



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. CONSTITUTIONAL PETITION NO. 22 OF 2018

IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE

RIGHTS AND FREEDOMS IN ARTICLE 2, 3, 10, 19(1) & (2), 20(1) & (2),

21, 22, 23, 29, 40(1), 42, 43, 44, 47, 48 & 50(1) & (2), 69, 70,

258(1) & 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE PUBLIC

PROCUREMENT AND ASSETS DISPOSAL ACT NO. 33 OF 2015

BETWEEN

JAMES KIONGI MWAURA.....1ST PETITIONER

JEREMY KIONGI MWAURA.....2ND PETITIONER

GODFREY KIONGI MWAURA.....3RD PETITIONER

-AND-

THE CABINET SECRETARY FOR

ENVIRONMENT AND FORESTRY.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

JUDGEMENT

1. The Ministry of Environment, Natural Resources and Regional Development Authorities, which was renamed Ministry of Environment and Forestry, intended to purchase seven (7) acres of land for the establishment of facilities for the management of medical and hazardous waste and invited bids through the tenders advertised on 29/1/2016.

2. The Petitioners are the trustees for the family of the late Erastus Mwaura Kiongi. They gave authority to IKua Mwangi & Co. Advocates

to sell plot numbers 14, 15, 16, 25, 26, 27 and 28 which were to be excised from L.R. No. 9362/25. The Petitioners submitted their bid and the tender evaluation committee recommended the award of contract to the Petitioners through their agent, to supply seven acres of land at Kshs. 35 million per acre making the total of Kshs. 245,000/=.

3. The Petitioners entered into a sale agreement with the Ministry of Environment and Natural Resources, State Department dated 17/11/2016 vide which the Ministry accepted to purchase plot numbers 13, 14, 15, 16, 26, 27 and 28 totaling 7 acres in accordance with the sketch map which showed that there were subdivisions of I.R. No. 9363/25 situated in Ruai, Nairobi area. The purchase price was agreed at Kshs. 245 million out of which 10% was to be paid on execution of the agreement. Kshs. 147 million was to be paid as the second instalment within 90 days of signing the agreement. The balance of Kshs. 73.5 million was to be paid upon the successful registration of the transfer in the purchaser's name. The purchaser was to take possession upon payment of the full purchase price. Payment of the purchase price was to be made through the purchaser's advocates. The sale was subject to the prevailing Law Society of Kenya Conditions of Sale in force at the time of signature.

4. The Ministry paid the deposit being the first instalment but failed to remit the balance of the purchase price. The Ministry wrote to the Petitioners on 2nd March 2018 demanding a refund of the deposit paid. It forwarded a copy of a letter dated 13/2/2017 which the Petitioners denied receiving in which the Ministry alleged that it had come to its attention through the 2nd Respondent, that the size of the land was much smaller than what was specified in the procurement documents hence the misrepresentation by the Petitioner's was contrary to the Public Procurement and Assets Disposal Act. The Ministry cancelled the procurement process and indicated that it would proceed to re-tender.

5. The Petitioners contend that the Ministry had no mandate to cancel the procurement process which they maintain had already been concluded when the parties signed the sale agreement dated 17/11/2016. They urged that the signing of the agreement presupposed that the 2nd Respondent had already verified the size of the suit land and advised the Ministry to go ahead and purchase it. The Petitioners were not aware of when the 2nd Respondent undertook the physical verification of the suit land and have not been shown a report of the verification. The Petitioners contend that under the Law Society of Kenya Conditions of sale, in case of breach by the purchaser as was the case here, the deposit is retained by the vendor yet the Ministry is now demanding a refund of the deposit. The Petitioners further contend that the Ministry took possession of the suit land and begun development.

6. In the petition dated 28/3/2018, the Petitioners contend that the purported cancellation of the contract and demand for deposit by the Ministry was actuated by malice and bad faith, and that the Petitioners were treated unfairly and in a discriminatory manner. They contend that the intention by the Ministry to re-tender for the purchase of another piece of land is discriminatory and a violation of the Petitioners' fundamental right guaranteed under Article 27 of the Constitution.

7. Further, that by purporting to measure and determine the size of the suit land, the Respondents subjected the Petitioners to unjustified harassment, intimidation and mental torture that undermined and fell short of the Petitioners' dignity as senior citizens and respectable businessmen and therefore contravenes Article 28 of the Constitution. The Petitioners allege that the failure to provide a report on the physical verification undertaken by the 2nd Respondent contravened the Petitioners' right to information under Article 35 of the Constitution.

8. The Petitioners allege that the Ministry took possession of the suit property and begun development on it before completing payment in blatant breach of the Petitioner's right to land guaranteed by Article 40 of the Constitution. They also contend that the cancellation of the contract would greatly undermine the Petitioner's right to property enshrined in the Constitution.

9. They further contend that the Respondents' alleged physical verification on the size of the suit land was done in clear violation of Section 4 of the Fair Administrative Action Act and Article 47 of the Constitution.

10. The Petitioners seek a declaration that the letters dated 13/2/2017 and 2/3/2018 purporting to cancel the procurement process and demanding a refund of the deposit from the Petitioners agent are fraudulent, illegal, unlawful and void. They seek a declaration that the 2nd Respondent lacks power or authority to determine the size or acreage of the suit land. They also seek a declaration that the cancellation of the procurement process and demand for the refund of the deposit paid violated the Petitioners' rights under Articles 27, 28, 35, 40 and 47 of the Constitution. Consequently, they seek compensation of Kshs 15 million or any amount the court may deem sufficient for violation of their rights under the Constitution. They further seek a declaration that the Ministry breached the sale agreement that it entered into with the Petitioners and damages for breach of contract and an order of certiorari to quash the Ministry's tender for procurement of another piece of land for the construction of the medical and hazardous waste project facility which was advertised in the *Daily Nation* of 27/3/2018 on the Ministry's website. They also seek a mandatory injunction to compel the Ministry to pay the balance of the purchase price under the sale agreement dated 27/11/2016, costs of this petition and any other relief the court may deem fit to grant.

11. The Attorney General filed a Cross Petition dated 15/5/2018 on behalf of the Cabinet Secretary for Environment and Forestry and the National Land Commission. The Respondents admit advertising a tender for the purchase of seven acres of land for the establishment of a medical and hazardous facility through public procurement. They contend that the beacon certificate prepared by Joseph Mureithi Mugendi was signed by Bernard Maina who referred to himself as the owner of the suit land contrary to the Petitioners contention that they owned the suit land. They allege that there was no beacon certificate submitted for preparation of the documents authorising the sale.

12. The Respondents aver that the 2nd Respondent's valuation offices carried out a field reconnaissance which revealed that part of the land being acquired by the Ministry fell on the riparian reserve of the Nairobi River. Further, that the seven plots measured $\frac{3}{4}$ of an acre each and not one acre each. The plots do not have separate titles and yet the Ministry entered into a contract for the purchase of seven acres. The Respondents contend that the Petitioners' misrepresented that they were selling seven acres to the Ministry yet they were actually selling seven plots measuring $\frac{3}{4}$ of an acre each which was less than the seven acres cumulatively. They contend that the Petitioners did not complete the subdivision process so that the portion the Ministry was acquiring could be given a separate title. They averred that the Petitioners did not present the consent from the other beneficiaries of the Estate of the late Erastus Mwangi Kiongi to sell the suit land.

13. Based on the misrepresentation of facts as to ownership and the exact size of the property being sold and the failure to subdivide the land after receiving payment of the deposit, the Respondents contend that the Petitioners wanted to defraud the government and to acquire public funds fraudulently since they did not hold a title to the land.

14. In the Cross Petition the Respondents seek a declaration that the Petitioners are bound to indemnify the government to the tune of Kshs. 24.5 million paid to the Petitioners through its advocates IKua Mwangi & Co. Advocates plus interest and costs of the petition and cross petition. They seek a declaration that the Petitioner lacks the power to transact on the suit land since they have no interest in it and that the Petitioners intended to defraud the government by transacting over land they had no interest in. The Respondents also seek a refund of the deposit of Kshs. 24.5 million that was paid to the Petitioners' advocate.

15. Parties filed submissions. The Petitioners contend that this is a case in which a contract for the sale and purchase of land was negotiated but was hijacked before its completion by powerful individuals who were keen to divert the funds for their individual benefit at the expense of Kenyans who would benefit from the construction of the medical and hazardous waste facility.

16. The Petitioners framed several issues for the court's determination. One of this is whether the court has jurisdiction to entertain this petition. The Respondents framed their own issues. The Respondents contend that the substantive question before the court does not relate to the environment or the use of, or the occupation or title to land. Rather, that the issues arise out of the fundamental breach of the terms of a procurement contract entered into by the Petitioners. The Petitioners contended that this court has jurisdiction to determine this dispute based on Article 162 of the Constitution and the provisions of the Environment and Land Court Act. The Petitioners submitted that the issues in this suit have not only arisen out of the breach of the fundamental terms of the procurement contract entered into by the two parties, but also the fundamental breach of the provisions of the LSK Conditions of Sale which were invoked in the agreement for sale of the suit land.

17. The Court has considered the rival submissions of the parties on the question of jurisdiction. In **Anarita Karimi Njeru v Republic [1979]eKLR**, the court stated that if a person is seeking redress on a matter which involves a reference to the Constitution it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner of infringement. The court further stated that there can be no doubt that for certain alleged contraventions, civil proceedings would be an appropriate way of seeking redress. Both the Petition and Cross Petition allude to breaches of contractual obligations under the sale agreement in which the Ministry was purchasing the Petitioners' land and the Ministry failed to pay the balance of the purchase price mainly on the ground that the suit land was less than the seven acres it was acquiring from the Petitioners.

18. The court is of the view that the Petitioners or the Respondents ought to file an ordinary suit for the court's determination as to whether there was breach of the contract entered into by the Petitioners and the Ministry and the reliefs to be granted if indeed the terms of the contract were not met. The Petitioners have failed to prove that their constitutional rights were breached by the cancellation of the sale agreement or tender over the suit land as they allege. Both the petition and cross petition are dismissed. Each party will bear its own costs.

19. The Petitioners are directed to deposit the sum of Kshs. 24.5 million paid by the Ministry as 10% of the deposit of the purchase price in court or in an interest earning account in the joint names of the advocates for the Petitioners and the Respondents within 30 days of the date of this judgement, pending filing and determination of the suit on the issue of the alleged breach of the sale agreement.

Dated and delivered at Nairobi this 15th day of November 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Ogada for the Petitioners

Mr. A. Kamau holding brief for Mr. Eredi for the Respondents

Mr. V. Owuor- Court Assistant