



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC NO 1347 OF 2013

**IN THE MATTER OF ARTICLE 22(1) AND IN THE MATTER OF ALLEGED
CONTRAVENTION OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER ARTICLE 19, 20,
21, 22, 27, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA**

BETWEEN

MUTHUI KIMOTHO & 12 OTHERS.....PETITIONERS

VERSUS

THE SENIOR RESIDENT MAGISTRATE'S COURT

AT MWINGI.....1ST RESPONDENT

MAMBU AUCTIONEERS.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....4TH RESPONDENT

THE REGISTRAR OF TITLES.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

MBEU GROUP RANCH.....7TH RESPONDENT

RULING

The Petitioners filed an application dated 4/10/2013 seeking an order that there be a stay of execution of the warrant issued in **Senior Resident Magistrates Court at Mwingi Civil Suit No. 32 of 2001**. The application is premised on grounds that the lower court has issued a warrant to have the Petitioners evicted from the suit premises yet they were never a party to the said suit. The Petitioners aver that their fundamental rights are likely to be violated by the threatened eviction which will affect over 3000 people.

It is their averment that the National Land Commission needs to investigate the question of land ownership over the property known as Katse/Mbau/1.

The application is supported by an affidavit sworn on 4/10/2013 by the 1st Petitioner wherein he deposed that the Petitioners have been in occupation of the property known as Katse/Mbau/1 (suit property) measuring 2000 acres which is situated in Mumoni and Tia Kamuthale Divisions. It is the deponent's claim that in 1974 the 7th Respondent was registered under the Group Representatives Act comprising of persons who did not hail either from Mumoni or Kyuso Districts and whose purpose was to illegally acquire land owned by the Petitioners. That in 1972, the 7th Respondent started to survey the suit property and in 1987 the 7th Respondent in collusion with the 4th, 5th and 6th Respondents obtained Certificate of Title for the suit property. The deponent outlined the particulars of fraud claiming that the 7th Respondent comprises of wealthy businessmen who used the positions of persons in Government to commence survey and adjudication processes of the suit property whereas no such process was being undertaken in the said Districts. It is deposed that the land allocation is illegal since the 7th Respondent did not pay any consideration for acquiring the same.

The deponent stated that on 23/7/2003, the 7th Respondent instituted a suit at the SRM Court in Mwingi against 8 persons who live within the suit property and that on 12/9/2013 the Court issued a warrant authorizing the Bailiff to move into the suit property and destroy by either pulling down any structure, remove and burn any fence by using reasonable force and put the 7th Respondent in occupation thereof. It is the 1st Petitioner's depositions that the warrant is unlawful and unconstitutional in view of the fact that the Petitioners herein were not party to the suit whereas the warrant issued affects them.

Benson Mukiti Mutio, the Chairman of the Board of Directors of the 7th Respondent swore a Replying Affidavit on 10/12/2013 and a Further Affidavit on 20/1/2014. The deponent refuted the claims made by the Petitioners in respect to the validity of title to the suit property. It was his deposition that membership to the Group was open to all persons who used the property to graze animals and cultivation, upon purchase of shares. The deponent stated that the land adjudication and survey process was proper and that the registration of title in favour of the 7th Respondent was never challenged in court. It was deposed for the 7th Respondent that the Petitioners have no basis to represent 3000 people since there is no list of persons annexed to the Petition. Consequently, the people referred to are imaginary. Further that there is no survey map annexed to the Petition indicating where the 3000 people reside, the sizes of their plots and extent of development thereon.

The deponent contended that the Petitioners' claims were unsubstantiated as they failed to name the alleged persons in Government who facilitated the land acquisition. The deponent also refuted the claim that there was collusion between the Respondents to facilitate the registration in favour of the 7th Respondent. It was his deposition that the Petitioners were being properly evicted from the suit property pursuant to a court process. It was deposed that subsequent to the adjudication and survey process and later the issuance of title, the Petitioners' parents encroached on the property claiming ownership. Therefore, that they cannot claim that which their fathers failed to get and also that the claim is *res judicata*.

In the Further Affidavit, the deponent annexed a list of members of the 7th Respondent deposing that none of them was an influential person in Government as alleged by the Petitioners. The deponent also outlined the names of the Defendants in the suit filed at the lower court stating their relation with the Petitioners herein and deposed that litigation over the property commenced before the Petitioners were born. He deposed that litigation having been against the Petitioners' fathers or close relatives, the same is binding upon the Petitioners and as such the Petition is barred by the principles of *res judicata*.

The application was canvassed by way of written submissions. E.K. Mutua Advocates for the Petitioners filed submissions dated 9/6/2014, wherein counsel reiterated the contents of the application that the Petitioners were not party to the suit in the lower court and therefore were not heard. Counsel submitted that the eviction order, in the circumstances amounted to unfair hearing contrary to the provision of

Article 50 of the Constitution. Counsel also submitted that the doctrine of *res judicata* did not apply as there was no law providing that litigation by a person's relatives was binding on that person.

Manthi Masika & Company Advocates, for the 2nd and 7th Respondents filed submissions dated 2/7/2014. Counsel reiterated that the Respondents' claim that the Petitioners' parents and guardians litigated over the suit property and lost has not been denied by the Petitioners. Further that the Petitioners were wrongly using the provisions of the Constitution to revive an old suit, which was not the intended purpose at its promulgation. Counsel also submitted that **SRMC No. 82 of 2003** was heard and determined by a competent court and since no appeal had been lodged, the eviction order was properly obtained and the 7th Respondent should be allowed to execute the same. Counsel urged the court to dismiss the application on the basis that the decision made by the lower court in respect to the litigation instituted against the Petitioners' parents is binding upon the Petitioners.

This Court has now considered the pleadings generally and the written submissions and finds as follows;- the Petitioners claim to be occupants of the suit property and aver that the Order issued by the lower Court in **Mwingi SRM CC No. 32 of 2001** adversely affects them. The said order is a warrant to the Bailiff to give vacant possession of the property known as LR. No Katse/Mbeu/1 to the Plaintiff (7th Respondent herein). The warrant authorizes the Bailiff to move into the property and destroy the structures, remove and burn any fence by using reasonable force and put the 7th Respondent herein in occupation. It is the execution of this warrant that the Petitioners beseech the Court to have it stayed on the material ground that they were not parties to the suit in the lower court and therefore that they are unheard yet they stand to be evicted from the suit property.

Other than their right to be heard, the Petitioners claim that their rights to equal protection of the law (Article 27); fair administrative action (Article 47); and to acquire and own property (40) have been or is likely to be violated. The Petitioners also contend that under Article 22, they have a right to bring proceedings on their own behalf as well as others similarly affected. The application is vehemently opposed by the 7th Respondent who avers that the Petitioners herein are kinsmen of the Defendants in the suit at the lower court and by extension, the orders emanating therefrom are binding on them. In that regard, therefore, the Petition herein is *res judicata*.

It is not in contention that the petitioners are in occupation of the suit property. The orders of the lower court did order an eviction of the Defendants, their servants, agents and relatives thereon. Whilst the Petitioners herein do not expressly deny the allegation that they are kinsmen of the Defendants in the lower court suit, it is their contention that they also have a right to be afforded an opportunity to be heard. I am of the view that the Defendants in the lower court suit were sued in their personal capacities unlike the present Petition where the Petitioners claim to bring the suit on their own behalf and that of the entire community leaving on the said property.

The right to be heard is cardinal rule of natural justice and a decision made that has an adverse effect on persons not made party to the suit amounts to condemning the said persons unheard. The resultant effect is that there is a breach of a fundamental tenet of natural justice. See the ruling by Mumbi Ngugi J. in **Kiptalam Arap Cherunya v Commissioner of Lands & 3 others Petition 191 of 2008 [2012] eKLR** where the Learned Judge set aside Judgment of a Court of concurrent jurisdiction on the basis that the Applicant was not a party to the suit.

On the foregoing, I hereby make the following orders:

1. ***That pending the hearing and determination of the petition the status quo be maintained. For the avoidance of doubt, the status quo is that the Petitioners shall not be evicted and the Respondents shall not in any way interfere with Petitioners' possession in the property known as Katse/Mbau/1***
2. ***The status quo order shall be in force for a period of 6 months within which time the Petitioners ought to have prosecuted the Petition. In default, the said order shall lapse.***

3. *Parties are at liberty to file and exchange witness statements and further supporting documents within 45 days from the date hereof.*

4. *Costs of this application shall be in the cause.*

Dated, signed and delivered this **31st** day of **October, 2014**

L.N. GACHERU

JUDGE

In the Presence of:-

M/s Butoyi holding brief for Mr Mutua for the Petitioners

None attendance for the 1st Respondent

Mr. Masika for the 2nd Respondent

None attendance for the 3rd Respondent

None attendance for the 4th Respondent

None attendance for the 5th Respondent

None attendance for the 6th Respondent

Mr Masika for the 7th Respondent

Kamau: Court Clerk

L.N. GACHERU

JUDGE