



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

PETITION CASE NO. 3 OF 2016

In The Matter Of Alleged Infringement Of The Provisions Of Articles 1(1), 1(3) 2(1), 2(2) 2(4), 3(1), 6(2) 10, 35(1), 47, 62(2) 63(1), (2) (3) And (4), 67, 232(1) 258 And 259(1) Of The Constitution Of Kenya

And

The Land Adjudication Act, Cap 284 Laws Of Kenya

Between

THE COUNTY GOVERNMENT OF KIRINYAGA.....PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF LAND, HOUSING

AND URBAN DEVELOPMENT.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

JOSEPH MIANO MIIGWA

NAHASHON MUGO KABEU

NATHAN MWARE

JOSPHAT NGIRIGACHA NUGWANJA

PETERSON MAINA

MBUI KIMEU CIURI

BENARD MWANGI

JOSEPH MUKONO

**MURAGE GITURA.....) INTENDED INTERESTED
PARTIES**

RULING

Having filed this petition on 15th August 2016 seeking various declarations including a declaration that the demarcation, alienating. and allocation of titles to all the land comprising the Mwea Settlement Scheme is inconsistent with **Articles 10, 27 (4), 28, 35 (1), 47, 63 (4) and (5) and 67 (2) of the Constitution** and is null and void, the petitioner also sought and obtained, via a Notice of Motion dated 12th August 2016, a conservatory order staying issuance of title deeds in relation to the Mwea Settlement Scheme. That application was listed for hearing inter-parte on 1st September 2016.

On 1st September 2016, I was indisposed and the said order was extended by the Deputy Registrar who fixed the inter-parte hearing for 5th October 2016.

On 5th October 2016 in the presence of counsel for the petitioner, the 1st, 2nd and 3rd respondents and the interested parties, several orders were recorded by consent. For purposes of this ruling, I shall refer to only the 2nd, 3rd and 4th orders which are:-

2. "The conservatory order issued on 16th August 2016 be vacated to pave way to the petitioner and the 1st interested party i.e County Government of Kirinyaga and County Government of Embu to pursue the dispute resolution mechanism under the Inter Governmental Relation Act of 2012"

3. "Either party at liberty to apply"

4. "Mention on 6th December 2016 together with petition No. 2 of 2016".

However, on 3rd November 2016, counsel for the petitioner Ms Kamau appeared before me with an Ex-parte application dated 2nd November 2016 filed under certificate of urgency seeking, among other orders, an ex-parte conservatory order staying the commencement or continuation of issuance of title deeds in relation to Mwea Settlement Scheme/Mwea Trust Land by Embu County, the Cabinet Secretary responsible for Lands and all his officers, and the National Land Commission. That application was supported by the affidavit of **HARRY MUGO** a resident of Kirinyaga County in which he deponed, inter alia, that following the consent recorded on 5th October 2016 when the petitioner agreed in good faith to the withdrawal of the interlocutory orders so that the matter could be resolved through the Inter-Governmental Relations Committee, the petitioner had since then written to the Cabinet Secretary responsible for lands with a view to commencing the resolution of the dispute. However, the respondents have not acted in good faith and are currently issuing titles.

In view of the spirit that the parties had demonstrated on 5th October 2016 and even though this Court had the jurisdiction to grant the said orders ex-parte, I directed that the application be served for inter-parte hearing on 11th November 2016. This was done in the hope that the spirit exhibited on 5th October 2016 would be carried on. I was also particularly concerned that perhaps one party in these proceedings may not be acting within the consent order dated 5th October 2016.

Come 4th November 2016, I was again faced by another application also filed under certificate of urgency this time by Mr. Abubakar advocate for the 4th interested party and supported by the affidavit of **NAHASHON MUGO KABEU**. That application also sought, among others, an order that this Court do issue conservatory orders against the respondents staying the continued issuance of title deeds at Mwea Settlement Scheme pending inter-parte hearing. In his supporting affidavit, **Mr. KABEU** deponed that notwithstanding the consent orders of 5th October 2016, he had since learnt that the County Government of Embu and the Land Registrar Siakago were issuing title deeds for land in the Mwea Settlement Scheme without considering the right of the members of the Mihiriga Kenda in Kirinyaga County. Having

expressed my displeasure again and in view of the earlier consent order issued on 5th October 2016 I directed that the other parties be served for hearing on 11th November 2016.

On 11th November 2016 and in keeping with the spirit earlier shown by the parties and with a view to reaching some amicable settlement on the way forward, I engaged counsels for all sides, off record, to find out what could be frustrating the achievement of the very noble and pragmatic goals that all parties consented to on 5th October 2016. Nothing much came out of that engagement but the parties did agree that the respondent and the interested parties be given 14 days to file their respective responses to the application by the petitioner dated 2nd November 2016 and that by the 4th interested party dated 4th November 2016. The matter was then fixed to come up on 6th December 2016 to mention for further directions including the Preliminary Objection raised by the 1st interested party.

However, counsel for the petitioner and the 4th interested party asked to address me on their two ex-parte applications dated 2nd November 2016 and 4th November 2016. Notwithstanding the objection raised both by Mr. Kamunda and Mr. Ndegwa, I ruled that I would consider those two applications.

I can now give my reasons for so doing.

Firstly, the two applications were filed ex-parte and under certificate of urgency. When they were placed before me on 3rd November 2016 and on 4th November 2016, I did not consider them on their merits for reasons which are clear from the record and which I have alluded to above. My view was that following the earlier consent order dated 5th October 2016, it would be better to have the other parties in Court and see if someone somewhere stepped out of the line and perhaps strike another consent.

Secondly, this Court did not wish to dampen the earlier spirit shown by the parties herein.

I therefore directed that since nothing much appeared to be forthcoming inspite my efforts to strike some agreement, I would entertain the two applications dated 2nd November 2016 and 4th November 2016. In doing so, I was guided by the fact that I had not considered them, as I should, when they first were placed before me and also, that prior to 5th October 2016, the petitioner was already enjoying such orders as were now being sought.

Both Mr. Wanyama and Mr. Abubakar did argue their applications which were supported by Mr. Macharia counsel for the 2nd interested party. Notwithstanding my directions that the two applications were being considered ex-parte as in any event orders had been recorded that the other parties do file their respective responses, this Court allowed both Mr. Githinji, Mr. Ndegwa and Mr. Kamunda to address the Court.

I have considered the ex-parte applications dated 2nd November 2016 and 4th November 2016 together with supporting affidavits and submissions made by counsel.

Firstly, with regard to the petitioner's application dated 2nd November 2016, there were already ex-parte orders issued on 16th August 2016 in its favour. The petitioner did gratuitously have them vacated to give room for settlement of this dispute in another forum. There is clearly no reason why this Court should not give them similar orders. I am persuaded that the petitioner is deserving of the same.

With regard to the application by the 4th interested party, this Court has been shown newspaper cuttings showing that the title deeds are being issued even as this matter is still pending. Indeed in one newspaper article dated 24th October 2016 (annexture **NMK 2b**) it is reported as follows:-

“The Embu County Government will issue title deeds for the 54,000 acre Mwea Trust Land despite a Court case opposing the move. Land Executive Josephat Kithumbu said more than 12,000 title deeds had already been printed and were awaiting to be issued to respective owners”.

It is of course not clear when the said title deeds were printed. However, there is sufficient evidence upon which this Court can conclude, which I hereby do, that unless that process is stayed, the substratum

of this petition may be destroyed.

Ultimately therefore, this Court after considering all the submissions herein is persuaded to issue the following orders:-

- 1. The petitioner's Notice of Motion dated 2nd November 2016 is granted in terms of prayer 1 and 2 thereof.***
- 2. The 4th interested party's Notice of Motion dated 4th November 2016 is granted in terms of prayer 1 and 2 thereof.***
- 3. Costs of both applications shall be in the cause.***

As earlier directed, this matter be mentioned on 6th December 2016 together with Petition No. 2 of 2016 for further directions.

It is so ordered.

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016

Ruling dated, delivered and signed in open Court at 3.30 p.m this 11th day of November 2016

Mr. Wanyama for Petitioner present

Mr. Githinji for Respondent present

Mr. Macharia for 2nd Interested party present

Mr. Ndegwa and Mr. Mwangi for 1st Interested party present

Mr. Kaunda for 3rd Interested party present

Mr. Abubakar for 4th Interested party present.

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016