



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**PETITION NO. 7 OF 2016**

**PETER NJOGU KARANU**

**ANN NJOKI NJOROGE**

**MARGARET WAMBUI KIMITI**

**CHARLES NJAMA WANGAI**

**MARTIN MITHEO & OTHERS.....PETITIONERS**

**VERSUS**

**NYAKINYUA MUGUMO TREES CO.LTD.....1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF SURVEYS.....3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**R U L I N G**

1. The petitioners filed this petition on **15/9/2016**. They sought orders of declaration:-

**(a) A declaration that the parallel survey exercise is unlawful and in violation of the rights of the petitioners.**

**(b) An order that the survey of LR. 1803 carried out by Ms. Mali Survey Services and which was passed and registered on 16<sup>th</sup> April, 2014 is valid.**

**(c) That the respondents be permanently restrained from carrying on a parallel survey/issuance of title deeds exercise of the shareholders on the basis of any other survey other than the one registered on 16<sup>th</sup> April, 2014, and the ensuing area list.**

**(d) A declaration that the title documents (indentures) issued to the petitioners are valid and lawful.**

**(e) An order of Judicial Review to call the order/decision of the Chief Land Registrar into the Honourable Court and quash the same.**

2. A Notice of Motion was also filed on the same day seeking conservatory orders:

**(a) That this Honourable Court be pleased to certify this application urgent and do hear the same *ex parte* in the first instance.**

**(b) That his Honourable Court be pleased to issue conservatory orders to halt the parallel process of issuing title deeds commenced by the respondents pending the hearing and determination of this application and pending the hearing and determination of this petition.**

**(c) Pending the hearing and determination of this application the respondents do furnish the petitioners with copies of the survey maps/drawing for LR. 1803, consent of the Land Control Board and the area list being used in the purported title issuing process.**

3. The Notice of Motion was premised on the grounds that:-

**(a) The 1<sup>st</sup> respondent is the plaintiff in Kitale Environment and Land Court Case No. 103 of 2015 which is pending in court.**

**(b) The case was filed with an intention to stop the title issuing process started by the appointed representatives of the 1<sup>st</sup> respondent's members.**

**(c) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are also defendants in the said suit which is pending in court.**

**(d) The respondents have colluded to stop the title issuing process which was commenced by the said elected members' representatives/directors and embarked on their own process using a body called the National Titling Centre without any information or notice to the applicants.**

**(e) The survey of LR. 1803 had been completed and over to 200 people had been issued with documents of title.**

**(f) The process started but the respondent has not held any consultative meeting with the applicants or brought out an area list for verification by the applicants before starting to issue the title deed.**

**(g) The exercise lacks transparency as some former directors are being given titles for more land that they are not entitled to while some shareholders names have been omitted from the "secret" area list.**

**(h) Other members have been relocated from their established home where they have lived for about 40 years.**

4. It is alleged that the respondents are issuing titles clandestinely thus depriving many of the applicants their rightful shares.

5. The Notice of Motion is opposed. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed grounds of opposition on 25/10/2016. The 1<sup>st</sup> respondent filed two replying affidavits sworn by directors of the company.

6. I have considered this matter at length. The dispute over the subject matter land has been running over a very long time. According to the copy attached one of the 1<sup>st</sup> defendant's replying affidavits the land subject matter of the petition is the same land subject matter of **ELC Kitale No. 103 of 2015** and **Eldoret High Court Civil Case No. 98 of 1987** whose final judgement was delivered on **16/10/2012**.

7. The prayers refer to conservatory orders to halt the parallel process of issuing title deeds allegedly commenced by the respondents and the need for the respondents to furnish the petitioners with copies of the survey maps/drawings for **LR. No. 1803**, consent of the Land Control Board and the area list being

used in the purported title issuing process.

8. The petitioner avers that **LR. No. 1803** was subdivided into **1461** portions. The 3<sup>rd</sup> respondent approved deed plans. The petitioners began receiving indentures for their respective portions from the 2<sup>nd</sup> respondent.

9. The 1<sup>st</sup> respondent unsuccessfully attempted to stop the issuance of the indentures in **Kitale ELC. No. 103/2015** and the suit was subsequently dismissed for want of prosecution.

10. The petitioners now allege that the respondents have without the petitioners knowledge commenced a parallel survey and prepared title deeds to be issued without any court orders sanctioning the exercise and without regard to the titles issued to some of the petitioners/shareholders.

11. It is also alleged that some former directors are being given titles for more land than they are entitled to while some shareholders names have been omitted from the “*secret*” area list. Further the applicants allege that other members have been relocated from their established homes where they have lived for forty years.

12.. The grounds of objection which state that ELC Kitale No. 103 of 2015 is still pending in court contradict the affidavit of Peter Njogu Karanu which states that that case is concluded. The grounds of opposition filed by the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents challenge the applicants’ Notice of Motion on a number of technical grounds, including the ground that the motion and the petition have been overtaken by events as titles under National Titling Programme have already been issued and are only pending collection at the lands office.

13. It is also stated in the said grounds that there are no parallel processes as alleged because the process commenced by the petitioners is a futile exercise for the reason that it was based on the Registration of Titles Act, (Repealed) and hence it has no basis in law.

14. It is further stated in the grounds that the petitioners have not demonstrated which of their fundamental freedoms and rights have been violated. The technical objections have been reiterated in the replying affidavits of **Grace Muthoni Nganga** and **Mary Wangari Githu** both sworn on the **26<sup>th</sup> October, 2016** and filed in court on **27/10/2016**.

15. In addition, in the replying affidavit of Grace Muthoni Nganga is exhibited a copy of a judgement in **Eldoret HCCC No. 98 of 1987** which she states dealt with the same issues as are being raised by the petitioners in this case.

16. The petitioners are silent on this allegation. Their supporting affidavit is also scant on evidence of who has been dispossessed of any land, who has been moved from the homes that they have lived in for forty years, and that some former directors are being awarded more land that they are entitled to.

17. The strength of any petitioner’s case lies in the evidence that the petitioners brings to court. There must also be sufficient evidence demonstrating a prima facie case to warrant the granting of conservatory orders. Where a petitioner fails to bring sufficient evidence to convince the court that certain conservatory orders are merited his application must be dismissed.

18. I have considered the fact that both parties in this case seem to place emphasis on the value of the judgement issued in **Eldoret HCCC No. 98 of 1997**. In **paragraph 17** of the supporting affidavit **Peter Njogu Karanu** avers as follows:-

**“17...That the Eldoret HCCC No. 98 of 1997 the High Court identified the true and genuine shareholders of the 1<sup>st</sup> respondent together with their respective shareholding which includes Obadia Karanja, Geoffrey Ndungu and Timothy Kibe but their names have been omitted by the respondents from the “new” area list without any notice or explanation to them”**

In **paragraph 9** of the affidavit of **Grace Muthoni Nganga** sworn on **26/10/2016**, she states as follows:-

**“9 That in 1987, the petitioners herein filed similar case (sic) Eldoret (sic) that is Eldoret HCCC No. 98 of 1987 with the same issues and whose judgement was never challenged annexed hereto is the said judgement marked “GMN1”.**

19. If both parties rely on the contents of the same judgement, it can be presumed that any activity relating to the land would comply with the last opinion of the court. The application for conservatory orders would then require considerable evidence to support the claim that any person stands to be prejudiced by issuance of titles by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents or by any person empowered to do so.

20. Besides, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents have averred at **paragraph 6** of their Grounds of Opposition that the orders sought herein as against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are not available as against them as they have no “legitimate control over the issuance of titles which is being done through the National Titling Programme. There is no response to this allegation.

21. All in all I find that there is no sufficient evidence tabled before this court to warrant the granting of prayer No. (b) in the notice of motion.

22. As regards prayer No. (c) it is trite that by the time a person approaches a court with an application filed inside the main petition seeking that they be furnished with any information, they need to show that first they have asked for such information from the respondents. In the case of **Nairobi Milimani Law Courts Petition No 191 Of 2011 (Consolidated With Petition No 292 Of 2011) Kituo Cha Sheria & Charles Kioko Muthusi Versus The Central Bank Of Kenya And Others** this Court has previously stated as follows:

***“The second limitation, which has been alluded to by the respondents, is that there must be a request for information before a party entitled to that information can allege violation. Even where a citizen is entitled to seek information under Article 35(1), he or she is under an obligation to request for it. Only if it is denied after such a request can a party approach the court for relief.***

***In the present case, there is no evidence that there was ever a request made from any of the respondents for information relating to the alleged currency printing contracts. Further, while the 2<sup>nd</sup> petitioner was entitled to information under Article 35(1), on the authority of the Nairobi Law Monthly and Famy Care decisions, the 2<sup>nd</sup> petitioner, being a corporate person, was not so entitled.***

***In the circumstances, therefore, the court’s response to this issue is in favour of the respondents: there is no demonstration of a violation of the right to information.”***

23. The request for the documents or materials cannot be made in the same petition where a remedy for a breach of right is alleged. The applicants have not complied with these principles and prayer No. (c) in their application therefore fails.

24. Before I pen off I observe that the submissions by the applicant eloquently speak of what may have transpired over the years preceding this petition: the directors of the 1<sup>st</sup> respondent engaged in a protracted leadership wrangles and were thus unable to subdivide the land and issue the title deeds to the individual members.

25. In this our beloved country today, it is a regrettable reality that urgently requires to be specifically addressed by stringent policy and possibly legislative measures, that some land buying firms some incorporated about fifty years ago, have failed to promptly deliver what their now old, wizened, bent over and walking-stick wielding shareholders expected in their youth: land or title documents to land. It is even more regrettable where that delay was occasioned by leadership wrangles. This is a serious omission in an

economy where land is one of the most cherished capital assets.

26. The consequence is that investors may have been denied access to billions of shillings worth of assets, their securitization and other potential that comes along with land and land ownership documents.

27. Turning to the instant case, some 27 years after LR. No. 1803 was bought to benefit the shareholders of the 1<sup>st</sup> respondent a group of shareholders are in court seeking to bar at an interlocutory stage of these proceedings, the completion of the title issuance process on the basis that another survey had been conducted earlier, yet they are unable to demonstrate any prejudice that would be occasioned them by the re-survey, that is, if there is indeed any such exercise going on.

28. The petitioners herein are only shareholders in the 1<sup>st</sup> respondent. They hold varying shares in **Land Reference No. 1803** situated in Cherangany Division, Trans-Nzoia County. At least that is how they describe themselves. There are only five petitioners in this petition. There is no evidence that they have been authorized to act for the numerous other shareholders who are not parties to the petition. The deponent of the supporting affidavit, **Peter Njogu Karanu**, does not even demonstrate that he has authority to swear it on behalf of the others.

29. The particular threat to their own interests in the land has not been verified at the moment. There is no evidence linking the applicants to any prejudice alleged to be occasioned by the alleged activities of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

30. Another concern this court has considered is delay. When this matter came up before this court under certificate of urgency on **19/9/2016**, the court ordered that the petition be set down for hearing on **27/9/2016**. Much time has passed since then, yet the petitioners still insist on proceeding with the notice of motion rather than have the substantive petition tried on its merit.

31. In matters where some good citizens of this republic (including the applicants) have been awaiting titles for 27 years, it is improper that any ordinary shareholder, without any concrete evidence of wrong doing on the part of the respondents, would attempt to have issuance of title to his and other shareholder's land entitlements delayed any further.

32. I think that in the circumstances, such long delay is itself a self- inflicted denial of rights on the part of the company leadership and members. In view of the need for the realization of rights and entitlements of the shareholders, the court would only be ready to issue conservatory orders on the basis of sound evidence of possible breach of rights by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and not on the basis of unsupported allegations. This court would therefore not hesitate to issue appropriate conservatory orders upon presentation of the proper evidence. Such evidence is lacking in this case at this stage.

33. Consequently, I dismiss the Notice of Motion dated **13<sup>th</sup> September, 2016**. The applicants shall bear the costs of the motion.

Dated, signed and delivered at Kitale on this **28<sup>th</sup>** day of **July 2017**.

**MWANGI NJOROGE**

**JUDGE**

**28/07/2018**

Coram before Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Ms Sitati for Applicants

N/A for the Respondents

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**28/07/2017**