



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

CONSTITUTIONAL PETITION NO. 8 OF 2017

SALIM SEIF AMBUNYA ANDANJE.....1ST PETITIONER

ALEX GIDALI MAGUNAMU.....2ND PETITIONER

VERSUS

ALEX JEPKOECH YANO.....1ST RESPONDENT

JOYCE CHEPKOECH SIROR.....2ND RESPONDENT

JUDGMENT

Introduction

Salim Seif Ambunya Andanje, Alex Gidali Magunamu (**hereinafter referred to as the petitioners**) filed this petition against Alice Jepkoech Yano And Joyce Chepkoech Siror (**hereinafter referred to as respondents**) seeking declaratory orders that the proceedings in Eldoret Environment and land court case no. 608 of 2012 be declared a nullity as the failure to enjoin the squatters in the suit was to deliberately deny them a fair trial. The import of that case was that they were evicted from the suit property as per the order of the court.

Further, they seek orders that the National Land Commission be directed to conduct an investigation on the suit land as the eviction of the squatters was in violation of the constitution. They also sought special damages valued at kshs. 25,000,000 and general damages.

The petitioners are squatters who have been living on the suit property ELDORET Municipality/ Block 15/2051. They claim that through the years, as the suit property switched owners through purchase, their parents and grandparents have been residents on the land as labourers. They contend that they had met the threshold of a constitutional petition as per the contents of the supporting affidavit.

RESPONDENTS' CASE

The respondent's response is that the petition is fatally defective and that the 2nd respondent holds a valid and unchallenged title to the property. Moreover, that the declaratory orders cannot issue against the National Land Commission who are not parties to the suit and cannot respond appropriately.

The respondents maintained that the petitioners were represented in Eldoret Environment and land court case no. 608 of 2012 and could not deny that they were proxies to the representatives in the suit. They further contend that this petition is an attempt to appeal the case through the back door. They contended that the petitioners had no locus and there is no evidence they were suing on behalf of others. According to the respondents, special damages cannot issue as the alleged occupation of the petitioners on the land cannot legitimize an unlawful process.

ISSUES FOR DETERMINATION

In determining this petition, the following issues must be considered;

1. Does the petition meet the threshold for a constitutional petition?
2. Do the Petitioners have locus standi?
3. Can orders issue against parties that are not party to the suit?
4. Were the petitioners excluded from ELC case no. 608 of 2012?

5. Should they have filed an application for review?
6. Whether the Petitioners have rights to the suit property as squatters.
7. Whether there is legitimate expectation.

DOES THE PETITION MEET THE THRESHOLD FOR A CONSTITUTIONAL PETITION?

The threshold for a constitutional petition was set out in the case of **Anarita Karimi Njeru v Republic [1979] eKLR** where the court held;

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

In **Serah Mweru Muhi v Commissioner of Lands & 2 others [2014] eKLR** the court determined that;

In order to protect the right to property, a party must establish a proprietary right or interest in land as the Constitution does not itself create these rights or interests

The petitioners have not precisely set out their rights to the land that they currently have. The issue of proprietary rights was determined in Eldoret Environment and land court case no. 608 of 2012 and as it stands petitioners have no rights to the property as the court has already determined ownership. Therefore, the petitioners have failed to meet the threshold of a constitutional petition as they have failed to prove that there exist rights that have been infringed upon. Their eviction was based and derived from a court order and the decision has not been overturned therefore they have not established any proprietary rights to the land.

Do the Petitioners have locus standi?

The petitioners claim that they represent 23 families in this petition thus making this a representative suit.

Order 1 Rule 8 of the Civil Procedure Rules states;

One person may sue or defend on behalf of all in same interest

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

In **Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others [2016] eKLR** , the court held;

From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority, must be filed in the proceeding.

The petitioners have not provided any proof that they have been appointed to represent the 23 families therefore casting doubt as to whether they indeed represent anyone apart from themselves. The petition fails to meet the threshold for a representative suit.

Can orders issue against parties that are not party to the suit?

The petitioners seek orders compelling the National Land Commission to conduct investigations and present a report before the court. These orders are not enforceable as the commission is not party to the suit.

In **MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206**, at page 210, the Court stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard

To grant orders against the National Land Commission compelling them to conduct investigations is tantamount to condemning them unheard and this would be in breach of natural justice. Further, the court cannot issue orders against a person that is not party to the suit.

WERE THE PETITIONERS EXCLUDED FROM ELDORET ENVIRONMENT AND LAND COURT CASE NO. 608 OF 2012?

The petitioners have admitted that they were squatters on the suit property and by virtue of that they cannot claim that they were not represented in the Eldoret Environment and Land Court Case No. 608 of 2012.

In *John Omolo Oracha & 3 others v Kenya Petroleum Refineries Ltd & 3 others* [2016] eKLR, the court held;

If the defendants who were 54 in the former suit were residents in the same subject matter (land) how then can these petitioners deny they are not proxies or privies to parties in the former suit when now in their petition, they are claiming on their own behalf and on behalf of the residents of Port Reitz which includes the defendants in the former suit" This is a fact deductible from the face of the pleadings and need no ascertainment.

The case cited above can be distinguished from this petition as the petitioners herein have not provided any proof of who they represent in the petition. By virtue of being squatters and claiming to represent 23 families, it is probable the families were parties in the Eldoret Environment and land court case no. 608 of 2012. By being proxies to these parties that were in the suit it is improbable that the petitioners were not represented in the Eldoret Environment and land court case no. 608 of 2012 suit.

SHOULD THEY HAVE FILED AN APPLICATION FOR REVIEW?

There already exists a decision determining the ownership of the suit property. The petition is a clear attempt to appeal the decision in ELC 608 of 2012 through the backdoor. Order 45 of the Civil Procedure rules states;

Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

If indeed the petitioners were genuinely aggrieved by the findings in Eldoret Environment and land court case no. 608 of 2012, their remedy would lie in an application for review and not a constitutional petition.

WHETHER THE PETITIONERS HAVE RIGHTS TO THE SUIT PROPERTY AS SQUATTERS.

The Court of Appeal, in the case of *Nelson Kazungu Chai & 9 others vs Pwani University College (Malindi)* CA No. 78 of 2016 [2017] eKLR stated;

One cannot acquire property rights over another's property rights other than in a manner prescribed in law.

Section 24 of the Land Registration Act provides;

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 26(1) of the Land Registration Act provides;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The ownership of the suit property was already determined by the court and the petitioners have no title to the property. The respondents

provided titles and proof that the proprietary rights legally vest in the respondents. The correct legal position in the absence of the judgment in the Eldoret Environment and land court case no. 608 of 2012 being overturned or appealed is that the respondents have the right to the property and the same should be protected as per **article 40** of the constitution. The petitioners have no rights to the suit property as squatters.

WHETHER THERE IS LEGITIMATE EXPECTATION

In **Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR** the court stated that

In Communication Commission of Kenya & 5 Others v. Royal Media Services & 5 Others, SC Petition Nos. 14, 14 A, 14B & 14C of 2014 the Supreme Court stated that **legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. For an expectation to be legitimate, therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfil the expectation.**

The court went on to state;

The decision of the Supreme Court that we have just cited adds that legitimate expectation involves a representation that must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.

The petitioners have no legitimate expectation with regards to their proprietary rights as they have no right to the suit property due to the current legal position being that the respondents have registered title to the property. The court cannot legitimize what would otherwise be an illegality. The petitioners were trespassers and are therefore not entitled to damages.

In **SIMON M. ETHANGATTA v EDDAH WANJIRU MBIYI & ANOTHER [2007] eKLR** the court held;

I find that the plaintiff was a trespasser and therefore not entitled to the claim made for damages.

The petitioners are not entitled to damages as the suit property belongs to the respondents. The upshot of the above is that the petition is dismissed with no order as to costs.

Dated and delivered at Eldoret this 21st day of February, 2019.

A. OMBWAYO

JUDGE