REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC PETITION CASE NO. 16 OF 2017

MATAYO WAKHUNGU NDANYO & 1544 OTHERS.....PETITIONERS

VERSUS

NATIONAL LAND COMMISSION & 4 OTHERS.....RESPONDENTS

JUDGEMENT

The petition of the above named petitioners who state as follows, that the petitioners are members of the Tachoni sub tribe of the larger Luhya ethnic group. The petitioners aver that their ancestors settled at the area comprised in the present Lugari Sub County as early as the 16th Century AD. For centuries now, Tachoni circumcision rituals have been held at their cultural shrine at Efivambilo in Lugari forest which dates to pre-colonial Kenya. That indeed the name "Lugari" is a corrupted form of the Tachoni word "Lwakari" meaning the land between two rivers, that is, the "Kivorani" river now the "Nzoia" and the "Sikilayi" river that was the colonial "check line" corrupted into Tachoni as "Chekalini". It is the petitioners' case that when the colonialists arrived around 1911, the Tachoni people, to wit, the petitioners' ancestors were displaced from their land that now comprises the Lugari Forest land. Indeed most of the displaced people were forced to squat and work on the white settlements, these were referred to as the "Blue Squatters". It was the hope of the Tachoni people that with the exit of the colonialists and the attainment of political independence, their ancestral land would revert back to them, but this was not to be. Allocations of land in Lugari under the KANU regime was to be based on political loyalty and any perceived opponents of the regime were rudely left out. In 1992 the KANU government ferried alien people from Vihiga County and settled them in parts of Lugari and Mautuma Settlement Schemes and Forest land, which historically belong to the Tachoni. On 26th of April, 1998 the Tachoni attempted to reclaim their land, being the Lugari and Mautuma Settlement Schemes and Forest land, but were repulsed by the aliens. Thereafter the petitioners and other members of the community have used all modes of avenues of communication with the relevant agencies of government to have their grievances redressed, but to no avail. Instead the government has allocated parts of the land to people who have no ancestral nexus to the land and leaving out the indigenous Tachoni people who are now squatters in their hundreds of thousands. The respondents are currently in the process of sub-dividing the Lugari and Mautuma forest Land and give it out to non-indigenous squatters leaving out the petitioners who are constitutionally entitled to the same by virtue of being landless and by virtue of their ancestral nexus.

The petitioners submit that legal foundation of the petition is as follows;

Pursuant to Article 67 (2) of the constitution, the functions of the Commission shall be –

a. To manage public land on behalf of the national and county governments;

b. To recommend a national land policy to the national government;

c. To advise the national government on a comprehensive programme for the registration of title in land throughout Kenya.

d. To conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities.

e. To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices , and recommend appropriate redress;

f. To encourage the application of traditional dispute resolution mechanisms in land conflicts;

g. To assess tax on land and premiums on immovable property in any area designated by law; and

h. To monitor and have oversight responsibilities over land use planning throughout the country.

Under the National Land commission Act, the Commission shall;

a. On behalf of, and with the consent of the national and county governments, alienate public land;

b. Monitor the registration of all rights and interests in land.

c. Ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations;

d. Develop and maintain an effective land information management system at national and county levels.

e. Manage and administer all unregistered trust land and unregistered community land on behalf of the county government; and

f. Develop and encourage alternative dispute resolution mechanisms in land dispute handling and management.

It is further the mandate of the Commission that within five years of the commencement of the NLC Act, the Commission, on its own motion or upon a complaint by the National or County Government, a community or an individual review or grant disposition of public land to establish their propriety or legality. The commission shall in consultation and cooperation with the national and county governments, establish county land management boards for the purposes of managing public land. Article 27 of the constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

The Petitioners submit that violations of the Constitution are as follows;

1. The allocation of land to persons who have no legal connection to the land in question violates articles 21 (3) 22(2) (b) 23 (3) 27, 56, 60 & 67 (2) (e) of the Constitution of Kenya.

2. That despite being informed, the National Land Commission has failed to carry out investigations to verify the petitioners' claims to entitlement to allocation of Lugari and Mautuma forest land as required under article 67 (2) (e) of the constitution and is resolved to allocating the land in isolation of the petitioners.

3. Unless this honourable court intervenes, the petitioners and their descendants shall be rendered permanently deprived and landless.

The Petitioners now pray for:-

a. A declaration that land comprising Lugari and Mautuma Settlement Schemes and forest land historically belong to the Tachoni people.

b. A declaration that previous allocations of the Lugari and Mautuma Settlement Schemes and Forest Land and any allocations to the exclusion of the petitioners is contrary to Articles 21 (3) 22 (2) (b) 23 (3) 27, 56, 60 & 67 (2) (e) Constitution of Kenya, is unconstitutional, illegal null and void.

c. An order requiring the National Land Commission to comply with Article 67 (2) (e) of the Constitution of Kenya by including the Petitioners in the any allocation of Lugari and Mautuma Settlement Schemes and Forest Land.

d. An order of permanent injunction restraining the respondents from allocating remaining portions of Lugari and Mautuma Settlement Schemes and/or Forest Land to persons not historically entitled to such allocation and issuing title deeds to any previous irregular allocations of the said land.

e. Costs of this petition.

f. Any other appropriate remedy the honourable court may deem fit and just to grant.

The 3rd respondent submits as follows, that the petitioners' petition does not disclose any reasonable cause of action against the 3rd respondent and ought to be dismissed. There was established the Land Act of 2012 which addresses the issues of the applicants herein. Land Act of 2012 specifically Section 2 which describes the "Commission as National Land Commission established under Article 63 of the constitution". Your Ladyship, Article 63 (2) of the constitution describes Community Land and Article 67 describes National Land Commission. The petition herein relates to deeds and or misdeeds of 1911 (Paragraph 11 of the petition) 1992 (Paragraph 15 of the Petition, 1998 (Paragraph 16 of the petition) which renders the claim herein statutory barred. The 3rd respondent County Government of Kakamega has no capacity to do all those requirements of Article 62 (2) of the constitution which are clearly pronounced and well quoted in paragraph 20 of the Petitioner's affidavit. The petition as it is offends the provisions of Article 27 of the Constitution which provides that every person is equal before the law and has a right to equal protection and equal benefit of the law. The Petitioners have not disclosed the Citation of the Land under dispute, it is therefore unclear they are seeking relief in respect of what parcel of land. The County Government only deals with land registered under the County Government and not any other land parcels and the applicants petition is misplaced as relates the County Government. The County Government has never allocated community land, and has no capacity to do so and there is nowhere in the petition or affidavit that the petitioners have offered proof of the allegations. The County Government denies the allegations that the 3rd respondent is in the process of sub diving the Lugari and Mautuma forest land and that that they intend to give it out to non-indigenous squatters leaving out the petitioners who are constitutionally entitled to the same by virtue of being landless and by virtue of their ancestral nexus and

reiterated that County Government does not deal with community land and the 3rd respondent demands strict proof to the contrary. That amongst the orders sought in the petition, none of them is in relation to the County Government and that they have been wrongly been sued in this petition. The annextures on the affidavit of the applicants do not support the petition as against the County Government. The 3rd respondent submits that the petition herein should be dismissed as against it and costs awarded.

This court has considered the petition and the submissions therein. The 1st, 2nd and 4th respondents were served with the petition but filed no reply. The petitioner and 3rd respondent agreed to proceed by way of written submissions. The 3rd respondent filed their submissions but the petitioner filed none. Article 40 of the Constitution, reads in part as follows:

> 40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
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> (a) of any description; and
>
> (b) in any part of Kenya.
>
> (2) Parliament shall not enact a law that permits the State or any person—
>
> (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
>
> (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
>
> (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
>
> (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
>
> (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
>
> (i) requires prompt payment in full, of just compensation to the person; and
>
> (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

> "Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land."

The Universal Declaration of Human Rights has the force of law in Kenya. In the case of R vs Chief Immigration Officer (1976) 3 AER 843 Lord Denning stated thus regarding the Universal Declaration of Human Rights;

> "… Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly…"

And Justice G.V. Odunga in Republic v Council of Legal Education Ex-parte Nyabira Oguta (2016) eKLR, phrased it thus:

> "Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality".

Be that as it may, the petitioners stated that the respondents are currently in the process of sub-dividing the Lugari and Mautuma forest Land and give it out to non-indigenous squatters leaving out the petitioners who are constitutionally entitled to the same by virtue of being landless and by virtue of their ancestral nexus. Throughout the petition the description of the land is the Lugari and Mautuma Settlement Schemes and Forest land. I concur with the 3rd respondents submissions that, the petitioners have not disclosed the citation of the land under dispute, it is

therefore unclear they are seeking relief in respect of what parcel of land. The petitioners allege violation of fundamental rights and freedoms and it is therefore their duty to plead their case with particularity, in the case of Anarita Karimi Njeru vs. The Republic (1976-1980) eKLR 1272 the Court established the principle that a person seeking redress from the High Court on a matter which involves reference to the Constitution should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed. From the documents on record, the description is Lugari and Mautuma forest land. The principle in the **Anarita Karimi Njeru** was clarified in the case of **Trusted Society of Human Rights Alliance vs. Attorney General & 2 others, Petition No. 229 of 2012.** The Petitioners in the instant case had failed to meet the test as they have not identified the exact property they were calling the Court to protect.

This principle was re-affrimed by the Court of Appeal in the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012** where the it was stated as follows:

> **"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."**

From facts of this case it is in my view that the petition lacks any specifity such that it is merely of a general nature in that it fails to identify with precision the particular property to which the Petitioners lay claim. A constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the petitioner ought to revert to a civil claim. I find this petition is unmerited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE