



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 281 OF 2012**

1. GEORGE MWANDOE
2. JOSPHAT MGHANGA
3. PRINSTONE R MSAFWARI
4. GEOFFREY M. MWADIME
5. LEONARD MWASI MANGELI
6. JOSHUA MWAKALE
7. ROBERT MWARIGHA
8. VINCENT MCHAWIA
9. MWACHABO CBO ORGANIZATION.....PETITIONERS

**VERSUS**

1. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT
2. COMMISSIONER FOR LANDS
3. THE ATTORNEY GENERAL .....RESPONDENTS

**AND**

**AUSTIN VITA MZEE.....INTERESTED PARTY**

**JUDGMENT**

**INTRODUCTION**

1. The Petitioners commenced the suit herein by way of a petition dated 9<sup>th</sup> October, 2012 and filed on 10<sup>th</sup> October 2012. The Petitioners aver that they make the petition on their behalf and on behalf of the members of the communities known as Chawia, Wamuri, Sechu and Gambwa.

2. The Petitioners seek the following orders:

- a. A declaration that the creation of Mwachabo Squatters Settlement Scheme is unconstitutional and an infringement of the Petitioners' constitutional rights to property.
- b. A declaration that being ancestral land and trust land vested only in the local authority unit, only an Adjudication and subdivision registration can be carried out in the land.
- c. A declaration that the Petitioners are entitled property of land they occupy and cannot be deprived the same by the Respondents.

**d. An order of this court directing the Respondents to declare an adjudication section and to proceed to carry out the adjudication under the Land Adjudication Act.**

**e. Costs of the proceedings**

**f. Such other orders or reliefs as this Honourable Court shall deem just.**

3. The petition was supported by facts set out in the petition and the affidavit and further affidavit of LEONARD MWASI MANGELI the 5<sup>th</sup> Petitioner sworn on 9<sup>th</sup> October 2012 and on 30<sup>th</sup> October 2012 respectively.

4. In response to the petition, the Respondents filed a replying affidavit sworn by MWANGI K. WANJOHI on 1<sup>st</sup> November, 2012.

5. On 29<sup>th</sup> May 2014, AUSTIN VITA MZEE was granted leave to be enjoined as an Interested Party and filed his Replying Affidavit sworn on 9<sup>th</sup> June, 2014.

#### **THE PETITIONERS' CASE**

6. The Petitioners' case in a nutshell is that they have lived on the land known as Mwachabo since time immemorial. It is their contention that the land is community land. According to the Petitioners, the Respondents, rather than go for conventional adjudication, declared Mwachabo Settlement project and proceeded to appoint or second a manager. The Petitioners aver that the Respondents have come up with a narrative that the residents (Petitioners) are squatters and that the land is government land available for settlement of the Petitioners. The Petitioners however object to the settlement process and prefer an adjudication. The Petitioner's apprehension is that if the settlement projects proceeds, the same will disrupt their settlement as the offers made have not been matched with the position on the ground.

7. The Petitioners contend that the proposed settlement has a lot of irregularities as can be seen from the list showing the proposed demarcation and the beneficiaries. According to the Petitioners the settlement process may be prone to abuse and therefore they stand to suffer irreparably as their land may be taken away.

#### **RESPONDENTS CASE**

8. In the replying affidavit filed by the Respondents, it is deponed that the land in question is not a trust land but government land surrendered to the Settlement Fund Trustees in 1995 by the Commissioner of Lands for settlement of squatters. That the suit land being government land can only be transformed to private land through settlement scheme as it is being done.

9. The Respondents aver that the scheme exercise which was initiated in 1993 commenced in 1995 and to date 1298 Plots have been issued with Letters of Offer whose beneficiaries are not enjoined to these proceedings yet they will be affected by the outcome.

10. It is the Respondents' contention that the suit land is and has always been government land and cannot be transformed into Trust Land through the existing laws and therefore the typical adjudication under the Land Adjudication Act cannot apply. The Respondents aver that the Petitioners are misleading the Court that the Mwachabo community will be deprived of their ancestral land which is not as the Ministry of Lands Officers are just offering technical and financial assistance for the exercise, while the role of identifying the plot boundaries and the squatters is purely done by the elected Mwachabo Lands Committee. That Letters of Offer were issued on 4<sup>th</sup> November, 2011 and most of the beneficiaries have already collected their letters and paid the mandatory land charges, among them the 2<sup>nd</sup> Petitioner who is the beneficiary of Plot No.81.

11. The Respondents contend that the community's interests are taken care of by their local leaders who were incorporated in the plot allocation committee and that the so called community representatives alluded to by the Petitioners are self-appointed to champion their own selfish agenda, and cited Leonard Mwasi Mangeli who has not disclosed that he had a dispute with other families which dispute was resolved by the land committee chaired by George Mwandoe, the 1<sup>st</sup> Petitioner who is also the allottee of the Plot No.1107.

#### **INTERESTED PARTY'S CASE**

12. In his replying affidavit the Interested Party stated that the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners have benefited from the land settlement exercise and have been issued with and have collected their title documents. The Interested Party contended that the land under the scheme has never been Trust Land and has always been unalienated Government land. He states that to date there are about 1298 plots that have been allocated and title deed issued and that about 1300 plots are remaining to complete the exercise. The Interested Party stated that it is unfair for anyone who has already benefited from the settlement exercise to again approach the court and ask that the remaining part of the exercise be stopped and another system of allocation adopted, adding that most of the Petitioners have been closely involved in the entire exercise with the 1<sup>st</sup> Petitioner being the chairman and overseeing the exercise. He urged the court to dismiss the petition.

#### **THE PETITIONERS' SUBMISSIONS**

13. The Petitioners filed their written submissions on 3/7/18. They submitted that they have lived on the land known as Mwachabo as their homes since time immemorial. It is their contention that this is community land and that all neighbouring land had their adjudication process concluded.

14. The Petitioners submitted that rather than go for the conventional adjudication, the Respondents declared Mwachabo Settlement Project

and proceeded to appoint or second a manager. That the manager's report reveal serious problems and all the residents and occupants of Mwachabo were declared squatters. They further submitted that they have property rights on the land they occupy and use and that the Respondents' action is to extinguish that right and to render them landless. The Petitioners submitted that if an adjudication is properly done, their rights would not be extinguished.

15. The Petitioners have submitted that there is no evidence that the land is government land. It is their submissions that they would be prejudiced because there is no assurance that each resident will be allocated the parcel where he/she is currently settled on, that no strangers, speculators and grabbers would not be considered for allocation and there is no assurance as to the size of any land to be allocated. It is further submitted that already the Respondents have reserved large tracks of land for unknown people.

### **RESPONDENTS' SUBMISSIONS**

16. The Respondents filed their submissions dated 30<sup>th</sup> July 2018. It is submitted that as early as 1972, the suit land was recognized as state land and was reserved by the commissioner of lands for purposes of a settlement schemes in 1995. The Respondents submitted that the land is not trust land and the provisions of the Land Adjudication Act does not apply. That the Petitioners have not proved that the land is ancestral/community land to warrant a declaration of an adjudication section. It is further submitted that the Petitioners have not demonstrated infringement of any of their rights. That the process is aimed at giving the Petitioners proprietary rights. The Respondents relied on Halsbury's Laws of England, 4<sup>th</sup> Edition (Re-Issue) Col 8(2) at paragraph 165 and the case of **Ann Itumbi Kiseli –v= James Muriuki Muriith (2013)eKLR.**

### **INTERESTED PARTY'S SUBMISSIONS**

17. The Interested Party filed his submissions dated 11<sup>th</sup> July, 2018 in which he supported the Respondents' position that the suit land is not trust land but rather unalienated government land to which the land Adjudication Act is inapplicable. It is further submitted that some of the Petitioners have benefited from the settlement process and have titles, hence their rights have not been infringed. It is submitted that the Petitioners moved the court motivated by ill motive and malice as they only moved the court after the allocation exercise was midway, 1298 parcels having been allocated including some to the Petitioners themselves. That some of the Petitioners in particular the 5<sup>th</sup> Petitioner had laid claims to over 493 acres of land against other beneficiaries and the dispute was heard and determined by the land committee for arbitration and the 5<sup>th</sup> petitioners lost and now wants to stop the entire land allocation exercise. It is further submitted that the 1<sup>st</sup> Petitioner who is also the chair of the land committee filed this suit and still chaired committee meetings thereafter. The Interested Party relied on the cases of **Stephen Wambua Kithuku –v- Abdul Karim Omar (2013)eKLR** and **Mohamed Ahmed Khalid & 11 others –v- Director Land Adjudication & 2 Others (2013)eKLR.** All the parties' advocates highlighted their submissions.

### **ANALYSIS**

18. Having analyzed the pleadings and the submissions filed, I pose the following questions for my determination:

- i. Whether the suit property is Government/Public Land.**
- ii. Whether or not the suit property should be allocated via adjudication or settlement scheme.**
- iii. Whether or not the Petitioner's rights to property have been infringed.**
- iv. What orders are appropriate in the circumstances?**

### **Whether the suit property is government/public land**

19. The Petitioners have argued that the suit property is their ancestral land and trust land which should vest only in the local authority unit and that it should be dealt with under the Land Adjudication Act and not through a Settlement Scheme.

20. From the material on record, in particular the correspondence attached to the Interested Party's list of documents dated 9<sup>th</sup> June, 2014, what emerges is that the suit land has been referred to as a Settlement Scheme. I have in particular perused the letters dated 14<sup>th</sup> September 1972 and 17<sup>th</sup> May 1973 (marked as Appendix II and III respectively) I have also perused the letters dated 9<sup>th</sup> January 1995 and 19<sup>th</sup> December 1996. All these letters refer to Mwachabo Settlement Scheme.

21. From the evidence on record, there is no doubt that the suit land was recognized as government land. The evidence on record reveal that the land was reserved by the Government for purposes of a Settlement Scheme and the same communicated to the Settlement Fund Trustees vide the letter dated 9<sup>th</sup> January, 1995.

22. Indeed it is apparent that the settlement process over these suit land commenced in the 1990's. It is not disputed that over half of the plots have been allocated and titles issued, including to some of the Petitioners.

23. The Petitioners have not proved that the suit land is ancestral/community/trust land. The evidence on record points to the fact that the land in question was government land. It is therefore my findings and I so hold that the suit land is government/public land and not ancestral or trust or community land as submitted by the Petitioners.

### **Whether or not the suit property should be allocated via adjudication or settlement scheme**

24. The provisions of Section 3 of the Land Adjudication Act only apply to the ascertainment of rights over trust/community lands. Upon reservation of the land in favour of the Settlement Fund Trustees, the settlement programme could only be implemented under Section 167 and 168 of the Agriculture Act Cap 318 (repealed by Agriculture and Food Authority Act No.13 of 2013). It should be noted that this role has been taken over by the National Land Commission pursuant to the provisions of Sections 134 and 135 of the Land Act, 2012. It is thus my holding that the Land Adjudication Act is inapplicable.

**Whether or not the Petitioner's rights to property have been infringed**

25. The Petitioners have not demonstrated how their property rights have been infringed. The evidence on record show that the settlement process has commenced and is ongoing. The evidence also indicate that the Petitioners or some of them have already benefited from the settlement exercise. In my view, the settlement process has not infringed on the Petitioners rights to property. On the contrary, the process is aimed at giving the Petitioners proprietary rights over the suit land.

26. I also find it ironical and absolute dishonest for the Petitioners or at least some of them such as the 1<sup>st</sup> petitioners, to have taken up leadership positions that spearheaded the process, allow the exercise to be undertaken under the settlement process where they benefited and then when the exercise is midway, they turn around and claim that the exercise should be done through adjudication because it is alleged the land is ancestral land or trust or community land. The question I would pose is if it was such land from the beginning, why was there no objection from the onset? On this, I agree with the Respondents and the Interested Party that the petition is an afterthought and tainted with malice.

27. In the result, I find that the petition herein lacks merit and hereby dismiss it with costs to the Respondents and the Interested Party.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 15<sup>th</sup> day of January, 2019.**

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**C. YANO**

**JUDGE**

**In the presence of**

Magolo for the Petitioners

Mwandeje holding brief for Makuto for Respondents.

Yumna Court Assistant.

**C.K. YANO**

**JUDGE**

**15/1/19**