



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

PETITION NO. 1 OF 2009

**IN THE MATTER OF SECTION 84(1) (OLD CONSTITUTION AND ARTICLES 22(1) & 2 OF
THE CONSTITUTION (2010)**

A N D

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMNTAL RIGHTS AND
FREEDOM UNDER SECTION 70 (1) , SECTION 75(1) AND (2) AND SECTION 77 (9(AND (10)
OF THE OLD CONSTITUTION AND ARTICLE 258 11(2) OF THE CONSTITUTION**

A N D

**IN THE MATTER OF SECTION 3 ENVIRONMENTAL MANAGEMENT AND CO-
ORDINATION ACT, 1999**

A N D

**IN THE MATTER OF ALLEGED CONTRAVENTION FIRMATION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER SECTION 82(1) AND (2) OF THE CONSTITUTION**

A N D

**IN THE MATTER OF ARTICLES 35 (1) (A) AND (B) AND 47 (1) AND (2) OF THE
CONSTITUTION (2010)**

A N D

**IN THE MATTER OF SECTION 61(1) 64, 65 AND 68 OF THE CO-OPERATIVE SOCIETIES
ACT CAP 490 (1972 EDITION)**

A N D

IN THE MATTER OF SECTION 13 (2) (A) ENVIRONMENT AND LAND COURT ACT 2011.

BETWEEN

1. PONDENI FARMERS CO-OPERATIVE SOCIETY LIMITED 1ST PETITIONER
2. NATHAN MUTALI MMAS 2ND PETITIONER 3.
TOM WANYONYI WALUBENGO 3RD PETITIONER
4. MOSES LUMATI 4TH PETITIONER

5. SILVESTER M. MAUKO 5TH PETITIONER 6.
JOSEPH MBIAKAA CHAKWENDA 6TH PETITIONER
7. WILLIAM WASIKE 7TH PETITIONER
8. PETER WALUCHIO..... 8TH PETITIONER
9. NEWTON MUGANDA..... .9TH PETITIONER 10.
DAVID SIMIYU KISO NGUTA N DHI 10TH PETITIONER
11. VINCENT WAMUAMA MUSEINI..... 11TH PETITIONER
12. JOSEPH WAKURA WAFULA 12TH PETITIONER
13. PETER B. WANJALA 13TH PETITIONER
14. ZILPA MIKISI 14TH PETITIONER
15. PATRIC WANJALA 15TH PETITIONER
16. JAMES SIFUMA 16TH PETITIONER
17. NDIEMA MATAYA 17TH PETITIONER
18. GILBERT WASIKE MABONGA 18TH PETITIONER
19. GODFREY WANYONYI MAKURENYA 19TH PETITIONER

A N D

1. COMMISSIONER OF CO-OPERATIVE DEVELOPMENT 1ST RESPONDENT
2. LIQUIDATOR, PONDENI FARMERS CO-OP SOCIETY LTD 2ND RESPONDENT
3. MINISTER FOR EDUCATION 3RD RESPONDENT
4. COMMISSIONER OF POLICE 4TH RESPONDENT
5. THE ATTORNEY GENERAL 5TH RESPONDENT
6. LAWRENCE K. CHEPKONGA 6TH RESPONDENT
7. BENJAMIN MACHANDIA 7TH RESPONDENT
8. ZACHARIA M. OGANDO 8TH RESPONDENT

A N D

1. RAYMOND W. BOMETT 1ST INTERESTED PARTY
2. PATRIC A. BOIYO 2ND INTERESTED PARTY
3. FRANCIS O. KISIA 3RD INTERESTED PARTY
4. NAKAMI SECONDARY SCHOOL 4TH INTERESTED PARTY

5. KENYA COMMERCIAL BANK LTD. 5TH INTERESTED PARTY
6. CO-OPERATIVE BANK OF KENYA 6TH INTERESTED PARTY
7. CHIEF FRANCIS KAPTEKA TENDET 7TH INTERESTED PARTY
8. LUCAS CHIRAKA EHITAI 8TH INTERESTED PARTY

J U D G E M E N T

INTRODUCTION

1. The first petitioner was a co-operative society registered under the co-operative societies Act Cap 490 (the Act). The society has since had its certificate of registration cancelled. The second to Ninth Petitioners were elected management committee members of the society. The sixth to eight respondents were members of an inquiry, appointed by the commissioner of co-operatives to look into the by-laws, working and financial condition of the society. The first interested party is a former Commissioner of co-operatives. The second and third interested parties were officials of the ministry of Co-operative Development and were at some stage appointed liquidators of the society. The fourth interested party is an educational institution which is alleged to be occupying land of the society without the society's consent. The fifth and sixth interested parties are financial institutions which are said to have handled the finances of the society. The seventh and eight interested parties are individuals who are alleged to have taken part of the society's land and participated in embezzlement and squandering of the society.
2. The society was officially registered as a co-operative society on 10.5.1984 for purposes of purchasing land for its members. The society's initial members were landless squatters who had been removed from Lugari forest in the then Western Province. The society bought two farms namely Kinyoro farm and Mount Farm which were 1079 and 926 acres respectively. The society had been provisionary in existence since 27.11.1977.
3. On 30.11.1987 the commissioner of co-operative Development appointed members to inquire into the by-laws, working and financial condition of the society. The committee members prepared a report dated 9.6.1988 and forwarded it to the commissioner of co-operative Development. The elected management committee was subsequently removed from office following the report of the inquiry. It is the removal of the elected management of the committee which triggered the filing of this petition in which the petitioners are seeking the following reliefs:-

- (a) A declaration that the cancellation of the certificate of registration No.2797 of 10th May 1984 was illegal and flawed under the provisions of sections 61 to 65 of the co-operative societies Act (Now repealed) and was a breach of the petitioners fundamental rights and freedom under section 75(1) and (2) of the constitution or section 40 of the New Constitution.
- b) A declaration that in the circumstances section 61(1), 64 and 65 of the Co-operative society of cap 490 (1972 edition) was discriminatory against the Petitioner each in itself or each in the effect and was applied by the first respondent in violation of the petitioners fundamental rights and freedoms protected by section 82(1) and (2) of the constitution.
- c) A declaration that in the circumstances, the petitioners fundamental rights and freedoms protected by Articles 35(1) (a) and (b) and 47(1) (2010) were violated.
- d) A declaration that in the circumstances, the appointment of the said adjudicating authority and its failure to read its report dated 9th June 1988 publicly contravened section 77(9) and (10) of the constitution and was discriminatory against the Petitioners and was a breach of the provisions of section 82(1) and (2) of the constitution which protects the fundamental rights and freedoms of the petitioners.
- e) A declaration that in the circumstances the illegal possession of about 1070 acres of the petitioners

LR. No.8887 Kinyoro Farm and LR.6881/5 Machewa farm by the two Commissions and two liquidators and the cancellation of the first petitioners certificate of registration dated 10th May 1984 by the commissioner for Co-operative Development was a violation of the petitioners fundamental rights and freedoms protected under section 75(1) and (2) of the Constituting and was null and void.

f) A declaration that in the circumstances, the removal of the elected management committee was a violation of the fundamental rights and freedoms protected by section 82(1) and (2) of the constitution since it was discriminatory.

g) A mandatory injunction that the first petitioner's certificate of registration dated 10th May 1984 is reinstated forthwith and the society be returned to its members and the said elected management committee be reinstated forthwith.

h) Eviction of invaders of LR. No.8887 and LR. No.6681/5.

i) That the recommendation of the adjudication authority that the invaders be evicted be adopted forthwith.

j) Damages/Compensation for trespass under the Environment and Land Court Act 2011.

k) Special damages of Kshs.1,000,000,000/= or that the invaders be identified through Court Process and they be ordered to give vacant possession after due hearing.

l) Each bank to produce all the documents in respect of debit and credit of the first petitioner's accounts held by each of them.

m) An order that the surveyor do locate the boundary between the 4th interested party and petitioner's LR No.8807 Kinyoro farm.

n) Costs

o) Interest at Court Rates

p) Such other or further relief as the court may deem fit to grant.

PETITIONERS CASE

4. The Petitioners contend that the manner in which the elected management committee was removed from office was not proper and that the sections of the Act which were applied in their removal violated the Petitioners rights under section 82(1) and (2) of the Old Constitution. The Petitioners further contend that the cancellation of the certificate of registration of the first petitioner was in violation of the petitioners rights under section 75(1) and (2) of the old constitution.
5. The Petitioners also contend that about 1070 of the petitioners land has been taken without compensation contrary to the provisions of section 75(1) and (2) of the old constitution. The petitioners further contends that the appointment of the liquidators was not proper and that there has been misappropriation of the fist petitioners money and properties by some of the respondents as well as some of the interested parties. The petitioners money and properties by some of the respondents as well as some of the interested parties. The petitioners has also taken issue in the manner in which the commissioner of co-operative development appointed a management commission to run the affairs of the first petitioner.
6. The petitioner also contend that their right to access to information has been violated in that the court ordered that they be given certain documents but they were not given. They therefore contend that their rights under Article 35 (1) of the constitution (2010) have been violated. They further contend that their right to fair administrative action under Article 47 (1) and (2) has been violated.

RESPONDENTS CASE

7. A state counsel entered appearance for all the respondents in the original petition. A replying affidavit to the petition was filed. When the petition was amended, the state counsel did not respond to the same. What therefore remains on record is a replying affidavit sworn by Francis O. Kisia (the current 5th Interested Party) who swore it on his behalf and on behalf of the 2nd interested party who was the 3rd respondent in the original petition. The two contended that the petitioners petition is incompetent and bad in law. The two contended that the petitioners were founder members of the first petitioner and that they have since sold out their entitlements in the first petitioner and thus relinquished their interest in the society. They contended that a liquidator was appointed to liquidate the society and after the distribution of the assets had been completed the liquidator was discharged. The respondents contend that the cancellation of the registration certificate of the first petitioner was neither wrong nor illegal as alleged by the Petitioners. The third interested party contended that when he was liquidator, he oversaw the survey of the two properties owned by the first petitioner and that each of the first petitioner's members were given land according to survey maps deposited with the Director of Surveys Nairobi.

FIFTH INTERESTED PARTY'S CASE

8. The 5th interested party filed grounds of opposition in which it contends that the petition herein is time barred, that the petition offends mandatory provisions of the companies Act Cap 486 Laws of Kenya; that the petition offends the mandatory provisions of the Co-operative Societies Act Cap 490 Laws of Kenya and that the court lacks jurisdiction to hear the petition.

ISSUES FOR DETERMINATION

9. The petitioners have brought this petition on allegations that their fundamental rights under section 75(1) and (2) 77(a) and (10), and 82 (1) and (2) of the Old Constitution as well as Article 35 (1) (a) and (b) and Article 47(1) and (2) of the constitution have been violated. The petitioners contend that the application of the provisions of section 61 to 65 of the Co-operative Societies Act led to breach of their constitutional rights under the aforesaid sections of the old constitution and the Articles of the New Constitution (2010).
10. The Petition herein is alleging violation of the Petitioners Constitutional rights. It is upon the Petitioners to demonstrate that their rights have been violated. Such demonstration must be with a degree of precision. The alleged violation of the petitioners rights are pegged to what was done by the commissioner of the Co-operative Development under the provisions of the Co-operative Societies Act. The Commissioner invoked the provisions of section 61(1) of the Act which states as follows:-

“ The Commissioner may, of his own accord, and shall on the direction of the Minister or on the application of a majority of the committee of the society; or of not less than one third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry, or direct some person authorized by him in writing to hold an inquiry, into the by-laws working and financial condition of any registered society.”

In compliance with the provisions of the afore-stated section, the commissioner of Co-operative Development appointed four members through Gazette Notice No.6177 of 30.11.1987. The four members conducted an inquiry and prepared their report dated 9.6.1988. The Petitioners contend that they were not involved in the said inquiry and that they never knew of the Gazetment of the inquiry and that in any case the notice was in English language which the members of the society were not conversant with. The petitioners also contend that the report of 9.6.1988 was not read to the members in Public and that there was no Public Participation.

11. Following the report by the members who had been appointed by the Commissioner of Co-operatives Development, the commissioner made a decision that the elected Management Committee of the Society was not conducting the business of society in a proper manner. He

removed the elected management committee of the society from office through Gazette Notice. I have read the inquiry report which gives details of how the society was being run and what ills were afflicting the society due to the manner in which the elected management were conducting the affairs of the society. I do not find any merit in the petitioners arguments that they were not involved in the inquiry and that they never knew anything about the Gazette Notice appointing members of the inquiry. The said Gazette Notice drew the attention of the members of the society to the pertinent sections of the Act including those prescribing offences. The inquiry team went through the books of accounts which were given to them by the management and that is how they were able to write a report on the financial status of the society as well as the running of the society. The Petitioners particularly petitioner Nos 2 to 9 who were the elected management members cannot claim ignorance of what was being done by the inquiry team.

12. There was no requirement that the inquiry report be read to the society members in Public. The Report was meant for the consumption of the commissioner of Co-operatives Development who was expected to take appropriate measures following the report. The Commissioner duly removed the members of the elected management committee from office through Gazette Notice. He thereafter appointed a Committee to manage the affairs of the society. The Petitioners are contending that the commissioner appointed a management commission which is not provided for in the Act. The commissioner appointed persons to manage the affairs of the society. This followed the removal of the elected management committee members. Whether the Gazette Notice called those members a management commission or any other name is a matter of semantics. The fact remains that those appointed were to manage the affairs of the society in accordance with section 64 of the Act.

13. The Petitioners contend that the cancellation of the society's certificate of registration was engineered and was wrongful. Under the repealed Co-operative Societies Act Cap 490 (1972 edition) section 65(1) of the said Act provided for dissolution of a society. If the commissioner after holding an inquiry under section 61, is of the opinion that the society ought to be dissolved, he may in writing order the cancellation of the registration of the society. The Commissioner ordered the cancellation of the society's certificate of registration in writing. By virtue of section 65(2) any member of the society was free to appeal against the cancellation to the Minister within 2 months of the making of the order canceling the certificate of registration. Subsection (3) of section 65 Provided that where there was no appeal presented within the time limited for appeal, the order shall take effect on the expiry of that period, but where an appeal is presented within that time the order shall not take effect unless it is confirmed by the minister.

Section 67 of the Act provided that where the registration of a society is cancelled, the society shall cease to exist as a corporate body upon the order taking effect. For purposes of winding up of a co-operative society certain sections of the companies Act which are set out in part 1 of the schedule to the Act apply. Such sections include section 223 which deals with power to stay or restrain proceedings against company. In this regard, the society ceased to exist as a body corporate upon expiry of the two months given for appeal purposes. It therefore means that under section 223 of the companies Act which applies to winding up of societies, the society could not sue or be sued. It does not matter whether the proceedings in which a society under liquidation brought are clothed as a constitutional petition. The fact remains that a society under liquidation cannot sue or be sued. It is on this score that I agree with the submissions of the 5th interested parties that the first petitioner had no capacity to bring this petition in view of the Provisions of the Co-operative societies Act (now repealed). It is only the liquidator who could sue or be sued.

14. Section 75(1) of the old constitution provided as follows:-

“ No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:-

a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

b) the necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation. “

15. In the instant case there is no issue of compulsory acquisition of land held by the petitioners. The petitioners have made general allegations that about 1070 acres of the petitioners land has been taken. They are not saying who has taken the said 1070 acres or the circumstances under which those person or institutions came to have the alleged acres. The petitioners claims are ambiguous. The ambiguity of their claim is evident from the petition which is contradictory and is not clear on the particulars. As I said before in this judgment it is incumbent upon the petitioners to demonstrate the alleged violation with precision if they are to succeed. A petitioner cannot succeed merely on the basis of generalized allegations that its land or his land has been taken away. The petitioners are contending that their land has been taken by invaders. The petitioners are not being specific on who the invaders are or their identities. This uncertainty is evident in prayer (k) of the petition where the petitioners are asking for vacant possession of their land by invaders to be identified in court after compliance with the rules of natural justice. This shows that the petitioners do not know who are on the properties illegally and those who are on the land legally. The inquiry report showed that there were persons who had invaded the land and some had bought the land legally. The inquiry team made certain specific recommendations. When the society was put under liquidation, there is the affidavit of Francis O. Kisia who was one of the liquidators who has deponed that he completed the process of liquidation and was thereby discharged as a liquidator. The petitioners seem to be faulting the liquidation process as a sham . They do not show how the liquidation process was a sham. The process followed the provisions set out in the co-operative societies Act cap 490.
16. The petitioners also contend that their constitutional right as enshrined under section 82(1) and (2) of the old constitution were violated. Section 82(1) provided that subject to subsections (4) (5) and (8); no law shall make any provision that is discriminatory either of itself or its effect: subsection (2) of the same section provided that subject to subsections (6), (8) and (9), no person shall be treated in discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.
17. The petitioners contend that the provisions of section 61 through to section 65 of the co-operative societies Act were in themselves or in their effect discriminatory. Section 61 deals with inquiry by commissioner, 62 deals with inspection of books of an indebted society, 63 deals with expenses of inquiry, 64 deals with powers of commissioner to remove committee and 65 deals with procedure and effective date of order of cancellation of certificate. The petitioners have not demonstrated on how any of the provisions were discriminatory in themselves or in their effect. The expression “discriminatory” is defined in subsection (3) of section 82 to mean affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribes, place of origin or residence or other local convention, political opinions, Colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
18. The petitioners particularly those who were in the elected management committee who were removed from office have not demonstrated that they were removed from office due to any grounds set out under section 82 (3) of the old constitution . The management committee were removed because of the manner in which they were running the affairs of the society. For instance the management let the treasurer of the society to keep large sums of money in cash in his house without banking the same. In one incident while the inquiry was in progress, the treasurer claimed that over Kshs.400,000/= had been stolen from his house. This allegation of theft was investigated and found to have been false. He was also found keeping cash of more than 500,000/= in his house and a lot more could not be traced. The books of accounts were not properly kept. These are some of the reasons which made the commissioner to remove the elected management of the committee of the society. The commissioner followed the law as it was and

there was no single section of the Act which was discriminatory either in itself or in its effect.

19. The petitioners contend that their right to access to information under Article 35 of the new constitution were violated. Article 35 (1) provides that every citizen has the right of access to (a) information held by the state; and

b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

The petitioners are contending that they sought for information from the commissioner of co-operatives and the fifth interested party in cases in Nairobi, Eldoret and Kitale but that information was denied. Under Article 35 of the 2010 constitution, it is only a citizen who can access information. A juridical person as the first petitioner is not a citizen who can access information. It is only living citizens who are guaranteed access to information. Information which is required has to be information which will be required for the exercise or protection of any right or fundamental freedom. In the case of **Nairobi Law Monthly Company Limited vs Kenya Electricity Generating Company & 2 Others (2013) eKLR** Justice Mumbi Ngugi quoted from two South African decisions regarding the threshold required when it comes to right of access to information. In the case of **Cape Metropolitan Council vs Metro Inspection Services Western Cape cc and Others (10/99) (2001) ZASCA 56** the court held that :-

“ Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that in order to make out a case for access to information..... an applicant has to state what the right is that he wished to exercise or protect. What the information is which is required and how the information would assist him in exercising or protecting that right.”

The above proposition was adopted in the case of **Unitas Hospital vs Can Wyk & Another (231/05) (2006) ZASCA 34** where the South African Court of Appeal stated that:-

“[17] The threshold requirement of “assistance” has been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self evidently however, more compliance with the threshold requirement of assistance will not be enough.”

20. The petitioners in this petition have not demonstrated which information they require and how that information will assist them to exercise or protect a right or freedom. What the petitioners have said is that they obtained an order of discovery in petition No.3 of 2010. This petition though filed by some of the petitioners herein, the same has never been consolidated with this petition and in any case even if it were to be consolidated, the petitioners have not met the threshold set by the constitution.

21. The petitioners contend that their right to fair administrative action has been violated. Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. I have said twice herein-above that it was upon the petitioners to demonstrate that the violation which they allege actually occurred. The petitioners have not demonstrated how their rights to fair administrative Action was violated. The process of removal of the elected management committee of the society was undertaken before the promulgation of the new constitution. The process followed the provisions of the Co-operative Societies Act. The petitioners as members of the society whose registration was cancelled had the opportunity of appealing to the Minister against the decision to cancel the registration certificate. They did not exercise their rights and they cannot be heard to complain that they were not afforded a fair hearing.

22. The petitioners are seeking special damages of Kshs. One billion. This is just a figure which is not supported by any evidence. There is no evidence of the extent of land occupied by the so called invaders. Their identities are not known. There is no valuation report of the alleged land which the invaders are occupying. A Party cannot pick a figure and come to court and say that ***“this what I have suffered. Give it to me.”*** There must be particulars of the special loss being claimed. The special loss has to be properly particularized. The petitioners in their prayers have

demonstrated that they do not know the invaders and that the invaders should be identified through a court process. There is therefore no basis upon which special damages or even general damages for trespass can be granted. The trespassers have not been identified or specified. There can be no blanket orders of eviction against unknown invaders.

23. The petitioners are seeking an order that a surveyor do proceed to the ground and determine the boundary between the land occupied by the 4th interested party and the petitioners LR. No.8887 Kinyoro Farm. The petitioners have not adduced any evidence upon which the court can issue such an order. The petitioners are contending that the 4th interested party was illegally allowed to occupy 18 acres of its land. There is no evidence to show that the position regarding their occupation has changed. When the land was being subdivided, there was provisions for public utilities Nakami Secondary School is such a public utility facility. If there is any boundary dispute, the petitioners ought to have given such evidence. A surveyor cannot be sent to go and ascertain what is not disclosed.

24. There were wild and unsubstantiated allegations of embezzlement of funds. One of the petitioners in his affidavit stated that certain individuals who were aware of how the society's funds were embezzled were willing to come to court and publicly testify. This did not happen and those persons never even swore affidavits about what they knew regarding plundering of the society funds.

DETERMINATION

25. I have demonstrated herein-above that none of the petitioners prayers can be granted. The petition filed herein is hereby dismissed. Each party to bear their own costs.

Dated , signed and delivered at Kitale on this 13th day of May 2015.

E. OBAGA

JUDGE

In the presence of Mr. Owuor for petitioners and Mr. Kisa for Interested party. Court Clerk Isabellah

E. OBAGA

JUDGE

Mr. Owour

I pray for proceedings and judgment for appeal purposes.

Court

Let the petitioners Advocate be given certified copies of proceedings and judgement for purposes of appeal upon payment of the requisite fees.

E. OBAGA

JUDGE

13.5.15