



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. PETITION NO. 2 OF 2018

FRANCIS KIMOLO KIMATU & 58 OTHERS.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE MBEERE DISTRICT LAND ADJUDICATION

OFFICER.....2ND RESPONDENT

THE EMBU DISTRICT LAND REGISTRAR.....3RD RESPONDENT

MWANIKI MUNYI

(As Trustee for the Mbandi Clan).....4TH RESPONDENT

AND

PURITY KANINI MUGO & 52 OTHERS.....INTERESTED PARTIES

JUDGMENT

A. INTRODUCTION

1. By a petition dated 22nd March, 2018, expressed to be based upon **Articles 19, 20, 22, 23, 27, 40, 50, 63 and 64 of the Constitution of Kenya, 2010, Sections 27, 28, 30 and 143 of the Registered Land Act (repealed) and the Land Adjudication Act (Cap. 284)**, the Petitioners sought the following reliefs;

(a) A declaration that the failure to join the Petitioners as parties in the High Court Civil Case No. 97 of 2005 (Embu) Mutokaa Nthautho and 19 Others v The Attorney General was a violation of the Petitioners' rights to a fair trial as enshrined in Article 50 of the Constitution of Kenya, 2010 thereby rendering the entire proceedings unconstitutional, null and void.

(b) A declaration that the failure to join the Petitioners as parties in High Court Civil Case No. 97 of 2005 (Embu) Mutokaa Nthautho & 19 Others v The Attorney General was a violation of the Petitioners' rights to equal protection by the law as enshrined in Article 27 of the Constitution of Kenya, 2010 thereby rendering the entire proceedings unconstitutional, null and void.

(c) The Petitioners be awarded costs of the petition.

(d) Any other or further relief this Honorable Court deems fit and just to grant.

B. THE PETITIONERS' CASE

2. The petition was supported by an affidavit sworn by the 1st Petitioner, Francis Kimolo Kimatu, on 20th March, 2018 and the annexures thereto. The Petitioners contended that their forefathers purchased Title Nos. Mbeti/Gachuriri/249 and Mbeti/Gachuriri/250 (collectively the *suit properties*) from Muruga Clan and that they and their families had been in occupation since 1972 or thereabouts.

3. The Petitioners contended that they had openly and peaceably occupied the suit properties and developed them without any adverse claim thereto by third parties over the years. They also contended that several members of their families who had passed on over the years were buried on the suit properties.

4. The Petitioners pleaded that sometime in 2017 they were surprised to receive a notice from the firm of Victor Andande & Co. Advocates requiring them to vacate the suit properties on the ground that they belonged to Mbandi Clan on the basis of *Embu High Court Civil Case No. 97 of 2005 and Nyeri Civil Appeal No. 11 of 2014*.

5. The Petitioners further pleaded that at all material times they were not aware of the existence of the said suits since they were not made parties thereto. They contended that the parties to the said proceedings did not disclose to the High Court and the Court of Appeal that they were in possession and occupation of the suit properties hence they were not accorded an opportunity of being heard before orders affecting them were made.

6. As a result of the foregoing the Petitioners contended that there was a violation of various articles of the Constitution of Kenya including **Articles 27, 40 and 50 of the Constitution**. They Consequently filed the instant petition seeking, *inter alia*, a declaration that the High Court proceedings were unconstitutional, null and void.

C. THE ATTORNEY GENERAL'S RESPONSE

7. There is no indication on record of the 1st – 3rd Respondents having filed a replying affidavit in answer to the petition. However, the Attorney General filed a notice of preliminary objection dated 11th October, 2018 raising the following objections:

(a) That the Petitioners have not disclosed the violation attributed to the 1st, 2nd and 3rd Respondents.

(b) That the 1st, 2nd and 3rd Respondents are not and have never been agents of the Petitioners that would give them a duty to enjoin them to the suits referred to in the petition.

(c) That the Petitioners ought to have applied to be enjoined as parties to the said suits.

(d) That the Petitioners are indolent and are guilty of laches. At paragraph 15 of the affidavit in support of the petition, the Petitioners exhibit that they have extensive knowledge of the proceedings before the High Court in Embu and should have sought a review of the judgment.

(e) That it is evident from the judgment annexed to the affidavit in support and marked as FKK 9 that the 1st to 3rd Respondents did not participate in Embu High Court Civil Case 97 of 2005.

(f) That it is evident from the judgment annexed to the affidavit in support and marked as FKK 10 that the 1st to 3rd Respondents did not participate in the Nyeri Civil Appeal.

*(g) That the petition fails to disclose the manner in which the quoted sections of the **Land Adjudication Act** apply to the instant situation.*

(h) That the Petition fails to disclose the manner in which the quoted sections of **Registered Land Act (repealed)** apply to the instant situation.

(i) That the subject matter of this suit is thus *res judicata*.

(j) That this Honorable Court lacks the jurisdiction to sit in appeal of the decision of the Court of Appeal and the Petitioners ought to move to the Supreme Court.

D. THE 4TH RESPONDENT'S RESPONSE

8. The 4th Respondent filed a replying affidavit sworn on 6th February, 2020 in opposition to the petition. He stated that he was the chairman of Mbandi Clan and that the petition was devoid of merit since the Petitioners claimed to have bought the suit properties from Muruga Clan who lost their claim to the suit properties before the Court of Appeal at Nyeri.

9. The 4th Respondent stated that the Petitioners and their relatives were fully aware of the proceedings before the High Court and the Court of Appeal. In particular, it was contended that Kyai Munyasia and Muli Munyasia who were parents of some of the Petitioners herein were parties to the said proceedings in both courts.

10. The 4th Respondent listed 10 close relatives of Kyai Munyasia and 17 close relatives of Muli Munyasia who are said to have been involved in the earlier cases. He also listed 17 relatives of the 1st Petitioner, Francis Kimolo Kimatu, who allegedly participated in previous proceedings over the suit properties. It was contended that the instant Petition was an attempt to obtain relief through the back door after exhausting available appellate mechanisms.

11. The 4th Respondent disputed that the petition raised any *bona fide* constitutional issues for adjudication and that if the Petitioners had any genuine grievances they ought to have moved the previous courts for review or setting aside. It was contended that it was the Petitioners who were infringing on the constitutional rights of members of Mbandi Clan by unlawfully occupying the suit properties which were adjudged to belong to Mbandi Clan.

E. THE RESPONSE BY THE INTERESTED PARTIES

12. The Interested Parties filed a replying affidavit sworn by Mwaniki Munyi on 8th August, 2018. He swore the said affidavit on his own behalf and on behalf of the rest of the Interested Parties. They stated that whilst the matter was pending before the Court of Appeal, it was directed that all parties having an interest in the suit properties should be joined in the proceedings. They stated that it was pursuant to such directive that they applied to be joined as Interested Parties in the appeal but the Petitioners neglected to apply for joinder despite being aware of the appeal. It was further contended that some of the Petitioners' parents and relatives were parties in the previous cases and that the instant appeal was an attempt to obtain relief through the back door.

13. The Interested Parties were of the view that the dispute in the previous proceedings concerned ownership of the suit properties as between Mbandi and Muruga Clans and that Muruga Clan from whom the Petitioners' forefathers purported to buy the suit properties lost in the litigation. It was contended that the Petitioners had no genuine constitutional issues and that the instant petition was an abuse of the court process.

F. DIRECTIONS ON SUBMISSIONS

14. When the petition was last listed for directions on 29th September, 2020, it was directed that the Petition shall be canvassed through written submissions. The Petitioners were given 14 days to file and serve their written submissions whereas the Respondents and the Interested Parties were to file and serve theirs within 14 days upon the lapse of the Petitioners' period. The record shows that the Petitioners filed theirs on or about 28th October, 2020 whereas the 4th Respondent and Interested Parties filed theirs on or about 2nd November, 2020. However, the Attorney General's submissions were not on record by the time of preparation of the judgment.

G. THE ISSUES FOR DETERMINATION

15. The court has considered the petition together with the supporting affidavit and annexures thereto, the replying affidavits in opposition thereto, the notice of preliminary objection, and the material on record. The court is of the opinion that the following issues arise for determination in this petition:

- (a) *Whether the petition raises any bona fide constitutional issues.*
- (b) *Whether the Petitioners have demonstrated a violation of their Constitutional rights.*
- (c) *Whether the Petitioners are entitled to the reliefs sought in the petition.*
- (d) *Who shall bear costs of the petition.*

H. ANALYSIS AND DETERMINATIONS

a. Whether the petition raises any bona fide constitutional issues

16. The petitioners submitted that the failure of the litigants in Embu HCCC. No. 97 of 2005 to join them in the suit or to inform the court that they were in occupation of the suit properties was a violation of their right to a fair hearing under **Article 50 of the Constitution** which rendered the proceedings and resultant decree null and void. The Petitioners cited **Nakuru ELC Petition No. 35 of 2014 – Lekinyot Ole Lanke v Attorney General & 2 Others [2015] eKLR** and **Nairobi Civil Appeal No. 251 of 2014 Registrar of Trade Unions v Nicky Njuguna & 4 Others [2017] eKLR** in support of their submission.

17. The 4th Respondent and the Interested Parties, on the other hand, submitted that the petition did not raise any *bona fide* constitutional issues since the High Court proceedings and decree cannot be considered as unconstitutional. It was submitted that the High Court is a superior court of record and that its decisions cannot be declared unconstitutional by a Court of equal status such as the Environment and Land Court. They cited the case of **Papinder Kaur Atwal v Manjit Singh Amit Nairobi Petition No. 236 of 2011** and **Anne Wangui Ngugi & Others v Edward Odundo [2015] eKLR** in support of the submission that not every grievance or violation of the law should be addressed through the Bill of Rights.

18. The court has considered the rival submissions of the parties. The court is aware that not every violation of the rules of natural justice or the right to be heard necessarily gives right to constitutional issues which can only be resolved through a constitutional petition. In the case of **Kenya Bus Service Ltd & 2 Others v Attorney General [2005] 1KLR 787** Nyamu J (as he then was) held, *inter alia*, that:

“In addition, although there is no direct local authority on the point, the holding No. 3 in the Trinidad and Tobago Constitutional case of Re-Application by Bahader [1986] LRC (Const) 297 at page 298 represents our position as well;

“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.” See Harrikson Vs Attorney General of Trinidad and Tobago [1979] 3 WLR 62 applied”.

19. The court is, therefore, inclined to agree with the 4th Respondent and the Interested Parties that the alleged violation of the right to be heard before the High Court does not necessarily raise constitutional issues which can only ventilated through a constitutional petition since there are adequate statutory mechanisms for redressing the alleged violation. Accordingly, the court finds and holds that the instant petition does not raise any constitutional issues.

b. Whether the Petitioners have demonstrated a violation of their constitutional rights

20. The court has already found and held that the instant petition does not disclose any constitutional issues. It would, therefore, follow that the Petitioners have not established a violation of their constitutional rights and freedoms.

21. Even if the court had found that the petition had raised constitutional issues, the court would not be persuaded that the Petitioners have proved violation of their constitutional rights for at least four reasons. First, the court is persuaded that the principle of avoidance as propounded by the Supreme Court in the case of **Communication Commission of Kenya and 5 Others v Royal Media Services Ltd and 5 others [2014] eKLR**, would be applicable to the instant petition. A court of law should not be inclined to determine a legal dispute as a constitutional issue if it can properly be adjudicated and determined on another basis.

22. The second reason lies in the jurisdiction of this court to make the declaration sought with respect to another superior court. As was held by Mabeya J in **Elias Mwirigi Arimi v High Court of Kenya & Others [2020] eKLR**:

“It is true that his court has jurisdiction to determine a question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. In prayer (d) of the petition, the Petitioner seeks to declare the said judgment unconstitutional on the ground that it had denied him his right to property.

In my view, that would be invoking the court’s supervisory jurisdiction. That jurisdiction is not available where the actions sought to be reviewed are those of a Court of Co-ordinate jurisdiction. That will infringe Article 165 (6) of the Constitution.”

23. The High Court further held in the said case, *inter alia*, that:

“He alleged that he was not involved in the cause. The judgment is alleged to have infringed his right to property. Is that a Constitutional breach which can be pursued by way of Constitutional petition”

I do not think so. Since the judgment was made in a properly existing cause, the proper course should have been to pursue and challenge those orders in the said cause and not to lodge an independent Constitutional petition. It is presumed that a lawful judgment by a competent court cannot be said to be unconstitutional and amenable to the process of challenge through a Constitutional petition as the Petitioner has sought herein. There are legal channels that exist to challenge such decisions.”

24. The third reason is that the Petitioners appear to be taking the court for a ride when they allege that they were not aware of the previous proceedings before the High Court and the Court of Appeal. The 4th Respondent listed several names of some of the parties whose parents and relatives were involved in the previous proceedings. The Petitioners did not file any further or supplementary affidavit denying those allegations even though the 4th Respondent’s replying affidavit was filed way back in February 2020. The court is, therefore, inclined to believe the 4th Respondent’s contention that some of the Petitioners’ relatives were aware of the previous proceedings.

25. Finally, there is no evidence on record to demonstrate that the Petitioners and their forefathers were really deprived of the suit properties. The material on record indicates that the High Court suit was a dispute between members of the Interested Parties’ Mbandi Clan and Murugu Clan. What the High Court did upon hearing the suit (by way of formal proof) was to order cancellation of the registration of Murugu Clan members and to restore the suit properties to Mbandi Clan. There is no material on record to demonstrate that the Petitioners who are not members of either of the two clans were the registered proprietors of the suit properties at the time the judgment was passed. In contradistinction, in the case of **Lekinyot Ole Lanke v Attorney General & 2 Others (supra)** which was cited by the Petitioners, the Petitioner in that petition was at all material times the registered proprietor of the suit property of which he was wrongly deprived by the defunct Land Disputes Tribunal without being heard.

c. Whether the Petitioners are entitled to the reliefs sought in the petition

26. The court has already held that the petition does not raise any *bona fide* constitutional issues. The court has also found that the Petitioners have failed to prove violation of their constitutional rights as alleged or at all. It would, therefore, follow that the Petitioners are not entitled to the reliefs sought in the petition, or any one of them.

d. Who shall bear costs of the petition

27. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigants should not be awarded costs of the petition. Accordingly, the Respondents and the Interested Parties shall be awarded costs of the petition.

I. CONCLUSION AND DISPOSAL ORDER

28. The upshot of the foregoing is that the court finds no merit in the instant petition. Accordingly, the petition dated 22nd March, 2018 is hereby dismissed in its entirety with costs to the Respondents and the Interested Parties.

It is so decided.

RULING DATED and SIGNED NYAHURURU and DELIVERED via Microsoft Teams Platform this 18th of December, 2020.

In the presence of:

Mr. Kariuki holding brief for Mr. Andande for the 4th Respondent and the Interested Parties

Ms. Njenga holding brief for Mr. Siro for the 1st – 3rd Respondents

No appearance by the Petitioners

Court Assistant - Carol

Y.M. ANGIMA

JUDGE

18.12.2020



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