



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION NO 1 OF 2014

**IN THE MATTER OF ARTICLE 21, 22, 23 (1 & 3) 40 & 62 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF LAND REFERENCE NO. 28352 SITUATE WITHIN NDARAGWA
TOWNSHIP**

AND

IN THE MATTER OF ALLEGED ILLEGAL OCCUPATION OF LAND REFERENCE NO.28352

BETWEEN

NDARAGWA JUA KALI ASSOCIATION.....PETITIONER

-VERSUS-

THE ATTORNEY GENERAL 1ST RESPONDENT

ANTONY KIMAMO MACHARIA 2ND RESPONDENT

BENSON MUGU KAHIA3RD RESPONDENT

KARIUKI KIHURUTO 4TH RESPONDENT

DANIEL KIMATHI 5TH RESPONDENT

NJOGU KIHURUTO 6TH RESPONDENT

KABUTHA NDURUMO 7TH RESPONDENT

PETERSON KAROCHO 8TH RESPONDENT

KARIUKI WA JOSHUA 9TH RESPONDENT

THEURI NGATIA 10TH RESPONDENT

FRANCIS GITONGA RUNYOI 11TH RESPONDENT

LUCY WANJIRU KARANJA 12TH RESPONDENT

NYARUAI MACHARIA 13TH RESPONDENT

COUNTY GOVERNMENT OF NYANDARUA 14TH RESPONDENT

NATIONAL LAND COMMISSION 15TH RESPONDENT

RULING

Introduction

1. The petitioner herein, a registered society, filed the suit herein claiming that its members who are jua kali artisans within Ndaragwa area of Nyandarua county are the beneficial owners of the parcel of land known as land reference No.28352 (the suit property) situated in Ndaragwa township, the same having been allocated by the Government of Kenya for use and benefit of its members thus denying its members the use of the land .

2. The petitioner accuses the 2nd to the 13 respondents of having illegally and without any justification occupied a portion of the suit property (four acres).

3. It is the petitioner case, that it has approached various government offices seeking eviction of the 2nd to the 13th respondents in vain.

4. The petitioner accuses the 1st, 14th and 15th respondents of having failed to take measures to protect the suit property despite the issue of encroachment by the 2nd to the 13th respondents having been brought to their attention.

5. Terming the actions of the 2nd to 13th respondents of trespassing into the suit property a contravention and threat to its members fundamental rights, the petitioner urges the court to grant it the following reliefs:

a. A declaration that the suit property, LR. No.28352 having been reserved for it, is unavailable for utilisation by private developers;

b. A declaration that the 2nd to the 13th respondents are trespassers on the suit property;

c. An order of eviction against the 2nd to the 13th respondent.

d. Any other orders as the court may deem just and appropriate for the purposes of enforcing and securing its fundamental rights and freedoms;

e. Costs of the petition.

6. Upon being served with the petition, the 2nd to the 13th respondents filed the replying affidavit sworn by the 4th and 9th respondent on **26th June, 2014** in which they *inter alia* contend that the petitioner lacks locus to institute the suit herein.

7. The 2nd to the 13th respondents also filed a supplementary affidavit on **4th August, 2014** in which they challenge the admissibility of the petition as a constitutional issue and the jurisdiction of this court to issue the order of eviction sought vide prayer (c) of the petition.

Notice of Preliminary Objection

8. On **27th April, 2015** the 2nd to 13th respondents filed a notice of preliminary objection (P.O) challenging the petition herein on the following grounds;

- a. The petitioner has no locus to bring the petition because the suit property belongs to the Government of Kenya;
- b. The petition does not disclose any factual or legal conceivable cause of action against the 2nd to the 13th respondents;
- c. The petition does not disclose any special reason why it has been instituted in the Constitutional court;
- d. The petition seeks prayers that cannot be granted by a Constitutional court.

9. The preliminary objection was disposed of by way of written submissions.

10. From the submissions filed in support and against the P.O the sole issue for determination is whether the P.O meets the threshold of a P.O as espoused in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) E.A 696** thus:

“... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, on which if argued as a preliminary point may dispose of the suit. Examples are on objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

11. According to the petitioners, the P.O herein does not meet the threshold of a P.O for the following reasons:-

- a. It is incapable of dealing with the issues raised in the petition *in limine*;
- b. The Constitution of Kenya (COK) 2010 gives the petitioners *locus* to institute the impugned proceedings;
- c. The Environment and Land Court Act, 2011 gives this court jurisdiction to entertain the dispute and to grant the orders therein sought;
- d. Evidence is required to prove whether the petition raises any reasonable cause of action against the 2nd to the 13th respondents;
- e. Some of the reliefs sought can only be issued by a Constitutional court;
- f. The P.O does not seek to dispose the entire petition as it does not address the claim against the 1st, 14th and 15th respondents; and
- g. That the pleaded facts of the case are contested.

12. In their submissions, the 2nd to 13th respondents maintain that the petitioner lacks locus to institute any suit concerning the suit property because the suit property belongs to the government of Kenya. According to the 2nd to 13th respondents, only the Government of Kenya through its agencies may urge a case in respect of the suit property.

13. The petitioner is said to have failed to demonstrate how it derives its interest and/or right to agitate in respect of the suit property.

14. Based on the cases of **Uhuru Muigai Kenyatta vs. Nairobi Star Publications Ltd (2013) e KLR**

where it was held that not all disputes should attract a constitutional adjudication, the respondents contend that the petitioner's cause of action, if any, lies in the law of trespass and not in constitutional law.

15. The petition herein is said to be lacking in precision and/or particulars of the breaches and/or violations of the constitution on which it is premised. In that regard, the petitioner is said to have very simply thrown at this court the provisions of the constitution without expounding on the facts which they are based.

16. The petitioner is also said to have failed to bring itself within the ambit of the relevant constitutional provisions by relating the facts of its case to the cited provisions of the law and explaining how in its view those provisions are relevant to its case.

17. They relied on the decision in case of **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** where it was *inter alia* stated that “...it is contended that there are no constitutional rights which have been violated and that there is no threat which justifies the present proceedings being called a constitutional petition.”

18. According to the 2nd to 13th respondents, the petitioners have nothing to show that their rights are being breached as they have no proprietary rights in the suit property.

Analysis and determination

19. Have carefully read and considered the issues raised in this petition. I find the issues for determination to be as follows:

i. Whether the petitioner has *locus standi* to institute the suit herein;

ii. Subject to the outcome of (i) above, whether this court has jurisdiction to hear and determine the issues raised in the petition;

iii. Subject to the outcome of (ii) above, whether the respondents have made up a case for striking of the suit herein;

iv. What orders should the court make?

21. On whether the petitioner has locus to institute this suit, it is noteworthy that based on the undisputed fact that the suit property belongs to the Government of Kenya, it is submitted that the petitioner lacks jurisdiction to urge any claim in respect of the suit property.

21. Concerning that contention, whereas it is not in dispute that the suit property belongs to the Government of Kenya, it is clear from the petitioner's pleaded case that the petitioners' members claim to have interest in the suit property (the interest is said to arise from the equally undisputed fact that the suit property was set apart/allocated by the government for use by the petitioners members).

22. Since it is not disputed that the members of the petitioner are the beneficial owners of the suit property, I am of the considered view that the petitioner's members have sufficient interest in the suit property, which interest they are entitled to move to court if violated or threatened with violations for protection or redress in respect of any transgressions in respect thereof.

23. In view of the foregoing, despite the suit property being registered in the name of the government of Kenya, I find and hold that the petitioner's members as the beneficial owners of the suit property have sufficient stake in the suit property on which their claim against the respondents can hinge.

24. The foregoing notwithstanding, it is doubtful whether the petitioner being an unincorporated entity is capable of suing or being sued by its own name. In this regard see cases of **Football Kenya Federation v. Kenyan Premier League Ltd & 4 others (2015)e KLR**; **Kipsiwo Community Self Help Group v.**

Attorney General & 6 others (2013) e KLR; DI Koisagat Tea Estate Ltd v. Eritrea Orthodox Tewhdo Church Ltd (2015)e KLR and Bridge Hotel Ltd v. Winfred Mutiso Lai v. Jesus Celebration Centre (2016) e KLR where the issue was considered and determination in respect thereof made.

25. In *Football Kenya Federation v. Kenyan Premier League Ltd & 4 others supra* it was observed: -

“The plaint as filed does describe the plaintiff as a registered society under the Societies Act, Cap 108 Laws of Kenya. It is trite law that a society as the plaintiff herein, which fact is not denied by the plaintiff, that is an unincorporated entity and therefore it has no legal personality with the capacity to sue and be sued in its own name. However, Mr. Mutua advocate submits that that is bad law and that the Supreme Court must determine that fact. Until that happens, it remains law- I hear him saying.

The 1st respondent has cited a plethora of decisions that have determined that point of law and all are unanimous without exception that an incorporated society cannot sue and be sued in its own name, but that its officials or trustees can institute suit on behalf of the society. I accept those decisions which I have extensively referred to in this ruling and they include: *African Orthodox church of Kenya versus Rev Charles Omuroka and Lagos Ministry for*

Orthodox Renewal (2014) eKLR, Matinyani Women Development Group vs Group Four Security Limited (2005) eKLR, Simu Vendors Association vs the Town Clerks City Council of Nairobi & Another (2005) eKLR, Eritrea Orthodox Church vs Wariwax Generation Limited (2007)

eKLR , Living water Church International vs City Council Nairobi (2008) eKLR. Where the court pronounced itself on the legal status of registered societies to the effect that they were not legal personalities capable of suing and being sued in their own names but through their officials or trustees as per their respective constitutions.

The above decisions, in my humble view, give the correct legal position and as I have no good reason to depart from their reasoned findings, I adopt them.”

26. With regard to the provisions of the Constitution which recognise the right of associations to institute suits on behalf of their members, the judge stated:-

“I would still take solace in the case OF MUMO MATEMU VS TRUSTED SOCIETY 2014) EKLR where the CA in applying the provisions of Articles 22 and 258 of the constitution, was clear that it is only where a person was acting in the [public interest and when instituting proceedings before a court challenging the contravention of the Constitution, would they, be they NGOS or associations be permitted to institute proceedings as persons, as defined under their respective statutes and when such definition of who the bodies are is read together with Article 260 of the Constitution.” Article 260 of the Constitution is an interpretation Article

Further, in KIRINYAGA UNITED BAR OWNERS ORGANIZATION VS COUNTY SECRETARY KIRINYAGA COUNTY GOVERNMENT & 6 OTHERS {2014} EKLR, the court was categorical, and I concur that:

“The above Constitutional provisions for me indicate that a person named with a capacity to act on his own can bring a representative suit on his behalf and on behalf of others. A person who lacks capacity to institute a suit can also bring an action under Article 22(1) through another person. The person bringing the action should clearly indicate his name in the suit stating that he/she is bringing the action on behalf of another or on his own behalf in addition to others who for purposes of clarity must be named and must give authority or mandate if they wish to benefit or obligated from the reliefs sought. In the absence of a

named person, then it becomes difficult to know whether legal capacity is vested or not. Under Article 260 of the Constitution a “person” includes a company, association or other body of persons whether incorporated or not. Of course bodies have capacity to sue or be sued as the law vests them with legal capacity. What the Constitution addresses here are unincorporated bodies or class of persons such as self-help groups. The law does not bestow them with the legal capacity per se but Constitution provides for an avenue through which they can competently appear in court and this is through person(s) vested with legal capacity. It is a bit absurd to imagine that the new Constitution has opened doors for anybody including people of unsound mind, minors, bankrupts etc to institute proceedings without a next friend or a person with legal and sound capacity to represent them. Self-help groups or community based organizations were created by the government to address poverty eradication and other noble causes but were not clothed with the capacity to sue but can do so through its elected officials whose description should be given to show who they are and who they represent.”

27. In the case of Kipsiwo Community Self Group v. A.G & 6 others *supra*; it was held that;

“It would seem therefore, from a reading of Article 22 and the definition provided in Article 260, that a company, association or other body of persons whether incorporated or unincorporated, may institute proceedings asserting a violation of a right in the Bill of Rights.

I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal capacity and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.

39. This was indeed the holding in the case of *Kituo Cha Sheria vs John Ndirangu Kariuki & Another*. In this case a petition was instituted by Kituo Cha Sheria. An application was filed to dismiss the petition on the grounds inter alia that the petitioner is a non-entity and lacks the requisite locus standi to file and prosecute the petition. Kimondo J, found that Kituo Cha Sheria is not a legal entity capable of bringing an action in its own name and averred that it can only maintain an action through its officials or other person nominated by its board”.

28. In the case of Bridge Hotel Ltd v. Wilfred Mutiso Lai Jesus Celebration Centre (*supra*) it was observed:-

“In the Eritrea Orthodox Church case *supra*, the Judge held that since a religious organisation is not a body corporate, it lacked legal personality to institute proceedings in its own name. In this instant, the 2nd defendant is not a body corporate. Similarly it lacks capacity to sue or be sued in its own name. The suit as filed against it is fatally defective. For now the suit against the 2nd defendant being fatally defective, no orders can issue against it as that would be issuing orders in vain. The only proper order I can issue against the 2nd Respondent at this stage and which I do hereby issue is that the plaintiff’s suit together with the application against her is struck out for want of capacity. The question would then be whether to consider the merits of the application as against the 1st defendant as the Society Act has not bestowed on it legal personality. I am in agreement by the decisions of my

learned brothers cited above. The suit can only be brought against the 2nd Respondent through its officials or trustees as the case may be.”

29. The common thread in all those cases is that despite the COK, 2010 having recognized the right of associations to sue on behalf of their members, the associations cannot do that in their own name but through their registered trustees.

30. There being no good reason to depart from the path taken in the above cited persuasive authorities and the suit herein having been brought in the name of the society which has no capacity to sue or be sued on its own capacity, I find the suit to be bad in law. The suit as filed raises issues as to who will enforce orders issued in favour of the petitioner or against whom can any adverse orders issued against the petitioner be executed.

31. In view of the foregoing, I find the suit as instituted to be bad in law and dismiss it.

32. As an order for costs will raise serious issues based on the finding that the petitioner not being a legal person has no capacity to sue or be sued on its own name I award no costs.

Dated, signed and delivered in open court at Nyeri this 21st day of February, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Kinuthia h/b for Muchiri wa Gathoni for the petitioner

N/A for the respondents

Court assistant – Esther