



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 47 OF 2011

ABDULAH MUIGAI & 5 OTHERS.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

AND

AMBOSELI COURT LIMITED & 11 OTHERS.....INTERESTED PARTIES

RULING

Background:

The Petitioners brought this petition on 21st March, 2011 against the Attorney General who was sued on behalf of the Commissioner of Lands. The Petition was amended, further amended and further further amended on 13th June, 2017. In the further further amended Petition dated 8th June, 2017, the Petitioners averred that the 1st to 5th Petitioners were trustees for and on behalf of Kiambu Dandora Farmers Company Limited, the 6th Petitioner which was a beneficiary of Land Reference No. 11379/3 measuring 818 acres (hereinafter referred to as “the suit property”). The Petitioners averred that the suit property was registered in the name of the 1st to 5th Petitioners who were the directors of the 6th Petitioner to hold in trust for the members of the 6th Petitioner who had contributed money for the purchase of the property in 1966. The Petitioners averred that the suit property was registered in the names of the initial trustees of the 6th Petitioner on 8th April, 1970.

The Petitioners averred that in a decree that was issued 8th September, 1983 in Nairobi HCCC No. 1348 of 1972 which was a case involving the 6th Petitioner and its original trustees on the one hand and a company known as Dandora Housing Schemes Limited on the other hand, the court ordered that the suit property belonged to the Petitioners. The Petitioners averred that in 1974 while Nairobi HCCC No. 1348 of 1972 was pending in court, the 1st Respondent offered to purchase from the 6th Petitioner’s initial trustees a portion of the suit property measuring 275 acres at a consideration of Kshs.68,000/- which offer was rejected by the 6th Petitioner’s initial trustees.

The Petitioners averred that after the refusal by the 6th Petitioner’s initial trustees to accept the 1st Respondent’s offer as aforesaid, the 1st Respondent purported to acquire the suit property compulsorily. The Petitioner averred that through Gazette Notices published on 15th March, 1974, the 1st Respondent indicated that it intended to acquire the suit property for future urban development. The Petitioners averred that the said Gazette Notices were bad in law, defective and unconstitutional. The Petitioners averred that the provisions of Sections 3 and 6(2) of the Land Acquisition Act, Chapter 295 Laws of Kenya (now repealed) were not complied with by the 1st Respondent and as such the said Gazette Notices were ineffective to initiate the process of acquiring the suit property.

The Petitioners averred that the 1st Respondent did not conduct any inquiry involving the Petitioners to ascertain the amount of compensation that was to be given to the Petitioners for the property. The Petitioners averred that the 1st Respondent did not make any attempt to join Nairobi HCCC No. 1348 of 1972 or to notify the court that it intended to acquire the suit property. The Petitioners averred that the 1st Respondent purported to deposit in court a sum of Kshs.1,316,980/= as compensation for the suit property which was rejected by the court and returned to the 1st Respondent. The Petitioners averred that they were not paid any compensation for the suit property.

The Petitioners averred that the 1st Respondent proceeded to allocate huge parcels of land carved out of the suit property to private companies and individuals thereby negating any intention on the part of the 1st Respondent to acquire the suit property for public purposes. The petitioners contended that the 1st Respondent refused to grant them access to the documents at the Land Registry to enable them ascertain the particulars of the persons to whom the suit property had been allocated. The Petitioners averred that after the determination of

Nairobi HCCC No. 1348 of 1972, the 1st Respondent confirmed on several occasions that the suit property belonged to the Petitioners and that the purported acquisition of the property by the 1st Respondent was illegal, unprocedural and not intended for any public benefit. The Petitioners averred that they had successfully surveyed and retaken possession of portions of the suit property measuring 142 acres in total leaving out 676 acres which the 1st Respondent had refused to release to them or compensate them for. The Petitioners averred that the Respondents had failed and/or refused to revoke the allotments that the 1st Respondent had made to third parties in respect of the suit property and had continued with allocation of the property and issuance of new titles to such parties.

The Petitioners sought judgment against the Respondents for: -

1. A declaration that the Petitioners' fundamental right to protection against deprivation of private property had been infringed and violated by the Respondents purported acquisition of the suit property.
2. A declaration that the purported compulsory acquisition of the suit property through Gazette Notices Numbers 840 and 841 of 15th March, 1974 was unlawful, null and void *ab initio*.
3. An order that all subsequent dealings by the Respondents with the suit property save for those in favour of the Petitioners were null and void.
4. An order directing the Respondents to cancel all dealings with the suit property involving third parties and to remove the persons who are in occupation of the property within 30 days in default of which the Petitioners be at liberty to cause their removal at the Respondents' cost.
5. Damages for trespass and loss of use of the suit property from 1974 to date.
6. In the alternative and/or in addition to the reliefs sought above, compensation for 676 acres carved out of the suit property and allocated to third parties at Kshs.21 million per acre together with 20% thereof being damages for loss and disturbance making a total of Kshs.17,035,200,000/=.
7. Costs

On 31st October, 2011, the court ordered on application by the petitioners that the filing of the petition be advertised in the daily newspapers with national circulation inviting any party interested in joining the petition to do so within 14 days of the advertisement. The filing of the petition was advertised in the Daily Nation Newspaper on 28th November, 2011 and the Standard Newspaper on 30th November, 2011. The advertisement stated in part as follows:

“...any party or person interested in the said land or holding title therefrom is hereby invited to enjoin in the stated petition and to file their papers in court in the next 14 days from the date hereof.”

Following that advertisement, several persons joined the petition as interested parties. At the moment, there are twelve (12) interested parties in the petition. The Petition has been pending in court for the last eight (8) years. During the pendency of the petition, several cases have been filed in relation to the suit property most of which have been stayed or put in abeyance awaiting the hearing and determination of this petition. After a long wait of seven (7) years, this petition was ultimately listed for hearing for three (3) days namely, 23rd, 24th and 25th September, 2019. The hearing dates were fixed on 27th September, 2018, about a year ago. On 15th July, 2019, the 7th, 10th and 11th interested parties changed advocates and filed an application by way of Notice of Motion dated 10th July, 2019 seeking the following main orders: -

1. That the court be pleased to join the 7th, 10th and 11th interested parties as respondents to the petition.
2. That the 7th, 10th and 11th interested parties once joined as such be granted leave to file a response to the petition and a cross-petition.
3. That the draft response to the petition and cross-petition annexed to the application be deemed as properly filed.

It is this application which is the subject of this ruling. The 7th, 10th and 11th interested parties (hereinafter referred to only as “the applicants”) which are related companies joined this suit on 25th January, 2012 and filed a response to the petition through the affidavit and further affidavit sworn by J. S. Shah and Francis Kibiru Njenga on 8th October, 2012 and 21st February, 2013 respectively.

Basically, what the applicants are seeking is to change their status in these proceedings from interested parties to Respondents so that they may bring a counter-petition against the Petitioners and the Respondents in the petition. The applicants' application was opposed by the 2nd Respondent through grounds of opposition dated 4th September, 2019. The 2nd Respondent contended that the application should be dismissed on the following grounds: -

1. The Petitioners had not made any claim against the applicants to warrant their joinder in the petition as respondents.
2. The Petitioners' claim was for compensation for land acquired compulsorily by the Respondents and that the applicants have no mandate on compulsory acquisition of land or compensation for land compulsorily acquired.

3. That the applicants had sued the Petitioners and the Respondents in a civil suit namely ELC No. 39 of 2019, U-Haul Vehicle Ltd. v Kiambu Dandora Farmers Co. Ltd & 2 others which suit was pending and that the best cause of action for the applicants was to pursue their civil claim rather than bring a cross-petition which raises the same issues.

When the applicants' application came up for hearing on 17th September, 2019, the advocate for the applicants relied on the grounds on the face of the application and the affidavit filed in support thereof while the advocates for the 2nd Respondent relied on the grounds of opposition filed in opposition to the application and both left the matter to the court for determination.

I have considered the application and the grounds of opposition filed in support thereof. The following is my view on the matter. The Petitioners' petition was brought under Articles 22, 23, 165(3) and 40(1) and (3) of the Constitution. Article 22(1) of the Constitution provides that:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

Article 22 (3) provides that:

“The chief justice shall make rules providing for the court proceedings referred to in this Article...”

Through Legal Notice No. 117 of 2013 published on 28th June, 2013, the Chief Justice made rules pursuant to Articles 22(3) of the Constitution of Kenya namely, The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to only as “the rules”).

Rule 2 of the rules defines interested party as follows:

“ “interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

In the same rule, a respondent is defined as:

“ “respondent” means a person who is alleged to have denied violated or infringed, or threatened to deny, violated or infringe a right or fundamental freedom.”

I am in agreement with the 2nd Respondent that there is no basis for the joinder of the applicants as respondents in this petition. As rightly pointed out by the 2nd Respondent, this petition was brought by the Petitioners to enforce their rights and fundamental freedoms in the Bill of Rights which they claimed to have been violated or infringed by the Respondents.

Under rules 2 and 5(d) and (e) of the rules aforesaid, a person can only be joined in a petition of this nature either, where he is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom or where his presence before the court may be necessary in order to enable the court adjudicate upon and settle the petition. I am not satisfied that the applicants have met the threshold for joinder as a respondent in a petition. The Petitioners have not accused any of the applicants of violation or threatened violation of their rights or fundamental freedoms. The applicants have also not established that their presence before the court as respondents rather than as interested parties which they already are is necessary to enable the court to adjudicate upon the petition.

I have considered the draft cross-petition by the applicants. I am of the view that the issues raised therein are more of a private nature rather than violation of constitutional rights and fundamental freedoms. In any event, the mere fact that the applicants wish to bring a cross-petition is not a valid ground for them to be added to this petition as respondents. I am unable to see any relationship between the issues forming the basis of the Petitioners' petition and those raised in the draft cross-petition by the applicants. The fact that one of the applicants, U-Haul Vehicle Hire Limited has brought a civil suit against the Petitioners and the Respondents over the same issues raised in the draft cross-petition reinforces this court's view that the applicants' remedies if any for the claims raised in the draft cross-petition lie in a normal civil court.

Even if I am wrong in my findings above, I would still have refused the applicants' application for other reasons. First, as I have mentioned earlier, the applicants joined these proceedings on 25th January, 2012, more than 7 years ago. No good reason or explanation has been given by applicants as to why they waited for 7 years to bring the present application which if allowed would have the effect of interfering with the hearing of the petition which has been allocated three (3) consecutive days. Secondly, the application if allowed would highly prejudice litigants in the other cases which have been put in abeyance pending the determination of this petition.

For the foregoing reasons, the applicant's application dated 10th July, 2019 is not for granting. The application is dismissed with costs to the 2nd Respondent.

Delivered and Dated at Nairobi this 23rd day of September 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Namada for the Petitioners

Ms. Fatma for the 1st Respondent

Mr. Murunga h/b for Mr. Mbuthia for the 2nd Respondent

Ms. Gichuru h/b for Mr. Macharia for the 1st Interested Party

Mr. Ochieng for the 5th Interested Party

Mr. Wakwaya for the 7th , 10th and 11th Interested Parties

Ms. Matasi for the 8th Interested party

Mr. Omuga for the 9th Interested Party

Mr. Oange for the 12th Interested Party

C. Nyokabi-Court Assistant