



**REPUBLIC OF KENYA**

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

**PETITION NO. 1 OF 2019**

**KIMUTAI KIRUI.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF UASIN GISHU.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE HON. COUNTY ATTORNEY OF UASIN GISHU....3<sup>RD</sup> RESPONDENT**

**RULING**

**Kimutai Kirui (hereinafter referred to as *Petitioner*)** brings this petition on his behalf and on behalf of members of the public and against the respondents.

The *Petitioner* contends that the Respondent without following the requirements of the law as provided for under the Fourth Schedule of the Constitution of Kenya, 2010 part 2(7) designated parcel of land known as Nariri (Cheptiret Trading Centre Plot No. 3 situated on Land Parcel No. 7728/1 and Land Parcel No. L.R. No.3655) hereinafter referred to as the "**suit property**" as the 1<sup>st</sup> Respondent's administration offices and the 1<sup>st</sup> Respondent has embarked at constructing the ward administrative offices contrary to the law and without public participation of the petitioner and its members.

That the *Petitioner* avers that its members were in the ordinary course of exercising their constitutional rights as guaranteed by the Constitution of Kenya, 2010 at the suit property when the 1<sup>st</sup> Respondent through its servants and or agents carried out the following acts:

- a) *In January 2019, the 1<sup>st</sup> Respondent's County Enforcement guards under the command of the Chief County Enforcement officer came with the Administration Police to the suit property while the petitioner's members were enjoying the recreation facility on the suit property armed with clubs, arrows, bows, helmets and machetes and forcefully entered the recreation facility and ordered the members of the petitioner to move out of the suit property*
- b) *The Petitioner's members being apprehensive of the imminent harm left the suit property peacefully.*
- c) *In January 2019, the 1<sup>st</sup> Respondent embarked on erecting structures on the suit property termed as 1<sup>st</sup> Respondent's ward administration offices without the participation of the Petitioner' and its members.*
- d) *The 1<sup>st</sup> Respondent's County Security guards have denied the Petitioner's members access to the recreation facility on the suit property which they petitioner and its members use for social events like recreation, public rallies, public barazas, cinema viewing and crusades.*

The *Petitioner* avers that the actions by the 1<sup>st</sup> Respondent are a nullity, unlawful and unconstitutional for the reasons that the 1<sup>st</sup> Respondent is seeking to deny petitioner and it members from using the suit property for aforesaid social events notwithstanding the fact that the suit property is a public land without following due process and without a decree of the Court thus an improper exercise of the sovereign power of the people of Kenya contrary to article I of the Constitution of Kenya, 2010.

The petitioners contend that the 1<sup>st</sup> Respondent in seeking to close the suit property without consultations is acting in breach of the national values and principles of governance under article 10 & 20 of the Constitution of Kenya, 2010 which obligates it to carry out public participation.

The actions of the 1<sup>st</sup> Respondent of embarking on construction of 1<sup>st</sup> Respondent's ward administration offices on the suit property without

notice or according a hearing to the Petitioner and its members is acting contrary to article 35 of the Constitution of Kenya, 2010 which guarantees the members of the petitioner the right to lawful, reasonable, procedurally fair, and entitlement to be given written reasons since their interests are adversely affected and that the 1<sup>st</sup> Respondent's actions of denying access to the suit property militates against article 10(1), (2)(a), (b), (c) and (d) of the Constitution of Kenya, 2010 since the same is contrary to the rule of law, the objects of devolution, human dignity, social justice human rights, good governance and sustainable development.

The 1<sup>st</sup> Respondent's actions amount to arbitrary deprivation of property or an interest in it contrary to article 40 of the Constitution of Kenya, 2010. Generally, the petitioners state that; -

- a. The 1<sup>st</sup> Respondent's actions amount to unwarranted interruption and infringement with the Petitioner's members' constitutional rights under the article 47 of Constitution of Kenya, 2010.***
- b. The 1<sup>st</sup> Respondent's actions amounts to an infringement of articles 55 and 57 of the Constitution of Kenya, 2010 as it denies the petitioner's members an opportunity to associate and participate in the economic spheres of life, pursue personal development, to live in dignity and respect free from abuse.***
- c. The 1<sup>st</sup> Respondent's action is contrary to article 186 of the Constitution of Kenya, 2010 as it does not mandate the 1<sup>st</sup> Respondent to evict any persons without a court decree.***
- d. That the suit property has never been surrendered to the government for public use to warrant the 1<sup>st</sup> Respondent to Plan and re-plan as per the 1<sup>st</sup> Respondent's development agenda without public participation which acts by the 1<sup>st</sup> Respondent are unconstitutional.***
- e. The National land commission was not involved in the designation and implementation of the decision to build 1<sup>st</sup> Respondent's ward administrative offices on the suit property in violation of article 67(2) a of the Constitution of Kenya and the Land Act 2012 since the suit property is a public land which the 1<sup>st</sup> Respondent is holding in trust and on behalf of the people of Uasin Gishu County and people of Kenya at large.***
- f. The 1<sup>st</sup> Respondent's actions amount to infringement of Article 69(1) of the Constitution of Kenya 2010 as the actions do not promote sustainable exploitation, mutilation, management and conservation of natural resources and ensure equitable of the accruing benefits.***

The petition is accompanied with a notice of motion dated 28.1.2019 wherein the petitioner seeks conservatory orders to restrain the 1<sup>st</sup> respondent from entering, digging holes, crushing stones, erecting, constructing on Nariri (Cheptiret Trading Centre) Plot No. 3 situated on land parcel No. 7728/1 and land parcel No. L. R. 3655, the suit property and to restrain the respondents from interfering with the Petitioner access to the property for public recreation and to restore the respondents from constructing on the suit property.

The application is supported by the affidavit of Kimutai Kirui who states that the parcel of land is meant for recreation and social activities and does not belong to the County Government.

He swears that the 1<sup>st</sup> respondent took over the property without public participation and embarked on construction of the Ward Administration office and a perimeter wall. The suit property was designated as an open space.

According to the Petitioner, the construction of the Ward offices without consulting the people of Cheptiret offends the provisions of Article 1 of the Constitution and Articles 10 and 20 of the Constitution of Kenya, 2010 that requires public participation. Moreover, that the structure intended to be constructed infringes on the right to a clean and healthy environment. Moreover, that the merited Land Commission is not involved in breach of Article 67(2) of the Constitution of Kenya, 2010.

In the replying affidavit, the 1<sup>st</sup> and 3<sup>rd</sup> respondents state through Jackton Kiprop that the Petitioner came to court through CMCC Case No. 312 of 2018 which was withdrawn. The land in dispute is public land at Cheptiret Centre that is available for public use and that the County Government is intended to use it for public by construction of the Ward office. The same has been housing the chief's office since surrender.

The deponent states that public consultations were done on 11.5.2018 and a budget was done and contract entered into for construction of ward offices at a cost of Kshs. 100,650,375 and that the County Government risks losing the money. The applicant has not put any security for costs. There is a petition by the residents pending before the County Assembly.

It is claimed that some of the petitioners are using the land for illegal activities and would not like the construction of the ward administration office.

In the supplementary affidavit, the Petitioner states that the land was contributed by Nariri Farm holders and not Samuel Kimutai Maina. Moreover, that the alleged Minutes show that the meeting took place on 11.5.2015 and not 11.05.2018. The meeting had nothing to do with public participation. The Petitioners contend that there was no invitation for the meeting on public participation in the media or fixed within Cheptiret Centre.

***Mr. Kagunza, learned counsel for the Petitioner*** submits that the petitioner has established a prima facie case with a likelihood of success as the petitioner and members of the public are being denied access to the suit property and therefore their right to clean and healthy environment is being infringed contrary to Article 42 of the constitution of Kenya 2010. Moreover, that the petitioners right to a fair

administrative action has been infringed by being not allowed to participate in the decision to construct the ward administration Offices on the suit land. Mr. Kagunza argues that if a conservatory order is not granted, the Petitioner will suffer irreparable injury. Lastly, that the balance of convenience favours the Petitioner. The 1<sup>st</sup> and 3<sup>rd</sup> respondents state that if the conservatory orders are issued, the public will lose millions of shillings for the contract which amounts to Kshs.100,000,000.

**Mr. Mutahi learned counsel for the 1<sup>st</sup> respondent** submits that the petition does not meet the threshold of the **Anarita Karimis Njeru vs the Republic of Kenya** ((1976 -1980) KLR 1272 and therefore the application should be dismissed.

**Mr. Kuria learned state counsel for the 2<sup>nd</sup> respondent** submits that the applicant has failed to demonstrate a prima facie case with a likelihood of success as there is evidence of public participation and that the intended works are for public interest. The Attorney General argues that the respondents will suffer irreparable injury if the orders are granted because of the construction agreement entered into by the County Government. Lastly, that the Petitioner is guilty of forum shopping.

I have considered the rival submissions and do find that the principle for grant of conservatory orders in such applications are similar to the principles of grant of temporary injunctions which are set out in the ***locus classicus*** case ***A prima facie*** case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others** [2003] eKLR as follows:

**“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

I do find that the Petitioners have made a prima facie case with a likelihood of success as there appear to be no indication that the public was invited for public consultation. There is a discrepancy between the Minutes of 11.5.2018 and the attendance list of 11.5.2015. It is a fundamental norm in Article 10 of the Constitution of Kenya 2010 that people’s participation is paramount before any administrative action affecting them is taken. Article 10(1) provides that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution enacts or interprets any law or makes or implements public policy decisions. These principles include participation of the people.

The petitioners have argued that the land is meant for recreation and public *barazas* and not for office blocks. All these issues raise a prima facie case with a likelihood of success.

Moreover, the National Land Commission has not been involved in the setting the land apart for Ward offices. Section 67 of the Constitution provides that;

***National Land Commission***

***(1) There is established the National Land Commission.***

***(2) The functions of the National Land Commission are—***

***(a) to manage public land on behalf of the national and county governments;***

***(b) .....***

***(c) .....***

***(3) The National Land Commission may perform any other functions prescribed by national legislation.***

It is important that the National Land Commission be involved in the management of public land. Failure by the respondents to involve the National Land Commission in the decision to construct the administration block raises a prima facie case with a likelihood of success

It is not clear whether the land is meant for recreation or for urban development of structures but this will be addressed in the petition. This court finds that this is a matter of great public interest not because of the money involved in the construction of buildings but due to the fact that it raises weighty constitutional issues of public participation and administration of justice and therefore, it is not proper to argue that the project cost involves millions of shillings and should not be stopped.

I do find that the petitioners are likely to suffer irreparable injury if the project is allowed to proceed and they later succeed as they cannot be compensated in damages. Moreover, the Government is likely to suffer loss of colossal amount of money if the petition succeeds and yet the government would have invested a lot of money in the project.

The balance of convenience and public interest tilts in favor of the petitioner due to the fact that he was using the land for recreation, crusades and public barazas before he was evicted from the land.

The upshot of the above is that the petitioner has satisfied the court that he is entitled to the conservatory order sought and it is hereby ordered that any further construction on the suit property be stopped until the petition is heard and determined. No order as to costs, this being a public interest matter.

**Dated and delivered at Eldoret this 1<sup>st</sup> day of March, 2019.**

**A. OMBWAYO**

**JUDGE**