



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC PETITION CASE NO. 17 OF 2017

(Formerly Kisii ELC Case no. 57 of 2017)

DOMINIC PHELIX OTIENO).....1ST PETITIONER
MAXWELL ANGAYA NYALWANDA.....2ND PETITIONER
CHRISTOPHER GUMBA HONGO.....3RD PETITIONER
MARY AOKO ORINDA.....4TH PETITIONER

VERSUS

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT

OFFICER MIGORI /NYATIKE DISTRICTS.....1ST RESPONDENT
THE DIRECTOR OF LAND ADJUDICATION.....2ND RESPONDENT
DIRECTOR OF SURVEY.....3RD RESPONDENT
THE CHIEF LAND REGISTRAR.....4TH RESPONDENT
MIGORI COUNTY GOVERNMENT.....5TH RESPONDENT
THE NATIONAL LAND COMMISSION.....6TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....7TH RESPONDENT
PATRICK OTIENO.....8TH RESPONDENT
ALICE KASERA.....9TH RESPONDENT

RULING

1. On 4th November 2019, Mr. David Adawo, learned counsel for the petitioners namely Domnic Phelix Otieno, Maxwell Angaya Nyalwanda, Christopher Gumba Hongo and Mary Aoko Orinda orally made an application for leave that:-

a) Mary Aoko Orinda (PW1) be stood down

b) The petitioners' counsel be allowed to file and serve a letter dated 4th November 2015 addressed to the National Land Commission (NLC) for possible admission as an exhibit for the petitioners.

2. The application rests on the grounds as follows:-

a) That the letter dated 4th November 2015 (the letter to National Land Commission (NLC) was in the file of the petitioners' counsel but was left out of the court record in error.

b) That the letter was alluded to during cross examination of PW1.

c) That the admission of letter to National Land Commission will enable the court to conclusively address the issues in the petition.

d) That the letter will not prejudice any party to the petition.

e) That the application is tailored to meeting the ends of justice.

3. Learned counsel Ms. E. Opiyo for the respondents opposed the application. She termed the same an ambush on the respondents. That the letter is bound prejudice the respondents. Counsel urged the court to allow the petition with what the petitioners' have on record.

4. I have carefully, considered the application, the objection thereto and character of the petition. Thus, is the application merited in this petition?

5. The petition dated 4th December 2015 was lodged pursuant to **Article 10 (1) (c) and 2 (c), 19 (1), 20 (1) and (2), 21 (1), 48, 159 and 165 of the Constitution of Kenya, 2010 as well as section 25 and 26 of the Land Adjudication Act Chapter 284 Laws of Kenya.** The petitioners claim that the respondents' actions constitute violation of their Constitutional rights in respect of plot numbers **4029, 6554, 1784, 2714, 6248, 6477, 6373, 7901-8000, Kachieng "A"** adjudication section.

6. In a replying affidavit sworn on 19th January 2017 by ICM Osebe, the District Land Adjudication and Settlement Officer, Migori /Nyatike District (1st respondent), the respondents opposed the petition. They stated that it in the interest of the public that the petition must fail as proper avenues were followed during adjudication process.

7. The instant petition is partly heard as PW1 testified and was stood down during cross examination on 4th November 2019. So, the first prayer in this application is spent.

8. In examination in chief, PW1 did refer to documents, among others, a letter dated 4/11/2015, addressed to the Director of Land Adjudication and Settlement (PExhibit 5). During cross-examination, PW1 stated, inter alia;-

".....It is the 2nd petitioner who did PExhibit 5. I requested for the confirmation of plots by PExhibits 5. It was not a complaint."

9. Notably, the letter to National Land Commission was alluded to during cross-examination. The same is not a strange document in this petition.

10. The petitioners' counsel submitted that the letter was left out of the court record in error. It was a mistake of counsel which should not be visited on a client as held in **Shabir din –vs- Ram Parkash Anad (1955) ECA volume 22 at page 48.**

11. In the case of **Philip Chemwolo and another –vs- Augustine Kubende (1982-88) KAR 103**, the Court of Appeal held thus:-

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on it's merit." (emphasis laid)

12. It is a fundamental principle that the court should take the lower risk of injustice in a matter before it; see the view of justice Hoffman in **Films Role International Ltd –vs- Cannon Film Sales Ltd (1986) ALLER 772** to which I subscribed accordingly.

13. The right to fair trial shall not be curtailed as provided for under **Articles 25 (c) and 50 (1) of the Constitution of Kenya, 2010.** The petitioners have the uncurtailed right to fair hearing of their petition including the presentation of the letter addressed to National Land Commission.

14. Borrowing from the foregoing authorities and the obtaining circumstances of the case, I find that grant of leave to the petitioners to file and serve the letter will not prejudice the respondents as he petitioners including PW1, will be subjected to cross-examination in the instant petition. It would also enable the court to conclusively address the issues in the petition in a just and expeditious manner as envisaged under section 3 of the Environment and Land Court Act, 2015 (2011). The application is merited.

15. Accordingly, I grant leave to the petitioners' counsel to file and serve the letter to National Land Commission on the respondents forthwith.

16. It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this day 11th of DECEMBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of:

Mr. Ogutu Mboya for Petitioners

Ms. Opiyo for 1st, 4th and 7th Respondents.

No appearance for 5th and 6th Respondents

Tom Maurice – Court Assistant.