



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO.76 OF 2017

IN THE MATTER OF THE ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 28, 29 AND 43 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 60 AND 61 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF RULE 4 AND 19 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS (PRACTICE AND PROCEDURE RULES, 2013))

AND

IN THE MATTER OF SECTION 30 OF THE REGISTERED LANDS ACT (REPEALED) AND SECTION 28 OF THE LAND REGISTRATION ACT

BETWEEN

ONESMAS NTHANGA NGUMA & 77

OTHERS.....PETITIONERS/APPLICANTS

AND

KATELEMBO ATHIANI MUPUTI FARMING AND RANCHING CO-OPERATIVE SOCIETY1ST RESPONDENT

THE LANDS REGISTRAR, MACHAKOS2ND RESPONDENT

THE MINISTRY OF INTERIOR.....3RD RESPONDENT

NATIONAL POLICE SERVICE.....4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS5TH RESPONDENT

THE ATTORNEY GENERAL6TH RESPONDENT

AND

THE NATIONAL LAND

COMMISSIONINTERESTED PARTY

RULING

1. In the Notice of Motion dated 23rd May, 2016, the Petitioners are seeking for the following orders:
 - a. That a temporary injunction issues restraining the 1st, 3rd, 4th and 5th Respondents from summoning, arresting, detaining, prosecuting, evicting or in any manner harassing the Petitioners/Applicants over their occupation and use of the land upon which they are settled pending the hearing and determination of the main Petition filed herein.*
 - b. That costs of this Application be in the cause.*
2. The Application is supported by the Affidavit of the 7th Petitioner who has deponed that she was born in the year 1944 in Katelembo location, Machakos County; that her parents have been in possession and occupation of the disputed land; that both of them were buried on the said land and that the said land has passed down several generations.
3. According to the 7th Petitioner, each and every Co-Petitioner was born in Katelembo and that they have constructed their respective houses on the said land.
4. According to the Petitioners, the 1st Respondent purchased a large portion of land from a departing British settler; that the land the 1st Respondent purchased did not include the areas that people had already occupied and that they have received letters threatening them with eviction.
5. In response, the 1st Respondent filed Grounds of Opposition in which it averred that the orders that have been sought in the Application and the Petition are incapable of being issued; that this court is divested of jurisdiction to hear and determine the Petition and that the whole suit is incompetent and fatally defective.
6. The 2nd, 3rd, 4th, 5th and 6th Respondents also filed Grounds of Opposition in which they averred that the Petition is frivolous and vexatious; that there is no disclosed cause of action and that the Petitioners have not demonstrated ownership of the suit land.
7. In the Replying Affidavit, the 1st Respondent's Chairman deponed that the 1st Respondent is a Co-operative Society which was registered on 10th June, 1970; that its members are drawn from Katelembo, Athiani and Muputi areas of Machakos County and that in 1970, the 1st Respondent purchased parcels of land from a white settler known as Normac Hill.
8. It is the 1st Respondent's case that the Petitioners invaded portions of the Society's land and illegally occupied the same on the pretence that they are squatters; that indeed, most Petitioners are members of the 1st Respondent, who, despite having been allocated the required number of plots, have grabbed and fenced off huge chunks of land belonging to the 1st Respondent and that some of the Petitioners sold their allotted plots and illegally moved back to the Society's land.
9. Both the Petitioners' and the 1st Respondent's advocates filed their respective submissions and authorities which I have considered.
10. In the Petition before this court, the Petitioners are praying for a declaration that they have an overriding interest as per Sections 30 and 28 of the Registered Land Act (*repealed*) and the Land Registration Act respectively in the land on which they have settled and that the suit land is their ancestral

land pursuant to Article 63 (d) (ii) of the Constitution.

11. In the meantime, the Petitioners are seeking for conservatory orders restraining the Respondent from arresting or evicting them from the suit land.

12. The 1st Respondent's advocate has submitted that this court is divested of jurisdiction in matters touching on Articles 28, 29 and 43 of the Constitution. According to counsel, it is the High Court that should handle the current Petition.

13. The claim by the Petitioners is that they are entitled to the suit land pursuant to the provisions of Article 40 and 63 of the Constitution. The dispute before the court therefore is who between the 1st Respondent and the Petitioners has the right to own the suit land.

14. In the case of ***Machakos ELC No. 63 of 2017, Christopher Ngusu Mulwa & others vs. The County Government of Kitui***, this court discussed at length the jurisdiction of the Environment and Land Court in handling Constitutional Petitions relating to Land and Environment. In the said decision, this court held as follows:

“23. While I am in agreement with the above decisions, I do not associate myself with the holding by the Judges that both the High Court and the Environment and Land court have a concurrent and or coordinate jurisdiction in constitutional matters touching on the environment and land.

24. I say so because under Article 162(2) (b) of the Constitution, it is the Environment and Land Court that is mandated to hear and determine disputes relating to the environment and land. Article 165(5) on the other hand prohibits the High court from hearing disputes relating to the environment and land.

25. Indeed, the wording of Article 165(3) of the Constitution shows that while the High Court has the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, it ought to be alive to the limitation provided for under Article 165(5) of the Constitution.

26. It is because of the limitation imposed on the High Court by the Constitution to determine matters relating to land and the environment, be it by way of a Complaint, a Petition, an Originating Summons etc that Article 165(3) of the Constitution starts with the words “subject to clause (5)...”

27. The position that I have taken above that the two courts cannot have concurrent or coordinate jurisdiction in disputes relating to the environment and land – whether filed as constitutional petitions or ordinary suits - is informed by the Constitution and the Supreme Court's decision in the case of Republic vs Karisa Chengo & others, Supreme Court. Petition No. 5 of 2015 in which the court held as follows:

“From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court.”

28. Consequently, and considering that a dispute relating to land and or the environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that

has jurisdiction to entertain such matters. The two courts cannot have concurrent jurisdiction in such matters because they are two distinct courts.

29. For those reasons, the Respondents' objection that this court does not have jurisdiction to determine the Petition before it is unmeritorious. Indeed, it is only this court that has the jurisdiction to hear land disputes, notwithstanding how those disputes are commenced."

15. Considering that the Petition before this court is in relation to the right to own land, it is this court, and not the High Court, that has the jurisdiction to determine the dispute.

16. The Respondents have not denied that the Petitioners are in occupation of the suit land.

17. Indeed, the Petitioners have exhibited photographs showing the developments that they have made on the suit land.

18. Considering that the 1st Respondent has not exhibited the title document and the survey map in respect to the land that it purports it purchased, the court cannot at this stage state with certainty that the Applicants are trespassers.

19. Indeed, the issue of the Petitioners' claim that the suit land is community land as defined under Article 63 of the Constitution can only be determined after trial. However, before then, the prevailing status quo should be maintained.

20. For those reasons, I allow the Application dated 23rd May, 2016 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF JUNE, 2017.

O.A. ANGOTE

JUDGE