



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 26 OF 2011

IN THE MATTER OF ARTICLE 22 AND 23 (1), (3) OF THE CONSTITUTION OF
KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 40 (3), (4), 27 (1), (2), (3), (4), (5) OF THE
CONSTITUTION OF KENYA

BETWEEN

1. IRENE KANYI MWANGI.....1ST PETITIONER
2. MARY NYAMBURA MUGO.....2ND PETITIONER
3. WANGECHI MBURU.....3RD
PETITIONER
4. WINNIE MUTHONI.....4TH PETITIONER
5. HELLEN NYAGATI MUREITHI.....5TH PETITIONER
6. ZIPPORAH WARINGA.....6TH PETITIONER
7. HARIET WANJIRU.....7TH PETITIONER
8. LOISE WANJIKU.....8TH PETITIONER
9. MARY WANGARI W/O OWEN NDUNGU.....9TH PETITIONER
10. PENNINAH WANGUI NDUNGU D/O OWEN NDUNGU.....10TH PETITIONER

AND

ATTORNEY GENERAL.....1ST RESPONDENT

PERMANENT SECRETARY, MINISTRY OF LANDS

AND SETTLEMENT2ND RESPONDENT

PERMANENT SECRETARY, MINISTRY OF

SPECIAL PROGRAMMES.....3RD RESPONDENT

RULING

Introduction

1. The petition herein was filed in court on 19th September 2011. The petitioners allege that their fundamental rights and freedoms have been violated with regard to the alleged sale of the property known as Ndonga Farm Subukia L.R. No.6507 to the Government of Kenya.
2. The 1st to 8th petitioners describe themselves as daughters of the late Benjamin Njoroge Wamanji while the 9th petitioner is daughter in law of the said Benjamin Njoroge Wamanji. The 10th petitioner is a granddaughter of Benjamin Njoroge Wamanji.
3. The respondents are various government officers as specified in the petition.
4. On 18th February 2013, M/s. Kiplenge & Kurgat Advocates, acting for 267 proposed interested parties, filed Notice of Motion dated 18th February 2013. The prayers sought in the application are:

1.
2.
3. THAT pending the hearing and determination of this petition, this honourable court be pleased to issue an order of interim injunction restraining the petitioners either by themselves their agents, servants or any other one acting under their authority from entering, taking possession and or in any other manner interfering with occupation, use and/or ownership of Ndonga Farm Subukia L.R. No. 6507/IR No. 2195 by the applicants herein.
4. THAT this Honourable court be pleased to enjoin the applicants herein as interested parties to this petition.
5. THAT upon prayer 4 being granted, this honourable court be pleased to grant leave to the petitioners to amend their petition if need be.
6. THAT the applicants be allowed to file such papers in reply to the petitioners petition/application as may be necessary.
7. THAT this honourable court be pleased to set aside and/or discharge the orders that were issued ex-parte and all proceedings relating to this petition pending the hearing and determination of this petition.
8. THAT the costs of this application be provided for.

5. It is this Notice of Motion dated 18th February 2013 which is the subject of this ruling.

Applicant's Case

6. The application is supported by the affidavit of Joseph Kuria Njuguna, the 1st applicant. In total, there are 267 applicants. They all seek to be joined as interested parties.
7. Through a signed "authority to plead, testify and act", the 2nd to 267th applicants have authorized Joseph Kuria Njuguna to swear the affidavit on their behalf. Counsel for the applicants relied entirely on the affidavit.
8. The applicants say that they are all internally displaced persons (IDPs) and that they occupy and use a portion of L.R. No.6507/IR. 2195, the suit land.
9. The applicants further state that the suit land was bought by the government of Kenya through the Settlement Fund Trustees for their benefit as IDPs and that they were immediately settled by the government on a portion thereof.

- 10.10. The applicants accuse one Christopher Kariuki, a son of the 9th petitioner, of entering the suit land with armed youth on 8th February 2013 with an intention of tilling the land and preventing the applicants from farming it.
11. In view of their interests in the suit land, the applicants wish to be joined as interested parties since they are directly affected by the proceedings and outcome of the petition. They also seek the other prayers listed in the application.

Petitioner's Case

12. An affidavit of service is on record indicating that the petitioners' advocates on record were served with a hearing notice on 26th January 2017 indicating that the application dated 18th February 2013 would be heard on 15th February 2017. There was however no appearance for the petitioners at the hearing of the application.
13. Nevertheless, I note from the record that the petitioners filed a replying affidavit on 11th March 2013. The affidavit was sworn by the 2nd petitioner.
14. The petitioners deny that the applicants are in occupation of the suit land and cite the order made by the court on 19th October 2011 as having restrained the applicants from entering the suit land.
15. The petitioners maintain that they have no claim against the applicants and they therefore see no reason why the applicants should be allowed to join the proceedings.
16. The petitioners also filed grounds of opposition on 22nd July 2014 in which they variously aver that the application is incompetent and will unnecessarily choke the hearing of the petitioners' case; that the applicants have not shown a prima facie case to warrant granting the orders; that the balance of convenience was with the application being dismissed; that no prejudice will be suffered by the applicants if the application is dismissed and that it is in the interest of justice that the application be dismissed.
17. Through the replying affidavit and grounds of opposition, the petitioners have opposed the application.

Respondents' Case

18. Respondents' counsel indicated to the court that the respondents do not oppose the application. I also note that there is on record a replying affidavit in respect of the petition sworn by Esther Nadupoi Ogega, the Director of Land Adjudication and Settlement in the 2nd respondent ministry, and filed on 28th October 2011. She depones that the issue of purchase of a portion of the suit land by the government was referred to the **Interministerial committee of Permanent Secretaries on the resettlement of IDPs** for deliberations and that the purchase by the government was completed in August 2011.

Analysis and Determinations

19. The application is expressed as brought under 'Order 40, 51 of the Civil Procedure Rules and Article 23 (3) of the Constitution of Kenya'.
20. Order 40 of the Civil Procedure Rules is titled 'TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS'. As the title suggests, it deals with the procedure for applying for and the test for granting temporary injunctions and interlocutory orders.
21. Order 51 of the **Civil Procedure Rules** is titled 'APPLICATIONS' and generally deals with matters of procedure and form in regard to applications generally.
22. Article 23 (3) provides for reliefs which the court can grant in proceedings for enforcement of Bill of Rights. Suffice it to say that what is before court is principally an application where the applicants seek to leave to join the proceedings as interested parties.
23. This being a constitutional petition, the applicants ought not to rely on the Civil Procedure Rules since there are ample provisions in the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. Since Article 159 (2) (d) enjoins the court to administer justice without undue regard to procedural technicalities, I will disregard the failure to rely on the correct legal provisions. Instead, I will focus on the substantive issues

raised in the application.

24. Faced with a similar situation in **Rogers Mogaka Mogusu v George Onyango Oloo & 2 others [2014] eKLR**, Lenaola J. (as he then was) had the following to say:

The powers conferred upon the High Court by the provisions of Order 8 Rule 5(1) of the Civil Procedure Rules in civil proceedings cannot be disputed but the Applicant, having filed a Constitutional Petition, ought to have invoked the provisions of Rule 8 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Having so said and noting that the issue for determination is clear and obvious to this Court, I will proceed and determine it without undue regard to that fact.

25. Even though there are other prayers in the application such as the prayers for injunction, leave to amend the petition, leave for interested parties to respond to the petition and prayer for setting aside of ex parte orders, the issue of whether or not the applicants should be admitted as interested parties is what must be decided first. All the other prayers in the application revolve around this issue.

26. While adopting a similar approach in **Yusuf Abdi Adan & another v Hussein Ahmed Farah & 3 others [2016] eKLR**, Nzioka J observed as follows:

I shall first deal with the issue of enjoining a party into proceedings. This is informed by an understanding that, a Party cannot have the locus standi to address the Court unless and until they are properly on record or a Party to the suit. In that regard I wish to first of all examine the Law relating to Parties being enjoined in a Suit.

27. The issues for determination are therefore the following:

- i. Whether the applicants should be admitted as interested parties
- ii. Whether the petition needs to be amended upon admission of the applicants as interested parties
- iii. Whether an injunction should issue as prayed at prayer 3 of the application
- iv. Whether orders that were issued ex parte and all proceedings in the petition ought to be set aside or discharged

28. Starting with issue (i) above, the concept of “Interested Party” has been introduced in constitutional petitions by the provisions of Rule 7 of **the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** which states:

7. Interested party

(1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

(2) A court may on its own motion join any interested party to the proceedings before it.

29. In the definitions part of the said rules, an Interested Party is defined as

a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation

30. From the above provisions, it is clear that for a person to qualify to be an interested party he must have some “identifiable stake or legal interest or duty in the proceedings before the court”. A person cannot be an interested party if he is already a party to the proceedings. Further, a person can only become an interested party upon being admitted by the court either on its own motion or upon an application.

31. Do the applicants have any identifiable stake or legal interest or duty in the proceedings before the court? As already noted, we have on record the supporting affidavit of Joseph Kuria Njuguna, the 1st applicant wherein he deposes that the applicants are all internally displaced persons (IDPs) and that they occupy and use a portion of LR. No.6507/IR. 2195, the suit land. That the suit land was bought by the government of Kenya through the Settlement Fund Trustees for their benefit as IDPs and that they were immediately settled by the government on a portion thereof.
32. The applicants' nexus with the suit land is corroborated by Esther Nadupoi Ogega, the Director of Land Adjudication and Settlement in the 2nd respondent ministry who confirms that a portion of the suit land was bought with the idea of resettlement of IDPs in mind.
33. The petitioners' denial that the applicants are in occupation of the suit land and their citing the order made by the court on 19th October 2011 also lends credence to the applicants' claim of having a stake or legal interest in the suit land.
34. The extracted order of 19th October 2011 reads inter alia as follows:

“..... pending the hearing and determination of this petition this honourable court be and is hereby pleased to issue an order of interim injunction to restrain respondent either by itself, its agents, servants or anyone acting under its authority from taking temporary possession and or ownership, subdividing, allocating, dispossessing, settling Internally Displaced Persons or any other person or in any other manner interfering with the petitioners' possession, use, occupation, or ownership of Ndonga Farm Subukia No. LR. 6507 (Original No. 267/2)”.

35. I have also noted from the record that alongside the petition a supporting affidavit sworn by Irene Kanyi Mwangi the 1st petitioner was also filed. Paragraph 19 of the affidavit states as follows:

“THAT we are aware that the Government of Kenya is in the process of resettling the Internally Displaced Persons in the said parcel of land”.

36. Whereas it is not possible for me to ascribe each of the applicants' interest or claim to a specific portion of the suit land and whereas I haven't been shown any proof that the applicants are the persons who the government intended to settle on the suit land as IDPs, it suffices that the applicants have come before court and stated on oath that they have a stake and legal interest in the proceedings before the court.
37. It is also important to note that the respondents, who represent the government, have not opposed the application.
38. Looked from any angle, the applicants have demonstrated that as internally displaced persons (IDPs) they have an interest or claim on a portion of LR. No.6507/IR. 2195, the suit land. They have an identifiable stake or legal interest in the proceedings before the court.
39. I therefore have no hesitation in finding, as I now do, that the applicants should be joined as interested parties. That disposes of issue (i).
40. Regarding issue (ii) on whether the petition needs to be amended upon admission of the applicants as interested parties, the petitioners have indicated that they have no claim against the applicants. As is normal practice, the interested parties can advance their case by filing a response to the petition through replying affidavits and submissions. I therefore find that there is no need to amend the petition.
41. Issue (iii) was on whether an injunction should issue as prayed at prayer 3 of the application. In this case I suppose that by “Injunction” the applicants mean a conservatory order. To succeed in the prayer for an injunction, the applicants need to establish a prima facie case with a likelihood of success. They further must persuade the court that unless the orders are granted, they will suffer prejudice. No evidence has been put before the court by the applicants to satisfy the ingredients of a conservatory order. I therefore dismiss the application for an injunction.
42. Finally, issue (iv) was on whether orders that were issued ex parte and all proceedings in the petition ought to be set aside or discharged. Again, no submissions or evidence was advanced in support of this prayer. Even though setting aside is discretionary remedy, discretion must be exercised judiciously. There being no supporting evidence in respect of the prayer, I find no basis on which to exercise discretion as sought. Prayer 7 of the application is therefore dismissed.

Conclusion

43. In the end, I allow only prayer 4 of the Notice of Motion. The applicants are hereby joined as 1st to 267th interested parties.

44. The 1st to 267th interested parties to file and serve their response to the petition within 14 (fourteen) days from the date of this ruling.

45. No order on costs.

46. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 3rd day of March 2017.

D. O. OHUNGO

JUDGE

In the presence of:

for the 1st to 267th Interested Parties/Applicants

for the petitioners

for the respondents