



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 5 OF 2020

DENNIS WANYONYI SIMIYU.....1ST PETITIONER

ZADOCK MAKHANU KHAEMBA.....2ND PETITIONER

T/A KHAEMBA CONTRACTORS.....3RD PETITIONER

VERSUS

CAROLINE NAFULA OMONDI.....1ST RESPONDENT

FELIX SHIKOLI AGUT.....2ND RESPONDENT

JUDGMENT

THE PETITION

1. The following words of lamentation of *Medea* the main protagonist in Euripides' ancient Greek tragedy bearing the same title, while crying out to a Greek deity, come to mind after perusing the petitioner's narrative of the events that led to this petition:

"O Zeus! why has thou granted unto man clear signs to know the sham in gold whilst on man's brow no brand is stamped by which to gauge the villain's heart!"

2. One will perceive the 1st petitioner's cry of agony represented by the petition herein over a double betrayal by a trusted friend, perchance the facts he narrates are eventually verified at the end of all litigation over the suit land, but for now it remains a mere cry for help.

3. The background to this petition, as far as the petitioners are concerned, is that the 1st petitioner purchased **Title No. KAPKOI/MABONDE BLOCK 1/EX-PRISON/554** (hereinafter "the suit land") from the 2nd respondent and developed it extensively, but when he conducted an official search in respect of the title it reflected the 1st respondent as the registered owner. At that juncture the 1st respondent states. He appointed the 1st respondent as his attorney and this petition was filed, which he states is for the recovery of the suit land.

4. In a remarkable act of candour the petitioners disclosed in their petition the existence of another case - **Kitale CMC Land case No. 53 of 2020 Dennis Wanyonyi Simiyu vs Caroline Nafula Omondi** - whose record I sought and perused. The claim in subordinate court litigation is that the 1st petitioner paid the consideration for the suit land in instalments and sent the 1st respondent, his erstwhile girlfriend, to the 2nd respondent (vendor) with the last instalment whereupon the 1st respondent caused the sale agreement with the 2nd respondent to be written in her own name and the suit land was therefore transferred to her name. Thereafter, forgetting the affections of the 1st petitioner just like *Jason* in "*Medea*" forgot the text's heroine's assistance and daring of extreme

perils on his behalf in Colchis while securing the golden fleece, she then prepared to marry, and in this case, married another person.

5. For the purposes of this petition it is sufficient to state that according to the proceedings of **5/10/2020** before the presiding magistrate, the subordinate court case was set down for hearing on its merits on **15/2/2021**, or date not so far off.

6. The Petitioners filed the Petition dated **11th September, 2020** seeking among other orders that:

(a) That the transfer of title deed of the dispute land was irregular, unconstitutional and illegal hence invalid, null and void.

(b) That a permanent injunction be issued restraining the respondents, themselves or their agents from encroaching, trespassing or any other interference of the dispute land till after the determination and court verdict.

(c) That the dispute plot Title Deed No. KAPKOI/MABONDE BLOCK 1/EX-PRISON/554 be in court custody till determination and verdict is given.

(d) That the application made to Trans-Nzoia County Land Registrar for powers of attorney to ZADOCK MAKHANU KHAEMBA as the 1st plaintiff's attorney by consent be issued in the first instance.

(e) That costs at court rates be provided.

(f) That any other relief that court deems fit, just and expedient be provided.

7. The Notice of Motion filed alongside the petition sought the following orders:

(1) That the CMELC Case No. 53/2020 be transferred to this court for interpretation of the constitution and determination altogether of this suit.

(2) That service of this suit be in the first instance.

(3) That the transfer of title deed of the dispute land was irregular, unconstitutional and illegal.

(4) That a permanent injunction be issued, restraining the respondents themselves or their agents from encroaching, trespassing or any other interference of the disputed land.

(5) That the disputed plot Title Deed No. KAPKOI/MABONDE BLOCK 1/EX-PRISON/554 be in court custody 'KEY and LOCK' till determination and verdict is given.

(6) That the application made to the Trans-Nzoia Land Registrar for the powers of attorney to ZADOCK MAKHANU KHAEMBA as the 1st plaintiff's attorney by consent be issued in the first instance.

(7) That costs be at court rates be provided.

(8) That any other relief court deems fit, just and expedient be provided.

THE RESPONSE TO PETITION

The 2nd respondent's response.

8. In response, the 1st respondent filed a replying affidavit sworn on **28th September, 2020** and filed on **30th September 2020**. The

gist of the affidavit is that: the petition is incompetent and bad in law as the petitioners have not set out their or any other person's right that has been denied, violated, infringed or threatened and the particulars of such denial, violation, infringement or threat; that petition is fatally defective, incompetent and bad in law as it has been instituted by a person who has no legal capacity; that the 1st respondent legally acquired the suit land by way of purchase for a valuable consideration from the 2nd respondent; that after the purchase of the suit land, all due processes were undertaken without any fraud, corrupt act or concealment of any material fact; that the petition herein is premature as is based on sale agreement between the 1st and the 2nd respondent whereas the validity of the agreement is subject to litigation in **Kitale CMCC Land case No. 53 of 2020**.

The 2nd respondent's response.

9. There is no response filed by the 2nd respondent.

SUBMISSIONS

10. The petitioners and the 1st respondent filed written submissions which I have considered but the 2nd respondent filed none. I will now briefly summarize the positions taken by the parties in their respective submissions.

The Petitioners' Submissions

11. It would appear that the petition is premised on **Article 2(4) of the Constitution of Kenya**. *The petitioner has submitted that the 1st respondent acquired the suit land through fraud and that the 2nd registration in her name was inconsistent with Article 40(6) of the Constitution.*

1st Respondent's Submissions

12. The 1st respondent averred in her submissions that the petition can only be instituted and signed by persons set out under **Article 22(2) of the Constitution of Kenya, 2010** and **Rule 4(2) of the Constitution of Kenya Practice and Procedure Rules, 2013**.

13. The 1st respondent further submitted that she has furnished the court with evidence of her acquisition of the land by way of sale agreements, to which the 1st petitioner was a witness. It is argued that there is no contract in writing and signed by the 1st petitioner and the 2nd respondent and that therefore the 1st petitioner cannot be said to have acquired any interest or title in the suit capable of protection under **Article 40 of the Constitution of Kenya**. For this proposition, the 1st respondent relied on the authority of ***Vekariya Investments Limited V Kenya Airports Authority & 2 others (2014) eKLR*** where the court stated that:

"... at the heart of the petitioner's claim is the right to the protection of property afforded by Article 40 of the Constitution. In order to succeed in a petition, the petitioner must demonstrate that it holds property which is recognized in law as capable of being protected".

14. Further, the 1st respondent contended that the petitioners have not specifically set out the right(s) that have been breached and how they have been violated in order to meet the requisite constitutional petition threshold. It was averred that what the petitioners have presented amounts to nothing but private interest litigation. The 1st respondent placed reliance on *the case of Michael Otieno Nyaguti V County Government of Kisumu & Another (2019) eKLR* in support of the above position.

15. With regard to the claim that the petition did not disclose any denial, violation, infringement or threat to the 1st petitioner's acquisition and ownership of the property, the 1st respondent quoted the case of ***Sophia Nyakerario Maina And Sebastian Adala (Suing on their own behalf and in the interest of 440 other Applicants being inhabitants of Properties known as Land Reference Number 209/12016) v Kenya Airports Authority & 3 others [2020] eKLR*** where the court stated:

"...The last issue is whether the petitioners are entitled to any of the relief set out in the petition against any of the respondents. Having found that the petitioners have not proved lawful ownership and occupation of the suit property and have similarly failed to establish violation(s) of their constitutional right(s) by any of the respondents, it follows that they

have failed to prove their petition on a balance of probabilities. The net result is that they are not entitled to any of the reliefs sought in the petition.”

16. Lastly, the 1st respondent submitted that she is the registered owner of the suit land and as such all the rights to its possession, occupation, use, development and disposal solely vests on her. The 1st respondent quoted **Section 24(a)** and **Section 25(1)** and **Section 26(1)** of the **Land Registration Act, 2012** to buttress the position that she is *prima facie* the absolute and indefeasible owner of all that parcel of land known as **Kapko/Mabonde Block 1/ Ex-Prison/554**.

17. The 1st respondent concluded by stating that the instant petition is an abuse of the due process of the court as there was a sale agreement between her and the 2nd respondent which is subject cause of litigation in **Kitale CMCC Land Case No. 53 of 2020** between the 1st petitioner and the 1st respondent and that the parties had a private commercial contract and if any of the parties breached the same, the Magistrate’s court is seized of jurisdiction to hear and determine it. The 1st respondent urged the court to dismiss the petition with costs.

DETERMINATION

18. After considering the pleadings, the rival submissions by the parties and all the authorities cited, I find that the main issue that arises for determination is whether the petition raises any constitutional issue or whether it is an abuse of the process of the court.

19. It is noteworthy that the petitioners express the wish that the lower court case no **CMCC Land Case No. 53 of 2020** be transferred to this court and be consolidated with this petition for determination by this court. However having called for and perused the court record in the lower court case, this court is inclined to consider that a Constitutional Petition ought to be reserved for matters weightier than those in private litigation, and to treat the two cases separately unless and until a substantive application has been filed in the proper manner seeking such transfer whereupon the court will issue its considered opinion on the matter.

20. The 1st petitioner in the petition quoted **Articles 2(4), 40(1) - (6)** of the **Constitution** explaining how his rights were infringed as a result of the registration of land plot **No. Kapko/Mabonde Block 1/Ex Prison/554** in favour of the 1st respondent. From the pleadings on record, most of the factual matters raised by the Petitioners were vehemently denied by the Respondents.

21. The petitioners in prosecuting their petition filed a list of documents in a bid to prove the alleged “relationship” between the main contesting parties leading to the subsequent acquisition and transfer of the suit land into the 2nd respondent’s name.

22. In order for a petitioner to succeed in any constitutional petition, the law requires that the petitioner must demonstrate that the constitutional rights subject matter of the petition have actually been denied or violated or are threatened with denial or violation.

23. Courts have held that private law claims should not form the basis of constitutional petitions and should be resolved by using the usual process of civil litigation. See ***Benjoh Amalgamated Limited & Another V Kenya Commercial Bank Limited (2007) eKLR***. In ***Uhuru Muigai Kenyatta V Nairobi Star Publications Limited (2013) eKLR*** Lenaola J applied the holding in the ***Re application by Bahadur (1968) LR C (cost) 297*** and held that:-

“Where there is remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (Supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction”

24. In the **Re-application by Bahadur Case (Supra)**, the court held as follows:-

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the constitution”.

25. I have analysed the petition before me and I do not find it to raise any constitutional issues for due consideration by this court. It is my considered view that the Petitioner’s claim is a civil claim which will be best determined as prescribed by the Civil Procedure

Act and the Rules made thereunder.

26. The upshot of the foregoing is that much as this court sympathizes with the 1st petitioner's plight, the instant petition cannot stand and the same is hereby struck out. However each party shall bear their own costs of the petition.

Dated, signed and delivered at Kitale via electronic mail on this 17th day of December, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.



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