



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. PETITION CASE NO. 5 OF 2018

IN THE MATTER OF PETITION FILED BY RESIDENT/OCCUPIERS/STATUS QUO AGAINST

**1ST RESPONDENT (EMBU COUNTY GOVERNMENT) 2ND RESPONDENT (C.S. MINISTRY
OF LAND HOUSING AND URBAN DEVELOPMENT) 3RD RESPONDENT (CHAIRMAN NATIONAL
LAND COMMISSION) 4TH RESPONDENT (THE HON. ATTORNEY GENERAL) WHO FAILED TO
PROTECT/PROMOTE/DEVELOP/ THE CONSTITUTION OF KENYA**

AND WRITTEN LAW

AND

IN THE MATTER OF ALLEGED INFRINGEMENT OF ART, 1 (1) (3) ART 2

**(2) ART 3 (1) ART 10 ART 27 (4) ART 35 (1) ART 47 ART 62 (2) ART 63 (1) (2) (3) &
(4) ART 67 (1) (2) (a) (b) (c) ART 232 (1) (a) (i) (ii) (iii) AND ART 259 (1) (a) (b) (c) (d) (2) (3) OF THE CONSTITUTION**

OF KENYA

AND

IN THE MATTER OF ALLEGED INFRINGEMENT OF

ARTICLE 156 (1) (2) (3) (4) (a) (c) CLAUSE (5) (6) (7) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE

COMMUNITY LAND ACT 2016 SECTION 6 (7) (8) SECTION 7 (1) (2) (3) (4) (5) (6) SECTION 13 (1)

AND

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE LAND

REGISTRATION ACT 2012 SECTION 8 (1) (b) (c) (d) SECTION 13 (1)

AND

IN THE MATTER OF ALLEGED INFRINGEMENT OF LAND CONTROL

BOARD ACT CAP 302 SECTION (1) (b) AND (c) SECTION 16 (1) SECTION 20 (1) (2) LAWS OF KENYA

AND

**IN THE MATTER OF ALLEGED INFRINGEMENT OF LAND ADJUDICATION ACT CAP 284 SECTION 4 (1) (2)
SECTION 5 (1) (a) (b) (2) (a) (b) (c) (d) SECTION 6 (1) (2) SECTION 7 (1) SECTION 8 (1) (2) (3) (4) (5) SECTION 9
(1) (2) (a) (b) SECTION 10 SECTION 11 AND OTHER SECTIONS OF THE LAND ADJUDICATION ACT CAP 284**

BETWEEN

LINUS KINYUA NYAGA.....1ST PETITIONER

GATITU M. KWIGUA & 140 OTHERS.....2ND PETITIONER

VERSUS

THE EMBU COUNTY GOVERNMENT & 3 OTHERS.....RESPONDENTS

RULING

1. By a notice of motion dated 18th October 2018 brought under the provisions of **Order 49 Rule 4 and Order 10, Rules 8, 9 & 10 of the Civil Procedure Rules** (hereinafter *the Rules*) the Petitioners sought the following orders;

a. That this honourable court be pleased to grant order for leave of court to enter interlocutory judgement against the 1st, 2nd, 3rd and 4th Respondents who failed to enter an appearance. (Sic)

b. That this honourable court be pleased to grant an order to set down the date for a formal proof. (Sic)

2. The said application was based upon the grounds set out on the face of the motion and supported by an affidavit jointly sworn by the Petitioners on 18th October 2018. In a nutshell, it was contended that the Respondents had failed to enter an appearance within 15 days despite service hence the Petition should proceed ex-parte and by way of formal proof.

3. The provisions of **Order 49 Rule 4** of the Rules stipulate that no judgement shall be entered against the Government without leave of court whereas the provisions of **Order 10** of the Rules provide for the consequences of non-appearance and for entry of default judgement in specified instances. In particular **Order 10** provides for entry of final judgement on liquidated claims (i.e. Rule 4) and for interlocutory judgement where the plaintiff seeks pecuniary damages with or without any other claim (i.e. Rule 6). Upon entry of interlocutory judgement the court may then set down the suit for assessment of damages.

4. The court would like to quote **Order 10 Rule 9** which was also relied upon by the petitioners. It stipulates as follows;

“9. Subject to Rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

5. The court has noted that the Petitioner’s claim was not commenced by way of plaint but through a constitutional petition. In those circumstances, the applicable rules for the purpose of preparation for hearing and disposal of the petition would be the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*, (hereinafter *the Mutunga Rules*). Of particular importance is that the Mutunga Rules do not make provision for entry of any form of interlocutory judgement against Respondents who have not responded to a constitutional petition.

6. **Rule 16 (1)** of the Mutunga Rules, stipulates as follows;

“If the Respondent does not respond within the time stipulated in Rule 15, the court may hear and determine the petition in the Respondent’s absence.”

7. It is evident from the reliefs sought in the petition that the Petitioners are seeking various declarations and orders to nullify the process of land allocation, demarcation and alienation of land within Mwea Settlement Scheme. They are also seeking an order of *certiorari* to quash any titles which may have been issued within the said scheme.

8. The Petitioners are not seeking reliefs with respect to any liquidated claim. They are also not seeking any pecuniary damages in their claim. Accordingly, the question of entry of interlocutory judgement cannot arise. The provisions of **Order 10 of the Rules** are not applicable to the petition before the court. Even if they were applicable, by dint of **Order 10 Rule 9 of the Rules** the Petitioners would be obliged to set down the petition for hearing in the normal manner.

9. The upshot of the foregoing is that the court finds no merit whatsoever in the Petitioners’ Notice of Motion dated 18th October 2018. The same is consequently dismissed with no order as to costs. The petitioners shall wait in the queue for directions on the hearing of petitions filed in 2018.

10. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 16TH day of MAY, 2019.

In the presence of Andrew Ileri Njeru for Petitioners, 1st & 2nd Petitioners present in person, absent for the Respondents.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

16.05.19