



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC PETITION NO. 19 OF 2020**

**ALI JUMA MWAKANENO, STEPHEN CHARO**

**CHEMBE & 70 OTHERS.....PETITIONER**

**-VS-**

**1. REGISTRAR OF TITLES, MOMBASA**

**2. ZAKAYO OSAPIRI MRUI**

**3. TWO 3RDS INVESTMENT COMPANY LIMITED**

**4. HONOURABLE ATTORNEY GENERAL**

**5. NATIONAL LAND COMMISSION**

**6. SETTLEMENT FUND BOARD OF TRUSTESS**

**7. CHIEF LAND REGISTRAR**

**8. CABINET SECRETARY MINISTRY OF LAND.....:RESPONDENTS**

**JUDGEMENT**

The Petitioner states that they are original indigenous residents of Kibokoni, Utange and the suit parcel of land comprising of Plot Number 390/II/MN measuring by measurement 28.3 and/or thereabout and the same is their ancestral land on which they being occupying possessing and using since time immemorial. The Petitioner states that sometimes in November 2016 some strangers started claiming ownership of the subject parcel of land and sharked a process of evicting the community members of Kibokoni, Utange and some of the members of the community were arrested and charged with the offence of forceable detainer and creating disturbance at the behest of the strangers who were claiming ownership. The Petitioner avers that after being confronted by strangers claiming ownership of their ancestral land which they have been in occupation, possession and use the Petitioner started to make inquiry on how the persons ownership over that parcel of land which is their claiming ancestral land. The Petitioner avers upon making inquiries and the Mombasa Land Registry in many attempts to obtain information regarding the identity of the strangers they were being frustrated by the personnel in the Land Registry in Mombasa who withheld all information regarding the suit property from the Petitioner. The Petitioner has nonetheless managed to obtain photocopies of some of the documents submitted to Mombasa county offices the Respondents were seeking approval for carrying subdivision of the suit parcel, of land and the Petitioner came to know that the 6<sup>th</sup> Respondent Two Third Investments Limited was the one claiming ownership and purported to be the registered owner of the suit parcel of land. The said records show that sub-division of the suit property have been subdivided at the behest of the said Two Third Investment Limited acting in concert with the other Respondents, their servants and /or agents. The aforesaid officials are within the Mombasa Land Registry, Ministry of Land, National Land Commission Provincial Administration and other government organs for the time being engaged in matters relating to the disposal and creation of the interest in land and development they have acted and continue to work with Impunity and in contravention of the rule of law which they are required to protect, promote and defend.

In as much as the Constitution is the Supreme Law of the Republic of Konya and binds all person and all state organs at both levels of government, the action by the Respondent in continuing to disregard the laws in the country is as serious setback to the rule of law and the court should step in to stop them from proceeding with the breach of clear provision of the Constitution. Whereas the Petitioners have the Constitutional Right to acquire and. enjoy property anywhere in the Republic of Kenya, these rights are being infringed by the actions the breach and other arising from constitution of express provision of constitution behooves the Court to restrain the 6<sup>th</sup> Respondent from acting with impunity and compel the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and other officers in the Republic of Kenya as defined herein to observe and defend the Rule of Law.

That the Honorable Court be pleased to make the following a declaration and issue the following orders,

- a) A Declaration that at all material times herein the Petitioner herein was and is entitled against the Respondents and all persons to their fundamental rights and freedom enshrined in the Bill of Rights which applies to all and binds all state organs including but not limited to the freedom from discrimination, equal protection and benefit of the law and that in the relationship between, the parties herein the Respondent were and remain under a duty to observe the National Value enshrined in Article 10 of the Constitution.
- b) A Declaration that the Respondents as public officers and citizens of Kenya have a constitutional duty to respect uphold and defend the constitution and the fundamental rights of individual enshrined hereunder.
- c) A Declaration that the 1<sup>st</sup> Petitioner (residents of Kibokoni, Utango Area) being the original indigenous residents on the subject parcel, of land comprising of Plot No 390/11/MN, who are in actual occupation, possession and use are entitled to be registered as legal owners and be issued with legal ownership instruments (certificate of title and/or title deed to that effect).
- d) A Declaration that, the subject parcel of land at the time of acquisition by the 6<sup>th</sup> Respondent it was not available and/or capable of being sold, purchased, transferred and be passed to the Respondent in vacant possession with interfering the quiet possession and enjoyment of the property by the Petitioner and/or their rights to being violated, infringed and/or threatened.
- e) A Declaration that, the continuance of development and subdivision being done on the suit property is an affront to the rule of law as it is a furtherance of violation and infringement of the Petitioner's fundamental rights and freedoms.
- f) An order prohibiting and restraining the Respondent whether by themselves, the agents, servants and other relevant officers of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents in the service of the Republic of Kenya for the time being concerned with registration, recognition and enforcement of the rights and interest in land an supervision thereof as well from granting approvals of transaction pertaining land registering transfers supervising development, grant licenses for development and undertaking any other purpose directly or incidental to development to sale, transfer and/or any alienation of whatever nature connected parcel, of land Plot No 390/11./MN shall affect, breach, infringe, violate and threaten the fundamental rights and freedom of the Petitioner.
- g) A prohibitory order freezing and restraining any sale transfer subdivision charging and in transaction of whatsoever nature on the suit property Plot No 390/11/MN.
- h) Declaration that the act of omission and/or commission of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents was violation of the rights of the Petitioner to access and own property and to be settled in preservation of their human dignity as unswagged by the constitution.
- i) An order of mandatory injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents to perform their constitutional mandate and discharge their constitutional obligation.
- j) Declaration the any legal instruments be it title deed, grant lease, certificate of title held by the Respondents is null and void as the subject parcel of land was not available and capable of being acquired and/or purchased in the first instance.
- k) An order restraining the Respondent by themselves, servants, and agents from evicting the Respondents cause to be evicted therefrom.
- l) Any other orders the court may deem fit to grant in the interest of justice
- m) That the court be pleased to order cost of this petition be borne by the Respondents.

The 2<sup>nd</sup> to 5<sup>th</sup> Respondents filed grounds of opposition to the petition stating that the Petitioners are unknown as the Petition fails to disclose the names and details of the seventy others thereby rendering the petition defective. That one Ali Juma Mwakano who has sworn the verifying affidavit to the Petition had no express authority from the other Petitioners as per the provisions of Order 1 Rule 13 (1&2) of the Civil Procedure Rules. That the Petitioners have not claimed any known proprietary rights under the established regimes enshrined in Article 61 of the Constitution of Kenya 2012. The petitioners have also failed to set out the precise provisions of the constitution which have been violated.

The 3<sup>rd</sup> Respondents stated that they are the registered owners of the suit land being bonafide purchasers for value.

This court has considered the Petition and the submissions therein. It is a principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** where the court stated;

*“Constitutional violations must be pleaded with a reasonable degree of precision.*

The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings. The Court of Appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** provided the standard of proof in Constitutional Petitions. The Court of Appeal judges stated that;

“...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. What Jessel, M.R said in 1876 in the case of **Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639** holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> Respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the Respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in **Anarita Karimi Njeru (Supra)**. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> Respondent...”

In the case of **Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013** stated that;

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated.”

I concur with the grounds of opposition by the Respondents that looking at the Petitioner’s pleadings, the evidence of the parties as well as the submissions, it is my opinion that the Petitioner has not met the requirements of a Constitution Petition. Although the Petitioner has pleaded provisions of the Constitution, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the Respondents. He has not adduced any evidence to demonstrate the alleged violations. Who are these (70 others) referred to in the Petition?

Even assuming that this petition was competent, it would not pass the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case **Leonard Otieno vs. Airtel Kenya Limited (2018)** where Mativo J. held that;

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

The Petitioner stated that there are original indigenous residents of Kibokoni, Utange and the suit parcel of land comprising of Plot Number 390/II/MN measuring by measurement 28.3 and/or thereabout and the same is their ancestral land on which they being occupying possessing and using since time immemorial. The Petitioner states that sometimes in November 2016 some strangers started claiming ownership of the subject parcel of land and sharked a process of evicting the community members of Kibokoni, Utange and some of the members of the community were arrested and charged with the offence of forceable detainer and creating disturbance at the behest of the strangers who were claiming ownership. The Petitioner provided no evidence to support this and no supporting affidavit was filed in support of the allegations in the Petition. The Respondents also submitted that this case was subjudice as the Petitioner had filed a suit against the 3<sup>rd</sup> Respondent in Mombasa ELC No. 232 of 2014 and another by the 3<sup>rd</sup> Respondent against the Petitioner in ELC No. 3 of 2015 seeking to determine the ownership of the suit land.

From the observation above I reach a conclusion that this Petition has not been pleaded with a reasonable degree of precision and that the alleged violations have not been proved. I also find the same subjudice and I strike it out with costs to the Respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF FEBRUARY 2022.**

**N.A. MATHEKA**

**JUDGE**