REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ENVIRONMENT AND LAND DIVISION

CONSTITUTIONAL PETITION NO. 1 OF 2017

IN THE MATTER OF ARTICLES 10, 20, 21, 23, 28, 40, 61, 63 AND 68 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 37 OF THE LAND ACT 2012 AND THE ENVIRONMENT COURT ACT 2011

AND

IN THE MATTER OF UN-SURVEYED LAND PARCELS NO. LR 5468/R

BETWEEN

JOSEPH LANGAT.....1ST PETITIONER

PETROLINER CHERONO.....2ND PETITIONER

PATRICK LANGAT..... 3RD PETITIONER

(SUING AS THE OFFICIALS OF 343 MEMBERS OF KOITA WELFARE SELF HELP GROUP)

AND

KERICHO COUNTY GOVERMENT.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Introduction

1. The Petitioners commenced the/this suit by way of a Petition dated 27th February 2017 seeking inter alia an order of permanent injunction restraining the 1st Respondent from trespassing, demarcating, sub-dividing, leasing selling, interfering with or in any other way dealing with all that un-surveyed land known as L.R No. 5468R; a declaration that the Petitioners are the legitimate and bonafide owners of the suit property; a declaration that the forceful entry of the 1st Respondent through its agents, officers, employees and/or any other person working through it on the suit land was unconstitutional; an order of demolition of all the illegal structures on the suit property; an order directing the 2nd Respondent to conduct investigations on the suit property and recommend appropriate redress among others.

2. Contemporaneously with the said Petition, the Petitioners filed an application by way of Notice of Motion dated **27th February, 2017** and filed in court on **7th March, 2017** seeking for the following prayers: -

1. Spent.

2. Spent.

3. THAT pending hearing and determination of this petition the Respondents be restrained by way of an injunction by themselves, their agents, employees, servants and/or officers from working through it from trespassing, demarcating, subdividing, leasing, selling, developing, issuing title deeds, interfering with and/or in any way adversely dealing with all that un-surveyed land known as **NO.LR 5468/R.**

4. THAT the costs of this petition be borne by the Respondents.

3. The said application is supported by the affidavit of **PETROLINER CHERONO** sworn on 27th February, 2017 on behalf of herself and on behalf of the members of Koita Welfare Self-Help Group which was registered on 3rd August 2011 and has a membership of 343 members.

4. In the said affidavit the 2nd Petitioner depones that they are members of Koita Welfare Self-Help Group who reside, graze, worship and co-exist on part of all that un-surveyed land known as **NO.LR 5468/R**.

5. She states that the members of Koita Welfare Self-Help Group have since time immemorial been occupying that undivided parcel of land known as **NO.LR 5468/R** and they have developed the said land with among others a school, semi-permanent houses, livestock, churches and even shops. Photographs of the said developments were annexed as **P.C.-VI**.

6. She further depones that the members of Koita Welfare Self-Help Group have been co-existing peacefully until sometimes around **December 2016** when the 1st Respondent by itself, its agents, servants, employees, officers forcefully gained entry to the said land and started surveying the same for demarcation using heavy machinery. Photographs of the 1st Respondent's agents demarcating the land were annexed as **P.C. VIII**.

7. She avers that the resistance from the members of Koita Welfare self-help group was met with hostility by the 1st Respondent who used the office of the County Commander Kericho to intimidate the Petitioners into silence. She has annexed photographs of the police officers as **P.C-X.**

8. She explains that the genesis of the suit land herein started way back in the 1950 when one of the Petitioner's ancestors was arrested following a land row on the suit land for his eviction. He defied orders of the then Provincial Commissioner and was charged with a criminal offence. The suit went all the way to the then Supreme Court and a finding was made. A copy of the court's Judgment is annexed as **P.C-XIII**.

9. The 2nd Petitioner maintains that the suit land herein is a community land which has been exclusively under the care, control, use, occupation and possession of the Petitioners as Ndorobos. She has annexed copies of letters dated **6/1/1987**, **11/10/1996**, **7/8/1997**, **18/9/1998**, **16/7/1997** and **25/6/1997** as **P.C-XIV**.

10. The 2nd Petitioner avers that the suit land herein is ancestral land to the Petitioners and is a fundamental reason for the material and cultural livelihood of the petitioners.

11. She depones that the forceful entry of the 1st Respondent, its agents, servants, employees and/or officials amounts to sabotage to the lawful subdivision and registration of the suit land herein justly.

I. That sometimes around **22nd February, 2005** and **11th March, 2009**, the 1st Respondent formally known as the defunct Municipal Council of Kericho issued notices inducting, demolishing structures and/or preventing cultivation of the suit land herein by the Petitioners who are residents of the land described as Chelimo area**.** Copies of the notices were annexed as **P.C-XVII (a) and (b)**.

II. The Petitioners allege that the 1st Respondent's conduct is not new to the Petitioners herein and has previously given rise to two separate suits touching on the suit land namely **KERICHO HCC NO. 98 OF 2011 (05) JOHN KIPLANGAT CHEPKONY & 427 OTHERS –VS- MUNICIPAL COUNCIL OF KERICHO AND KERICHO ELC NO. 12 OF 2016 CHELIMO PLOT OWNERS WELFARE GROUP & 288 OTHERS –VS- (SUED AS THE MANAGEMENT COMMITTEE OF CHELIMO SQUATTERS GROUP**. The said suits were withdrawn and struck out respectively on **24th June, 2015** and **25th November, 2016**. The 2nd Petitioner has annexed a copy of the Order issued on **24th June, 2015** and the Ruling by Hon. Sila Munyao J. delivered on 25th November, 2016 as **P.C-XVIII (a) and (b)**.

12. The application is opposed by the Respondents through the Replying Affidavit of John Mibei sworn on 13th March, 2017 in which he depones that the application herein is incompetent and bad in law.

13. He refutes the Petitioners' allegation that they own the land known as **L.R NO. 5468/R** as community land and that the 1st Respondent gained forceful entry into the said land.

14. Mr. Mibei depones that the land that had been earmarked for the Agricultural show by the 1st Respondent was public land known as **L.R NO. 631** and not **L.R NO. 5468** as alleged by the petitioners. He has annexed a copy of the Survey of Kenya map of **1963** Sheet **No.3** cadastral **1: 250,000** (Special) as annexture "**CGK 1**".

15. He explains that parcel of land No. **631** as indicated in the Part Development Plan was defined as the intended Agricultural Show ground and the same was within Parcel **No. L.R 631** and not **L.R NO. 5468** as alleged by the Petitioners.

16. Mr. Mibei argues that the 1st Respondent is bound to protect public land as a custodian of the same and hence granting the orders sought by the Petitioners would have a draconian effect on the protection and preservation of public land.

17. He argues that the Petitioners' application is defective and brought in bad faith hence an abuse of the court process and prays that the same be dismissed with costs to the Respondent.

Issue for Determination

18. The main issue for determination is whether the Petitioners are entitled to injunctive orders.

Analysis and Determination

19. In order for the court to exercise it's discretion in granting injunctive relief the Applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

> "First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience."

A further test for the grant of an injunction has emerged from the approach adopted by Ojwang J (as he then was) in the case of **Amir Suleiman V Amboseli Resort Limited (2004) eKLR** when he relied on the English case of **Films Rover International 1986 3 All ER 772** where the court stated as follows:

> "A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong".

The first issue that the Court must determine is whether the Plaintiff has established a prima facie case with a probability of success.

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

> "A prima facie case is… one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

20. The role of a Court faced with an interlocutory application for injunction is not really to make final findings but to weigh the relative strength of the parties' cases. This was so held in the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR1**, where the court stated as follows: -

> **"in an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties' cases,"**

21. The Petitioners have demonstrated that they have been in occupation of the suit property since time immemorial and they have developed the said land with among others a school, semi-permanent houses, livestock, churches and even shops. As depicted in the photos annexed to the 2nd Petitioner's affidavit.

22. Additionally, she has demonstrated that the suit land herein is a community land which has been exclusively under the care, control, use, occupation and possession of the Petitioners as Ndorobos. She has annexed copies of letters dated **6/1/1987**, **11/10/1996**, **7/8/1997**, **18/9/1998**, **16/7/1997** and **25/6/1997** as **P.C-XIV**. For example annexture PC1X is a letter dated 6th January 1987 from the Ministry of Lands and Settlement addressed to the Distric Commissioner, Kericho stating in part as follows:

> "**Some members of Koita Squatters have visited this office with a complaint that they have been evicted from their shamabs and got their houses burnt down.**
>
> **According to them, they have been residing on this shamba for over 50 years and have even put up permanent houses and other structures.**
>
> **They allege that the Kericho Municipal Council has taken up these premises and thus their eviction.**
>
> **Please deal with their case as appropriate and communicate to them accordingly"**

23. To the extent that the Petitioners have demonstrated that they have been in occupation of the suit property for many years, they have established an interest in the same. They have also demonstrated that this interest in the suit property has been violated thus proving that they have a prima facie case with a probability of success. In arriving at this finding I am guided by the case of **Luka Kitumbi and 8 others V**

Commissioner of Mines and Another (2010) eKLR where Ojwang J (as he then was observed as follows:

> **On the basis of affidavit evidence, Mr. Mwinzi urged that the plaintiffs, even though they were not bearing formal documents of title, had the most practical indicia of ownership, in the sense of living their rlives , for many years in homesteads constructed and fenced on the suit land, earning their entire livelihood therefrom. Counsel was n my view able to demonstrate that by the terms of the Trust Land Act Cap 288 of the Laws of Kenya, the plaintiffs must be regarded as the de facto owners of the suit land. It appears to me from the evidence that the availing of documents of title tot eh plaintiffs for the lands they occupy is but a formality, for in substance they are the owners. *Can such land be arbitrarily claimed by the Commissioner of Mines and Geology, and thereafter disposed off just as he chooses, introducing to these lands miners of his choice, and these miners then enter the land, disrupt the social lives of the resident families, and dig up the ground prospecting for minerals, in the process actually taking over those lands without the consent of the lawful occupants***
>
> **Against this background, I hold that the entitlement to the suit land attached to the plaintiffs and I must then come to the conclusion that the 1st defendant had no right, in law and on constitutional principle, to assume disposal powers over the suit land, and to assign the same for any purpose whatsoever to the 2nd defendant."**

24. Whether or not the parcel of land No. **631** as indicated in the Part Development Plan was defined as the intended Agricultural Show ground and the same was within Parcel **No. L.R 631** and not **L.R NO. 5468** as alleged by the petitioners are issues which can only become clear when the matter is heard and all the parties present their evidence.

25. I am however persuaded that in order for the issue of ownership to be determined, there is need to preserve the subject matter of the suit in accordance with the doctrine of lis pendens.

26. In the case of ***Mawji vs US International University & another [1976] KLR 185,*** Madan, J.A. stated thus:-

> **"The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other…"**

27. The principle of *lis pendens* is therefore applicable in this sui*t.* See the case of **Naftali Ruthi Kinyua V Patrick Thuita Gachure and another (2015) Eklr** where the Court held that the doctrine of *lis pendens* is applicable pursuant to the provisions of section 107 of the Land Registration Act .

28. As to whether the petitioners are likely to suffer substantial loss if the orders sought are not granted. I am persuaded that they have met this threshold.

29. Section 5 (4) of the Community Land Act, 2016 provides as follows:-

> **"Subject to Article 40 (3) of the Constitution and the Land Act, no interest in, or right over community land may be compulsorily acquired by the state except in accordance with the law, for a public purpose, and upon prompt payment of just compensation to the person or persons in full or by negotiated settlement".**

30. From the foregoing provision it is clear that the rights of the Petitioners herein, are recognized by the statute law and cannot be denied by the Respondents. Section 6 of the Community Land Act, 2016 has set out a detailed procedure to regulate circumstances in which trust land in the occupation of residents has been taken. No such procedure has been followed by the 1st Respondent herein; the Petitioners were only issued with notices restraining them from dealing with the suit property in any way whatsoever. The Petitioners were ordered to move in order to give way to the construction of a show ground by the 1st Respondent without any offers of alternative settlement considering that the Petitioners allege that they have no other place to call home. Their forced eviction has therefore occasioned them substantial loss and damage.

31. I am also guided by the principle laid down in the case of **Films Rover International** cited in the case of Amboseli Resort (supra), that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong which more or less accords with the balance of convenience.

32. Accordingly, I direct as follows:

a. That the status quo be maintained pending the hearing and determination of the suit herein. For the avoidance of doubt, the status quo means that the Petitioners shall continue to use or occupy the respective properties that they have been occupying but none of the parties shall sell, transfer or part with possession of the suit land pending the hearing and determination of the main suit.

b. That the parties comply with order 11 of the Civil Procedure Act within the next 30 days in order to expedite the hearing and disposal of this suit.

c. The costs of this application shall be in the cause.

Dated, signed and delivered at Kericho this 12th day of July 2018

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Nyadimo for the Interested Party

2. 1st & 3rd Petitioners present in person

3. Court assistant - Rotich