



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 4 OF 2018

ISAAC KIPLETING KIBITOK *alias*

ISAAC KIPLETING KIBITOK.....APPLICANT

VERSUS

THE SECRETARY BOARD OF GOVERNORS

CHERANGANY PRIMARY SCHOOL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF EDUCATION.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The applicant filed an application dated 27/2/2018 seeking the following orders:-

1.spent

2. That in the interim the applicant be compensated for the lease of part of the suit property LR No.2142/7 measuring approximately 12 acres before the commencement of this proceedings by the orders of this honourable court.

3. That in the interim the honourable court may by its orders grant such terms as to inquiry as to damages upon the duration the lease has taken being from 1970 to date.

4. That costs of this suit be provided for.

2. The application is supported by grounds on the face of the application which are reiterated in the affidavit of the applicant. The grounds are that the Ministry Of Education secured part of the applicant's land measuring 12 acres with intent to lease or buy it but failed to pay for the lease or compensate the applicant who has made all effort to redeem his rightful ownership of the said portion which is currently being occupied by Cherangany Primary School, a public school. It is further stated that the applicant is of advanced age hence the prayer for payment in respect of the 30 year period the school is alleged to have been in occupation before the proceedings in this petition commence.

3. The 1st respondent filed replying affidavit of Lynetty Nambuye Atolla, Secretary of Board of Management Cherangany Primary School sworn on 6/6/2018 in response to the application dated 27/2/2018. The deponent denies the applicant's claims of occupation of the applicant's land by way of a negotiated lease or purchase of the suit land or that the issue of compensation of the petitioner ever arose; that the school was began in 1926 on the suit land before the applicant developed any interest in the land; that it was begun on a white settler's compound; that its physical location was described as LR NO 2142 and it was registered in 1964; that the applicant acquired the suit land in 1981 in unclear circumstances and subsequently purported to donate 12 acres of the said suit land to the school by virtue of a letter dated 13/12/1984; that he executed an application for consent to transfer the 12 acres to the school but the same was not acted upon; that he has failed to deliver the original certificate of title to facilitate the subdivision and transfer and his version of events regarding the land has changed from "donation of land" to "exchange" and then to "sale agreement". The school is therefore said to have been in possession of 12 acres for 92 years. It is asserted by the deponent that the application made by the applicant is unknown in law and can not be granted at this stage as it is without justification. The deponent also avers that the doctrine of limitation has set in and the applicant's cause of action is time barred.

4. A further affidavit of the applicant dated **28/2/2019** is on the record. The deponent avers that he is the registered proprietor of that land known as **LR 2142/6/R**, now known and referred to as **LR NO 2142/7** and that he was issued with a certificate of title for **35.61 Ha**. He deposes that the **12** acres were never donated to the school either by the white settler or by the applicant.

5. The petitioner filed his written submissions on **28/2/2019**. The 3rd respondent filed his on **14/3/2019**.

6. I have examined the application at hand and the response and the submissions of the parties. My impression is that the applicant would wish to have this court to order that he be paid for the schools occupation of the suit land comprising of 12 acres before this petition has been finalised, and indeed as he states and as I understand him, before the commencement of the hearing of the main petition.

7. In my view an application of this nature would have been apt where it has been shown by ample evidence that the respondents have acknowledged the plaintiff's claim to the land. That is not the case herein.

8. The respondents herein strongly contest the applicant's claim to the land occupied by the school. Validity of the applicant's title to the suit land is in issue, and that implies that the applicant's capacity to donate any land to the school as he alleges to have done is also at issue.

9. I find no satisfactory response at this interlocutory stage to the allegation that the school has not been on the **12** acres for **92** years; the rights of the school which is in possession of land must be inquired into before final orders are made in this petition. How then can this court make any preliminary orders of payment where the validity of the petitioner's title and such possessory rights require to be first ascertained? This court can not make any such orders where no proof that the applicant is deserving has been furnished. I can only reserve this issue for determination at the main hearing of the petition.

10. Furthermore perchance payment was ordered, how would a refund be possible when the applicant has not demonstrated his capacity to repay if the substantive decision in the petition goes against him?

Determination

11. In the light of the foregoing I find that the application dated **27/2/2019** has no merit and the same is dismissed with costs to the respondents.

Dated, signed and delivered at Kitale on this **30th** day of **April, 2019**.

MWANGI NJOROGE

JUDGE

30/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Kiplagat holding brief for Isiji for plaintiff

Mr. Wabwire for respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/4/2019