



REPUBLIC OF KENYA

IN THE E.L.C. OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 1 OF 2017

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(1), 1(3), 2(1), 2(2), 2(4), 3(1), 6(2), 10, 35(1), 47, 62(2), (3) AND (4), 67, 232 (1), 258 AND 259 (1) OF THE CONSTITUTION OF KENYA

AND

THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

BETWEEN

ELIJAH NJERU GACHOKI

JAMLECK KIURA MURATHI

PETER S.N. MACHAI

ABIJAH WARUGURU

REV. HOSEPH MURAGE

.....PETITIONERS

PATRICK MWANIKI

HENRY NYAGA

DAVID MUTHIKE GACHOKI

VERSUS

CABINET SECRETARY MINISTRY OF

LAND HOUSING & URBAN DEVELOPMENT.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA.....2ND RESPONDENT

COUNTY GOVERNMENT OF EMBU.....3RD RESPONDENT

NATIONAL LAND COMMISSION (NLC).....4TH RESPONDENT

INDEPENDENT ELECTRICAL AND BOUNDARIES

COMMISSION (IEBC).....5TH RESPONDENT
HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT
NATIONAL IRRIGATION BOARD (NIB).....7TH RESPONDENT
KENYA AGRICULTURAL, LIVESTOCK
& RESEARCH ORGANIZATION (KALRO).....8TH RESPONDENT

AND

EMBU/MWEA RANCHING
CO-OPERATIVE SOCIETY LIMITED
FREDRICK MWANIKI NYAGA
MARGARET MATHURI NGONDI

JONATHAN NJERUINTERESTED PARTIES

JEREMIAH WARUI

ANTHONY NJUE

MARTIN MBUTU

GICHOVI IRERI GICHINDANO

AND

MBEERE ELDERS ADVISORY

WELFARE GWROUP (NGOME)

NJERU BANDAINTERESTED PARTIES

ESTON NYAGA NTHIGA

SERAPHINO NGARI

RULING

1. By a petition dated 8th February 2017 and filed on 9th February 2017, the Petitioners who described themselves as adults of sound mind hailing from Kirinyaga County sought various reliefs against the Respondents or some of them. There were 8 specific reliefs sought. The 9th was an order for costs whereas the 10th was a general prayer for any “equitable relief” the court may deem fit to grant.
2. The Petitioners stated in their petition that they were instituting the petition on their own behalf and as members of what they called the *Kirinyaga Mihiriga Kenda*. The Petitioners also framed about 16 questions or issues for determination.
3. It would appear that the main or one of the main issues for determination is the status of all that parcel of land commonly known as *Mwea Trust Land* or *Mwea Settlement Scheme*. The said scheme is currently

located within Embu County whereas the Petitioners hold the view that the land historically belonged to Kirinyaga. They are also aggrieved by the manner in which land adjudication was being undertaken as they allege that about 600 of their members were left out of the allocation process and 2000 strangers introduced to replace them.

4. At the time of filing the said petition, the Petitioners also filed an application dated 8th February 2017 under certificate of urgency for conservatory orders. It was disclosed in the said application that there were other proceedings or petitions which were pending in court to which the Petitioners were not parties which related to *Mwea Trust Land* or portions thereof. Some of those petitions were ELC Petition Nos. 2, 3 and 6 of 2017. The instant petition could be the fourth in the series.

5. On or about 21st March 2017, the 3rd Respondent filed a notice of preliminary objection to the petition which stated thus;

a. That this matter revolves about;

i The boundary dispute between Kirinyaga and Embu Counties and therefore legally vests with the Inter-Governmental Relations Committee under the Inter-Governmental Relations Act No. 2 of 2012.

ii. Land Adjudication which vests in Land Adjudication Officers as provided for under the Land Adjudication Act.

b. This matter as substantially the same with Kerugoya High Court ELC No. 119 of 2013 where judgement was delivered hence the new suit was res judicata.

c. The Petitioners had not disclosed a cause of action against the 3rd Respondent.

d. The petition be struck out or dismissed with costs.

f. When the parties appeared before me on 4th April 2017, they agreed to dispose of the said preliminary objection by written submissions. Consequently, the 3rd Respondent filed its written submissions and authorities on 25th May 2017. Whereas the petitioner filed notice of objection/opposition to the preliminary objection on 22nd March 2017, there is no indication that the petitioners filed any submissions.

g. In the said grounds of opposition to the preliminary objection, the Petitioners stated that the preliminary objections do not satisfy the test set out in the case of **Mukisa Biscuits Co Ltd v. West End Distributors Ltd [1969] EA 696**; that they merely constituted alleged contraventions of various laws; and that they could be argued as answers or responses to the main petition.

h. The court has considered the submissions in support of the preliminary objection and the Petitioner's grounds of opposition thereto. The 3rd Respondent and the Petitioners have both relied on the case **of Mukisa Biscuits Manufacturing Co. Ltd** (supra) in support of their respective positions. In the said case, a preliminary objection was described as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration

(per Law, JA)

9 In the said case *Sir Charles Newbold, P*, made the following remarks on the matter;

“The first relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs, and on occasion, confuse the issues. This improper practice should stop.”

10. In my view, the first issue cannot be fairly adjudicated upon without ascertaining some facts on the true nature of the dispute submitted for adjudication. It may be true that the Inter-Governmental Relations Committee is competent to deal with disputes arising between the national government and the county government and disputes arising amongst county governments. But it is not clear from the petition that this is a dispute solely between two county governments. It would appear that some residents of Kirinyaga County as represented by the Petitioners may have some grievances as well. In fact, both County Governments of Embu and Kirinyaga have been joined as Respondents in the petition. I am, therefore, of the opinion that some facts require investigation or ascertainment.

11. The same reasoning would apply to the second limb of the objection which states that land adjudication is the exclusive province of Land Adjudication Officers under the Land Adjudication Act. There are certainly facts to be ascertained on the nature of the dispute, the reasons why the Petitioners are aggrieved, the stage at which the adjudication process has reached, whether consent is required to institute legal proceedings etc.

12. The issue of *res judicata* may be a good point of preliminary objection and may be raised as such. The test for *res judicata* was laid out in the cases cited by the 3rd respondent that is, **Nicholas Njeru v. Attorney General & 8 Others [2013] eKLR and Uhuru Development Co. Ltd v. Central Bank of Kenya & 2 Others & 2 Others Civil Appeal No. 36 of 1996.**

13. There is no evidence on the face of the record to show that the requirements of section 7 of the Civil Procedure Act and the cited case law have been met. In particular, it is not clear if the former suit was between the same parties. At least from the face of pleadings the 2nd, 3rd, 4th, 5th, 7th and 8th Respondents were not party to the earlier proceedings. This issue would certainly require ascertainment of additional facts before a definitive decision can be made thereon. It is not enough that one or two of the Petitioners were parties in the previous suit.

14. In my view, it is not necessary in a constitutional petition that a specific cause of action be established against every respondent. It is permissible to join a respondent as necessary party or a party who may be affected by the outcome of the petition.

15. In view of the foregoing, the court is not persuaded that there is merit in the notice of preliminary objection dated 21st March 2017. The 3rd Respondent is at liberty to argue those points during the hearing of the main petition.

16. Consequently, the 3rd Respondent's notice of preliminary objection dated 21st March 2017 is hereby dismissed with costs to the Petitioners.

17. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **10TH** day of **JULY, 2017**.

In the presence of Mr Andande holding brief for Mr Otieno for Petitioners.

Mr Kamunda for 2nd Interested Parties

Mr Guantai for 1st Interested Parties.

No appearance for the 8th Respondent.

Mr Mutuma holding brief for Mr Ileri for 3rd respondent.

Mr Mutuma holding brief Mr Githinji for 1st and 6th Respondents.

No appearance for the 4th Respondent.

Miss Njiru holding brief for Mr Kathungu for the 5th Respondent.

No appearance for the 2nd Respondent and 7th Respondent.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

10.07.17