



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION CASE NO 23 OF 2012

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOM IN THE BILL OF RIGHT UNDER ARTICLE 40 OF THE CONSTITUTION OF
KENYA 2010**

AND

IN THE MATTER OF ARTICLES 22, 23 AND 68 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012

BETWEEN

AKITHII RANCHING

(DIRECTED AGRICULTURAL) COMPANY LIMITEDAPPLICANT

-VERSUS-

THE DISTRICT LAND ADJUDICATION AND

SETTLEMENTS OFFICER TIGANIA DISTRICT.....1ST RESPONDENT

THE PERMANENT SECRETARY, MINISTRY OF LAND..2ND RESPONDENT

THE HON. THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The Applicant, the 3rd Respondent in the original suit, states that this application is brought to court pursuant to Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The application is dated **29th July, 2015**.
2. The application seeks an order that: “The Ruling dated 2nd October, 2013 be interpreted.
3. The application is supported by the affidavit of Martin Odhiambo sworn on 29th July,2015 and has the following grounds:

a) The interpretation of the court is necessary in order to enable the 1st Respondent engage his statutory duties.

b) That if the injunctive orders are not lifted the 1st Respondent will be barred from fulfilling his duties which was (sic) stayed by this Honorable court until the lease expires after 33 year of which is not stipulated in the Ruling.

c) It is just, fair and mete that the application be granted as prayed.

4. The application was heard by way of written submissions.

5. The 3rd Respondent who represents the 1st Respondent has stated that paragraph 7b of the Ruling of the court contained an order in the following terms: ***“A permanent injunction do issue restraining the respondents by themselves, their agents, employees, representatives and/or anybody else whomsoever acting for/or on their behalf from continuing with the adjudication process in respect of the Petitioner’s Ranch Land measuring approximately 33,000 Acres until expiry of the Petitioner’s term of 33 years.”***

6. The 3rd Respondent says that whereas the respondents intended to file an appeal challenging the apposite ruling, they had second thoughts after realizing that the order contained in paragraph 7b of the ruling had a time frame which was ***“until expiry of the petitioner’s term of 33 years”***.

7. The 3rd respondent submits that it is evident that:

a) The 33 years period allocated to the petitioners has since lapsed.

b) That the lease was for 33 years from June, 1982.

c) The Petitioners have not renewed the Lease in question.

d) That the Respondent should be given a go-ahead to proceed with Adjudication.

8. Miss Kungu, Principal Litigation Officer, for the 1st and 3rd Respondents has told the court in her submissions that the 1st Respondent had all along complied with the apposite court ruling. She wants the court to interpret when the 33 years lease period lapsed and as the petitioner had given evidence that they were allocated land in 1982 for a period of 33 years, she wants the court to find that the permanent injunction had expired in the year 2015. She asserted that this finding would allow the 1st Respondent to embark on his mandatory duty of Adjudication and issuance of new numbers within New Kiare Adjudication Area.

9. Mr. Rimita for the Petitioner has submitted that the current application is an abuse of the court process as the suit land belonged to the Petitioner and was private land. He says that in the year 2002, the Petitioner’s lease had been extended by the County Council of Nyambene which was created after Meru was subdivided into several sub-counties. He also states that the Petitioner had already applied for a formal lease from the National Land Commission.

10. Mr Rimita has submitted on how the Land Adjudication Act and the Land Consolidation Act should be applied. He asserts that under the Land Consolidation Act, Cap 283, and the Land Adjudication Act, Cap 284, it is only the Minister who can by Gazette Notice declare an area to be under the Land Consolidation Act or under the Land Adjudication Act. He opines that the Land Adjudication Officer by purporting to declare the area where the Petitioner’s land is an adjudication area was serving illegal interests and was not serving the Ministry of lands or the National Land Commission. He is laconic that the Petitioner’s land is private property.

11. He submits that as the interested parties application to be enjoined in the suit came after its

determination and after the court had declared itself functus official, they have no business participating in this application. He submits that the interested parties' application was finally concluded on 23.10.2014 when they were being represented by Ole Kaikai & Co. Advocates. He argues that the Notice of Change of Advocates filed by M/S Muriuki Ngunjiru Advocates is bad in law and illegal. He urges that the papers filed by M/S Muriuki Ngunjiru & Co. Advocates are bad in law and illegal and should be expunged from the record.

12. The interested parties' application dated 13th November, 2013 sought an order for the applicants/interested parties to be enjoined in the suit. The application was dismissed because a final ruling had already been delivered.

13. In this matter Mr. Ngunjiri represents the interests of some interested parties who say that they were inimically affected by the ruling of this court for which the 1st and 3rd Respondents seek an interpretation. They say that the area where they reside had been declared an adjudication section on 15th October, 2009 and because of the ruling whose interpretation is being sought, the intended adjudication process was stopped to their detriment. In their application dated 13th November, 2013 the applicants stated that they represented 10,000 families resident at Kiare/Mintutu sub locations of Rwanda/Mumui Locations in Tigania, Meru County.

14. On 20.4.2016, Mr. Ngunjiru told the court that after consultation with the 3rd Respondent, the interested parties wished to withdraw their application dated 6.4.2016 and filed in court on 7.4.2016. Mr. Kiongo, for the 3rd Respondent, supported the withdrawal. Mr Joseph Karuri Ithili, who said that he was chairman of the Petitioner Company indicated that he was also not opposed to the withdrawal of the application. Constructively, therefore, the court moved on the premise that the parties had acquiesced to the participation of the interested parties in these interpretation proceedings.

15. Be that as it may, order 9 rule 9 is pellucid in as far as this matter is concerned. Order 9 rule 9 states as follows:

“When there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

16. I find that the requirements of order 9 rule 9 had not been satisfied by Mr. Muriuki Ngunjiri when he filed his Notice of Change of Advocate dated 10th November, 2015. I will therefore, not consider the submissions he has filed in this matter. Although order 9 rule 9 talks of a judgment, my ruling dated 2nd October, 2013 had ramifications of finality and, therefore, the status of a judgment.

17. Mr. Rimita, for the Petitioners, proffered the following documents to court:

(a) Letter of Extension dated 26th September 2002

(b) Civil Appeal No. 6 of 2013 (TELKOM (K) LTD VERSUS OCHANDA

(c) Section 2(1) of the Land Consolidation Act, Cap. 283 Laws of Kenya

(d) Section 3(1) of the Land Adjudication Act, Cap 284 Laws of Kenya

(e) Ruling dated 2nd October, 2013

(f) Ruling dated 23rd October, 2014

18. I have considered the pleadings and the submissions proffered by the parties in their articulation of their propositions. I have also considered the authority proffered by Mr. Rimita on behalf of the Petitioners, that is, Court of Appeal, Civil Appeal No. 60 of 2013, NAIROBI, Telkom Kenya Limited (Appellant) versus John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya (Respondents). I agree with the binding finding that once a court is functus officio it cannot reopen a suit and that litigants must strive to abide by the apposite rules of procedure. This is why I have expunged the submissions filed by advocate Muriuki Ngunjiri on behalf of the interested parties. I, however, opine that interpreting an order of the court by the judge who issued it does not amount to reopening the suit.

19. Order 3A under which this application is brought to court states as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

20. In seeking to have the court’s order interpreted the 1st and 3rd respondents are seeking clarification of the apposite order. They are not praying for new findings and new orders. I find that it is necessary for the ends of justice or to prevent abuse of the court process for the requested clarification to be pellucidly made.

21. I do not wish to delve into extraneous issues which have been raised in this matter including the intentions and integrity of the 1st Respondent and others and how the provisions of the Land Adjudication Act and the Land Consolidation Act should be applied.

22. In the ruling dated 2nd October, 2013 I decried the cavalier attitude the respondents had adopted in their articulation of the issues which were raised by this petition. I opined as follows:

Paragraph 6: “Issues apposite to this petition would have been better ventilated and determined had the respondents filed their submissions either in opposition or in support of the petition. They, however, opted to have the petition heard and determined without their input. They have a right to decide how they approach any litigation against them just as any other litigant has similar rights. In the circumstances, the petition stands veritably unopposed.”

23. The poor participation by the respondents notwithstanding, the apposite ruling was issued including paragraph 7(b) for which an interpretation is sought.

24. Annexed to the supporting Affidavit of JOSEPH KARURI ITHILI, the Chairman of the petitioner, was annexure “JKI 1”. I reproduce its contents in full herebelow:

EXTRACT OF THE MINUTE

MINUTES OF THE FULL COUNCIL MEETING HELD ON 29TH JUNE, 1982 IN THE COUNCIL’S CHAMBER AT 10.00AM

MIN NO. 31/82 EX. MIN. NO.30/82 –ALLOCATION OF PUBLIC LANDS

3. Akithii Ranching Group in Tigania Division for 21,000 acres in Meru Concessional Area and the remaining portion of public land in Ranch “B” in N.G.A. and 33 years lease was considered and approved after the area concerned was visited and viewed by the sub-committee of the council on 16.6.82.

25. The extract of the minute was certified as a true and accurate copy of the minutes by the Clerk,

County Council of Meru.

26. It is clear that the council allocated land to the petitioner, if the petitioner is the same as Akithii Ranching Group, referred to in the allocating minute for 33 years from 29th June, 1982.

27. A priori, reference to expiry of the lease after 33 years in my ruling is reference to expiry of the Petitioners lease 33 years after the 29th of June, 1982. This was the reference the petitioners gave to the court in its pleadings. The alleged extension of the lease for a period of 33 years by the County Council of Nyambene in 2002 was not brought to the attention of the Court. Something not in the knowledge of the court can have no bearing on the orders a court issues basing its decision on available facts and law.

28. I unequivocally clarify that the lease referred to in my ruling expired 33 years after 29th June, 1982. The lease was non existent after the end of June, 2015.

29. The confusion seems to arise because the court issued a permanent injunction. A permanent injunction is a final order of a court that a person or entity refrains from certain activities permanently. A permanent injunction is distinguishable from an interlocutory, or preliminary or interim injunction which a court issues pending the outcome of a suit or petition seeking prayers for a permanent injunction.

30. An interlocutory or preliminary or interim injunction seeks the maintenance of status quo pending hearing and determination of a suit or petition.

31. Permanence of an injunction must embrace both diachronic and synchronic perspectives. It is synchronic in that it subsists when the term of a lease subsists. It is diachronic in that its permanence dissipates permanently with the expiry of the lease which it had symbiotically attached its permanence to.

32. At the risk of being repetitive, I opine that the permanence of an injunction in relation to a lease has an inexorable relationship with the term of the relevant lease. Once a term of a lease expires no permanent injunction can outlive it. Finding otherwise would be tantamount to contriving a veritable oxymoron like the unruly horse referred to by Burrough, J, in *M. Richardson versus Melish* (1824) 2 Bing 252, quoted with approval by Lord Bramwell in *Mogul Steamship Co. Ltd versus MCGregor, Gow & Others*, [1982] AC 25 which “when you get astride you never know where it will carry you”. The Judges opinion concerned public policy but I find it an apposite observation when dealing with this matter.

33. In the circumstances, I clarify that the permanent injunction alluded to in my ruling dated 23rd day of October, 2015 ceased to exist upon expiry of the apposite lease. In other words, the injunction died with the expiry of the lease. It is no longer in existence. Anything not in existence cannot confer duties and rights.

34. It is so clarified and ordered.

Delivered in open court at Chuka this **31st day of July, 2017** in the presence of:

CA: Ndegwa

Ngunjiri for interested parties

Nyenyire h/b Rimita for Petitioner

Kiongo for the Respondents

P.M. NJOROGE

JUDGE