



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.170 OF 2014

BETWEEN

DITON KOIKAI.....PETITIONER

AND

LIALO KARBOLO

TIMOTHY MAKORESPONDENTS

LEYIAN PERE

Sued as trustees of Olderkesi community Wildlife Conservation Trust)

JUDGMENT

Introduction

1. This Petition, dated 9th April 2014 was filed on 11th April 2014 and raises the question whether the Petitioner and 50 other families residing in Olderkesi Land Adjudication Section within Narok County are entitled to unhibited occupation of the land comprised in the said Adjudication Section. In addition, there is the question whether the intention of the Respondents to convert the said Section into a wildlife conservancy without compensation to the Petitioner and others, is unlawful.

Petitioner's Case

2. In his Petition, Supporting Affidavit and written Submissions, the Petitioner's case is that Olderkesi Location of Narok County was declared an adjudication Section on 10th September 2010. Some of the villages within the Section are Olgayenet, Olpalagilagi and Ndoinyio Oolkokoyok which have allegedly been occupied by the Petitioner and 50 other families for many years and they in fact consider it as their ancestral home.

3. That upon the Adjudication Section being created, the process of identification of *bona fide* "owners" of the land commenced and at the time the Petition was filed, the process had reached the arbitration stage.

4. The Petitioner now further contends that in March 2014, the Respondents served the Petitioner and those he represents, with notices to vacate their villages to pave way for the creation of a wildlife conservancy. The notices were to subsist for two months and had no provision of alternative land and no compensation for the evictees. He further contends that the said notice was given in Contravention of **Articles 40 and 43** of the **Constitution**.

5. It is also the Petitioner's submission that the land in question was community land under **Article 63(2)(d)** of the **Constitution** and ought to have been properly set apart under **Section 13** of the **Trust Land Act** with provision for compensation being made to all the residents of the land being set apart.

6. Further, that if land is compulsory acquired for any public purpose, then under **Article 40(3)** of the **Constitution**, there ought to be prompt and just compensation to any affected person. In addition, that under **Section 6(2)** of the **Land Acquisition Act**, the procedure for compulsory acquisition has been set out and the conduct of the Respondents in forcefully acquiring the land in question did not follow that procedure and was therefore unlawful.

7. For the above reasons, the Petitioner seeks the following orders;

(i) A declaration that the public notice served upon the residents of Olgayenet, Olpalagilagi and Ndoinyio Oolkokoyok villages within the Olderkesi Land Adjudication Section requiring them to leave their property by the end of May, 2014 to create room for wildlife conservation is illegal, unconstitutional, null and void.

(ii) An order of prohibitory injunction directed at the Respondents, their agents, subordinates, servants and/or employees stopping them from evicting the residents of Olgayenet, Olpalagilagi and Ndoinyio Oolkokoyok villages within the Olderkesi Land Adjudication Section.

(iii) Costs of the Petition.

Respondents' Case

8. The Respondents filed a Replying Affidavit sworn on 22nd April 2014 by Timothy Mako, the 2nd Respondent and also filed written Submissions on 25th July 2014. Their case is that the Petition is premature and misconceived because the Petitioner had not obtained consent under **Section 30(1)** of the **Land Adjudication Act** before instituting the Petition.

9. It is also the Respondents' case that the Petitioner had failed to disclose that he had participated in all the processes relating to his application to be registered as a member of Olderkesi Land Adjudication Section and that this claim had been dismissed. That his appeal was similarly disallowed.

10. As regards the setting apart of part of Olderkesi Land Adjudication Section as a wildlife conservation area, it is the Respondents' case that the decision to set up a wildlife conservancy was taken by all members of the Olderkesi Land Adjudication Section and they were all to benefit from the said decision. In any event, that only 8,000 acres out of 106,000 acres comprising Olderkesi Land Adjudication Section was to be used for wildlife conservation purposes and therefore no serious loss of land and/or prejudice would be occasioned to the members of the Adjudication Section. That in any event, members of the Section who were living in the wildlife conservation area voluntarily moved out of the land and have no special claim to it.

11. The Respondents have also urged the point that the Petition is incompetent, a nullity and an abuse of Court process and their Advocate in submissions added that the Petitioner has no interest capable of protection under **Article 40** of the **Constitution** and none of his fundamental rights have been violated and therefore the Petition ought to be dismissed with costs.

Determination

12. This Petition portends no difficulty at all because the first issue to determine is whether any constitutional issues arise for determination and whether the jurisdiction of this Court to determine those issues has been properly invoked. As has been said more than once, jurisdiction is everything and if a Court acts without jurisdiction, the proceedings are a nullity – See **Narok County Council vs Transmara County Council & Anor, C.A. 25 of 2010** and **Re the Owners of Motor Vessel “Lillian S” vs Caltex Oil (K) Ltd (1989) KLR 14**.

13. In that regard, the question to ask at the outset is, what is the present dispute all about? It is about a simple claim for entitlement to land situated in a Land Adjudication Section.

14. In that regard, it is agreed that the Petitioner has no title to the land and his interests in any portion of Olderkesi Land Adjudication Section have not crystallised. If so, does this Court have jurisdiction to determine that question? The answer is a resounding NO.

15. I say so because **Article 162(2)** of the **Constitution** provides as follows;

“(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

a. employment and labour relations; and

b. the environment and the use and occupation of, and title to, land. (Emphasis added)

16. The Court created to handle land related disputes is the Environment and Land Court and its constitutive Statute is the **Environment and Land Court Act Cap. 12A**. Under **Section 13(1), (2) and (3)** of that **Act**, the jurisdiction of the Court is expressed to be as follows;

“13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes –

a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining minerals and other natural resources.

relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement or, or threat to, rights or fundamental freedom relating to the land and substitute therefore the words “a clean and healthy environment” under Article 42, 69 and 70 of the Constitution.”(Emphasis added)

17. The above **Section** must be read together with **Article 165(5)** of the **Constitution** which provides as follows;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) *The High Court shall not have jurisdiction in respect of matters—*

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

c. falling within the jurisdiction of the courts contemplated in Article 162 (2).” (Emphasis added)

18. The simple and straightforward matter arising from the above rendition of the law is that the dispute placed before this Court for determination is one that this Court has no jurisdiction to determine.

19. If any advise is needed, let the Petitioner pursue his claim in the right forum which is either the processes known to the **Land Adjudication Act, Cap.284** or the **Land Act Cap. 280**.

20. Having held as above, I see no reason to go beyond the clear letter of the law and will quickly strike out the Petition with costs to the Respondents.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

Mr. Sankale for Respondents

No appearance for Petitioner

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

10/7/2015