



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

PETITION No. 22 OF 2018

ISAAC RUTOH.....1ST PETITIONER

JACKSON K.TANGUS.....2ND PETITIONER

DAVID K.ROTICH.....3RD PETITIONER

VERSUS

NAFTALI K.KIPKORIR ASSISTANT COUNTY

COMMISSIONER ELBURGON DIVISION.....1ST RESPONDENT

SIMON WAIGANJO FORESTER MARIASHONI FOREST STATION....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

SOLOMON TIEMOSI.....4TH RESPONDENT

PHARIS K. NGIRIA.....5TH RESPONDENT

PAUL K. KEMOI.....6TH RESPONDENT

OMUCH SELF HELP GROUP.....7TH RESPONDENT

JUDGMENT

1. By petition dated 8th October 2018, the petitioners herein averred that they are adults residing and working for gain at Mariashoni within Nakuru County. They added that the inhabitants of Mariashoni Trading Centre are members of Ogiek community, a hunter gatherer community and that the trees growing at Mariashoni Trading Centre do not belong to individuals or groups of individuals but to the community that resides around the area. They further averred that the Assistant County Commissioner Elburgon Division (the 1st respondent herein) does not have authority to have the trees felled, transported and disposed of without the participation of the community and that the felling, transportation and disposal of trees at the trading centre was in contravention of the countrywide ban on felling of trees and was in violation of Article 69 of the Constitution.

2. The petitioners therefore prayed for judgment against the respondents for:

1) THAT pending the hearing and determination of this petition inter partes this Honourable Court be pleased to restrain the 1st and 2nd Respondents by themselves, agents, servants, employees and/or others howsoever from cutting, ferrying, disposing off or in any manner interfering with the cypress trees on Land Parcel No. 09457/Mariashoni/Nakuru and on the community land being Mariashoni Trading Centre.

2) THAT this Honourable Court be pleased to order the 2nd Respondent to avail the report of the Cypress trees that had been felled/transported/disposed off from Land Parcel No.09457/Mariashoni/Nakuru and on the community land being Mariashoni Trading Centre between the month of April 2018 to September 2018 and inter-alia whether forest permit to cut/transport/dispose off the trees was issued and if it was issued the procedure followed to issues of the forest permit and who gained from the proceeds of

the subject trees that were disposed off (sic).

3) *THAT the costs of this petition be provided for.*

3. As is manifest, the petition having been heard and now being determined by this judgment, prayer (1) of the petition is overtaken by events.

4. The petition is supported by an affidavit sworn by the 1st petitioner. Although the Attorney General entered appearance for the 1st to 3rd respondents, no response to the petition was filed by the said respondents despite seeking and being granted time to do so. Upon their own application, the 4th to 7th respondents were allowed to join the proceedings. The said 4th to 7th respondents responded to the petition through a replying affidavit sworn by the 4th respondent. The petitioners also filed a further affidavit sworn by the 1st petitioner.

5. It was deposed in the affidavit in support of the petition that a parcel of land known as Land Parcel No. 09457/Mariashoni/Nakuru was allocated to one Grace Mureno (deceased). A copy of an Allotment Card was annexed. The deponent further stated that in the months of April and September 2018 the 1st respondent through police officers from Elburon Police Station in the company of their agents using a police vehicle registration number GKA 877X, a canter motor vehicle registration number KAZ 987G and a tractor registration number KAT 408N moved into Land Parcel No. 09457/Mariashoni/Nakuru at Mariashoni Trading Centre and cut down cypress trees. Photographs allegedly depicting loading process were annexed. He added that the trees were felled at a time when there was an existence a government *caveat* banning logging of trees nationwide and that the felling took place at a public land to the detriment of the local residents.

6. The deponent also stated that despite deliberations at the office of the Elburgon Division Officer (D.O) and the D.O's order that the status quo to be maintained, the 1st respondent has ordered for the trees to be cut and for the logs to be transported to some two saw mills in Elburgon to be cut into timber. He added that the community living in and around Mariashoni is entitled to the said trees and that the actions of the 1st respondent in cohort with the 2nd respondent who is the forest officer is detrimental to the community. He also stated that the issue of felling trees on land parcel No. 09457/Mariashoni/Nakuru led the 2nd petitioner herein to file **Molo CM ELC No. 51 of 2018** but the felling continues nevertheless. He therefore urged the court to grant the orders sought in the petition.

7. The 4th respondent deposed in his replying affidavit that he is the chairman of the 7th respondent and that the 5th and 6th respondents are also officials of the 7th respondent, a self-help group registered with the Department of Social Development under the Ministry of East African Community, Labour and Social Protection. He added that through letter dated 8th February 2003 addressed to the Chief Mariashoni Location, the 7th respondent 7th respondent sought and was granted permission to carry out their activities including planting cypress trees and maintaining them on a 10 acre public utility land at Mariashoni Trading Centre. He further stated that cypress trees which they planted on the 10 acre public utility land at Mariashoni Trading Centre are mature and due for harvesting and that on 2nd July 2018 the Chief Mariashoni Location wrote to the Kenya Forest Service confirming that the 7th respondent is the owner of the trees. Further, that on 4th July 2018, the petitioners wrote to the Kenya Forest Service requesting that the 7th respondent not be issued with a permit to harvest trees in the suit property and that meetings were held on 9th July 2018 and on 16th July 2018 between members of the 7th respondent and Mariashoni Youth with a view to resolving the dispute. That on 19th July 2018, the petitioners wrote a letter through their advocates requesting the Kenya Forest Service not to issue any permit for harvesting the trees to the 7th respondent and that on 24th July 2018 the 7th respondent wrote to the Chief Conservator of Forests seeking a permit to harvest the trees

8. The 4th respondent further stated that there is another case pending before Molo Court in regard to land parcel No. 09457/Mariashoni/Nakuru being **Molo CM ELC No. 51 of 2018** and that land parcel No. 09457/Mariashoni/Nakuru is located at Ndoswa Location, Kapchola Sub-location while the public utility land is located at Mariashoni Location, Mariashoni Sub-location.

9. The petition was canvassed through written submissions. The petitioners and the 4th to 7th respondents filed submissions while the 1st to 3rd respondents did not file any.

10. The petitioners Argued in their submissions that the 1st to 3rd respondents did not have any authority to allow the 4th to 7th respondents to harvest the trees. Accordingly, the petitioners urged the court to compel the respondents to declare any financial gain attained from the felling. The petitioners attached a copy of a voluminous document titled "Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex" to their submissions. Needless to state, such document could only be validly introduced as an annexure to an affidavit.

11. In their submissions the 4th to 7th respondents generally reiterated to contents of their replying affidavit. They added that they have no claim of ownership over the community land save for the right to harvest the trees which they planted. Citing **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, they argued that the petition herein is not a valid petition since it does not identify any constitutional or statutory provision which has been breached. They further argued that the petition herein is an abuse of the court's process owing to the existence of **Molo CM ELC No. 51 of 2018**.

12. I have carefully considered the petition, the affidavits filed as well as the submissions. The issues that arise for determination are firstly, whether the petition herein is a valid constitutional petition and lastly whether the petitioners are entitled to the reliefs sought.

13. There is no dispute that there exists another case being **Molo CM ELC No. 51 of 2018**. Copies of the pleadings in the case were annexed by the 4th to 7th respondents. Upon perusal of the plaint in the said case, I note that although none of the parties to this petition are parties to the said case, the same law firm of R.M. Onyancha & Company is on record for the petitioners herein and for the plaintiff in **Molo CM ELC No. 51 of 2018**. The relief sought in the plaint is a permanent injunction restraining the defendants from felling, transporting, cutting into timber, selling or disposing trees on land parcel No. 09457/Mariashoni Nakuru. On the other hand, the relief sought in this petition is that the

2nd Respondent be ordered to avail a report in respect of the Cypress trees that had been felled/transported/disposed of from Land Parcel No.09457/Mariashoni/Nakuru and on the community land being Mariashoni Trading Centre between the month of April 2018 to September 2018 and inter-alia whether forest permit to cut/transport/dispose of the trees was issued and if it was issued the procedure followed to issues of the forest permit and who gained from the proceeds of the subject trees that were disposed of. It is thus apparent that the reliefs sought in both matters are closely related. The petitioners herein, who are represented by the same advocates who are acting for the plaintiff in **Molo CM ELC No. 51 of 2018**, ought to have made their intervention in the said matter instead of bringing fresh proceedings in this court.

14. It is a cardinal requirement that constitutional petitions be pleaded with accuracy. The Court of Appeal reiterated as much in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** when it stated thus:

.... Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

15. A reading of the petition herein shows that there is only a passing mention of Article 69 of the constitution. There is no indication of the manner in which the said article has been breached or is threatened with breach. Even the relief sought leaves one more confused since all that is sought is a report on the trees felled and whether a permit had been granted for the felling. These are all issues that could and ought to have been resolved through an ordinary suit such as **Molo CM ELC No. 51 of 2018**. In the circumstances I am satisfied that this petition is not a valid constitutional petition.

16. Owing to the lack of clarity and particularity on the petition, I am not persuaded that the petitioners are entitled to the reliefs sought. I must however emphasise that if there is to be any harvesting of the subject trees, that has to be done strictly in compliance with the law and only after obtaining the appropriate permits. No such permit has been exhibited by any of the parties herein.

17. In the end, the petition herein is dismissed. Considering the public interest nature of litigation concerning the right to a clean and healthy environment, I order that each party bears own costs.

Dated, signed and delivered in open court at Nakuru this 20th day of November 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the petitioners

No appearance for the 1st, 2nd and 3rd respondents

No appearance for the 4th, 5th, 6th and 7th respondents

Court Assistants: Beatrice & Lotkomoi