



**REPUBLIC OF KENYA**

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

**PET No. 1B OF 2017**

**OLOJORAI COMPANY LIMITED.....PETITIONER**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Parties**

1. The petitioner herein is a limited liability company incorporated pursuant to the provisions of the Companies Act, Chapter 486, Laws of Kenya.
2. The 1<sup>st</sup> respondent is a body corporate established pursuant to the provisions of Article 67 (1) of the Constitution of Kenya, 2010.
3. The 2<sup>nd</sup> respondent is an office established pursuant to Article 156 (1) of the Constitution of Kenya with the mandate of being the principal legal advisor to the government of Kenya.

**The petition**

4. The proceedings herein were commenced by way of petition dated 13<sup>th</sup> January 2017 and filed in court on 18<sup>th</sup> January 2017. The petitioner avers that it purchased land known as **LR No. 9581** and **LR 10242** and subdivided them into 3965 parcels out of which it has issued 900 titles to its members while another 200 are yet to be given titles. The petitioner further avers that on 17<sup>th</sup> June 2015 the 1<sup>st</sup> respondent purportedly constituted a committee whose objective was to interfere in the affairs of the petitioner.
5. The petitioner's case is that the 1<sup>st</sup> respondent's decision contained in its letter dated 17<sup>th</sup> June 2015 is an abuse of its powers under **Article 67 (2) (a)** and a violation of the petitioner's rights under **Article 40** of the Constitution. Additionally, the petitioner alleges violation of **Articles 21, 47** and **73** of the Constitution.
6. The petitioner therefore seeks the following:

***1. A declaration that the 1<sup>st</sup> respondent's actions are without and/or in abuse of its jurisdiction and powers and hence illegal, null & void and unconstitutional.***

*2. A declaration that the respondents have abdicated their constitutional and legal roles and are therefore escapists.*

*3. An order of certiorari to bring to the high court for the purposing of quashing and to consequently quash the decision of the 1<sup>st</sup> respondent contained in its letter of the 17<sup>th</sup> June 2015.*

*4. An order of prohibition preventing the 1<sup>st</sup> respondent from initiating any investigations or purporting to investigate, discussing, commenting on, allocating, alienating, disposing, intermeddling, interfering with or in any way dealing with the issues of the petitioner's properties.*

*5. Any other relief the court may deem fit to grant; and*

*6. An order for payment of costs of this petition by the respondents.*

### **Evidence Supporting the Petition**

7. The petition is supported by an affidavit sworn by Peter Ole Sono, a director of the petitioner. He deposed that the petitioner, a land buying company, purchased parcels of land known as LR No. 9581 and LR 10242 (the suit property) from Agricultural Development Corporation at a cost of KShs 10,000,000. He annexed a copy of a receipt dated 13<sup>th</sup> March 1996 for the aforesaid amount. The suit properties were subdivided into 3965 parcels out of which the petitioner had issued 1600 titles to its individual members as at the time the affidavit was sworn. There are 3 Secondary Schools, 6 primary schools, 6 polling stations on the suit properties. Additionally, over 800 deceased persons who were residing on the land have been buried there.

8. It was further deposed that on 17<sup>th</sup> June 2015, the chairman of the 1<sup>st</sup> respondent purportedly constituted a committee whose objective was to interfere with the affairs of the petitioner. A copy of a letter dated 17<sup>th</sup> June 2015 from the 1<sup>st</sup> respondent was annexed as POS4. Owing to the said actions of the 1<sup>st</sup> respondent, the petitioner has not been able to transact its affairs including settling rightful owners and registering the index map. The deponent further urged the court to protect the petitioner "from open extortion and bribery by commissioners" or the 1<sup>st</sup> respondent. He concluded by stating that the petitioners' constitutional rights had been violated.

9. The 1<sup>st</sup> respondent opposed the petition through a replying affidavit sworn by Brian Koli, its Deputy Director of Legal Affairs and Enforcement. He deposed that the petitioner is involved in wrangles with its members and that aggrieved members approached the 1<sup>st</sup> respondent seeking its intervention in assisting them to amicably resolve their wrangles. He added that the petitioner had converted some of its land to public land and the 1<sup>st</sup> respondent therefore has jurisdiction to monitor and supervise the petitioner in its management to ensure protection of the public entities. Further, that the actions of the 1<sup>st</sup> respondent are intended to encourage traditional or alternative dispute resolution mechanism.

### **Response by 2<sup>nd</sup> Respondent**

10. The 2<sup>nd</sup> respondent did not file any replying affidavit. He instead opposed the petition through Grounds of Opposition in which he argued that the petitioner had not elaborated with precision how its rights had been infringed by the 1<sup>st</sup> respondent. That the letter dated 17<sup>th</sup> June 2015 precisely stated that the 1<sup>st</sup> respondent was attempting to resolve a long standing land dispute and that the 1<sup>st</sup> respondent is empowered by **Article 67 (2) (e)** of the Constitution and **Section 5 (1) (e)** of the National Land Commission Act No. 5 of 2012 to initiate investigations into present and historical land injustices. The 2<sup>nd</sup> respondent therefore urged the court to dismiss the petition.

## Submissions

11. The petition was argued by written submissions. The petitioner filed its submissions on 7<sup>th</sup> November 2017, the 1<sup>st</sup> respondent on 6<sup>th</sup> December 2017 and the 2<sup>nd</sup> respondent on 19<sup>th</sup> December 2017.

12. For the petitioner, it was argued that in view of the letter dated 17<sup>th</sup> June 2015, the respondents have violated the petitioner's rights under **Article 40** of the Constitution since the effect of the respondents' action is to micro manage the petitioners' private property. Citing the provisions of **Article 67** of the Constitution and **Section 5(1)** of the National Land Commission Act, 2012, counsel for the petitioner argued that the 1<sup>st</sup> respondent's actions are opaque, clandestine, tainted with corruption, without jurisdiction and contrary to **Articles 21, 40 (2) (a), 47, 64, 67(2) (a), 68 and 73** of the Constitution as well as **Section 5(1)** of the Fair Administrative Action Act, 2015. Counsel further cited the cases of **Sceneries Ltd –vs- National Land Commission [2017] eKLR** and **Republic –vs- National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 others [2016] eKLR** and urged the court to allow the petition as prayed.

13. It was submitted on behalf of the 1<sup>st</sup> respondent that pursuant to **Article 67(1) and (h)** the 1<sup>st</sup> respondent has a mandate to deal with land both in private use and public use and that the 1<sup>st</sup> respondent was formed having taken into account the circumstances and evils that burdened land transactions in the country. Such evils included land grabbing, inconsistencies in land transfers, illegal allocations and irregular registration of rights and interests in land. That the 1<sup>st</sup> respondent has wide powers and mandate in the management, use and registration of interest in land including the mandate to find amicable solutions in land disputes by encouraging traditional mechanisms and alternative dispute resolution. In this regard, counsel for 1<sup>st</sup> respondent cited the provisions of **Section 5(f), 5(h) and 5(2) (b)** of the National Land Commission Act. As further examples of the 1<sup>st</sup> respondent's mandate over private land, counsel referred the court to **Part VIII** of the Land Act 2012.

14. Regarding whether or not the petition is competent, counsel submitted that it is not since it lacks precision as to what has been violated. Citing the case of **Rodgers Mwema Nziku –vs- Attorney General & others (Nairobi Petition No. 613 of 2006)** (Unreported) counsel argued that the jurisdiction of the court is meant to vindicate pure fundamental rights and not mere allegations that a fundamental right is likely to be infringed. In conclusion, counsel submitted that the 1<sup>st</sup> respondent's actions were within the law and urged the court to dismiss the petition with costs.

15. For the 2<sup>nd</sup> respondent, it was submitted that the petition does not meet the threshold set out in **Anarita Karimi Njeru** case since the petitioner has not stated with precision the manner in which the various articles of the Constitution which it has listed were infringed. In this regard, counsel cited the case of **Francis Kirima M'Ikunyua –vs- Inspector General of Police & 3 others [2016] eKLR**.

16. Regarding the letter dated 17<sup>th</sup> June 2015, counsel submitted that the letter is not a decision capable of being quashed. It was merely communicating a decision that had already been made and that the implementation of a decision cannot be quashed. For this submission, reliance was placed on the case of **Republic –vs- National Transport and Safety Authority & 10 others Ex-Parte James Maina Mugo [2015] eKLR**

17. As to whether or not the 1<sup>st</sup> respondent acted in excess of its mandate, counsel for 2<sup>nd</sup> respondent submitted that where there are historical injustices the 1<sup>st</sup> respondent may investigate and recommend appropriate redress and that the letter dated 17<sup>th</sup> June 2015 does not disclose any breach of a constitutional right. Consequently, the 1<sup>st</sup> respondent acted within its mandate. In conclusion, the 2<sup>nd</sup> respondent urged the court to dismiss the petition with costs.

## Analysis and Determination

18. At the core of this petition is the letter from the 1<sup>st</sup> respondent dated 17<sup>th</sup> June 2015. It is thus necessary to reproduce the said letter which I do below:

**REF: NLC/CHAIRMAN/VOL.XI/133      Date: 17<sup>th</sup> June, 2015**

**Hon. Kinuthia Mbugua**

**Governor**

**County Government of**

**NAKURU**

**PROFILING OF SETTLERS ON OLJORAI FARM**

**A meeting was held today at the office of the Minister for Interior and Coordination of Government, Hon. Nkaissery and attended by yourselves, the Member of Parliament for Gilgil, the MCA for Eburu Mbaruku Ward and the Vice-chairperson of the National Land Commission.**

**Amongst other things, it was resolved that an audit and profiling of the genuine settlers/squatters on this farm be quickly undertaken.**

**The following shall form the membership of the team to conduct the exercise:**

- 1) Mr. Frank Kibelekenya – CLMB Secretary, Nakuru to lead the team.**
- 2) District Officer – Elementaita**
- 3) Mr. Parit Sururu – Area Chief**
- 4) Mr. Mpaine Kesa ID. No. 20663386 – Rep. of the Ward MCA**
- 5) Mr. Kenneth Kariuki Githii – ID No.3562884 –Rep. of the Member of Parliament.**
- 6) Ms. Veronica Gachambi – ID No.10024194 – Rep. of the Governor of Nakuru**

**In addition, the above team shall ascertain the extent of occupation of the farm. The County Surveyor shall show the team the official boundary of the farm. Please accord them the necessary assistance to help us resolve this longstanding dispute.**

**Thank you.**

**MUHAMMAD A. SWAZURI, PhD, OGW**

**CHAIRMAN, NATIONAL LAND COMMISSION**

**cc**

**Hon. Joseph Nkaissery**

**Cabinet Secretary**

**Ministry of Interior and Coordination of National Government**

**Department of State**

**P.O Box 30510**

**NAIROBI**

**Hon. Samuel Nderitu Mathenge – MP Gilgil**

**Hon. John Kihagi – MP Naivasha**

**Mrs. Abigael Mbagaya – Vice Chairperson in charge Nakuru County**

**County Commissioner – Nakuru County**

**CLMB Chairman – Nakuru County**

19. The letter was addressed to the Governor of the County of Nakuru. Its subject is “Profiling of settlers on Oljorai Farm”. The land reference number of the parcel in issue is not given. The letter states that a meeting was held on 17<sup>th</sup> June 2015 at the office of the Minister for Interior and Coordination of Government during which it was resolved, among other things, that an audit and profiling of the genuine settlers/squatters on the farm be undertaken. A team was formed to conduct the exercise. The team was additionally tasked to ascertain the extent of occupation of the farm.

20. The petitioner’s case is simply that the so called Oljorai Farm is its private property and that therefore it is private land over which the 1<sup>st</sup> respondent has no mandate. According to the petitioner, the 1<sup>st</sup> respondent is meddling in its private affairs and thereby infringing on its rights under Article 40 and 47 of the Constitution among others. Further, the petitioner argues that the 1<sup>st</sup> respondent has exceeded its legal mandate.

21. The 1<sup>st</sup> respondent’s mandate is spelt out under **Article 67** which provides:

***67. National Land Commission***

***(1) There is established the National Land Commission.***

***(2) The functions of the National Land Commission are—***

***(a) to manage public land on behalf of the national and county governments;***

***(b) to recommend a national land policy to the national government;***

***(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;***

***(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;***

***(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;***

***(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;***

***(g) to assess tax on land and premiums on immovable property in any area designated by law; and***

**(h) to monitor and have oversight responsibilities over land use planning throughout the country.**

**(3) The National Land Commission may perform any other functions prescribed by national legislation.**

22. Further, the 1<sup>st</sup> respondent has additional functions under **Section 5(2)** of the National Land Commission Act which Provides:

**(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution—**

**(a) on behalf of, and with the consent of the national and county governments, alienate public land;**

**(b) monitor the registration of all rights and interests in land;**

**(c) ensure that public land under the management of the designated state agencies is sustainably managed for the intended purposes;**

**(d) may develop and maintain an effective land information system for the management of public land;**

23. So as to perform its functions, the 1<sup>st</sup> respondent has powers which are spelt out under **Section 6** of the aforesaid Act. The section provides:

**6. Powers of the Commission**

**(1) The Commission, shall have all the powers necessary for the execution of its functions under the Constitution, this Act and any other written law.**

**(2) Without prejudice to the generality of subsection (1), the Commission shall have powers to—**

**(a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;**

**(b) hold inquiries for the purposes of performing its functions under this Act;**

**(c) take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60(1) of the Constitution.**

**(3) In the exercise of its powers and the discharge of its functions, the Commission—**

**(a) may inform itself in such manner as it may consider necessary;**

**(b) may receive written or oral statements; and**

**(c) is not bound by the strict rules of evidence.**

24. So as to establish its case which alleges a breach of institutional right, the petitioner is under a duty to establish its rights over the suit properties. Though the petitioner claims that it owns the suit properties, no evidence in the nature of a copy of a certificate of title or a certificate of search or certified copy of extract from the register has been availed. All that the petitioner has put before the court is a copy of a receipt for Kshs10,000,000. The petitioner contends that it has subdivided the suit properties into 3965 parcels out of which it has issued about 1600 titles to its individual members. The process of subdivision

of land and issuance of new titles is ordinarily a well-documented process and it should not have been difficult for the petitioner to put before the court documentary evidence of its ownership of the suit properties. Such evidence is particularly important in a situation such as the present one where the petitioner would like the court to reach a conclusion that what the 1<sup>st</sup> respondent refers to as “Oljorai Farm” is one and the same thing as the suit properties.

25. Even assuming that it is established that “Oljorai Farm” is the same as the suit properties, the petitioner is required to plead with reasonable precision, the manner in which its constitutional rights over the suit property have been violated. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the Court of Appeal stated:

*... Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. ... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. ...*

*(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.*

26. I have already adumbrated above the contents and substance of the 1<sup>st</sup> respondent’s letter dated 17<sup>th</sup> June 2015 as well as the 1<sup>st</sup> respondent’s functions and powers. All that is sought to be done in the letter is to collect information concerning squatters or settlers on the farm. It is not stated how the information will be used. There is no suggestion that the title of the registered proprietor would be affected in any way. Under **Section 5(2) (b)** of the National Land Commission Act, the 1<sup>st</sup> respondent has a function of monitoring registration of all rights and interests in land. Similarly, under **Section 6(2)** of the Act, the 1<sup>st</sup> respondent has powers to inter alia gather information, hold enquiries and to take measures to ensure compliance with the principles of land policy set out under Article 60(1) of the constitution. Given the above and considering that no threat to the petitioner’s proprietary rights over any property is demonstrated, I see no reason to fault the 1<sup>st</sup> respondent. The actions of the 1<sup>st</sup> respondent in writing the letter dated 17<sup>th</sup> June 2015 are within its powers and functions which include gathering information and holding enquiries.

27. In view of the foregoing discussion, I am not persuaded that the petitioner has established its case. The petition is dismissed. Each party to bear own costs.

**Dated, signed and delivered in open court at Nakuru this 13<sup>th</sup> day of March 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Kipkoech for Petitioner.

No appearance for 1<sup>st</sup> Respondent.

No appearance for 2<sup>nd</sup> Respondent.

Court Assistants: Gichaba & Lotkomoi