



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAROK

CONSTITUTIONAL PETITION NO. 12 OF 2018

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1 (1), 1(3), 2(1), 2(2),2(4), 3(1), 10,22,23,28,35(1),40,47,48,62(2),63(1), (2), (30 AND (4), 67, 232(1), 258 AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF THE FOREST CONSERVATION AND MANAGEMENT ACT, 2016

AND

IN THE MATTER OF WILDLIFE CONSERVATION AND MANAGEMENT ACT, 2013

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

JOSEPH KIMETO OLE MAPELU.....1ST PETITIONER
FREDRICK KIPTANUI CHERES.....2ND PETITIONER
JOHNSON KIPKETERER ARAP TALAM.....3RD PETITIONER
NAYIEYO OLOLE SIRMA.....4TH PETITIONER
DAVID LEKUTA OLE SULUNYE.....5TH PETITIONER
BENSON KIPNG'ETICH KORIR.....6TH PETITIONER
SEMPELE OLE MALETO.....7TH PETITIONER
PHILIP KIPKIRUI NG'ENO.....8TH PETITIONER
LEONARD LANGAT.....9TH PETITIONER
STEPHEN KIPNGETICH MUTAL.....10TH PETITIONER
SAMUEL MALAKWEN CHUMO.....11TH PETITIONER
NICHOLAS K. KIMETO.....12TH PETITIONER
STANLEY NUNUNA OLE SULUNYE.....13TH PETITIONER

-VERSUS-

THE CABINET SECRETARY, MINISTRY OF LAND

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

COUNTY COMMISSIONER, NAROK COUNTY.....3RD RESPONDENT

NATEMBEYA GEORGE.....4TH RESPONDENT

COMMANDANT, ADMINISTRATION POLICE.....5TH RESPONDENT

THE NATIONAL LAND COMMISSION.....6TH RESPONDENT

KENYA WILDLIFE SERVICE.....7TH RESPONDENT

DIRECTOR GENERAL, KENYA WILDLIFE SERVICE.....8TH RESPONDENT

KENYA FOREST SERVICE.....9TH RESPONDENT

CHIEF CONSERVATOR OF FORESTS,

KENYA FOREST SERVICE.....10TH RESPONDENT

THE ATTORNEY GENERAL

NYAYO TEA ZONE DEVELOPMENT CORPORATION...INTERESTED PARTY

RULING

The Application before me is the Petitioners Notice of Motion dated 18th July, 2018 which was brought under Rule 24 (1) of the Constitution of Kenya (Protection of Rights and Freedoms) Practice Rule 23 in which the Petitioners sought for orders that:-

1. Pending the hearing and determination of this application, interim and conservatory orders do issue and be directed to the Respondents, their agents or anyone authorized by the Respondents or acting under the Respondents, to stay the commencement or continuation of forceful and unlawful eviction, harassment, intimidation, threatening, provocation, incitement, detention arrest, trespass into, demolition, burning of the property of the petitioners and other residents owners who have lawful title deeds of land comprised in the following former Group Ranches:-

- (a) Reiyu Group Ranch
- (b) Enakishomi Group Ranch
- (c) Sisiyan Group Ranch
- (d) Enoosokon Group Ranch
- (e) Nkaroni Group Ranch

2. Pending the hearing and determination of this application, interim and conservatory orders do issue and be directed to the Respondents', their agents or anyone authorized by the Respondents or acting under the Respondents to stay the possession, repossession, adjudication, or in any manner whatsoever irregularly and illegally alienating land comprising the following former Group Ranches:-

- (a) Reiyu Group Ranch
- (b) Enakishomi Group Ranch
- (c) Sisiyan Group Ranch

(d) Ennosokon Group Ranch

(e) Nkaroni Group Ranch

3. Pending the hearing and determination of this Application, the Respondent, their agents or anyone authorized by the Respondents or acting under the Respondents be restrained from interfering or continuing to interfere with the quiet and peaceful enjoyment of the property rights of the petitioners and other residents of land in the following former Group Ranches;

(a) Reiyo Group Ranch

(b) Enakishomi Group Ranch

(c) Sisiyan Group Ranch

(d) Ennosokon Group Ranch

(e) Nkaroni Group Ranch

4. The Applicants be granted to leave to serve the Respondents by way of substituted service in a newspaper of national circulation in Kenya.

interparties

5. Pending the hearing and determination of this petition, interim and conservatory orders do issue and be directed to the Respondents, their agents or anyone authorized by the Respondents or acting under the Respondents, to say the commencement or continuation of forceful and unlawful eviction harassment, intimidation, threatening, provocation, incitement, detention, arrest, trespass into, demolition, burning of the property of the Petitioners and other residents/owner of land in the following former Group Ranches:-

(a) Reiyo Group Ranch

(b) Enakishomi Group Ranch

(c) Sisiyan Group Ranch

(d) Ennosokon Group Ranch

(e) Nkaroni Group Ranch

6. Pending the hearing and determination of this petition, interim and conservatory orders do issue and be directed to the Respondents, their agents or anyone authorized by the Respondents or acting under the Respondents to stay the possession, repossession, adjudication, or in any manner whatsoever irregularly and illegally alienating land comprising the following Group Ranches;

(a) Reiyo Group Ranch

(b) Enakishomi Group Ranch

(c) Sisiyan Group Ranch

(d) Ennosokon Group Ranch

(e) Nkaroni Group Ranch

7. Pending the hearing and determination of this Petition, the Respondent, their agents or anyone authorized by the Respondents or acting under the Respondents be restrained from interfering or continuing to interfere with the property rights of the petitioners and other residents/owners of land in the following former Group Ranches:-

(a) Reiyo Group Ranch

(b) Enakishomi Group Ranch

(c) Sisiyan Group Ranch

(d) Ennosokon Group Ranch

(e) Nkaroni Group Ranch

The Application was based on the grounds that the Respondents had without right or legal authority and in utter disrespect of the property rights and human dignity of the Petitioners have illegally and with impunity commenced forceful evictions and alienation of the Petitioners and other private owners of their property comprising of the five group ranches hereinabove mentioned.

The Petitioners argue that they have been issued with title to the group ranches land having obtained authority and consent to subdivide the original parcel to individual parcels.

The Petitioners further argue that the Respondents actions are politically motivated as there were constant attempts to evict the legal owners and that there is serious and real danger of breach of security as a result of the actions of the Respondents.

The Petitioners also argue that the Respondents in carrying out the aforesaid evictions have not observed the provisions of Article 10 of the Constitution of Kenya in observing human dignity, social justice inclusively, non-discrimination and protection of minority groups. The Petitioners allege that the Respondents have abused their power and have maliciously carried out the aforesaid evictions and allege that they have evicted residents with the group ranches.

The Application was supported by the Affidavit of Joseph Kimeto Ole Mapelu who is the 1st Petitioner but with the authority of his Co-Petitioners where he states that on 7th July, 2018 the Respondents without any authority or right commenced evictions of residents in the five (5) group ranch allegedly in the name of evicting illegal settlers within the Maasai Mau section of the Mau Forest and that the group ranches that are targeted are separated by a belt of Nyayo tea zones which was to create a cutline between the Forest and their parcels of land.

The Deponent further contends that they were issued with individual title deeds to their respective parcels of land consequent to the subdivision of the original parcels of land. He has annexed to the Affidavit correspondence of consents obtained from the defunct Narok County Council.

The Petitioners further averred that in the year 2005 the Respondents attempted to evict the Petitioners but the same was stopped after the court declared the Petitioners as the legal owners of the ranches and further that the eviction of the Petitioners is done in an inhumane and indignified manner and with impunity.

The Petitioners further averred that those evictions amounts to compulsory acquisition of private property and in disregard of the laid down process and procedures and that the Respondents actions are ultra vires and outside their mandate and their actions have resulted in alienation of property, wanton destruction of property and displacement of people.

It is because of the aforesaid grounds and the averments contained in the Petition that they sought for the intervention of the court to grant conservatory orders to stop the Respondents from continuing to carry out evictions in the subject parcels of land situated within the Mau complex.

The Notice of Motion was opposed by all the Respondents by way of replying affidavits. The 1st Respondent opposed the Application and the orders sought through a Replying Affidavit by the acting Director of Land Adjudication and Settlement. He deponed that there are various forests that constitute the Mau forest Complex namely: Trans Mara, Olposimoru, Maasai Mau, Londiani, Eastern Mau, Mau Narok, South West Mau and Western Mau. He stated while the rest of the Forests have been gazetted and are managed by the Kenya Forest Service the Maasai Mau is Trust land under the County Government of Narok.

He stated that the Land owned by the 5 group ranches emanated from 3 adjudication section and on completion of the adjudication process the 5 group ranches owned 447.5 hectares, 1597.5 hectares, 1748.54 hectares and 26 hectares respectively and further that the encroachment of Mau Forest began when the group ranches sub-divided their land and they acquired extra acreage beyond what they owned.

He further deponed that the land owned by the Petitioners were the illegally acquired extra acres and hence were thus acquired irregularly and hence illegal and the Petitioners are beneficiaries of a fraudulently obtained titles.

The 2nd, 3rd and 4th Respondents through a replying affidavit sworn by George Natembeya who deponed that he is the Narok County Commissioner and whom the subject land falls within his area of jurisdiction. He stated that the Mau forest had faced a number of challenges from unauthorized human settlement, illegal settlements, logging, timber harvesting and illegal grazing.

The 2nd, 3rd, 4th Respondents averred that the encroachment into the Maasai Mau forest started during the sub-division of the five group ranches in which the said group ranches illegally encroached further into the forest.

The Respondents have outlined various meetings that they have held with the residents of the area and averred that the residents were co-operative during the eviction exercise which was triggered when a multi-agency county team found that there was massive illegal loggings and destruction of endangered trees.

The 2nd, 3rd and 4th Respondents have also taken issues with the Petitioners averments that the Nyayo Tea zone cutline was meant to separate the group ranches and the forest. The Respondents further averred that this exercise that was carried out was for the wider public interest and good.

The Application was also opposed by the 6th Respondent the National Land Commission.

The 2nd interested party had also opposed the Application and they state that the Petitioners land lays out of the Adjudication section of the originally sub-divided land where consent for sub-division was obtained.

The 2nd interested party further averred that the encroachment of the Petitioners into the forest has caused massive and wanton destruction of the forest and they have accused the Petitioners of a litany of excess ranging from not following due process in the acquisition of their land to outright irregularities.

When the application came up for hearing before me all the parties made their submissions and highlighted the same. At this interlocutory stage what is before the court is an application by the Petitioners for the grant of conservatory orders against the Defendants from evicting them from their parcels of land and hence I will not address myself on the averments made by the parties with regard to whether or not the titles that the Petitioner possess are genuine and/or properly obtained.

The issue that is before the court is whether there was a threatened violation of the Petitioners constitutional rights and whether I should grant conservatory orders to preserve the status of the suit land.

The crux of the Petitioners case is that the Respondent in complete disregard of the Petitioners rights to own property have evicted them from their land within the Mau Complex this are the averments contained throughout the Affidavit of the Petitioners in support of the Notice of Motion.

The Respondents are of the view that the evictions of the Petitioners is justified as they have encroached on the Forest land and their existence is a threat to the environment and the county which relies on the Mau Forest as a Water Tower.

The grounds upon which conservatory orders are granted have already been settled by the courts. Conservatory orders are not the usual interlocutory orders granted by courts the threshold is higher. A party must demonstrate that he has a prima facie case.

The court of Appeal in **Nguruman Limited –Versus- Jan Bonde Nietwen** and 2 others (2014)eKLR at page 10 stated:-

“A party to whom a burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive”.....

From the case before me and the pleadings I have not seen any threat that is tangible and eminent because at the time the Petition was filed together with the instant Application the acts complained of which am called to stop have taken place and evictions had taken place. The grant of conservatory rights are futuristic and cannot be applied retroactively.

Further I also find that the issues raised in the Application are highly contested by the Respondents and in this regard I find that the same can only be determined at a full hearing of the Petition where evidence as to be called to either proof the facts of the Petition.

From the above therefore I find that the Applicants have not laid the basis for the grant of orders sought and that the Application has been overtaken by events as the evictions have taken place and I find that the application is not merited and I dismiss the same.

Costs of the Application be in the cause.

Dated, Signed and Delivered in open court at NAROK on this 17TH day of September, 2018

Mohammed Noor Kullow

Judge

In the presence of:-

CA:Chuma

Mr Manyange for the petitioners 1st to 13th

Mr Eredi for 1st,2nd,3rd,4th,5th and 11th Respondents

Mr Kambo holding brief for Mr. Langat for the 7th and 10th Respondents

Mr Masikonde and Mr. Kamwaro for Lempaa for 3rd Interested party

Ms Meingati is for 2nd interested party

N/A for 6th Respondent

N/A for the 1st Interested party