



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**ELC PETITION NO. 12 OF 2015**

**IN THE MATTER OF ARTICLES 22(1), (2) AND 23 (1),(3) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER**

**ARTICLE 40(3) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**JOHN NDIRANGU KIBOGA ..... 1ST PETITIONER**

**PAUL GACHENGO WACHIRA ..... 2ND PETITIONER**

**JAMES KARIMI MUIRU ..... 3RD PETITIONER**

**JAMES GITATA HIRAM ..... 4TH PETITIONER**

**DAVID GACHIGI WACHIRA ..... 5TH PETITIONER**

**JOHNSTONE NDIRANGU WAIGWA ..... 6TH PETITIONER**

**JOHN MOYO MUGAMBI ..... 7TH PETITIONER**

**FRANCIS MWANGI MATHENGE ..... 8TH PETITIONER**

**JACOB GAKOBI RUNANO ..... 9TH PETITIONER**

*(Suing on their own behalf and on behalf of 156 members of the family of Mbari ya Karigi and Karigi welfare group)*

**-VERSUS-**

**ATTORNEY GENERAL ..... 1ST RESPONDENT**

**MINISTRY OF EDUCATION, SCIENCE**

**AND TECHNOLOGY ..... 2ND RESPONDENT**

**BOARD OF MANAGEMENT OF**

**KAGUMO TEACHERS COLLEGE ..... 3RD RESPONDENT**

**RULING**

1. On **8th June, 2015** the petitioners who claim to be original owners of the parcel of land known as Aguthi/Gaki/865 (the suit property) brought the petition herein seeking the following reliefs/orders against the respondents:-

**a) A declaration that the alienation of the suit property is a violation of their constitutional and fundamental rights to property under article 40 of the Constitution of Kenya;**

**b) A declaration that they are entitled to prompt, full, fair and just compensation from the respondents for the said unconstitutional deprivation of property to the tune of Kshs. 1, 662, 250,000/=.**

**c) Payment of Kshs. 15,000,000/= being punitive and/or aggravated damages;**

**d) interest on (b) and (c) above at court rates from the date of filing of the petition until payment in full.**

**e) costs of the petition.**

2. On 4th November, 2015 the court granted the respondents 30 days to respond to the petition and fixed the matter for mention on 25th January, 2016 for further direction.

3. When the matter was called for mention on 25th January, 2016 counsel for the petitioner informed the court that the respondents had not complied with the directions given on 4th November, 2015 and urged it to allow them proceed with the petition as it was unopposed.

4. Because the respondents were represented by counsel when the directions of 4th November, 2015 were issued and there being no response filed or representation for the respondents, the court issued the following directions:-

**“The petition will proceed unopposed. The petitioners are granted leave of 14 days to file and serve their written submissions. The valuer will produce his report (No.21) in the list of documents on 15th February, 2016.”**

5. On 15th February, 2016 counsel for the respondents informed the court that he had filed a response, albeit, out of time, which she wanted to be admitted. She also intended to enjoin other parties to the suit. For those reasons she urged the court to set aside the directions issued on 25th January, 2016.

6. Counsel for the petitioner stated that a formal application was necessary if the Attorney general wanted to set aside the orders. Consequently, counsel for the 1st to 3rd Respondent filed the notice of motion dated **16th February, 2016** seeking;

**1. Spent**

**2. To stay the proceedings and directions issued on 25th January, 2016 pending the hearing**

**and determination of the application.**

**3. To enjoin the National Land Commission, the County Government of Nyeri and Minerva Nominee (East Africa) Limited as respondents or parties to the petition.**

**4. To set aside or vary its orders of 25th January, 2016 and any other consequential orders arising therefrom to allow the intended respondents and all parties to take fresh directions and respond to the petition under section 15 of the Constitution Practice Procedure Rules, 2013.**

**5. To admit the replying affidavit of the 1st to 3rd respondent filed on 15th February, 2015 and that the said affidavit be deemed to have been filed within time.**

**6. Costs of the application be in cause.**

7. The application is premised on the grounds that there is doubt as to whether the respondents are the only rightful parties to the petition; that from the documentary evidence accompanying the petition, it appears that the parties mentioned in prayer 3 above are necessary parties to the petition; that the petition raises issues touching on the mandate of the National Land Commission; that failure to comply with the orders of 4th November, 2015 was not deliberate but was occasioned by an inadvertent error on the part of the office of the 1st to 3rd respondent's counsel and that addition of the intended respondents would help the court to justly adjudicate and determine the matter.

8. The application is supported by the affidavit of the advocate for the 1st to 3rd respondent, **Callen Masaka**, in which the grounds on the face of the application are reiterated.

#### **4th Respondent's response**

9. Further supported by the 4th respondent vide the replying affidavit of **Brian Ikol**, Deputy Director Legal affairs and Enforcement at the National Land Commission, sworn on 13th June, 2016. On the grounds that the petition raises weighty issues touching on the mandate of the 4th respondent (National Land Commission); that the documents on which the petitioner's claim is hinged require thorough investigations before a decision is arrived at; that since the petition appears to be premised on alleged historical injustices, a public inquiry under the NLCA, 2012 ought to have been conducted before invoking the mandate of the court.

#### **5th Respondent's Response**

10. The application is also supported by the 5th respondent, through the affidavit of its Director for Lands, sworn on 20th June, 2016. In that affidavit the deponent, **Beatrice Koech**, has pointed out that on 2nd March, 2016 the court allowed other parties to join the petition and contended that in view of that fact, it is necessary to set aside the orders of 25th January, 2016 in order to grant those parties an opportunity to respond to the petition. It is further deposed that unless those orders are set aside, the respondents will be condemned unheard with a possibility of irreparable injury being occasioned on them.

11. It is deposed that under **Rule 16(2)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, this Court has power to set aside its orders. The court is also said to have power to make such orders as are necessary for ends of justice.

12. Given the importance of this matter and the value of the suit property, it is submitted that it is in the interest of justice to set aside the directions hereto and grant the respondents leave to respond to the issues raised in the petition.

#### **Petitioners' response**

13. In response to the application, the petitioners through the replying affidavit of John Ndirangu Kiboga sworn on **9th June, 2016** have deposed that there is no material placed before the court to warrant the setting aside of the orders in question, that the 4th and 6th respondents have not filed any responses despite having been served; that the grounds of opposition by the 5th respondent raises issues of law only; that the 6th respondent is none existent and that the replying affidavit of the 1st to 3rd respondents, filed simultaneously with the application for setting aside the orders hereto does not raise any issues warranting setting aside of the orders hereto.

### **Analysis and determination**

14. There cannot be any doubt that this court has power to set aside its orders. In this regard see the case of **Kenya Bus Services Ltd & Others vs. Attorney General and Others** [2005] 1 EA 111; [2005] 1 KLR 743 where it was observed:-

**“It is trite law that an *ex parte* order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the actor principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy.....Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent”. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfill itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional.”**

15. **Has the applicant made up a case for being granted the orders sought?**

Having read and considered the arguments by the respective parties concerning this issue, I am persuaded that the applicant has made up a case for being granted the orders sought. I say so because failure to attend court on the day the orders sought to be set aside were issued has been properly explained. There has also been change of circumstances; more parties have been enjoined in the case, who deserve an opportunity to respond to the issues raised in the petition. Besides, no prejudice will be occasioned on the petitioners if the application is allowed.

16. For the foregoing reasons, I find and hold that the motion dated **16th February, 2016** has merit and allow it as prayed.

**Dated, signed and delivered at Nyeri this 5th day of October, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Wachira Nderitu for petitioners

N/A for National Land Commission

N/A for the Attorney General

Court assistant - Lydia