



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT NYAHURURU
ELC PETITION NO 15 OF 2017
IN THE MATTER OF THIRIRIKA SELF HELP GROUP THROUGH THE
CHAIRMAN KAMAU KAGUNDA AND SECRETARY JAMES GAITHO
AND
IN THE MATTER OF RE-AFFIRMATION OF OWNERSHIP OF
LAND PARCEL NO. NYANDARUA/SOUTH KINANGOP/563
THIRIRIKA SELF HELP GROUP.....PETITIONER/APPLICANT
VERSUS
NYANDARUA COUNTY ASSEMBLY.....1st RESPONDENT
NYANDARUA COUNTY GOVERNMENT.....2nd RESPONDENT

RULING

1. On the, 5th May 2017, the petitioners filed their Petition dated 23rd March 2017 before the High Court of Kenya sitting at Nyahururu.
2. On the 23rd October 2017, the matter was placed before my sister Hon lady Justice R. Wendoh who directed that the same be placed before the Environment and land Court in whose jurisdiction the matter fell, on the 30th October 2017, on the said date, the matter was placed before me wherein by consent parties agreed to have the said Petition prosecuted by way of written submissions to which they filed respectively.
3. The Petitioners in their Petition pray for orders that;
 - i. A declaration do issue that their title Nyandarua/South Kinangop/563 is valid and duly registered.
 - ii. That no one least of all members of local Administration or any other body has authority to interfere with ownership and any restriction be withdrawn. They also prayed for costs of the Petition.

The petitioners' Case

4. The Petitioners' claim is to the effect that they were registered on the 20th August 2015 under a Community organization under certificate Number 3509701 with the ministry of labour, social Security and Services as a self-help group. It's membership totaling to about 28 members. They were thus registered as proprietors of parcel of land No. Nyandarua/South Kinangop/563 in the year on the 3rd April 2008.

5. That despite holding a valid title to the said suit land, there has been interferences and disruptions on the same by the Respondents herein who are political entities, thus hindering the development of the suit land by creating a scenario that there is a dispute on the issue of ownership of the same.

6. That the Respondents have been holding deliberations and adverse discussions and overtures in respect to the suit land to which effect that the 1st Respondent had even summoned the Petitioners to its committee forum to shed light on the ownership of the suit land, which inquiry the Petitioners submitted, was a preserve of the National Land Commission and the Land Environment Court.

7. That by trespassing and/or interfering with the Petitioners' running of its business on the suit land which is a private land, the Respondents were restricting the Petitioners from exercising its rights to own, occupy and/or develop the suit land which is not public land.

8. The Petitioners also raised a Preliminary Objection to the representation of the 1st Respondent to the effect that counsel on record was neither a Practicing Advocates nor state Counsel from the office of the Hon Attorney General and as such had no capacity to represent the 1st Respondent. The Petitioners relied on the provisions of Section 43 of the County Government Act to buttress their submissions.

9. That the legal representative of the 1st Respondent, save from being an advocate of the High Court of Kenya, was a state officer as was indicated in the annexure marked as GNN3, and therefore his representation of the 1st Respondent amounted to conflict of interest. That internal lawyers in the county Assemblies cannot purport to practice law and make appearances in court on behalf of the County Assemblies. The Petitioners thus prayed that the 1st Respondent's pleadings in response to the petition were null and void and ought to be to be expunged and/or dismissed from the record as they were filed by a person not authorized by the office of the Hon. Attorney General.

10. In their supplementary submissions, the Petitioners reiterated that the Minutes of the meeting held on the 4th February 2016 being min 488 L. HPPC/4/02/2016, confirmed that the Respondents and more so the County Assemblies had no powers both under the Constitution and any law to discuss and deliberate on issues of private land that had a valid title deed. The Petitioners relied on the provisions of Article 64 and 67 of the constitution as well as on the provisions of Section 8 of the County Government Act to buttress their submissions.

11. They further submitted that despite the 1st Respondents committee having found that the Petitioners' title was absolute/ freehold and that it was free from any encumbrances the committee in its wisdom decided that they would hold yet another meeting, which has not been held but which hangs on the Petitioners shoulders and is tantamount to political prosecution.

12. That the allegations put forward by the clerk to the 1st Respondent's to the effect that there have been complaints by members of the public or 3rd parties as to the ownership of the suit land by the Petitioners are baseless as no evidence in any form be it complaint petitions, objections or complaints has been adduced to support their allegations. That although the Respondent has alleged that the suit land was public land and that the Petitioners obtained the same through fraud, they had not demonstrated any aspect of the same. No evidence has presented to prove that the Petitioners did indeed obtain the said title through fraud.

13. The Petitioners prayed that the court upholds their rights of the registration and ownership of the suit land so as to protect it from interference by the busy bodies like the 1st Respondent who were the organ of

the 2nd Respondent.

14. In response to this Petition, the 1st Respondent filed their replying affidavit on 23rd October 2017 through their directorate of Legal Services while the 2nd Respondent filed their response on the 15th August 2017 through the firm of Njuguna Kamanga and Company Advocates.

1st Respondents case.

15. The 1st Respondent's case is contained largely in the Affidavit in response to the Petition sworn by the clerk to Nyandarua County Assembly on the 23rd October 2017. The 1st Respondent's counsel's submission was to the effect that firstly, he was properly on record in terms of the provisions of Section 9 of the Advocates Act. That the Preliminary Objection raised by the Petitioners did not meet the threshold laid down in the case of **Mukhisa biscuits Manufacturing Co. Ltd vs. West End distributors Ltd [1969] EA 696** in that it was not a point of law but a personal opinion. That the 1st Respondent having fulfilled the requirements under Section 9 of the Advocates Act, was properly on record. That further Section 43 of the County Government Act gives the county government a choice of its legal representation.

16. That the Petitioners' title to the suit land was a subject of contention from members of the public more so the residents of Thiririka-Kariani village, to the effect that the allocation of the said suit land by the Settlement Fund Trustee to the Petitioners was marred by vagueness and procedural inconsistencies and illegalities which has sparked protests and objections as evidenced in annexures marked as NN3 and NN4 of their replying affidavit.

17. The 1st Respondent pointed out to examples of irregularities in the issuance of the title to the Petitioners one of them being that although the title deed was issued to the Petitioners on the 3rd April 2008, yet the Petitioners' registration of the Self-help group had been on the 12th January 2012 four years after the issuance of the title.

18. A second anomaly was to the effect that the land purportedly issued to the Petitioners by the Settlement Fund Trustees had a dam situate within it and several public amenities constructed by members of the public which included a nursery school, cattle and sheep dips and houses which were initially used by the Administration Police as a police post, public utilities which the Respondents have undertaken to destroy in an attempt to wipe out evidence and deny the public access to the facilities.

19. That the findings, observation and recommendation by the County Assembly Committee on lands (its functions) herein annexed as NN1 was to the effect that the Petitioners had fenced off the dam, which was a major source of water to the residents of Thiririka-Kariani village thus denying them access to water.

20. That the Constitution under Article 176 as well as Section 9 of the County Government Act had vested in the county Assembly and its committees with among others, powers to offer representation, oversight and legislative roles to the people of Nyandarua County which included presenting, conversing on concerns and complaints raised by the people on public interests issues in the county Assembly. This powers thus included the power to summon any person to appear before it for the purpose of giving evidence or providing information.

21. That the issue of the present suit land was raised to the effect that the same being a public land, could not be held by a private person but be used by the public for public good.

22. The 1st Respondent relied on the provisions of Article 61 of the Constitution that classified land as public, private and community land. That further Article 64 (1) (i) defined public land as *all rivers, lakes and other water bodies as defined by an Act of Parliament*;

23. That Section 2 of the Land Act thus gave a further definition of public land as *having the meaning*

assigned by Article 62 of the Constitution and includes the coast foreshore, river, dams lakes and other reserves under the Survey Act ([Cap. 299](#)) or under any other law;

24. They submitted that Article 62 of the Constitution vested power in the county governments, National governments as well as the National Land commission with the authority to protect public and on behalf of the people of Kenya therefore the County Assembly did not overstep on its mandate as claimed by the Petitioners.

25. The 1st Respondent further submitted that Sections 24, 25, and 26 of the Land Registration Act foresaw a scenario where the registration by a person as a proprietor of a suit land obtains absolute ownership and is entitled to enjoy all the rights and privileges belonging or appurtenant thereto, but that such right could be diminished where the said certificate had been acquired illegally, un-procedurally or through a corrupt scheme.

26. They relied on the case of **Diocese of Eldoret Trustees (registered) vs. National Land Commission and 2 others [2015] eKLR** wherein the court held that it was not sufficient to wave a title deed and claim to be the owner of land. That it must be established that the same was acquired lawfully and procedurally, to submit that in the instance case, the Petitioners had not established this fact.

27. The 1st Respondent urged the court to find that the certificate of title held by the Petitioners was not lawfully and procedurally acquired and to order that there be rectification of the register by ordering the Land Registrar to cancel and/or amend the same if it is satisfied that the registration was obtained, made or omitted by fraud or mistake. That the petition be dismissed.

2nd Respondent's Case

28. The 2nd Respondent's response to the petition was that they were opposed to the same entirely for being vague, misplaced and for not disclosing any violations of the Petitioners rights to warrant the intervention of the court.

29. The fact, as disposed by the Petitioners, that there has been interferences and disruptions by the county Government officials had not been substantiated as to what the officials have actually done in contravention of the petitioners' rights.

30. Further that the Petitioners was trying to sanitize its title, which they acquired fraudulently through a shortcut, the present petition herein. The 2nd Respondent submitted that the orders they sought, being a declaration that their title Nyandarua/South Kinangop/563 was valid and duly registered could only be sought through the filing of a suit and not through the Petition as this would lock out any questions as to how the said title was obtained.

31. The 2nd Respondent associated itself with the submissions of the 1st Respondent to the effect that the suit land was public land and by the court issuing the orders so sought, it would be locking out interested parties from challenging the said title, further, the validity of the title has been challenged to the effect that it was issued to a non-existing entity as at 3rd August 2008, the Petitioners had not been registered. They prayed that the Petition be dismissed.

32. I have considered the submissions as well as the annexures, the law and the authorities herein attached by counsel for the parties. From the title and/or heading of the Petition, the Petitioners has not disclosed which of their rights have been infringed by the Respondents. It therefore not easy for the court to discern what Constitutional rights of the Petitioners were violated by the Respondents.

33. However, a reading of the pleading seems to bring out the fact that whereas the Petitioners' claim to be proprietors of the suit land by virtue of having been registered as such, their complaint is that the Respondents, more so the 1st Respondent has been interfering and/or trespassing on the said suit by holding meetings to deliberate on the issue of whether they hold a valid title deed to the suit land thereby

interfering with the petitioners' running of its business on the suit land which they claim is private land.

34. That the Respondents were restricting the Petitioners from exercising its rights to own, occupy and/or develop the suit land which is not public land. The Petitioners therefore seek from this court a declaration order to the effect that their title Nyandarua/South Kinangop/563 is duly registered and valid.

The Petitioners have also raised a Preliminary Objection as to the legal representation of the 1st Respondent.

35. Respondents on the other hand have challenged the proprietorship of the Petitioners to the suit land claiming that the same is public land and the title to the same was procured fraudulently and un-procedurally. Further that the Petitioners have come to court by filing a Petition which is a short cut and does not bring out all the issues at stake. That the proper way was for them to file suit in such a scenario.

36. The Respondents have also submitted that the petition is vague, misplaced and does not disclose any violations of the Petitioners' rights to warrant the intervention of the court.

37. The issues for determination herein are follows.

- i. Whether the Preliminary Objection is sustainable by virtue of the 1st Respondent's legal representation.
- ii. Whether the Petition is fatally defective in so far as it raises no Constitutional issue or matter and facts.
- iii. Whether the Petitioners are entitled to the reliefs sought in the petition.

38. I have considered the issues raised herein. The first issue for determination is whether the 1st Respondent's Counsel had the *locus standi* to institute these proceedings. On the first issue, raised, I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696 A** Preliminary Objection per Law J.A. was stated to be thus:-

“.....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 the 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

39. The summation of the petitioners' submission is on the irregular representation of the 1st Respondent in the petition for reason that the 1st Respondents' Counsel was a person not authorized by virtue of Section 43 of the County Government Act to represent the County Assembly in court.

40. Section 43 of the County Government Act provides as follows:

A county government may, pursuant to Article 156(4) of the Constitution request the Attorney-General to represent the county government in court or in any other legal proceedings to which the county government is a party other than in criminal proceedings.

41. Article 156(4) of the Constitution provides as follows:

The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

42. According to the wording of Section 43 of the County Government Act, the same is clear that it **may** (emphasis) request the Attorney general to represent it. The wordings are therefore not couched in mandatory terms which then leaves room for the County Government to have a legal representation of their choice to represent them in court proceedings.

43. Secondly, the letter of appointment of counsel representing the County assembly was clear to the effect that amongst other legal duties, his responsibilities as a Principal legal Counsel shall be to represent the County Assembly and the County Assembly Service Board in court proceedings.

44. In my humble opinion, the Preliminary Objection raised is a mere technicality which cannot be upheld at the expense of substantive justice, and the public interest. Further, in view of the provisions of Article 156(4) of the Constitution which are clear that the Attorney General is mandated to represent the National Government in court in civil or *in any other legal proceedings to which the National Government is a party other than criminal proceedings*. The said provision is self-explanatory. The Preliminary Objection hence lacks merit and is dismissed.

45. On the second issue as to whether the Petition is fatally defective in so far as it raises no Constitutional issue or matter and facts, I find that fundamental rights and freedoms are specifically set out in Chapter Four of the Constitution which rights and freedoms are individually identifiable and defined from article 26 to 51 of the Constitution.

46. It follows therefore, that a breach of any of the rights and freedoms must be specifically pleaded, particulars thereof set out and facts in respect thereof indicated in the Affidavit of a Petitioners. In the present Petition, the Petitioners has not set and/or pleaded what rights have been breached. Hence it cannot be ascertained what actual rights or freedoms have been contravened and in what way.

47. In the decided cases in **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** and **Stephen Njuguna & others –vs- Hon. Lewis Nguyai & Others, H.C Petition No. 118 of 2011 (UR)** where it was held that:

*“The jurisdiction of the court under Article 22 and 23 of the Constitution is one for enforcement of fundamental rights and freedoms guaranteed under the Bill of Rights. Each right under the Constitution is specifically defined and has specific contents. It therefore follows that a party who invokes these provisions must set out clearly the sections or provisions he claims have been infringed or violated and show how these sections are infringed in relation to him. The principle has been established in a long line of cases dating from **Anarita K. Njeru v Republic [1979] eKLR**. I also agree with the Respondent that the petitioner’s complaints are of a general nature and relate to dissatisfaction in the manner the ESP has been implemented. If this is the case, then, unless there are specific provisions of the Bill of Rights that have been infringed, I consider that the petition is lacking in merit.”*

48. The wordings of Trevelyan J and Hancox J (as he then was) were clear, in the case of **Anarita Karimi Njeru** (supra), where they stated as follows:

“We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed”.

49. Although it has been urged that each case ought to be considered on its own merits with the court ascertaining if one can painlessly identify the constitutional questions being raised or advanced, and further that it is the substance of the claim that matters rather than the prayers, I hold and find that the instant Petition is so vague that it does not disclose what the Petitioners claims are constitutional concerns. I therefore proceed to strike it out with costs to the Respondents.

Dated and delivered at Nyahururu this 30th day of July 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE