



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L PET NO 6 OF 2014**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 19, 201, 21, 22, 23, 40, AND 60 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA**

**SAMUEL M. NDIRANGU & 141 OTHERS .....APPLICANTS**

**VS**

**COUNTY GOVERNMENT, BARINGO.....1ST RESPONDENT**

**NATIONAL LAND COMMISSION.....2ND RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS.....3RD RESPONDENT**

***(Application for conservatory orders; petitioners seeking to have certain land adjudicated and registered in their names; status quo ordered to be maintained pending hearing of the petition)***

**RULING**

1. This suit was instituted by way of a Petition filed on 27 May 2014, brought pursuant to the provisions of Articles 2, 19, 201, 21, 22, 23, 40, and 60 of the Constitution of Kenya and pursuant to the Land Adjudication Act, CAP 284, Laws of Kenya. In the Petition, the petitioners, who are 142 in number, have pleaded that they are owners of various portions of land in Kisarget Village, Eldama Ravine Town. They have averred that they were allocated the said land sometimes in the year 2000 by the then Clerk to Eldama Ravine Town and by virtue of being members of Kisarget Village. They have stated that they have demarcated their respective parcels through a process that was overseen by the then Town Clerk of Eldama Ravine. It is averred that the land is unsurveyed and that it is community land "by virtue of it being lawfully transferred and allocated to members of Kisarget Community through a valid and legal process by the then Town Clerk to Eldama Ravine Town." It is stated that they have extensively developed their respective parcels of land. The petitioners have contended that, the respondents have failed to commence the process of land adjudication and it is their assertion that this is a deprivation of their proprietary rights contrary to Article 40 of the Constitution.

2. In the Petition, they have sought the following prayers :-

*(a) A declaration that the petitioners are the rightful and legal owners of all that parcel of land contained in Kisarget Village as the rightful allottees and community members of Kisarget Village hence a*

*declaration that all that parcel of land contained in Kisarget Village Eldama Ravine Town is community land.*

*(b) An order to compel the respondents to commence the adjudication process in respect of Kisarget Community land by demarcating, surveying, recording and registering the petitioners' interests in all that parcel of land contained at Kisarget Village Eldama Ravine Town.*

*(c) A declaration that the petitioners' rights to the properties they hold within Kisarget Village Eldama Ravine Town is constitutionally guaranteed and it should not be taken away or altered to their detriment.*

*(d) Conservatory orders permanently restraining the 1st and 2nd respondents either by themselves, their officers, juniors, agents, servants, and or employees from removing, altering, trespassing, and or dealing whatsoever to the detriment of the petitioners with all that parcel of land contained in Kisarget Village Eldama Ravine Town (a temporary conservatory order pending the hearing and determination of the Petition herein).*

*(e) Costs of this petition.*

3. Simultaneously with the filing of the Petition, the petitioners, filed an application, said to be a Chamber Summons application, brought pursuant to the provisions of High Court Practice and Procedure Rules, 2006. In the application, the petitioners want the following principal order :-

*That pending the hearing and determination of the petition herein this Honourable Court be pleased to grant a conservatory order restraining the respondents jointly and severally either by themselves, servants, employees or agents from trespassing, encroaching, alienating, dealing with, demolishing developments on, dumping of waste garbage, occupation of and/or harassing the petitioners/applicants herein and/or in any other way interfering with the petitioners'/applicants' quiet enjoyment, use, and occupation of any part or part of or the entire piece of land contained in Kisarget Village Eldama Ravine Town.*

4. The application is based on the grounds inter alia, that the petitioners have been residing on the suit land, that they have demarcated their respective parcels, that they have extensively developed their parcels with permanent homesteads, that unless restrained, the respondents may demolish all the developments, that they stand to suffer irreparable loss, and that the petitioners have an arguable case.

5. The application is supported by the affidavit of one James Maranga, who has sworn the affidavit on behalf of all the other petitioners. It is averred that in the early 2000s the then local authority passed a resolution vide a meeting No. Min/WTPMC/73 Appendix 'O', and decided to allocate all that parcel of land forming part of Kisarget Village to residents of Eldama Ravine. The minutes are annexed. It is averred that the petitioners complied with the conditions by paying the amount demanded by the then Town Clerk after which they were shown and given vacant possession of the land. It is further stated that the Town Clerk then arranged for a Part Development Plan (PDP) and some copies of receipts said to be from some petitioners are said to be annexed. It is contended that upon completion of the PDP, the Town Clerk wrote to the Commissioner of Lands recommending the issuance of allotment letters. A copy of the said letter is annexed as JM-5. The petitioners then wrote asking for a proper demarcation of the land so as to enable them procure title.

6. It is said that the then Local Authority responded and affirmed the position that the petitioners were the rightful owners of the suit land through a letter JM-7 addressed to the petitioners. It is further stated that the Town Clerk, Eldama Ravine continued to give assurance to the petitioners that they were the rightful owners of the suit land. Some pictures showing the alleged occupation of the suit land are annexed. It is said that some petitioners were issued with temporary letters to affirm that they are rightful allottees. It is stated that upon allocation, the petitioners made the requisite payments and have continued to do so to date. It is averred that the 1st respondent has now reneged on the administrative actions of its predecessor by claiming that the petitioners are illegal squatters and that the land is earmarked for other activities. It is further averred that the 1st respondent is now dumping garbage on the said land without there being an

## Environmental Impact Assessment.

7. It is contended that the land was community land and held in trust for Eldama Ravine residents but that it was converted to private land once the then local government allocated it to the petitioners. It is thus deposed that the suit land is no longer Trust land and that the 1st respondent has lost the power to hold it in trust for its residents and that the only remedy available is for the land to be demarcated, surveyed, recorded and registered. It is said that the intended action by the respondents will violate the petitioners' rights to hold property.

8. Despite being served, none of the respondents entered appearance nor filed any response to both petition and the application. The application therefore proceeded ex-parte before me on 18 June 2014 with Mr. Mukabane, urging me to allow the application for conservatory orders. He relied entirely on the grounds and the supporting affidavit.

9. I have considered the application.

10. Let me at the outset state that The Constitution Practice and Procedure Rules of 2006 (Gicheru Rules), are no longer in operation. The same were superceded by Legal Notice No. 117 of 2013, The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which were gazetted on 28 June 2013. The current rules, specifically rules 23 and 24 allow for one to make an application for conservatory orders, but such application, ought to be by way of Notice of Motion and not Chamber Summons as has been the case in this application. Procedurally, the application is therefore defective. However, I presume that no party has been prejudiced by the defects, and pursuant to Article 159 (2) (d) of the Constitution, I will not have undue regard to the procedural defects but deal with the substance of the application. I trust however, that counsel for the applicant has taken note of the procedural defects and that he will correct himself in future applications.

11. Essentially, the application seeks conservatory orders so that the petitioners are not evicted from the suit land pending the determination of this petition. It is the case of the petitioners that they were allocated the land by the former Local Authority and that the current County Government has reneged on that promise made by the former local authority. They therefore want the land adjudicated and that they be issued with titles.

12. I have had some difficulties in appreciating the case of the petitioners. On one hand, it is stated that the land is community land, but on the other hand, especially in the deposition of Mr. Maranga in support of this application, it is stated that the suit land is private land, and that all that is pending is the issuance of titles. I have been unable to reconcile these two opposing positions, for community land cannot be private land at the same time, by dint of the provisions of Articles 63 and 64 of the Constitution, which define what community land is and what private land is. I have also been unable to reconcile whether the position of the petitioners is that they were allotted the suit land, and therefore deserve to have titles to it by virtue of the allotment, or whether the suit land can be land that may be the subject of an adjudication process under the Land Adjudication Act, CAP 284, Laws of Kenya. Ordinarily, the Land Adjudication Act, is applied to determine land that had previously been held under customary tenure and not land that was held by the Government or by the now defunct Local Authorities.

13. However, I believe that those will probably be the issues for determination in the petition and I would rather not dwell too much on them without first hearing the petitioners. For now, it has been demonstrated that the petitioners are in danger of being evicted from the land in dispute. If I do not allow this application, they may risk eviction and this petition may be rendered nugatory. The respondents have also not thought it fit to oppose this application.

14. So as to preserve the subject matter of the litigation, I hereby make the following orders pending the hearing and determination of the petition :-

(1) The respondents are hereby restrained from evicting the petitioners from the suit land.

- (2) The petitioners are hereby restrained from making any new developments on the suit land.
- (3) The status quo currently prevailing on the suit land be maintained until the petition is determined.
- (4) The costs of the application shall be in the petition.

It is hereby ordered.

**DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF JULY 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in the presence of:*

*Mr. Aseso holding brief for Mr. Chege for petitioners.*

*N/A for respondents.*