



NO.2028

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO.29 OF 2013

IN THE MATTER OF ARTICLES 2, 22, 23,40, 42 AND 70 OF THE CONSTITUTION

AND

IN THE MATTER OF LAND PARCEL NO. NORTH MUGIRANGO/IKONGE/838

AND

IN THE MATTER OF THE LAND REGISTRAR NYAMIRA DISTRICT

AND

IN THE MATTER OF THE ESTATE OF OGECHI OKERIO (DECEASED)

AND

IN THE MATTER OF SUCCESSION ACT LAWS OF KENYA

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 2, 40, 42 & 70 OF THE
CONSTITUTION**

AND

IN THE MATTER OF PUBLIC HEALTH LAWS AND OTHER RELEVANT LAWS

BETWEEN

DANIEL OCHENGO OENDO PETITIONER

AND

DAVID OKERIO OGECHI 1ST RESPONDENT

NYAMBANE NYANCHONGI 2ND RESPONDENT

DISTRICT LAND REGISTRAR, NYAMIRA 3RD RESPONDENT

RULING

1. The petitioner herein filed a petition on the 17th October 2013 which was brought under Articles 2, 22, 23, 40, 42 and 70 of the Constitution seeking orders that:-
 - a. *This honourable court do declare that the 1st respondent unlawfully and illegally obtained registration of land parcel No. North Mugirango/Ikonge/838 contrary to law and he had no title to pass to the 2nd respondent.*
 - b. *This honourable court do make a finding that the 2nd respondent had no good title to land parcel No. North Mugirango/Ikonge/838 having obtained title from the 1st respondent who did not have good title and that the title he presently holds be cancelled and the land do revert to the name of Ogechi Okerio (deceased).*
 - c. *That injunction is appropriate in the circumstances to stop burial of the remains of the wife of the 2nd respondent in land parcel No. North Mugirango/Ikonge/838 pending the hearing of his petition by restraining the 2nd respondent and his agents from burying the body of the deceased on the land.*
2. The petition is opposed. The 2nd respondent has filed grounds of opposition dated 28th October 2013 and a replying affidavit dated the same day whereas the 3rd respondent filed a replying affidavit dated 6th November 2013.
3. In the 2nd respondent's grounds of opposition, he has raised a preliminary objection to the effect that the petitioner lacks the necessary legal capacity to sue. The ruling herein therefore is concerned with the preliminary objection raised by the 2nd respondent.
4. In their oral submissions, Mr. Momanyi Aunga for the 2nd respondent raised two points:- That from the pleadings the petitioner/applicant says he bought the suit land in 1975 and went to Land Control Board in 1982 and yet no registration was done at all until the seller died in 1997. He submits that the 2nd respondent bought the suit land from the 1st respondent and was registered as such in 2007 and he (2nd respondent) has developed it and now the petitioner comes to court seeking cancellation of the title given to the 2nd respondent and the property to revert to the deceased.
5. Mr. Momanyi submitted that the petitioner has no capacity to come to this court. That the mere fact that he bought the land and went to the Land Control Board does not give him capacity to come before this court. That the applicant cannot ask for cancellation of a title acquired by a purchaser for value. He has relied on **Sections 24, 25 and 26** of the **Land Registration Act 2012**.
6. Secondly counsel submitted that under **Section 6** of the **Limitation of Actions Act Cap 22 Laws of Kenya**, claims in land must be lodged within 12 years. He argued that if it is true that the petitioner bought the land in 1975 then it is now 38 years since thus the claim herein is time barred. That he (petitioner) claims he went to the Land Control Board in 1982 which is now over 30 years and if he says the deceased died in 1997 it is about 16 years and that since the petitioner is not before this court for adverse possession, his claim cannot stand. Therefore that by operation of law the petition herein is time barred.
7. Counsel further submitted that there is no fundamental right of the petitioner which has been violated and that in any event **Article 40** allows anybody to own property anywhere in the country and therefore none of the articles under which the petition is filed give the petitioner any right in the subject property.
8. Mr. Momanyi urged the court to make a finding that the petition and the attendant application have no legs to stand on and to dismiss the same with costs.
9. Mr. Nyagwencha who was holding brief for Mr. Bosire Gichana for the 1st respondent submitted that the only reason why petitioner came to court by way of petition was to avoid the Limitation of Actions Act. He submitted that since the petitioner wants the suit land to revert to the deceased, this is a matter for the Environment and Land Court and on the basis of limitation, this court

should dismiss the petition with costs to the respondents.
10. Mr. Mokuia for the petitioner responded as follows:-

Locus standi

11. That the petitioner has locus standi to maintain the petition. He argued that the courts have held that a person who champions his constitutional rights must be given audience and that such rights cannot be killed at the preliminary stage thus the petitioner must have his day in court. That it is only during full hearing that the court can determine whether there has been violation of such rights. Reliance was placed on 2 cases:-
- a. Court of appeal Civil Appeal No. 110 of 2001 – Rashid Odhiambo Aloggoh & 245 Others –vs- Hacco Industries Ltd.
 - b. Nairobi High Court Misc. Application No. 908 of 2001 – Albert Ruturi & Another –vs- Minister for Finance & Another in which the court held that issues of a constitutional nature cannot be side-stepped by clinging to a narrow technical view of locus standi. I hasten to add that under the constitution and in particular under Chapter Four – the Bill of Rights – every person has the right to come to court and in whatever manner he chooses.

Time Limitation

12. That this was not pleaded among grounds of opposition and also submitted that this petition is anchored in the Constitution of Kenya 2010 and not under any act of parliament. He submitted that the Limitation of Actions Act cannot override the constitution. He referred to **Articles 159 and 40 (6) of the Constitution.**
13. In summary Mr. Mokuia submitted that the allegation that the petition is time barred and that time cannot cure an illegality has no basis. He contended that where there is a violation of constitutional rights the constitution comes to the rescue of the afflicted party and prays that the petitioner be given a day in court. Counsel urged this court to dismiss the preliminary objection with costs.
14. The 3rd respondent John Momanyi Gichana who came in person relied on his affidavit dated 6th November 2013 and filed on 7th November 2013. He told the court that he had nothing more to add and that the ministry would be duly guided by the court's decision.
15. The only point of law which has been raised as a preliminary objection by the 2nd respondent in his grounds of opposition dated 28th October 2013 is that the petitioner lacks the necessary legal capacity to move the court on the issue in controversy.
16. Mr. Momanyi Aunga's submissions were basically on the issue of locus standi of the petitioner. Counsel submitted that the mere fact that the petitioner went to the Land Control Board after he allegedly bought the suit land does not clothe him with the necessary power to come to this court. Mr. Nyangwencha for the 1st respondent was of the same view. The petitioner's advocate on the other hand submitted that since the petitioner is alleging violation of his rights under the constitution his claim cannot be said to be time barred and that the petitioner ought therefore to be given his day in court so that his rights are not killed at this preliminary stage.
17. This court has carefully considered the oral submissions that have been placed before it. I am satisfied from an analysis of the submissions and the pleadings that the issues raised by the petitioner are of a constitutional nature requiring interrogation by the court at a full hearing. It is now widely accepted by the courts that a person who raises issues regarding actual or alleged violation of constitutional rights has the right to be heard, whether or not he eventually succeeds. That being the case, there is no time bar to such a claim. Time is therefore not of the essence in matters of this nature. What the petitioner is required to show is that his rights were violated or were threatened to be violated.
18. This court therefore finds that the preliminary objection has no basis and is accordingly dismissed.
19. Finally, I note that this being an Environment and Land case here at Kisii, this matter ought to be heard and determined by the said court. I direct that the matter be mentioned before the said court on a mutually convenient date for directions.

20.The costs of this objection shall abide the outcome of the main petition.

21.Orders accordingly.

Ruling written and signed by

R.N. SITATI

JUDGE.

Ruling delivered, dated and countersigned in open court at Kisii this 9th day of January 2015 by

C. NAGILLAH

J U D G E

In the presence of:-

Okenya h/b for Mokuu for Petitioner

Abobo h/b for Bosire for 1st Respondent

N/A for 2nd Respondent

N/A for 3rd Respondent

N/A for 4th Respondent

Edwin Mong'are Court Assistant