



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 3 OF 2017

BATHOLOMEW DOME.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF BUNGOMA.....RESPONDENT

J U D G M E N T

BOTHOLOMEW DOME, the Petitioner herein, filed this Petition on 29th August 2017 seeking the following reliefs as against the **COUNTY GOVERNMENT OF BUNGOMA**, the Respondent herein:-

- (a) A declaration that the Respondent has violated the Petitioner's rights under Article 47 of the Constitution.**
- (b) An order that the Respondent compensates the Petitioner of upto Kshs. 1,976,080/= being the value of the seedlings destroyed.**
- (c) The Respondent be condemned to pay costs of this Petition.**
- (d) Any other relief this Honourable Court may deem fit to grant.**

The Petitioner's case is that on or about 10th February 2017, the Respondent's workers, agents or contractors maliciously descended upon his tree nursery near Tongaren market and destroyed his Eucalyptus, Grevillea and Alberia tree seedlings all valued at Kshs. 1,976,080/= alleging that they were on it's land. No notice was issued to the Petitioner to enable him relocate his nursery.

Annexed to the Petition is a demand notice from **KASSIM SIFUMA ADVOCATE** dated 7th March 2017, a report from the **KENYA FOREST SERVICE** assessing the value of the damaged seedlings as Kshs. 1,976,080/= and a Certificate of Search in respect to land parcel **NO BUNGOMA/TONGAREN 623** registered in the name of **BUNGOMA COUNTY COUNCIL**.

From the record, the Respondent did not file any response to the said Petition. All I have is grounds of opposition dated 31st December 2017 in response to the Petitioner's application dated 21st December 2017 seeking to set aside the consent order recorded on 18th December 2017 which application was allowed by consent on 25th July 2018. On that day, **MR OCHARO ADVOCATE** for the Respondent was allowed 14 days to file a response to the Petition but by the time the case was mentioned on 6th May 2019, the Respondent had not filed any response to the Petition nor submissions. The Petition is therefore not opposed.

I have considered the Petition, un-contested as it is, and the submissions by **MR NYAMU** Counsel for the Petitioner.

It is not in dispute that the Petitioner had established his tree nursery on land parcel **NO BUNGOMA/TONGAREN/623** belonging to the **BUNGOMA COUNTY COUNCIL** and now vests in the Respondent. It is also clear from the report of the **KENYA FOREST SERVICE** dated 14th February 2017 that the value of the damaged seedlings was Kshs. 1,976,080/=. The Petitioner's claim that the said seedlings were damaged by workers, agents or contractors of the Respondent is not disputed. The land on which the Petitioner had established his tree nursery is no doubt public land. There is no evidence that the Petitioner had any licence from the Respondent to occupy the same. However, under **Section 155(2) of the Land Act 2012**, it is provided that:-

“If, with respect to Public Land the Commission is of the opinion that a person is in unlawful occupation of Public Land, the Commission may serve on that person a notice in the prescribed form or give to that person an oral communication, in a language calculated to be understood by that person requiring that person to show cause as to why the person should not be required to vacate the land within any time and subject to any terms and conditions as to the removal of buildings, the keeping of growing crops and any other matters which the justice of the case may require, which may be specified in the notice or oral communication.”

It is true, as submitted by Counsel for the Petitioner, that the Respondent ought to have liaised with the National Land Commission and issue notices **under Section 155(2) of the Land Act** before evicting the Petitioner. Once a decision to evict is made, then the National Land Commission would have proceeded in terms of **Section 152(c) of the Land Act** to cause the decisions to be notified to the Petitioner and thereafter, the eviction would have been carried out in accordance with the procedures set out in **Section 152(g) of the Land Act**. One of the Requirements under that provision is that the affected person be given priority to salvage his property. That was not done in the circumstances of this case.

Article 47(1) of the Constitution also provides that:-

“Every person has the right to administrative action that is expeditious, efficient lawful reasonable and procedurally fair.”
Emphasis added.

Therefore, a party who is likely to be affected by the administrative action of any organ is entitled to be given a hearing before such action is taken. This is meant to safeguard persons against arbitrary, capricious or whimsical actions. The entrenchment of **Article 47 in the Constitution** is a clear indication that the right to a hearing is not discretionary.

There is also **Section 4(2) of the Fair Administrative Actions Act** which provides that:-

“Every person has the right to be given written reasons for any administrative action that is taken against him.”

The said Act also provides for a right to be given notice for any proposed action and the right to be heard. From the Petitioner’s un-contested evidence herein, he was neither given any notice nor a right to be heard during which he would have salvaged his property. In my view, the Petitioner has made out a case to warrant the grant of the orders sought.

With regard to the reliefs that this Court can award, they are provided for in **Section 13 of the Environment and Land Court Act** and include:-

- Injunctions
- Prerogative orders
- Damages
- Compensation
- Specific performance
- Restitution
- Declaration
- Costs

The Petitioner has availed a report from the **KENYA FOREST SERVICE**, a state agency, showing that he lost seedlings worth Kshs. 1,976,080/=. I have no reason to doubt that report.

Ultimately therefore, there shall be Judgment for the Petitioner in the following terms:-

(a) A declaration that the Respondent has violated the Petitioner’s rights under Article 47 of the constitution.

(b) An order for compensation of the Petitioner in the sum of Kshs. 1,976,080/=.

(c) The Respondent to meet the Petitioner’s costs of the Petition.

Boaz N. Olao.

J U D G E

30th May 2019.

Judgment dated, delivered and signed in Open Court at Bungoma this 30th day of May 2019.

Mr Kopere for Mr Nyamu for Petitioner present

Ms Mutunda for Mr Ocharo for Respondent present

Joy/Felix – Court Assistants - present

Boaz N. Olao.

J U D G E

30th May 2019.

Ms Mutunda: - I seek a stay for 30 days.

Mr Kopere: - No objection.

Court: - Stay of 30 days is granted.

Boaz N. Olao.

J U D G E

30th May 2019.