



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO. 1 OF 2011

THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006 ARTICLE 262 (19) OF THE TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

AND

IN THE MATTER OF ARTICLE 21 (1), 23(1&3), 40 (1) a & b 2a & b, 40 (6) OF THE NEW CONSTITUTION

BETWEEN

RUTONGOT FARM LIMITED PETITIONER

AND

HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

KENYA FOREST SERVICE 2ND RESPONDENT

PERMANENT SECRETARY MINISTRY

OF FORESTS AND WILDLIFE 3RD RESPONDENT

COMMISSIONER OF LANDS 4TH RESPONDENT

J U D G E M E N T

INTRODUCTION

1. The Petitioner Rutongot Farm Limited (Petitioner) is a limited liability company incorporated under the Companies Act Cap 486. The petitioner filed an amended petition dated 19th March, 2013 in which it seeks the following reliefs:-

- i. *That the Honourable court be pleased to grant an order of certiorari to bring into the High Court and quash Gazette Notice contained in Legal Notice Number 152 dated the 17th June, 1977 which declared the petitioner's LR. NO. Trans – Nzoia/6657 and 10832 to be forest land named Sikhendu.*
- ii. *That a declaration be and is hereby given declaring that LR No. Trans-Nzoia/6657 and 10832 be and is hereby owned by the petitioner and the same be transferred to and/or registered in*

the name of the petitioner herein Rutongot Farm Ltd.

- iii. That the respondents be ordered to sign transfer forms to have the land transferred to the name of the petitioner by the commissioner of lands being ordered to issue allotment letters for LR Trans-Nzoia 6657 and 10832 to the petitioner herein and in default the Deputy Registrar of the High Court be ordered to sign the same on the respondents behalf.*
 - iv. That a declaration be and is hereby granted compelling the respondents to pay damages to the petitioner for non user of its land namely Trans-Nzoia 6657 and 10832 since the date of purchase to date.*
 - v. That the Honourable court be pleased to order the respondents to compensate the petitioner for lose of its properties destroyed and/or taken when the members of the petitioner were being evicted from LR Trans- Nzoia 6657 and 10832.*
 - vi. That a declaration be and is hereby granted permanently restraining the respondents by themselves, their agents, servants, employees and/or any other person acting on their behalf whatsoever from interfering with LR Trans-Nzoia 6657 and 10832 belonging to the petitioner herein.*
 - vii. That the Honourable court be pleased to order that the respondents pay damages to the petitioner for pain and suffering for having been deprived of their land unconstitutionally and left without food, clothing, shelter, health, education among others.*
 - viii. The costs of this petition be provided for and awarded to the petitioner in any event.*
- (ix) Any other relief this Honourable court is pleased to grant.*

PETITIONER'S CASE

2. The history of this petition can be traced to a sale agreement made on 28/8/1973 between a Danish called Andres Johannes Olsen who owned LR Trans – Nzoia 6657 and 10832 which were 798 and 1200 acres respectively and the petitioner. The purchase price was Kshs.1,200,000/=. The terms of the agreement were that the petitioner was to pay a down payment of Kshs. 400,000/= upon application for land control board being received. The petitioner was to take immediate possession upon payment of the Kshs.400,000/=. The balance of Kshs.720,000/= was to be made after the maize season of January, 1976.
3. The petitioner had made an application for consent of the Land Control Board which application was rejected on the ground that the Ministry of Natural Resources had interest in the same land. There was intervention of then M.P Taita Towett who talked to the Minister for Natural Resources who agreed to relinquish the Ministry's interest in the land. The petitioner's were then allowed to lodge a fresh application for consent of the land control board.
4. The Land Control Board met on 16/1/1974 and the petitioner's application was granted vide minute No. 87/73. Consent of the Land Control Board was granted on 17/1/1974.
5. On 3/2/1975 the two properties were transferred to the Government of Kenya at a consideration of Kshs.729,200/=. On 17/6/1977 the two parcels were Gazetted as Sikhendu Forest. This marked the beginning of petitioner's members trouble with the Forest department.
6. The petitioner's members were constantly harassed. They were evicted from their farms and their houses torched. Whenever they returned back, they met the same fate, their houses torched and their properties destroyed. The petitioner's members then embarked on a long journey of seeking to have their land back. They knocked on the doors of various Government offices seeking help. They even petitioned the Parliamentary Committee on land which listened to them. A report of the committee was adopted by

Parliament. The report of the parliamentary committee headed by Reverend Mutava Musyimi unanimously found that the land indeed belonged to the petitioner and recommended that the land should revert to the petitioner.

7. Prior to the parliamentary committee on land addressing the petitioner's case, the commissioner of lands Sammy Mwaita had written to the Permanent Secretary Ministry of Lands and Settlement stating that since the petitioner had paid for the land earlier than the Ministry of Natural Resources, the Ministry should relinquish its interest in the land and let the petitioner be documented for the land.

THE RESPONDENTS CASE

8. The 1st, 3rd and 4th respondents opposed the petitioner's case on the ground that the same is statute barred and that there are no constitutional issues raised to warrant the court to grant the orders. They also contend that the petitioner should have come to court in an ordinary Civil Suit or judicial review but not as a constitutional petition.

9. The 1st, 3rd and 4th respondent contends that the land was lawfully purchased by the Government after the petitioner failed to purchase the same. The respondents are disputing the authenticity of letter dated 10/11/2000 which was written by the then commissioner of lands Sammy Mwaita.

10. On its part the second respondent contends that there are no constitutional issues raised in the petitioner's petition and that there is no proof that the petitioner completed paying the balance of the purchase price. The second respondent further contends that what the petitioner paid for was for loose assets.

11. The second respondent contends that the two parcels in contention are already Government Gazetted Forest and that the petitioner's members have not been in occupation of the land for a long time. The second respondent also contends that when 28 days notice was issued there was no objection to the land parcels being declared Government forest.

ANALYSIS OF EVIDENCE

12. There is no doubt that the petitioner entered into a sale agreement with Andres Johannes Olsen. The terms of the agreement of 28/8/1973 are clear. The petitioner was to take immediate possession after making a down payment of Kshs.400,000/=. The Kshs.400,000/= down payment was to be made upon receipt of the application for consent. The petitioner paid the down payment of Kshs.400,000/= on 28/12/1973. This payment was made in compliance with the terms of the sale agreement. The petitioner's application for consent had been received. However the same had been rejected on the ground that the Ministry of Natural Resources had interest on the same land.

13. The respondents are contending that the petitioner paid Kshs.400,000/= for loose assets. In support of their argument, they cite the letter of consent issued on 17/1/1974 which specified that Kshs.400,000/= was for loose assets and 720,000/= was for land and permanent improvements. It is important to note that the petitioner had already paid Kshs.400,000/= before the consent was given. It cannot therefore be argued that what they paid was for loose assets. The payment of Kshs.400,000/= was made in compliance of the terms of the sale agreement. It appears that the members of the land control board deliberately split the payments to align them to the payment already made by the petitioner in their scheme to deny the petitioner the land. Remember the same members had rejected the petitioner's application for consent. They only re-considered it after Hon. Taita Towett intervened. It is therefore clear that there was a calculated move to deny the petitioner the land. If there was any need to specify if loose assets were to be treated separately, then this should have been captured in the sale agreement and not in the consent. This argument was later used to deny the petitioner the land as the Government claims that it paid for land only as the petitioner had already paid for loose assets which they distributed amongst its members.

14. The respondents also contend that the Government purchased the land after the petitioner failed to

meet their part of the bargain. The agreement between the vendor and the petitioner was governed by the terms of the agreement. The terms were that the petitioner was to pay a down payment of Kshs.400,000/= and take possession and the balance was to be paid after the maize season for January 1976. The Government did not wait until the expiry of the time given. It moved in and bought the property which was transferred to it on 3/2/1975. The argument that the purchase was after the petitioner failed to pay the balance is therefore without basis.

15. The Commissioner of Lands in his letter of 10/11/2000 clearly points out there was foul play in the manner in which the Government came to buy the land. He states in his letter that there was a scheme to deny the petitioner the land. I have demonstrated in paragraph 13 herein above that indeed there was a calculated move to deny the petitioner the land. The commissioner himself saw this in the whole affair. Though the respondents are denouncing this letter, there is no basis upon which a finding can be made that the letter was not written by the commissioner of lands. The commissioner clearly stated that the land was indeed the petitioner's. He recommended that the petitioner be documented for the same.

16. The respondents contend that the petitioner should have pursued its case in an ordinary civil suit. The fact that a petitioner has other avenues of ventilating its claim is no bar for it to file a constitutional petition. **In Civil Appeal No. 110 of 2001 Rashid Odhiambo Aloggoh & 245 Others -Vs- Hacco Industries Ltd**, the appellant's constitutional petition had been dismissed by a bench of two High Court Judges on the ground that the appellants had other avenues to seek redress. The appellants appealed to the court of Appeal. The court of Appeal in allowing the appeal states as follows;-

“With respect to the learned Judges of the High Court, they erred in holding that the appellants had other lawful avenues in which they could go to ventilate their grievances”

The Judges of Appeal went on to state as follows;-

“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 sections 73, 74 and 80 of the constitution as contended for by the appellants.”

17. There was also an argument by the respondent that the petitioner's claim is statute barred under the Limitation of Actions Act Chapter 22 Laws of Kenya and under the Public Authorities Limitations Act Chapter 39 Laws of Kenya. A Constitutional Petition has no limitation of time within which it can be filed. The respondents argument is therefore without basis.

18. In June, 2011 Hon. Bonny Khalwale who was then a member of Parliament for Ikolomani tabled a public petition in respect of Kiboroa Squatters Alliance. The petition was handled by the Departmental Committee on lands and Natural Resources chaired by Hon. Mutava Musyimi. The committee dealt with a number of issues touching on squatters in Trans-Nzoia. One of the issues addressed was that of the petitioner. The committee recommended that the Ministry of Forestry and Wildlife should relinquish its interest in Sikhendu farm. LR NO. 6657 and 10832 and stop interfering with the farm. They recommended that the petitioner being the initial buyers should be allowed to settle in the farm.

In its findings and observations, the committee stated as follows;-

“The committee found out that Sikhendu Farm LR NO. 6657 and 10832 belongs to Rutongot Limited who bought it from Mr Olsen in 1973 as first buyer. The Ministry of Natural Resources then also went ahead to pay Mr Olsen in 1975 to deny Rutongot Limited the piece of land. It is difficult to establish the Government claim on this land.”

The report of the departmental committee on lands and Natural Resources was finally adopted in Parliament. The petitioner provided a certified copy of the report and parliamentary hansard where the report was adopted.

19. I find that the petitioners claim to the land is legitimate. On the petitioner's contention that its members were evicted from the land and their houses burned and their crops destroyed, I have no doubt that this is the case. The petitioner's members had taken possession of the land upon payment of the down payment of Kshs.400,000/=. They were subsequently evicted from the farm when the Ministry of Natural Resources took over the land and planted pine for use at Pan paper Factory Webuye. The petitioner's members have since been harrassed. Some have even been arrested and arraigned in court. Some of the petitioner's members were charged in Kitale Chief magistrate's court in Criminal case No. 364 of 2011. The petitioner annexed copies of the bonds for its members who were arraigned in court.

20. The forest officials in their letters contained in their replying affidavits confirm that the petitioner's members have been chased away and their structures destroyed. There is a time the court ordered the Deputy Registrar to go and ascertain whether there was occupation of the disputed land. A report was made and filed in court. The petitioner has contended that the Deputy Registrar was unable to go through the entire land as he arrived late and could not access other areas due to a difficult terrain. The petitioner annexed photographs of its member's cows grazing on the disputed land as well as caves in which its members have been forced to take refuge after their houses were destroyed by Forest guards.

21. Having found that the petitioner's allegations are true, I now move to determine whether the actions by the respondents amounted to breach of the constitutional rights of the Petitioner. Article 40 (1) of the constitution provides as follows;-

40 (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"

The constitution is clear on the protection of right to property. I have demonstrated hereinabove that the respondents were deliberately working to deprive the petitioner of its right to acquire property. They went ahead to deprive the petitioner of its right to acquire property by scheming on how to do so. Whereas the petitioner had made payment of Kshs.400,000/= in December, 1973, the consent of the land control board was deliberately couched to show that Kshs. 400,000/= was for loose assets and 720,000/= was for land and permanent improvement. This argument was later used to justify the respondent's acquisition of the property by paying Shs.729,000/=. This was a clear case of a stronger party suppressing a weaker party.

22. Investigations into the sale have always revealed that the party who should have the land is the petitioner. The respondents have always ignored the findings. It is clear that the respondents violated the petitioner's constitutional right to acquire property. The acquisition of the property by the Government deprived the petitioner its right to acquire the property. Even section 75 of the old constitution provided for protection of right to property. Property of an individual could not be taken unless in accordance with the constitutionally provided means.

23. The petitioner's members have undergone continued harrassment. =Their houses have been destroyed and there have been arbitrary arrests by the Forest guards.=The petitioner's members have been forced to shelter in caves under harsh =conditions.=The eviction has been cruel and degrading. This is clearly a violation of the petitioner's members right to dignified = treatment.

24. Whereas there is need to guard our forests for future generation and for the benefit of the larger society, this cannot be done at the expense of violating other people's right to acquire property. The properties in question were not forests. The properties belonged to an individual who was willing to sell the same to the petitioner. The petitioner's right to acquire the same was thwarted by the unorthodox manner in which the Government acquired it. The properties were subsequently gazetted as Government forest.

The Gazettement of the land as forest land followed acquisition of the same by the Government which denied the petitioner its right to have the land. In the circumstances the Gazettement should not stand. The argument by the respondents that the degazetment of the forest can only be done as provided under the relevant Act has no basis. The constitution is Supreme to an Act of Parliament. The constitution gives the court power to uphold and enforce the Bill of Rights. The court is given power to give appropriate relief including an order of judicial review.

25. In the present case there was no material placed before me to warrant issuance of an order for compensation. The number of the petitioner's members was not disclosed. There was no specific loss given regarding each individual member. What was provided is a general claim of loss. It is therefore practically impossible to offer any compensation as the basis for it has not been shown. The petitioner's members have indeed undergone a lot of pain for over 40 years. It is difficult to quantify such loss. The petitioner's members will however get solace in return of their land which they had intended to acquire and which acquisition was cut short by the machinations of the respondents.

DECISION

26. Having found that the petitioner's constitutional rights were violated, I make the following orders:-

(i) An order of certiorari is hereby issued bringing into this court Gazette Notice No. 152 of 17/6/1977 which is hereby quashed.

(ii) A declaration that LR NO. Trans – Nzoia 6657 and 10832 belongs to the petitioner.

(iii) An order that the commissioner of lands or any other person under his charge do sign transfer documents to transfer LR NO. 6657 and 10832 to the petitioner or the transfer documents be signed by the Deputy Registrar in case the commissioner of lands declines to do so.

(iv) Considering the nature of this petition, I will not make any order as to costs. Each party to bear their own costs.

Dated, signed and delivered at Kitale on this 3rd day of July, 2014.

E. OBAGA

JUDGE

In the presence of Mr Mokuia for petitioner, M/s Lungu for 1st, 3rd and 4th respondents and Mr Langat for M/S Wanyama for 2nd respondent. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

3/7/2014