly identifying the relevant and specific *Articles* of the Constitution, but availing evidence, through affidavit or otherwise of such violation as per the required standard set out in respect of the Constitutional Petitions. This was the holding in the case of **Anarita Katimi Njeru vs The Republic (196-1980) KLR 1272** that:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

23. From the above captioned Petition, the Petitioner and the Interested Parties are in agreement that Iruri Colonial Village was established

by the Colonial Government, during the struggle for independence, as a concentration camp for the local people residing therein which persons and their families are still in occupation of a distinct part of the village to date.

24. That after an executive directive that the residents of the village were to be issued with title deeds to their respective plots under their occupation, the Respondents together with the local administration demarcated the village land and commenced on the process of alienating the same as per the said directives.

25. The Petitioners' Petition however was to the effect that whereas the village land comprised public land and was vested in the 2nd Respondent to hold it in trust for the residents of the village, and whereas the duty to alienate the village land was vested in the 1st Respondent on behalf of the 2nd Respondent, the Respondents had been undertaking the said exercise surreptitiously, secretly and without any participation of the Petitioner and all the other residents of the village.

26. That in so doing, the Respondents concealed information on the identity of the proposed beneficiaries of the ongoing alienation and the criteria they had used of identifying such beneficiaries despite the Petitioners' plea for public participation. In the process, the Petitioners and interested village residents established that the ongoing alienation of the village land was substantially for the benefit of strangers who were not residents of the village.

27. That the actions of the Respondents had thus denied the Petitioners and the interested residents of the village the right to participate in the exercise, the right to information, the right to protection of property and the right to fair administrative action pursuant to *Articles* 35, 40, 47, 48, and 50 of the Constitution

28. I find that three issues arising for determination as follows:-

i. Whether the Petitioner's rights under Article 35, 40, 47, 48, and 50 of the Constitution had been infringed.

ii. Whether the Petitioner was entitled to the orders sought in the Petition?

29. Article 35 of the Constitution provides that;

1) "Every citizen has the right of access to—

a) information held by the State; and

b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

3) The State shall publish and publicise any important information affecting the nation.

30. From the above captioned provisions of the Constitution, it is clear that that information held by the state is accessible by citizens which information should be available on request. Thus once a citizen places a request to access information, the information should be availed to the citizen without delay as this is an important right for the proper and democratic conduct of government affairs. The right to access information becomes a foundational human right which right enables citizens to participate in that governance.

31. It is therefore important that for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.

32. In the case of **Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others [2013] eKLR** the Court held as follows:

"The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State..."

The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."

33. In the case of **Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission [2016] eKLR**, the Court held that;

*"Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in *The Public's Right to Know: Principles on Freedom of Information Legislation – Article 19 at page 2* that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies*

have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information”.

34. The provisions of Article 47 of the Constitution provide as follows:

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*
 - (a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and*
 - (b) promote efficient administration. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair*

35. The Court of Appeal stated in the case of **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR**; that;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

36. The Petitioners and the Interested Parties herein have submitted that the Respondents herein, pursuant to an executive directive to demarcate and alienate Iruri village so that its residents could be issued titles, commenced on the process surreptitiously and secretly without any participation of the Petitioner and other residents of the village. That they concealed the information on the identity of the proposed beneficiaries of the ongoing alienation or the criteria used to identify such beneficiaries, allegations which were not controverted by the Respondents.

37. I find that pursuant to the provisions of Article 35 and 47 of the Constitution, the Respondents were under an obligation to allow the Petitioners and Interested Parties access the information they so sought and/or where it was not possible, to give them reasons therein. I find that they failed in both instances to render such information despite the Petitioners’ plea for public participation. This clearly violated the Petitioners’ rights under Article 35 and 47 of the Constitution.

38. The Petitioners’ further grievance was that pursuant to the Respondents’ act of concealing the information on the identity of the proposed beneficiaries of the ongoing alienation or the criteria of identifying such beneficiaries, the alienation of the village land was substantially for the benefit of strangers who were not residents of the village and which action denied the Petitioner and the interested residents of the village the rights to participate in the exercise, the right to information, the right to protection of property and the right to fair administrative action thereby infringing their rights as enshrined under *Articles* 40, 48, and 50 of the Constitution.

39. Article 40 of the Constitution of Kenya provides that;

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-*
 - (a) of any description; and*
 - (b) in any part of Kenya.*
- (2) Parliament shall not enact a law that permits the State or any person-*
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or*
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).*
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-*
 - (a) results from an acquisition of land or an interest in land or a conservation of an interest in land, or title to land, in accordance with Chapter Five; or*

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) requires prompt payment in full or just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired

40. In the case of **R vs Chief Immigration Officer (1976) 3 AER 843** Lord Denning stated this regarding the Universal Declaration of Human Rights;

"... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognized in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State Counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the Court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly..."

41. The thrust of **Article 40** is to protect proprietary rights under the law which rights are governed by statutes, for example, in this case, the *Land Registration Act and Land Act which statutes are clear that* that once a title is issued under the Act, the holder thereof acquires an indefeasible title which cannot be taken away except in accordance with the Constitution and the law as was held in the case of **Wreck Motors Enterprises v The Commissioner of Lands and Others [1997] eKLR**.

42. The Petitioners have alleged that the Respondents' actions was substantially for the benefit of strangers who were not residents of the village thus violating their constitutional rights to property under **Article 40** of the **Constitution**. **In view of the above sentiments, I find that there has been no** evidence that discloses an arbitrarily deprivation of the Petitioners' interest over land in Iruri colonial village as alleged. It must be kept in mind that the bill of rights are sacrosanct and should be safeguarded to be invoked only when it is extremely necessary to do so.

43. Article 48 of the Constitution applies to access to justice to all while Article 50 applies to fair hearing in a Court, impartial tribunal or a body established to resolve a dispute. From the narrative of the Petition herein, I do not find any of these rights having been infringed as there has been no evidence adduced to that effect.

44. It is therefore the finding of this Court that the Petitioners have partially proved the Petition on a balance of probability that they are entitled to the orders and declarations as follows:

i. A declaration that any alienation of land forming Iruri Colonial Village without the participation of, and disclosure of information to the Petitioner and other interested residents of the village is unconstitutional.

ii. An Order of Mandamus directing the Respondents to disclose to the Petitioner the intended beneficiaries of alienation of the land forming Iruri Colonial Village.

iii. Costs of this Petition shall be for the Petitioners and the Interested Party and shall be paid by the Respondents.

Dated and delivered at Nyeri this 8th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE