



**REPUBLIC OF KENYA**

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

**PETITION NO. 29 OF 2017**

**(FORMERLY NAIROBI PETITION NO. 368 OF 2017)**

**JACKSON KAMAU NDEGWA.....PETITIONER**

**VERSUS**

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

**HON. SRM. J.N. NTHUKU.....2<sup>ND</sup> RESPONDENT**

**JAPHETH MWIRICHIA – D/OCPD.....3<sup>RD</sup> RESPONDENT**

**DANIEL NYATIKE – LAND REGISTRAR**

**NAKURU DISTRICT.....4<sup>TH</sup> RESPONDENT**

**MERCY MAKENA.....5<sup>TH</sup> RESPONDENT**

**VIJAY SHAH .....6<sup>TH</sup> RESPONDENT**

**SOPHIA MBURU.....7<sup>TH</sup> RESPONDENT**

**MUHATIA PAUL AUCTIONEERS.....8<sup>TH</sup> RESPONDENT**

**RULING**

1. This Petition was initially filed in the High Court Nairobi by the Petitioner under a Certificate of Urgency dated 7/7/2017. It was transferred to the High Court Nakuru as the subject touched on proceedings before the Chief Magistrate's Court in Nakuru.

2. The Petitioner seeks a raft of declaratory and orders which I reproduced verbatim herein below.

*(a) A DECLARATION that the Petitioner's right to human dignity as provided for by Article 28 of the Constitution has been, is being and is likely to be contravened by the Trial Court SRM JN Nthuku who have failed/ignored to observe dispensation and administration of equity, fairness and justice by declaring Petitioner has a case to answer while the complainant has disowned him contrary to Section 210 of the Penal Code.*

*(b) A DECLARATION that the manner - Trial Court SRM AK Mwichigi (Mr.) in Nairobi Children's Case No. 148/2004 illegally alienated the suit parcel land Nakuru Municipality/Block 12/223 to Mercy Makena Chweya instead of the advertised one Nakuru Municipality/Block 12/123 without jurisdiction and paid off the entire sale sum of Kshs.5million instead of the decreed sum of Kshs.500,000 contravening the Petitioner's right to human dignity as provided for by the Article 29 (a), (c), (f) of the Constitution which has been, and is being contravened by the said trial court decision to date.*

*(c) A DECLARATION that the manner in which the suit Parcel Land Nakuru Municipality/Block 12/223 was alienated to Vijah from Mercy Makena CONTRARY to the court injunction contravenes the Petitioner's right to human dignity as provided for by the Article 40 (2 (a),(b), 3(b), 4 of the Constitution which has been, and is being contravened by the D/OCP Japheth Mwirichia and Mercy Makena continued holding stolen household goods worth over Kshs.3million and continued forceful occupation by Vijay Shah.*

*(d) The Nakuru Chief Magistrate's court Criminal Case CMCR 1130/2013 be terminated against me/Petitioner with an acquittal under Section 210 of the Penal Code and the cash bail returned forthwith.*

*(e) D/OCPD Japheth Mwirichia, Mercy Makena enjoined by auctioneer Muhatia, Daniel Nyatike and Vijay Shah pay compensation for loss of user of the suit property by the Petitioner calculated at the monthly rent amount of Kshs.212,000 plus accrued interest at compound annuity rate of 21% p.a. thereon w.e.f. material time on 14.5.2013 of illegal and unlawful forceful trespass occupation and alienation unto Mercy Makena and thereafter to Vijay Shah.*

*(f) Vijay Shah be ordered to vacate and render in vacant possession under the quiet occupation and possession of this Petitioner forthwith the suit property land parcel registration Nakuru Municipality/Block 12/223 in good repair and habitable status acceptable to the Petitioner.*

*(g) An order to Daniel Nyatike Nakuru Land Registrar to effect the restitution of suit property Nakuru Municipality/Block 12/223 back unto to Jackson Kamau Ndegwawa PO Box 1130-20100 Nairobi ID/No. 6633017 and conveyance cost to be borne by Mercy Makena.*

*(h) An order requiring SRM AK Mwicigi (Mr.) to refund to the Nairobi Children's court case file no. 148/2004 Kshs.4.5million illegally paid out by himself.*

*(i) An order be made to D/OCPD and Mercy Makena to return back the household goods worth over kshs.3million they took/stole form Nakuru Municipality/Block 12/223 in the same sate they were in then.*

*(j) The auction sale held by Muhatia Pala auctioneers on 14.4.2011 be nullified and voided ab initio.*

*(k) An order cancelling the auctioneering to Muhatia Pala Auctioneers for gross misconduct as a court officer.*

*(l) The Hon. Court to issue all such other orders as shall deem just.*

*(m) The Respondents be condemned with the costs of this Petition at the higher cost."*

3. Along with the Petition, the Petitioner filed a Notice of Motion dated 7/7/2017 seeking an array of orders principally aimed at staying proceedings in the Nakuru Chief Magistrate's Court Criminal Case No. 1130/2013; an injunction against the 6<sup>th</sup> Respondent from entering Nakuru Municipal/Block/2/223; an order to compel the 5<sup>th</sup> and 8<sup>th</sup> Respondents to return the Petitioner's goods; a nullification of the auction and sale held on 15/4/2011 by the 8<sup>th</sup> Respondent and committal of the 5<sup>th</sup>, 6<sup>th</sup> and 3<sup>rd</sup> Respondents for contempt of court.

4. The parties took directions to respond to the Petition. The main prayer in the application was the recusal of the Magistrate (Hon. Nthuku) from the Criminal Case No. 1130/2013 and stay of the proceedings in the matter. During the pendency of the application however Hon. Nthuku was transferred from the station. The prayer for recusal was however overtaken by events and consequently the court directed the parties to proceed with the substantive Petition.

5. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents were represented by Mr. Ondieki for the Attorney General in the proceedings. They filed Grounds of Opposition dated 5/9/2017. They state *inter-alia* that the Petition and application does not disclose particulars in support of the alleged violation of the Constitution to enable the court grant the reliefs sought. That the Petition and application are general, speculative and do not disclose a real dispute capable of resolution by the court and as such are scandalous frivolous, vexatious and the abuse of the court process.

6. The 6<sup>th</sup> Respondent filed a Replying Affidavit sworn by himself on 12/10/2017. He states that the issues raised in the Petition against the 6<sup>th</sup> Respondent were before another court in ELC No. 359 of 2013 and that the reliefs being sought by the Petitioner against the 6<sup>th</sup> Respondent were the same. On the allegations made against him in the Petition, the 6<sup>th</sup> Respondent stated that he was a *bona fide* purchaser for value of LR No. Nakuru/Municipality Block 12/223 which he bought from the 5<sup>th</sup> Respondent.

7. The 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents did not respond to the Petition.

8. The Petitioner filed a response to the Attorney General's grounds of opposition. In the Response which is worded in fairly strong language he accuses the litigation counsel of purporting not to understand the Petition and turning a blind eye to the wrongs visited on him (the Petitioner) by the Respondents. The Petitioner also filed a response to the 6<sup>th</sup> Respondent's Replying Affidavit. In it he restates his case that the 6<sup>th</sup> Respondent colluded with the 5<sup>th</sup> Respondent to illegally dispose him (the Petitioner) of **LR. Block/2/223** and that the OCPD (6<sup>th</sup> Respondent) facilitated them arresting and detaining him.

9. In his submissions dated 30/11/2017, the Petitioner set out what he considers to be the role each Respondent has played in violating his (the Petitioner's) constitutional rights. According to him the Attorney General has failed to assist the court dispense justice. According to the Petitioner, the 2<sup>nd</sup> Respondent proceeded to conduct **Criminal Case No. 1130** in contempt of court orders in **ELC 359/2013**. The 3<sup>rd</sup> Respondent is alleged to have conspired to steal goods from the Petitioner's house and effected unlawful arrest and detention of the Petitioner. The 4<sup>th</sup> Respondent is alleged to have effected the transfer of the land despite a court order. The 5<sup>th</sup> Respondent is accused of facilitating the transfer from the 5<sup>th</sup> Respondent to the 6<sup>th</sup> Respondent who in turn is alleged to have used his money to unlawfully take possession of the Petitioner's property. The 7<sup>th</sup> Respondent is accused of fraudulently effecting the sale of the said property. The 8<sup>th</sup> Respondent is accused of having conspired with the Trial Magistrate in **Nairobi Children's Court Case No. 148 of 2004** to alienate the Petitioner's matrimonial home.

10. The gist of the 6<sup>th</sup> Respondent's submissions is that the present Petition is an abuse of process of court. According to him the issues raised in the Petition against him were the subject of **ELC No. 359 of 2013** pending before the Environmental and Land Court.

11. I have considered the affidavits and submissions of the parties as aforesaid. The two issues in this Petition are whether the Petition as drafted can be sustained and whether the orders sought are merited.

12. The Petition is brought under numerous Articles of the Constitution including Articles 1, 2, 3(i), 10, 19, 20, 21, 23, 24, 25, 26, 27, 35, 40, 43, 47, 48, 50, 75(3), 76(2), 156(6), 159(2)(b) and (d), 165 and other laws as stated on the face of the Petition. In the case of **Anarita Karimi Njeru -Vs- Republic (1976-1980) EA 14** the Court of Appeal set the principle that constitutional pleadings should have a degree of precision. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the Court of Appeal further stated in respect to the need for clarity of pleadings that:-

*“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court . . . The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution . . . Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”*

13. The present Petition cannot by any standards be said to be concise. Right from the orders sought as reproduced verbatim at page one of this Ruling to the submissions of the Petitioner, it is clear that the Petitioner has a multitude of complaints and claims against the various Respondents individually and severally. The Petitioner has however failed to demonstrate to the court how the Respondents individually and severally have violated the various Articles of the Constitution. In effect the Petitioner has just thrown the Constitution at the court for the court to decipher any violations.

14. Notwithstanding the imprecise nature of the Petition, I have understood the thread of the claims as follows: Firstly, the Petitioner was a party to a dispute in **Nairobi Children's Court Case No. 148/2004**. The particulars of that case have not been disclosed to the court. The Petitioner however makes an allegation that the judicial officer (SRM. AK. Mwigigi) who was handling the case issued irregular orders. If that be the case, then a Constitutional Petition of this nature would not be the right forum for the resolution of such a claim. The right forum would be a review or appeal process as the case might be.

15. Secondly, the Petitioner seeks an order to stay **Criminal Proceedings in CMCR 1130/2013** on account of what he perceives as bias by the Trial Court and violation of his constitutional rights. Whereas this court has power under **Section 362 of the Civil Procedure Code** to call up and examine the record of a lower court, it must do so on a sound basis. The Petitioner has not presented material before this court to warrant the grant of such an order.

16. Thirdly, it has been brought out by both the 6<sup>th</sup> Respondent and the Petitioner that there is in existence an active suit between the Petitioner and the 6<sup>th</sup> Respondent being Nakuru **ELC No. 359 of 2013**. I have looked at the amended Complaint annexed to the 6<sup>th</sup> Respondent's Replying Affidavit. The parties are Jackson Kamau Ndegwa (Plaintiff and now Petitioner); Mercy Makena Chweya (1<sup>st</sup> Defendant and now 5<sup>th</sup> Respondent); District Land Registrar Nakuru (2<sup>nd</sup> Defendant and now 4<sup>th</sup> Respondent); and Vijay Laxmi Shah (3<sup>rd</sup> Defendant and now 6<sup>th</sup> Respondent). The suit is principally on the ownership of **LR Nakuru Municipality Block 12/224**. It is clear that the parties are principally the same and the suit property is the same. **Section 6 of the Civil Procedure Act** automatically bars this court from proceeding with the aspect of the petition with respect of the said land. Furthermore Article 162 of the Constitution vests jurisdiction on land matters exclusively on the Land and Environment Court. I have no doubt in my mind that the Petitioner can raise any constitutional issues in the matter before the Land and Environment Court.

17. What I have said above qualifies this Petition for striking out.

18. The petition is struck out with no orders to costs.

Orders accordingly.

Ruling signed on this .... day of July, 2018.

**R. LAGAT-KORIR**

**JUDGE**

**Ruling dated, delivered and signed at Nakuru this 26<sup>th</sup> day of September, 2018.**

.....

**JANET MULWA**

**JUDGE**

**In the presence of:**

.....Court clerk

.....For the Petitioner

.....For the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents

.....For the 5<sup>th</sup> Respondent

.....For the 6<sup>th</sup> Respondent

.....For the 7<sup>th</sup> Respondent