



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

PETITION NO. 2 OF 2017

CHOSEN CHILDREN INTERNATIONAL.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF TRANS-NZOIA....1ST DEFENFANT

MOUNT KENYA UNIVERSITY.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. The petition dated 18th April 2017 which was filed on the same date the petitioner herein seeks the following orders against the defendant:-

(a) A declaration that the actions of the respondents are unconstitutional and that the petitioner is entitled to exclusive use and possession of 8.094 ha situated at Kwanza within Trans Nzoia County which land was allotted vide letter of allotment dated 12th may 2010.

(b) A declaration that the petitioner has been discriminated upon;

(c) General and exemplary damages;

(d) Mesne profits from the 2nd defendant

(e) An order restraining the respondents from intermeddling with the suit property pending the hearing and determination of this petition;

(f) Costs be awarded to the petitioner.

The Petitioner's Case

2. According to the plaint the petitioner, it is a non-government organization duly registered in Kenya; it applied for a parcel of land from the 1st respondent in 2005 and was issued a letter of allotment on 12th May 2010; that the petitioner built on the suit land and enrolled pupils; that the 1st respondent subsequently hired goons who disrupted the petitioner's operations and the operations ceased; that later between 2011 and 2015 the 1st respondent allowed the 2nd respondent to occupy the suit land; that the 2nd respondent thereupon developed the land; that however, upon receipt of a demand note from the petitioner's counsel the 2nd respondent vacated the premises; that now administration police live in the land and in the building erected by the petitioner; that the 1st respondent has also allowed local residents to utilize the land for agriculture; that the 1st respondent has constructed a cattle yard on the land and that owing to the foregoing the petitioner can not utilize the land for the intended purpose.

3. The petition is supported by the sworn affidavit of Marilyn Kohn who is said to be a chief executive officer of the petitioner which reiterates substantially the same facts set out in the petition.

The 3rd Respondents' Case

4. Vide a response to the petition dated 2/6/2017 and filed on 5/6/2018 the 3rd respondent sought that the petition be dismissed on the following main grounds, namely that the petition does not meet the threshold laid down in the **Anarita Case**; that it does not raise any constitutional question; that the petitioner is a non-existent entity or an amorphous body with no legal capacity to sue or be sued; that the petitioner has not demonstrated that it complied with the terms of the allotment and that no rights of the petitioner have been violated.

The 3rd Respondents' Case

5. The 2nd respondent filed its response to the petition vide an affidavit dated 4/5/2018 on the 7/5/2018. It states that it formally requested the 1st respondent for an unspecified parcel of land for educational purposes in 2011 which request was allowed on 25th May 2011 and the approval was only in respect of 20 acres; that subsequently the 2nd respondent was issued by the 1st respondent with a letter of allotment on 3/10/2011 whereupon the 2nd respondent requested for a survey and proper identification of the allocated parcel and paid survey and other fees; that subsequently the 2nd respondent took possession of the allocated land believing it to be free of any claims; that local leaders met and approved of the allocation; that the earlier allocation to the petitioner was cancelled for want of compliance with the conditions; that the 2nd respondent did not have the power or influence over the earlier allocation to the petitioner hence no constitutional claim arises against it; that such first allocation came to its attention through the minutes of the 1st respondent; that the petitioner had at one time sought compensation from the 2nd respondent and that amounted to an acknowledgment that the 2nd respondent was the legal and equitable owner of the property and had caused the suit land to be valued for the intended purpose and this amounted to waiver or surrender of any proprietary rights and hence the doctrine of estoppel applies; that due to local politics and prior subdivision of the land and allocation by the 1st defendant to other persons the 2nd respondent formally surrendered and vacated the land to the 1st respondent in 2015; that the petition has failed the basic threshold expected of petitions and discloses no violations and further can not be maintained against it as a private organization that it never knew of the existence of the petitioner as at the time of allocation and taking possession; that the petitioner was not in possession of the land as at the time it moved in and it was not instrumental in the causing of cessation of the petitioner's operations.

DETERMINATION

Issues for Determination

6. The issues that arise in this petition are as follows:

(a) Whether the petitioner has demonstrated any violation of rights under Article 40(1) of the constitution by the respondents.

(b) What orders should issue.

(a) Whether the petitioner has demonstrated any violation of its rights under Article 40(1) of the constitution by the respondents

7. It is clear that the petitioner is aggrieved by the allocation of the suit land to the 2nd respondent. In my view the 2nd respondent has narrated in its reply, which facts have not been controverted by any other party, how it came to be allocated the suit land and how it surrendered the same.

8. This court is convinced that even from the petitioner's own affidavit evidence the 2nd respondent was not instrumental in the alleged attacks that caused the petitioner to cease its operations on the suit land.

9. It is also clear that the 2nd respondent did not have any hand in the allocation of the suit land to it. The petitioner can not in the absence of any evidence to the contrary maintain any case against the 2nd respondent.

10. As to the argument that a claim of violation of rights can not be maintained against the 2nd respondent on the ground that it is a private body as contrasted with a governmental body this court notes that previous decisions have addressed the issue and concluded that the bill of rights applies both vertically and horizontally meaning that even private persons may in appropriate cases be held accountable for violations of the bill of rights. See the case of **Rose Wangui Mambo & 2 Others -vs- Limuru Country Club & 17 Others [2014] eKLR**. That argument alone could not therefore have saved the 2nd respondent from judgment in the instant case. However it is good to note that even in the Rose Wangui Mambo case, the court cautioned in its decision that though Constitutional protection apply both vertically and horizontally the extent to which they apply horizontally depends on the context and unique circumstances of individual cases including availability of alternative remedies.

11. Regarding the claim against the 1st and 2nd respondents, I find that there is no rebuttal of the evidence given by the 2nd respondent to the effect that the petitioner's allocation was cancelled for want of compliance on the part of the petitioner with the conditions in the letter of allotment.

12. Having examined the copy of the allotment letter exhibited in the petition's supporting affidavit, this court would have expected the statements in the 2nd respondent's affidavit to be controverted by the petitioner. That never happened. Prima facie ownership and title to the suit land by the petitioner can not be said to have been established by the petitioners.

13. The petitioner's case can not be said to have attained the appropriate threshold from which an expedition seeking to verify the claims of violation of rights by the respondents can be launched.

14. Besides, it is doubtful that the proper way to approach this court in respect of the instant claim is by way of a petition. In my view and

having regard to the documents filed by the parties on either side, the real dispute revolves around the issue of who was the proper allottee of the suit land and not whether the rights of the petitioner have been violated. That is an issue that should be resolved in a normal suit commenced by way of plaint. See the case of **Shimoni Resorts -vs- Registrar of Titles 2016 eKLR and Chemey Investments Ltd -vs- A.G. & Others 2018 eKLR**).

CONCLUSION

(b) What orders should issue?

15. Consequently I find that the petition does not have any merits and the same is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Kitale on this 29th day of January, 2019.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for petitioner

N/A for respondent

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019