



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CONSTITUTIONAL PETITION NO. 5 OF 2017

IN THE MATTER OF ARTICLE 2, 3, 19, 20, 21,

22, 23, 40, 47, 48, 62 AND 67 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR

ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE

NATIONAL LAND COMMISSION ACT, NO. 4 OF 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 40, 47, 48, 50 AND 60

OF THE CONSTITUTION

AND

IN THE MATTER OF MBIRIRI MARKET,

NDATHI SETTLEMENT SCHEME

BETWEEN

EPHANTUS MURIUKI MUHORO

RICHARD MWANIKI MUNENE

CHARLES NDUNGU MAIMBA

PAUL IRUMBI WAHOME

JAMES KAMAU NJOROGE (*Suing on their own behalf and on 793*

***original members of Ndathi Scheme*).....PETITIONERS**

-VERSUS-

JUDGMENT

1. The petitioners herein, who have described themselves as original allottees of the parcel of land within Ndathi Settlement Scheme (herein after referred to as the Scheme), filed the suit herein claiming that the parcel of land which was reserved for public use in the scheme has been demarcated and the resultant parcels of land therefrom allocated to persons who are not members of the scheme.

2. Terming the demarcation of the land into 58 plots or thereabout and allocation of the resultant plots to persons who are not members of the scheme unlawful and against their expectation that they were the ones to benefit from the allocations, the petitioners contend that the respondents violated their right to a fair administrative action and right to property.

3. For the foregoing reasons the petitioners seek the following reliefs:-

(i) A declaration that any action by the respondents alienating the suit properties to persons who are not members of Ndathi Settlement Scheme and residents of the area within the scheme would contravene their right to protection of right to property;

(ii) A declaration that any action by the respondents alienating the suit properties to persons who are not members of Ndathi Settlement Scheme and residents of the area within the scheme would contravene their right to fair administrative action;

(iii) A declaration that any action by the respondents alienating the suit properties to persons who are not members of Ndathi Settlement Scheme and residents of the area within the scheme would be in breach of the respondent's constitutional duty to hold the suit properties in trust for residents of Ndathi Settlement Scheme;

(iv) A declaration that any action by the respondents alienating the suit properties to persons who are not members of Ndathi Settlement Scheme and residents of the area within the scheme would be in breach of the respondents' constitutional duty to hold the suit properties in trust for the residents of Ndathi Settlement Scheme and is thus unconstitutional.

(v) An order of certiorari to quash the decision of the respondents to allocate the suit land to persons who are not members of the scheme and an order reverting the suit plots to the 2nd respondent to hold on their behalf;

(vi) An order of mandamus to compel the 1st respondent to repeat the allocation of the suit plots and to allocate the plots to members of the scheme only;

(vii) costs of the petition and interest.

4. The petition is supported by the affidavit of **Richard Mwaniki Munene**, one of the petitioners herein, in which the averments on the petition are reiterated.

5. The petition is opposed on the following grounds:-

(a) That the petitioners lack capacity to sue and be sued on behalf of the members of Ndathi Settlement Scheme as they are not the bona fide officials of the scheme;

(b) That the petitioners' allegations are unsubstantiated and unverifiable (names of strangers to whom the suit land was allocated not provided);

(c) Allegations in the petition are unfounded, baseless and scandalous in nature hence incapable of forming the basis of issuance of the orders sought;

(d) There is no evidence of wrong doing by the respondents;

(e) That no formal complaint was made to the respondents and in particular the 2nd respondent;

(f) That this court has no jurisdiction to hear and determine the suit herein as its jurisdiction is ousted by **Section 30** of the Land Adjudication Act, Cap 284 Laws of Kenya.

(g) That the petitioners have no cause of action against the respondents;

(h) That the petitioners have not exhausted the remedies provided under **Section 26** and **26A** of the Land Adjudication Act as read with **Section 15** of the National Land Commission Act, 2012.

6. Pursuant to the directions issued on 30th October 2017, the petition was disposed of by way of written submissions.

Petitioner's submissions

7. In the submissions filed on behalf of the petitioners reference is made to the averments contained in the petition to the effect that the suit properties are public lands which have been subdivided and allocated to persons who are not members of the scheme and because the 1st respondent did not respond to those allegations despite having been served with the petition herein submitted that those depositions remain unchallenged.

8. Explaining that the petitioners' claim is based on the right to be allocated the parcels of land which are the subject matter of this petition, the petitioners contend that the process of allocation of the suit property is governed by the provisions of the Constitution and the Land Act, 2012 and not the Land Adjudication Act as contended by the 1st respondent.

9. Arguing that in dealing with public land the respondents are subject to the checks provided for

in the Constitution and the other applicable laws based on the case of **National Land Commission v. Attorney General & 17 others (2015) eKLR** where it was observed:-

“the conditioning medium within these functions have to be conducted is constituted by the national values and principles outlined in Article 10 of the Constitution: Participation of people, equity, inclusiveness, human rights, non discrimination, good governance, trans- parency and accountability....in view of the troubled history of land in Kenya, the NLC and the ministry have to involve the public when carrying out there functions. Only through public participation is it possible to realize the principles of land policy, as set out in article 60(1)....”, it is pointed out that the petitioner's petition is founded on grounds of alleged failure to involve them in the alienation of the suit property yet the respondents hold it for their own benefit; the process of alienation was not transparent-was shrouded in secrecy; alienation was done for the benefit of strangers at the expense of local residents and the petitioners have been denied access to information to how the alienation process is being done.

10. On account of the foregoing allegations, the petitioners contend that their Constitutional right to a fair administrative action and the right to property has been breached by the respondents. The respondents are also said to have breached their trust obligations to the petitioners.

11. Arguing that under **Article 47** as read with **Sections 4(1), 5 and 7(2)** of the Fair Administrative Actions Act, the respondent ought to have issued a public notice inviting public views concerning the alienation of the suit properties, considered the views submitted as well as relevant material facts and given reasons for their action explaining that the respondents in dealing with the suit properties did not comply with those legal edits, it is submitted that the actions of the respondents are vitiated by their none compliance with the law and hence subject to review. In that regard reference is made to the case of **Geothermal**

Development Co. Ltd vs. Attorney General & 3 others (2013) e KLR.

12. Based on **Article 40** of the Constitution under which the right to acquire property, either individually or in association with others is guaranteed, it is submitted that by alienating the suit properties to strangers and without giving the petitioners the right to participate in decisions in relation to the suit properties, breached their right to own property.

13. Based on **Article 23(3)** of the Constitution and **Section 7** of the Fair Administrative Action Act it submitted that the reliefs sought are well founded.

The 2nd respondent's submissions

14. On behalf of 2nd respondent, it is submitted that the petitioners not being the trustees of the scheme, have no *locus standi* to bring and prosecute this petition either on their own behalf or on behalf of the other members of the scheme.

15. Based on the provisions of **Article 67(2)(a) and (e)** of the Constitution, the petition is said to be bad in law for having been pre-maturely brought before court. It is reiterated that the jurisdiction of this court is ousted by the provisions of **Section 30** of the Land Adjudication Act.

16. According to the 2nd respondent, the petitioners ought to have filed a formal complaint before the 1st respondent in accordance with the provisions of **Section 38** of the Land Act (Amended),2016 which amended **Section 15(4)(e)** of the National Land Commission Act, 2012.

17. Arguing that the petitioners who own individual titles in the scheme have failed to demonstrate how their rights are being directly violated or interfered with in so far as the suit property is concerned, it is pointed out that the suit is premised on the contention that the petitioners ought to have been given priority while allocating the property which ground, according to the 2nd respondent is flimsy and illegally instigated for personal gain.

18. Based on the decision in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** where it was observed:-

“where a peson is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject the application at the threshold...”, the petition herein is said to be lacking in merit and the court urged to dismiss it with costs to the 2nd respondent.

Analysis and determination

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

(i) Whether the petitioners have *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 petition discloses any reasonable cause of action against the respondents?

(iv) What orders should the court make?

20. On whether the petitioners have *locus standi* to institute this suit, because the petitioners are not the trustees of the Scheme on whose members behalf the petition was brought, it is submitted that the petitioners lack *locus standi* to institute and prosecute this suit.

21. Concerning that contention, whilst the suit herein is expressed as having been brought on behalf of the petitioners and on behalf of the 793 original members of Ndathi Settlement Scheme, it is noteworthy that besides the 5 names listed on the face of the petition, the petitioners neither filed a list of the members of the scheme on whose behalf the suit is also expressed to be brought nor an authority by the alleged members of the scheme authorizing the petitioners to sue on their behalf as by law required. In this regard see the case of **Kipsiwo Community Self Group v. A.G & 6 others (2013) e KLR** where the court stated:-

“... 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...”

22. It is clear from the above persuasive authorities that members of a group, like in this case, may bring action as a group using their own names or names of some of the members. However, where the action is brought in the name of some of the group members on behalf of others it is a requirement of law that the other members on whose behalf the action is brought be listed and their authority for filing of the group action be sought and obtained if they are to benefit from the reliefs sought in the group action. This is especially so where remedies of private nature as opposed to public remedies are sought in the suit. In that regard see the case of **Kirinyaga United Bar Owners Organization vs. County Secretary Kirinyaga & 6 Others (2014) eKLR**, where it was stated:-

“... 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...”

23. In applying the principles cited above to the circumstances of this case where the reliefs sought are expressed to accrue to the members of the scheme as opposed to the public in general, I am of the considered view that the petitioners ought to have listed the other members of the scheme on whose behalf the petition is expressed to be brought and filed an authority from those members to sue on their behalf. Failure by the petitioners to comply with that requirement of the law, however did not vitiate their right to pursue the claim on their own behalf as the suit is also expressed to be brought on their own behalf.

24. On whether this court has jurisdiction to hear and determine the suit herein, having read and considered the issues raised in this petition which include the right to be consulted when decisions likely to affect them are being made by the respondents, I find that this court is clothed with the requisite jurisdiction to hear and determine such an issue. In this regard see **Articles 23** of the Constitution of Kenya, 2010.

25. On whether the petition discloses any reasonable cause of action against the respondents, I note that the petitioners have merely made allegations of some wrong actions allegedly done by the respondents without providing any evidence of the wrong actions on the part of the respondents for instance:-

(i) No evidence of any allocations to any persons were made. It is not enough to allege that the 1st respondent allocated some parcels of land carved from the suit land to strangers. The petitioners needed to produce evidence of such exercise and the beneficiaries there of to assist the court make an informed decision on the issue. Although that contention was not controverted by the 1st respondent whose officers were accused of having conducted the alleged unlawful allocations, that did not absolve the petitioners from the duty imposed on them of proving all the averments contained in the petition and in respect of which they sought relief from this court. In this regard see **Section 107** of the Evidence Act which imposes a duty on the person who alleges existence of facts on which his claim is hinged to prove existence of the facts. I reiterate that in the circumstances of this case, the petitioners failed to prove existence of the facts on which their petition is premised hence failing to prove their case on a balance of probabilities as by law required.

(ii) Even assuming that the respondents had made allocation of the land to some strangers as contended by the petitioners, it would not be possible for this court to grant any orders adverse to the interests of those people without giving them an opportunity to defend their right to the properties as to do so would be tantamount to condemning them unheard something the law abhors. In this regard see the case of **Pashito Holdings Limited & Another vs Paul Ndungu & 2 OTHERS [1197]eKLR** where the Court of

Appeal stated that:

“...The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

“However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings”.

With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents' case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief”.

26. The upshot of the foregoing is that the petition has no merit and is dismissed with costs to the 2nd respondent.

Dated, signed and delivered in open court at Nyeri this 18th day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

Ms Ndegwa h/b for C. M. King'ori for the petitioners

N/A for the respondents

Court assistant - Esther