



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION NO. 1 OF 2017

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 35, 40, 42, 43, 62, 69 AND 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ILLEGAL ALLOCATION OF PUBLIC UTILITY NO. NYERI MUNICIPALITY BLOCK 1/29 & 214 NYERI TOWN

BETWEEN

MUTHANGA-INI SELF HELP GROUP.....1ST PETITIONER

SAMUEL WAMBUGU.....2ND PETITIONER

(Suing on his own behalf and as Chairman of the Committee

members and in a representative capacity on behalf of Nyeri County Residents)

-VERSUS-

SUNDOWN PROPERTIES LIMITED.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

COUNTY GOVERNMENT OF NYERI.....4TH RESPONDENT

THE ATTORNEY GENERAL..... 5TH RESPONDENT

RULING

Introduction

1. The petitioners herein who have described themselves as the elected officials of Muthanga-ini Self

Help Group, Residents of Nyeri and beneficiaries of the plots known as Nyeri/Municipality/Block 1/214 and Nyeri/Municipality/Block 1/29 (hereinafter referred to as the suit properties) have deposed that Muthanga-ini Self Help Group has been in actual possession of the suit properties as an open garage and a public parking space.

2. The petitioners contend that the predecessor to the 4th respondent to wit, the Municipal Council of Nyeri irregularly allocated the suit properties to the 1st respondent.

3. Terming the allocation of the suit properties to the 1st respondent illegal and unlawful, the petitioners brought this suit to *inter alia*:

i. compel the 3rd respondent to provide them with information on the circumstances leading to issuance of a certificate of lease in favour of the 1st respondent;

ii. For a declaration that the suit properties are public utilities and to that extend their alienation in favour of the 1st respondent was unlawful;

iii. cancellation of the certificate of lease issued in favour of the 1st respondent; and

iv. for a declaration that the suit properties are not available for allocation to individuals/developers.

4. Simultaneously with the petition, the petitioners filed the notice of motion of an even date seeking various conservatory reliefs against the respondents.

5. On 10th January, 2017 the court certified the application as urgent and directed that it be served for *inter partes* hearing on 19th January, 2017.

6. When the matter came up for hearing on 19th January, 2017, the matter was adjourned to 22nd February 2017 to allow the respondents file responses to the application.

7. On 22nd February, 2017 it emerged that the petitioners had filed a notice of discontinuance/withdrawal of the petition.

8. Even though not opposed to the application for discontinuance of the suit, it emerged that the 1st respondent who had since filed a response to the application, had written to the Deputy Registrar of this court urging him to enter judgment for costs in his favour.

9. The 4th respondent who had also appointed an advocate to act on its behalf also prayed for costs arguing that by the time it was served with the notice of discontinuance/withdrawal of the suit it had begun preparing its response.

10. According to the documents filed in this suit, upon being served with summons to enter appearance, the 1st respondent filed a notice of appointment of advocates. Vide that notice, filed on 17th January, 2017, the 1st respondent appointed the firm of Kivuva Omuga & Company Advocates to act for it. On the same day, 17th January, 2017 the 3rd and 5th respondents appointed the Honourable Attorney General to act for them.

11. On 31st January, 2017, the petitioners filed a notice of intention to act in person.

12. Alongside the notice to act in person, the petitioners filed a notice of discontinuance/withdrawal of the petition and the application herein.

13. On 2nd February, 2017, the 1st respondent appointed the firm of Wamae & Allen Advocates to act for it in place of M/S Kivuva Omuga & Co. Advocates. On the same day, the firm of Wamae & Allen & Co Advocates filed a response to the petition and the application.

14. Arguing that by the time they were served with the notice of discontinuance/withdrawal of the suit, they had already filed their response to the application, on 13th February, 2017 counsel for the 1st respondent wrote to the Deputy Registrar of this court urging him to enter judgment for costs and interest on costs in its favour under Order 25 Rule 3 of the Civil Procedure Rules. Alongside the letter, the 1st respondent annexed its bill of costs amounting to Kshs. 1, 513,533/=.

Analysis and determination

15. As none of the parties is opposed to discontinuance/withdrawal of the suit, the sole issue for the court's determination is whether the respondents or any of them is entitled to costs.

16. As pointed out in the submissions filed by counsel for the 1st respondent, the law on costs is provided under **Section 27** of the Civil Procedure Act which provides as follows:

“27(1) subject to such conditions as may be prescribed, and to the provisions of any law for time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers; provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

17. Courts have ably pronounced themselves on the issue of costs. For instance, in the case of **Jasbir Rai & 3 others v. Tarlochan Singh Rai & 4 others (2014) eKLR** the Supreme Court of Kenya stated as follows:

“...costs are awarded at the discretion of the court or judge. ...such principle applies in other countries as well, as we learn from the comparative lesson. We draw, in this respect, from Halsbury's Laws of England, 4th ed Re-Issue (2010), Vol.10, para.16:

“...”

18. Though this matter had been litigated and a judgment in respect thereof rendered, there is no indication that the petitioners were either party to the previous suit and/or were aware of it. For that reason, it is my considered view that they cannot be faulted for bringing this suit for determination of the issues raised therein in which issues *prima facie* appear to be quite germane.

19. After they realized that they were misled to file the suit, the petitioners moved with speed and got the suit withdrawn.

20. In **Jasbir Rai** case *supra* the Supreme Court stated:

“It is plain to us that, at the time the petition was lodged in the Supreme Court, it was, in every respect, a valid cause of action; and thus, no blame attaches to the act of filing. By Article 50(1) of the Constitution of Kenya, 2010-

“Every person has the right to have any dispute that can be resolved by application of law decided in a fair and a public hearing before a court...”.

21. The court further stated:

“It is to be concluded that the petitioners, indeed, had a constitutional right to submit themselves to the judicial process before the Supreme Court.”

22. In applying the foregoing principles to the circumstances of this case, even though by filing the instant

suit the petitioners occasioned the respondents some prejudice, having determined that it was not unreasonable for them to bring the suit, in the spirit espoused in the case of **Jasbir Rai** *supra*, I decline to condemn them to pay the costs of the suit and instead order that parties bear their own costs of the suit.

23. Orders accordingly.

Dated, signed and delivered at Nyeri this 3rd day of October, 2017

L N WAITHAKA

JUDGE