



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CONSTITUTION AND HUMAN RIGHTS DIVISION**

**PETITION NO. E012 OF 2021**

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLE 2, 10, 19, 20, 21,  
22, 27, 28, 47, 48, 157, AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION NO.4 OF 2015**

**AND**

**IN THE MATTER OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION ACT, NO 2 OF 2013**

**AND**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION**

**BETWEEN**

**HARRIET WANJIKU KIMANI.....1<sup>ST</sup> APPLICANT/PETITIONER**

**PETER GACHOKA KURIA.....2<sup>ND</sup> APPLICANT/PETITIONER**

**HERBERT MUSUMBA MUMALA.....3<sup>RD</sup> APPLICANT/PETITIONER**

**MIRIAM SAID.....4<sup>TH</sup> APPLICANT /PETITIONER**

**RISPER KAJUJU.....5<sup>TH</sup> APPLICANT/PETITIONER**

**SIMON WANYOIKE MUNGAI.....6<sup>TH</sup> APPLICANT/PETITIONER**

**RUTH WANJIRU.....7<sup>TH</sup> APPLICANT/PETITIONER**

**SAMUEL GICHANGA.....8<sup>TH</sup> APPLICANT/PETITIONER**

**GERALD MWANIKI.....9<sup>TH</sup> APPLICANT/PETITIONER**

**RUTH MUTHONI KIMANI.....10<sup>TH</sup> APPLICANT/PETITIONER**

**BENJAMIN KINARA.....11<sup>TH</sup> APPLICANT/PETITIONER**

**JOSEPH NYAMAMBA.....12<sup>TH</sup> APPLICANT/PETITIONER**

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT

INSPECTOR-GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT

AND

FRANCIS KAMAU NJUGUNA.....1<sup>ST</sup> INTERESTED PARTY

JOHN MWAGO GAITHO.....2<sup>ND</sup> INTERESTED PARTY

MICHAEL MUCHIRI GAITHO.....3<sup>RD</sup> INTERESTED PARTY

RULING

1. The petitioners approached this court by way of a Notice of Motion 27<sup>th</sup> May 2021 seeking the following orders:

a. Spent

b. Spent

c. This honourable court be and hereby pleased to issue a conservatory order forthwith staying the 1<sup>st</sup> Respondents decision communicated vide a letter dated the 23<sup>rd</sup> March 2021 directing the implementation of its directions of the 27<sup>th</sup> February 2020 and consequently restraining the respondent, their agents, servants, or assistants from arresting, arraigning, charging and/or prosecuting the applicants/petitioners herein until the hearing and determination of this humble petition.

d. Any other order that this court may deem fit and just in the circumstances.

2. The application is premised on the following grounds:-

i. The 1<sup>st</sup> -12<sup>th</sup> applicants herein are legitimate and bona fide purchasers of various parcels of land that were long sold to them by the interested party from the subdivisions made from land originally known as **Solai Ndungiri Block 9/1**.

ii. the 1<sup>st</sup> – 12<sup>th</sup> Applicant received good title through the efforts of the then Nakuru Land Registrar being the 13<sup>th</sup> applicant after consideration was made to the interested party herein as he was then registered as the owner of the various plots that were exercised from the land known as **Solai Ndungiri Block 9/1**.

iii. that sometimes in the year 2019 the officers from the director of criminal investigations prompted by a complaint made by the late **Joseph Gaitho Mwago** (Deceased) commenced investigations surrounding the original registration of the suit property then referred to as **Solai Ndungiri Block 9/1** in the name interested party and its later subdivision and transfers to the 1<sup>st</sup> -12<sup>th</sup> Applicants on grounds that the transfer and subsequent sales were fraudulent.

iv. That vide a letter dated 27<sup>th</sup> February 2020, the 1<sup>st</sup> Respondent wrote to the DCI regional coordinator in the Rift Valley Region and directed the arrest and prosecution of the applicants and the interested Party herein for various offences.

v. In the letter of the 27<sup>th</sup> February 2020, the 1<sup>st</sup> Respondent preferred as against the applicants **a charge of forcibly entry contrary to sections 90 as read with section 36 of the penal code and forcible detainer contrary to section 91 as read with section 36 of the penal code** because of their subsequent purchase and of the subdivisions exercised from the land originally known as **Solai Ndungiri Block 9/1**.

vi. That in another letter dated the 23<sup>rd</sup> March 2020 the 1<sup>st</sup> Respondent wrote to the DCI regional Coordinator in the Rift valley region and withdrew his initial directions ordering that the arrest and prosecution of the applicants and the interested party herein for various offences.

vii. That the 1<sup>st</sup> Respondent's reason for withdrawing his letter of the 27<sup>th</sup> February 2020 was because he had since established that the complainant being the late **Jospeh Gaitho Mwago** was deceased and thus not persuaded that the charges would see the light of the day in a court of law.

viii. That it has now come to the attention of the applicants that the 1<sup>st</sup> Respondent in another letter dated 23<sup>rd</sup> March 2021 has since withdrawn and/or reneged on his previous instructions to wit his letter of the 23<sup>rd</sup> March 2020 and has now preferred/directed the DCI Regional coordinator of the Rift Valley Region to arrest, arraign, charge and prosecute the applicants herein and the interested party as per his earlier instructions contained in his letter of the 27<sup>th</sup> February 2020.

ix. That the applicants herein are reasonably perplexed, confused and bewildered by the sudden, illegal and certainly questionable change of the 1<sup>st</sup> Respondent's instructions since there is no proof of the resurrection of the complainant or any change of circumstances in the matter a year later after they got a reprieve and are thus apprehensive of their imminent arrest and prosecution because of their bonafide purchase of the parcel of land exercised from the **Solai Ndungiri Block 9/1**.

x. That there is an urgent need for this Honourable court to come to the rescue of the applicants herein who face an imminent threat of their rights and fundamental freedoms by granting them the appropriate reliefs in the circumstances as they have been receiving calls from the 2<sup>nd</sup> Respondent's officers to record further statements in anticipation of their arrest and prosecution on baseless charges meant to embarrass them.

xi. That the applicants' imminent arrests and prosecution is only meant to embarrass the applicants as it has no valid or legitimate reason in the first place as most of the applicants herein have long disposed of their parcels of land. Moreover, there is no suggestion or proof from the respondents the applicants/petitioners herein have ever engaged in any fraud or any other criminal activity.

xii. That the Respondents will not be prejudiced if the orders sought herein are granted.

3. The application is supported by the affidavit of **Harriet Wanjiku Kimani** who restated the grounds of the application.

4. In response to the application, the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties filed a notice of preliminary objection on the following grounds:-

a. By dint of **section 6 of the Civil Procedure Act cap 21**, this Honourable court does not have the necessary jurisdiction to continue hearing these proceedings as the matter in issue are also directly and substantially in issue in a previously instituted matter at Milimani being **Milimni High court JR No. E1151 of 2020** between the same parties which matter is still pending and has not been heard and finally determined by that court.

b. As we held in the famous case of the **owners of the Motor vessel Lilian s' versus Caltex oil (Kenya) Ltd (1989) eKLR** a question as to jurisdiction ought to be raised at the earliest opportunity and the court seized the matter is then obligated to decide the issue right away on the material before it.

c. As was held in the supra case, jurisdiction is everything without it a court has no power to make one more step.

d. That the current proceedings are a gross abuse of court process and therefore these proceedings ought to be struck off out with costs forthwith.

e. That the current proceedings are a gross abuse of the court process as the petitioners' are forum shopping.

f. That was held in the case of **republic vs. Paul Kariuki, Attorney General & 2 others Ex-parte Law Society of Kenya (2020) eKLR** instituting a multiplicity of actions on the same subject against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to bring actions such amounts to abuse of court process.

g. That similarly instituting different actions between the same parties simultaneously in different courts even though on different grounds amounts to gross abuse of court process.

h. That litigation is not a game of chess where players outsmart themselves by the dexterity of purpose and traps.

i. That as was held in the case of **Mwangi Stephen Muriithi vs. Daniel T. Arap Moi & Anor (2017) eKLR** sub-judice and resjudicata are principles that go to the core of the rule of law as far as litigation is concerned. Any suit that runs afoul of these two principles has zero chances of survival.

j. That as was held in the case of **Kenya Planters Co-operative Union Ltd vs. Kenya co-operative Coffee Millers Ltd & Anor (2016) eKLR** that while the court affirms the Petitioner's right to approach it to enforce a constitutional right, it must also be made clear that the court has a duty to ensure that its process is not abused.

5. The 3<sup>rd</sup> interested party responded to the objection by filing a replying affidavit where he averred that Nairobi JR No. E1151 of 2020 is different from the current suit as it seeks to clarify the constitutionality of the 1<sup>st</sup> respondent letter dated 23<sup>rd</sup> March 2020 and the 2<sup>nd</sup> and 3<sup>rd</sup> interested party will not suffer any prejudice if the court fails to strike out the proceedings. He averred that the 2<sup>nd</sup> and 3<sup>rd</sup> application is unquestionable without merit and does not call for the exercise of this Honourable court directions.

#### **APPLICANTS' SUBMISSION**

6. The applicants submitted that **article 22 and 23 of the constitution** empowers citizens to institute legal proceedings where their rights are infringed, and the courts are empowered to grant appropriate reliefs; and cited the case of **Ewa & 2 others vs. Director of Immigration and Registration of persons & another (2018) eKLR**.

7. The applicants submitted that the scope of granting conservatory orders was discussed in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji (2014) eKLR** and stated that the applicants have established a prima facie case which is likely to succeed and cited the

case of the Center for rights education and awareness (CREAW) & 7 others vs. attorney General Nairobi High court Petition No. 16 of 2011 eKLR the court stated as follows:-

**“at this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that he will suffer prejudice as a result of the violation or threatened violation of the constitution.”**

8. Counsel for the applicants submitted that the applicants’ rights and freedom have been threatened and are likely to be breached if this Honourable court does not stop the Respondents’ arbitrary abuse of power; that the respondents have no reason to arrest the applicants as it will amount to breaching their constitutional rights as envisaged under Article 23 (3) of the constitution.

9. The applicants further submitted that denial of the conservatory orders by the court will disentitle the applicants as they face possible arrest and detention for an offence they did not commit; that the respondents have not proved that the applicants were involved in any fraudulent sale or purchase of the subdivision from LR Solai Ndungiri Block 9/1 and urged this court to issue the conservatory orders restraining the respondents from arresting, charging, and/or prosecuting the applicants.

### **1<sup>ST</sup> INTERESTED PARTY’S SUBMISSIONS**

10. Counsel for the 1<sup>st</sup> interested party submitted that Nairobi JR No. 1151 of 2020 and Nakuru Petition E012 of 2021 are only related in terms of the parties; that Nairobi JR.1151 of 2020 seeks to establish the constitutionality of the 1<sup>st</sup> Respondent letters dated 27<sup>th</sup> February 2020 and 23<sup>rd</sup> March 2020, while Nakuru Petition NO.E012 of 2021 seeks to quash the 1<sup>st</sup> Respondent directives vide letter dated 23<sup>rd</sup> March 2021 to arrest, charge and prosecute the applicants and the 1<sup>st</sup> interested party. That the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties are misleading the court that the matter in Nairobi JR 1151 of 2020 and Nakuru Petition E012 2021 are between the same parties with similar subject matters.

11. The 1<sup>st</sup> interested party further submitted that the preliminary objection fails to meet the required threshold; that the doctrine of re judicata cannot stand and cited the case of *Republic vs. Kenya & 2 others Ex-parte Moses Kiruna & 2 others (2017) eKLR where the court stated as follows:-*

**“therefore for the principle to apply certain precedent must be shown to exist, first, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit, proceedings must be between the same parties, or between parties under who they or any of them claim to litigate under the same title, and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”**

12. The 1<sup>st</sup> interested party submitted that this court has jurisdiction to hear and determine this matter; that it is not an abuse of the court process or a waste of judicial time and the preliminary objection intended to delay the court’s time and deplete the applicant’s funds; that the petition contains triable issues with a possibility of success and urged this court to dismiss the preliminary objection dated 14<sup>th</sup> June 2021.

13. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties’s Advocate filed list of authorities dated 8<sup>th</sup> June 2021.

### **ANALYSIS AND DETERMINATION.**

14. I have perused and considered averments herein and the submissions by the parties in respect of various positions.

15. The 2<sup>nd</sup> and 3<sup>rd</sup> interested party have insisted that this matter is subjudice as the matter in issue are also directly and substantially in issue in a previously instituted matter at Milimani being Milimani High Court JR No. E1151 of 2020. On the other hand, the applicants contend that the two suits are different as Nairobi JR.1151 of 2020, seeks to establish the constitutionality of the 1<sup>st</sup> Respondent letters dated 27<sup>th</sup> February 2020 and 23<sup>rd</sup> March 2020 while Nakuru Petition No.E012 of 2021 seeks to quash the 1<sup>st</sup> Respondent directives vide letter dated 23<sup>rd</sup> March 2021 to arrest, charge and prosecute the applicants and the 1<sup>st</sup> Interested party.

16. According to **Black Law Dictionary 9<sup>th</sup> Edition**, *sub judice* is defined as follows:-

**“before a court for determination.....”**

17. The sub-judice rule prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same as the previously instituted suit between the same parties pending before the same or another court with jurisdiction to determine it.

18. **Section 6 of the Civil Procedure Act** defines *sub- judice* as follows:-

**"..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim to litigate under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed."**

19. From the record herein, I note that the applicants herein are seeking conservatory orders for fear of arrest and/ or prosecution of the applicants in respect to LR **Solai Ndungiri Block 9/1**. In Nairobi JR Nairobi JR.1151 of 2020, the applicants are challenging the constitutionality of the 1<sup>st</sup> Respondent letters dated 27<sup>th</sup> February 2020 and 23<sup>rd</sup> March 2020.

20. The dispute leading to the issuance of 2<sup>nd</sup> respondents letters both in this suit and Nairobi suit arise from property LR Solai Ndungiri Block 9/1, The letters in the Nairobi suit and this suit direct the arrest, charge, and prosecution of the applicants. The parties in both suits are the same. Apart from the difference in the date of the letters, the purpose of the letters and the land in question and parties involved are the same. There is no doubt that these two suits are substantially similar and decision in one will substantially affect the other; determination of one suit will render the other spent. From the reading of **Section 6 of the Civil Procedure Act** quoted above, there is no doubt that this suit cannot proceed at the same time with the Nairobi matter as issues are substantially the same between the same parties and the two courts have jurisdiction to grant reliefs sought.

21. From the foregoing, I find this matter is substantially similar to Nairobi JR 1151 of 2020. The Nairobi matter was filed earlier and there was no reason for the parties herein to file this suit while the other is still pending. The preliminary objection is merited and is upheld. The application dated 27<sup>th</sup> May 2021 is hereby dismissed.

## **22. FINAL ORDERS**

- 1. Preliminary objection dated 14<sup>th</sup> June 2021 is hereby upheld.**
- 2. Application dated 27<sup>th</sup> May 2021 is dismissed.**
- 3. Costs to the respondents and the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.**

**RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 28<sup>TH</sup> DAY OF OCTOBER, 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Ms.Odongo holding for Danstan & Shadrack Wambu for petitioners/Applicants

Mr.Muthanwa holding for Aduda for 2<sup>nd</sup> & 3<sup>rd</sup> interested parties