



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CONSTITUTIONAL PETITION NUMBER 11 OF 2020**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE PREAMBLE OF THE CONSTITUTION AND THE ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 35, 46 (b), 159, 165 (3) (d), 258 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE RIGHT TO ACCESS INFORMATION AND CONSUMER RIGHTS**

**AND**

**IN THE MATTER OF THE BANK-CUSTOMER RELATIONSHIP**

**BETWEEN**

**GEORGE GABRIEL KIGURU MWANGI.....1<sup>ST</sup> PETITIONER**

**JANE NDUTA KIGURU.....2<sup>ND</sup> PETITIONER**

**AND**

**KENYA WOMEN MICROFINANCE LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Petition is brought by George Gabriel Kiguru Mwangi and Janet Nduta Kaguru,
2. It seeks declarations against the respondent;

*(a) A declaration that the omission and or refusal by the Respondent to release the details and particulars of sale, Notice of intention to sell, Advertisement for sale, the Auctioneers returns, and the Agreement for sale of the land parcels known as LR. NO. NYANDARUA/MAWINGI/3029, NYANDARUA/MAWINGO/3030, NYANDARUA/MAWINGO/3031 and NYANDARUA/MAWINGO/3032 is unconstitutional and it is in violation of the rights and freedom of the Petitioners under Article 35, 46(b) and 48 of the Constitution of Kenya.*

*(b) An order against the Respondent compelling it to disclose, release and/or supply the Petitioners with the details and particulars of sale, Notice of intention to sale by the Auctioneer, regarding the sale of the land parcels known as LR. NO. NYANDARUA/MAWINGI/3029, NYANDARUA/MAWINGO/3030, NYANDARUA/MAWINGO/3031 and NYANDARUA/MAWINGO/3032.*

*(c) A declaration that the Respondent is an escapist and moribund.*

*(d) The Petitioners be paid costs of this Petition.*

3. The said Petition is supported by the Affidavit of GEORGE GABRIEL KIGURU MWANGI sworn on 24<sup>th</sup> June 2020 in support thereof and the annexures attached. The Petition is premised on the allegations that the Petitioners obtained a loan facility of Kshs. 9,000,000/= from the Respondent and the 1<sup>st</sup> Petitioner charged the subject parcels being NYANDARUA/MAWINGI/3029, NYANDARUA/MAWINGO/3030, NYANDARUA/MAWINGO/3031 and NYANDARUA/MAWINGO/3032 as security for the loan. He stated that they have been dutifully paying the loan monthly but the Respondent purported to instruct auctioneers to sell the suit properties by way of public auction without their knowledge, information, consent or authority. He further stated that they were never served with any statutory notice to rectify any default at all despite the respondent having knowledge of their last known postal address and the physical location of their offices. He stated that the Respondents informed them that it had sold the suit properties by way of public auction but refused to supply them with any documentation whatsoever regarding the purported auction.

4. In view of the allegations raised in the Petition, the Respondent filed a Replying Affidavit sworn by TERESIA WAMBUI, the Respondent's Manager, Nakuru Branch sworn on 6<sup>th</sup> August, 2020 and filed in court on 7<sup>th</sup> August, 2020. In her Replying Affidavit, she stated that the 2<sup>nd</sup> Petitioner was advanced a business loan of Kshs. 5,000,000/= by the Bank on 24<sup>th</sup> January, 2013 which loan was secured by registering a charge over the properties known as L. R. NOS. NYANDARUA/MAWINGI/3029, NYANDARUA/MAWINGO/3030, NYANDARUA/MAWINGO/3031 and NYANDARUA/MAWINGO/3032 all registered in the name of the 1<sup>st</sup> Petitioner. On 13<sup>th</sup> March, 2015, the Petitioners successfully applied for another loan of Kshs. 9,000,000/= for purchase of land following which a further charge was registered against the same parcels of land as demonstrated by the charge documents.

She stated that following default on servicing the loan arrears, the bank issued the Petitioners with the Statutory notices dated 22<sup>nd</sup> June 2016 for 90 days but the same elicited no response prompting it to serve another notice dated 19<sup>th</sup> October 2016 for 40 days via registered post through their last known address, however, the Petitioners continued to default in servicing the said loan. The notices and postage receipts are marked as TW 3(a) and (b) in the Replying Affidavit. The notices elicited no response from Petitioners prompting the Respondent to carry out violation on the suit parcel of land and instruct Crater View Auctioneers to sell the suit parcels of land by public auction. She further stated that the Auctioneers under the instructions of the Respondent served a 45 days redemption notice dated 3<sup>rd</sup> February 2017 upon the petitioners (both being borrowers) who were then incarcerated at the Nakuru G. K. Prison but the Petitioners advised them to serve notices upon their then Advocate Mr. Wachira Waiganjo who received the documents by stamping and signing on the face of the redemption notice and notification for sale marked as TW 5 (a) and (b) in the Replying Affidavit. The 1<sup>st</sup> Petitioner being the registered owner of the property gave his consent to have the properties sold by public auction on 11<sup>th</sup> April, 2017 and 11<sup>th</sup> May, 2017. Following the sale, the auctioneers issued the Respondent with the list of bidders, memorandum of sale and certificate of sale for such parcel of land sold. Despite the sale of the four properties, the proceeds realised could not fully offset the Petitioners' loan arrears hence the Respondent called the Petitioners and informed them of the sale and the outstanding balance.

5. It is the respondents' position that the Petitioners are insisting on getting documents from the Respondent on the sale of the suit property when the Bank already gave the said information to them. There is no express provision that supports the Petitioners' position that they must be handed documentation on the sale of the suit properties and the auctioneers' returns as opposed to being orally informed by the Respondents of the proceeds of sale and the loan arrears after deduction of the proceeds realised from the sale.

In the event the Petitioners feel that the sale of the suit property by public auction was tainted with any illegalities (which is denied) and they would wish to protect the same, the said issues cannot be canvassed by way of a constitutional petition but a civil court.

6. It is also the respondents' position that the relationship between the Petitioners and the Respondent is contractual with a clear scope and remedies and hence there is nothing constitutional as alleged. That these are issues that can be fully determined by a civil court which can effectively grant the remedies available to a charger in respect to any alleged breach of the contract of sale by a charge. That the said properties were sold in April 2017 and lack of seriousness and good faith on the part of the Petitioners has been demonstrated by the fact that since then, no action has been taken to challenge the said sale or rather any takeover on their properties as alleged in the Petition, but the Petitioners are only keen on obtaining documentation from the bank which documents had already been served upon them. That the Petitioners are guilty of glaring laches. In any event, the right to own property that the Petitioners are seeking to protect has been overtaken by events and the only remedy available to the Petitioners in the event the sale is found to have been in breach of a contract would be compensation in the form of damages.

7. It is the Petitioners case that in 2015 the 1<sup>st</sup> Petitioner guaranteed the 2<sup>nd</sup> Petitioner loan from the Respondent using his four parcels of land; L.R. NOS. NYANDARUA/MAWINGI/3029, 3030, 3031 and 3032.

8. According to the Petitioners the Respondent unlawfully and without justification has attempted to fraudulently dispossess them of the said properties. That despite their paying the loan difficulty, the Respondent instructed auctioneers who sold the properties by way of public auction, during period when both of them were incarcerated, without their knowledge, information, consent or authority.

9. This the Petitioners learnt from the Respondent who has refused to supply them with any documentation regarding the purported sale. They cited :

*(a) Article 3(1) of the Constitution of Kenya 2010 provides that every person has a right to respect, uphold and defend the Constitution.*

*(b) Article 19 of the Constitution of Kenya 2010 recognise that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies and that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The Article also provides that the rights and freedoms in the Bill of Rights belong to each individual and not granted by the state and that the said rights and freedoms cannot be limited unless in accordance with the Constitution.*

(c) Article 35(1) (a) and (b) of the Constitution of Kenya provides that every citizen has a right of access of information held by the state or by another person for the exercise of protection of any right or fundamental freedom. The Petitioners are citizens of Kenya, who acquired and indeed hold property in their names in Kenya, who are entitled to this information so as to enjoy the right to access justice and the right to acquire and hold property in their name. Through unreasonably holding information from the Petitioners, the Respondent clearly in violation of Article 35(1) (a) and (b) of the Constitution of Kenya and is infringing on the rights of the Petitioners by attempting to forcefully take over the Petitioner's properties while keeping the Petitioners in the dark.

(d) Article 46(b) of the Constitution of Kenya provides for right of consumers of services to have the information necessary for them to gain full benefit from services. The Petitioners, being consumers of the banking services offered by the Respondent are being denied by the Respondent the right to access information relating to the purported sale by way of public auction of their property. These documents will enable them to gain the full benefit of the services offered by the Respondent, more so information regarding the regularity or otherwise of the purported sale by auction.

10. The Petition is canvassed by way of written submissions. Gordon Ogolla, Kipkoech & Company Advocates argue on behalf of the Petitioners, Rodi, Orege & Company Advocates for the Respondents.

11. The Petitioners cite **Stephen Nyarangi Ouma & Another vs George Mago & 7 Others [2014] eKLR** where the court stated;

*“As a basic minimum a petitioner is required to cite the provisions of the Constitution which have allegedly been violated, and the manner in which they have been violated and the remedy which he seeks from the violation. See **Anarita Karimi Njeru vs Republic (1976 – 1980) IKLR 1272**. In demonstrating the manner in which there has been violation a Petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation.”*

12. The Petitioners set out the articles of the Constitution, the facts of their case and relied on **Access to Information Act 2016 Sections 4 & 6**.

13. It was argued for the Petitioners that the only way the Respondents could deny the Petitioners the information sought was if the respondent could justify the refusal. On this reliance as made on the case of **Mercy Nyamwade vs Banking Fraud Investigatios Department and 2 Others [2017] eKLR** in which the **South African case of President of South Africa & Others vs M & G Media Limited** was referred to. Therein the Court held;

**“The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of.....the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions.....Hence.....the evidentiary burden rests with the holder of information and not with the requester.”**

14. For the Respondent it is argued that the Petitioner is wrongfully before this court and the Petitioners ought to have filed their case before the civil court. That this was the position held in **David Ogoti & 6 Others vs Kiamokama Tea Factory & Another [2017] eKLR** that the court can only exercise its jurisdiction under **Article 165 (3) (b)** if it is shown that the Petition falls within the constitutional threshold of **Anarita Karimi Njeru vs Republic**. That for justice to be done the Petitioner must set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and how that infringement was done. Further, that the remedy sought for the breach is only available in the Constitutional Court as opposed to any other court.

15. **The issue for determination is whether the refusal by the respondent to avail the required information to the Petitioners violated their constitutional rights.**

16. The Petitioners case is simply that they were not supplied with the information regarding the disposal of the property the 1<sup>st</sup> Petitioner offered as security for the 2<sup>nd</sup> Petitioner's loan with the Respondent, that that information is crucial to enable them exercise their right to their property.

17. On this they cited **Article 35 of the Constitution** which states at **(1) (b)** that:

***“Every citizen has the right of access to .... Information held by another person and required for the exercise or protection of any right or fundamental freedom.”***

18. That that information relates to right to property as protected by **Article 40 (1)** and further their rights as consumers of the Respondents services as protected by **Article 46(1) (b) of the Constitution**.

19. The right to access the said information is further guaranteed by the provisions of **Section 4 of the Access to Information Act 31 of 2016** which states;

***“S.4. Right to information***

***(1) Subject to this Act and any other written law, every citizen has the right of access to information held by—***

*(a) the State; and*

*(b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.*

*(2) Subject to this Act, every citizen's right to access information is not affected by—*

*(a) any reason the person gives for seeking access; or*

*(b) the public entity's belief as to what are the person's reasons for seeking access.*

*(3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.*

*(4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.*

*(5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information. ”*

20. **Section 6** of the same Act sets out the grounds upon which such information can be withheld.

*“S.6. Limitation of right of access to information*

*(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—*

*(a) undermine the national security of Kenya;*

*(b) impede the due process of law;*

*(c) endanger the safety, health or life of any person;*

*(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;*

*(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;*

*(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;*

*(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;*

*(h) damage a public entity's position in any actual or contemplated legal proceedings; or*

*(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.*

*(2) For purposes of subsection (1)(a), information relating to national security includes—*

*(a) military strategy, covert operations, doctrine, capability, capacity or deployment;*

*(b) foreign government information with implications on national security;*

*(c) intelligence activities, sources, capabilities, methods or cryptology;*

*(d) foreign relations;*

*(e) scientific, technology or economic matters relating to national security;*

*(f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;*

*(g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;*

*(h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;*

*(i) cabinet deliberations and records;*

*(j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;*

*(k) information that is referred to as classified information in the Kenya Defence Forces Act; and*

*(l) any other information whose unauthorized disclosure would prejudice national security.*

*(3) Subsection (1)(d) and (e) shall not apply if a request for information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.*

*(4) Despite anything contained in subsections (1) and (2), a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a Court.*

*(5) A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.*

*(6) In considering the public interest referred in subsection (4), particular regard shall be had to the constitutional principles on the need to—*

*(a) promote accountability of public entities to the public;*

*(b) ensure that the expenditure of public funds is subject to effective oversight;*

*(c) promote informed debate on issues of public interest ;*

*(d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and*

*(e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.*

*(7) Unless the contrary is proved by the public entity or private body, information is presumed not to be exempt if the information has been held for a period exceeding thirty years.”*

21. From the respondents’ submissions, the key argument is that the said information was supplied to the Petitioners through their last known address but they never responded. That they instructed counsel to receive the information on their behalf which information their counsel received. That even when they were incarcerated, that attempts were made to serve them in prison. On this point it is noteworthy that in their letter of 24<sup>th</sup> July 2018, the respondent, in response to demand by counsel for the Petitioners for the said information, wrote that;

*“At no times was the Kenya Women Microfinance Bank Limited aware of your client’s incarceration.”*

Yet, it is their position that there were attempts to serve the Petitioners in prison.

22. That besides that the Petitioners have recourse in the civil court. The Petitioners are not challenging the purported sale before this court, they as simply saying that, yes, we took a loan, we paid regularly, we defaulted at some point, the property is said to have been sold, we have no information as to the process because we were not aware yet we are losing the said property, and, the respondent refuses to give us the information surrounding the said sale.

23. I cannot for one fathom the resistance by the respondent to give access to the information requested by the Petitioners. If the same was sent to them, and they say they never got it, then there must be copies somewhere they can see/or be supplied with. It is evident to me that without the said information unreasonably withheld by the respondent they cannot pursue any right they may still have to the said property, in that civil court. It is evident that efforts by their advocate to obtain the same has been met with resistance. The more reason the prayers herein become tenable.

24. In view of **Section 4 of the Access to Information Act** the Petitioners cannot move to pursue their right to the said properties without the said information, and no evidence has been adduced to demonstrate the limitations set out by the law.

25. **Article 23 of the Constitution provides that;**

*“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—*

*(a) a declaration of rights;*

*(b) an injunction;*

*(c) a conservatory order*

*(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*

*(e) an order for compensation; and*

*(f) an order of judicial review.”*

26. To that end the petition succeeds and the following prayers are allowed;

a. A declaration that the omission and or refusal by the Respondent to release the details and particulars of sale, notice of intention to sell, Advertisement for sale, the Auctioneers returns, and the Agreement for sale of the land parcels known as LR. NO. NYANDARUA/MAWINGI/3029, NYANDARUA/MAWINGO/3030, NYANDARUA/MAWINGO/3031 and NYANDARUA/MAWINGO/3032 is unconstitutional and it is in violation of the rights and freedom of the Petitioners under Article 35, 46(b) and 48 of the Constitution of Kenya.

b. An order against the Respondent compelling it to disclose, release and/or supply the Petitioners with the details and particulars of sale, Notice of intention to sale by the Auctioneer, regarding the sale of the Land parcels known as LR. NO. NYANDARUA/MAWINGI/3029, NYANDARUA/MAWINGO/3030, NYANDARUA/MAWINGO/3031 and NYANDARUA/MAWINGO/3032

c. Costs to the Petitioners.

Right of Appeal 30 days.

**Dated this 18<sup>th</sup> day of January 2021.**

**Mumbua T. Matheka**

**Judge**

**Delivered virtually this 21<sup>st</sup> January 2021.**

**Mumbua T. Matheka**

**Judge**

**In the presence of:**

Court Assistant Martin

Gordon Ogolla, Kipkoech & Company Advocates for the Petitioners N/A

**Ms Mungai hb for Orege of Rodi, Orege & Company Advocates for the Respondents**