



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. PETITION NO. 470 OF 2017

MWANGANGI MAKAU.....1ST PETITIONER

ZAKAYA KIMILI BEKE.....2ND PETITIONER

FRANCIS MUTISO MULATYA.....3RD PETITIONER

KENYA HUMAN RIGHTS COMMISSION.....4TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF KITUI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JULIUS MUMO THOMAS.....3RD RESPONDENT

JONATHAN MANTHI THOMAS.....4TH RESPONDENT

RULING

1. In the Notice of Motion dated 6th February, 2019, the Petitioners are seeking for the following orders:

- a. That this Honourable Court be pleased to set aside/vary the orders made on 31st January, 2019 dismissing the Petitioners' Petition.*
- b. That subsequently, the Petitioners'/Applicants' Petition dated 6th October, 2015 be reinstated.*
- c. That further to (1) and (2) above, this court be pleased to enjoin the National Land Commission as an Interested Party to these proceedings.*
- d. That further to (3) above this court be pleased to direct the National Land Commission to investigate the grievances of historical injustices disclosed in the Petition and file its findings in court.*
- e. That this court be pleased to stay these proceedings pending findings of the National Land Commission*
- f. That the costs of this Application be in the cause.*

2. The Application is supported by the Affidavit of the Petitioners' advocate who has deponed that he filed the current Petition in the High Court at Kitui seeking a declaration that the suit property is community land; that in the year 2016, the National Assembly enacted the Community Land Act giving effect to Article 63(5) of the Constitution and that the National Assembly also enacted the Land Laws (*Amendment Act*) which delegated the entire Section 15 of the National Land Commission Act by giving the Commission the mandate to address historical land injustices.

3. According to the Petitioners' counsel, following the amendment to the Land Act, he was instructed by the Petitioners to lodge a claim at the National Land Commission, which he did on 29th June, 2018; that the Commission has never responded to the letter and that when the

matter came up for directions, he asked an advocate to hold his brief and take a further date.

4. The Petitioners' counsel deponed that the order of 31st January, 2019 dismissing the Petition should be set aside and the Petition be heard on merit and that the Application to reinstate the suit has been made without any delay.

5. In reply, the 1st Respondent's advocate deponed that the Petition was filed on 6th October, 2015; that the 1st Respondent filed Grounds of Opposition in response to the Petition on 7th October, 2015 and that on 8th April, 2018, the court gave directions that the Petition be canvassed by way of written submissions.

6. The 1st Respondent's counsel submitted that the Petitioner was directed to file submissions within fourteen (14) days from 15th October, 2018; that the matter was further mentioned on three different days to confirm compliance and that since the Petitioners prefer to have their issues dealt with by the National Land Commission, then they should pursue their interests before the Commission.

7. The 1st Respondent's advocate finally deponed that the adjudication process in respect of the suit land has already been completed and that no reason has been given to warrant the reinstatement of the dismissed Petition.

8. The 3rd and 4th Respondents filed Grounds of Opposition in which it was averred that the subject land has already been adjudicated to the rightful owners and that there are no constitutional issues to be dealt with by the court.

9. The Petitioners' advocate submitted that the reinstatement of a suit is a discretionary relief; that the test is whether a suit was dismissed because of a prolonged and inexcusable mistake; that the Applicants have explained why a reinstatement is necessary and that there have been legal developments that made it difficult to proceed with quick disposal of the Petition.

10. Counsel submitted that the main reason for non-attendance of court was occasioned by a lapse on the part of an advocate that was asked to hold his brief and that the said mistake is excusable.

11. The Petitioners' counsel finally submitted that the Petitioners have lodged a claim for historical injustices with the National Land Commission and that the Petitioners have not been indolent in this matter.

12. The 1st, 3rd and 4th Respondents' advocate submitted that the Petitioners have not denied that they were aware of the orders that were given by the court; that the Petitioners have not offered an explanation as to why they never prosecuted the Petition and that the National Land Commission cannot be blamed for the delay in the prosecution of the Petition because the Commission is not a party to the Petition.

13. The Petition herein dated 6th October, 2015 was filed on 6th October, 2015. When the Petition came up for directions on 11th July, 2016, the court directed the Respondents to file their responses to the Petition within fourteen (14) days. The Petition was then mentioned on 18th July, 2017 and 27th July, 2017. On 6th February, 2018, the court gave the following directions in the presence of the Petitioners' advocate:

“The Petition to proceed by way of written submissions. The Petitioners to file and serve submissions within fourteen (14) days and the Respondents to file theirs within fourteen (14) days of the date of service. Highlighting of submissions to be on 28th June, 2018; Hearing Notice to issue.”

14. The matter was not mentioned on 28th June, 2018 as scheduled. However, the Petitioners' advocate fixed the matter for mention on 15th October, 2018. On the said date, neither the Petitioners nor their advocates were in court. The court accommodated the Petitioners by fixing the matter for mention on 12th November, 2018.

15. When the matter was mentioned on 12th November, 2018, the Petitioners' advocate was, once again, not in court. The court directed that the matter be mentioned on 31st January, 2019. Although the Petitioners' advocate was served with a mention notice for 31st January, 2019, the Petitioners' advocate was again absent in court, whereafter the court dismissed the Petition for want of prosecution.

16. The record shows that since 18th April, 2018, when the court directed the Petitioners' advocate to prosecute the Petition by filing submissions within fourteen (14) days, the Petitioners' advocate neither filed the said submissions nor appeared in court on the subsequent dates.

17. According to the Petitioners' advocate, one of the reasons that made him not prosecute the Petition is because the Community Land Act and the Land Laws (Amendment) Act, 2016 were enacted. According to counsel, the enactment of the two statutes in the year 2016 meant that the National Land Commission could resolve the issue of historical injustice pertaining to the suit land. The Petitioners' advocate annexed on his Affidavit a letter dated 29th June, 2018 addressed to the National Land Commission. In the said letter, the Petitioners' counsel informed the Commission that although the Petitioners had filed Machakos ELC. No. 470 of 2017, they believed that *“this dispute is not capable of being resolved through court process in view of historic-political aspects.”*

18. The letter by the Petitioners' advocate clearly shows that after reporting the issue of the dispute to the Commission, the Petitioners lost interest in the Petition. That being the case, the court was entitled to dismiss the Petition for want of prosecution. Indeed, the fact that the Petitioners were willing to resolve the dispute by filing a complaint with the Commission cannot be a reason to keep the Petition pending in the registry indefinitely.

19. In any event, it is not legally correct, as argued by the Petitioners' advocate, that it is the National Land Commission that has the

exclusive jurisdiction to deal with the issue of historical land injustice. This court, just like the Commission, has the statutory and constitutional mandate to delve into the issue of historical land injustice and make an appropriate decision thereof. In the case of **Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others (2018) eKLR**, the Court of Appeal held as follows:

“On the question whether a court should await investigations and recommendations by the National Land Commission before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the National Land Commission is seized on the matter. Our conviction stems from our reading of Article 67 (2) (e) of the Constitution... Further, there is nothing in the 2010 Constitution or in the National Land Commission Act ousting the jurisdiction of the High Court or barring a person from presenting a Petition before a court in relation to a claim founded on historical injustice.”

20. The above decision was adopted with approval by the Court of Appeal in the case of **Safepak Limited vs. Henry Wambega & 11 others (2019) eKLR**. That being the case, the mere fact that the Petitioners had referred the dispute between themselves and the Respondents in respect to the suit land to the National Land Commission cannot be a reason for the delay in prosecuting the Petition. Indeed, no plausible reason has been given why the Petitioners never complied with the directions of this court of 18th April, 2018.

21. In the circumstances, I decline to reinstate the Petition. The Application dated 6th February, 2019 is dismissed with costs. For avoidance of doubt, the Petition dated 6th October, 2015 stands dismissed with costs as ordered on 31st January, 2019.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE