



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 3 OF 2016

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(1), 1(3), 2(2), 2(4), 3(1), 10, 35(1), 47, 62 (2), 63(1), (2), (3) AND (4), 67, 232(1), 258 AND 259(1) OF THE CONSTITUTION OF KENYA

AND

THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

BETWEEN

**THE COUNTY GOVERNMENT OF
KIRINYAGA.....PETITIONER**

VERSUS

THE CABINET SECRETARY, MINISTRY OF LAND,

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

**THE NATIONAL LAND COMMISSION.....2ND
RESPONDENT**

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

**THE COUNTY GOVERNMENT OF EMBU.....1ST INTERESTED
PARTY**

APOLO NJERU MAGANJO

JOSEPH MAINA KANYIRI

JAMES NJAGI CYRUS

NJIRATI KIRANGA

FRANCIS KARIUKI KAMAU

2ND INTERESTED

PARTIES

KUTHUA KORI

SAMUEL MURIITHI

JOHN KIAMBI MUCHIRI

JEFITHA MWANIKI

MBEERE ELDERS ADVISORY WELFARE GROUP

NJERU BANDA

ESTON NYAGA NTHIGA

3RD INTERESTED PARTIES

SERAPHINO NGARI

JOSEPH MIANO MIIGWA

NAHASHON MUGO KABEU

NATHAN MWARE

JOSPHAT NGIRIGACHA NUGWANJA

PETERSON MAINA

MBUI KIMEU CIURI

**4th INTERESTED
PARTIES**

BENARD MWANGI

JOSEPH MUKONO

NGIGE MURE

MURAGE GITURA

RULING

1. By a petition dated 12th August 2016 brought under Articles 1, 2, 3, 6, 10, 35, 62, 63, 67, 232, 258 and 259 of the Constitution of Kenya, the Petitioner sought the following 12 reliefs against the Respondents;

a. A declaration that within the intendment of Article 10 of the Constitution the Respondents are bound by the key national values and principles, to carry out meaningful and qualitative public participation.

b. A declaration that within the intendment of Article 27(4) of the Constitution the Respondents cannot discriminate directly or indirectly against any person on any ground, including ethnic origin.

c. A declaration that within the intendment of Article 28 of the Constitution the Respondents are bound to respect and protect the inherent dignity of all persons occupying the Mwea Scheme land and those with valid historical claim to it.

d. A declaration that within the intendment of Article 35(1) of the Constitution the Respondents are

bound to release all documents pertaining to the demarcation, alienation and allocation of titles to all the land comprising the Mwea Settlement Scheme.

e. A declaration that within the intendment of Article 40(3) of the Constitution the Respondents cannot exclude thousands of Kenyans who have current or historical land claims in their demarcation, alienation and allocation of titles to all the land comprising the Mwea Settlement Scheme.

f. A declaration that within the intendment of Article 47(1) of the Constitution, the Respondents are bound to provide administrative action that is lawful, reasonable and procedurally fair.

g. A declaration that within the intendment of Article 47(2) of the Constitution, the Respondents are bound to provide reasons for failure to include names of thousands of Kenyans with current and historical land rights in its allocation of titles to all the land comprising the Mwea Settlement Scheme.

h. A declaration that within the intendment of Article 63(4) & (5) of the Constitution, the Respondents cannot demarcate, alienate and allocate titles to community land before the enactment of legislation on community land.

i. A declaration that within the intendment of Article 67(2) (f) of the Constitution, the Respondents are bound to investigate all complaints relating to historical land injustices referred to it.

j. A declaration that the demarcation, alienation and allocation of titles to all the land comprising the Mwea Settlement Scheme, is inconsistent with the provisions of Articles 10, 27(4), 28, 35(1), 47, 63(4) & (5) and 67(2) (f) of the Constitution, and is null and void.

k. An order of certiorari quashing any and all the titles to the land in question comprising the Mwea Settlement scheme.

l. There be an order as to costs.

2. The basis of the said reliefs was that the Petitioner was aggrieved by the manner in which the alienation, allocation and demarcation of Mwea Settlement Scheme (hereinafter referred to as the “Scheme”) was being undertaken. It was pleaded that the said process was not only irregular and unlawful but also unconstitutional. It was alleged that the Respondents had wrongfully excluded thousands of members of some communities or clans from Kirinyaga County who had either current or historical claims to the scheme.

3. Simultaneously with the filling of the petition, the Petitioners filed a notice of motion application under Rule 24(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure) Rules 2013 seeking some conservatory orders pending the hearing and determination of the petition. The Petitioner sought an interim order staying the issuance of title deeds in relation to the scheme as well as an interim order “staying” any title deeds already issued.

4. The 1st and 3rd Interested Parties (hereinafter called “objectors”) objected to both the said petition and application for conservatory orders by filing separate notices of preliminary objection dated 8th September 2016 and 5th December 2016 respectively. The wording of the two notices was identical. The objectors raised the following preliminary objections in their said notices;

a. That pursuant to Article 62(1) and (2) of the Constitution, Petitioner/Applicant has no locus standi to institute this petition.

b. That pursuant to Article 64 of the Constitution, Petitioner/Applicant has no locus standi to institute this petition.

c. That the Petitioner by instituting this petition is in violation of Article 189(3) and (4) of the Constitution.

d. That the Petitioner by instituting this petition is in violation of section 31 of the Intergovernmental Relations Act.

e. That the prayers being sought by the Petitioner are already spent.

f. That the subject matter of this petition is spent and individual titles having been issued on or before 5th May 2016; pursuant to section 24 of the Land Registration Act No. 3 of 2012.

g. That the petition is incompetent, frivolous and abuse of the court process and the same should be dismissed with costs.

5. By consent of all the concerned parties, it was directed that the said preliminary objection shall be disposed of through written submissions. The 3rd Interested Parties filed their written submissions on 9th May 2017 whereas the Petitioner filed its submissions on 10th July 2017. The other parties did not file any submissions in relation to the said preliminary objection. The 3rd Respondent, however, filed a list of authorities in relation thereto.

6. The 1st and 2nd objections relate to the *locus standi* of the Petitioner to file the petition under Articles 62 and 64 respectively of the Constitution of Kenya 2010. The court shall, therefore, consider and determine those two objections together. As was stated in the case of **Mukisa Biscuits Manufacturing Ltd Vs West End Distributors Ltd [1969] EA. 696**, a preliminary objection must raise a pure point of law which, if successful, would have the effect of determining the proceedings in limine. It cannot be raised if any facts have to be ascertained or investigated, or in relation to the exercise of judicial discretion.

7. Whereas the objectors challenged the *locus standi* of the Petitioner to institute the proceedings, they argued the point is a rather curious manner. It was submitted that the property in dispute i.e Mwea Settlement Scheme was not public land as defined in Article 62 of the Constitution but private land hence the Petitioner had no business litigating over the scheme.

8. The Petitioner submitted that under Article 62(2) of the Constitution of Kenya, public land was vested on county governments in trust for the people resident in the respective counties. It was further submitted that the scheme in dispute was part of unregistered community land which should be held by the county government on behalf of the resident communities under Article 63 of the Constitution. It was therefore submitted that a trustee of public or community and cannot lack the *locus standi* to undertake legal proceedings to protect such property.

9. It was the petitioner's case that the boundaries of *locus standi* have been greatly expanded under the Constitution of Kenya 2010. The Petitioner relied on **Articles 22, 48, 50 (1) and 258 of the Constitution of Kenya** in opposition to the preliminary objection on *locus standi*. The Petitioner also relied upon the case of **John Kipng'eno Koech & 2 Others Vs Nakuru County Assembly and 5 Others [2013] eKLR** and the case of **Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR** on the point.

10. The court has carefully considered the issue of *locus standi* as argued both by the Petitioner and the objectors. The issue of whether or not the property in dispute (i.e the scheme) is public or private is not agreed. It would appear that the question may require further investigation at the hearing of the petition. It may not be possible at this stage to determine merely from the constitutional definitions whether the land comprised in the scheme is public, private or community land. It is also not evident whether such ascertainment would affect the *locus standi* of the Petitioner to maintain the instant proceedings.

11. On the face of the pleadings and decided authorities, the court is of the view that the Petitioner has *locus standi* to institute the petition on the basis of the allegations contained therein. It is pleaded that the

alleged constitutional and other violations by the Respondents adversely affected the property rights of some communities in Kirinyaga who have either current or historical claims to the scheme. In the case of **County Government of Nyeri Vs Cabinet Secretary, Ministry of Education, Science and Technology [2014] eKLR** the High Court found that the Applicant had *locus standi* to file suit in respect of alleged injustice against the residents of Nyeri County with regard to admission of form one students into extra-county schools. The court, therefore, finds no merit in the 1st and 2nd grounds of objection and the same are hereby dismissed.

12. The 3rd, 4th and 5th preliminary objections fault the petitioner for having filed the petition in violation of **Articles 189(3) and (4) of the Constitution**, and the **Inter-Governmental Relations Act, 2012** without first having exhausted alternative dispute resolution mechanisms. The objector relied upon the case of **Isiolo County Assembly Service Board and Another Vs Principal Secretary (Devolution) Ministry of Devolution and Planning and Another [2016] eKLR** where Hon Justice J.L. Onguto held, *inter alia*, that

“Thus where the Constitution itself or vide statute seeks to and indeed provides an alternative mode of dispute resolution for specified disputes, then in the spirit of Article 159 (2) of the Constitution, the court should oblige and cede jurisdiction to such forums.”

13. It was submitted that the Petitioner had not exhausted the alternative disputes resolution mechanism provided for under the framework of the Inter-Governments Relations Act 2012 hence the petition should be struck out or dismissed.

14. The Petitioner submitted that it had made every effort to have the dispute resolved amicably as contemplated by Article 189 of the Constitution of Kenya and the Inter-Governmental Relations Act but there was lack of commitment from the Respondents. It was submitted that by consent of all the concerned parties, the conservatory orders initially granted in favour of the Petitioner by Hon Justice Boaz Olao were vacated on 5th October 2016 to pave way for alternative dispute resolution. The Petitioner’s advocates apparently wrote to the concerned authorities to facilitate the process without success. It was then that the Petitioner went back to court and obtained conservatory orders afresh.

15. The court has considered this matter of alleged violation of Article 189 (3) and (4) of the Constitution of Kenya. The court fully agrees with the decision of the court in the case of **Isiolo County Assembly Service Board and Another** (supra). The only question which is disputed herein is whether or not the Petitioner made any reasonable efforts to engage in alternative dispute resolution before filing the proceedings. The Petitioner thinks that it did while the objectors think otherwise.

16. The court has considered the material on record and noted that on 5th October 2016, the conservatory orders in existence then were vacated by consent of the parties in order for them to pursue alternative dispute resolutions under the Inter-Governmental Relations Act, 2012. There is also evidence that the Petitioner wrote a letter to the Chairperson of the relevant organ under that Act to facilitate resolution of the dispute. The Chairperson responded to the letter by requesting for a further brief on the matter. There is no indication of any further action or progress in relation to alternative dispute resolution until the Petitioner went back to court to seek reinstatement of the conservatory order. The court also notes that there is no material on record to demonstrate the efforts made, if any, by the Respondents, or any one of them, towards resolution of the dispute in the spirit of Article 189 of the Constitution of Kenya.

17. In the circumstances, the court is satisfied that the Petitioner made some reasonable efforts to have the dispute resolved through alternative dispute resolution even though it would appear that no progress was made towards resolution. In terms of alternative dispute resolution, not every effort at resolution may succeed. It may succeed in some cases, and fail in others. The Constitution does not decree that it must succeed. The court, therefore, finds no merit in the 3rd, 4th and 5th objections which are hereby dismissed.

18. The 6th and 7th objections are to the effect that the prayers sought in the petition are spent for the reason that title deeds were issued on or before 5th May 2016. The gist of the objection is that the entire

petition has been overtaken by events. The court is not persuaded that the petition has been overtaken by events for two reasons. First, the scheme in dispute is a very large scheme and there is no evidence before court to demonstrate that titles were issued for the entire scheme. This is a factual issue which would require an investigation of facts hence not suitable for determination as a preliminary objection. Second, the Petitioner seeks orders for nullification of the impugned process and for cancellation of any titles already issued.

19. In those circumstances, the petition and application for conservatory orders cannot be said to have been spent or overtaken by events. The court consequently finds no merit in the 6th and 7th preliminary objections and the same are hereby dismissed.

20. The 8th objection is rather general and ambiguous. It states that the petition is “incompetent, frivolous and an abuse of the court process.” No particulars of those matters were given. If the objectors intended this objection to mean the resultant effect or culmination of the earlier 7 objections, then it would follow that it must fail as well. The court has found no merit in the first 7 objections hence the 8th one is similarly dismissed.

21. Since the court has found no merit in all the preliminary objections raised, the 1st and 3rd Interested Parties’ notices of preliminary objections dated 8th September 2016 and 5th December 2016 respectively are hereby dismissed with costs to the Petitioner.

22. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **18th day** of **JANUARY, 2018**.

In the presence of Mr Abubakar holding brief for Mr Wanyama for the Petitioner, Mr Abubakar for the 4th Interested Party, Ms Muriuki holding brief for Mr Guantai for the 9th Interested Party, Mr Okwaro holding brief for Mr Kamunda for the 3rd Interested Party and in the absence of all the other parties.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

18.01.18