



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC PETITION NO.8 OF 2018

KIPSYENAN FARMERS COMPANY.....PETITIONER

VERSUS

NATIONAL LAND COMMISSIONER.....1ST RESPONDENTS

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

(Petitioner being a private limited liability company and holding land under freehold tenure; the National Land Commission entertaining a complaint raised by members of the petitioner on how the petitioner is distributing land to its members; Commission making various directions; complaint by petitioner that the Commission does not have jurisdiction to deal with private land; Commission arguing that it has mandate to do so; mandate of the National Land Commission being restricted to public land; National Land Commission not having jurisdiction on disputes relating to private land; petition allowed; decisions of the Commission quashed)

1. The petitioner, Kipsyenani Farmers Company Limited, is a limited liability company, duly incorporated under the Companies Act, Cap 486, Laws of Kenya. The 1st respondent is the National Land Commission, which is the commission established under Article 67 of the Constitution of Kenya, 2010, and responsible for various functions outlined in the constitution. The 2nd respondent is the Attorney General, who represents the Government in all suits.

2. In this petition, the petitioner has averred that it is a land buying company, and that it purchased the land parcel Kampi Ya Moto/Kampi Ya Moto Block 6/288 (hereinafter referred to as the suit land) in the year 1968 for the benefit of its shareholders/members. It is averred that its mandate was to subdivide and allocate the land to its members but this had not been carried out by the time the company was wound up in the year 1982. It is pleaded that the company was later revived through an intricate process which consumed considerable time and expense, and upon revival, the members met on 12 July 2008, and decided to reconstitute the board of directors of the company so that the suit land may be accordingly allocated. It is contended that the suit land is private land owned by the petitioner which has competent directors in office who are capable of managing its affairs. It is contended that the 1st respondent has acted without jurisdiction and in abuse of its powers by purporting to investigate and adjudicate over matters relating to the properties of the petitioner in absence of any complaint of present or historical injustices. It is pleaded that on 26 January 2018, the Vice Chair of the 1st respondent purportedly constituted a committee whose purport was to interfere and intermeddle with the affairs of the petitioner. Through a letter dated 22 February 2018, the said Vice Chairperson of the 1st respondent purported to freeze the affairs of the petitioner and purported to instruct the Directorate of Criminal Investigations to investigate the petitioner on how it acquired the suit land. The petitioner argues that the mandate of the 1st respondent is to look into issues touching on public land, and not private land, and thus the action of the 1st respondent is illegal and unconstitutional, and infringes on the petitioner's right to own property.

3. In this petition, the petitioner has asked for the following orders :-

(i) A declaration that the 1st respondent's actions are without and/or in abuse of its jurisdiction and powers and hence illegal, null and void and unconstitutional.

(ii) An order of certiorari to bring to the High Court for the purpose of quashing and to consequently quash the decision of the 1st respondent contained in its letter of the 22nd February 2018.

(iii) An order of prohibition preventing the 1st respondent from initiating any investigations or purporting to investigate, discussing, commenting on, allocating, alienating, disposing, intermeddling, interfering with or in any way dealing with the issues of the petitioner's properties and more so parcel No Kampi Ya Moto/Kampi Ya Moto Block 6/288.

(iv) Any other relief the court may deem fit to grant; and

(v) An order for payment of costs of this petition by the respondents.

4. The supporting affidavit to the petition has been sworn by Mr. George Morogo, the chairperson of the petitioner. He has annexed the certificate of incorporation of the petitioner showing that it was established on 20 November 1969. He has also annexed a copy of the title deed to the suit land which shows that the suit land became registered in the name of the petitioner on 23 April 2003. He has explained that in the year 1970, the petitioner purchased a land parcel Kampi Ya Moto/Kampi Ya Moto Block 6 which was later subdivided and members allocated some parcels of land. The suit land, Kampi Ya Moto/Kampi Ya Moto Block 6/288 was one of the subdivisions of Kampi Ya Moto/Kampi Ya Moto Block 6, and which parcel of land remained owned by the company. He has averred that from this land, soil was mined, leaving it uninhabitable, but later members rehabilitated it with the help of the Government. So as to obtain funds for the rehabilitation process, members resolved to sell a portion of it, but he has deposed that the then directors overstepped their mandate and sold more land than authorized by members, and thus subdivided the suit land and allocated it to non-members of the company. Owing to this, the members resolved to elect new directors, who attempted to regularize the allocation and wrote to the Commissioner of Lands a letter dated 7 September 2010, seeking to have the previous subdivisions of the suit land cancelled as the company intended to conduct a fresh survey, subdivision and allocation. It is averred that the Commissioner of Lands, through a letter dated 25 April 2012, allowed the cancellation of the previous allocations and gave a go-ahead for a fresh sub-division of the suit land. The company then commissioned a fresh survey which gave rise to several plots which members balloted for. The company then commenced the processing of titles to members and applied for consent of the Land Control Board, which application is annexed to the supporting affidavit. He has deposed that despite the land being private land, the 1st respondent has without jurisdiction, purported to investigate and adjudicate over the property of the petitioners without there being any complaint of present or historical injustices and has alluded to the letters mentioned in the petition.

5. The 1st respondent has opposed the petition through the replying affidavit of Brian Ikoi, its Deputy Director Legal Affairs and Enforcement and the acting director in charge of legal matters affecting the Commission. He has averred that the 1st respondent is a constitutional commission with wide mandate in matters of land including to monitor and have oversight responsibilities over land use and planning throughout the country, to initiate investigations on its own or upon a complaint into historical injustice, and encourage application of traditional dispute resolution mechanisms in land disputes. He has further deposed that the 1st respondent is clothed with statutory functions in land through the Land Act, 2013 (sic), the Land Registration Act, and the National Land Commission Act, which direct the 1st respondent among others, to inquire into disputes in land use, ownership and planning and make appropriate recommendations. He has contended that the functions of the 1st respondent are not limited to manage public lands but extends to public land in use and possession of private users as in the case herein. He has deposed that in the instant case, the 1st respondent received complaints from the members touching on the management and distribution of land by the purported officials of the petitioner upon which an inquiry was initiated. He has mentioned that the preliminary investigations revealed that indeed there was a dispute on management and distribution that required to be addressed and that in line with its mandate of encouraging traditional and amicable solutions, the 1st respondent constituted a committee from within the members and the legitimate directors of the company. He has deposed that the investigations established that the true directors of the petitioner are not the persons who have complained in this case, nor the deponent of the supporting affidavit, but those contained in a letter dated 27 February 2018 from the Registrar of Companies, which letter he has annexed. He has deposed that the 1st respondent established that the suit land does not exist as it was subdivided in the year 2003 to give rise to new parcels of land with new reference numbers. It is his view that the applicant irregularly obtained the title to the suit land, fourteen years after the subdivision had been closed and the mother title surrendered for closure. He has deposed that this illegal title was obtained through wilful and deliberate falsehood and misrepresentation made to the Chief Land Registrar, to the effect that the mother title had gotten lost, when knowing very well that the same had been surrendered for closure upon subdivision. He has contended that the claim by the petitioner is based on illegal and fraudulent activities which cannot be protected in line with Article 40 (6) of the Constitution. He has averred that the chronological events touching on subdivision and closure of the mother title, has been a big gap, where the previous regime, by omission or otherwise, failed to close the mother title and the same has been subsequently used by unscrupulous parties to further effect fresh subdivision on the same land, creating a scenario of double allocation. He has deposed that the land parcel Kampi Ya Moto/Kampi Ya Moto Block 6/288 ceased to exist in the year 2003 upon subdivision and issuance of fresh titles.

6. On the part of the 2nd respondent, an application was filed seeking that the 2nd respondent be struck out of the proceedings for being improperly enjoined, as the Attorney General does not represent the 1st respondent. I did not hear that application, but instead directed that the issues therein be canvassed within the petition. I also directed that the petition be canvassed by way of written submissions.

7. In his submissions, Mr. Kipkoeh, learned counsel for the petitioner, inter alia submitted that the land in question has never been public land and that it was unfathomable where the 1st respondent purports to get jurisdiction. He referred me to Article 67 of the Constitution which lays down the functions of the 1st respondent and submitted that the 1st respondent has no jurisdiction to investigate title to private land as it only reviews grants to public land. To buttress his argument, he referred me to no less than 10 authorities.

8. On the part of the 1st respondent, Ms. Masaka, learned counsel, inter alia submitted that the findings and recommendations of the 1st respondent for proper investigation, cannot form a basis of a constitutional reference and further that an action that is provided for in statute cannot form a basis for a constitutional petition. She insisted that the 1st respondent is clothed with power to investigate into a complaint or a dispute in land and recommend appropriate redress. She submitted that in this case, the 1st respondent received a complaint and proceeded to make inquiry under Section 5 of the National Land Commission Act, and recommended further investigations by the Director of Criminal Investigations. She believed that the 1st respondent was carrying out its constitutional and statutory mandate. She further submitted that the letter dated 22 February 2018 contains mere findings from preliminary inquiries and thus cannot be construed as a decision capable of being quashed. She submitted that a letter issued within the powers of the body issuing it cannot be quashed. She finally submitted that the order of prohibition cannot issue.

9. Mr. Ondieki, learned counsel for the 2nd respondent, inter alia submitted that the 1st respondent is an independent commission which represents itself in civil matters and thus the Attorney General cannot be sued on its behalf. He submitted that it has capacity to sue and to be sued. He also did not believe that the petition discloses violations of the Constitution against the 2nd respondent. He asked this court to find

that the Attorney General has been improperly enjoined.

10. I have considered the matter. Before I go too far, there are a couple of preliminary issues that have been raised. First, is the argument of the Attorney General that he was improperly enjoined. I agree, that it was not necessary to have the Attorney General in this suit, but I cannot blame the petitioners for enjoining the Attorney General, for at times, when public authorities are involved, one is never sure if the issue at hand also touches on the Attorney General. I will strike out the Attorney General from this suit, but make no orders as to costs.

11. There is the other preliminary point, raised by Ms. Masaka, that the matter herein is not one that falls within the purview of a constitutional petition. My short answer is that I am persuaded that the matter is a proper constitutional petition. It raises issues relating to the extent of the power of the National Land Commission, as given in the Constitution. The matter is thus properly before this court.

12. In my view, the principal question in this suit is whether or not the 1st respondent could investigate the title of the petitioner, or the manner in which the petitioner has undertaken a subdivision and distribution of its land. It is of course common ground that the petitioner is a private entity. The land in question is registered in the name of the petitioner. The nature of proprietorship of the land is noted to be "absolute" meaning that this land is not under any lease from the Government. In essence it is certainly land held under a freehold tenure by a private entity. From the reply filed by the 1st respondent, the 1st respondent does not pretend that the Government has any stake in this land. The land in issue is thus captured under the definition of private land given by Article 64 of the Constitution which provides as follows :-

64. Private land consists of—

(a) registered land held by any person under any freehold tenure;

b) land held by any person under leasehold tenure; and

(c) any other land declared private land under an Act of Parliament.

13. The land in issue falls under the definition provided in Article 64 (a), that is, that it is registered land held by a person under a freehold tenure.

14. The 1st respondent in its reply, has admitted receiving complaints from members of the petitioner touching on the management and distribution of land by its officials. It is upon this complaint that they formed a committee to investigate the issue and came up with some findings. The question is whether the 1st respondent had the mandate and jurisdiction to conduct all this in light of its constitutional and statutory mandate.

15. The mandate of the 1st respondent is outlined in Article 67 of the Constitution which provides as follows :-

67. National Land Commission

(1) There is established the National Land Commission.

(2) The functions of the National Land Commission are—

(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.

(3) The National Land Commission may perform any other functions prescribed by national legislation.

16. To operationalize the National Land Commission, there was enacted the National Land Commission Act. The statute lays down the functions and powers of the commission at Sections 5 and 6, which provide as follows :-

5. Functions of the Commission

(1) 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.

(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution

- (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 under the management of the designated state agencies is sustainably managed for the intended purposes;
- (d) may develop and maintain an effective land information system for the management of public land;
- (e) deleted by [Act No. 28 of 2016](#), s. 37 (a)(iii);
- (f) deleted by [Act No. 28 of 2016](#), s. 37 (a)(iv);

(3) Deleted by [Act No. 28 of 2016](#), s. 37(b).

(4) Deleted by [Act No. 28 of 2016](#), s. 37(c).

[[Act No. 28 of 2016](#), s. 37.]

6. Powers of the Commission

(1) The Commission, shall have all the powers necessary for the execution of its functions under the Constitution, this Act and any other written law.

(2) Without prejudice to the generality of subsection (1), the Commission shall have powers to—

- (a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;
- (b) hold inquiries for the purposes of performing its functions under this Act;
- (c) take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60(1) of the Constitution.

(3) In the exercise of its powers and the discharge of its functions, the Commission—

- (a) may inform itself in such manner as it may consider necessary;
- (b) may receive written or oral statements; and

(c) is not bound by the strict rules of evidence.

17. From the above, it will be noted that Section 5 (1) of the Act is similar to Article 67 (2) of the Constitution in so far as it outlines the functions of the 1st respondent. There are the additional functions in Section 5 (2) of the Act, which touch on alienation of public land, registration of interests in land, management of public land, and development of a land information system for the management of public land.

18. In the replying affidavit sworn by Brian Ikoi, it is contended that the 1st respondent has powers under the Land Act, 2012 and Land Registration Act, 2012, to inquire into land use, ownership and planning and make appropriate recommendations. Mr. Ikoi, did not refer me to any section of these statutes that give the 1st respondent such powers. Further, Mr. Ikoi in his affidavit, deposed that the powers of the 1st respondent extend to public land under private use, but I need not decide that issue because clearly, that is not what we are dealing with here, the suit land not being one that is public land under private use. Ms. Masaka in her submissions, did submit that the 1st respondent “is clothed with the power to investigate into a complaint or a dispute in land and recommend for appropriate redress...”. She did not refer me to any law that gives the 1st respondent power to do so in the context of private land. She did state that the inquiry, that is the subject of this suit, was done under Section 5 of the National Land Commission Act, but what I gather from the statute is that there is power of inquiry under Section 6, but such inquiry is for purposes of performing the functions outlined in Section 5 of the Act, all of which, in my view, relate to public land.

19. I am at a loss as to where the National Land Commission got the idea that they have a mandate to investigate and make decisions in relation to privately owned land. When it comes to disputes over private land that is not the mandate of the National Land Commission. For example, if people holding land under private tenure, have a dispute as to whether such land has been subdivided properly, or who between two private individuals should have title to the land, or whether an individual’s title to private land should be cancelled, that is a dispute that needs to go to the courts and not to the National Land Commission. Similarly, if a land buying company, has a dispute over who its members are, or whether the company has distributed the land to its members equitably, or whether some people got land when in fact they ought not to have gotten land, or that some got more or less land than they deserve, that has nothing to do with the National Land Commission. That is a private dispute among members of a private company, holding private land for which the National Land Commission has absolutely no mandate. We have other institutions which can, and do, resolve such disputes. When faced with such disputes, the National Land Commission should not waste tax payers money in trying to resolve these, but should politely decline jurisdiction and advise the parties as much. What the parties do thereafter is really none of the business of the National Land Commission.

20. I am not saying anything new here. It has been held in countless decisions that the National Land Commission needs to stick to its lane, which is dealing with public land. I need not revisit all such decisions, but will only point at one, that is the case of **James Ngochi Nguji vs National Land Commission & Another (2017) eKLR**, which case has been cited by Mr. Kipkoech in his submissions. The petitioner in the case had received a letter from the National Land Commission stating that it had received a complaint, from the interested party in the suit, to the effect that the land in dispute was allocated to the interested party. It thus invited the petitioner to attend to “resolve the dispute.” What the court found is that the deceased, whose estate the petitioner represented, and interested party, held shares in a private company and the interested party complained that the deceased used her position as director to improperly . The court (Mativo J) had this to say on the matter :-

“The complaint disclosed by the documents presented by the interested party in my view disclose a claim to the land and cast aspirations on the manner in which the deceased acquired title to the land which the interested party claims is her land. Such allegations can in my view form the basis of a claim in the Environment and Land Court. I reiterate that no material was been presented (sic) to this court to demonstrate that the land was once public land and was converted into private land. Absence of such evidence in my view ousts the jurisdiction of the Respondent because the tile held by the petitioner shows that the land in question is private land registered in the name of the deceased as the absolute lawful proprietor under the provisions of the Registered Land Act – Repealed.

The upshot is that I find and declare that the Respondent has no legal mandate to investigate the legality or propriety of title No....”.

21. It is more or less the same scenario that we have in this case. The complaint received by the 1st respondent related to distribution of land in a private land buying company. It is not important that the 1st respondent thinks that the company is wrongly distributing its land, or that it is doing a fresh subdivision on land that is already subdivided. What the 1st respondent’s view of the dispute is immaterial, for the members, if aggrieved, have the avenue of approaching court for redress. The mere fact that the 1st respondent thinks that the petitioner and/or its chairman are doing something wrong does not give them mandate to micromanage the affairs of the company in the manner in which it is dealing with its land.

22. I am persuaded that the 1st respondent entered into an arena in which it had no jurisdiction, and that being the position, this petition must succeed. It is a shame that despite the various decisions that have been made by courts touching on the jurisdiction of the 1st respondent, the 1st respondent still embarks on taking in matters outside its jurisdiction. It is indeed an irresponsible exercise of the power donated to the public to the members of this institution. The effect of such is only to invite unnecessary litigation which ends up causing loss to the tax payer, for the National Land Commission is funded by the tax payer, and when it is condemned to pay costs, it is the tax payer who will inevitably end up footing the bill. Maybe it is time, individuals within such public institutions were held personally liable for their actions, or be surcharged. For now however, the 1st respondent will pay the costs.

23. I now make the following final orders :-

(a) A declaration is hereby issued that the actions of the National Land Commission in investigating the title of the petitioner to the land parcel Kampi Ya Moto/Kampi Ya Moto Block 6/288 was and is illegal and unconstitutional, for the National Land Commission does not have jurisdiction or the mandate to do so.

(b) A declaration is hereby issued that any decision made by the National Land Commission in respect of the ownership of the land parcel Kampi Ya Moto/Kampi Ya Moto Block 6/288 was made out of jurisdiction and such decision is hereby quashed.

(c) That the decision or deliberations contained in the letter of the National Land Commission dated 22 February 2018, is hereby quashed.

(d) That an order of prohibition is hereby issued preventing the National Land Commission from purporting to investigate or interfere with the manner in which the petitioner is dealing with its properties including the land parcel Kampi Ya Moto/Kampi Ya Moto Block 2/288.

(e) That the petitioner shall have the costs of this petition as against the 1st respondent.

24. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Kipkoech present for petitioners.

No appearance for the NLC and AG- Respondents.

Court Assistants: Nancy Bor/Alfred Cheron.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU