REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L PET. NO. 6 OF 2014

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 19, 201, 21, 22, 23, 40 AND 60 OF THE CONSTITUTION OF KENYA

AND

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

SAMUEL NDIRANGU AND 141 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF BARINGO.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF LANDS.....3RD RESPONDENT

JUDGMENT

The petitioners herein filed this petition dated 28th April 2014 together with the supporting affidavit sworn by James Maranga and the annexures thereto, seeking for the following orders:

a) A declaration that the petitioners are the rightful and legal owners of all that parcel of land contained in Kisarget village as the rightful allottees and community members of Kisarget village hence a declaration that all that parcel of land contained in Kisarget village Eldama Ravine Town is community land.

b) An order to compel the respondents to commence the adjudication process in respect of Kisarget community land by demarcating, surveying, recording and registering the petitioner's interests in all that parcel of land contained at Kisarget village Eldama Ravine Town.

c) A declaration that the petitioners rights to the properties they hold within Kisarget village Eldama Ravine Town is constitutionally guaranteed and it should not be taken away or altered to their detriment.

d) Conservatory orders of permanently restraining the Ist and 2nd respondents either by themselves, their officers, junior, agents, servants and or employees from removing, altering, trespassing and or dealing whatsoever to the detriment of the petitioners with all that parcel of land contained at Kisarget village Eldama Ravine Town (pending hearing and determination of the petition).

e) Costs of this petition.

The Petitioners filed an application for conservatory orders contemporaneously with the petition which was heard and the court restrained the respondents from evicting the petitioners from the suit land and similarly the petitioners were ordered not to carry out any new developments on the suit land and a status quo to be maintained pending the hearing and determination of the petition.

Directions were taken and the parties agreed to canvass the petition vide written submissions which were filed by all the parties except the 2nd respondent.

Petitioners' Case.

The petitioner gave a history of the dispute. It was the petitioners' case that on 24th March, 2014, the 1st Respondent issued a notice requiring the petitioners to vacate the land known as, for the purposes of this suit 'Kirsaget village' within 14 days.The Petitioners claim that the land on which Kirsaget village is grounded is effectively unregistered community land which had not been surveyed and adjudicated.

It was their averment that the stated notice to vacate triggered the instant proceedings, with the 1st Respondent filing a response to petition and cross petition, while the 3rd Respondent filed grounds of opposition to the petition both dated 21th August 2014 and 28th October, 2018 respectively.

The Petitioners averred that the Respondents' conduct as complained of infringes on their constitutional rights, particularly Articles 2, 19, 201, 21, 22, 23, 40 and 60 of the Constitution of Kenya, 2010, together with statutory provisions as contained in the Land Adjudication Act, cap 284 of the laws of Kenya.

It was the petitioners' case that they settled on all that parcel of land known as Kirsaget village on or about the early 2000's initially as landless people(squatters), and later allocated by authority of the Town Council, now defunct to the 1st Respondent. That the petitioners sought for and were subsequently allocated respective portions of the land, commenced developments thereon, as authorized by the Town Clerk at the time and affirmed by the Commissioner of Lands.

The petitioners further stated that they are organized and occupy what is known as 'Kirsaget village' and there is a clear identification of a community in terms of similar community interest as set out in article 63 (1) of the Constitution. That their ultimate goal is to get title deeds and that the suit land is unsurveyed, there being no physical planning map registered pursuant to the physical Planning Act and in the custody of the Chief Land Registrar.

The petitioners further averred that the suit land is effectively unregistered community land which should be adjudicated hence the current petition to urge the respondents to kick start the process. They urged the court to grant the orders as prayed in the petition.

1st Respondent's Response to the petition

The 1st respondent opposed the petition vide a reply to petition and cross petition filed on 26th September 2014. It was the 1st respondent's case that the land in dispute is public utility land that has not been allocated to any individual or community and that it belongs absolutely to the 1st respondent.

The 1st respondent also stated that the land was planned by the Ministry of Lands, Settlement and Physical Planning on or about the year 1994, in approved development plan No. 70 map A-I . Further that upon creation of 'Lower Shauri Squatter' later named 'Huruma Phase II, 'a neighboring village calling itself Kisarget' made request to the then County Council of Ravine through the Town Clerk seeking to be allocated land where they had been living.

It was further the 1st respondent's case that the site marked as 'D' was demarcated for sewerage treatment works and dumpsite and that the site marked 'C' was earmarked for a high density residential area. The respondent also stated that in the year 2000 the defunct Town Council of Eldama Ravine had made a development plan to facilitate the creation of access roads, way leaves for Kenya Power and Lighting Company and for public utilities within the town including Shauri village.

The 1st respondent stated that the Town Council could not have allocated land which had already been earmarked for public utilities. The respondent therefore stated that if the petitioners were registered as owners of any land which is denied then the same must have been done fraudulently. The 1st respondent further filed a cross petition urging the court to declare that the 1st respondent is the beneficial owner of the suit land in Kisarget Village within Eldama Ravine Town and that it is public utility land earmarked for sewerage treatment works and a dumpsite. Further the 1st respondent prayed for mandatory injunction compelling the petitioners to demolish the temporary structures on the suit land plus costs of the petition.

3rd Respondent's Case

The 3rd Respondent filed grounds of opposition dated 28th October, 2014 stating that the court ought not compel the Respondents to commence adjudication process in respect of Kisarget Community Land as the decision to commence adjudication in respect to the suit land is an administrative one on the part of the executive hinged on availability of funds for the said exercise and not vested in the judiciary power. The 3rd respondent urged the court to dismiss the petition as it is misconceived.

Petitioners' Submissions

Counsel for the petitioners submitted that it is disputed that the suit land was allocated to individuals and that the suit land was set aside for public utility. Counsel listed the following issues for determination by the court;

a) Whether the land in question is unregistered community land or land set aside for public utility.

b) Whether adjudication process is a purely administrative decision, and the Honourable court has no jurisdiction/power to order commencement of adjudication process.

c) The applicable Law (The Constitution, Community Land Act, Land Adjudication Act Trust Land Act).

d) Whether the petitioners are entitled to reliefs as prayed in the petition.

On the 1st issue as to whether the land in question is unregistered community land or land set aside for public utility, Counsel submitted that the Commissioner of Lands has powers to dispose of town plots as set out in Part Ill of the Government Lands Act. Sections 9, 12 and 13, with section 9 provides as follows :-

> 9. *The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed off in the prescribed manner.*

Counsel cited the case of **Republic v Commissioner of Lands & 4 others ex parte Associated Steel Limited, High Court at Nairobi, Misc. Civil Suit No. 273 of 2007, (2014) eKLR**, with the court holding,

> .....it is thus our holding that the disputed plot having already been set aside as a public utility plot the same was held in trust by the 1st respondent (Commissioner of Lands) for the public and public purposes and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot".

It was Counsel's further submission that the petitioners acknowledged that public land is land meant to be utilized by the public as stated above but averred that there has been no part development plan produced in court to ascertain that the land is for public utilities. He further cited the case of Chengo Katana Roi vs Protus Evans Masinde (2013) e KLR , where it was held that :-

> '……*settlement schemes could either be created by purchase of private land or by utilizing unalienated Government Land.*
>
> *The creation of settlement schemes was, and still is, meant to settle the landless people and to regularize situations where people have been staying on either government land or private land without the requisite legal documents.……'*

Counsel therefore submitted that in the absence of any evidence to the contrary, the only inference that this court can draw is that the suit property was not within any contemplated public utilities area as there has been no PDP and survey done on the suit land. He stated that the Director of Physical Planning is mandated under the Physical Planning Act, 1996 to prepare regional physical development plans in respect to Government land, Trust land and Private land for the proper physical development of such land as per Section 16 of the Physical Planning Act, 1996 which provides as follows;

> *"A regional physical development plan may be prepared by the Director with reference to any government land, trust land or private land within the area of authority of a County Council for the purpose of improving the land and providing for the proper physical development of such land, and securing suitable provisions for transportation, public purpose, utilities and services, commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and also the making of suitable provision for the use of land for building or other purpose-*

Counsel also submitted that it is trite law and an indispensable prerequisite that regional physical development plan must be published in the gazzette and in such other manner as the physical planner and Chief Land Registrar deems expedient to the effect that the plan is open for inspection at the place or places and the time specified in the notice.

Counsel further cited the case of BASELINE ARCHITECTS LIMITED & 2 OTHERS vs. NATIONAL HOSPITAL INSURANCE FUND BOARD MANAGEMENT [20081 eKLR where the court that:-

> *"As stated the court has ultimate power in the interest of justice to fulfill the mandate given to it, to safeguard the interests of the public and in doing so, where there is reasonable grounds to protect and preserve the interests of the public. Such duty must*
>
> *be performed in order to do justice between the parties. It is also instructive to note that the court has a duty to safeguard genuine interest of a litigant but also ensure that the scope of privilege is not extended in matters which have strategic importance to members of the public.*

It was Counsel's submission that Government land (now public land) in the former constitutional dispensation provided for two types of land held by the Government of Kenya as a result of Sections 204 and 205 of the repealed Constitution and a number of subsequent Acts. That unalienated government land being land held by the government in the public interest that is not leased by the Commissioner of Lands to another person via a letter of allotment and over which no private title has been granted. Alienated government land on the other hand is land held by the government in the public interest which has been leased to a private individual or corporate body, or which has been reserved for the use of a government ministry, department, parastatal, or other public institution, or has been set aside for a planned public use.

Counsel therefore stated that the suit land is not set aside for public utility and hence should be adjudicated upon to enable the petitioners get title deeds. That for the claim of community land to hold, then there is a requirement for clear identification of communities in terms of ethnicity, culture, or similar community interest as set out in article 63 (1) of the Constitution and that the petitioners qualify in this respect.

On the issue as to whether adjudication process is a purely administrative decision, Counsel submitted that where a public authority has acted in exercise of its discretion, the Court is only entitled to interfere with the exercise of discretion in the following situations:- (i) where there is an abuse of discretion; (ii) where the decision-maker exercises discretion for an improper purpose; (iii) where the decision-maker is in breach of the duty to act fairly; (iv) where the decision-maker has failed to exercise statutory discretion reasonably; (v) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (vi) where the decision maker fetters the discretion given; (vii) where the decision-maker fails to exercise discretion; (viii) where the decision-maker is irrational and unreasonable. He cited the case of

Republic v Independent Electoral and Boundaries Commission (I.E.B. C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017 eKLR, where the court held that the Constitution simply creates the Judiciary as the institution through which the people of Kenya have bequeathed their sovereign power to exercise judicial authority and then mandates that Judiciary, and specifically, the High Court, to enforce the Bill of Rights. In doing so, the Constitution does not constrain the Judiciary to self-limit itself so as to create administrative autonomy or institutional capacity of coordinate organs under the banner of "Judicial Restraint. "

In buttressing the above point Counsel stated that courts must police the boundaries of administrative power as it is firmly based on the constitutional principle of the rule of law. This enhances the role of the courts as the guardians of the law and protectors of individual rights. He stated that the court not only has jurisdiction, but it will be an abdication of its Constitutional mandate to hold otherwise.

Counsel quoted De Smith, Woolf & Jowell, "Judicial Review of Administrative Action" 6thEdn. Sweet & Maxwell page 609:

> "A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

It was therefore Counsel's submission that from the evidence on record the petitioners had, and still have a legitimate expectation of ultimately having their ownership of the suit land crystallized. He further cited the case of Sirikwa Squatters Group v Commissioner of Lands & 9 others [2017 eKLR where the learned judge in granting reliefs stated thus:-

> 'Having found that the petitioners have established their claim under the principle of legitimate expectation this court issues an order directing the 1st, 2nd, 3rd, 4th and 5th Respondents to perform their constitutional duties and abide with the letter reference No. DS/C/I/VOL.II/OI dated the 11th day of October, 2001 by the Director Land adjudication & Settlement Mr. A. Shariff on behalf of the Ministry of Land and Settlement and also His Excellency the President of the Republic of Kenya (Retired) direct approval of the 28th October, 1998 and issue Title Deeds for parcel Nos. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu District into the names of the petitioners for them to resettle and allocate their members….'

Counsel therefore urged the court to find that the petition has merit and be allowed as prayed.

THE 1ST RESPONDENT'S WRITTEN SUBMISSIONS

Counsel for the respondent filed submissions and reiterated the 1st respondents case and that that the suit land is not available for allocation but for sewerage and treatment works for Eldama Ravine Town residents. It was its submission that the petitioners have not met the conditions set to be considered as community members as they are not registered as per section 7 of the Community Land Act. Counsel therefore urged that court to dismiss the petition and issue an order compelling the petitioners to demolish the temporary structures on the suit land.

THE 3RD RESPONDENT'S WRITTEN SUBMISSIONS

It was the 3rd respondent's submission that the petition herein is fatally defective and untenable both in substance and form as it does not meet the constitutional threshold as set out in the celebrated case of Anarita as the petitioners have not in any way set out with reasonable degree of precision that right which is complained of, the provisions of the Constitution said to be infringed and the manner in which the 3rd respondent has breached the petitioners' right over unidentified piece of land .

Counsel further submitted that the petitioners have not sufficiently identified themselves as provided for under section 7 of the Community Land Act, to the extent of establishing that indeed they are registered community members of Kisarget village and that they have the full authority to represent the larger unidentified community with whom they have not demonstrated as having exclusive occupation of the aforesaid land to warrant the issuance of orders sought.

That the petitioners have not even annexed the chief's introductory letter to confirm that indeed the petitioners are members of the alleged Kisarget village within Eldama Ravine Town and as such it is not clear who are the real litigants before the court. Counsel also submitted that the conditions stated under section 7 of the Community Land Act must be met for the petitioners to be entitled to the reliefs being sought.

It was Counsel's submission that if the petitioners' case is that the suit land is community land as defined under Article 63(3) of the Constitution, then any unregistered community land shall be held in trust by the County governments on behalf of the communities for which it is held, and that the law applicable in the management of such land is the Community Land Act. Section 8(1) and (2) of the Community Land Act provides that

> " Subject to this Act and any law relating to adjudication of titles to land, the Cabinet Secretary shall, in consultation with the respective County governments, develop and publish in the Gazette a comprehensive adjudication programme for purposes of registration of community land.(2) The Cabinet Secretary shall, in consultation with the County government ensure that the process of documenting, mapping and developing of the inventory of community land shall be transparent, cost effective and participatory."

It was Counsel's further submission that Section 3 of the Land Adjudication Act CAP 284 which provides that a County Government in which a particular ascertained community land vests may request for the application of CAP 284 on such land, meaning that such adjudication may only be initiated at the request of the County Government. Further that there was no evidence before the court that the 3rd

respondent was formally requested by the 1st respondent to undertake the same but was refused.

Mr. Wabwire Counsel for the 3rd respondent submitted that the land in question is not ascertained by the petitioners and the court cannot be called upon to make a finding on land which is not ascertained. He also stated that the petitioners have failed to demonstrate that the 3rd respondent should be compelled to undertake an adjudication process on unascertained parcel of land for the benefit of unidentified persons in form of the petitioners. That there is well laid down procedures for adjudication process of such parcel of land under the Community Land Act and Land Adjudication Act which the petitioners before court have not even attempted to demonstrate that indeed they followed. Further that the Petitioners have not fulfilled the requirements of Article 63 of the Constitution that for a claim of community land to hold, article 63(1) requires clear identification of communities in terms of ethnicity, culture, or similar Community interests which Petitioners have failed to demonstrate at all. That Article 63(2) (3) and 4 sets out the various qualification of Community land and the persons to whom it belongs which qualification the Petitioners have failed to meet as well.

Counsel therefore urged the court to dismiss the petition with costs to the respondents.

Analysis and determination

I have considered the petitioners' and the respondents' cases together with the submissions by their Counsel and come to the conclusion that the issues for determination are as follows:

a) Whether the suit land is community land or land set aside for public utilities.

b) Whether the petitioners were allocated the said suit land

c) Whether the petitioners are entitled to the reliefs sought.

It was the petitioners' case that they applied to the then Eldama Ravine Town Council to be allocated land as they were squatters on the suit land. They stated that they were subsequently allocated the land and commenced development.

The 1st respondent denied the petitioners' allegation and stated that the land was earmarked for sewerage and treatment works for Eldama Ravine Town and therefore was not available for allocation. The 1st respondent also claimed that the documents produced in court were a forgery. It was their case that the petitioners have also not demonstrated to the court what right has been infringed and that they have not met the threshold of being members of a community as provided for under section 7 of the Community Land Act.

From the onset this petition was bound to suffer some setbacks as it is not clear whether they are claiming the suit land as community land or individual members who want to enforce their right to property. If the petitioners are claiming the suit land as members of a community of Kisarget village then they must first establish that they are a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes-

(a) common ancestry;

(b) similar culture or unique mode of livelihood;

(c) socio-economic or other similar common interest;

(d) geographical space;

(e) ecological space; or

(f) ethnicity.

From the evidence on record and submissions, this was not established by the petitioners. They also did not establish that the suit land was declared as such as per Article 63 (2) of the Constitution. They further did not establish that the land had been converted into community land under any law.

The other issue worth noting is that the petitioners did not establish that they are registered community as provided for under section 7 of the Community Land Act to enable them claim an interest in land. The petitioners also failed to adhere to the provisions of section 8 of the Community Land Act which provides for recognition and adjudication of community land.

" Subject to this Act and any law relating to adjudication of titles to land, the Cabinet Secretary shall, in consultation with the respective County governments, develop and publish in the Gazette a comprehensive adjudication programme for purposes of registration of community land.

(2) The Cabinet Secretary shall, in consultation with the County government ensure that the process of documenting, mapping and developing of the inventory of community land shall be transparent, cost effective and participatory."

From the above analysis I find that the petitioners have not established that the suit land is community land and that the laid down procedures for recognition were followed.

The 1st respondent produced evidence to the effect that the suit land was earmarked for sewerage and treatment works for the good of the people of Eldama Ravine Town which includes the petitioners. Why would individual interest override the public interest in allocation of public land. I find that this land was not available for individual allocation and if the petitioners were looking for land for allocation as squatters then they should follow the right channel through the national government to consider their plight as landless.

I am also not sure of what rights have been infringed from the petitioners' perspective. The petitioners has not outlined what rights have been infringed by the respondents. **Article 22** of the Constitution grants every person the right to move the High Court to enforce fundamental rights and freedoms contained in the Bill of Rights. These rights are very specific and a petitioner who comes before the court must set out with some level of particularity the specific right and how it is violated. This principle was established in the case of ***Anarita Karimi Njeru v Republic*** **(No. 1) [1979] 1 KLR 154** and augmented by the Court of Appeal recently in the case of ***Mumo Matemu v Trusted Society of Human Rights Alliance*** **Civil Appeal No. 290 of 2012 [2013]eKLR**.

What the petitioners want is to compel the respondents to kick start an adjudication process which has elaborate procedures provided for under the law. If they are claiming the land under Community Land Act, then I would say that this avenue is not available as they have not met the threshold as provided for under section 8 of the Act.

On the 2nd issue as to whether the petitioners were allocated the suit land, the evidence on record does not support this assertion as the petitioners gave contradictory statements on the issue. Is it that they are claiming the land because it is community land and therefore entitled as a community or that they are squatters who requested for allocation on that basis? The 1st respondent has refuted that the land was available for allocation and disowned the documents produced by the petitioners. The purported meeting was not a Town Council meeting but for the petitioners to prepare their objectives for keeping peace, education and election.

The petition in itself must fail because it is not clear whether the petitioners want a judicial review of the offending institution's actions or compelling them to act on their administrative duty. The petition does also not clearly state the infringed rights. I find that the petition lacks merit and is therefore dismissed with no orders as to costs. I therefore allow the cross petition as prayed with no orders as to costs.

Dated and delivered at Eldoret this 16th Day of October, 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Miss Ruto holding brief for Mr. Chege for the Petitioners and in the absence of Mrs Chesano for the 1st defendant and Mr. Wabwire for 3rd defendant.

Mr. Koech: Court Assistant