



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 3 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF INFRINGEMENT AND OR VIOLATION OF THE PETITIONERS CONSTITUTIONAL RIGHTS
CONTRARY TO ARTICLES 19(2), 20(5), 21(1), 2, 2, 22(1), 23(1,2-a,d, & e, 26,27(6),28,29,35,40(1),(3)(a-b),(4)(6),
431(c&d),3,47,47(1-2),60(1-a),62(4),65(4),66(1),68)c-iv,v,vii),73(1),(a),iii &iv,95 and 165 OF THE NEW CONSTITUTION OF
KENYA, 2010**

AND

IN THE MATTER OF SECTION 2, 9 &12 THE GOVERNMENT LAND ACT, CAP 280, LAWS OF KENYA

AND

**IN THE MATTER OF SECTION 65, 66, 67,68,69,70,167,177 & PART X11 OF AGRICULTURAL ACT, CAP 318 LAWS OF
KENYA**

BETWEEN

CHARLES OPONDO OCHIENG.....1ST PETITIONER

NICK MUSUNGU.....2ND PETITIONER

BONIFACE MAKOKHA TELEWA

(And 111 OTHERS).....3RD PETITIONERS/APPLICANTS

VERSUS

KABARAK FARM LTD.....1ST RESPONDENT

ABMA INVESTMENT LTD.....2ND RESPONDENT

KIPSINENDE FARM LTD.....3RD RESPONDENT

LINSHIRE LTD.....4TH RESPONDENT

SIMON MBUGUA THUNGU.....5TH RESPONDENT

HON. NICHOLAS BIWOTT.....6TH RESPONDENT

SETTLEMENT FUND TRUSTEE.....7TH RESPONDENT

COMMISSIONER FOR LANDS.....8TH RESPONDENT

LAND REGISTRAR, TRANS-NZOIA COUNTY.....9TH RESPONDENT
DIRECTOR, LAND ADJUDICATION & SETTLEMENT
TRANS-NZOIA COUNTY.....10TH RESPONDENT
COUNTY SURVEYOR OF LANDS
TRANS-NZOIA COUNTY.....11TH RESPONDENT
THE CABINET SECRETARY FOR LANDS,
HOUSING & URBAN DEVELOPMENT.....12TH RESPONDENT
THE NATIONAL LAND COMMISSION.....13TH RESPONDENT
THE INSPECTOR GENERAL OF POLICE.....14TH RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS.....15TH RESPONDENT
THE NATIONAL ASSEMBLY OF KENYA.....16TH RESPONDENT
THE HON. ATTORNEY GENERAL.....17TH RESPONDENT
THE CABINET SECRETARY,MINISTRY OF
INTERIOR & CO-ORDINATION1.....8TH RESPONDENT

AND

THE COUNTY GOVERNMENT OF
TRANS-NZOIA.....1ST INTERESTED PARTY
THE AREA MP, KWANZA CONTITUENCY.....2ND INTERESTED PARTY
THE KENYA HUMAN RIGHTS COMMISSION..3RD INTERESTED PARTY

R U L I N G

1. The petitioners filed an application dated 28TH May, 2018 seeking the following orders:-

1. That leave be granted to the petitioners/applicants to enjoin Kapsitwet River Estate Limited in this suit as the 19th Respondent.
2. That the 6th respondent herein, Hon. Nicholas Biwott now deceased be substituted in this suit with duly appointed executor's of his will as per the Kenya Gazette Notice.
3. That subsequent to prayer one (1) and two (2) above the petitioners/applicants be granted leave to amend the petition dated 28th April, 2017 in terms of the draft amended petition attached herewith.
4. That subsequent to prayer three (3) above, the petitioner be at liberty to serve the amended petition to the 6th and 19th respondents to the Firm of Daly & Inamdar Advocates, ABC Towers, 6th Floor-Nairobi, AND/ OR through newspaper advert in the Daily Nation.
5. That the costs of this application be in the cause.

2. The application is supported by the affidavit of the 1st petitioner and the grounds on the face of the application. A further affidavit sworn by the 1st to 3rd petitioners on the 13/7/2018 was filed on 16/7/2018.

3. The 6th respondent filed replying affidavit of **Kenneth Hamish Wooler Keith** dated 25/6/2018 in response to the application dated

28/5/2018. The gist of that affidavit is that contrary to the requirements of the **Law Reform Act Cap 26**, the **Constitution of Kenya (protection of rights and fundamental freedoms) Practice and Procedure Rules 2013**, and the **Civil Procedure Rules**, it has not been established that the petition raises a cause of action or justiciable controversy against the deceased and so it can not be deemed to have survived the deceased, or as against the estate of the deceased; that the petition does not set out with a reasonable degree of precision that which the complainant is complaining about, the provision of the **Constitution** said to be infringed and the manner in which it can be said to have been infringed; that in any event the deceased has never been a registered proprietor of **LR No. 2046** comprised in **Certificate No. IR 318/1** or the subsequent subdivisions thereto and that the same does not form part of the estate of the deceased available for distribution to the beneficiaries thereof. It is stated that the petitioners have not filed any documentary evidence showing that the deceased was the proprietor of the suit land or any subdivision thereof, that he could not have therefore possibly acquired or subdivided or disposed of the suit land, and that the 1st to 5th respondents have filed process acknowledging ownership of the land. It is also alleged that there is no evidence that the petitioners were illegally evicted or arrested and prosecuted or their houses demolished at the instance of the 6th defendant. For those reasons the deponent states that claim against the 6th defendant can not survive the estate of the deceased should not be made party to this dispute.

4. Concerning the prayer that service be effected on Kapsitwet River Estate Ltd through Messrs Daly and Inamdar Advocates, objection is raised that that legal firm would have to take instructions first from the company intended to be served. Counsel for the 6th respondent's estate argued that in the unlikely event that this court is minded to allow the application, the petitioners should provide security for costs to mitigate the prejudice occasioned to the estate of the 6th respondent by these proceedings.

5. A further affidavit of the 1st respondent dated **13/7/2018** is on the record. The deponents therein aver that the only issue before the court is the joinder of the estate of the 6th respondent and any address on the merits of the petition are premature need be avoided at this interlocutory stage. It is stated that the estate can respond substantively to the petition once it is enjoined if an order to that effect issues. I agree with that submission.

6. It is also averred that the 6th respondent was the complainant in **Kitale Criminal Case No 1272 of 2005** against the petitioners and indeed the charge sheet exhibited therein as **"002"** reflects the deceased's name. He is also said to have been a shareholder in Kapsitwet River Estate Limited which company is intended to be enjoined as a party to these proceedings for its role in the alleged fraudulent purchase of the disputed land on **31st May 1982** from the Settlement Fund Trustees while the petitioners had what they describe as **"occupatory"** interest. This shareholding is not disputed.

Determination

7. I have considered the application and the response by the estate of the 6th respondent and the submissions of both counsel. In my view the mention of the 6th respondent (now deceased) as a complainant in the criminal case renders it possible that he had personal interest in the land which the petitioners may be allowed to prove at the hearing of the main petition. His undisputed shareholding in the Kapsitwet River Estate Ltd is also a factor to be considered. I am of the view that the joinder of the Kapsitwet River Estate Ltd is not opposed. Only issuance of an order of service on the Kapsitwet River Estate Ltd through the Advocates mentioned is opposed. I consider the company an entity from its individual shareholders as recognized by the case of **Salomon Vs Salomon**. However, this is a constitutional petition and I am not oblivious of the fact that the complaint in the criminal case is said to have been made by the 6th respondent and not the company. So whereas the company can be enjoined in respect of its alleged acquisition of the land (which is yet to be proved at the hearing), the estate of the 6th respondent requires to take responsibility for the acts of the 6th respondent which were undertaken in person or as an agent of the company, if at all, in respect of the land subject matter in this petition.

8. I need not state more. There are good grounds to cause the estate of the 6th respondent to be enjoined and substituted for the deceased in these proceedings as well as the joinder of Kapsitwet River Estate Limited in these proceedings.

9. In my view the application dated **28/7/2018** merited and it is hereby granted in terms of **prayers 1, 2 and 3**. The amended petition is to be filed and served on all parties within 14 days of this order.

10. However, I agree with counsel for the 6th respondent that instructions would have to be taken from the Kapsitwet River Estate Ltd but I am not oblivious of the fact that the estate now represented by the same counsel in these very proceedings is now aware of the intention to enjoin Kapsitwet River Estate Ltd as a respondent as the deceased had shares therein.

11. For those reasons **prayer number 4** is granted only in so far as the petitioner is granted leave to serve the amended petition upon the Kapsitwet River Estate Ltd and not through the firm of **Daly & Inamdar Advocates, ABC Towers, 6th Floor-Nairobi**, but through a newspaper advert in the Daily Nation or any other daily having national circulation within **14 days** of this order. However, in view of what I have stated on the awareness of the estate regarding the intention to enjoin and serve the Kapsitwet River Estate Ltd, through the counsel or through the press, I direct that in the event that enquiry is made within **7 days** hereof of the firm of **Daly & Inamdar Advocates, ABC Towers, 6th Floor-Nairobi** by counsel for the petitioners as to their willingness to accept service prior to the placing of the press advertisement, and the firm of Daly & Inamdar Advocates, ABC Towers, 6th Floor-Nairobi accepts service of such process within one day of that request, then service on behalf of Kapsitwet River Estate Ltd shall be effected on them. If that legal firm objects to service, matters relating to the expense of that service of process through the press, shall be considered specifically by the Deputy Registrar during the taxation of the bill of costs and ruled on as appropriate.

12. On the issue of security for costs, this court is of the view that in constitutional petitions for the enforcement of rights there should be no unnecessary hurdle placed in the path of a bona fide litigant unless the petition is so hopelessly presented. However I must make it clear that at this juncture the court is concerned only with the issues of joinder, service and security for costs and other matters may be raised at the appropriate time during the hearing. For now I find no need to order security for costs be required of the petitioners and that request is hereby dismissed. The costs of this application be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale on this 26th day of September, 2018.

MWANGI NJOROGE

JUDGE

26/9/2018

Coram: Before Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Achoki for the respondent's Estate

Mr. Karani holding brief for Musungu for petitioners

Mr. Karani holding brief for Kuyioni -16th respondent

Mr. Kiarie for 19th Interested Party

Mr. Kiarie holding brief for Kiplenge & Kurgat for the 15th respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

26/9/2018