



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION 8A OF 2012

FREDRICK MANOAH EGUNZA.....PETITIONER

AND

GERALD MUUO MUTISO.....1st RESPONDENT

THE PRINCIPAL MAGISTRATES

COURT AT KAPSABET.....2nd RESPONDENT

JOSEPH KIPTANUI KALYA.....3rd RESPONDENT

THE HON. ATTORNEY GENERAL.....4th RESPONDENT

JUDGMENT

1. The petition dated 7th August 2012 is seeking the following orders

a) A declaration that the 1st respondent (**GERALD MUUO MUTISO**) is unfit to hold office on the nature of **THE PRINCIPAL MAGISTRATES COURT AT KAPSABET** (the second respondent) and/or otherwise that the proceedings carried out in **Civil Case Number 11 of 2010 – Joseph Kiptanui Kalya v Fredrick Manoah Egunza** are a nullity.

b) A declaration that the forceful takeover of the unit of the **New Holland Tractor reg no. KAN 611K** is illegal, null and void and further, the petitioner be restituted of his title deed to **LR No. NANDI/KAPKANGANI/102**

c) A declaration that the petitioners right to the said properties mentioned herein above is constitutionally guaranteed and the property cannot be taken away without being heard and that the 1st respondent is not a mercenary for hire by the 3rd respondent so as to abuse the office of the 2nd respondent.

d) Preservatory and conservatory orders restraining the 1st to 4th Respondents from proceeding with Civil Case Number 11 of 2010, the petitioners' property **New Holland Tractor reg no. KAN 611K and to LR No. NANDI/KAPKANGANI/102**.

e) Punitive and aggravated damages of a sufficient amount to punish the 1st and 3rd respondents for breaching the constitutional rights to a fair trial.

f) Costs.

PETITIONERS' CASE

The court directed that the matter be canvassed by way of written submissions, and although Mr. Mogambi said he had filed submissions but there are none on record for the petitioner.

2. In an affidavit sworn by the petitioner, he deposes that he was arrested by persons claiming to be police in the county of Busia. He was placed in custody in Mumias and was served with a Chamber Summons dated 20th January 2010. After spending the night there he was transferred to Kapsabet, and produced before the 1st respondent on **24th January 2010 in Civil Case no. 11 of 2010** where orders were issued that he was a civil debtor, without him being granted audience. He was sent to prison via committal warrants dated 25th January 2010. It is only after he deposited his title deed that he was granted freedom. The case involved a dispute over the tractor which had been sold to

JOSEPH KIPTANUI KALYA (the 3rd respondent) who had returned it to the petitioner after renegeing on the original terms and conditions. He then sued the petitioner and colluded with the 1st respondent.

3. It is his contention that the 1st respondent exceeded his jurisdiction by ordering him to deposit an amount that is above what is mandated to him, kshs. 1,500,000/-. He was produced before the 1st respondent to show cause why he could not produce security for kshs. 1,500,000/-. It was impossible for him to produce a tractor that was under guard having been impounded by the respondent.

RESPONDENT'S CASE

4. In a replying affidavit, the 3rd respondent deposes that the petitioner is not being truthful regarding the tractor transaction, and is the author of his own problems. He is described as a perennial litigant who has pursued that issue in several cases which are yet to be determined by the courts. That he does not respect the courts and the judicial officers, and is given to using improper and demeaning language against them

5. The 2nd and 4th respondents filed their submissions on 20th May 2019 where they argue that the issue of whether the 1st respondent is fit to hold public office was properly raised before the Judges and Magistrates vetting board and is therefore overtaken by events and a decision was made on 14th July 2014. The court does not have jurisdiction to determine this issue as the jurisdiction to ascertain his suitability as a judicial officer lies with the **Judges and Magistrates Vetting Board**.

6. That the 2nd prayer cannot be granted as the petitioner has not proved that the properties belong to him. Further, the issue of the ownership of the properties is the subject in pending suits including **Kapsabet Civil Case 11 of 2010, Busia Civil Suit 248 of 2012, Eldoret Civil Appeal No. 137 of 2010 and Eldoret Judicial Review Number 8 of 2010**, and the only avenue available is the petitioner to pursue all the cases to conclusion.

7. It is pointed out that the determination as to the ownership of the properties has not been made, (a fact well known to the petitioner) therefore it is misleading of him to state that his property has been taken away without being heard, as his ownership can only be ascertained through the pending cases. This therefore makes the third prayer impossible to grant.

8. That the 4th prayer can only be granted in civil cases and not in this forum, and in any event there is a valid court order granting the 3rd respondent the tractor, thus the only available avenue to the petitioner, is to have the order set aside or file an appeal. As regards the prayer for general damages, it is submitted that there is no evidence to support it. Further, the petition does not meet the threshold set for constitutional petitions therefore prayer on costs cannot be granted.

9. That since the gist of the petition is the conduct of the 1st respondent and having been struck out of the suit there is nothing substantive remaining to be determined. Further, that the Magistrates Vetting board having found that the 1st respondent was fit to hold office then it goes without saying that the actions taken were well within the law. This court is referred to a decision of the **Judges and Magistrates Vetting Board** dated 14th July 2014 which in effect renders the petition herein an academic exercise.

10. As for the 2nd and 4th respondents herein it is submitted that there were no specific allegations pleaded against them, thus there is no cause of action to be sustained.

ISSUES FOR DETERMINATION

- a) Whether the 1st respondent is unfit to hold office
- b) Whether the takeover of the New Holland Tractor was a nullity
- c) Whether the petitioner's property was taken away without a right to be heard
- d) Whether he is entitled to conservatory orders
- e) Whether the petitioner is entitled to the damages sought

WHETHER THE 1ST RESPONDENT IS UNFIT TO HOLD OFFICE

11. I think I do not need to delve much on this issue as the 1st respondent was struck out of the suit and therefore this prayer is overtaken by events.

WHETHER THE TAKEOVER OF THE NEW HOLLAND TRACTOR WAS A NULLITY

12. The petitioner did not provide any evidence that the said property belonged to him. It is therefore not possible to declare that property he has not proven to have been his, was illegally taken from him.

WHETHER THE PETITIONER'S PROPERTY WAS TAKEN AWAY WITHOUT AN OPPORTUNITY TO BE HEARD.

13. The determination as to the ownership of the property has not been made as the disputes in court over the same are still pending. I am in

agreement with the respondents that the ownership can only be ascertained vide the civil cases and not through this petition.

WHETHER THE PETITIONER IS ENTITLED TO CONSERVATORY ORDERS.

14. There is an order in effect that gave the tractor to one of the respondents and the same has not been appealed against or set aside. For the petitioner to attempt to interfere with the said order is in my view an abuse of the court process. The conservatory orders would result in interfering with the court orders and I decline to grant the prayer

WHETHER THE PETITIONER IS ENTITLED TO DAMAGES SOUGHT

15. The petitioner sought general damages, yet he has not provided any proof that he should be awarded any damages. The gist of the petition was the conduct of the 1st respondent. The petitioner did not seek orders against the other respondents. It follows that the cause of action does not arise against the respondents. In the premises the petition fails in its entirety and is dismissed with costs to the respondents.

Delivered and dated this 29 day of May 2020 at Eldoret

H.A. OMONDI

JUDGE