



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ELC PETITION NO.12 OF 2014**

**IN THE MATTER OF ARTICLES 21 (1), 22(3), 23(1) 24 (1), 25, 27, 29, 39 AND 40 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF LR NOS. WEST KITUTU/BUGUSERO/648,649, 3333 AND 2234**

**BETWEEN**

**SISILIA NYAKOE.....1<sup>ST</sup> PETITIONER**

**VINCENT MAOBE NYAKOE.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR-KISII COUNTY.....2<sup>ND</sup> RESPONDENT**

**JEMIMAH MORAA NYABOGA.....3<sup>RD</sup> RESPONDENT**

**MARY NYABETA OSORO.....4<sup>TH</sup> RESPONDENT**

**DANIEL OMAIYO.....5<sup>TH</sup>RESPONDENT**

**RULING**

**INTRODUCTION**

1. This Ruling is in respect of a Preliminary Objection dated 7<sup>th</sup> September, 2021 raised by the 3<sup>rd</sup> Respondent against a Petition dated 5<sup>th</sup> March 2014.

2. The Preliminary Objection is based on the following grounds;

a) The Petitioners herein having not been hitherto registered as the proprietors of the properties at the foot of the Petition, same are devoid of the requisite *Locus standi* to commence, originate and/or otherwise maintain the subject petition.

b) The instant Petition has been mounted and/or commenced by busybodies; in any event the petition is an affront to the provisions of section 82 of the Law of Succession act, Cap 160.

c) The subject Petition is *Omnibus* and otherwise seeks to revisit the issues of land adjudication and demarcation process which were lawfully and legitimately carried out and/or undertaken pursuant to Land Adjudication Act 284. Consequently, the Honourable Court is devoid of jurisdiction to entertain and adjudicate upon the entire Petition.

d) The instant Petition is barred by the provisions of section 4(2), 7 and 12 of the Limitation of Act cap 22 Laws of Kenya.

e) Besides the instant Petition is barred by Section 3 of the Public Authorities Limitation Act cap 39 Laws of Kenya.

f) Nevertheless, the instant Petition does not disclose and/or capture any reasonable cause of Action.

g) The instant suit amounts to and/or constitutes an abuse of due process of the court.

h) At any rate, the purported transgressions, infringement and or violation of (sic) the rights complained of, if any, predate the Constitution of Kenya 2010, the invocation and reliance on the provisions of the Constitution of Kenya 2010, is an exercise in futility in so far as the Constitution does not apply retrospectively. In the premises the Petition is legally untenable.

i) Besides the Petitioners are *non-suited*.

3. In response to the Preliminary Objection the Petitioners filed a response through a Reply to Preliminary Objection dated 26<sup>th</sup> November, 2020 and filed in court on 1<sup>st</sup> October, 2020 wherein they state that;

a) Upholding the Preliminary Objection by the 3<sup>rd</sup> Respondent at this stage of the proceedings will be draconian as there are substantive issues to be determined in the Petition.

b) The Petition herein is based on beneficial interest and or/ land held in trust.

c) The Preliminary Objection unnecessarily increases costs, confuses issues and eats into precious courts time.

d) The Preliminary Objection does not meet the threshold to uphold a Preliminary Objection hence points raised therein should be argued in the normal way and/or the main Petition.

e) The Preliminary Objection must be purely on points of law which have been pleaded and or arise by clear provisions of the law

f) That the provisions of sections 4(2), 7 and 12 of the Limitation of Actions Act CAP 22 should be read together with section 26 which extends the limitation in case of a fraud or mistake as envisaged in the petition herein. The period of limitation only starts running from the time the fraud is discovered.

g) In the premises the Petitioners are entitled to be heard on the merit and waive the limitation period hence courts should aim at sustaining rather than terminating suits.

4. All the parties consented to disposing of the Preliminary Objection by way of written submissions, however it was only the third Respondent and the Petitioners who filed their submissions.

#### **BRIEF BACKGROUND TO THE PETITION**

5. Before determining the Preliminary Objection, it will be essential to understand the background of the Petition.

6. The Petitioners commenced this suit vide a Petition dated 5<sup>th</sup> March 2014 in which they sought a declaration that land parcels LR WEST KITUTU/BOGUSERO/648 and 649 that were subdivided illegally into LR Nos. WEST KITUTU/BOGUSERO/2198, 2199 and 2233 and 2334 and registered in the names of the 3<sup>rd</sup> to 5<sup>th</sup> Respondents belonged to the family of the late Nyakoe. The said Nyakoe was the father-in-law and grandfather respectively to the Petitioners.

7. The Petitioners allege that the late Nyakoe was the original owner of land parcel No. LR WEST KITUTU/BOGUSERO 648 and 649. They further aver that the said Nyakoe who died before the adjudication process commenced, had two wives namely, Kerubo Nyakoe and Sanganga Nyakoe all deceased. The 1<sup>st</sup> wife had 3 daughters namely Machoka Nyakoe, Nyamusi Nyakoe and Bitutu Nyakoe all deceased. The 2<sup>nd</sup> wife was blessed with two sons and a daughter namely Christopher Nyakoe, Kerongo Nyakoe and Bisieri Nyakoe. Christopher Nyakoe was the husband and father of the Petitioners respectively.

8. They allege that parcel No. 648 which was a preserve of the second wife and was registered in her name was subdivided into parcel number 2198 (now registered in the name of Stephen Roman Kerongo a son of Kerongo Nyakoe) and 2199 (now registered in the name of the 5<sup>th</sup> Respondent).

9. Parcel 649 which was a preserve of the first wife and which was erroneously registered in the name of Bitutu Nyakoe, a third born of the first wife. Parcel No. 649 has illegally been subdivided into parcel 2233 registered in the name of the 4<sup>th</sup> Respondent and parcel 2234 in the name of the 3<sup>rd</sup> Respondent.

10. They also allege that the two sons of the late Nyakoe namely, Christopher Nyakoe and Kerongo Nyakoe died without being registered as the owners of their father's/mother's land but left behind children and wives who have no share of the property.

11. It is their allegation that Bitutu Nyakoe who was erroneously registered as the owner of parcel 649 during the Land Adjudication process, was happily married and was buried away from her father's land. They hence claim that they do not understand how she sold and/or transferred parcel 648 to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to the exclusion of the family members including those of her mother's womb.

12. They also wonder how the son of Kerongo became the only heir of Nyakoe and got a share of his property specifically parcel 648 reserved for the second house where they belong.

13. The Respondents did not file any response to the Petition. However, they filed a Notice of Preliminary Objection dated 7/9/2020 which is the subject of this ruling.

### ISSUES FOR DETERMINATION

14. Having considered the above averments by parties, the Preliminary Objection filed by the 3<sup>rd</sup> Respondent, the Reply filed by the Petitioners and the written submission filed by their learned counsel, I deduce the following as the main issues for determination:-

- i) Whether Petitioners lacked the *locus standi* to commence this suit
- ii) Whether the Petition meets the threshold of a constitutional petition
- iii) Whether the Petition is barred by the provisions the Limitation of Actions Act.

### ANALYSIS AND DETERMINATION

#### Whether Petitioners lack the *locus standi* to commence this suit.

15. At the heart of the Preliminary Objection raised by the third Respondent is the issue of *locus standi*. Counsel for the 3<sup>rd</sup> Respondent has submitted that the Petitioners did not have **Locus Standi** or capacity to institute this Petition. That due to the lack of the said capacity, the suit is incompetent and should be struck out.

16. In the case of **Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000**, the Court held that;

***“Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue a in court of law”.***

17. Further in the case of **Alfred Njau and Others Vs City Council of Nairobi ( 1982) KAR 229**, the Court also held that:-

***“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.***

18. It is clear that *locus standi* is the right to appear and be heard in Court or other proceedings and literally, it means ‘**a place of standing**’. Therefore, if a party is found to have no **locus standi**, then it means he or she cannot be heard even on whether or not he has a case worth listening to.

19. It is further evident that if this Court was to find that the Petitioners have no **locus standi**, then the Petitioners cannot be heard and that point alone may dispose of the suit. In the case of **Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999**, the Court held that: -

***“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.***

20. Having found that the issue of **locus standi** is rightly raised as a point of law, it important to determine whether the same as argued by the 3<sup>rd</sup> Respondent can determine this suit without me resorting to considering the facts raised by the Petitioners in the suit.

21. In this instant suit, the learned counsel for the 3<sup>rd</sup> Respondent submitted that the Petitioners have not obtained a Grant of letters of Administration for the estate of the late Nyakoe who was their late father-in- law and grandfather respectively to give them the powers to commence this suit. In support of his submission, counsel referred to the case of **Charles Ratemo Nyambati Vs Jacton Ocharo & 4 others (2016) eKLR** where the Honourable Court observed as hereunder;

***“And a legal representative is a person who has been issued letters of grant. This is provided under section 82(a) of the Law of Succession Act. It is true that under the Adjudication Act any one can appear to represent a dead person. But the court which deals with estates of deceased persons operates under the Law of Succession Act which gives specific direction on how such matters should be handled. The applicant cannot fail to follow this procedure and hide under article 22 (1) and 2 of the Constitution. The Applicant herein has a specific claim which is the estate of his deceased brother.***

***It cannot therefore be anyone having a claim on this estate who can file a claim. The law of Succession is clear that it must be the legal representative. The applicant has not shown that he is the legal representative. He therefore lacks the locus standi specific to this estate of his deceased brother.”***

22. On the other hand, learned counsel for the Petitioners postulates that given that the Petitioners are claiming that they have an interest in the suit property which is being held in trust for them, such a claim is a factual one which needs to be determined after a full hearing. He submits therefore that it would be draconian to dismiss this matter on grounds that they lack *locus standi*. He relies on the case **Daykio Plantations Ltd v NBK Ltd & 2 others (2018) eKLR**.

23. Despite the argument by counsel for the Petitioners hereinabove, it is a matter of law that anyone who wishes to approach a court claiming a beneficial interest in a property registered in the name of a deceased person must be clothed with the authority to do so, which essentially means that he must first and foremost obtain a Grant of Letters of Administration. The above observation was made by Chitembwe J in **Hawo Shanko v Mohamed Uta Shanko [2018] eKLR** wherein he observed that:

“.....The general consensus is that a party lacks the *Locus standi* to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or Applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased’s estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit. The leave of the Court is not required before one seeks a grant limited to the filing of the suit. The orders granted to the plaintiff herein authorizing her to seek a grant of letters of administration are superfluous and cannot assist her. She ought to have sought a limited grant first before filing this suit.....”

.....

. ....Without a limited grant being issued allowing the filing of the suit, the plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the suit. The suit as initiated becomes **void ab initio** and cannot be resuscitated by the issuance of a subsequent limited grant.....”

24. In the case of **Trouistik Union International vs. Mbeyu & Another [1993] eKLR** the Court of Appeal emphasized that personal representatives are people who have obtained Grant and not blood relations. That if an administrator brought an action before obtaining Grant, the same would be incompetent from inception. That a suit commenced by a party who has not obtained Letters of Administration was therefore incompetent as the party filing it lacks the *locus standi* to present and prosecute the suit. The court had relied on their own decision in the case of **Otieno v Joash Ochieng Ougo & another (1987) eKLR** to hold that;

“The administrator is not entitled to bring an action as administrator before he has taken Letters of Administration. If he does, the action is incompetent at the date of its inception”.

25. From the foregoing therefore, it my finding that the Petitioners lacked the *locus standi* as they instituted the present suit without having obtained a Grant of letters of Administration.

26. Even though this finding disposes of the matter, I will nevertheless consider the other issues, in case I am mistaken.

**Whether the Petition meets the threshold of a Constitutional Petition.**

27. Before determining whether Petition meets the threshold of what constitutes a Constitutional Petition properly so called, it is important at the earliest opportunity to emphasize that the court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional Petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand. The court must also ensure that any person who wishes to institute a claim through a Constitutional Petition has met the threshold set in the case of **Anarita Karimi Njeru -vs- Republic 1976-1980 KLR** wherein **Trevelyan & Hancox, JJ**, summarized it as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

28. Further in **Ostenah Ogero Taracha v Ethics & Anti-Corruption Commission & Attorney General [2017] eKLR** the court held that:

*It is not however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved. Section 107 (1) of the Evidence Act Cap. 80 Laws of Kenya is clear in this regard and provides as follows;*

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

*The letter and spirit of the above provision has been captured in several decisions of the superior courts including but not limited to the cases of **Anarita Karimi Njeru –vs- Republic [1979] eKLR** and **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. Ancillary to the foregoing is the requirement that any prospective petitioner ought to set out his or her complaint with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed.*

29. Can it be said that the Petition before me met the aforementioned threshold? Learned counsel for the Respondent submitted that any litigant who chooses to ventilate his claim by way of a Constitutional Petition must comply with the strict requirements of the law, *inter alia*, specificity of the pleadings. To elaborate his argument, counsel submitted that, the Petitioners were called upon to state with clarity, the alleged violation and/or threatened violation of the fundamental rights, the manner in which the fundamental rights are being violated and or threatened to be violated and provisions of the constitution that anchor the impugned rights. He relied on the case of **Mumo Matemu vs Trusted Society of Human Right Alliance & 5 others (2013) eKLR** to support his argument.

30. Learned Counsel for the 3rd Respondent submitted further that the claims raised by the Petitioners are private claims whereby they are seeking to unseat the registered owners of their assorted properties and/ or their entitlement. He argues that such claims, are claims that belong to the purview of private ordinary suits commenced by way of a complaint and not through a Constitutional Petition.

31. Counsel for the Petitioners completely became evasive and did not provide any substantive argument as to whether the Petitioners had met the threshold elaborated hereinabove and whether the issues raised were within the private law purview hence could be instituted in an ordinary way. He submitted only on Articles 22 and 258 of the Constitution of Kenya, 2010 that gives every party a right to file a Petition in court where his rights as well as rights of others have been infringed or threatened to be infringed. He however failed to recognize that in as much as the said articles would ordinarily give the Petitioners a chance to come to court, they were required to ensure that they stated with a reasonable degree of precision their complaints against the Respondents, the provisions of the Constitution that the Respondents had infringed, and the manner in which the said provisions were infringed. From paragraph 24 to 27 of the Petition, the Petitioners highlight the provisions of the Constitutions that they claim to have been violated by the Respondents but they fail to elaborate on the manner in which the said provisions were violated. I therefore agree with counsel for the Respondent that the Petitioners' Petition does not meet the threshold of what constitutes a Constitutional Petition.

32. The above notwithstanding, in their prayers all the Petitioners seek is a declaration that original titles **LR NO. WEST KITUTU/BOGUSERO 648 and 649** that were subdivided into **LR Nos. WEST KITUTU/BOGUSERO 2198, 2199 and 2233 and 2334** belong to and/or are owned by the Petitioners as members of Nyakoe's family and that the same should be cancelled and the 3<sup>rd</sup> to 5<sup>th</sup> Respondents who are the current registered owners evicted. This remedy that Petitioners want me to grant is one that can be achieved by them instituting an ordinary suit through a complaint and not through a Constitution Petition. In **Francis Oyagi Vs Samwel Motari Mangare and 2 Others (2018) eKLR** the Honourable Court observed and which observation I agree with that;

*“The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.”*

33. The upshot is that I find that the Petition before me does not meet the threshold of what constitutes a Constitutional Petition and that the claims therein are ordinary civil claims that can be canvassed through a complaint and not a Constitutional Petition.

#### **Whether the petition is barred by the provisions of the Limitation of Actions Act.**

34. Lastly, and even though I need not do so, I shall examine whether the suit is statute barred. The 3<sup>rd</sup> Respondent has also hinged the Preliminary Objection on the fact that the Plaintiff's cause of action was time barred and that the suit was brought after the expiry or lapse of the period of limitation. The question whether or not the Plaintiff's suit is barred by statute on account of limitation goes to the jurisdiction of the court to entertain the suit. If the suit is statute barred on account of limitation, then the court lacks the jurisdiction to entertain the same. If the court were to proceed to hear and adjudicate the suit when it lacked the jurisdiction, its decision would be null and void.

35. Section 4 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of action. The limitation period in regard to an action to recover land under section 7 of the Limitation of Actions Act is twelve years. Section 7 of the Act provides as follows: -

*“An action 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 or, it first accrued to some persons through whom he claims, to that person.”*

36. The 3<sup>rd</sup> Respondent contends that subdivision of the original titles (648 and 649) which the Petitioners want this court to cancel was done on 20<sup>th</sup> June, 1979 and 22<sup>nd</sup> April 1975 respectively which is more than 40 years ago, hence the suit is time barred. The 3<sup>rd</sup> Respondent further argues that the fraud that the Petitioners claim to have taken place to have one Bitutu Nyakoe registered as the owner parcel 648 during the Adjudication and demarcation process took place in 1975. This is 46 years ago which period is more than the 3-year period provided for under section 4 of the limitation of action Act.

37. In his submission, counsel for the 3<sup>rd</sup> Respondent argued that the Petitioners filed this matter as a Constitutional Petition in order to evade the stringent laws on limitation of actions which was pronounced not to be legally sound in the case of **Francis Nyakundi Oyagi Vs Samwel Motari (supra)**.

38. Counsel for the Petitioners argued that provisions of sections 4(2), 7 and 12 of the Limitation of Actions Act Cap 22 should be read together with section 26 which extends the limitation in case of a fraud or mistake as envisaged in the petition herein. The period of limitation only starts running from the time the fraud is discovered.

39. Section 26 of Limitation of Actions Act provides that:

“Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it: Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which— (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.’

40. In the Affidavit in support of the Petition, the Petitioners have set out what they consider as particulars of fraud on the part of the Respondent. In the said particulars they raise a number issues putting one Bitutu Nyakoe at the center of the fraud. However, the said Bitutu Nyakoe is dead and thus they have shifted the blame to the Respondents. They allege the transactions that took place between the Respondents and Bitutu Nyakoe were fraudulent and the Respondents have taken illegal steps of disinheriting the family members of the late Nyakoe including cutting down tea bushes and at worst evicting them. However, it is not stated by the Petitioners when all these alleged illegal activities by the Respondents took place. The 3rd Respondent through the submissions by his learned counsel tries to shed light that the subdivision took place in 1976 and 1979 respectively. However, it is not clear why the Petitioners never filed their claim earlier hence they are barred by the provisions of section 4 of the Limitation of Action Act. The Petitioners on their part have asked the court to consider that time started running when the fraud was discovered. However, the Petitioners have not explained when the fraud on the part of the Respondent was discovered or whether the said fraud had been concealed by the Respondent for all that time until recently when they filed this Petition. Given that it is not clear when the Petitioner discovered the fraud, their reliance on the section 26 is a tall order.

41. Having established that Petitioners lacked *locus standi* to commence this suit, that the Petition did not meet the threshold of what constitutes a Constitutional Petition and that suit is time barred, I hereby allow the Preliminary Objection and strike out the Petition with costs to the third Respondent.

**Dated, signed and delivered at Kisii this 17<sup>th</sup> day of March 2021.**

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**J.M ONYANGO**

**JUDGE**