



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**ELC PET NO. 9 OF 2019**

**KEIYAN SELF HELP ASSOCIATION.....PETITIONER**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MIGORI.....3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MIGORI**

**LAND MANAGEMENT BOARD.....4<sup>TH</sup> RESPONDENT**

**AND**

**KEIYAN GROUP BRANCH, OOLONTARE, SIKAWA**

**AND OLDANYATI OF TRANSMARA.....1<sup>ST</sup> INTERESTED PARTY**

**JUDGMENT**

1. In the instant petition dated 20<sup>th</sup> May 2019 and lodged in court on 24<sup>th</sup> May 2019, the petitioner, **KEIYAN SELF HELP ASSOCIATION** is seeking the following reliefs:-

*a) A declaration that the action of the 1<sup>st</sup> respondent to issue Gazette Notice No. 882 dated the 1<sup>st</sup> March 2019 in so far as it dismissed the petitioner's claim without according the petitioner's right to be heard on 1<sup>st</sup> November 2018 when adverse evidence was given in unconstitutional and is therefore null and void.*

*b) A declaration that the Petitioner's members are the genuine owner of all that land known as AREA "A" and AREA "B" (The suit land herein) within Transmara.*

*c) A Judicial Review Order of Certiorari to quash the determination of the 1<sup>st</sup> respondent dated 7h February 2019 together with the Gazette Notice No. 882 dated the 1<sup>st</sup> March,2019 in so far as it dismissed the petitioner's claim without according the petitioner's the right to be heard on 1<sup>st</sup> November 2018 when adverse evidence was given is unconstitutional and is therefore null and void.*

*d) Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the Constitution and fundamental rights and freedoms.*

2. The petition is supported by a 64-paragraphed affidavit sworn on even date by Stephen P. Ochieng, the coordinator of the petitioner. Annexed to the said affidavit, are copies of documents marked as "SPO1" to "SPO11" which include special power of attorney, certificate of registration of the petitioner, determination rendered on 1<sup>st</sup> March 2019 by the historical land injustice committee of the National Land Commission (1<sup>st</sup> respondent) and Hansard verbatim record of the 1<sup>st</sup> respondent's investigations on historical land injustices claims hearings held at ACK Gardens Annex of the 1<sup>st</sup> respondent's boardroom on 10<sup>th</sup> May 2018.

3. On 7<sup>th</sup> November 2019, the said deponent, Stephen Peter Ochieng also filed a supplementary affidavit sworn on 6<sup>th</sup> November 2019 in

support of the petition and in response to the 3<sup>rd</sup> respondent's replying affidavit sworn on 19<sup>th</sup> July 2019. Basically, he deposed that the matter is not statute barred and that the petition is not an appeal from the 1<sup>st</sup> defendant's determination, among others.

4. The petition is also fortified by a 13-paragraphed supporting affidavit sworn on 6<sup>th</sup> December 2019 and filed in court on 16<sup>th</sup> December 2019 by Ole Kiu, a member and elder of Siria community. He deposed, inter alia, that he gave evidence at the 1<sup>st</sup> respondent's session in respect of the instant matter held at Kericho. That the petitioner's members occupied the suit land until the year 1976 when they were removed from it by force.

5. The petition is further reinforced by a 12-paragraphed supporting affidavit sworn on 6<sup>th</sup> December 2019 and filed in court on 16<sup>th</sup> December 2019 by Roge Ole Sankale aged over 80 years, a member and elder of Siria community, too. He deposed, inter alia, that the petitioner's members occupied the suit land as earlier as the year 1923. That they were pushed away from the land by force in January 1976, hence the matter qualifies to be an historical land injustice.

6. The gist of the petition is that the petitioner is a duly registered association under registration number 24597 with about 16,000 members residing within Narok and Migori counties. That by an agreement with the Siria community made as early as the year 1923, the suit was handed over to the petitioner's members. That the said agreement was confirmed by the Colonial Government in 1938 in Kenya Gazette vide The Native Lands (Kenya Migori Land Utilization Rules 1950 as provided in The Native Lands Trust Ordinance No. 280 1938) and letters dated 12<sup>th</sup> August 1966 and 12<sup>th</sup> October 1986 from the Ministry of Lands and Settlement addressed to the defunct Narok County Council.

7. The petitioner's members complain inter alia, that in the year 1976, they were pushed away from the suit land by force hence the matter qualified to be a historical injustice. That the petitioner filed a claim No. NLC/HLI/057/2017 with the 1<sup>st</sup> respondent in the year 2017 on the ground of historical injustice. That during the hearing of the claim, one Stephen Peter Ochieng, the petitioner's authorised coordinator gave evidence for and on behalf of the petitioner in support of the claim on 10<sup>th</sup> May 2018. That a witness, Mzee Ole Kiu from the Siria clan gave evidence to the effect that the land was handed over to the petitioner's members in the year 1923.

8. It is the lamentation of the petitioner's members that the 1<sup>st</sup> respondent proceeded to hear the petitioner's claim in the absence of the petitioner's members on 1<sup>st</sup> November 2018. That the matter was not in the cause list of that day and that the petitioner had not been served with documents relied upon during hearing on that day. That the 1<sup>st</sup> respondent did not accord a fair hearing to the petitioner, relied on false evidence and arrived at an erroneous determination on 7<sup>th</sup> February 2019 which culminated to Gazette Notice number 882 of 1<sup>st</sup> March 2019. Thus, it provoked the present petition.

9. The petitioner is represented by learned counsel, Mr Nelson Jura.

10. The 1<sup>st</sup> respondent is represented by learned counsel, Joy Brenda Machinda.

11. The 2<sup>nd</sup> respondent is represented by learned counsel, Esther Opiyo.

12. The 3<sup>rd</sup> respondent is represented by learned counsel, Mr Omonde Kisera.

13. By a 34-paragraphed replying affidavit sworn on 4<sup>th</sup> December 2019 and filed in court on 6<sup>th</sup> December 2019, the 1<sup>st</sup> respondent opposed the petition and sought its dismissal with costs. One Samwel Okenyi Odari, the Deputy Director Adjudication Directorate and a member of the historical land injustice committee of the 1<sup>st</sup> respondent made reference to various constitutional and legal provisions including Articles 67(3) of the Constitution of Kenya, 2010, Sections 6 and 15(1) of the National Land Commission (NLC) Act, 2012 therein. He deposed inter alia, that the petitioner's members were accorded the opportunity to present their claim as discerned in the proceedings of 11<sup>th</sup> October 2018 and 1<sup>st</sup> November 2018. That the petitioner acknowledged by a letter dated 15<sup>th</sup> October 2018 that it was aware of the hearing date of 1<sup>st</sup> November 2018 as shown in the determination rendered by the 1<sup>st</sup> respondent.

14. The 1<sup>st</sup> respondent stated that it complied with Articles 47, 50(1), 67 and 252 of the Constitution (supra) and Section 15 of the NLC Act, 2012 and Sections 4(3) and (4) and 5 of the Fair Administrative Action Act in arriving at the said determination. That if the petitioner was aggrieved by the 1<sup>st</sup> respondent's decision, its cause of action would be to either lodge an appeal or in the alternative, file judicial review proceedings and not the present petition.

15. The replying affidavit is premised on documents marked as "SOO-1" to "SOO-8" and annexed thereto. The documents are copies of a complaint under Ref No. NLC/HL1 057/2017 made pursuant to **Section 15 of the NLC Act (supra)** by the petitioner to the 1<sup>st</sup> respondent (SOO-1), a copy of a letter dated 16<sup>th</sup> April 2018 by the 1<sup>st</sup> respondent addressed to all interested parties for hearing of the complaint on 10<sup>th</sup> May 2018 at the 1<sup>st</sup> respondent's office, NBI (SOO-2), copies of proceedings of the complaint before the 1<sup>st</sup> respondent (SOO-3, SOO-4, SOO-5, SOO-6) and a copy of the determination (SOO-7 and SOO-8).

16. The 3<sup>rd</sup> respondent, too opposed this petition by way of a 14-paragraphed replying affidavit sworn on 19<sup>th</sup> June 2019 by the 3<sup>rd</sup> respondent's acting secretary and duly filed in court on 19<sup>th</sup> July 2019. It is deposed therein, inter alia, that the suit land is not defined and its acreage unknown. That the adjudication and registration process in respect of the suit land was never challenged by the petitioner. That the constitutional mandate of the 1<sup>st</sup> respondent has no room for appeal.

17. The 3<sup>rd</sup> respondent stated that the entire petition is amorphous, mysterious, ridiculous, vague, ambiguous, statute barred, misconceived. That the same do not present any comprehensive case and it is a pure abuse of the process of the court.

18. It is noted that on 11<sup>th</sup> November 2019, learned counsel for the petitioner sought to withdraw the claim against the 4<sup>th</sup> respondent. The prayer was found meritorious and allowed accordingly with no order as to costs.

19. The 1<sup>st</sup> interested party herein was duly served by substituted service under Order 5(1) of the Civil Procedure Rules, 2010) as disclosed in affidavit of service sworn on 11<sup>th</sup> November 2019 filed on even date. However, there was neither response nor appearance on the part of the 1<sup>st</sup> interested party in the instant petition.

20. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not file any response to the petition. A final latitude was granted thereof as revealed in the proceedings of 11<sup>th</sup> November 2019 herein.

21. On 16<sup>th</sup> December 2019, this court ordered and directed that the petition be argued by way of written submissions pursuant thereto. Only the petitioner and the 1<sup>st</sup> respondent complied accordingly.

22. By his submissions dated 22<sup>nd</sup> June 2020 duly filed in court on 24<sup>th</sup> June 2020, learned counsel for the petitioner gave the background of the matter, cited several statutory provisions and Articles of the Constitution (supra), and referred to documents marked as “SPO1” to “SPO11” attached to the petition. He submitted that the court be enjoined to grant orders sought in the petition as the petitioner’s constitutional rights were violated and that it is in the interest of justice.

23. In her submissions, learned counsel for the 1<sup>st</sup> respondent provided the background of the petition and identified three (3) issues for determination namely;

*i. Whether the 1<sup>st</sup> respondent has the jurisdiction to hear and determine the Historical land injustice claim filed by the Petitioner.*

*ii. Whether the petitioner was granted a fair hearing by the 1<sup>st</sup> respondent.*

*iii. Whether the orders sought should be granted.*

24. To buttress the submissions, counsel relied on inter alia, Sections 6(3) and 15(1) of the NLC Act, and Article 67(3) (supra). That the petitioner was granted an opportunity to be heard and present documents before the 1<sup>st</sup> respondent. That the petitioner did not appeal or file judicial review proceedings from the determination of the 1<sup>st</sup> respondent. Therefore, counsel sought dismissal of the petition with costs to 1<sup>st</sup> respondent.

25. It is trite law that issues for determination in a suit flow from either the pleadings or as framed by the parties for the court’s determination; see *Great Lakes Company (U) Ltd v Kenya Revenue Authority (2009) KLR 720*.

26. This court is conscious of the definition of the term “**suit**” at page 1663 of the Black’s Law Dictionary, 10<sup>th</sup> Edition; see also **Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya**.

27. In view of the entire petition, the replying affidavits of the 1<sup>st</sup> and 3<sup>rd</sup> respondents and the evidence presented and the petitioner’s submissions as well as the 1<sup>st</sup> respondent’s submissions, I endorse the three (3) issues for determination as framed in the 1<sup>st</sup> respondent’s submissions and as set out at paragraph 23 hereinabove.

28. On the first issue, the 1<sup>st</sup> respondent is created under Article 67 (1)(supra). Its functions are set out under Article 67 (2) (a) to (h) thereof. They include;-

*“to initiate investigations on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress”*

29. In addition, **Section 15 (1) of the NLC Act (supra)** mandates the 1<sup>st</sup> Respondent to receive, admit and investigate all historical injustice complaints and recommend appropriate redress. The said mandate is aligned to Article **67 (3) (supra)**.

30. It is noted that the Petitioner lodged a claim number NLC/HLI/057/2017 with the 1<sup>st</sup> Respondent in the year 2017 on the ground of historical injustice. The same is disclosed in paragraph 17 of the supporting affidavit to the petition, the Hansard verbatim record and determination of the claim by the 1<sup>st</sup> Respondent.

31. Under Article 260 of the Constitution (supra), the term “**Land**” includes the surface of the earth, the subsurface rock and natural resources completely contained on or under the surface. This court is also conscious of the definition of the term “Historical land injustice” under section 15 (2) of the NLC Act (Supra).

32. **Article 62 (2) of the Constitution (supra)** stipulates that Public land shall vest in and be held by a County Government in trust for the people resident in the County. That the land be administered by the 1<sup>st</sup> respondent.

33. As such, it is common ground that the 1<sup>st</sup> respondent is mandated by the Kenyan Constitution to administer Public land. This is so discerned from page 1 of the petition, paragraph 1 of the 1<sup>st</sup> respondent’s replying affidavit and paragraph 6 of the 3<sup>rd</sup> respondent’s replying

affidavit. So, the 1<sup>st</sup> issue is resolved thereby.

34. Regarding the second issue, the right to fair administrative action is entrenched under **Article 47 of the Constitution (supra)**. I note the contents of the Article in its entirety.

35. Additionally, I bear in mind all the other Constitutional provisions under which the petition is mounted. I also take into account that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system, as held in a long line of authorities including **Onyango Oloo –vs- Attorney General (1986-1989) EA 456 and James Kanyita Nderitu –vs- Marios Philotas Ghikas and another (2016)**

*eKLR.*

36. It is noteworthy that hearing of the petitioner's complaint was conducted on 10<sup>th</sup> May 2018, 6<sup>th</sup> June 2018, 24<sup>th</sup> September 2018, 10<sup>th</sup> October 2018 and 1<sup>st</sup> November 2018 as per the Hansard Verbatim record of the 1<sup>st</sup> respondent's proceedings and on the face of determination. In that regard, did the 1<sup>st</sup> respondent accord the petitioner a fair hearing of the complaint?

37. The proceedings of 10<sup>th</sup> May 2018 reveal that Mr. Stephen Ochieng, the coordinator of the petitioner's attended the hearing of the complaint at ACK Garden Annex, the 1<sup>st</sup> respondent's Board room. He testified inter alia :-

***“ We would like the Commissioner to resettle us back in our land that we were pushed away in 1976”***

38. At the end of the hearing of the complaint on that day, the 1<sup>st</sup> respondent ordered and directed thus:-

***“.....We will do, once we get a date we shall inform you in good time, we will also inform them and we will also assist us to inform them so that when we come to Kilgories we listen to all of you while all of you are there”***

39. As to the next hearing date, the 1<sup>st</sup> respondent further decreed as follows:-

***“..... So we will inform on notice “***

40. On 24<sup>th</sup> September 2018, Mr. Maiyani Sankale, learned counsel for the respondent, Kenyan Group Ranch, the residents of Sakawa Olwandare and Oldwanyati, informed the 1<sup>st</sup> respondent that the complainant was the petitioner herein. He could not tell whether the petitioner's members were present on that day. Nonetheless, hearing proceeded in the absence of the petitioner.

41. On 11<sup>th</sup> October 2018, the 1<sup>st</sup> respondent heard the respondents' case in absence of the petitioner. There is nothing to show that the petitioner was aware or notified of the hearing. The next sitting was fixed for 1<sup>st</sup> November 2018.

42. During the hearing on 1<sup>st</sup> November 2018, the 1<sup>st</sup> respondent received the respondents' submissions. The petitioner was not represented or at all.

43. By the 1<sup>st</sup> respondent's determination rendered on 7<sup>th</sup> January 2019, the petitioner's claim failed. It was recommended that:-

***a) The claim is dismissed***

***b) Area A and B found to be in Migori and they are not part of Keiyan Group Ranch, Oolontare, Sikawa and Oldanyati adjudication sections which is in Transmara sub County.***

44. The petitioner complains at paragraph 43 of the petition and submitted that the 1<sup>st</sup> respondent proceeded to hear the petitioner's claim in the absence of the petitioner's members on 1<sup>st</sup> November 2018. Copies of proceedings marked as “SOO-6” annexed to the 1<sup>st</sup> respondent's affidavit, affirm the same.

45. It is established law that it is the court's duty to ensure the respondent is made aware of the existence of a matter including appeals and petitions and to have the party served with necessary papers. That the party has the right to appear or to decline to appear accordingly; see **Ogada-vs- Mollin (2009) KLR 620.**

46. The 1<sup>st</sup> respondent asserted that it is not bound by strict rules of procedure. Reference was made to **sections 6 (3) (c) of the NLC Act (supra).**

47. It is settled law that procedural cock ups can not deter a court in the delivery of justice; see the case of **Ali bin Khamis –vs- Salim Bin Khamis Kirube and others (1956) EA 195.**

48. Moreover, **Article 159 (2) (d) of the Constitution (Supra)** provides that justice shall be administered without undue regard to technicalities of procedure. The same constitutional principle is mirrored in sections 1, 1A,3 and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya) and sections 3 and 19 of the Environment and Land Court Act, 2015 (2011).

49. The right to be heard was discussed in the case of **Re- Hebtullah Properties Ltd (1976-80) 1 KLR 1195 at 1209** where it was held that :-

**“ ..... The tribunal (BPRT) had a duty to hear the landlord on the objection. It did not hear the land lord. There was in my opinion a violation of the audi alteram partem rule”**

50. In the case of **Philip Chemwolo and another –vs- Augustine Kubende (1982-88) KAR 103**, the Court of Appeal was very emphatic on the need to render a decision on merits. It was held;-

**“Blinders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits.”**

51. Under Article 25 (c) of the Constitution of (supra), the right to fair trial shall not be curtailed. The petitioner’s members were entitled to access to justice and fair hearing as enshrined under **Articles 48 and 50 (1) of the Constitution (supra) respectively.**

52. It is findings of this court that the 1<sup>st</sup> respondent violated the petitioner’s right to fair administrative action, fair hearing and access to justice on 24<sup>th</sup> September 2019 and 1<sup>st</sup> November 2018. The 2<sup>nd</sup> defendant did not challenge the petition. Therefore, the petitioner has proved this petition to the requisite standards and is entitled to the reliefs namely (a) (c) and (d) sought in the petition as provided for under **Articles 22 (1) and 23 (3) of the Constitution (supra).**

53. In respect of relief No. (b) sought in the petition, Indeed, by its character, the same ought to be heard on merits as noted in **Ogada, Re-Hebtullah and Chemwolo cases (supra)**. Thus, I decline to grant the relief of declaration that the petitioner’s members own the suit land in the terms sought therein, in the spirit of fair hearing.

54. A fortiori, Judgment be and is hereby entered for the petitioner against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally for a declaration, a Judicial Review Order of certiorari and costs as per prayers (a) (c) and (d) respectively in the petition dated 2<sup>nd</sup> May 2019 and filed in court on 24<sup>th</sup> May 2019.

55. It is so ordered.

**Delivered, Signed and Dated at Migori in open Court and through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge, this 22<sup>nd</sup> day of OCTOBER, 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In presence of :-**

Mr. Kiseru learned counsel for the 3<sup>rd</sup> respondent and holding brief for Ms. E. Opiyo for 2<sup>nd</sup> respondent.

Ms. Apondi holding brief for Jura learned counsel for petitioner

Tom Maurice – Court Assistant