



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC PETITION NO. 2 OF 2018**

**SANIAKO N. KIBIWOT.....PETITIONER**

**VERSUS**

**THE LAND CONTROL BOARD,**

**MARAKWET DIVISION.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY LAND SURVEYOR,**

**ELGEYO MARAKWET.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR,**

**ELGEYO MARAKWET.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petition dated 13<sup>th</sup> June, 2018 which was filed on the same date the petitioner herein seeks the following reliefs against the respondents:-

**(1) This matter be certified urgent and service of the petition be dispensed with in the first instance.**

**(2) A declaration be made and be issued that the petitioner is entitled to protection under the Constitution.**

**(3) An order of judicial review in the nature of mandamus against the respondents jointly or severally compelling the issue to the petitioner all the documents and information in their custody relating to the sub-division of land parcel known as Cherangany/Kapkanyor/23 and the transfer of the land parcel known as Cherangany/Kapkanyor/55 to Kiptanui A. Kimaget which documents should include those specified at paragraph 33 hereinabove.**

**(4) Costs of this petition be awarded to the petitioners herein.**

**The Petitioner's Case**

2. According to the petition the petitioner is the widow to the late **Kibiwot Kimutul**. Kimutul was the registered proprietor of land parcel No. **Cherangany/Kapkanyor/23**. She avers that she is the owner of the **Cherangany/Kapkanyor/54** which was a subdivision of **Cherangany/Kapkanyor/23**. **Parcel No. 23** was allegedly bought during the pendency of their marriage. After its subdivision into a parcel No. 54 and 55 parcel no. 55 was secretly transferred to one Kiptanui A. Kimaget whose family has now threatened to evict the petitioner from the land. It is alleged the son of Kiptanui A. Kimaget one Stanley Tanui obtained a decree in Kitale Land Case No. 16 of 2001 and threatened to evict the petitioner.

3. The petitioner avers that under Article 35 of the Constitution she has sought information from the respondents concerning all the statutory documents used to effect the subdivision of parcel No. 23 and the transfer of parcel No. 55 to Kiptanui A. Kimaget in vain. The request for information was conveyed to the District Land Registrar vide a letter dated 10/11/2016 written by David Ingosi & Co. Advocates on behalf of the petition. The said letter notifies the Land Registrar Elgeyo Marakwet of intention to file legal proceedings in default of provision of the said information. The documents sought by the petitioner are listed at paragraph 33 of the petition as follows

**(a) Certified copy of the application to the 1<sup>st</sup> respondent for consent to subdivide land parcel Cherangany/Kapkanyor/23.**

(b) Certified copy of the minutes of the meeting by the 1<sup>st</sup> respondent that considered the subdivision of Cherangany/Kapkanyor/23.

(c) Certified copy of the letter of consent by the 1<sup>st</sup> respondent to subdivide parcel No. Cherangany/Kapkanyor/23.

(d) Certified copy of the mutation form submitted to the 2<sup>nd</sup> respondent and the one submitted to the 3<sup>rd</sup> respondent, used to subdivide land parcel No. Cherangany/Kapkanyor/23.

(e) Certified copy of the application to the 1<sup>st</sup> respondent for consent to transfer parcel No. Cherangany/Kapkanyor/55 to Kiptanui A. Kimaget.

(f) Certified copy of letter of consent to transfer No. Cherangany/Kapkanyor/55 to Kiptanui A. Kimaget.

(g) Certified copy of transfer form used to transfer parcel No. Cherangany/Kapkanyor/55 to Kiptanui A. Kimaget.

4. The petition is supported by the sworn affidavit of the petitioner which reiterates substantially the same facts set out in the petition.

5. The petition is not opposed. The respondents' counsel was granted a number of adjournments to enable him prepare and file a defence to the petition but he failed to do so. On 29/4/2019 Mr. Wabwire appearing for the respondents said that he leaves the matter to the court while Mr. Wanyama urged the court to issue a judgment thereafter the judgment date was set for 6/5/2019 of which date a judgment could not be delivered and it was adjourned to 7/5/2019.

## **DETERMINATION**

### **Issues for Determination**

6. The issues that arise in this petition are as follows:

(a) *Whether the petitioner's right to access to information have been violated by the respondents;*

(b) *What orders should issue.*

**(a) Whether the petitioner's right to access to information have been violated by the respondents**

7. Article 35 of the Constitution states as follows:

#### **Access to information**

(1) **Every citizen has the right of access to-**

(a) **Information held by the State; and**

(b) **Information held by another person and required for the exercise or protection of any right or fundamental freedom.**

8. Section 4 of the Access To Information Act an Act of Parliament to give effect to Article 35 of the Constitution provides as follows:-

#### **Right to information**

(1) Subject to this Act and any other written law, every citizen has the right of access to information held by-

(a) the State; and

(b) Another person and where that information is required for the exercise or protection of any right or fundamental freedom.

(2) Subject to this Act, every citizen's right to access information is not affected by-

(a) any reason the person gives for seeking access; or

(b) the public entity's belief as to what are the person's reasons for seeking access.

(3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

(4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in

circumstances exempted under section 6.

**(5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.**

9. It is trite that in order to stand a chance of successfully moving the court in a petition such as this one the petitioner must demonstrate that he first sought the information from the appropriate office and that he was denied the same or that his request was not responded to. In **Andrew Omtatah Okoiti V Attorney General & 2 Others [2011] eKLR, Musinga J.**, stated that:

**“Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC to avail to him any information that he considered necessary and the same was not granted. In that regard, prayer 4 of the applicant’s application is rather premature.”**

10. In the case of **Kahindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others [2013] eKLR (NBI Petition No. 25 of 2013)** it was stated as follows:

**“However, in order for this right to be justiciable, it must be established that the person seeking the information has sought the information, and access to such information has been denied. As was also observed in the Nairobi Law Monthly case (supra) at paras. 40, 84;**

**“[40] Finally, in order to facilitate the right of access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.**

**[84] However, this petition succeeds to the extent that I have found that the 1st respondent [Kenya Electricity Generating Company] has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the respondent, and the respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a constitutional obligation to provide the information sought.”**

**In the instant case, no request for information has been made to the respondents. The enforcement of the right cannot therefore be said to have crystallized.”**

11. Violation of right of access to information cannot therefore be deemed to have occurred unless first a request for information is shown to have been made and refused or neglected by the respondents. The request must accord with **Section 8(1)** of the **Access to Information Act** which provides that:

**“An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.”**

12. In my view the letter dated 10/11/2016 amounts to a proper request under that section. The respondents have not denied having received that letter.

13. I find that the letter dated **10/11/2016** seeking information was directed only to the 3<sup>rd</sup> respondent. Judging by the contents of the petition and the supporting affidavit there is no evidence that any similar letter was addressed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot be deemed to have failed or refused to furnish the petitioner with any information as long as the request for information was not addressed to them. They should not have been enjoined in this petition in the first place as no request for information was made to them.

14. I have also considered the length of time that the petitioner has awaited the response to her request for information. It is a period of over two years. **Part III** of the **Access to Information Act** gives guidelines as to the timelines expected of the respondents to such a request to either accede to it or refuse giving justification. **Section 9** of the Act provides as follows:

#### **9. Processing of application**

**(1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application**

**(2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.**

**(3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if-**

(a) the request is for a large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder; or

(b) consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.

(4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating-

(a) whether or not the public entity or private body holds the information sought;

(b) whether the request for information is approved:

(c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and

(d) if the request is declined, a statement about how the requester may appeal to the Commission";

15. From a plain reading of the provisions set out as above, it is clear that the two year period the petitioner has waited for the 3<sup>rd</sup> respondent's reaction is way beyond the time period within which the 3<sup>rd</sup> respondent was expected to react.

16. In the final analysis, I find that this petition can be sustained only as against the 3<sup>rd</sup> respondent who failed to avail the petitioner the information sought. He has violated the petitioner's right to information **Article 35(1) (a)** of the **Constitution** and **Section 9** of the **Access to Information Act**.

## CONCLUSION

(b) What orders should issue?

17. Consequently I find that the petition is merited. I hereby issue an order of judicial review in the nature of mandamus compelling the 3<sup>rd</sup> respondent to issue to the petitioner all the documents the petitioner seek which are listed here as follows:-

(a) Certified copy of the application to the 1<sup>st</sup> respondent for consent to subdivide land parcel Cherangany/Kapkanyor/23.

(b) Certified copy of the minutes of the meeting by the 1<sup>st</sup> respondent that considered the subdivision of Cherangany/Kapkanyor/23.

(c) Certified copy of the letter of consent by the 1<sup>st</sup> respondent to subdivide parcel No. Cherangany/Kapkanyor/23.

(d) Certified copy of the mutation form submitted to the 2<sup>nd</sup> respondent and the one submitted to the 3<sup>rd</sup> respondent, used to subdivide land parcel No. Cherangany/Kapkanyor/23.

(e) Certified copy of the application to the 1<sup>st</sup> respondent for consent to transfer parcel No. Cherangany/Kapkanyor/55 to Kiptanui A. Kimaget.

(f) Certified copy of letter of consent to transfer No. Cherangany/Kapkanyor/55 to Kiptanui A. Kimaget.

(g) Certified copy of transfer form used to transfer parcel No. Cherangany/Kapkanyor/55 to Kiptanui A. Kimaget.

18. The costs of the petition shall be borne by the 3<sup>rd</sup> respondent.

Dated, signed and delivered at Kitale on this day of 7<sup>th</sup> May, 2019.

MWANGI NJOROGE

JUDGE

7/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyama for petitioner

N/A for the respondents

**COURT**

Judgment read in open court.

**MWANGI NJORGE**

**JUDGE**

**7/5/2019**