



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

PETITION No. 1 OF 2018

KAGIA OLE KAMOIRO.....1ST PETITIONER
LEYUYA OLE MAATANY.....2ND PETITIONER
MUSANKA OLE ESHO.....3RD PETITIONER
JOHN KERENKE OLOLDOTO.....4TH PETITIONER
JOSEPH TEEYIA MAATANY..... 5TH PETITIONER
JULIUS KILUSU SERPEPI.....6TH PETITIONER
SANKALE OLE NKOTI.....7TH PETITIONER
SAIGILU OLE KARIA8TH PETITIONER
METEKAI OLE KAMAAMIA 9TH PETITIONER

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION.....1ST RESPONDENT
MINISTRY OF LAND, HOUSING AND
URBAN DEVELOPMENT2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT
NATIONAL LAND COMMISSION.....4TH RESPONDENT

JUDGMENT

1. Proceedings herein were commenced by way of petition filed on 22nd November 2016 as Petition No. 15 of 2016 at the High Court in Naivasha. The matter was later in November 2017 transferred to Narok ELC and became Narok ELC Petition No. 25 of

2017. Yet again, the matter was transferred from Narok ELC to this court on 26th January 2018 and thus became Nakuru ELC Petition No. 1 of 2018. The Petitioners aver that they bring this case on their own behalf and on behalf of the Maasai community residing in Oloomunyi, Olesunte, Oloorbenia, Olmusaakua and Elwaai sections of the larger Natooli region within Naivasha Sub-County. They have brought the petition against the 1st respondent which is a state corporation duly established under the Agricultural Development Corporation Act, Cap 444 Laws of Kenya, the 2nd respondent which is a ministry established by the President of the Republic of Kenya as part of the structure of the national government, the 3rd respondent who is the Attorney General of the Republic of Kenya and the 4th respondent which is a constitutional commission established under Article 67 of the Constitution.

2. The petitioners aver that they and the Maasai community residing in Oloomunyi, Olesunte, Oloorbenia, Olmusaakua and Elwaai sections of the larger Natooli region within Naivasha Sub-County have lived on, grazed, cultivated and raise families on land parcel number LR No. 20591 part of which was formerly LR No. 6233 (which they state is currently subdivided as per a schedule which they have marked 'B' and annexed to the petition), LR No. 410/1, LR No. 410/2, LR No. 7265 and LR No. 7281 (which they state is currently subdivided as per a schedule which they have marked 'A' and annexed to the petition) located in Naivasha within Nakuru County since time immemorial. All these parcels are hereinafter collectively described as the "suit properties". They further aver that although the current registered proprietor of the suit properties is the 1st respondent, they deem the suit properties as part of their cultural heritage and as their ancestral land and that some of their ancestors are buried within the area.

3. They further aver that after the First World War, the colonial allocated parcel No. 413 Naivasha which was a portion of the petitioner's land to a British citizen by the name of Gilbert Colville as a token of appreciation for his First World War exploits. That Mr Gilbert Colville hived off the suit properties and registered it in his name in addition LR No. 413. That after independence Mr Gilbert Colville vacated the suit properties and the 1st respondent took possession without disrupting the petitioners' occupation. That the 4th respondent has a mandate under Article 67 of the Constitution to initiate investigations into present or historical land injustices and recommend appropriate action and that it ought to investigate the manner in which the 1st respondent dealt with the suit properties. They further state that the 1st respondent abandoned the purpose for which it had been entrusted control of the suit land which was to enhance and promote national food production and livestock rearing and instead commenced wanton and selective allocation of the suit properties to politically correct individuals and communities in blatant ignorance of the law. That the petitioners have been threatened with forceful eviction from the suit properties notwithstanding their historical claim thereto.

4. The petitioners claim that the respondents have violated Articles 27, 28, 29, 40, 47 and 63 of the Constitution among others as far as they and the suit properties are concerned. They therefore prayer for judgment against the respondents for:

1. Declaration that the petitioners are the absolute owners of LR No. 6233 LR No. 20591 part of which was formerly LR 6233 (which is currently subdivided as per schedule B attached herein), LR No. 410/1 and LR No. 410/2 LR No. 7265, and LR No. 7281, (which is currently subdivided as per schedule A attached herein) Naivasha within the Nakuru County by virtue of the land being community land.

2. A declaration that LR No. 6233 LR No. 20591 part of which was formerly LR 6233 (which is currently subdivided as per schedule B attached herein), LR No. 410/1 and LR No. 410/2 LR No. 7265, and LR No. 7281 (which is currently subdivided as per schedule A attached herein) be vested and registered in the names of the petitioners as the owners.

3. A declaration that the actions of the 1st & 2nd respondents to purport to subdivide and allocate L.R No. 6233 LR No. 20591 to the other (sic) persons was unlawful, illegal and null and void.

4. A declaration that the petitioners' rights to fair administrative action, equality and equal protection of the law were infringed.

5. A declaration that the petitioners' right to property and/or ownership over that LR No. 6233 LR No. 20591 part of which was formerly LR 6233 (which is currently subdivided as per schedule B attached herein), LR No. 410/1 and LR No. 410/2 LR No.7265, and LR No. 7281, (which is currently subdivided as per schedule A attached herein) was infringed and deserves protection of the court.

6. Nullification of the purported subdivision and allocation of LR No. 6233 LR No. 20591 part of which was formerly LR 6233 (which is currently subdivided as per schedule B attached herein), LR No. 410/1 and, LR No. 410/2 LR No. 7265, and LR No.7281,

(which is currently subdivided as per schedule A attached herein) and subsequent surveying and issuance of title.

7. An order directing the 4th respondent to investigate the circumstances under which the 2nd respondent, as trustee of public land, had the title to the suit lands issued to Gilbert Colville.

8. A permanent order of injunction restraining the 1st respondent, their agents, servants or any person acting under their direction from interfering with the petitioners' possession, occupation and use of all that land comprised in LR. No. 20591 part of which was formerly LR. No. 6233 (currently subdivided as per schedule B), LR No. 728 (currently subdivided as per schedule A), LR 7265, LR No. 410/1, LR No. 410/2.

9. A declaration that the 1st respondent's acts of forcefully evicting the petitioners from their land rendering them destitute and squatters in their own native soil infringes on the petitioners' inherent dignity contrary to Article 28 of the constitution.

10. A declaration that the 1st and 2nd respondents have unconstitutionally and compulsory (sic) acquired the petitioner's ancestral land contrary to Article 40 (3) of the Constitution.

11. Pending the hearing and determination of this petition, the 1st respondent herein, its agents, servants or any person acting under their directions be restrained from disposing, selling, allocating, transferring or doing anything that in any way may encumber the title LR. No. 20591 part of which was formerly LR. No. 6233 and which is currently subdivided as per schedule B attached and LR 7281 (currently subdivided as per schedule A attached and LR 410/1 and LR No. 410/2, LR No. 7265.

12. That this court do issue judicial review order cancelling the 1st and 2nd respondents' decisions and or actions.

13. Damages against the 1st, 2nd and 3rd respondents for breaching and/or violating of the petitioners' constitutional rights.

14. Any other further order that the Honourable Court may deem it fit and just to grant.

15. An order for payment of costs of this Petition by the Respondents.

5. The petition is supported by an affidavit sworn by Kagia Ole Kamoiro, the 1st petitioner. He deposed that the petitioners and their forefathers have historically been in occupation of the suit properties, that they deem it as part of their cultural heritage, their ancestral land and that they do not know of any other home except the suit properties. That their forefathers were forcefully evicted by the colonial government from the early 1920s to about mid 1950s to make way for the white settler community and that some of their ancestors are buried within the suit property and they risk being haunted by their spirits if they were to be displaced and desert their graves. He added that the process leading to the title to the suit property dates back to pre-colonial era. That by the year 1902 the whole of Naivasha area was occupied by the Maasai community and that the colonial administration then started the process of displacing and dislodging the Maasai community from the said ancestral land through Maasai Anglo Agreements which he termed fraudulent, invalid treaties and a legal fiction. That over the last few weeks security agencies have been invading and terrorizing the petitioners' families residing on the suit properties in a continuation of the old historical injustices.

6. The 1st respondent opposed the petition through a replying affidavit sworn by Anthony Ademba, its company secretary. He deposed that the petitioners are members of an organization known as Naibor-Ajjik Group Ranch which had at some point been engaged in negotiations to purchase part of the 1st respondent's property but upon their failure to take up an offer which was made to them by the 1st respondent, the property was sold to other parties. He added that there is no title deed showing LR No. 6233, LR No. 410/1 and LR No. 410/2. Instead, the 1st respondent is the registered proprietor of parcels of land known as LR No. 20591/86 and LR No. 7281/3 only. He denied that the petitioners have been in occupation of the suit properties since they were privately owned. He further stated that the suit properties have never been community land but instead private land as defined in the constitution.

7. On their part, the 2nd to 4th respondents' counsel on record indicated that they oppose the petition through a replying affidavit sworn by Hassan R. Barua, the County Police Commander, Nakuru County. A reading of the affidavit however shows that it was filed in response to petitioners' Notice of Motion dated 25th May 2018.

8. The petition was canvassed through written submissions. The petitioners argue that they have been discriminated against on account of their ethnic and social origin contrary to Article 27 and that their constitutional right to property has been infringed contrary to Article 40. They acknowledge that protection of the right to property does not obtain until it is possible to lay claim to the subject property and add that their claim to the suit properties is based on their occupation and use of it. They therefore maintain that the suit properties are community land by virtue of having been occupied by their ancestors and managed and used as a grazing area by the petitioners.

9. The petitioners further acknowledge that the 4th respondent has the function and power to initiate investigations into present or historical land injustices and to recommend appropriate redress but they add that such powers do not oust the jurisdiction of this court. They cited the cases of **Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others** [2014] eKLR and **Kipsiwo Community Self Help Group v Attorney General and 6 Others** [2013] eKLR in support of that contention. The petitioners further argue that they have been discriminated against for being of a particular tribe. Citing the decision of the High Court of Australia in **Mabo v Queensland (No 2) ("Mabo case")** [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), the petitioners argue that they are entitled to the suit properties by virtue of their unique connection to it. They also argue that being forced to move out of the suit properties will amount to denial of their livelihood thereby being an infringement of Article 26 of the constitution. They therefore urged the court to grant the reliefs sought.

10. For the 1st respondent it is argued that to the extent that part of the suit properties being the parcels of land known as LR No. 20591/86 and LR No. 7281/3 are registered in its name, they cannot be community land but are instead public land since it is a state corporation. Regarding the rest of the suit properties, it is argued that they are privately owned and therefore not community land. Further that the petitioners should register their grievances with the 4th respondent which has the mandate under Article 67 to initiate investigations into present or historical land injustices and to recommend appropriate redress. It is also argued that the petition is full of generalities, does not set out with precision the nature of infringement and should therefore be dismissed with costs.

11. For the 2nd to 4th respondents, it is argued by the attorney general that the dispute herein is an ordinary civil dispute which has been dressed as a historical injustices claim and which is not hinged on any evidence but on tales and hearsay. That since the 1st respondent has a title to the suit properties, the court should decline to exercise jurisdiction until petitioners will have exhausted the avenues available to them under Section 5 of the National Land Commission Act, 2012. In support of that contention, the decision of the Constitutional Court of South Africa in **NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)** 200 (5) S.A 250 (CC) was cited among other cases. It is further argued on behalf of the 2nd to 4th respondents that since the suit properties are registered in the name of the 1st respondent, they are public land and not community land notwithstanding the petitioners' claim that they are ancestral land. In the circumstances, the 2nd to 4th respondents urge the court to dismiss the petition with costs.

12. I have carefully considered the petition, the affidavits and the submissions. Two issues arise for determination; firstly whether the constitutional jurisdiction of this court has been properly invoked and lastly, whether the reliefs sought should issue.

13. There is no doubt that the petitioners have a right under **Article 22** of the **Constitution** to institute proceedings in court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. There is also no doubt that they have a right to do so on behalf of other persons who cannot act in their own names or to do so in the interest of a group or class of persons or even in the public interest. Still, access to the court is just the beginning. Having walked through the hallowed portals of justice, a litigant's must then stand both the procedural and substantive tests. See **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** (supra). Regarding the constitutional jurisdiction of the court which the petitioners have invoked, procedural law is clear that where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain the dispute. Thus, when formulating his claim a party must take the statutory route where it is available as opposed to the constitutional one. There are many decisions to that effect. In **Sumayya Athmani Hassan v Paul Masinde Simidi & another** [2019] eKLR the Court of Appeal stated:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

[17] In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the

petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ...

14. In **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another** [2016] eKLR, the same court stated:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

...

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.

15. The petitioners' case is that the 1st respondent is the registered proprietor of the suit properties. The 1st respondent is a state corporation established under section 3 of the Agricultural Development Corporation Act which provides:

There is hereby established a Corporation, to be known as the Agricultural Development Corporation, which shall be a body corporate having perpetual succession and a common seal, with power to sue and be sued, purchase, hold, manage and dispose of land and any other property and to enter into such contracts as it may consider necessary or expedient for the purposes of performing its functions under this Act.

16. Its functions which are specified under section 12 (1) of the Act are:

(a) to promote the production of Kenya's essential agricultural inputs as the Corporation may decide from time to time, such as seeds and pedigree and high grade livestock including, hybrid seed maize, cereal seed, potato seed, pasture seed, vegetable seed, pedigree and high grade cattle, sheep, goats, pigs, poultry and bees;

(b) to undertake such activities as the Corporation may decide from time to time for the purpose of developing agricultural production in specific areas or specific fields of production; and

(c) to participate in activities in agricultural production which are related to the primary and secondary functions of the Corporation and which in the view of the Corporation are commercially viable.

17. To the extent that the petitioners themselves acknowledge that the 1st respondent is the registered proprietor of the suit properties, it follows that the suit properties are currently public land which is defined by article 62 of the constitution as follows:

(1) Public land is—

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) land transferred to the State by way of sale, reversion or surrender;

(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any legal process;

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

(l) all land between the high and low water marks;

(m) any land not classified as private or community land under this Constitution; and

(n) any other land declared to be public land by an Act of Parliament—

(i) in force at the effective date; or

(ii) enacted after the effective date.

18. As a state corporation, the 1st respondent's holding of the suit properties would be under article 62 (1) (b) of the constitution. The petitioners have however not exhibited any certificate of title. Nevertheless, the 1st respondent's version is that it is the registered proprietor of the parcels of land known as LR No. 20591/86 and LR No. 7281/3 while the rest of the suit properties are privately owned. Either way, the suit properties have a registered proprietor. Among the reliefs sought by the petitioners is a declaration that they are the absolute owners of the suit properties and an order that the suit properties be vested and registered in their names. In essence, the petitioners wish to have registered proprietorship of the suit properties changed to themselves.

19. So long as the current registered proprietors of the suit properties remain proprietors, Article 40 of the constitution protects their right to property. That does not mean that their proprietorship cannot be challenged. All it means is that any effort to change proprietorship must be lawful. In that regard, Section 24 of the Land Registration Act makes provision on interest conferred by registration of a proprietor of land as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. [Emphasis supplied]

20. Under section 26 of the Act, there are ample provisions on the circumstances and requirements for nullification of registered proprietorship. It provides:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the

certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

21. Thus, to nullify a title it must be shown that registration was procured through fraud or misrepresentation to which the registered proprietor is proved to have been a party. Alternatively, it has to be shown that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. Procedural law is clear that fraud, illegality and misrepresentation must be pleaded, particularised and strictly proven. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**. There are ample provisions regarding the manner of pleading such a case within the **Civil Procedure Act** and rules made thereunder. In short, there are adequate statutory provisions for the petitioners to bring an ordinary claim for nullification of the titles in respect of the suit properties.

22. The petitioners also seek a declaration that their right to property in respect of the suit properties has been infringed on grounds of what they term “historical injustices”. They also seek an order directing the 4th respondent to investigate the circumstances under which title to the suit properties was issued to Gilbert Colville and ultimately to the 1st respondent.

23. The 4th respondent is a constitutional commission established under Article 67 of the constitution. Its functions are specified under section 5 (1) of the National Land Commission Act, 2012 which provides:

(1) Pursuant to Article 67(2) of the Constitution, the functions of the Commission shall be—

(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country. [Emphasis supplied]

24. So as to execute its mandate, section 6 (2) and (3) of the Act give the 4th respondent powers to:

(a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;

(b) hold inquiries for the purposes of performing its functions under this Act;

(c) take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60(1) of the Constitution.

(3) In the exercise of its powers and the discharge of its functions, the Commission—

(a) may inform itself in such manner as it may consider necessary;

(b) may receive written or oral statements; and

(c) is not bound by the strict rules of evidence.

25. While it is true as argued by the petitioners that the foregoing provisions do not oust the jurisdiction of this court, they provide ample statutory avenues for addressing the petitioners' complaints of historical injustices without having to invoke the constitutional jurisdiction of the court. In a sense, those avenues may afford a better opportunity to receive and interrogate evidence as opposed to this petition which has been prosecuted entirely on the basis of affidavit evidence and written submissions.

26. In view of the foregoing discourse, it is manifest that there are adequate statutory options for addressing the petitioners' complaints. In such circumstances the principle of constitutional avoidance requires that this court declines to exercise constitutional jurisdiction. Thus, the first issue as to whether the constitutional jurisdiction of this court has been properly invoked is answered in the negative. It therefore follows that the second issue as to whether the reliefs sought should issue is also answered in the negative.

27. In the result, this petition is dismissed. Each party shall bear own costs.

28. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 14th day of May 2020.

D. O. OHUNGO

JUDGE



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