REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 2 OF 2017

CHOSEN CHILDREN INTERNATIONAL.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF TRANS-NZOIA.....1ST DEFENDANT

MOUNT KENYA UNIVERSITY.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. The application dated **27/2/2019** and filed in court on the same date has been filed by the plaintiff. It seeks orders that this court be pleased to set aside the judgement entered herein and costs be provided for.

2. The grounds for the application are the parties in the matter have been negotiating with a view to settlement.

3. The application is supported by affidavit sworn on **27/2/2019** by Risper Arunga Counsel for the petitioner herein.

4. Grounds of opposition to the motion were filed by the 3rd respondent on **14/3/2019** stating that the application incurably defective incompetent frivolous and scandalous and vexatious. The 3rd respondent avers that the only avenue to the petitioner is either to appeal or review the decision as required by the Civil Procedure Act and the Civil Procedure Rules and that there is no evidence that all the parties herein have been negotiating as alleged or of the effect that the judgment will have on the negotiations. The 3rd respondent further states that this court has rendered the judgment is now *functus officio.*

5. I have examined the application and the response thereto the application is supported by a brief 7 paragraph affidavit of counsel for the plaintiff/applicant. I find the 3rd respondent's ground to be correct when they state *inter alia* that there is no proof that the parties were negotiating a settlement or all parties were involved in the alleged settlement. That evidence should have been contained in the affidavit supporting the application. On that ground alone I find that it is not necessary to disturb the judgment of this court dated 29/1/2019.

Another ground raised is that this court is *functus officio* and the only avenue to the petitioner is to appeal. It is proper to observe at this point that a constitutional petition is not like an ordinary suit by way of plaint. A constitutional petition is meant to address weightier issues relating to violation of the constitution right of a citizen or as in the current instant, an entity. The dispute in this matter related to whether the actions of the respondents are unconstitutional and whether the petitioner has been discriminated against. Pursuing of a private claim that does not involve any interpretation of the Constitution in a constitutional petition is highly discouraged. Indeed the court only framed only two issues in the judgment in this petition as follows:

> ***(a) Whether the petitioner has demonstrated any violation of rights under Article 40 (1) of the constitution by the respondent; and***
>
> ***(b) What orders should issue.***

6. This is what the court stated in the judgment dated **29/1/2019** in this case:

> **"Having examined the copy of the allotment letter exhibited in the petition's supporting affidavit, this court would have expected the statements in the 2nd respondent's affidavit to be controverted by the petitioner. That never happened. Prima facie ownership and title to the suit land by the petitioner can not be said to have been established by the petitioners.**

The petitioner's case can not be said to have attained the appropriate threshold from which an expedition seeking to verify the claims of violation of rights by the respondents can be launched.

Besides, it is doubtful that the proper way to approach this court in respect of the instant claim is by way of a petition. In my view and having regard to the documents filed by the parties on either side, the real dispute revolves around the issue of who was the proper allottee of the suit land and not whether the rights of the petitioner have been violated. That is an issue that should be resolved in a normal suit commenced by way of plaint. See the case of Shimoni Resorts -vs- Registrar of Titles 2016 eKLR and Chemey Investments Ltd -vs- A.G. & Others 2018 eKLR)".

7. A look at the petition and response shows that there were doubts as to whether the applicant was entitled to ownership of the suit land.

8. There is ample material in the court record including the petition itself that shows that the rights of the petitioner in the suit land had not crystallised as at the time of commencement of the petition; the petitioner did not have title to the land and therefore what should have been are dispute concerning violation of rights turned out to be a dispute over ownership which this court could not entertain in a petition. It is therefore unclear what kind of a settlement could be arrived at in a dispute regarding violation of rights without concurrence of the 3rd respondent.

9. In the circumstances only this court could have pronounced itself as to whether there was violation of rights of the petitioner as alleged or not. It was not open to the consent to the parties who were in any event opposing the petition at its hearing to concede to the allegations of violation. The applicant's position is further compounded by opposition raised by the 3rd respondent who in any event is the normal respondent in petitions concerning violation of rights by governmental authorities. I find that in the circumstances the 3rd respondent's averment is true, that is that this court is *functus officio* and that the only remedy open the applicant is to file an appeal. However I disagree with him on the issue of a review as a possible remedy for the reason that whereas an appeal is normally as of right safe in a few specified circumstance, no grounds have been advanced to support a review.

10. The final grounds relied upon by the applicant is that judgment in the matter was made without knowledge of the parties. I have examined the record and found that on 8/10/2018 this court set the judgment date as 5/12/2018. Judgment was not read on that date. However it was read on 29/1/2019.

11. It would appear from a holding file that was commenced by the registry following a letter dated 22/10/2018 from Risper Arunga & Company Advocates for the petitioner, that on the 14/11/2018 the holding file came up and Ms. Arunga appeared for the petitioner while Mr. Wabwire appeared for the 3rd respondent. There was no appearance for the 1st and 2nd respondent. The court set the matter down for a mention on 27/11/2018 for recording of a possible settlement. On 27/11/2018 Ms. Arunga appeared alone and the court set the matter down for a mention on 6/2/2019. On 6/2/2019 Ms. Arunga again appeared alone and the court ordered that the main file be brought up on 12/2/2019. On 12/2/2019 Ms. Arunga and Mr. Kuria for the 3rd respondent appeared and Ms. Arunga, appearing to be then seized of information that judgment had been read on 29/1/2019 indicated that she wished to file the instant application. However it is evident that on the 3/12/2018 a notice went out from Deputy Registrar indicating that all judgments and rulings meant to be delivered on 4th, 5th and 6th of December, 2018 which included the judgment in instant suit would be delivered on 29/1/2019. The petitioner and the other parties must have been aware of this notice and none of them ever filed an application to arrest the judgment. I therefore find no merit in the allegation that the judgment was read without the knowledge of the parties as they could have attended if they wished. In any event I find that lack of knowledge of judgment date is not material to the instant application.

12. In the final analysis I find that the application dated **27/2/2019** has no merit and the same is hereby dismissed with costs to the respondents.

Dated, signed and **delivered** at **Kitale on this 29th day of April, 2019.**

MWANGI NJOROGE

JUDGE

29/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for applicants

Mr. Kamunya holding brief for Wabwire for 3rd respondent

N/A for 1st and 2nd respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/4/2019