



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC PETITION NO.11 OF 2019

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(1) 3(1), 10(1) & (2), 19 (2), 20 (2), 22(1), 23, 27 (1), 35 (1), 47(1) & (2), 48, 50(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF BREACH OF THE RIGHT TO INFORMATION

BETWEEN

CHRISTOPHER MATATA LATI PETITIONER

VERSUS

THE LAND REGISTRAR MAKUENI 1ST RESPONDENT

THE DIRECTOR OF

LAND ADJUDICATION & SETTLEMENT 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

JUDGMENT

1. The Petitioner claims ownership of land parcels Makueni/Nguu Ranch/ 27, 33, 80, 84, 88, 89, 90, 98, 31, 82, 97 and 278 (*the properties*). He has averred that unknown people invaded the properties in July 2019 and his attempts to have them leave fell on deaf ears. His grievance is that his effort to get ownership details from the 1st and 2nd Respondents, has been ignored/neglected hence impeding his right to commence appropriate cause of action to assert his proprietary rights. The 3rd Respondent (A.G) has been sued in his capacity as the Chief Legal Advisor of the Government of Kenya, the employer of the 1st and 2nd Respondents. Further, he has averred that he runs a dairy farm on the properties and the acts of the invaders are highly detrimental to the business especially now that Makueni County is experiencing prolonged drought and availability of hay is a great challenge.

2. The amended petition is dated 28th November, 2019 and seeks the following reliefs;

a) A permanent mandatory injunction to compel the Respondents to release forthwith all the information in their power, possession and/or custody that is vital in enforcing the Petitioner’s fundamental rights and freedoms and more specifically provide the Petitioner with the following documents (in respect of the properties);

i. Letter of offer in respect of the current allottee.

ii. Letter of acceptance by the current allottee.

iii. Receipt issued by Settlement Fund Trustees to the current allottee upon payment of the 10% or outright purchase.

iv. Discharge of charge by Settlement Fund Trustees in favour of the current allottee.

v. **Transfer of land by Settlement Fund Trustees in favour of the current allottee.**

vi. **Title deed if any issued (if any) issued by the 1st Respondent in favour of the current allottee.**

vii. **Search certificates (where applicable) in cases where the allottees may have sold and transferred the land in question.**

b) A declaration that the Respondents' failure to release the information set out in (a) above to the Petitioner was unconstitutional and a violation of the Petitioner's Constitutional rights.

c) Any other relief that this Court may deem fit and just to grant.

d) Costs.

3. The petition is supported by the Petitioner's affidavit sworn on the same date and his supplementary affidavit sworn on 19th November, 2019. He has exhibited respective ownership documents for the properties as CML-1. He deposed that he visited the Lands Registry at Makueni in order to do a search on the properties but his efforts were thwarted by the 1st Respondent who insisted that anything to do with land parcels within Nguu Ranch area was in abeyance until further notice. He proceeded to the 2nd Respondent's office in Nairobi where he met a Mr. Abongo-Deputy Director of Land Adjudication and Settlement-at his office on 8th floor, Ardhi house. Mr. Abongo called for the respective files of the properties and confirmed orally that the properties had been repossessed from the Petitioner and allocated to other people.

4. He deposed that his Advocate wrote a demand letter to the 2nd Respondent requesting for information but the same was ignored. A copy of the letter is exhibited as CML-2. He has since become aware that the properties have been interfered with but is unable to do anything due to lack of information on the current ownership status. He deposed that his right to information under Article 35 of the Constitution has been denied, violated, infringed and/or threatened by the Respondents. His petition is also hinged on the Articles indicated in the heading of this judgment.

5. The Respondents opposed the petition through the replying affidavit of Lawrence Karong'e which was sworn on 07th October, 2019. He deposed that he is currently serving as Sub-County Land Adjudication & Settlement officer in Makueni County. He deposed that Nguu Ranch Settlement Scheme (the scheme) was established on LR No. 12134 measuring 10,713Ha (26, 471 acres) and LR No. 12971 measuring 2,976 Ha (7,353 acres). The two parcels of land were surrendered by the defunct Nguu Ranch Cooperative Society for the establishment of the scheme. The planning and survey of the scheme was completed in 1995 realizing 3,813 parcels which were allocated to the beneficiaries through the district settler selection committee. The scheme was faced with many challenges and a local verification committee was appointed in 2006 to resolve them.

6. After survey, balloting was done by members of the ranch and subsequent provisional letters of offer issued by the 2nd Respondent. Soon after the allocation, the scheme was faced with further challenges including complaints of missing plots by members, encroachment by squatters into public utility plots and plots of beneficiaries who did not occupy immediately, complaints by squatters that their land had been consolidated with LR No. 12134 to form Nguu Ranch and numerous undocumented sales which could not be validated or authenticated.

7. To resolve the problems, the Ministry of Lands & Physical Planning in consultation with the County Government of Makueni and National Land Commission constituted a joint team to carry out ground verification and auditing of documents in Nguu section between 28th June and 17th July, 2018. The plots were categorized and recommendations were made.

8. Further, he deposed that according to the register of Nguu Ranch Cooperative Society from which the scheme was formed, the Petitioner was member number 1541 with a share of 1500. That in a meeting with the Petitioner, he claimed that his total shares were seven, warranting him allocation of seven ten acres plots (approximately 70 acres). He however ended up with 23 acres of approximately 10 acres each *to wit*; Makueni/Nguu Ranch/32, 46, 50, 52, 53, 55, 56, 57, 80, 84, 85, 86 ,87, 89, 90, 100, 101, 104, 253 and 278.

9. He deposed that during the 2006 verification exercise, the Petitioner did not produce ownership documents to the verification committee and nor did he pay the 10% commitment deposit fee of the purchase price on letters of offer. Consequently, the committee recommended repossession of eleven plots from him to wit; Makueni/ Nguu Ranch 55, 57, 87, 89, 90, 98, 99, 100, 104 and 278. Further, he deposed that there are no documents in their possession supporting the Petitioner's claim of having purchased Makueni/ Nguu Ranch/27, 31, 33, 88, 97 and 1249. Their records show that the parcels have been retained by the original allottees. An extract of the record is exhibited as LK-1.

10. It was also his deposition that the verification process is still ongoing and that the Petitioner has been advised on various occasions to be more patient until the exercise is completed and implementations done so as to safeguard the integrity of the process, the interests of all scheme residents and the public at large. That due to the protracted challenges that have continued to face the scheme, it will not be in the interests of justice and the public to avail the information sought by the Petitioner. He deposed that withholding the information is important so as to preserve the integrity of the process and guard against possible physical conflict among the residents of the scheme and third parties who have laid claim to parts of the scheme.

11. It was also his deposition that the advise he has from the State Counsel is that the right of access to information is not absolute and can be limited in respect of information whose disclosure is likely to impede the due process of law, endanger the safety, health or life of any person or cause substantial harm to the Government's ability to manage Kenya's economy. He prays that the petition be dismissed.

12. In rejoinder, the Petitioner deposed that the parcels with respect to which he did not pay the requisite 10% remain 'unregistered'. That according to paragraph 7 of the replying affidavit, his parcels of land fall under categories **B (449 unregistered plots occupied by allottees)**

and C (593 plots sold by original allottees and occupied by buyers). Further, he deposed that according to paragraph 8 of the replying affidavit, his properties ought to have been dealt with as per recommendation A which states that; the plots with no adverse claims be registered and beneficiaries be issued with title deeds. These include the unregistered allottees and those who purchased from allottees.

13. Referring to paragraph 13 of the replying affidavit, he deposed that the repossession and re-allocation of his properties during the pendency of the verification process is discriminatory and against the Constitution. Referring to LK-1, he deposed that it is obvious that some of the properties have been allocated to other people who are foreign to him as he still has the original allotment letters. He deposed that in order to interrogate the process of repossession and re-allocation of his properties, he should be furnished with all the documents prayed for.

14. He deposed that the report of the joint team that verified and audited documents in 2018 is also crucial to him and he should be furnished with the same in order to pursue his proprietary rights. He deposed that the report will give him information as to the point in time when the properties were repossessed and re-allocated as well as the addresses of the current allottees and whether they have sold the same to third parties.

15. He deposed that the release of LK-1 shows that indeed the information he needs is in the possession, custody and power of the 2nd Respondent and there should be absolutely no harm in releasing the documents prayed for.

16. The petition was canvassed by way of written submissions.

17. In his submissions, the Petitioner identified the following as the issues for determination;

a) Whether the Respondents violated his right of access to information.

b) Whether the Respondents should be compelled to give the information.

18. On the first issue, he relied on Article 35 of the Constitution to submit that a citizen has the right to seek and have information from the State or State organ. He submitted that the 1st and 2nd Respondents are state officers hence bound by the Article. He submitted that section 9 of Access to Information Act No. 31 of 2016 (*the Act*) gives a timeline of 21 days within which to give information. He submitted that the Respondents have violated Article 10 of the Constitution which sets out the National Values and Principles of Governance. He contended that the 1st and 2nd Respondents have failed the minimum standard on how public officers should conduct themselves. He relied on the case of **Katiba Institute vs. President's Delivery Unit & 3 Others (2017) eKLR** where the Court observed that;

“The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of Government affairs, for this right enables citizens to participate in that governance...”

19. Relying on section 4 of the Act, he submitted that the right to information is not affected by the reason why the citizen seeks it or even what the public officer perceives to be the reason for seeking information.

20. It was also his submission that the right to access information is inviolable because it is neither granted nor grantable by the state. He relied *inter alia* on the case of **Trusted Society of Human Rights Alliance & 3 Others vs. Judicial Service Commission (2016) eKLR** where the Court stated that;

“Article 35(1)(a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the State. I therefore agree with the position encapsulated in the Public Right to Know: Principles of Freedom of Information Legislation- Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. Further, the exercise of this right should not require individuals to demonstrate a specific interest in the information.”

21. The Petitioner submitted that the reasons given for not availing the information sought do not meet the threshold of exemptions under the Act. He contends that it is difficult to see how the release of the information would jeopardize the integrity of whatever process the state is undertaking. He cited the case of **Attorney General vs. Kituo cha Sheria & 7 Others (2017) eKLR** where the Court stated that;

“The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable by the state. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favor done by the state or those in authority. They merely follow a Constitutional command to obey.”

22. The Respondents submitted that the right to access information is not a non derogable right. They relied on Article 25 of the Constitution to submit that it is not listed among the rights and freedoms that may not be limited.

23. They submitted that the Petitioner has not exhibited any evidence to show that he made an application for official search in the prescribed manner. They contended that the mandatory provisions of section 34 of the Land Registration Act (LRA) are that a person who requires an official search must pay the prescribed fee. They submitted that the Petitioner has tactfully failed to disclose that he never paid the prescribed fee, the 1st Respondent's verbal response notwithstanding.

24. They submitted that the Petitioner has admitted in his submissions that he was actually given a response as to why his request could not be considered at the time of lodging the application for official search. They contended that although the Petitioner was dissatisfied, he was actually given a response.

25. They submitted that the substantive law to Article 35 of the Constitution is the Access to information Act and contended that the reasons given in the replying affidavit fall within the exemptions in section 6(b) (c) of the Act.

26. They urged this Court to be persuaded by the reasons given and afford them the opportunity to put to rest the protracted challenges that have faced Nguu Ranch Settlement Scheme since 1995. They submitted that in the event that this Court is not persuaded by their case, the appropriate relief in all fairness would be to refer the matter to the 1st and 2nd Respondents for further consideration rather than issuance of any of the orders sought.

27. Having looked at the petition, response and the rival submissions, it is my considered view that the following issues arise for determination;

a) Whether the Respondents violated the Petitioner's right of access to information.

b) Whether the Respondents should be compelled to give the information.

28. It is evident that the information sought by the Petitioner with regard to the properties has not been provided. The 1st and 2nd Respondents have not denied this fact and their justification is that the verification process is ongoing and it would be premature to release the information. In their submissions, the Respondents claim that the Petitioner did not make an application for official search in the prescribed manner and did not pay the prescribed fees.

29. It has been held numerous times that submissions are not pleadings and as such, that particular aspect of their submissions goes to no issue. In any case, I find that submission to be contradictory to their position that they are not ready to release the information sought. The Petitioner's demand letter was received by the 1st Respondent on 25th July, 2019 and the 2nd Respondent has not denied receipt of the same. The letter is clear as to the nature of information sought and if the Respondents were keen on releasing it, they would have raised the issue of prescribed application and prescribed fee with the bearer of the letter.

30. **Article 35 of the Constitution** provides as follows;

“(1) Every citizen has the right of access to-

a) information held by the State; and

b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.”

31. As correctly submitted by the Respondents, the substantive law to **Article 35 is the Access to Information Act, No. 31 of 2016**. The Respondents claim that their reasons for withholding the information are covered by the exemptions in the Act and specifically section 6(b) and (c). **Section 6 of the Act** provides as follows;

6. (1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

(a) undermine the national security of Kenya;

(b) impede the due process of law;

(c) endanger the safety, health or life of any person;

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

32. Apart from stating that the verification process is ongoing, the Respondents have not placed anything before this Court to back up their assertion. From the replying affidavit, the first verification committee was appointed in 2006 and it looks like the process has been ongoing since then. The Respondents have not told this Court how much longer it is likely to take and it can never be permissible for such a process to go on indefinitely at the expense of information seekers.

33. With regard to the exemptions alluded to by the Respondents, I have interrogated the meaning of 'due process of law' and at **page 500 of the Blacks Law Dictionary, 6th Edn**, the phrase is explained as follows;

“Due process of law. Law in its regular course of administration through courts of justice. Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of the creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.”

34. In the American case of **Boddie -vs- Connecticut [1971] 40, US 371**, the Court stated as follows;

“without this guarantee that one may not be deprived of, neither liberty, nor property without due process of the law, the state monopoly over the techniques of resolution for binding conflict resolution, could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this court has through years of adjudication put flesh upon the due process principle.”

35. The Petitioner has demonstrated *prima facie* that he has a proprietary interest in the listed properties and from the materials placed before Court, there are indications that some of the properties may have been dealt with in an adverse manner without his participation. This is the kind of conduct that the principle of due process frowns upon and I am of the considered view that the continued withholding of the information sought is in fact the impediment to the due process of law.

36. It was also the Respondents' claim that disclosure of the information is likely to endanger the safety, health or life of people. I am unable to see how information on ownership of property will result to such. The land registries across the country release such information on a daily basis and some of it forms the basis of the numerous cases in Courts. In any case, the Petitioner has categorically stated that he intends to use it to enforce his proprietary rights through the Courts. Accordingly, I am not convinced that the information sought is exempted under section 6 (1) (c).

37. The upshot is that the Respondents have violated the Petitioner's right of access to information as enshrined in Article 35 of the Constitution.

38. From the depositions in the replying affidavit, it is clear that the information sought is in possession and custody of the Respondents. I agree with the Petitioner that indeed the 2nd Respondent has availed part of the information in the form of an extract of the record marked as LK-1 and I am not convinced that they will suffer any prejudice by availing the updated document from which the extract was taken. The Petitioner has made it very clear that he intends to use the information to make a decision on who to sue and the cause of action to bring. As stated earlier, the Petitioner has *prima facie* demonstrated interest in the listed properties and his right to access justice is protected by Article 48 of the Constitution. Any further withholding of the information will be an impediment to that right. Accordingly, the information sought should be released forthwith.

39. In the circumstances, I hereby proceed to enter judgement for the Petitioner and against the Respondents as follows: -

a) A permanent mandatory injunction is hereby issued compelling the Respondents to release forthwith all the information in their power, possession and/or custody that is vital in enforcing the Petitioner's fundamental rights and freedoms and more specifically provide the Petitioner with the following documents;

i. Letter of offer in respect of the current allottee.

ii. Letter of acceptance by the current allottee.

iii. Receipt issued by Settlement Fund Trustees to the current allottee upon payment of the 10% or outright purchase.

iv. Discharge of charge by Settlement Fund Trustees in favour of the current allottee.

v. Transfer of land by Settlement Fund Trustees in favour of the current allottee.

vi. Title deed if any issued (if any) issued by the 1st Respondent in favour of the current allottee.

vii. Search certificates (where applicable) in cases where the allottees may have sold and transferred the land in question.

The above documents to be provided in respect of each of the following parcels of land that is to say: -

i. Makueni/Nguu Ranch/27

ii. Makueni/Nguu Ranch/33

iii. Makueni/Nguu Ranch/80

iv. Makueni/Nguu Ranch/84

v. Makueni/Nguu Ranch/88

vi. Makueni/Nguu Ranch/89

vii. Makueni/Nguu Ranch/90

viii. Makueni/Nguu Ranch/98

ix. Makueni/Nguu Ranch/31

x. Makueni/Nguu Ranch/82

xi. Makueni/Nguu Ranch/97

xii. Makueni/Nguu Ranch/278

b) A declaration is hereby issued that the above Respondents' failure to release the information set out in (a) above to the Petitioner was unconstitutional and a violation of the Petitioner's constitutional rights.

c) Costs.

Signed, dated and delivered at Makueni via email this 23rd day of October, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: C. Nzioka