



Anindo v Land Administration Office Homa Bay & 3 others (Petition E003 of 2023) [2024] KEELC 171 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEELC 171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
PETITION E003 OF 2023
GMA ONGONDO, J
JANUARY 24, 2024**

BETWEEN

STEPHEN ODHIAMBO ANINDO PETITIONER

AND

LAND ADMINISTRATION OFFICE HOMA BAY 1ST RESPONDENT

COUNTY SURVEYOR HOMA BAY 2ND RESPONDENT

LAND REGISTRAR HOMA BAY 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. By a petition dated 2nd November 2023, the Petitioner through the firm of Aluoch Odera and Nyauke Advocates, is seeking the following orders;
 - a. The petition herein be certified as urgent and interim orders of preservation of the Petitioner's rights be issued directed at the Respondents to allow the presentation and subsequent registration of the Petitioner's documents in compliance with the court's decision in Homa Bay CMC *Succession Cause No. E042 of 2023*.
 - b. An order be issued suspending the concerning of any Land Control Board as the same are illegal, null and void.
 - c. An order directed at the 2nd and 3rd respondents to refrain from demanding consents from the Land Control Board as a precondition for proceeding with any dealings on land or records.
 - d. Such other further and/or any other order to be made as the court may deem just and expedient to grant.



2. The petition is based on the six grounds set out on its face alongside the petitioner's supporting affidavit of nine paragraphs sworn on even date and copies of documents marked as "SOA-1 to SOA-4 and annexed thereto. The documents are;
 - a. A certificate of confirmation of grant in Homa Bay CMC *Succession cause no. E042 of 2023* dated 27th April 2023 (SOA-1)
 - b. Title deed in respect of the land in dispute title number Kanyada/Kotieno/Katuma/1010 in the name of the petitioner (SOA-2).
 - c. A mutation form as regards the land in dispute (SOA-3)
 - d. A letter dated 27th October 2023 by the petitioner's counsel addressed to the County Surveyor Homa Bay (SOA-4)
3. In summary, the petitioner asserted that he is presenting this petition on his own behalf and behalf of the general public. That he is the Administrator of the estate of Sener Anindo (Deceased) as per the Certificate of Confirmation of Grant (SOA-1) and presented his request to the 3rd respondent who complied with the order as contained in the said certificate and registered the Transfer by Transmission in his favour as well as all the beneficiaries as disclosed in title deed in respect of the land in dispute, Title number Kanyada/Kotieno/Katuma A/1010 (SOA 2). That subsequently, he presented his mutation Form (SOA-3) and relevant documents for registration of the partitions to the 2nd respondent who declined to register the same and to issue new numbers insisting that he must obtain consent of the Land Control Board thereof.
4. The petitioner further asserted that he sought a written notice from the 2nd respondent who has kept referring him to the 1st and 3rd respondents as per the letter (SOA-4). That he has continually suffered injustice as his rights are violated by the respondents' reliance on the obsolete provisions of the [Land Control Act](#) Chapter 302 Laws of Kenya (The LCA herein) which created Land Control Boards which are now illegal to the extent that they are not properly aligned to the [Constitution](#) of Kenya, 2010
5. The respondents were duly served as revealed in affidavit of service sworn on 10th November 2023 and filed on 16th November 2023.
6. Besides, the respondents neither entered appearance nor responded to the petition.
7. Hearing of this petition was by way of affidavit evidence and written submissions.
8. In the submissions dated 2nd November 2023, learned counsel for the petitioner referred to Sections 2 and 5, 6, 10 (1) and (2), 11, 12, 13 and 16 of the [LCA](#). That non-existent bodies are recognized in some of the said sections. That in the interest of the petitioner and the general suffering public, the prayers sought in the petition, be granted.
9. In the foregone, it is the considered view of this court that the issues for determination herein are whether;
 - a. This petition meets the threshold of a constitutional petition
 - b. The land control Boards in the [LCA](#) are illegal, null and void.
 - c. The petitioner is entitled to the orders sought in the petition.
10. On the first issue, the petitioner contended that the 3rd respondent complied with SOA-1 by the registration of the petitioner and all other beneficiaries as disclosed in SOA-2. That thereafter, the



petitioner presented SOA-3 to the 2nd respondent who declined to register the partitions of the land in dispute and to issue new numbers insisting that the petitioner must obtain consent of the Land Control Board thereof. That his rights have been violated thereby.

11. It is trite law that in a Constitutional Petition, a party must state with reasonable precision, the Articles of the Constitution of Kenya, 2010 (The Constitution herein) that have been allegedly infringed and the manner in which the same have been infringed; see Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272 and Mumo Matemu v Trusted society of Human Rights Alliance & 5 others [2013] eKLR.
12. In the instant petition, the petitioner failed to state any Article of the Constitution allegedly violated with reasonable precision or at all. In that regard, there are no constitutional issues raised in this petition as held in Anarita Njeru and Mumo Matemu cases (*supra*).
13. As regards the second issue, it was the lamentation of the petitioner that the LCA is not aligned to the Constitution of Kenya, 2010. That thus, some of its provisions creating Land Control Boards are illegal.
14. It is established law that all statutes (including the LCA in this context) are presumed to be constitutional. That until the contrary is proved, a legislation is presumed to be constitutional. That it is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative; see Ndyanabo v Attorney General [2001] EA 495 which restated the case of Pearlberg v Varty [1972] 1 WLR 534.
15. Section 8 (1) of the LCA gives the parties an opportunity to apply for the consent in the prescribed form to the appropriate land control board which are created under section Sections 2 and 5 of the same Act, within six months of making a controlled transaction provided that the High Court may extend the said period. Clearly, the Petitioner has not stated whether he invoked Section 8 of the LCA which is presumed to be constitutional.
16. The essence of the consent of land control board as premised in section 8 (*supra*) was discussed in the case of David Sironga Ole Tukai v Francis Arap Muge & 2 Others (2014) eKLR, where the Court of Appeal stated that:

“The Land Control Act remains one of the most litigated statutes in Kenya.....the enactment of the Land Control Act in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land”
17. In Lyomoki and others v Attorney—General [2005] EA 127, it was observed that in constitutional Petitions, as in other ordinary civil actions, the onus is on the Petitioner or the Plaintiff to establish a prima facie case. That thereafter, the burden shifts to the Respondents to justify the limitation to those rights.



18. I subscribe to the position that Article 10 (2) (b) of the Constitution of Kenya, 2010 has elevated equity as a principle of justice to a constitutional principle. That the lack of consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular, the doctrine of constructive trust; see Willy Kimutai Kitilit v Michael Kibet (2018) eKLR.
19. Notably, land control boards are defined and established under Sections 2, 5, 10, 12, 11 and 13 of the LCA while Section 16 of the same Act governs decision of the boards. As envisioned in the sixth Schedule Part 4 No. 17 of the Constitution, the national government has restructured the provincial administration to accord with and respect the system of devolved government established under the Constitution. The boards are operative as noted in Ndyanabo case (supra) and may call for minor restructure in terms of title or name where necessary but there is no disclosure and proof of breach of any provisions of the Constitution in the obtaining circumstances.
20. It is therefore, the finding of this court that the petition does not meet the requisite threshold. The petitioner has not discharged the onus as held in Lyomoki case (supra) hence, not entitled to the orders sought in the petition.
21. *A fortiori*, the petition is devoid of merit and the same is hereby dismissed with each party to bear own costs.
22. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 24TH DAY OF JANUARY 2024.

G. M.A ONGONDO

JUDGE

Present;

- a. S.Nyauke learned counsel for the Petitioner-virtually
- b. Mutiva, Court Assistant

