



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

CONSTITUTIONAL PETITION NO. 05 OF 2019

IN THE MATTER OF ARTICLES 10, 20, 21 (1), 40 (1), 40 (3), 40 (4), 47, 50, 60, 64, 67, 232 (1), 232 (2), OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

-AND-

IN THE MATTER OF SECTION 14 AND 15 (2) (d) & (3) (e) OF THE NATIONAL LAND COMMISSION ACT, 2012

-AND-

IN THE MATTER OF SECTIONS 27 (a) AND 28 (a) OF THE REGISTERED LAND ACT

-AND-

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

OLOOLOLO GAME RANCH LTD.....PETITIONER

-VERSUS-

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

IKAREKESHE GROUP TRUST.....2ND RESPONDENT

THE ATTORNEY GENERAL OF KENYA.....3RD RESPONDENT

-AND-

THE CHIEF LAND REGISTRAR.....1ST INTERESTED PARTY

THE MINISTRY OF LANDS.....2ND INTERESTED PARTY

THE DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....3RD INTERESTED PARTY

RULING

The Petitioner herein had filed a Petition dated 4th March, 2019 against the Respondent seeking for the following orders: -

1. That the application be certified as urgent and service thereof be dispensed within the first instance.
2. That pending the hearing and determination of the application interparties orders do issue staying the decision of the 1st

Respondent contained in the Kenya Gazette dated 1st March, 2019 or any other subsequent notice that may be issued by the 1st Respondent relating to the suit property.

3. That pending the hearing and determination of this Application interparties conservatory orders do issue and be directed at the 1st Respondent the 1st, 2nd and 3rd Interested parties, their agents or anyone authorized by them respectively or acting under them- to stay the implementation of the 1st Respondent's decision contained in the Kenya Gazette notice dated 1st March, 2019 or any other subsequent notice that may be issued by the 1st Respondent relating to the suit property.

4. That pending the hearing and determination of this application interparties orders do issue and be directed at the 1st Respondent prohibiting it, its agents or anyone authorized by it or acting under it from issuing any subsequent notice/s in relation to the suit property.

5. That pending the hearing and determination of this Application interparties orders do issue and be directed at the 2nd Respondent prohibiting it, its agents or anyone authorized by it or acting under it from lodging, publishing or in any way commenting on the Petitioner's ownership of title in relation to the suit property.

6. That pending the hearing and determination of the petition orders do issue staying the decision of the 1st Respondent contained in the Kenya Gazette Notice dated 1st March, 2019 or any other subsequent notice that may be issued by the 1st Respondent relating to the suit property.

7. That pending the hearing and determination of the petition conservatory orders do issue and be directed at the 1st Respondent, the 1st, 2nd and 3rd interested parties, their agents or anyone authorized by them respectively or acting under them-to stay the implementation of the 1st Respondent's decision contained in the Kenya Gazette Notice dated 1st March, 2019 or any other subsequent notice that may be issued by the 1st Respondent relating to the suit property.

8. That pending the hearing and determination of the petition orders do issue and be directed at the 1st Respondent prohibiting it, its agents or anyone authorized by it or acting under if from issuing any subsequent notice/s in relation to the suit property.

9. That pending the hearing and determination of the petition orders do issue and be directed at the 2nd Respondent prohibiting it, its agents or anyone authorized by it or acting under it from lodging, publishing or in any way commenting on the petitioner's ownership of title in relation to the suit property.

10. Any such further relief be granted to the Applicant as the court deems fit.

11. Costs of this application be provided for.

The 2nd Respondent responded opposing the said petition through a cross petition filed on the 24th April, 2019 in which it sought for various orders and the same filed together with the cross petition, the 2nd Respondent had filed an application seeking various orders thus:-

1. Spent

2. Spent

3. That the Honourable court be pleased to certify that the petition raises substantial questions of law and consequently the same be referred to the Chief Justice for directions including empanelling a three judge bench.

4. Spent

5. Spent

6. Spent

7. That Ms Kemboy Law and Julius K. Kemboy be disqualified for acting for the petitioners herein and that the documents filed by themselves be expunged from the court records

8. That the costs of the Application be provided for

The 2nd Respondent in his submissions filed in court on 11/12/19 framed two issues for determination that is:-

(i) Whether the matter raises substantial issues of law to have the petition placed before the Chief Justice to constitute a bench of 3 judges

(ii) Whether Ms Kemboy law and Mr Julius K. Kemboy advocate be disqualified for acting for the petitioner and all documents filed by the said law firm and advocate be expunged from the court record.

It is the 2nd Respondents contention that the Petition as drawn raises substantial issues of law as the Petition challenges the Jurisdiction of the National Land Commission on the issues of title and ownership of the property in question was dealt with by court of competent and concurrent Jurisdiction and whether the National land commission should look into the issues of historical injustices. The 2nd respondent further contended that the suits previously filed in respect of the suit property were not properly determined as the same were dismissed without going through the full merits of the cases and that the current claim under the cross petition is one based on historical land injustice and not on proprietorship as was the case in the previous suits.

The instant Petition raises substantial questions of law to warrant the empanelment of a bench of an even number of Judges as provided for under Article 165(4) of the constitution of Kenya and further that in the event that the said bench is constituted then the petitioner shall not suffer any prejudice and it shall serve the interest of justice to do so.

On whether the law firm of Ms Kemboy law and Julius K. Kemboy be disqualified from acting for the Petitioner, it is the 2nd Respondents contention that Mr Julius K. Kemboy was their previous counsel and they shared with him certain privileged information relating to this matter in that he acted for Ms Abercombie and Kent in Nairobi HCCC No. 3457 of 1995 and for the reasons aforesaid the firm of Ms Kemboy law and Ms Julius K. Kemboy is conflicted as such he should be disqualified for acting for the petitioner.

The Application by the 2nd Respondent aforesaid was supported by the Affidavit of Ratik Paul Ole Kuyana who is the secretary of the 2nd Respondent in which he averred that the representation by Mr Julius Kemboy advocate and/or Ms Kemboy Law will be prejudicial to them as he obtained very crucial information when he represented Abercombie and Kent.

The Petitioner had opposed the Notice of Motion and more particularly the grant of prayers 2 and 3 of the Notice of Motion as all the others were already spent and in opposing the same the petitioners had also framed the same issues as that of the 2nd Defendant for determination by the court and on the issue of whether Kemboy Law and/or Julius Kemboy Advocate ought to be disqualified from conduct of the matter on behalf of the petitioner and all documents filed by the said law firm is expunged from the record Julius Kemboy advocate has filed an Affidavit in support of his motion to the grant of the aforesaid orders and in response to the same he averred that he was only instructed in HCCC 3457 of 1995 after Judgement in the matter was delivered and did not participate in the actual trial and that his engagement was not to challenge the judgement but to negotiate the party and costs between Abercombie and Kent and Oloololo game Ranch. Mr Julius Kemboy further stated that during the period in question he did not meet or discuss the said instructions by Abercombie and Kent Limited with any member of Ikarekeshe Group.

To buttress his averments Mr Julius Kemboy had annexed to the 2nd Affidavit a letter dated 30/4/19 from Abercombie and Kent Ltd which he supported his averments contained in paragraph 3 of his affidavit.

During the hearing of the application, the parties had filed their respective submissions in support and in opposing the divergent position. According to the 2nd Respondent the petitioner had received various substantial questions of law to warrant the empanelment of a bench of an even numbers of Judges and thus the file ought to be referred to the Chief Justice to constitute the Bench accordingly. To the 2nd Respondent the petition is weighty as it contemplates the determination of complex questions of law concerning the interpretation of Section 15(2) of the National Land Commission Act in respect of addressing historical Land injustices.

It is the 2nd Respondent's contention that under section 15 of the National Land Commission Act a party may bring claims on grounds of historical law injustices if one was barred from doing so before the coming into force of the Act and that the 2nd Respondent wishes to ventilate their case on merit to ascertain the legitimate proportions of the land in question and the same warrants the empanelment of a bench of uneven number of judges as contemplated under Article 165 (4) of the Constitution of Kenya.

The Petitioner in its submission argues that the Petition raises straight forward issues in that the petition challenges the 1st Respondent's decision to revoke the petitioner's title to the suit land and therefore the 2nd respondent does not meet the threshold for the Petition to be referred to the Chief Justice to constitute a bench of three or more judges to hear the petition.

On whether the law firm of Kemboy law and/or Julius Kemboy is conflicted and be disqualified from acting for the petitioner and all documents filed by the said law firm expunged from the record, the 2nd Respondent contends the said law firm had released confidential information that relates to the suit land previously and therefore there exists a conflict of interest as the said information was released and the same obtained from the members of the 2nd Respondent which information he could use against the 2nd Respondent in the instant petition.

The Petitioner in its submission terms the issue of conflict of interest as relates to being represented by Ms Kemboy Law on feeble and without basis as it is not alleged by the 2nd Respondent that Mr Julius Kemboy Advocate and by extension the aforesaid law firm acted for it previously and that the association of Mr Julius Kemboy Advocate to a third party does not create any conflict of interest. The Petitioner further states that an application to bar an advocate from acting for a party ought not to be taken lightly as any adverse decision on the same strikes at the constitutional right of an individual or party to be represented by an Advocate of his own choice and that the 2nd Respondent's attempts to bar the law firm and the advocate as mere assertions and no exceptional circumstances has been demonstrated by the 2nd Respondent.

I have considered the application before me and the submissions made by counsel and the issues for determination before me are twofold.

1. Whether the Petition reuses substantial questions of law to have the same referred to the Chief Justice to empanel a bench of an even number of Judges to hear and determine the petition herein.
2. Whether Ms Kemboy Law and Julius Kemboy law should be disqualified from representing the petition and if so whether all documents filed by them should be expunged from the court records.

In determining the issue, I wish to point out that any single judge of the Environment and Land Court under Article 165 of the constitution professional capability, the requisite jurisdiction and constitutional authority and power to handle a Constitution Petition before his or her court and therefore the decision on whether to certify a matter as raising a substantial questions of law is a question of judicial discretion to be exercised by an individual judge and not one of matter of right and the exercise of judicial discretion must be absolutely necessary and in conformity with both constitutional and statutory provisions and in exercising discretion judicially the same must not be granted at the whims of parties.

In the instant petition, the 2nd respondent has stated that the petition before the court raises substantial questions of law in so far as the 2nd respondent and not as the petitioner wishes the court to address and a determination made on the provisions of section 15 of the National Land Commission Act. What constitutes substantial issues of law is not defined by the constitution of Kenya or any statute and the same can only be gleaned from the facts and the circumstances of each case and each case must be considered in its own merit.

The 2nd respondent contends that since the suit land encompasses community land and the issues involved amounts to historical injustice which was investigated by the National Land commission then the same constitutes what amounts to substantial question of law. The petitioner on its part states that the petition raises an issue that is straight forward as it challenges the decision of the National Land Commission which is the 1st Respondent to cancel its title.

I have considered the submissions made by counsel and having looked at both the petition and cross-petition I find that the petition is about cancelling of title which in my opinion does not involve such substantial question of law that is worthy of placing the file before the Chief Justice for constituting a bench of three judges.

In the case of **HAMSA KINYANJUI –VERSUS- ATTORNEY GENERAL AND ANO (2012)EKLK MAJANJA J** stated as follows in defining what constitutes substantial quest of law on giving meaning to what amount is meant to take into account the provisions of the constitution and the need to dispense justice and that there must be somethings more complex to the substantial question.

In the instant petition I find nothing more to warrant to constitute a substantial question of law other than to challenge the petition posed to question the 1st Respondent's actions and in the circumstances and in view of the foregoing I find that the petition does not warrant the substantial quest of law if placed before the Chief Justice to institute a bench of three judge bench to hear it.

On whether the law firm of Ms Kemboy Law is to be disqualified from representing the petitioners it is the petitioner's contention that Mr Julius Kemboy advocate had obtained confidential information that may be prejudicial. Mr Kemboy on his part asserted that he has never acted for the 2nd Respondent but had been instructed by Abercombie and Kent Ltd to negotiate party to party costs after judgement was delivered in HCCC No. 3459 of 1995.

It is a fundamental principle of the constitution every individual or party is entitled to be represented by an advocate of his own choice subject and limited to where no conflict is shown. In the instant petition the 2nd respondent contends that the said conflict arose out of the firm of Ms Kemboy law acting for Abercombie and Kent Limited. However, the 2nd respondent does not provide and particularize the relationship that existed between the 2nd Respondent and the Abercombie and Kent Limited nor does they precisely state in clear terms what was the grounds for the conflict to arise, they have not stated whether they were present in meeting Julius Kemboy, received instructions, conducted trial and concluded the same and earned his fee themselves. Mere generalities on conflicts of advocate can be grounds to seek for his disqualification. The 2nd Respondent has not controverted the affidavit sworn by Julius Kemboy advocates in which he stated what was his professional relationship with Abercombie and Kent Limited.

Further to the above Ms Abercombie and Kent Limited had by a letter dated 30th April, 2019 stated that they have no relationship with the 2nd Respondent and that they did not give any information to Kemboy Law Firm. The 2nd Respondent has not challenged the contents of the said letter or even call its authors for cross examination and I therefore find that the 2nd Respondent has not established the necessary grounds to warrant the disqualification of Kemboy Law Firm acting in the matter.

The upshot of my finding on the two issues for determination is that the Notice of Motion is not merited as no grounds have been mounted to either refer the matter to Chief Justice to constitute a bench of 3 judges to hear the matter or to warrant the disqualification of the petitioners advocates and I therefore dismiss the application with costs.

DATED, SIGNED and DELIVERED in open court at NAROK on this 18TH day of DECEMBER, 2019

Mohammed Kullow

Judge

18/12/19

in the presence of:

CA:Chuma/Kimiriny

Mr Kere for the petitioners

N/A for the respondents

Mr Kilele with Mr Gordon Ogolla for the 2nd respondent

Mohammed Kullow

Judge

18/12/19