



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO. 16 OF 2013

KOKWO MULTI PURPOSE CO-OP SOCIETY PETITIONER

VERSUS

PRINCIPAL SECRETARY MINISTRY OF LANDS

HOUSING AND URBAN DEVELOPMENT 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

KENYA FOREST SERVICE 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

R U L I N G

1. The petitioner Kokwo Multi Purpose Co-operative Society brought a petition at the Environment and Land Court alleging violation of its members to right to property, dignity and protection of freedom and security of the person.
2. The petitioner contends that it was allotted land from the

Government for which it duly paid all the required amounts and were subsequently issued with letters of allotments. The petitioner then settled its members but the Government later changed its mind on the allotments arguing that the allotments were irregularly issued.

3. The petitioner's members were subsequently evicted from their farms and had their properties destroyed. The petitioner contends that its members were evicted in a degrading manner and have since 2006 lived in squalor. The petitioner contends that it had paid over 10 million to the government which has not been refunded. The petitioner therefore seeks compensation on the grounds that its members constitutional rights were violated.
4. Before the petition could be heard, a preliminary objection was taken on behalf of the Kenya Forest Service the 3rd respondent herein. I would like to reproduce the grounds upon which the preliminary objection was taken as follows:-

“(1) The petition is incompetent, misconceived, fatally defective and even unconstitutional; with defects that cannot be described as mere technicalities as they are mandatory requirements of the law.

(2) The alleged sale of forest land transaction between the petitioners and the Ministry of

Lands as alleged in the petition, if at all it occurred was void ab initio for being a contract for an illegal purpose hence unenforceable as forest land is not under the jurisdiction of the Ministry of lands or commissioner of lands hence the latter lacked capacity to dispose the land as it had not been degazetted.

(3) By granting the orders sought herein the court will not only be promoting an illegality, but will also be enforcing through public law, private rights of a commercial nature and which fail outside the purview of Article 21 of the Kenya Constitution of 2010.

(4) Although the petitioner has filed this matter as a constitutional, matter the subject of the petition is indeed purely commercial transaction that falls within the realm of private law and cannot be addressed as a public law matter as has been attempted by the petitioner herein and should therefore be dismissed.

(5) The said contractual transaction having been for an illegal purpose neither the Ministry of Lands nor the Provincial administration could under the law of agency bequath forest land to the petitioners as alleged in the petition. For that reason also, while money paid for an illegal purpose is in certain instances refundable, there can be no compensation for an illegal transaction and neither can such compensation be paid by Kenya Forest Service or its predecessor the Forest department.

(6) Under the current Forest Act of 2005 and even under the Forest Act Cap 385 (now repealed), neither the executive, the Kenya Forest Service, the courts nor any arm of Government is empowered to bequath or allocate a gazetted state forest land or any part thereof other than in accordance with the Act.”

5. Basically, the third respondent is contending that the transaction herein being of a commercial nature, the petitioner should not have pursued it as a constitutional petition. They ought to have pursued their claim by filing a a suit. This was and has been the argument of Professor Sifuna for the third respondent.

6. At the hearing of the preliminary objection, Professor Sifuna did not confine himself to the points of law. He went on to touch on the merits of the petition. In the case of Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA 696, it was held that objections should be raised on a pure point of law and cannot be raised if any fact has to be ascertained. It was further held that a preliminary objection is argued on assumption that all the facts pleaded by the other side are correct and which if argued as a preliminary point may dispose of the suit.

7. In the present petition, the petitioners contend that they were allotted the land by the Government which took its over 10 million but later forcefully evicted the petitioners members in a crude manner without even a refund of the amount paid.

8. There is much to be ascertained for instance whether the land allotted to the petitioner was available in the first place and whether the subsequent eviction which followed was lawful. It should also be ascertained whether the petitioners are entitled to any refund or compensation.

9. The mere fact that a party has an option of urging his/her claim in other fora is no bar to bringing a constitutional petition to pursue the same matter. In civil Appeal No. 110 of 2001 Between Rashid Odhiambo Aloggoh & 245 others and Haco Industries Ltd, the appellants had filed a constitutional petition which was placed before a two judge bench. The judges of the High Court heard the petition and dismissed it on the ground that the petitioners had other lawful avenues which they should have pursued. The petitioners were dissatisfied with the decision of the High Court and they preferred an appeal to the court of Appeal. The court of Appeal reversed the orders of the High Court and remitted the file back to the High Court for re-hearing de novo. The judges had this to say;-

“Because of the approach adopted by the High Court, namely that the appellants had other

lawful avenues open to them, that court failed to determine whether the complaints made by the appellants were true and if they were true, whether they amounted to or constituted a violation of section 73, 74 and 80 of the constitution as contended by the appellants.”

10. Following the decision of the court of appeal cited hereinabove, it is my duty to ascertain the truth of the contentions by the petitioner and if found to be true whether that amounts to violation of the provisions of the constitution which have been cited.

11. For the reasons given hereinabove, I find that the preliminary objection has no merit. The same is hereby overruled with costs to the petitioner.

It is ordered.

Dated, signed and delivered at Kitale on this 11th day of March, 2014.

E. OBAGA,

JUDGE

In the presence of Mr Ouma for Mr Kipkoech for the petitioner and Mr Barongo for Professor Sifuna for 3rd respondent. Court Clerk – Kassachoon.

E. OBAGA,

JUDGE

11/3/2014

MR OUMA: I pray for a certified copy of the ruling.

MR BARONGO: I also pray for certified copies of proceedings and ruling.

COURT: Let proceedings and ruling be typed and availed to parties upon payment for the same. Date for hearing of petition to be taken at the registry.

E. OBAGA,

JUDGE

11/3/2014