



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CONSTITUTIONAL PETITION 29 OF 2019**

**IN THE MATTER OF:- THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF:- THE SUPERVISORY, ENFORCEMENT AND INTERPRETATION OF THE BASIC AND FUNDAMENTAL RIGHTS & FREEDOMS ENSHRINED UNDER THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF:- ARTICLES 1, 2, 3 (1), 10, 19(1), 20(1), 21(1), 22(1), 23(1), 27, 40, 43,**

**47, 48, 50, 156(6), 159(6), 166(2c) 259 & 260 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF:- THE INTERPRETATION AND GENERAL PROVISIONS ACT CAP 1,**

**THE JUDICATURE ACT CAP 8; THE OATHS AND STATUTORY DECLARATION ACT CAP 15,**

**THE ADVOCATES ACT CAP 16; THE CIVIL PROCEDURE ACT CAP 21; THE LAW OF LIMITATION OF ACTIONS ACT CAP 22, THE REGISTRATION OF TITLES ACT 280, THE REGISTERED LAND ACT CAP 300;**

**THE EVIDENCE ACT CAP 80; THE COMPANIES ACT CAP 486 THE PREVENTION OF ORGANISED**

**CRIMES ACT 2003; THE JUDICIAL SERVICES ACT 2010.**

**IN THE MATTER OF:- NAIROBI HCCC 935/2001; NAKURU HIGH COURT SUCC 211/2008;**

**NAKURU HIGH COURT ELC 43/2013; NAIROBI COURT OF APPEAL CIVIL APPEAL 404/2017;**

**NAKURU COURT OF APPEAL CIVIL APPLICATION 38/2018; NAKURU CHIEF MAGISTRATE'S COURT**

**CMCR 1487/2009 AND NAKURU COURT OF APPEAL CRIMINAL APPEAL CA 39/2019**

**EDWARD KINGS ONYANCHA MAINA.....PETITIONER**

**VERSUS**

**REGISTRAR OF LANDS NAKURU COUNTY.....1<sup>ST</sup> RESPONDENT**

**JUMAA FARM COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**FRANCIS KAMAU NJUGUNA.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

What is before me is the Ex-parte Notice of Motion dated 30 December 2019 and filed on 13<sup>th</sup> January, 2020 under certificate of urgency of the applicant Edward Kings Onyancha Maina. The Notice of Motion is brought under **Sections 1A, 1b, 3A, 80 & 100 of the Civil Procedure Act Chapter 21 and all the enabling laws, Articles 1, 2 3 (1), 10, 22, 27, 40, 47, 48, 50 & 260 of the Constitution of Kenya**

**2010 and all applicable relevant enabling statutes**, and is supported by the applicants affidavit sworn on the same date.

The application was provoked by the orders made on 13<sup>th</sup> December 2019 with regard to the applicant's application Notice of Motion dated 5<sup>th</sup> December 2019 and filed on 13<sup>th</sup> December, 2019 seeking orders;

***"01.0. THAT the instant application be certified urgent upon doing away with service in the first instance whereupon an inter parties date be given by the Honourable Trial Court itself.***

***01.0 THAT pending the determination of the annexed petition an injunction do issue against the execution of the judgment on 19.02.2003 and all consequential orders issued in Nairobi HCCC 935/2001 now Nakuru High Court ELC 152/2018.***

***02.0 THAT pending the determination of the annexed petition an order do issue restituting the status quo in the said same suit land parcel LR 10581 (IR 18437) ante the impugned and repugnant judgment on 19.02.2003 in Nairobi HCCC 935/2001 now Nakuru High Court ELC 152/2018 and the impugned and repugnant judgment given on 21.09.2017 in Nakuru High Court ELC 43/2013.***

***03.0 THAT pending the determination of the annexed petition an order to issue compelling the 1<sup>st</sup> respondent enjoined by the 3<sup>rd</sup> respondent to furnish and filed into court all the new 411 individual Green Cards issued in the subdivision and/or alienation of the suit land parcel LR 10581 under Solai/Ndungiri Block 9/nn for further court orders.***

***04.0 THAT pending the determination of the annexed petition an injunction do issue against the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent refraining them jointly and severally howsoever known, from any further alienation howsoever at all any of the suit land parcel LR 10581 under Solai/Ndungiri Block 9/nn known as the new 411 individual title deeds in the said same suit land parcel LR 10581 (ir 19437) issued by the 1<sup>st</sup> respondent to the 3<sup>rd</sup> respondent.***

***9. THAT the Nakuru County District Commissioner and the Nakuru County Police Commander sustain and maintain civil orders within the suit Land Parcel LR 10582 (IR 18437) ante the judgment on 19.02.2003 in Nairobi HCCC 935/2001 now Nakuru High Court ELC 152/2018.***

***10. THAT the annexed petition be determined by a bench of three Judges to be named by His Lordship the Chief Justice.***

***11. THAT the costs incidental of this application abide in the petition.***

Upon perusal of the application, I noted that it made reference to matters that had been determined by the Environment and Land Court and that it was only appropriate that the same be dealt with by the court with that jurisdiction. The applicant was dissatisfied with my orders and brought this. He seeks orders:

***"01.0 THAT the Honourable Trial Court do certify this Notice of Motion Application as urgent and give an urgent inter parties hearing date in the first instance.***

***02.0 THAT the Honourable Trial Court do recall the ruling made on 13.12.2019 for purposes to rectify, set aside, rescind, vacate, nullify and void ab initio the subject same ruling given on 13.12.2019 forthwith.***

***03.0 THAT the Honourable Court do direct that this file be placed before the Nakuru High Court Constitutional Division for the determination and disposal of the Notice of Motion Application dated on 05.12.209 filed into Court on 13.12.2019.***

***04.0 THAT the costs incidental to incidental to instant application abide in the cause."***

The main ground for this application is stated as:

***"the matter is a constitutional petition seeking to enforce the rights and freedoms denied under the numerous court files cited in the face of the court record... [the] file contains constitutional matters to be determined in the Nakuru High Court decision .... [because] the litigant has no intention to litigate the matter in the Nakuru High Court Environmental (sic) Land Court Division... [which] lacks jurisdiction over constitutional matters contained in the Notice of Motion application and its petition dated 5<sup>th</sup> December 2019".***

The applicant explained further why this matter should not be heard by the Environment and Land Court (ELC);

***"0.80 THAT the annexed petition raises constitutional issues against the individual and different several judgments and/or rulings given on diverse dates in particular the deceitful and fraudulent judgment on 19.02.2003 and the subsequent rulings Nairobi HCCC 935 of 2001 now Nakuru High Court ELC 152 of 2018; the judgment on the entry of Land Parcel LR 10581 as free property of the Estate of the late Njuguna Mwaura Mbogo in Nakuru High Court Succession 211 of 2008 and the Judgment in Nakuru High court ELC 43 of 2013 former Nakuru HCCC 181 of 2008; the ruling in Nairobi Court of Appeal Civil Appeal CA 404 of 2017 and the fate of the Nakuru Court of Appeal Civil Application 38 of 2018 plus the judgment given in Nakuru CMCR 1487/2009 (R vs Jeremiah Mutura Kinyanjui) genesis of Nakuru High Court Criminal Appeal 39/2019 all at the behest of one Nakuru based Advocate Mr. Waiganjo Mwangi and the disputed ownership of land parcel LR 10581 now Solai Ndungiri***

block 9.”

In the Petition the applicant seeks the following orders:

**1. The Declaration order do issue declaring the judgment given 19.02.2003 in Nairobi HCCC 935/2001. Now Nakuru High Court ELC 152/2018 is null and void forthwith ab initio.**

**2. The Declaration order do issue that the entry of suit Land Parcel LR 10581 (IR 18437) as free property in the estate of the late Njuguna Mwaura Mbogo in Nakuru High Court Succ Cause 211/2008 is null and void forthwith ab initio.**

**3. The Declaration order do issue that the judgment given on 21/9/2017 in Nakuru High Court ELC 43/2013 is null and void forthwith ab initio.**

**4. An order of the Honourable Trial Court do issue forthwith compelling the 1<sup>st</sup> respondent to reconstitute the suit Land Parcel LR 10581 (IR 18437) to its legal registration as LR 10581 (IR 18437) and status ante the impugned and repugnant judgment given 19.02.2003 in Nairobi HCCC 935/2001 Now Nakuru High Court ELC 152/2018.**

**5. An order of the Honourable Trial Court do issue forthwith that the costs incidental to this application be granted to the petitioner and payable by the 4<sup>th</sup> Respondent at the higher scale under the applicable relevant statute.**

The issue to be determined is whether this the applicant has established grounds for review of the orders made on 13<sup>th</sup> December 2019. Those orders clearly stated that this court had no jurisdiction to hear and determine the applicant’s petition. **Section 80 of the Civil Procedure Act provides for Review in the following terms:**

*Any person who considers himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

This is read together with **Order 45 Civil Procedure Rules**, which provides for **Application for review of decree or order**

*(1) Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

Has the applicant fulfilled the above requirements?

True, the application was filed without delay.

The applicant argues that there is error on the face of the record, in that this court erroneously found that it had no jurisdiction to hear the matter. Was that an error?

I find refuge in the Court of Appeal case of **Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR** where the court stated on jurisdiction;

**“However, it is a basic principle in the administration of justice that once an adjudicating body finds that it has no jurisdiction to entertain a given matter, then it must there and then down its tools and proceed no more to the other parts of that matter. See the case of Rafiki Enterprises Limited versus Kings Way Tyres and Gatumart Limited Nai Civil Application No.375 of 1996 (UR) wherein this Court held inter alia that:- “Every court has a duty to determine whether or not it has jurisdiction in a particular matter...”**

That is what I did.

The applicant did not file any authorities to dispute this position, except arguing that he had no intention to litigate any matters before the ELC.

In making the brief ruling I was responding to the question whether this court has jurisdiction to review the decisions of the ELC court cited in the application and petition, and make the declarations sought by the applicant?

My view is that the issue of the jurisdiction of the courts of equal status vis a vis the High Court regarding constitutional issues is settled.

In the same, case of **Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR** the Court of Appeal agreed with the learned judge that;

***“...the claim placed before her by the appellant was based on employment – a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference”.***

This was because

***“the drafting , tenor and substance of the reference before her was essentially for breach of terms of employment...”***

Hence the appellant ought to have gone to the Industrial Court, despite the fact that the petitioner cited several Articles of the Constitution and seeking declaratory orders.

In this case the issues the applicant is dealing with emanate from proceedings that took place in the ELC court cases no. 152/2018 and 43/2013 which are related to a property he describes as ***‘Land Parcel LR 105 81 now Solai Ndungiri Block 9’***. That just points to the fact that it is a matter for that court.

The applicant seeks declarations that certain judgments in those cases as “null and void ab initio”. This court has no supervisory jurisdiction over that court and is being invited to violate the same Constitution on which the applicant stands to bring his Petition.

The Court of Appeal made this clear when it stated in the ***Mugendi*** case above that the Environment and Labour Relations (ELRC) has jurisdiction to hear and determine any constitutional issues that arise within the Environment and Land matters before that court;

***“In the same token, we venture to put forth the position that as we have concluded that, the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court when dealing with disputes involving environment and land, with any claims of breaches of fundamental rights associated with the two subjects”.*** (Emphasis mine)

I need not say more.

The applicant also cites for challenge rulings in **Nairobi Court of Appeal CA 404 of 2017, Nakuru CA Civil application 38/2018**. The applicant must be aware of the hierarchy of courts and must know without a doubt that this court cannot sit in review, or whatever manner over a Court of Appeal decision. The rules of precedent do not allow that. He knows he ought to go before the same Judges, or the next court in the hierarchy.

For the foregoing reasons I am satisfied that the decision I made on the 13<sup>th</sup> December, 2019 was not erroneous on its face to warrant a review as sought by the applicant.

I reiterate that I have no jurisdiction to declare the decision of a court of equal status ‘null and void’. Any breaches to the fundamental rights of the applicant, that may have been occasioned to him through that court’s decision will be righted by that Court or a Court of higher status.

The application dated 30<sup>th</sup> December 2019 is therefore not merited and is denied.

**Dated, delivered and signed at Nakuru this 20<sup>th</sup> day of February 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of

CA Edna

The Applicant