



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**PET. NO. 66 OF 2018**

**KALYASOI FARMERS'**

**CO-OPERATIVE SOCIETY LTD.....PETITIONER**

**-VERSUS-**

**ILGINA CONTRACTORS LTD.....1<sup>ST</sup> RESPONDENT**

**LIVINGSTONE KUNINI OLE NTUTU.....2<sup>ND</sup> RESPONDENT**

**AGNES WARROPIL NTUTU.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

By a Petition dated 19<sup>th</sup> December, 2016 the Petitioner herein sought various declaratory orders which may be combined as the infringement of his fundamental right to own property. However, before the said Petition could be heard, the 1<sup>st</sup> Respondent raised and issued a Notice of Preliminary Objection on points of law to the effect that:-

1. One William Kettienya lacks the capacity to sue on behalf of the Petitioner Kalyasoi Farmers Co-operative Society Limited in the absence of authority to plead as provided under order 1 Rule 13 of the Civil Procedure Rules 2010.
2. The reliefs sought by the Petitioner cannot be legally pleaded in a Petition as the matter raised are matters which are civil in nature.
3. The Petition before the court is incompetent, misconceived and an abuse of the court process.

With the filing of the Notice of Preliminary Objection it was obvious the court had to make a determination on its disposal and as a result it was directed that the parties do file submissions to dispose of the same.

It is the Respondents contention that the infringement and subsequent enforcement to the breach of a fundamental right by way of a Petition is only open to a private individual as against the state and therefore the Petitioner has a right to commence and enforce the breach of fundamental right as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are private individuals.

The Respondent further argues that the Petitioner's claim is a private right that can be pursued in a civil action by way of a plaint and as such the petitioner should have filed a plaint which would offer the Respondent the chance to test the veracity of the Petitioner's allegations in cross-examination.

The Respondents further contended that the Petition that is before the court is an abuse of the court process and that the Petitioner has concealed material facts to wit the existence of a civil suit being No. 664 of 2005 between the parties.

In view of the above, it is the Petitioner's prayers that the petition be struck out and direct the Petitioner to file a civil claim to ventilate their case.

In opposing the Preliminary Objection, the Petitioner filed submissions and averred that one William Ketteinya is clothed with the capacity to sue on behalf of the Petitioner as he is a member of the Petitioner which is a Cooperative Society and further that by the dint of the Provisions of Article 22 of the Constitution of Kenya 2010 any individual has a right to commence a Constitutional Petition where there is a breach of fundamental right and hence William Ketteinya has sufficient interest to institute the present petition.

On whether the Petition raises Constitutional issues, the Petitioner contends that there are specific violations which have been pleaded to the extent that the Petitioner's title to the Land Parcel **No. LR CIS MARA/OLOLOLUNGA/10463** was cancelled which was alleged to be forest land and that the said cancellations were done without notice and the Petitioner being offered the opportunity to be heard.

The Respondents had by a Notice of Motion dated 16<sup>th</sup> February, 2017 filed a Preliminary Objection on points of law to the Petition in which they contended that William Keitany lacks the capacity to sue on behalf of the petitioners and that the relief sought in the Petition could ordinarily be pleaded in a civil suit.

I have read the Preliminary objection and the submissions filed by the parties and what constitutes the Preliminary Objection has already been determined in the case of **MUKISA BISCUITS LTD-VERSUS-WESTEND DISTRIBUTORS(1969)EA** where the court held that a Preliminary objection should be on pure points of law that if argued could conclusively determine the issues and the matter before court. In the instant matter the Respondents have confirmed that if the petition is heard the remedies sought cannot be granted any further.

Having considered the Preliminary Objection as filed I find that the same does not meet the requisite condition to qualify on pecuniary points of law and I therefore dismiss the said Preliminary Objection and accordingly direct that the petition be heard on merit as it raises constitutional issues.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 16<sup>th</sup> day of December, 2019**

**Mohammed Kullow**

**Judge**

**16/12/19**

In the presence of:

CA:Chuma/Kimiriny

Mr Langat holding brief for the petitioner

N/A for the respondents

**Mohammed Kullow**

**Judge**

**16/12/19**