



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 3 OF 2018

**IN THE MATTER OF ARTICLES 23, 40(3), 47, 67, 186 AND SCHEDULE 4 PART 2 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 40(3)
AND 47 OF THE CONSTITUTION**

BETWEEN

KENYA AGRICULTURAL AND

LIVESTOCK RESEARCH ORGANIZATION.....PETITIONER

VERSUS

KISII COUNTY.....1ST PETITIONER

IBRAHIM MOSE - MEMBER OF COUNTY ASSEMBLY

BOBARACHO WARD.....2ND PETITIONER

J U D G M E N T

1. The Petitioner filed the present Petition on 23rd February 2018 against the Respondents alleging breach and/or threatened breach of its Constitutional rights to property. The Petitioner's case was that it has had the exclusive use and possession of the parcel of land identified and marked "C" in the coloured satellite map and the site map exhibited at pages 1 and 2 of the Petitioner's list and bundle of documents. The Petitioner's assertion was that the Respondents had without the consent and/or authority of the Petitioner entered onto the suit property and commenced the construction of unauthorized access and/or feeder roads across the Petitioner's property.

2. The Petitioner seeks the following orders in the Petition:-

(a) A declaration that the 1st and 2nd Respondents do not have the mandate under the Constitution of Kenya or any other written law to administer public land, by allocation and alienation of the same for public use.

(b) A declaration that the rights of the Petitioner under Article 47(1) of the Constitution of Kenya to a fair administrative action have been violated.

(c) A declaration that the Petitioner's right to property under Article 40(3) of the Constitution of Kenya has been violated.

(d) An order of permanent injunction restraining the Respondents herein jointly and severally with their agents, servants, employees and or any other person whatsoever from encroaching upon, trespassing onto, remaining on or in any way howsoever interfering with all that parcel of land marked as "C" in the maps annexed in the Petitioner's list and bundle of documents at page 1 and 2 situate at Kisii belonging to the Petitioner.

(e) An order directing the Respondents to restore the suit property to the status ante the 6th day of February 2018 and remove all or any structure(s) erected on the Petitioner's suit property above referred within 30 days, failure of which the Petitioner do carry out the restoration and or removal of the erected structures at the Respondent's cost and expense.

(f) An order that the Petitioner is entitled to compensation under Article 23(e) of the Constitution of Kenya to a tune of Kenya Shillings Seven Million (Kshs. 7,000,000/=) payable by the Respondents jointly and severally.

(g) An order that the Respondents shall jointly and severally bear the costs of this Petition.

(h) Any other relief or orders that this Honourable Court shall deem just, fit and appropriate to grant in favour of the Petitioner.

3. The Petition was grounded on the affidavit sworn in support by Dr. Eliud Kireger the Director General of the Petitioner dated 22nd February 2018 and the exhibits annexed thereto.

4. The Petitioner's assertion was that the Petitioner was allocated the suit land as far back as 1963 by the National Government and has since then utilized the land for Agricultural Research Services. The Petitioner admitted in their pleading that they did not hold title to the suit property but stated that they had commenced the process of procuring title and had in that regard applied for the preparation of a Part Development Plan (PDP) for purposes of delineating the property. The Petitioner's complaint is that the Respondents in January/February 2018 entered the suit property purportedly to open up a road of access/feeder road. The Petitioner protested this intrusion onto the suit property resulting in the filing of the present Petition.

5. The Respondents in spite of being served and being afforded the opportunity to file a replying affidavit in response to the Petition did not do so. On 1st October 2018 the court directed the parties to canvass the petition by way of written submissions and since the Respondents had not filed any response to the Petition, their submissions could only be on points of law and not facts.

6. The Petitioner's submissions were filed on 22nd November 2018 while the Respondents filed their submissions on 20th May 2019.

7. The Petition was filed on 23rd February 2018 and though the Respondents were served they filed no response and hence the factual basis for the Petition remained unchallenged. The averment therefore that the Petitioner was allocated and utilized the suit land exclusively for conducting Agricultural research since 1963 is not contestable and is deemed to be admitted. In the cases of **Israel Otieno Agina –vs- Attorney General [2011]eKLR** and **Mary Kanyamani Ekai –vs- County Assembly of Samburu & Another [2018] eKLR** the courts were emphatic on the effects of not filing a replying affidavit in a Petition. In the **Israel Otieno Agina** case [supra] the court stated as follows:-

“The facts of this case are set out in the petition and affidavit in support of the petition. These facts are not controverted by the Respondent. The effect of this is that I must take the facts set out as true and correct so that the only task before me is to consider whether they constitute a violation of the Petitioner's rights and if so what relief I should grant.”

8. In the case of **Mary Kanyamani Ekai** [supra] the court stated as follows:-

“In the circumstances and without any replying affidavit by the Respondent to join issue with the petitioner upon any allegation of fact stated in the Petitioner's sworn in support of the petition, there was clearly no issue of fact needing trial by oral evidence. All the matters of fact pleaded by the Petitioner were uncontroverted.”

9. In the circumstances, it cannot be disputed that the Petitioner was lawfully allocated and had been using the suit property since 1963 for purposes of conducting and co-ordinating Agricultural Research. There is no dispute further that the Petitioner was a statutory body charged with the responsibility and mandate of carrying out Agricultural Research on the suit property. The Petitioner therefore, cannot be said to have had no proprietary interest in the suit property even though they held no registered title in regard to the property. Hence the Petitioner would be entitled to be consulted before any activity that directly affected their interest in the suit property was undertaken by any other party who claimed to be interested in the suit property.

10. In the instant matter in view of the uncontested factual basis founding the Petition, it does appear to me that the issues to determine are whether the Petitioner had a proprietary interest or right over the suit property capable of being protected, and if so, whether the Petition as presented satisfies the constitutional threshold for sustainability as a Constitutional Petition.

Whether the Petition satisfies the test of what qualifies as a constitutional Petition:

11. What constitutes a constitutional petition has been the subject of judicial pronouncements and it is now settled that a Petition must be clear in terms and with some degree of specificity demonstrate the Articles of the Constitution that have been violated and in what manner. In the case of **Anne Njoki Kinyanjui -vs- Barclays Bank of Kenya Ltd [2015] eKLR** Mumbi Ngugi, J. stated at paragraph 20 of the judgment thus:-

“20. Under Article 22, the Constitution has given every person the right to approach the Court claiming that a right or fundamental freedom has been violated or infringed, or is threatened with violation. Decisions of this Court have settled the conditions that a party seeking constitutional relief must meet. The petitioner has an obligation to demonstrate which Articles have been violated, and the manner of violation with respect to her. See Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance -vs- Attorney General & Others High Court Petition No. 229 of 2012.”

12. In the case of **Trusted Society of Human Rights Alliance -vs- AG & 2 Others [2012]** the Court stated:-

“...The test does not demand mathematical precision in drawing constitutional petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately proper their case.”

13. In the present Petition the Petitioner has averred that the Respondents had no power or authority to allocate and/or alienate public land and that in attempting to create a public access through the suit property, the Respondents were acting in contravention of Article 186 and schedule 4 of the Constitution and Section 9 of the County Government Act, 2012. The Petitioner has contended that the Respondents actions were in contravention of Article 47(1) of the Constitution as the Respondents never sought the Petitioner’s views and neither did they afford the Petitioner a hearing before embarking on the creation of the feeder/access road over the suit property. The Petitioner further contended that the Respondents by alienating part of the Petitioner’s land without following due process as relates to payment of prompt and adequate compensation as provided under Article 40 (3) of the Constitution, the Respondents were violating the Petitioner’s rights as guaranteed under the Constitution. The Petitioner further maintained that the institution that had power to alienate and/or manage public land was National Land Commission pursuant to the provisions of Article 67 of the Constitution and thus by the Respondents arrogating to themselves the power to alienate public land were contravening the provisions of the Constitution.

14. On the basis of the foregoing, I am satisfied the Petition was properly grounded and that the Respondents had clear notice of what the Petitioner’s complaints were. The Petitioner had set out the Articles of the Constitution that were alleged to have been breached and the manner in which the breach was perpetrated. Thus the Petition met the threshold of what amounts to a Constitutional Petition and was therefore sustainable.

Whether the Petitioner had any proprietary interest over the suit property?

15. It was never disputed that the Petitioner was a statutory body that had a mandate to conduct agricultural research and that was the function the Petitioner was indeed carrying on the suit property. The suit land was public property allocated to the Petitioner by the Government way back in 1963 and the Petitioner had been in occupation of the property ever since.

16. The 1st Respondent has in its submissions argued that the Petitioner was not the registered owner of the suit property and that the Petitioner therefore did not have any right to the property capable of being protected. The 1st Respondent further submitted agriculture is a wholly devolved function under the Constitution and therefore the 1st Respondent in discharge of its constitutional functions had the power and authority to supervise the activities carried out upon any land set aside for agricultural purposes such as the suit property under the provisions of Article 187(2)(a) of the Constitution. The 1st Respondent has further submitted the suit property is public land within its territorial jurisdiction and that the Petitioner is not a state organ as it is not a Commission, office agency or such other body established under the Constitution within the meaning of Article 260 of the Constitution and therefore could not hold public land under Article 62(1)(b) of the Constitution.

17. The 1st Respondent additionally submitted that Article 186 of the Constitution can be construed as empowering it to carry out such functions as the construction of feeder roads as in the instant matter for use by the public.

18. Under Article 67(2)(a) the National Land Commission is vested with authority and mandate to manage public land. It provides as follows:-

67(2) The functions of the National Land Commission are:-

(a) To manage public land on behalf of the National and County Governments;

Article 62(1)(b) provides

62(1) Public land is –

(a)

(b) Land lawfully held, used or occupied by any state organ, except any such land that is occupied by the state organ as lessee under a private lease.

(c)

62(2) Public land shall vest in and be held by a County Government in trust for the people resident in the County, and shall be administered on their behalf by the National Land Commission, if its is classified under –

(a) Clause (1)(a), (c), (d) or (e); and

(b) Clause (1)(b), other than land held, used or occupied by a National state organ.

19. It cannot be gainsaid that the institution charged with the responsibility and mandate to manage and administer public land including alienation of such land is the National Land Commission (see Supreme Court Advisory Opinion Reference No. 2 of 2014; **In the matter of the National Land Commission [2015] eKLR and Republic –vs- Chairman National Land Commission & 5 Others Ex Parte**

Cordison International (K) Ltd [2018] eKLR. In the latter case where Olola, J. relied extensively on the Supreme Court Advisory Opinion, he was emphatic that the County Government has no mandate or authority to allocate and/or alienate public land as that role is exclusively vested in the National Land Commission under the National Land Commission Act. I agree with him.

20. In the present Petition the Kisii County Government could not properly arrogate to themselves the role of alienating what they presumed to be public land. If indeed it was public land, the same was vested in the National Land Commission and the same could only be alienated by following due process. Even if it was to create a public access road, there was process to be followed pursuant to Sections 143, 145, 146, 147, 148 and 149 of the Land Act No. 6 of 2012. The 1st Respondent could not take it upon themselves to enter onto a public land to ostensibly create a feeder/access road without following due process.

21. The 1st Respondent has argued that the Petitioner had no title to the suit property and had not proved it had possession of the land while asserting that it, (the 1st Respondent) was administering the property on behalf and in trust of the citizens of the County. This argument is faulty. The 1st Respondent as stated earlier in this judgment did not file any replying affidavit to controvert the averments of the Petitioner respecting allotment, possession and use of the property exclusively by the Petitioner. The exhibits annexed to the Petition affirm the land was in use by the Petitioner and indeed the District Development Committee (DDC) had in the year 2000 recommended and approved for the Petitioner to be issued title to the land. The correspondence further shows the Petitioner has set in motion the process of obtaining title to the land. The Petitioner would not be pursuing the issuance of title to the land if they had no proprietary interest in the land. Section 12 of the Land Act lays out the procedure for allocation of public land by the National Land Commission. Section 12(2) of the Act shields land reserved for specific purposes from alienation/allocation by the National Land Commission. Section 12(2)(d) of the Act provides:-

(2) The Commission shall ensure that any public land that has been identified for allocation does not fall within the following categories:-

(a)

(b)

(c)

(d) Public land that has been reserved for security, education, research and other strategic public uses as may be prescribed.

22. There can be no doubt that the suit property was reserved for research and that was the function that the Petitioner was carrying on the land since 1963 when the land was allocated or alienated at least without consultation and participation of the Petitioner.

23. The argument by the 1st Respondent that the Petitioner was not the owner of the land and did not have any right to it in my view cannot hold. It is evident that the Petitioner was in possession and occupation of alienated public land as defined under Article 62 of the Constitution and the land was reserved for research for agricultural purposes. The Petitioner is a public body established under an Act of Parliament and receives funding from the National Government for its activities. The Petitioner has mandate to acquire and hold public properties such as the suit property and in my view the Petitioner had proprietary interest over the suit property and in that regard no person had the right to deal with the property in a manner that was prejudicial to the interests of the Petitioner without appropriate consultations with the Petitioner.

Whether the Petitioner's Constitutional Rights had been Violated?

24. The Petitioner has contended that the Respondents invaded the suit property and went about to create a feeder road/access road over the property unlawfully and forcefully. The Petitioner's averment was that the Respondents had not followed due process to get their way. The Petitioner contended that they were not accorded fair administrative action as provided under Article 47 of the Constitution before the action was taken.

25. Article 47(1)(2) of the Constitution provides:

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

26. The Fair Administrative Action Act 2015 under Section 4 underscores what a party carrying out an administrative action likely to be prejudicial to an interested party is required to do to ensure that the action taken is arrived at through a process that is procedurally fair. Section 4(1), (2) and (3) of the Fair Administrative Action Act provides as follows:-

4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

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

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the

administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

27. It is imperative having regard to the above provisions that before an authority charged with taking administrative action against a party who stands to be adversely affected by any action that may be taken must subject such a party to a fair process by ensuring due process is followed before the action is taken. The party must be given notice and must be afforded an opportunity to be heard in adherence to the rules of natural justice. No party should be condemned without being heard.

28. In the present case, the Petitioner has stated that they were not given any notice of the intention to construct the road and were not given an opportunity of being heard before the decision to construct the road over their land was made. The Respondents have not furnished any evidence that they in fact engaged the Petitioner before they commenced constructing the road. Indeed there is no indication that they even attempted to do so. The act the Respondents were undertaking in the Petitioner's land was clearly adverse to the interests of the Petitioner. The Petitioner was under the provisions of Article 47(2) and Section 4(3) of the Fair Administrative Action Act entitled to notice and to a fair hearing before the adverse action was taken by the Respondents. The failure by the Respondents to do so rendered the decision/action taken null and void for being in contravention of Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act.

29. The Petitioner further complained that the Respondents contravened its rights under Article 40 of the Constitution respecting protection of rights to property. Having held that the Petitioner had a proprietary interest over the suit property it follows that its rights and interest over the property were protected and the Respondents could not deal with any part of the property without following due process.

30. Article 40(2)(a) provides:-

(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;

Article 40(3) of the Constitution provides:-

40(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.

31. The above provisions of the Constitution make it abundantly clear that a person cannot be arbitrarily deprived of his property and/or any interest in or right over any property. The Respondents actions were arbitrary and in my view the provisions of Article 40(3) were contravened to the prejudice of the Petitioner. The Respondents if it was necessary to create a feeder road/access road through the suit property did not follow due process to have the creation of the road sanctioned by the appropriate institutions. The Respondents had no right and/or authority to invade the Petitioner's property in the manner they did and the Court finds and holds their actions were in contravention of the Constitution.

32. The Petitioner claimed for damages occasioned by the Respondents when they entered the suit land in regard to damaged fencing materials and destroyed trees in the aggregate sum of kshs.6,933,600/=. An assessment of the damage by the Farm manager as per the tabulation dated 13th February 2018 was exhibited at page 26 of the Petition. This evidence of damage was not rebutted in any manner. The Respondents entered onto the Petitioner's land without authority and in the process occasioned damage to the Petitioner's property. Under Article 23(e) of the Constitution the court is empowered to award compensation. In the instant matter, the Petitioner is entitled to

compensation for the damage occasioned by the Respondents.

33. In the result, it is my finding and holding that the Petitioner's Petition has merit and the same is allowed and the Court hereby makes the following final orders:-

(i) The 1st and 2nd Respondents do not have the mandate under the Constitution or any other written law to administer Public land, by allocation and alienation of the same for public use.

(ii) The rights of the Petitioner under Article 47(1) of the Constitution of Kenya has been violated.

(iii) The Petitioner's right to property under Article 40(3) of the Constitution of Kenya has been violated.

(iv) An order of permanent injunction is hereby issued against the Respondents jointly and severally restraining their agents, servants and/or employees from encroaching upon, trespassing onto or in any manner howsoever interfering with the suit property identified and marked "C" in the maps annexed to the Petition.

(v) An order directing the closure of any feeder/access road that the Respondents may have unlawfully created over the suit property with immediate effect.

(vi) The Petitioner is awarded compensation in the form of damages in the sum of kshs.6,933,600/= together with interest thereon at court rates from the date of judgment until payment in full.

(vii) The Petitioner is awarded the costs of the Petition.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF AUGUST 2019.

J. M. MUTUNGI

JUDGE