



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PETITION NO. 2 OF 2019

SENTI KUMI COMMUNITY SELF HELP.....PLAINTIFF

VERSUS

1. KENYA MARITIME AUTHORITY

2. CHAIRMAN NATIONAL LAND COMMISSION.....DEFENDANTS

RULING

1. Senti Kumi Community Self Help Group instituted this Petition against the Respondents seeking the following prayers : -

1. A declaration that the continued demolition of the houses marked in Senti Kumi Village for allegedly encroaching on navigational aids by the 2nd Respondent is illegal and unlawful;

2. A declaration that the demolition if allowed to continue shall further infringe on their rights under Article 27 of the Constitution of Kenya, 2010.

3. A declaration that the 2nd Respondent does not have powers to issue any notice with regard to the encroachment of navigational aids, beacons lighthouse or buoys if any was issued;

4. An order of Certiorari to quash and to remove from this Honourable Court the verbal decision of the 2nd Respondent as was captured in the daily newspaper of 29th January, 2019 and any alleged notice to that effect directing the demolition of the houses in Senti Kumi Village for allegedly encroaching on navigation aids and beacons;

5. An order of a permanent injunction restricting the 1st and 2nd Respondent and any officer, persons, representatives, body and institution acting under the instructions of the 1st and 2nd Respondents from demolishing the houses marked for demolition and/or any house or structure or building in Senti Kumi Village.

6. In the alternative, an order compelling the 1st and 2nd Respondents to fully compensate the members of the Petitioners who have constructed and/or own and reside in residential and do business in their buildings therein for any intended and threatened demolition of the structures marked for demolition and/or any permanent buildings and structures within Senti Kumi Village for that matter.

7. That this Honourable Court do grant any other appropriate relief and do make such further or other orders and to give such further or other directions as this Honourable Court may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of the impugned Articles of Constitution and any other Articles of the Constitution in relation to the Petitioner in this Petition.

8. That the Respondents jointly and severally pay the costs of this Petition.

2. The Petitioner avers that it is community based Organization/Self-Help Group duly registered with the ministry of Labour, Social Security and Service and with the office of the Likoni Sub-County Social Development Officer as a Self-Help Group. The Petition relates to the threatened demolition of houses in Senti Kumi Village in Likoni Mombasa for allegedly blocking navigation aids and beacons. It is averred inter alia, that the Petitioner's members are squatters in the area who have constructed permanent residential houses that straddle **plot NUMBERS MS/1/1691, MS/1/1814, MS/1/1790, MS/1/1791, MS/1/1793, MS/1/1794, MS/1/1795, MS/1/1796, MS/1/1797, MS/1/1783, MS/1/1817 and MS/1/394** and their houses were marked for demolition. The Petitioner's members aver that they have never received formal

and official notice from the 1st Respondent and the proprietors of the said plot or at all except for a newspaper report of 29th January 2019. The Petitioner questions the motive behind the demolition, stating that no clear procedure or plan has been adopted before the demolition is carried out. The Petitioner avers that the 2nd respondent's Chairman had no power and therefore acted beyond his powers when he made the declaration regarding the demolition. The Petitioner states that if the demolition is allowed to continue, it would be a breach of their rights under Articles 27(1) and 40 of the Constitution and against the provisions of Section 223 of the Merchant Shipping Act No. 4 of 2009 and Section 5 of the Fair Administrative Action Act.

3. Simultaneously with the filing of the Petition, an application for conservatory orders was filed and was set for inter-partes hearing.

4. Before the inter-partes hearing of the said application, the 2nd Respondent filed a notice of Preliminary Objection on the following grounds:

i. That the Petitioner has no legal personality recognized in law and cannot therefore institute these pleadings in its name.

ii. That the Petition is invalid and incurably defective for having been brought by an unrecognized legal person in law.

This ruling is in respect of the Preliminary Objection raised.

5. Mr. Wahome, learned counsel for the 2nd Respondent urged me to allow the Preliminary Objection. He submitted that the Petitioner has no legal personality recognized in law and cannot therefore commence these proceeding. Secondly, that the Petition is invalid and incurably defective for having been brought by a person not recognized in law. It was his view that a Self-Help Group cannot sue. He relied on the case of **Kipsiwo Community Self Help Group-v- Attorney General and 6 Others (2013) eKLR**.

6. Mr. Makuto counsel for the 1st Respondent supported the Objection and argue that it is important that parties are clearly defined not only for purpose of enforcement but to prevent parties coming back to court over the same issues clothed in different names. Citing Article 260 of the Constitution, Mr. Makuto argued that a self Help Group does not fall within the definition given to a person under that Article. He added that one cannot identify the membership of the group or project from the certificate of Registration of the Self Help Group attached to the Petition.

7. Mr. Mgupu, learned for the Petitioner in response contended that the Petition can still be amended and urged the court to dismiss the Objection. He relied on the case of **Council of County Governors –v- Lake Basin Development Authority & 6 Other (2017)eKLR**

8. I have considered the Objection raised. In my view the issues that need to be determined here to cover the preliminary points are : -

i. Whether this Petition has been instituted by an entity that has capacity to institute such Petition.

ii. Whether the Petition ought to be dismissed or not.

9. The Petitioner in this case is Senti Kumi Community Self-Help Group. Paragraph 1 of the Petition describes the Petitioner as “**a community based Organization/Self Help Group duly registered with the Ministry of Labour, Social Security and Services and with the office of the Likoni Sub-County Social Development Officer as a Self Help Group**”

10. I have seen the certificate of Registration of the Self-Help Group/Project. It states that Senti Kumi Community Self Help Group is the group name/project. The registration was done o 27th May 2015 under Certificate No.3502132.

11. The question that arises is whether Senti Kumi Self Help Group, and indeed whether a Self Help Group, can institute proceedings at all or at least proceedings of this nature. This question was considered in the case of **Kipsiwo Community Self Help Group –v- Attorney General and 6 Others (2013)eKLR**. The court in that suit, Munyao Sila, J held:

“It is clear that Self Help Groups are not incorporated bodies. Infact I know of no law that recognizes them or incorporates them. They are probably the brain –child of administrators who at times had to come with a tool to identify specific groups of people that needed assistance, or needed to undertake projects together. They seem to have helped harness resources at community level. The only problem is that the Government has not put in place any legal framework under which they can be registered and managed. Such groups, in absence of a legal framework, indeed stand the risk of being declared unlawful societies as held in the case of Dennis Ololoigero..... Self Help Groups having no legal personality, cannot therefore institute proceedings in their own name.”

12. I am persuaded by the holding in the Kipsiwo Community Help Group Case. Senti Kumi Self Help Group has no capacity to institute this action in its own name. As was further held in the Kipsiwo Community Self Help Group case(supra), “a person recognized in law had to sue on behalf of members of the Group and such members had to be named and identified with precision. The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear who the beneficiary of the orders was, or who had obligation to obey or enforce such order...”

13. In the case of **Free Pentecostal Fellowship in Kenya –v- Kenya Commercial Bank Ltd (1992) eKLR 354**, a suit was instituted by

religious or organization which was an unincorporated body. Bosire J (as he then was) dismissed the suit for want of capacity to sue, and was not swayed that the defect could be cured by amendment.

14. A similar issue arose in the case of **St. Mary's School, Nairobi –v- Josephat Gitonga Kabugi, Nairobi (Milimani) HCCC NO. 65 of 2004** and the court also held that the suit was instituted by an unincorporated body which had no capacity to sue. A Preliminary Objection to strike out the suit was allowed and the plaint and the application were struck out as the plaintiff had no legal existence.

15. This was also the holding in the case of **Kituo cha Sheria –v- John Ndirangu Kariuki & Another (2013) eKLR** in which an application to dismiss the Petition on the grounds inter alia that the Petitioner was non-entity and lacked the requisite *locus standi* to file and prosecute the Petition. The court (Kimondo J) did not hesitate to strike out the Petition. The court further stated that the legal capacity of a party to institute proceedings in court is not technical matter, or one of form, and added that the failure to bring an action by a recognized judicial person is one of law and substance which cannot be accommodated within the latitude of Article 159 (2)(d) of the constitution.

16. I am persuaded by the above cited decisions. Senti Kumi Community Self Help Group had no capacity to institute action in its own name. I have no option but to strike out the Petition having been filed by an entity unknown in law and which had no capacity to institute action in its own name. It is not clear who the precise persons who intend to benefit from this Petition are. Even the list of the alleged Petitioner's members is not attached.

17. In the result the Preliminary Objection is upheld. This Petition and the notice of motion dated 11th February 2019 are hereby struck out and dismissed. Each party to bear their own costs

DATED, SIGNED and DELIVERED at MOMBASA this 21st day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mbuthia holding brief for Wahome for 2nd Respondent

Mrs. Kiti holding brief for Makuto for 1st Respondent

No appearance for Petitioners.

Yumna Court Assistant

C.K. YANO

JUDGE

21/2/19