



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PETITION NO. 2 OF 2018

1. HENRY WAMBEGA & 4 OTHERS.....PETITIONERS/RESPONDENTS

-VERSUS-

1. THE ATTORNEY GENERAL

2. KATHINI SPRING WATER LIMITED

3. COOPERATIVE BANK HOUSING SOCIETY LTD

4. CANNON ASSURANCE COMPANY LIMITED

5. HEDGE FARM LIMITED

6. NAAMAN BIN ALI BIN MUSES

7. NATIONAL LAND COMMISSION.....RESPONDENTS/APPLICANTS

AND

SAFEPAK LIMITED.....INTERESTED PARTY

RULING

1. The 3rd Respondent brought the application dated 20th June 2018 premised under the provisions of Rule 3 (8) and 19 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules 2013. The application seeks orders that:

- i) The petition dated 25th January 2018 and the Notice of Motion dated 20th April 2018 be struck out for being barred.**
- ii) In any event, the petition dated 15th January 2018 and Notice of Motion dated 20TH April 2018 be struck out for being an abuse of the Court process.**
- iii) Costs be provided.**

2. The application is premised on the grounds on the face of it inter alia that the petition is time barred as pleaded in paragraph 25 & 49 of the petition. The applicant also argues that the petition is an abuse of the Court process as it ignores the set statutory procedure in section 15 of the National Land Commission Act as well as converting an ordinary civil suit into a constitutional dispute.

3. The Interested Party also filed a preliminary objection dated 1st October 2018 that the petition offends the mandatory provisions of article 67 (2) (e) of the Constitution of Kenya and section 15 of the National Land Commission Act, 2012. Secondly, the Interested Party pleads that the petition has been filed without following due process of the law laid out in the Constitution and the National Land Commission Act thus an abuse of this Court's process. He urged the Court to strike out the petition for the foregoing reasons.

4. This application and the preliminary objection is supported by the 1st, 2nd, 4th, and 6th Respondents. The petitioners however oppose the orders seeking to strike out the petition.

5. The respective parties have filed written submissions in support and or opposition to the orders sought. In brief, the 3rd Respondent submits that the petition complains of violations done between 1960 – 1966 which is some 52 years ago. That this is contrary to the provisions of section 7 of the Limitation of Actions Act. Secondly that section 15 of the National Land Commission Act provides for an elaborate procedure that addresses complaints regarding historical injustices. The 3rd Respondent cited the cases of **Wellington Nzioka Kioko vs A. G (2018) eKLR** and **Irene Wambui Muchai vs A. G (2017) eKLR** on the question that parties should not bring a claim before Court where the delay is for 10 years or more.

6. On abuse of the Court process, the 3rd Respondent submits that the petitioners failed to utilize the statutory dispute resolutions mechanism provided under section 15 of the National Land Commission Act. In arguing this point, the 3rd Respondent quoted the Court of Appeal's decision in **Stanley Ng'ethe Kinyanjui vs Tony Ketter & 5 others (2015) eKLR** which stated that parties should not be allowed to constitutionalise simple processes and events to defeat the scheme of things set in the rules. The 3rd Respondent alluded that the petitioners are constitutionalizing the matter to atone their indolence.

7. The 3rd Respondent submitted further that these petitioners while aware of the existence of the cases No 13 of 2014 and 142 of 2014 where they are seeking enforcement of other rights still filed the current petition. He urged the Court to allow the application and grant the orders sought.

8. The Interested Party also submitted on the provisions of section 15 of the National Land Commission Act and article 67 (2) (e) of the Constitution. He has cited several case laws to support this proposition inter alia:

(a) Ledidi Ole Tauta & Others vs Attorney General & 2 others (2015) eKLR.

(b) Kenya Revenue Authority & 2 others vs Daraad Investments Limited (2018) eKLR.

9. The petitioners filed their submissions on 18th October 2018. The petitioner submits that this Court has jurisdiction to hear and determine this matter as the quoted provisions of the law have not ousted the jurisdiction of the Court. The petitioners also submitted that the case of *Ledidi Ole Tauta* supra is distinguishable from the facts of this case. The petitioner quoted the provisions of section 29 of the National Land Commission Act to state that the National Land Commission does not have monopoly on the hearings of such injustices.

10. On whether the petition is time barred, the petitioner relies on paragraph 30 & 31 of the petition which explains the new non-repressive climate where constitutional rights can be vindicated. That the question posed by the 3rd Respondent why they took long in bringing the claim is equivalent to asking why the current Constitution passed in 2010 decided to include the question of historical injustices dating back to 1895. The petitioners again cited the case of **Njuguna Githiru vs A. G (2016) eKLR** submitting that the prior regime was repressive. He also relied on the provisions of section 15 (3) (e) of the revised National Land Commission Act 2016 which gives a time frame of 5 years from date of the commencement of the Act. The petitioners therefore urged that the application and the preliminary objection be dismissed with costs to them.

11. There are mainly three issues raised in both the application and the preliminary objection i.e.

(a) Whether this Court is seized with jurisdiction to hear and determine this matter.

(b) If the claim is time barred under the provisions of the Limitation of Actions Act.

(c) Abuse of Court process.

12. Under article 67 (2) (e) of the Constitution 2010, one of the functions of the National Land Commission is stated to include initiating investigations on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress. Under section 15 (1) of the National Land Commission Act 2012, the Commission is mandated to admit & investigate the historical land injustice complaints and recommend appropriate redress. Section 15 (4) give a brief of what constitutes a historical injustice. Section 15 of National Land Act does not make a provision that the cases of historical injustices are solely to be heard and determined by the Commission.

13. Section 13 (1) of the Environment & land Act gives this Court original and appellate jurisdiction to hear and determine all disputes in accordance with article 162 (2) (b) of the Constitution and with provisions of this Act or any other written law relating to environment and land I am not bound with the findings of the case of Stanley Ngethe Kinyanjui supra that parties should not constitutionalise simple processes which should be done through ordinary claims as there are different positions taken on this particularly the provisions of article 159 (2) of the Constitution that requires the Courts to look at the substance rather than form. However the petitioners claim is premised on a matter clearly provided for under article 67 of the Constitution. The mode of resolving the dispute is provided to be done through the processes given under section 15 of the National Land Commission Act. However because this Court also enjoys original jurisdiction on land & environment matters, I find nothing wrong with a party who choses this Court as his first vehicle to ventilate his claim. (See the decision of Munyao J in the case of **Ken Kasinga vs Daniel Kiplagat Kirui & 5 others (2014) eKLR**).

14. The right to bring a claim for historical injustice was introduced in the Constitution of Kenya 2010. Article 67 does not put a time limit when the claim ought to be brought to Court. However if the provisions of section 7 of the Limitation of Act is to apply then in my view the 12 year period runs from date of commencement of the right creation of the right i.e. form August 2010 when the Constitution was passed. In the instant case, the twelve years has not lapsed. The argument of limitation thus fail because while it is true that the parties sued had a right to have claims brought in time, the previous law did not make for a direct provision for the petitioners herein or anyone else to bring such a claim. I hold that the indolence if at all was not of the petitioners' own making.

15. The last issues for determination is whether or not this petition is an abuse of the Court process in view of the existence of ELC cases No

13 of 2014 and 142 of 2014. The parties in both suits are the same. The claim in the two earlier cases relate to a claim of rights acquired by virtue of adverse possession. The claim in this petition relates to one of a historical injustice. Can this claim be adjudicated under the existing suits in light of the provisions of section 6 of the Civil Procedure Act? My answer is in the positive since the line of evidence to be adduced in my estimation relates to issue of occupation. I am also of the considered opinion that although the nature of this claim cannot be said directly and substantially in issue as in the former suit, the issues can still be determined in one suit by seeking separate prayers on reliefs/..... For this reason the petitioners are guilty of abuse of Court process by failing to bring the two claims in one suit and or electing which of the two they wish to pursue. If they are allowed to pursue both claims in different suits it amounts to wasting judicial time; putting the Respondents to multiple cost of litigation over same subject matter and also wanting to benefit twice. Consequently it is on this ground that the application succeeds.

16. In light of my above finding, I do grant the petitioners a period of 30 days to elect between this petition and ELC case Nos 13 & 142 (both of 2014 consolidated) they wish to pursue and or amend. In default of exercising such an election, the current suit which is this petition shall stand dismissed with costs to the Respondents. Further whatever the option is taken by the petitioners the costs of the suit to be withdrawn shall be awarded to the Respondents. The matter to be mentioned on a date given in Court during the delivery of this ruling for further orders. The costs of the application is awarded to the 3rd Respondent and the Interested Party.

Dated, signed & delivered at Mombasa this 13th Dec. 2018

A. OMOLLO

JUDGE