IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ,A)

CIVIL APPEAL NO. 267 OF 2014

BETWEEN

KENYA FOREST SERVICE……..…….……..….APPELLANT

AND

RUTONGO'T FARM LIMITED……..……..…RESPONDENT

(Appeal from the judgment and decree of the Environment & Land Court at Kitale (Obaga, J.) delivered on 3rd July, 2014)

In

H.C. CONSTITUTIONAL PETITION NO. 1 OF 2011)

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JUDGMENT OF THE COURT

This appeal concerns a dispute over the contested ownership, of properties known as Land Reference number Trans-Nzoia/ 6657 and 10832 (***the suit land***) which both the appellant and the respondent claim to have purchased from a private owner, one Andres Johannes Olsen (***Olsen)***.

In an amended Petition dated 19th March 2013, supported by an affidavit sworn by ***Michael Francis Chemonges Kitiyo,*** the respondent's Vice Chairman, the respondent stated that it entered into a sale agreement on 28th August 1973 with Olsen to purchase the suit land. That on 28th December 1973, the respondent paid a sum of Kshs. 400,000/- to Olsen, and applied to the Trans-Nzoia Land Control Board for consent to transfer the suit land. The application was approved by a Board meeting held on 16th January 1974 vide minute number ex-87/73, and on 17th January 1974, a Letter of Consent was issued. Whilst this transaction as ongoing, for reasons that were not stated, Olsen entered into another sale agreement with the appellant to purchase the suit land, and on 3rd February 1975, a transfer of the suit land from Olsen was registered in favour of the appellant. The respondent was aggrieved and wrote to the President of the Republic of Kenya contending that its rights had been violated, following which, the President directed the Permanent Secretary, Ministry of Lands and Settlement and the Commissioner of Lands to investigate the complaint.

On 10th November 2000, the Permanent Secretary, Ministry of Lands and Settlement, wrote to the Ministry of Natural Resources recommending that it relinquish its interest in, and desist from interfering

with the suit land, since it belonged to the respondent. On 29th April 2004, the District Forest officer, Trans Nzoia informed the respondent that the suit land belonged to the Ministry of Natural Resources and that pursuant to a Gazette Notice dated 17th June 1977 it was subsequently gazetted as a forest. A copy of the Gazette Notice was forwarded to the respondent. Consequently, the respondent wrote to the Minister of Environment and Natural Resources, and to other various government officials seeking to have the Gazette Notice revoked and the respondent's members settled on the suit land.

The respondent's further contention was that sometime in April 1974, the respondent's members moved onto the suit land, where they stated they built houses and commenced agricultural activities. In March 1975, the OCPD, Trans-Nzoia District, informed the respondent's members that the suit land was leased for the planting of Pine trees to service Webuye Pan Paper Mills, and so ordered the members to vacate the land. According to the respondent, its members declined to move out and were forcefully evicted by the Government and their houses demolished.

The respondent claimed that the appellant's actions violated it's members constitutional rights.

The respondent, being apprehensive that its members would be evicted permanently from the suit land, lodged a Petition in the High Court seeking orders:-

1. *for Certiorari to bring into the High Court and quash Gazette Notice contained in legal Notice number 152 of 17th June 1997, which declared Land Reference numbers Trans-Nzoia/6657 and 10832 to be Forest Land, referred to as Sikhendu.*
2. *for a Declaration that the suit land belongs to the Respondent and the same be transferred to it.*
3. *compelling the Land Registrar to issue Allotment Letters or Title Deeds in respect of the suit land to the members of the Respondent.*
4. *compelling the Appellant together with Three Others to pay damages to the Respondent for non user of its land from the time of its purchase up to the date of the suit.*
5. *for the Appellant to compensate the Respondent for the loss of property that was occasioned by eviction of its members from the suit land.*
6. *permanently restraining the Appellant and Three Others, together with their agents, from interfering with the suit land in any manner whatsoever.*

In its replying affidavit sworn on 23rd February 2011, by **Simon Kimani Wahome**, the Zonal Forest Manager, Trans- Nzoia Zone, the appellant deponed that the Petition before court was devoid of any constitutional issue, and was an abuse of the constitutional process. It stated further that, the aforesaid suit land comprised of forest land known as Sikhendu Forest, measuring approximately 804.1 hectares, situated fifteen kilometers South West of Kitale municipality in Trans-Nzoia District, and that the Ministry of Natural Resources had purchased the suit land in 1975 from Olsen. Both the Commissioner of Lands and Olsen had executed the transfer documents on 3rd February 1975. That the Minister for Natural Resources issued a twenty eight days' notice of the intention to declare the suit land a forest area as per the provisions of ***section 4(2)*** of the ***Forest Act, cap 385 Laws of Kenya, (now repealed),*** but that the period lapsed without any objection being lodged. Consequently, the suit land was gazetted as a Government Forest and was named Sikhendu Forest, which is currently covered by 502.1 hectares of both exotic and indigenous tree species.

The appellant further stated that the respondent only purchased loose assets, but did not pay the balance of the purchase price of Ksh.720,000/=; that having breached the agreement for sale, they were not entitled to ownership of the suit land, which the appellant subsequently lawfully acquired.

In a judgment delivered on 3rd July 2014, the High Court found that the respondent had a legitimate claim to the suit land and that its members' constitutional rights were violated by the appellant, and granted the prayers as sought in the Petition, thereby quashing the Gazette Notice of 17th June 1977 that declared the suit land to be government forest land; and made a further declaration that the suit land belonged to the respondent. The Commissioner of Lands or the Deputy Registrar was ordered to register a transfer of the suit land to the respondent.

The appellant was aggrieved by the decision of the High Court and brought this appeal on grounds *inter alia* that the trial judge erred in:

i. *determining and allowing a purported Constitutional Petition which was incompetent;*
ii. *bequeathing a gazetted State forest to a private firm without following the procedures laid down by the law, and failing to apply existing legal principles of environment and sustainable development;*
iii. *admitting evidence that did not meet the evidentiary threshold; and*
iv. *failing to convert the matter of the purported Constitutional Petition into an Environmental and Land case to be heard by the procedure prescribed by the Civil Procedure Rules, and by enforcing a private contractual sale of land through Public law remedies, since the claim was statutorily time barred.*

Prof. Sifuna, learned counsel for the appellant begun by stating that on the basis of the decision in ***Mumo Matemu vs Trusted Society of the Human Rights Alliance & 5 Others [2013] eKLR***, he would concede the issue of *locus standii* or the legal capacity of the respondent to bring this suit on it's own behalf and on behalf of its members, and instead address the issue of whether the suit should have been brought as a constitutional petition or as a contractual dispute under the Civil Procedure Act and rules; the question of land preservation and management and whether the court below rightfully ordered that the Notice which gazetted the suit land as a forest be quashed; whether the orders of the court were enforceable against the defunct office of the Commissioner of Lands following repeal of the Registration of Titles Act; and the extrajudicial remarks of the constitutional court.

With regard to the pleadings filed, counsel contended that the Constitutional petition was defective and ought not to have been entertained by the court; that constitutional petitions are guided by the principles enunciated in ***Anarita Karimi vs Attorney General*** **[1979] KLR 154 and the *Mutunga Rules (2013)* which stipulate that** the petitioner must state precisely which provisions of the Constitution had been violated; that the petition had stated that ***Articles 21, 22, 23, 40, 41*** and ***46*** of the ***Constitution*** were violated, yet the pleadings did not specify in which manner the respondent's rights had been violated. Another issue was that, the proceedings were not supported by any documents as, the annextures to the supporting affidavit of ***Michael Francis Chemonges Kitiyo*** which had been filed in the petition on 12th January 2011, were omitted from the amended petition filed subsequently, leaving the petition bare and unable to stand on its own.

The next issue was that the judgment was not delivered within the prescribed time, but after a delay of 3 years. Counsel also complained that the Environmental & Land Court had delivered a judgment that was in total disregard of the prevailing environmental principles; that ***Article 69*** of the ***Constitution*** specifies an intention to achieve a tree cover of 10% land area in Kenya and that the judgment, if not set aside would have the effect of further reducing the 7% existing national tree cover.

Counsel went on to submit that, the court had issued illegal orders against a defunct office of the Commissioner of Lands, and as a consequence the orders were unenforceable.

Counsel next turned to the issue of the contract between the respondent and Olsen. It was submitted that following execution of the agreement with Olsen and the respondent, Olsen then entered into another agreement to sell the same land to the Government in 1975, and in so doing he breached the agreement that he had entered into with the respondent. The respondent's claim therefore lay against Olsen for damages for breach of the sale agreement, and not against the appellant for specific performance. In counsel's view, the dispute should have been filed as a normal civil suit, and not a constitutional petition, which, given the lapse of time in bringing a claim for breach of contract against Olsen, the cause of action was time barred. Counsel concluded that, the purported constitutional petition was a conspiracy to defeat the course of justice and the Limitation of Actions Act.

Ms. P. Kuria, learned counsel for the State, adopted the submissions of the appellant's counsel, and added that the learned judge erred in concluding that an enforceable contract existed between Olsen and the respondent. The contract was repudiated, as the respondent was unable to demonstrate that the full purchase price had been paid.

Counsel questioned whether the respondent filed the petition within reasonable time, and submitted that the respondent ought to have filed the petition at the earliest possible opportunity, which recourse was available to it under section 75 of the retired Constitution. Instead, the respondent sought to bring this petition 35 years later under the provisions of the current Constitution, and as such was guilty of laches. Counsel further submitted that the suit land had been gazetted as forest land since 17th June 1977, and in so doing removed it from the respondent's possession; that the High Court order to quash the Gazette Notice, was wrong as it was properly published in accordance with the law.

Mr. Mokua, learned counsel for the respondent, opposed the appeal, and contended that the Constitutional petition was competent; that the respondent's rights under the provisions of the Constitution were specified and the violations demonstrated; that the Mutunga Rules were not enacted by the time the petition was filed, and as a consequence were inapplicable. Counsel further submitted that, the pleadings showed that the respondent purchased the suit land from Olsen, on the basis of willing buyer- willing seller, but that in 1975 it was arbitrarily transferred to the appellant, and was gazetted as forestland in 1977. Counsel conceded the respondent did not at any time sue Olsen for breach of contract.

Counsel contended that the members of the respondent sought to resolve the issue with the appellant, and on 10th November 2000, in a letter from Sammy Mwaita, the then Commissioner of Lands, the Government admitted that the suit land belonged to the respondent. According to the respondent, the contract with Olsen was reinstated by virtue of this letter, and the court was right to find that the land belonged to the respondent. Subsequent to this, about 150 members of the respondent entered onto the suit land. It was counsel's submission, that the court had jurisdiction to grant the orders it did, based on the evidence.

Counsel concluded by stating that ***Article 159*** of the ***Constitution*** would cure any defects or omissions in the pleadings, and the annextures.

In reply, Prof Sifuna contended that, under ***section 7*** of the ***Limitation of Actions Act*** there are no time extensions in claims for land, only in claims for tort or fraud. On the issue that the suit land had been transferred after the judgment, counsel submitted that a provisional title was issued which is not in the name of the appellant, and that there has been no transfer of the titles by the Deputy Registrar. The application to transfer was withdrawn, as the provisional title should have been issued in Olsen's name, subsequent to which, a transfer would be effected to the respondent by the Deputy Registrar. Counsel drew our attention to the legal personality of the respondent. The contention was that the rights of the members were violated and not the company's rights. If that were so, the members should have filed their own petition.

We have considered the pleadings, and the submissions of counsel and being a first appeal, as stated in the case of ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212;***

> ***"On a first appeal from the High Court , the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnessed and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence."***

We consider the issues for our determination are as follows:

i. *Was the purported Constitutional petition incompetent?*
ii. *Were the court orders unenforceable following the enactment of the new land provisions?*
iii. *Did the petition raise any constitutional issues for determination?*
iv. *Was there any violation of the respondent's constitutional rights?*
v. *Was the dispute contractual in nature?*
vi. *Was the suit land lawfully gazetted as forest land?*

Before addressing the issue of whether the suit was properly brought as a constitutional petition, we consider it necessary to set out the basic tenets of a constitutional petition.

Article 22 (1) of the ***Constitution*** provides:-

> ***"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."***

There is also the proposition under the retired constitution as set out in ***Anarita Karimi Njeru (supra)***, which remains a necessary requirement, that where a person is alleging a contravention or a threat of a contravention of a constitutional right, he or she must set out the specific right infringed and the particulars of such infringement or threat.

In ***Trusted Society of Human Rights Alliance vs Attorney General & 2 Others*** ***[2012] eKLR***, the court stated;

> ***"… the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged."***

The court went on to state that,

> ***"The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."***

In Mumo Matemu vs Trusted Society of Human Right Alliance and 5 Others [2013] eKLR this Court emphasized the importance of precise claims in due process and underscored the importance of defining the dispute.

Bearing these guidelines in mind, since the issue of the locus standi or competence of the respondent to bring this petition was conceded, we will begin by addressing the issue of whether the failure to include the annextures to the supporting affidavit of Michael Francis Chemonges Kitiyo when the amended petition was filed rendered the petition incompetent. In this regard, we agree with counsel for the respondent that by the time the petition was filed the Mutunga Rules were yet to be enacted, and as such are not applicable. But this notwithstanding, it is clear from the guidelines stipulated in the case law cited above that, provided the petition sets out the provisions of the Constitution that are alleged to have been violated, and the manner in which they are alleged to have been violated, the particulars of the rights infringed, and the remedy sought, the petition will be considered competent.

In this case, the constitutional petition together with the supporting affidavit and annextures was filed on 12th January 2011. It was subsequently amended on 20th March 2013, but this time the affidavit in support of the amended petition did not include any annextures. Despite the omission, we do not consider that the amended petition was incompetent, as it set out the alleged violations, particulars of the violations and the remedies sought. Consequently, we find that the petition was competent.

Turning to whether the orders against the Commissioner of Lands were enforceable, it is apparent that ***section 12*** of the ***Land Registration Act, 2012*** establishes the office of Chief Land Registrar to discharge the powers conferred on the office by the Act, while ***section 106*** of the same Act provides that the rights, liabilities and remedies of parties over land under the repealed Acts, including the Registration of Titles Act, will not be affected by the provisions of the current Act. We therefore find and hold that the orders that were sought against the Commissioner of Lands, if granted, may be enforced against the Chief Land Registrar.

The next issue was whether the petition raised any constitutional issues.

The respondent's claim was that its rights under ***Articles 21, 22, 23, 40, 41 and 46*** of the Constitution were violated by the appellant after it was deprived of the suit land by the appellant, and its members subsequently evicted.

In this regard, the learned judge found that the respondent's claims to the suit land were constitutional in nature and that the appellant's actions had violated the respondent's rights to acquire and own property under ***Article 40 (1)*** of the ***Constitution***; that the appellant had deliberately contrived a scheme to deprive the respondent of its rights to acquire property. The learned judge stated thus:

> ***"It is clear that the respondents violated the petitioner's constitutional right to acquire property. The acquisition of the property by the Government deprived the petitioner of its right to acquire the property. Even section 75 of the old constitution provided for the protection of right to property. Property of an individual could not be taken unless by the constitutionally provided means."***

The learned judge also found as a fact that the respondent and its members had been evicted from the suit land and their structures destroyed.

Article 40 *of the* ***Constitution*** *states as follows;*

> ***"40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—***
>
> ***(a) of any description; and***
>
> ***(b) in any part of Kenya.***
>
> ***(2) Parliament shall not enact a law that permits the State or any person—***
>
> ***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***
>
> ***(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).***
>
> ***(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—***
>
> ***(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***
>
> ***(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—***
>
> ***(i) requires prompt payment in full, of just compensation to the person; and***
>
> ***(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.***
>
> ***4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.***
>
> ***(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.***

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. "

In answer to whether the petition raised any constitutional issues, we find it necessary to restate the factual background.

The respondent's claim is that by virtue of an agreement dated 28th August 1973, it purchased the suit land, from Olsen, and that it paid a deposit of Kshs. 400,000/- leaving a balance of Kshs. 720,000/-. It obtained Land Control Board consent to purchase the suit property, and was yet to pay the balance of the purchase price, when it would appear Olsen reneged on his agreement with the respondent, and entered into another arrangement with the appellant. Olsen subsequently transferred the suit land to the appellant.

The appellant's case is that it purchased the suit land from Olsen for a sum of Kshs. 729,200/-, and that the suit land was duly transferred to it on 3rd February 1975. The suit land was subsequently gazetted as Sikhendu Forest by way of Gazette Notice No. 152 of 17th June 1977. It averred that as a result, it was the bona fide owner of the suit land, which it has managed as a forest ever since.

It is evident that following the registration of the suit land in the appellant's name, bar any allegations that it was acquired by illegal means which is not evident from the petition, this Court is enjoined to recognize the appellant's proprietary interest in the suit land as provided by section 75 of the retired constitution.

We take the view that, from the documents that were placed before the court below, this was a case of willing buyer/willing seller. Since Olsen opted to dispose of the suit land to the appellant, the question of deprivation of the suit land from the respondent cannot be said to arise. The respondent did not acquire any proprietary interest in the suit land which the Government either compulsorily acquired or confiscated or expropriated. As such, the application of ***Article 40*** of the ***Constitution*** or even section 75 of the retired Constitution was inapplicable to the circumstances of this case.

With regard to the contention that the appellant evicted the respondent from the suit land, and destroyed its members' houses, from the respondent's petition, and the supporting affidavit, we can find no evidence to support the averments that the respondent's members took possession of the suit land or that any evictions took place at the time the contract was entered into with Olsen. There are no facts or particulars identifying the members who took possession of the suit land, or evidencing the destruction of their property, when and how the destruction occurred, or even the extent and value of the destruction. Without specification of such factual particulars, we are not satisfied that the evidential threshold to support the rights violations alleged was met.

Accordingly, we find that the learned judge misconstrued the law and misdirected himself when he arrived at the conclusion that the respondent's right to own property had been violated, and that the respondent's members' rights had been violated.

Having established that the constitutional violations alleged were unfounded, it is evident that the issue reverts back to the genesis of the dispute based on the agreement for sale of the suit land between the Olsen and the respondent.

From the facts, it is undisputed that, the suit land was private land that belonged to Olsen. Once the agreement was executed with Olsen, a contract to purchase the suit land came into existence. It is this contract that became the basis of the respondent's contractual relationship with Olsen. When Olsen subsequently transferred the suit land to the appellant, and not to the respondent, a claim for breach of the respondent's contact with Olsen arose. Such a claim would be contractual in nature, and not constitutional. As such, ought to have been pursued as an ordinary contract claim by way of a plaint under the Civil Procedure Act and Rules that are specifically enacted to address contractual or civil disputes and to provide the appropriate remedies.

In ***Johnson vs Agnew [1979] 1 All ER 833***, Lord Wilberforce set out the propositions of the law of contract, particularly as they relate to the remedies.

> ***"In this situation it is possible to state at least some uncontroversial propositions of law. First a contract for the sale of land, after time has been made, or has become of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of contract, both parties being discharged form performance from further performance of the contract; or he may seek from the Court an order for specific performance with damages for any delay in loss arising from delay in performance. (Similar remedies are of course available to the purchaser against vendors). This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly, the vendor may proceed by action for remedies (viz specific performance or damages) in the alternative. At the trial he will have to elect which remedy to pursue. Thirdly, if the vendor as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance."***

In these circumstances, the respondent would have pursued the relevant remedies against Olsen with whom it had a contract. It failed to do so, and as a result, we find that the claim against the appellant for specific performance was misplaced, and of no consequence, as no contract existed between the respondent and the appellant in respect of the suit land.

It also follows that, since, this was a private contractual arrangement between the respondent and Olsen, any claims the respondent may have had should have been directed at Olsen, and not against the appellant.

Related to the previous issue is whether the respondent was time barred in bringing an action to claim the suit land from Olsen.

Section 7 of the ***Limitations of Actions Act*** provides that a suit may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him. The respondent's contract was entered into on 28th August 1973. The respondent filed their petition on 12th January 2011, 35 years after the cause of action arose. Assuming that we were to consider this in the context of a land matter as opposed strictly considering it to be a contractual dispute where the period of limitation is 6 years, the suit ought to have been filed within 12 years from the date of the agreement, that is by 27th August 1985.

In the circumstances, we are satisfied that this was a straight forward commercial matter concerning a dispute over land, and in our view, it ought to have be canvassed as such. It is evident to us that, having been time barred in bringing a claim for breach of contract against Olsen, the respondent instead chose bring this constitutional claim, and to plead that the appellant violated its constitutional rights to the suit land so as to defeat the provisions of the Limitations of Actions Act.

We consider that this was a flagrant attempt at clothing a contractual claim in a constitutional garment, so as to shroud the issues in contention with a view to securing ownership of the suit land by veiled means. This was an abuse of the court process. Of course, the respondent was entitled to approach the seat of justice to seek a settlement of it's dispute, but this required to be done in accordance with the legal procedures that have been enacted for the defined purpose.

Finally, on the question of the legality of the Gazette Notice No. 152 of 17th June 1977, it was contended that the gazetting of the suit land as forest land was unlawful, for reasons that the publication was in respect of property that belonged to the respondent, and not to the appellant. The respondent therefore sought to have the suit land degazetted as a forest.

On its part, the court below stated thus;

> ***The Gazettement of the land as forest land followed acquisition of the same by the***

Government which denied the petitioner its right to have the land. In the circumstances the Gazettement should not stand. The argument by the respondents that the degazetment of the forest can only be done as provided under the relevant Act has no basis. The constitution is Supreme to an Act of Parliament.

The repealed retired Forest Act provides at ***section 4*** as follows;

> ***"4. (1) The minister may, from time to time, by notice in the Gazzete-***
>
> ***(a) declare any unalienated Government land to be a forest area;***
>
> ***(b) declare the boundaries of a forest and from time to time alter those boundaries;***
>
> ***(c) declare that a forest area shall cease to be a forest area.***
>
> ***(2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty -eight days notice of the intention to make the declaration shall be published by the minister."***

Section 2 of the ***Government Land Act (now repealed)*** defines Government land as follows;

> ***"Government land" means land for the time being vested in the Government by virtue of sections 204 and 205 of the Constitution (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act, 1964;"***

It is apparent from the record that, by way of Gazette Notice No. 152 of 17th June 1977, the suit land was gazetted as a forest, Sikhendu Central Forest. According to the appellant, the respondent did not raise any objection following publication of the notice. There is nothing to show that the appellant acted illegally or wrongfully in gazetting the suit land as a public forest. Accordingly we find that the learned judge wrongly ordered that the gazette notice be quashed.

For the aforestated reasons, we find that we must interfere with the decision of the High Court, allow the appeal, and set aside the judgment of 3rd July, 2014 with costs to the appellant. The appellant shall also have the cost of the suit in the High Court.

It is so ordered.

Dated and delivered at Eldoret this 10th day of December, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……..……..

JUDGE OF APPEAL

A. K. MURGOR

……..

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR