



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 11 OF 2019**

**DANIEL KENDUIYWO & 135 OTHERS.....APPLICANTS**

**VERSUS**

**CABINET SECRETARY OF MINISTRY**

**OF DEFENCE.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

**[UNSIGNED NOTICE OF MOTION DATED 3<sup>RD</sup> MARCH, 2020]**

1. The Petitioners filed the Motion dated 3<sup>rd</sup> March, 2020 seeking for review of the ruling delivered on the 6<sup>th</sup> November, 2019 enjoining this **Petition to ELC No. 23 of 2019** to allow them proceed with the Petition. The application is based on the seven grounds on its face, and supported by the affidavit sworn by **Daniel Kenduiywo**, the 1<sup>st</sup> Petitioner, on the 3<sup>rd</sup> March, 2020. The Petitioners' case is that unless the order is reviewed, their petition will be abandoned resulting to them losing their claim for adverse possession, and compensation following the compulsory acquisition. That the parties in **ELC No. 78 of 2019** and **ELC No. 23 of 2019** are pursuing different causes of action from the Petitioners.

2. The application is opposed by the 1<sup>st</sup> Respondent, through the Replying Affidavit sworn by **Captain Jane Wangari**, a Staff Officer II with Defence Headquarters on the 23<sup>rd</sup> September, 2020. It is their case that the application is incurably defective, incompetent, bad in law and an abuse of the Court process. That the Petitioners were not coerced to be enjoined in **ELC No. 23 of 2019** and **ELC No. 78 of 2019**. That the Petitioners were enjoined willingly for expeditious settlement of disputes at minimum expense as the petition and the two suits were all about ownership of the land that has a common origin. That the Petitioners' claim in the petition is not based on adverse possession as alleged, but a challenge to the compulsory acquisition that took place more than 30 years ago. That the application is causing delay to the hearing of the suits.

3. The 3<sup>rd</sup> Respondent also opposed the application through the grounds of opposition dated the 29<sup>th</sup> September, 2020 summarized as follows:

(a) *That the application is incurably defective, misconceived, untenable and devoid of substance.*

(b) *That the application seeks to challenge a consent order for consolidation, but has failed to meet the conditions to set aside such an order.*

(c) *That the application does not meet the requirements under **Order 45 of Civil Procedure Rules** for review.*

4. The Petitioners filed their written submissions dated the 22<sup>nd</sup> June, 2020 while the 1<sup>st</sup> Respondent filed their unsigned submissions dated the 28<sup>th</sup> September, 2020 on 30<sup>th</sup> September, 2020. The learned Counsel for the Petitioners submits that the Petitioners were not satisfied with the ruling of 6<sup>th</sup> November, 2019 and filed the Motion dated 3<sup>rd</sup> March, 2020 for review to have their petition heard independently of the two suits. The Counsel submitted that the Petitioners have a right to be heard under **Article 50 of the Constitution**, and this court has jurisdiction to hear their petition under **Article 162(2) of the Constitution** and **Section 13(1) of the Environment and Land Court Act**.

That **Order 45 of the Civil Procedure Rules** and **Section 80 of the Civil Procedure Act** allows this Court to review its orders for sufficient reasons, even where no error or mistake on the face of the record or discovery of new and important evidence has arisen. The learned Counsel referred to the following Court of Appeal decisions:

- **Pancras T. Swai Vs Kenya Breweries Ltd [2014] eKLR.**
- **Equity Bank Vs West Link MBo Limited (Civil Application No. 78 of 2011, [2013] eKLR.**
- **National Union of Water and Sewerage Employees & 3 Others Vs Nairobi Water and Sewerage Company Limited [2018] eKLR.**
- **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (Deceased) Vs Kariuki Marega & Another [2018] eKLR among Others.**

The Counsel also referred to other decisions of Courts of concurrent jurisdiction. The learned Counsel for the 1<sup>st</sup> Respondent submitted that the Ruling of the Court of 6<sup>th</sup> November, 2020 was upon finding that the suit lands in the petition, and the two suits had a common origin and therefore the matters should be consolidated for hearing. The learned Counsel referred to the **High Court Petition No. 497 of 2017, Abdulkadir A. Khalif Vs The Principal Secretary, Ministry of Lands and Physical Planning and Others.** It has also been submitted that there was unreasonable delay in filing the application. That the ruling of 6<sup>th</sup> November, 2019 had given the Petitioners time to file their defence in 30 days but did not take any steps until filing of the current Motion, hence causing delay to the hearing of the main suits. That the application for review is not merited as there was no error, or mistake on the face of the record or discovery of new and important evidence established. That the petition does not make out a claim of adverse possession, and hence no sufficient reason has been shown to base the review application. The Counsel referred to the case of **Stephen Gathua Kimani Vs Nancy Wanjira t/a Providence Auctioneers [2016] eKLR** on the expression that sufficient reason is wide enough to include misconception of fact or law by a Court of Law or even by an advocate. That definition only covers misconception of facts or law but not negligence or conduct of an advocate.

5. The following are the issues for the Court's determinations;

***(a) Whether the Petitioners have established sufficient reasons for the order of 6<sup>th</sup> November, 2019 to be reviewed to allow the Petition to be heard independently of the two other suits.***

***(b) Who pays the costs of the application?***

6. The court has considered the grounds on the Motion, the affidavit evidence, the grounds of opposition, the written submissions, the superior court decisions cited thereon and come to the following determinations;

(a) That this petition was referred to this Court by my sister Odeny, J of Environment and Land Court 2, vide the Order of 19<sup>th</sup> September, 2019 as noted in paragraph one (1) of the subsequent ruling of 6<sup>th</sup> November, 2019. The Court then heard the learned Counsel representing the Parties in this **Petition, ELC No. 23 of 2019** and **ELC No. 78 of 2019** on the 22<sup>nd</sup> October, 2019. That the proceedings of that day are captured in the ruling of 6<sup>th</sup> November, 2019 as showing that all Counsel for the parties in the three matters, including **M/s Anyango** for the Petitioners herein, supported the consolidation of the petition with the two other suits, except **Mr. Yego** for the Plaintiffs in ELC No. 78 of 2019, who opposed consolidation proposing nevertheless that all the three matters be heard before one court.

(b) That upon perusing the pleadings by all the parties in this petition, **ELC No. 23 of 2019**, and **ELC No. 78 of 2019** and taking into consideration the learned Counsel's submissions, the Court found that all the parcels of land subject matter in the three matters have a common origin. The Court opined that though the petition by its nature would ordinarily be heard separately, the Petitioners' Counsel had indicated that the Petitioners would join the consolidated suit as Defendants. The Court then went ahead to find that the consolidation of the three matters would ***"enable the court to hear all the parties under one file which will not only be costs effective to all the parties and the Court, but also expedite the conclusion of the matters"***. The Court further expressed itself thus;

***"That a perusal of the three matters have shown that the first matter to be filed was ELC No. 23 of 2019. That it is only fair that the file be the one all the future filings and proceedings will take place"***.

That the Court then directed the consolidation of **ELC No. 78 of 2019** and ***"That the Petitioners in ELC Petition No. 11 of 2019 be enjoined in the consolidated suits as Defendants. That further, the Petitioners do obtain copies of the complaints in ELC No. 23 of 2019 and ELC No. 78 of 2019 from the Registry to enable them file and serve their defence with or without counterclaim in 30 (thirty) days from today..."*** That the record confirms that the Petitioners did not comply with the direction to file and serve their defence within 30 days from 6<sup>th</sup> November, 2019. That about four (4) months later, the Petitioners then filed the Motion, subject matter of this ruling.

(c) That the joinder of the Petition to the consolidated **ELC No. 23 of 2019** and **ELC No. 78 of 2019** as Defendants was through the consent communicated on the 22<sup>nd</sup> October, 2019 through **M/s Anyango**, their counsel. That obviously, there is no fraud, mistake, misrepresentation or coercion alleged in the way that consent was arrived at. That there is no error or mistake on the face of the record or discovery of new and important evidence alluded to as the basis of the application for review of the ruling or order of 6<sup>th</sup> November, 2019. That what the Petitioners have relied on is what they call sufficient reasons. That the sufficient reasons given is that unless they are allowed to prosecute their Petition independently of the two other suits that deal with ownership of the suit lands, they are going to be prejudiced in their claim of adverse possession, and compensation upon compulsory acquisition. That in

their submissions, the learned Counsel for the Petitioners appear to say that it was not the petitioners' original intention to abandon the petition upon consolidation. That even though the subject matters in the three cases were somewhat inter-related and consolidation would be appropriate, the "**Petitioners were only agreeable to the consolidation as the Applicants were apprehensive that their petition would be deemed res-judicata in that regard**". The Counsel went ahead to submit "**that is not a sufficient reason for the Court opting not to vary the consolidation order in the Applicants'/Petitioners' favour**". That with respect, the learned Counsel's submissions, the grounds on the Motion and the affidavit evidence tendered by the 1<sup>st</sup> Petitioner has not established any sufficient reason for the Court to review the consolidation order of 6<sup>th</sup> November, 2019. That the Petition by its heading leaves no doubt that it is a constitutional petition filed on 8<sup>th</sup> April, 2019. That the prayers (A) to (C) are all about declaratory orders to the effect that the Petitioners are the rightful owners, that compulsory acquisition of 1979 was void, and 1<sup>st</sup> Respondent has interfered with their rights. That prayers (D) and (F) are for order of certiorari, prohibition and costs. That the foregoing shows there is no prayer based on adverse possession as alleged in the application.

(d) That were the Court to have found merit in the application, the logical next step would have been to return the petition to Environment and Land Court No. 2 which was previously handling this matter yet the Order of 19<sup>th</sup> September, 2019 referring the petition to this Court has to-date not been challenged. That the alternative would have been to retain the petition before this Court and hear it separately from **ELC No. 23 of 2019** and **ELC No. 78 of 2019**. That would have required double the time it would take to hear all the three matters as consolidated on the 6<sup>th</sup> November, 2019, thereby increasing costs for the parties and Court. That as the Petitioners have not shown what aspect of their prayers in the petition cannot lawfully be filed and prosecuted in the consolidated suits, the court agrees with the submissions by the 1<sup>st</sup> Respondent that the application is an abuse of the Court process and its only aim is to delay the conclusion of the consolidated suits.

(e) That further, the Motion dated 3<sup>rd</sup> March, 2020 and filed on the 4<sup>th</sup> March, 2020 has not been signed by the Advocate for the Petitioners above "**KHAMINWA & KHAMINWA ADVOCATE FOR PETITIONER**", or at the part for "**DRAWN & FILED BY**". That there is therefore no competent application for review of the order or ruling of 6<sup>th</sup> December, 2019 before the Court and the same is liable to be struck out.

(f) That further, the application should have been filed in **Eldoret ELC No. 23 of 2019** as per Order 1 of 6<sup>th</sup> November, 2019 and served upon all the parties/Counsel in **ELC No. 23 of 2019**, **ELC No. 78 of 2019** and this petition. That there are no replies and submissions filed by Counsel for the parties in the two other matters other than those for the parties in this petition, which leads the Court to conclude that they were not served, yet they were involved in the proceedings that led to the ruling of 6<sup>th</sup> November, 2019 that is sought to be reviewed.

(g) That as the Motion has failed, the Petitioners should pay the Respondents costs of the application.

6. That flowing from the foregoing, the Petitioners' unsigned Motion dated 3<sup>rd</sup> March, 2020 and filed on 4<sup>th</sup> March, 2020 is without merit and is struck out with costs to the Respondents.

Orders accordingly

**Delivered virtually and dated at Eldoret this 18<sup>th</sup> day of November, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Petitioners: 1<sup>st</sup> Petitioner on the Lobby.

Respondents: Absent.

Counsel: Mr. Chemas for Kioko for 1<sup>st</sup> Respondent

M/s Lungu for 3<sup>rd</sup> Respondent.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.