



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 23 OF 2014**

**VERONICA SUM.....PETITIONER**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. In her petition dated 17<sup>th</sup> December 2014, the petitioner *Veronica Sum* seeks to enforce the right to housing protected under *Article 43* of the *Constitution of Kenya 2010*. The petitioner contends that the intended realization of land on which her home stands in the exercise of the respondents statutory power of sale during the pendency of an appeal challenging the legality of the intended sale violates her constitutional right to housing which ought to be protected by the court.

2. The petition seeks the following reliefs;

***a). A declaration does issue that the intended sale by the respondent of the applicant's only home prior to a decision on appeal on whether or not the respondent had been fully paid and is thus stopped from demanding for extra money will violate the applicant's right to housing.***

***b). A declaration that the applicant is entitled to protection of this right under the constitution and that the requirement of due process under the constitution will require the respondent to hold off any intended sale pending resolution of the appeal from Eldoret CMCC No. 865 of 2003.***

**THE PETITIONER'S CASE:**

3. The petitioner's case is well captured in her affidavit sworn on 17<sup>th</sup> December 2014 in support of the petition. It is her case that she is the registered proprietor of land known as Eldoret Municipality Block 13/42 (the suit property) on which her home stands; that she charged the suit property to the respondent the *National Bank of Kenya Ltd* to guarantee a loan facility advanced to Sisibo Co-operative Society which subsequently defaulted on the loan payment. As a result of the said default, the respondent threatened to sell the petitioner's land. The petitioner then entered into negotiations with the respondent who agreed that she pays Kshs.1,528,096.60 in full and final settlement of the loan balance; that she paid the sum agreed upon in full in four unequal instalments of Kshs.1,250,000; Kshs.100,000; Kshs.150,000 and Kshs.40,000 in a period of about four years.

4. The petitioner avers that after paying the agreed amount, the respondent in letter dated 29<sup>th</sup> November, 2001 reneged on the agreement claiming that the same had not received approval from the head office. This prompted her to file civil suit No. 865 of 2003 at the Eldoret Chief magistrate's court seeking a declaration that she had fully repaid the loan and that the respondent was estopped from altering its position regarding their agreement and demanding for money beyond what she had already paid.
5. The suit was heard before the lower court after which it was dismissed. The petitioner then filed an appeal to the High Court being HCCA No. 183 of 2011. She also filed an application for stay of execution of the lower court's decision pending the determination of the appeal which was also dismissed by the High Court.
6. The petitioner contends that the respondent subsequently advertised the suit property for sale by public auction on 15<sup>th</sup> January, 2015. It is her case that if the threatened sale proceeded, she would be rendered homeless and this would violate her constitutional right to housing.

### **THE RESPONDENT'S CASE**

7. The respondent opposed the petition through the replying affidavit sworn on its behalf on 19<sup>th</sup> February, 2013 by *Mr. Paul Chelanga*, its remedial manager. *Mr. Chelanga* deposed that the petition offends the legal principles of subjudice and res judicata in that the orders sought in the petition are pending determination in HCCA No. 183 of 2011; that instead of filing this petition, the petitioner should have filed an appeal against the court's decision dated 11<sup>th</sup> November 2014 which dismissed her application seeking to bar the respondent from exercising its statutory power of sale over the suit property.
8. It is the respondent's case that having voluntarily charged her property and converted it into a commodity available for sale in case of default and having severally defaulted on her promises to repay the outstanding loan, the petitioner cannot claim that the respondent's exercise of its statutory powers of sale was an infringement of her right to housing; that the right to housing is not absolute but is subject to limitations under the law specifically the statutory power of sale as provided for under the *Land Act 2012*.
9. The respondent further asserted that the petition does not raise any constitutional issues; that the issues raised in the petition concern purely commercial and contractual claims that should be determined by the court in the exercise of its civil jurisdiction; that by filing the petition, the petitioner was attempting to rewrite a contract voluntarily and lawfully entered into by the parties and that the respondent has not prevented the petitioner from redeeming her property by paying the outstanding loan balance.
10. Finally, the respondent averred that the petitioner has failed to demonstrate how her right to housing or any other right would be violated by the respondent's exercise of its statutory power of sale; that the petition was frivolous, vexatious and an abuse of the court process and that the same should be dismissed.
11. Both parties filed written submissions which they highlighted before me on 3<sup>rd</sup> November, 2015. In the oral submissions, learned counsel *Mr. Manani* represented the petitioner while learned counsel *Mr. Langat* appeared for the respondent.

I will now briefly summarise the positions taken by the parties in their respective submissions.

### **THE PETITIONER'S SUBMISSIONS**

12. It was submitted on behalf of the petitioner that the petition is premised on *Article 43* of the *Constitution* which protects among others the right to housing. While admitting that the

respondents' statutory power of sale provides a limitation on the petitioner's right to housing, the petitioner submitted that this limitation can only apply when the exercise of the power of sale was carried out in good faith and not in bad faith. For this proposition, the petitioner relied on the South African case of **Elsie Gundwana and others V National Consumer Forum CCT 44 of 2010 (2-11) 2ACC 14** which I will comment about later in this judgment.

13. The petitioner further argued that the attempt to sell the suit property after the petitioner had paid the agreed amount on the understanding that it was in full settlement of the loan balance and when her appeal challenging the legality of the intended sale was still pending hearing was an act of bad faith on the respondent's part.
14. In response to the respondent's claim that the petition was subjudice or res judicata, the petitioner submitted that the petition was not subjudice or resjudicata. Learned counsel *Mr. Manani* submitted that the petition raises a constitutional issue on the right to housing which was not the subject of litigation in the magistrate's court nor was it a question for determination in the pending civil appeal; that what was before the lower court was a commercial dispute while what was before this court was a constitutional dispute.
15. When addressing the respondents apprehension that the existence of the petition and the civil appeal might embarrass the court if the two courts reached different findings on the same subject matter, counsel contended that there was no possibility of this court and the appellate court rendering conflicting decisions because in his view, the issues raised in the petition cannot arise in the appeal since they never arose in the court of first instance and that in any event, the petitioner cannot convert an appeal into a constitutional petition.

## **RESPONDENTS SUBMISSIONS**

16. The respondent kicked off its submissions by asserting that the petition does not raise any constitutional issues; that the right to housing under *Article 43* of the constitution is not absolute and can be limited as it is not one of the rights protected under *Article 25* of the *Constitution* which cannot be limited; that in exercising its statutory power of sale over the suit property, the respondent was operating within the law namely the *Registered Land Act* (now repealed) and the *Land Act 2012* which have not been declared unconstitutional and therefore, the respondent's action cannot amount to a violation of the petitioner's right to housing.
17. The respondent further submitted that in willingly pledging the suit property as security for a loan, the petitioner turned the property into a commodity with a value which could be placed in the market for sale; that the petitioner cannot then turn around and claim a constitutional right with regard to such a property. For this proposition, the respondent relied on the authority of **Andrew Muriuki Wanjohi V Equity building society Limited & 2 others (2006) eKLR** where the court held that wherever an applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold.
18. In addition, the respondent contended that the petition is subjudice in view of the pendency of Eldoret Civil Appeal No. 183 of 2011 which involves the same parties and whose subject matter is the suit property and the charge created over it. The respondent placed reliance on *Section 6* of the *Civil Procedure Act* and the case of **Gimalu Estates Limited & Another V International Finance Corporation & Another (2007) eKLR** in support of its submission that the instant petition, just like the suit filed in the magistrate's court and the appeal pending in the High Court was filed with the sole objective of frustrating the respondent from realizing the security charged to it.
19. With regard to the claim that the petition was resjudicata, the respondent submitted that since the prayers in the petition principally seek orders to stop the intended sale of the suit property pending the determination of the appeal in Eldoret Civil Appeal No. 183 of 2011, the petition was resjudicata as the same orders had been sought in an application dated 27<sup>th</sup> September, 2012 which this court (Hon. G.W Ngenye Macharia J) dismissed with costs in a ruling delivered on 11<sup>th</sup>

November, 2014; that this court having pronounced itself on the orders sought in the petition should not make a second determination on the same prayers since it is not the Court of Appeal; that if the petitioner was dissatisfied with the decision of Hon. Ngenye J, she should have filed an appeal to the Court of Appeal.

20. Lastly, the respondent submitted that the petition is an abuse of the court process in view of the pending appeal and that to avoid the possibility of the two courts making conflicting decisions on the same set of facts, the petitioner's grievances should be fully canvassed and determined in the appeal.

## **DETERMINATION**

21. After considering the pleadings, the rival submissions both written and oral made by learned counsel *Mr. Manani* for the petitioner and *Mr. Langat* for the respondent and all the authorities cited, I find that the main issue that arises for determination is whether the petition raises any constitutional issue regarding the right to housing or whether it is an abuse of the process of the court. The other secondary issue that the court is called upon to determine is whether the petition is subjudice or res judicata.

22. The right to housing falls under the constitutional rights which are referred to as economic and social rights. The right is protected under *Article 43(1) (b)* of the *Constitution* which provides that;

***“Every person has the right –***

a. ....

b. ***“to accessible and adequate housing, and to reasonable standards of sanitation”.***

23. Generally speaking, in order for a petitioner to succeed in any constitutional petition, the law requires that he or she must demonstrate that the constitutional rights subject matter of the petition have actually been denied or violated or are threatened with denial or violation.

24. In this case, it is not disputed that the petition arises from a commercial dispute between the parties. As stated earlier the petitioner had used the land on which her home stands as security to guarantee a loan facility given by the respondent to Sisibo Co-operative Society. When the society defaulted, the petitioner and the respondent entered into an agreement on how much money would be paid in full and final settlement of the amount owed. After the petitioner paid the money in about four years although the agreement stipulated that the amount was to be paid immediately, the respondent changed its position and demanded payment of more money. This is what prompted the petitioner to sue the respondent in Eldoret CMCC 865 of 2003 claiming that the respondent was estopped from demanding any more money. The same argument is being advanced by the petitioner in this petition as a basis for her contention that the attempt to sell the suit property in the exercise of the respondent's statutory power of sale was made in bad faith and was a threat to her right to housing.

25. In view of the foregoing, I have no doubt in my mind that the petition is premised on a claim based on a commercial contract freely executed by both parties. This is why the petitioner initially approached the lower court and filed her claim as a commercial dispute. It is therefore clear beyond any peradventure that the petitioner's claim falls squarely in the realm of private law. The *Land Act 2012* which is one of the statutes that replaced the *Registered Land Act* provides remedies to both the chargee and the chargor in the event that either of the parties defaulted in their contractual obligations.

26. There is a host of authorities that elucidate the principle that private law claims should not form the basis of constitutional petitions and should be resolved by using the usual process of civil

litigation. In *Benjoh Amalgamated Limited & Another V Kenya Commercial Bank Limited (2007) eKLR*, this court (Hon. Emukule J) held that **“where a petitioner has entered into a tenancy, or a lease, a mortgage or charge, bill of sale, pledge or contract, any dispute arising out of those incidents are disputes of a private and commercial nature and give rise to claims in private law and are not inconsistent with the petitioners right to own property...”**

27. Similarly, in *Uhuru Muigai Kenyatta V Nairobi Star Publications Limited (2013) eKLR* Lenaola J applied the holding in the *Re application by Bahadur (1968) LR C (cost) 297* and held that;

**“where there is remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industires (Supra)* where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction ....”**

In the *Re-application by Bahadur* case (Supra), the court in Trinidad and Tobago held as follows:-

**“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the constitution”**.

I wholly agree with the above propositions of the law.

28. More importantly, it is not the petitioner’s case that the statutory provisions in the *Land Act* which gives a chargee the power of sale over charged property are unconstitutional. I agree with Muriithi J when he stated in *Leonard Jefwa Inalama & Another V Consolidated Bank of Kenya & 3 others (2014) eKLR* that **“unless it can be shown that the law itself is against the constitution, the sale of charged property in accordance with due process of that law cannot be held to be an unconstitutional deprivation of property within Article 40 of the Constitution. This is because the constitution has as one of its principles of governance and national values under Article 10 the doctrine of the rule of law...”**

In my view, the same position applies not only to the right to property protected under *Article 40* of the *Constitution* but to all other constitutional rights including the right to housing.

29. To conclude this aspect of the matter, I wish to borrow and fully adopt the words of Hon. Emukule J in *Maggie Mwauki Mtaleki V Housing Finance Company of Kenya Ltd (2015) eKLR* who, when confronted by a near similar set of facts as those in this petition held as follows;

**“Secondly and this is of paramount importance to litigants and counsel, the constitution is not to be used as a general substitute for litigating ordinary civil disputes. The petition herein is disguised as a constitutional petition for the redress of violation of fundamental rights when it is infact on ordinary civil dispute elevated into a constitutional issue. There is no single constitutional issue raised in the petition. The question of social-economic right of housing and sanitation is a smokescreen for denial of contractual liability and is therefore both misconceived and misguided as argued by the Respondent....”**

I cannot put it any better than the Hon. Judge did and I have nothing useful to add.

30. That said, I must state at this juncture that while I fully appreciate that the petitioner had a right under *Article 22* of the *Constitution* to institute court proceedings claiming that her rights under the Bill of rights including the right to adequate housing was threatened with violation and much as I appreciate the weight of the matters raised in the petition, the circumstances surrounding its institution coupled with the prayers in the petition leaves me with the distinct impression that the

petition was not filed in good faith. I say so because as indicated earlier, the petitioner had filed a civil suit in the lower court on the same facts which was dismissed. She then filed an appeal to the High Court against the decision of the lower court. It is not contested that the said appeal has not been heard to date.

31. It is also not contested that the petitioner filed an application dated 27<sup>th</sup> September, 2012 in which she sought inter alia orders of injunction to restrain the respondent from realizing the suit property before the appeal was heard and determined which application was dismissed by this court on 11<sup>th</sup> November, 2014.
32. Instead of pursuing her appeal to its logical conclusion, the petitioner proceeded to institute the instant petition raising essentially the same issues that were properly before the court in the pending appeal. It is noteworthy that the appeal was filed in November 2011 and by the time the petition was filed about three years later, the petitioner had not done anything to progress the hearing of the appeal. A close look at the prayers sought in the petition reveals that they in effect seek to stop the respondent from selling the suit property before the resolution of the appeal which is one of the prayers that were sought and dismissed in the application dated 27<sup>th</sup> September 2012.
33. As correctly pointed out by the respondent, if the petitioner was dissatisfied with the court's ruling, the correct approach would have been to file an appeal to the court of appeal against the court's decision. In my considered view, the petitioner's action of revisiting prayers similar to those that had earlier been dismissed by this court disguised as a constitutional petition for the redress of a threatened right to housing and in seeking to maintain two parallel cases over the same subject matter that is, the civil appeal and the petition amounts to an abuse of the process of the court.
34. Having come to the conclusion as I have that the instant petition does not raise any constitutional issue and that it is an abuse of the court process, I do not think that it is necessary or useful for me to consider the other secondary issues raised in the petition.
35. In conclusion, I wish to state that I have read the South African decision in *Elsie Gundwana V Steko Development CC & others (Supra)* which was relied on by the petitioner. I find that the facts supporting the petition in that case are totally different from the facts in the instant petition. The South African law required a mortgagor to obtain the court's sanction before selling mortgaged property in case of default which is different from the law in Kenya. The petition in the *Elsie Gundwana* case was filed after the petitioner's house was sold to the 1<sup>st</sup> Respondent in execution of a default judgment and after the 1<sup>st</sup> Respondent had obtained an eviction order to evict the petitioner from her home. The truth of the matter is that the facts and circumstances in the instant petition are entirely different from those in that other petition. I am thus not persuaded by *Mr. Manani's* submission that the authority would have offered guidance to this court in the adjudication of this petition.
36. For all the foregoing reasons, I do not find any merit in the petition. It is accordingly dismissed with costs to the respondent.

It is so ordered.

**C.W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED** at **ELDORET** this 31st day of May, 2016

In the presence of:-

Miss Ndambuki holding brief for Mr. Langat for the Respondent

No appearance for the petitioner

Naomi Chonde –Court clerk