



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 70 OF 2013**

IN THE MATTER OF: ARTICLES 2(6), 19, 22(2)(a), (3) & 25, 28, 40

165(30(a)(b), (d)(i), (ii) OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26(1), (3) 27(1), (2), 28, 29((c), (d) OF THE CONSTITUTION AND RULE 11(c) AND 12 PROTECITON OF FUNDAMENTAL RIGHTS AND PROCEDURE RULE AND ALL OTHER RELEVANT ENABLING POWER AND PROVISIONS OF THE LAWS OF KENYA.

**AND**

IN THE MATTER OF: ARTICLES 25 OF THE UNIVERSAL DELARATION OF HUMAN RIGHTS

**BETWEEN**

**MAGGIE MWAUKI MTALAKI.....PETITIONER**

**VERSUS**

**THE HOUSING FINANCE COMPANY OF KENYA.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. By a Petition dated and filed on 6<sup>th</sup> December, 2013 the Petitioner sought the following prayers:-

(a) that the Court do issue such writs and give such directions as it deems appropriate to prohibit the Respondent from interfering with the peaceful stay of the Petitioner with her family in the of the property known as Title Number 179/11/MN/ Mtopanga estate, Mombasa (the suit property) until such time as the Petitioner off-sets the loan secured over the matrimonial property and/or be allowed to sell the suit property by private treaty so as to redeem the Mortgage that was occasioned without her knowledge by her husband,

(b) an injunction to issue against the Respondent to be restrained by itself, servant and/or agents or otherwise from evicting, selling, disposing, alienating or in any manner dealing with the said suit land also known as title Number 1179(Original Number 53/171) Section II Mainland North;

(c) a declaration that the forcible, violent and brutal eviction of the Petitioner and her family without according them an alternative shelter and/or Accommodation leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to life guaranteed by article 26(1) and (3) of the Constitution of Kenya 2010 and Article 11 of the International Covenant and Economic Social and Cultural Rights (“ICESCR”), physical and moral health of the family under Articles 16 and 18 of the African Charter on Human and Peoples Rights (ACHPR) as read with Article 2(6) of the Constitution of Kenya 2010.

(d) **Costs of the Petition.**

2. In the response to the Petition, the Respondent (Housing Finance Company of Kenya Limited), filed on 3<sup>rd</sup> September, 2014, a preliminary objection of even the date thereof, and raised the following points of law:-

(1) the High court lacks jurisdiction to hear and determine the Petition herein by virtue of Articles 162(2) (b) and 65(5) of the Constitution, Section 13(2) (e) of the Environment and Land Act 2011 and Section 150 of the Land Act 2012/No. 6 of 2012).

(2) the Petitioner lacks the *locus standi* to institute the present petition on behalf of **FULGENCE DAMBALA**, who is the registered owner of the suit property and the party to the charge instrument leading to the alleged violations of the petitioner’s rights yet there is no evidence that the said Fulgence Dambala cannot act in his own name,

(3) The Petition is frivolous and vexatious and an abuse of the court process and should be struck out and/or dismissed with costs for attempting to elevate pure civil disputes and presenting them as constitutional issues against the clear statutory procedures provided in the Civil Procedure Act, (Cap 21; Laws of Kenya and the Land Act 2012, because-

(a) the Petition is a mere challenge of the Respondent’s exercise of the statutory power of sale which has rightly accrued to the Respondent;

(b) the said statutory power for sale arose and was exercised under Section 90(2) and (3) of the said Act 2012(No. 6 of 2012) and the Land Registration Act 2012. (No 3 of 2012).

(c) Section 103 as read with Section 150 of the Land Act provides that any challenge against the exercise of the Statutory power of sale and shall be made to the Environment and Land Court exercising its civil jurisdiction.

(d) the dispute in the Petition is a pure civil dispute capable of being determined under the civil jurisdiction of the Environment and Land Court.

(4) There is no allegation in the Petition that the civil remedies provided by statute, in particular, in the Land Act 2012, are inadequate and/or unconstitutional. A constitutional remedy as sought in the Petition cannot be granted where the adequacy and Constitutionality of the statutory remedy is not under challenge.

(5) The Petition offends the well established principles of drafting Constitutional petitions as enunciated in **ANARITA KARIMI NJERU vs REPUBLIC** because-

(a) the Petitioner does not provide the particulars of the alleged complaint;

(b) the Petitioner does not indicate the manner in which the respondent has purportedly infringed her rights;

(c) paragraphs 14-19 inclusive of the Petition indicate numerous omni bus rights to which the Petitioner alleges to be entitled to without indicating where or in what manner the Respondent has infringed or

threatened to infringe the said rights,

(6) the Petition is *sub-judice* and the court lacks jurisdiction to hear and determine it because the matter in issue in the Petition is also directly and substantially in issue in previously instituted suit between the parties herein or their privies as shown below-

(a) The Petitioner's interest and/or title to the suit property are predicated on the title of one Fulgence Dambala Abawata who is the Petitioner's husband.

(b) On 12<sup>th</sup> November, 2013, the Petitioner's husband one Fulgence Dambala Abawata filed Mombasa H.C.C.C. No. 124 of 2013 - **FULGENCE DAMBALA ABAWATA vs HOUSING FINANCE COMPANY OF KENYA LIMITED** and **ANOTHER** in which the said Fulgence Dambala Abawata the Borrower sued the Respondent seeking orders of injunction against the Respondent's exercise of its statutory power of sale.

(c) The said HCCC No, 124 of 2013 was heard *ex parte* under a certificate of urgency. on 17<sup>th</sup> November, 2013 and the court declined to grant the injunctive orders sought to stop the auction. The said suit is still pending determination before a court of competent jurisdiction.

### **The Petitioner's Case**

3. The Petitioner's case as set out in the Petition and reiterated in the affidavits in support of the initial interlocutory orders may be summarized as follows-

(1) the Petitioner is wife to Fulgence Dambala Abawata and that she, her husband and children, have lived in the suit property which her husband secretly charged to the Respondent to secure a loan or financial facility to finance the purchase of the suit property.

(2) the Petitioner's husband made some payments, but fell in arrears for reasons explained in paragraphs 4-8 of the Petitioner's statement of facts (in the Petition).

(3) The Petitioner with the concurrence of the husband sought leave of the Respondent to sell the suit property by private treaty and the Respondent failed/declined to respond to them.

(4) matters having come to a standstill, the Respondent tried to forcibly evict her, her husband and children, and this rendered them destitute and homeless.

5. For all those reasons the Petitioner claims that her constitutional right to life as guaranteed under Article 26(1) of the Constitution 2010, has been contravened, and that by dint of Article 43 of the constitution of Kenya 2010, the Petitioner is entitled to the fundamental rights to accessible and adequate housing that includes prohibition of forced eviction, reasonable standards of sanitation, health care services and freedom from hunger to clean and safe water in adequate quantities and to education which rights have been violated as a consequence of the demolition/eviction.

6. The Petitioner also claims that-

(1) By dint of Article 2(6) of the Constitution of Kenya 2010, the Petitioner and her family in the circumstances of the Petitioner is entitled to the fundamental rights of housing and prohibition from forced eviction as contained in Article 11 of the **IECESCR** to which Kenya is party and more particularly elaborated in General Comment Numbers 4 and 7 of the Committee on Economic Social and Cultural Rights relating to the right to adequate housing and forced evictions respectively.

(2) By virtue of Article 2(6) of the Constitution of Kenya, 2010, the petitioner and the family are, in the circumstances of the Petitioner, entitled to the fundamental right to housing and prohibition from forced eviction contained the Articles 14, (guaranteeing the right to property), 16, (guaranteeing the right to physical and mental health) and 18(guaranteeing the right to physical and moral health) of the **African**

**Charter on Human and Peoples Rights** to which Kenya is a party.

(3) By virtue of article 2(6) of the Constitution of Kenya, the Petitioner and her family, are in the circumstances of his Petitioner entitled to the fundamental right to life which includes the rights to livelihood and reasonable means of sustaining life, and

(d) by virtue of Articles 28 and 29 of the Constitution of Kenya the Petitioner and her family are entitled to the fundamental right to human dignity and security of the person which includes the right to have their inherent human dignity respected and protected, freedom from any form of violence from public, a private and prohibition of cruel inhuman or degrading treatment.

### **THE ISSUES FOR DETERMINATION**

7. Counsel agreed that the Preliminary objection be determined by way of written submissions. The respective written submissions by Counsel for the Respondent (Applicant), and the Petitioner(Respondent) are respectively dated 3<sup>rd</sup> November, 2014 and filed on 4<sup>th</sup> November 2014, and 27<sup>th</sup> November, 2014 and filed on 28<sup>th</sup> November 2014. The issues first raised by counsel for the respondent, and adopted by counsel for the Petitioner are whether –

- (1) the High court has jurisdiction;
- (2) the Petitioner has *locus standi* to sue
- (3) the Petitioner is *sub-judice*
- (4) the Petition is an abuse of the court process.
- (5) whether the Petition offends the principles of drafting constitutional petitions,,

8. I will consider each of these issue in turn, but first whether the Preliminary Objection satisfies the criteria or test for raising preliminary objections in civil litigation are equally applicable with regard to constitutional petitions.

9. The test in civil cases whether a preliminary objection is a true preliminary objection was set out in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD vs WEST END DISTRIBUTORS LIMITED [1969] EA. 696**, where **Newbold V.P.**, observed as follows-

**“A preliminary objection is in the nature of what used to be a demurrer..... It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and on occasion, confuse issues. This improper practice should stop,”**

10. Applying the above tests, I am satisfied that the points raised by the Respondent are pure points of law, that the facts as pleaded by the other side are correct, and no fact needs to be ascertained, nor is there sought the exercise of the court’s discretion. I am also satisfied that the Preliminary Objection on points of law has been raised properly, and does not confuse issues. The tests in civil cases are, *mutatis mutandis* applicable in constitutional Petitions, I will now advert to the issues as outlined above.

### **OF WHETHER THE COURT HAS JURISDICTION TO DETERMINE THE PETITION**

11. The Respondent and the Petitioner had as expected divergent submissions on the question of whether this court had or has the jurisdiction to determine the Petition. To answer this issue, the starting point is I think, to ask two other questions what is the jurisdiction and how is that jurisdiction conferred upon the court?

12. In **JOHN KIPNG'ENO KOECH vs NAKURU COUNTY ASSEMBLY & 4 OTHERS AND CHRISTOPHER S. ONDIEKI & ANOTHER vs COUNTY GOVERNMENT OF NAKURU & ANOTHER**. [2013] e KLR, the following definitions of “*jurisdiction*” were adopted – at Paragraph 803

–  
“By definition, “**jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter.**”

13. In the case **OF OWNERS OF MOTOR VESSEL “LILLIANS” vs CALTEX OIL(K) LTD** [1989] KLR I, the court defined jurisdiction thus-

“ **by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision.**”

14. In the same cases, **the OWNERS OF THE VESSEL “LILLIANS”** (supra), the court said

“**.. where a court has no jurisdiction, there would be no basis for a continuation of proceedings – a court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction.**”

15. On the question of conferment or investiture of jurisdiction, the Supreme Court of Kenya in the case of **SAMUEL KAMAU MACHARIA vs KENYA COMMERCIAL BANK LTD & 2 OTHERS**, [2012] E KLR said:-

“**A court’s jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred (to it) by the Constitution or other written law. It cannot abrogate to itself jurisdiction exceeding that which is conferred upon it by the law.**”

**We agree with counsel for the first and second Respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality, it goes to the very heart of the matter for without jurisdiction, the court cannot entertain the proceedings.**”

16. The Supreme Court also dealt extensively with the question of jurisdiction in the **MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION (THE APPLICANT)**, (Constitutional Application Number 2 of 2-11), and said

“**Where the Constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation nor can parliament confer jurisdiction upon a court of law beyond the scope defined in the Constitution. When the Constitution confers powers upon Parliament to set the jurisdiction of a court of law or Tribunal the legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by statute.**”

17. It was the Petitioner’s Counsel’s argument that the petitioner’s fundamental rights under **Articles 26** (the rights to life), **28** (the right to human dignity), **29** (the right to freedom and security of the person), **35** (the rights of access to information held by the State) and **43(1)(b)** (the right to accessible and adequate housing, and reasonable standards of sanitation).

18. Whereas agreeing with learned counsel for the Petitioner that these are all rights whose adjudication is conferred upon this court by virtue of Articles 23(1) and 165 of the Constitution of Kenya 2010, what counsel refuses to discuss is **firstly**, the subject matter of the alleged contravention or infringement or threatened violence or infringement and **secondly**, who is the guarantor of the rights alleged to have been denied, violated, infringed or threatened. These are relevant matters on the question of jurisdiction.

19. Finally the subject matter of the Petition is the suitland. Despite the cross jurisdiction allowed by the Honourable Chief Justice for purposes of clearance of back log, in initiatives such as “**justice @ Last,**” the original and unlimited jurisdiction in civil and criminal matters granted to the High Court by Article 165 (3)(a), such jurisdiction is not however absolute. It is limited by Article 165(5) which provides that the High court – shall not have jurisdiction in respect of matters-

**(a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution.**

**(b) falling within the jurisdiction of the courts contemplated in Article 162(3).**

19. Article 162(2) empowered Parliament to establish courts with the status of the High Court to hear and determine disputes relating to-

**(a) employment and labour relations,**

**(b) the environment and the use and occupation of, and title to land; and also determine the jurisdiction and functions of such courts.**

20. In exercise of the power donated to it, Parliament enacted the Environment and Land Court 2011 Act and Section 3(2) grants that Court jurisdiction in the terms following:-

13(2) in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have Power to hear and determine disputes –

a. – (c)

**(d) relating to public, private and community land and contracts choses in action or other instruments granting any enforceable interests in land,**

**(e) any other dispute relating to environment and land.**

21. The subject matter of the dispute in this case concerns the respondent’s enforcing the terms of a Charge Instrument dated 27<sup>th</sup> May, 2010. A charge on land is a contract between the parties thereto. And by virtue of section 80(11) of the Land Act 2012(No. 6 of 2012), a charge is equally an instrument granting an enforceable interest in land.

22. Equally, the power of sale though reserved to the chargee in the charge instrument, is not merely contractual, but is statutory though a charge registered before the Land Act came into force, is subject to the legal regime under which it was drawn and registered, any disputes arising thereunder are subject to the Land Act, Section 150 of which provides-

***150. The Environment and Land Court established in the Environment and Land Act is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.***

23. The Courts have come strongly in favour of this position of the law. In **UNITED STATES INTERNATIONAL UNIVERSITY (USIU) vs ATTORNEY –GENERAL** [2012] e KLR, Majanja J said-

**“The jurisdiction bestowed upon the High Court under Article 165(3) is not absolute but subject to Sub- Article (5) whose provisions forbid the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court, and the specialized courts established under Article 162(2). The High Court should not exercise jurisdiction in matters reserved for status courts contemplated under Article 162(2). This implies that the High Court cannot deal with matters set out in Section 12 of the Industrial Court Act, 2011”.**

24. In **OMAR TAHIR SAID vs REGISTRAR OF TITLES AND ANOTHER** [2013] E KLR the Petitioner alleged various *violations* of the right to property as enshrined in Article 40 of the Constitution citing Articles 23 of the Constitution as authority. Counsel for the Respondent argued in favour of the court's jurisdiction to hear the Petition for alleged infringement of the right to property. In rejecting that argument Tuiyott J said –

**“ the next issue I must determine is whether this jurisdiction in so far as it relates to breaches of rights and freedom in matters arising from disputes falling within the disputes described in Article 162(2)(b) and Section 13 of the Environment and Land Act is shared with the High Court.**

**The answer to this question is found in Article 164(5) (b) which categorically states that this court, the High Court, is not to exercise jurisdiction of the Courts established in Article 162(2).**

**It follows that the High court's enforcement jurisdiction does not extend to matters relating to disputes falling under Section 13(2) of the Environment and Land Act. That is the presence of the Environment and Land Court.”**

25. Endorsing this position in **MOHAMMED SAID vs COUNTY COUNCIL OF NANDI**[2013] e KLR, the court said:

**“Indeed the High Court has no jurisdiction in respect of matters that fall within the jurisdiction of the environment and Land Court or that falling under the jurisdiction of the Industrial and Labour Relations Court. This is set out in Article 165(5) of the Constitution.**

**As correctly stated in OMAR TAHIR SAID VS REGISTRAR OF TITLES case, the High Court has no jurisdiction to hear petitions touching on Environment and Land. These are to be heard and determined by the Environment and Land Court. The same goes to jurisdiction touching Employment and Labour Relations.” The High Court has no jurisdiction to hear and determine such disputes even when they are filed in Constitutional Petition.**

26. These sentiments were echoed by Odunga J in his inimitable style in the case of **COMMISSIONER OF LANDS, CABINET SECRETARY MINISTRY OF HOUSING AND URBAN DEVELOPMENT, PAMELA MUTEGI AND 5 OTHERS, e Parte, SAMUEL MUCHIRI W'NJUGUNA**[2014] eKLR said-

**“The court however appreciates that under Article 165(5) (b) of the constitution, this court had no Power to determine issues which fall within the jurisdiction of the courts contemplated in Article 162(2) and this includes courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Since the Constitution has expressly divested the High Court of the powers to hear and determine disputes which fall squarely within the jurisdiction of the courts with similar status established pursuant to Article 162(2) of the Constitution, this court would be acting in excess of its jurisdiction if it entertained such disputes.”**

27. In **JOHN MUGO NGUGI VS. MARGET M. MURANGI** [2014] e KLR, reiterating **THE “LILLIAN S’ case** [1989] KLR, I the court said-

**“the Lillian “S” case [1989] KLR I] established this jurisdiction flows from the law, and the recipient court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”**

28. Lastly, counsel for the Respondent submitted that as suit filed in court without jurisdiction is nullity, and there is nothing to transfer. Counsel relied on the decision of the Court of Appeal in **KENYA SEED CO LTD. vs. JOSPEH BOSIRE** (Civil Appeal No. 72 of 2002(unreported) where the court said-

**“In adversarial systems governing civil matters the plaintiff as the arbiter litis or dominus litis has the right to choose any forum the case allows him to agitate his case and such right is only subject to the control provided in the Civil Procedure Rules for transfer of cases, otherwise courts would lightly interfere with it... The suit must however be filed in the first instance before a court which has the jurisdiction to determine it, and if it is incompetent in that respect, it cannot even be transferred as the remedy is to withdraw it and file it before a court which has jurisdiction. The other remedy, if the limit of the jurisdiction is monetary, is to limit the claim to the jurisdiction the local limit.”**

29. So if the court has no jurisdiction, and if the case is a nullity and cannot be transferred, we revert to the court’s decision in the Owners of Motor Vessel “Lillian “S” case –

**“Without jurisdiction, a court has no power to make one more step. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

and

**...where the court has no jurisdiction, the court has to down its tools. It is trite law that a matter filed in a court or tribunal without jurisdiction is a nullity and is incapable of being transferred since in law it does not exist,”**

30. The discussion on jurisdiction would be incomplete without widening the subject matter of the petition- which stands dismissed on the ground of lack of jurisdiction and incapable of being transferred to the Environment and Land Court- and **that is the suit land.**

31. The suitland belonged to the Petitioner’s husband, who on his own free will charged it to secure a loan for the purchase thereof. At the time the charge was created, there was no law which prohibited the petitioner’s husband from registering the property in his own name or consulting the Petitioner whether they should own it jointly or in common. Having charged it to the Respondent in consideration of the loan, the Petitioner’s husband had one obligation, to pay for the loan, and one right to have the Respondent discharge the charge once repayment was made in full. The Petitioner’s husband had also the right to redeem the property at the auction before the hammer fell to the highest bidder or payment of the reserve price (if any)

32. Having defaulted the Petitioner cannot come and stand in the husband’s (Chargor’s) shoes, and invoke this court’s jurisdiction on the basis of alleged breach of her social-economic rights to **accessible and adequate housing, and to reasonable standards of sanitation.”** There are two reasons for this stand

32. **Firstly**, under Article 21 of the Constitution, the obligation on the implementation of rights and fundamental freedom is expressly put upon the state-

**“The State and every state organ shall observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”**

33. **Secondly**, the right to accessible housing and reasonable standards of sanitation under Article 43 (c) (b) which the Petitioner alleges to be threatened with violation or infringement is a right which is only guaranteed by the state or state organ. The Respondent is a private limited liability company, it is neither the state nor an organ of state. And even if it were, there is no allegation in the Petition, that is assumed or was conferred or invested with capital and responsibility to provide accessible and adequate housing or standards of sanitation, an obligation of the state or state organ. On this ground too, the Petitioner must stand dismissed. But he Respondent raised other issues, why the Petitioner should be dismissed. And because this Ruling is upon a Preliminary Objection on points of Law it is desirable to consider these other grounds.

**OF WHETHER THE PETITION IS SUB-JUDICE.**

34. The legal term “*Sub-judice*” literally means

**“under a judge that is to say under consideration of a judge or court, undecided still under consideration.”**

35. In our law the principle finds statutory expression under Section 6 of the Civil Procedure Act,(Cap 21, Laws of Kenya) - which says -

**“6. No court shall proceed with the trial of any suit or proceeding on which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief sought.”**

36. This principle of civil litigation in my humble view is equally applicable to Petitions under the Constitution within the wider meaning of the expression other “**proceeding**.” As no litigant in an ordinary civil case is at liberty to institute a multiplicity of suits on the same claim or subject matter, similarly no litigant in the name of a Petitioner is at liberty to institute another suit in the guise of a Constitutional Petition in the pendency of a suit seeking same reliefs or remedies.

37. Counsel for the Petitioner submitted that the reliefs sought in the Petitioner are different from what is sought in HCCC No. 123 of 2013, **FULGENCE DAMBALA vs HOUSING FINANCE COMPANY OF KENYA LTD & ANOTHER**, and put reliance on this Court’s original jurisdiction under Article 165(31) (b) of the Constitution to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. In this regard, Counsel sought to rely on the decisions of the court in **MARTIN NYAGA WAMBORA vs SPEAKER OF COUNTY ASSEMBLY OF EMBU & 3 OTHERS [2013] e KLR**. The decision in that case has however no resemblance to the Petition herein. Whereas in that Petition, the Petitioner was asserting his right against the Speaker of the County Assembly of the County of Embu, an organ of state as envisaged under Articles 130 and 175 of the Constitution, which define the powers of the tow levels of sovereign power of the people, at the national and **county** levels in this case the Petitioner is asserting alleged rights to the suitland, and against a private entity.

38. In the suit, the Petitioner seeks to be allowed to pay the loan in place of her husband, thus re-opening the charge. The Petitioner also seeks an injunction to restrain the Respondent from selling the suit property, very similar prayer to what the Petitioner seeks in the Petition. In **THIBA MINI-HYDRO CO. LTD vs JOSPHAT KARIU NDWEGA [2013] E KLR**, the B.N. Olao, J inter alia said

**“...there can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the su-judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which requires under Section 1B that there be an efficient use of the available judicial and administrative resources.”**

39. That principle is echoed in Article 159(2)(b) that justice shall not be delayed. Consequently, the Petitioner cannot run away from the clear provisions of the Constitution, both as to responsibility of the organ of state, to provide adequate housing and reasonable standards of sanitation, and not a private entity, and that the resources of the judiciary shall not be used to determine a civil case and a Petition on the same subject matter. It might be a consideration for counsel for the Petitioner to join the Petitioner’s husband in the civil case but she cannot be allowed to maintain two parallel proceedings. The preliminary objection succeeds on this point as well.

#### **OF WHETHER THE PETITIONER HAS LOCUS STANDI**

40. There is, from the pleadings, no dispute that the Petitioner is the wife of Fulgence Dambala Abawata, the registered owner of the suit property. The right to property is personal. She is not the owner of this property. She cannot claim under Article 40, of the constitution that her right to property

is being denied, violated, infringed or threatened. There is no averment that the owner of the property is under some disability for her to invoke Article 27 of the Constitution- to act on behalf of her husband, the registered owner. In **NZAI RUWA & 2 OTHERS vs. SECRETARY, INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION & 9 OTHERS [2012] e KLR**, the court addressing the question of *locus standi* requirement in petitions of fundamental rights and freedoms said-

**“... the Applicants do not fit into the category in Article 22(2)(a) as a person or persons” acting on behalf of another person who cannot act in their own name” the Applicants have not stated or shown that there are persons on whose behalf they act who cannot act in their own names. This provision caters for those many situations where a person acts as a formal or legal representative on behalf of another such as a person or guardian acting on loco parentis instead of, or in the absence of, the parent of the child – who cannot act on his own.”**

41. Similarly in **JOSHUA KARIANJAH WAIGANJO vs ATTORNEY-GENERAL AND 4 OTHERS [2013] e KLR** in dealing with Article 22, the court said.

**“I appreciate that Article 22(1) and (2) has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms, but even where one purports to enforce the rights of another there must be a nexus between the parties particularly where a case has direct effect on the person whose rights are affected. After all, Article 22(2)(a) entitles a person to act, “on behalf of another person who cannot act in his own name.”**

42. Whereas it can be said both from the petition and the suit (HCCC 124 of 2013), that the Petitioner and Fulgence D. Abawata have a nexus of wife and husband, there is no averment that the said Fulgence Dambala Abawata cannot act in his own name. Consequently the Petitioner cannot avail herself of the provisions of Article 22 (2) (a) of the Constitution. The Petitioner has therefore no *locus standi* and the Petition

herein cannot stand on this ground as well.

#### **OF WHETHER THE PETITION IS AN ABUSE OF COURT PROCESS.**

43. **“Abuse of the process of the court”** is a term found in Section 3A of the Civil Procedure Act, and declares that:

**“Nothing under the Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.”**

44. This provision finds its expressions in Article 159(2)(d) and (e) of the Constitution which requires the court to administer justice without undue regard to procedural technicalities, and to promote the purpose and principles of the Constitution, the essential values of human rights, equality, freedom democracy, social justice and the rule of law. The essential test in Article 159(2) (d) and (e) of doing substantial justice is the avoidance of procedural technicalities. There is however no technicality where the Constitution and the law is clear.

45. In **BETHWELL ALLAN OMONDI OKAI vs TELKOM(K) LTD(Founder) and 9 Others [2013] e KLR**. The court applied the holding by the Court of Appeal in **SPEAKER of NATIONAL ASSEMBLY vs NJEGA KARUME** where that court said-

**“In our view, there is considerable merit in the submission that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed.”**

46. This court has no jurisdiction to entertain matters reserved for the Environment and Land Court under Article 162(2) of the Constitution. In addition the Land Act, 2012 where applicable, has prescribed clear procedure for seeking redress whenever a person alleged to be prejudiced by the exercise of statutory

power. The procedure laid down in Section 105(3) as read with section 150 of the Land Act 2012 should be followed.

47. **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 petitioner herein is disguised as a Constitutional Petition for the redress of violation of fundamental rights when it is in fact an 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 the Respondent.

48. The Privy Council condemned the practice in its decision in **HARRIKSON vs ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO** [1980] A.L. 265 when it said-

**“The notion that whenever there is a failure by an organ of Government or a public authority or a public office to comply with the law this necessarily entails contravention of some human rights or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The High court under Section 6 (our Article 22) of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard for those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.”**

49. The above decision was adopted and endorsed by the Court in **BETWELL ALLAN OMONDI OKAI VS. TELKOM(K) LTD.(FOUNDER) AND 9 OTHERS** (*Supra*).

50. In **UHURU MUIGAI KENYATTA VS NAIROBI STAR PUBLICATIONS LTD.** [2013] e KLR, Lenaola J is striking out the Petition said-

**“Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in HACO INDUSTRIES (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract constitutional sanction, and as stated in AG vs. S. K. Dutambala Cr. Appeal No. 37 of 1991 (Tanzania Court of Appeal) such sanctions should be reserved for appropriate and really serious occasions.”**

51. And at page 29 of his Ruling the learned Judge said -

**“It is important to recognize that even if a case does raise a Constitutional matter, the assessment of whether the case should be heard by this court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a Constitutional issue worthy of attention.”**

52. The test whether a Petition raises a constitutional issue, and adopted by Tuiyott J in **FOUR FARMS LINTIED vs. AGRICULTURAL FINANCE CORPORATION** [2014] e KLR following the decision in **DAMIAN BELFONTE vs THE ATTORNEY GENERAL of TRINIDAD AND TOBAGO** where it was stated inter....

**... where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a General rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court’s process.”**

53. The above principle was not lost to the Court in **JOHN HARUN MWAU VS. PETER GASTROW & 3 OTHERS** [2014] E KLR where the court said –

**“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or**

some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.

... It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

54. The Constitution is not to be invoked unless the constitutionality is itself in question, in **LEONARD JEFWA KALAMA AND ANOTHER vs CONSOLIDATED BANK OF KENYA LTD. AND 3 OTHERS** [2014] E KLR, the court said-

**“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 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.”**

55. This view is in accordance with Section 75(b) of the repealed constitution which said that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the right to property (Section 76(1) or the right of access to the High Court (Section 76(2) to the extent that the law in question makes provision for taking of possession or acquisition of property-

(a) in satisfaction of any tax, duty, rate rents or other impost,

(b) .....

(c) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract.

56. Likewise the Constitution should not be used to determine private law issues. In considering a similar issue, the court in **BENJOH AMALGAMATED LIMITED AND ANOTHER vs KENYA COMMERCIAL BANK LIMITED** [2007] e KLR. acknowledged

**“where a petitioner has entered into a tenancy, or charge, bill of sale pledge or contract, any disputes 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 petitioner’s right to own property.”**

57. In allowing a prayer for striking out of the Petition the court stated as follows:

***“I have said enough to show that the Petition raises no constitutional issue, that the matters complained about fall within the realm of a private law, and are enforceable as such under Section 75(b) of the Constitution and whether the petitioners come under the guise of a Constitutional Reference and until and unless the constitutional provisions cited are changed, (and there would be no plausible reason for such change), the answer will, and can only be one, and I think the petitioners and their counsel already know what the answer shall be.....”***

58. In summary, the courts have struck out or dismissed Petitions in the aforesaid cases in the following circumstances-

(a) where there is a statutory procedure provided for addressing grievances;

(b) where the constitutionality of a statute or statutory remedy is itself not in question;

(c) where it is not necessary to determine the constitutional issue since it is trivial;

(d) where the constitution is being used as a substitute for ordinary civil dispute resolution systems;

(e) where, the issue is purely a private law matter;

59. In the circumstances of lawful exercise statutory of power of sale of charged property, the chargee cannot maintain a claim for violation of his fundamental right to property under Article 40 of the Constitution – **LEONARD JEFWA KALAMA AND ANOTHER vs CONSOLIDATED BANK OF KENYA & 3 OTHERS** [2014] e KLR.

60. Similarly as Muriithi J said in **FOUR FAMRS** case (*Supra*)

**“... this Petition does not reveal any special feature that would make a constitutional relief more efficacious or suitable than the now or can be sought in civil case number 41 of 2009,. It is not for the court to speculate on the reasons that motivated the petitioner to abandon those proceedings which, it freely commenced, and embark on this path. This court holds and finds that this Constitutional Petition is an abuse of process. And should be dismissed in limine.**

#### **OF WHETHER THE PETITION OFFENDS THE PRINCIPLES IN ANARITA KARIMI**

61. Of course the principles of drafting Constitutional Petitions stated in Anarita Karimi’s case are not cast in iron and stone. They have however been recognized as the principal goal posts in drafting informed and well- considered Petitions. Those principles were reiterated by the court in **NORTHERN NOMADIC DISABLED PERSONS ORGANIZATION (NONDO) vs. GOVERNOR, COUNTY GOVERNMENT OF GARISSA AND ANOTHER** [2013] e KLR-

“The principle in the Anarita Karimi case is captured in the words of Justices Trevelyan and Hamox when they stated as follows-

**“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important ( if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”**

62.The Petition has cited various Articles of the Constitution but has not given any particulars of the alleged violations of those provisions. A five Judge bench of the Court of Appeal in **MUMO MATEMU vs TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS** [2013] e KLR emphasized the importance of precise pleadings in Constitutional Petitions –

**“We cannot but emphasise the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.”**

63. The principles in Anarita Karimi’s case were cited by Lenaola J, in the case of **STEPHEN NYARANGI ONSUMA & ANOTHER vs. GEORGE MAGOHA & 7 OTHERS** [2014] e KLR as follows-

**“... This court has in the past expressed its concern about the manner in which parties coming before the court and alleging a violation to constitutional rights have presented these cases. As a basic minimum a Petition is required to cite the provisions of the Constitution which have allegedly been violated, and the manner in which they have been violated and the remedy which he seeks, for that violation. In demonstrating the manner in which they have been a violated, a Petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation.”**

64.Restated, the principles established in **ANATIRA KARIMI NJERU** require the Petitioner to –

**(a) specifically set out the provisions in the Bill of Rights that have been allegedly violated;**

**(b) provide the particulars of the alleged violations.**

**(c) provide particulars in which the Respondent has purportedly infringed the rights.**

65. The Respondent's counsel contends that the Petitioner has presented an omnibus petition. I agree with said counsel's contention. The Petitioner cites Article 26 of the Constitution which provides for right to life but does not say how the Respondent has violated her right to life or threatened to take away her life.

66. Similarly in paragraph 17 of the Petition, the Petitioner avers that she is entitled to human dignity and security of the person. In **C.J.K. vs. K.D. [2911] e KLR** the court stated

**“For an action to amount to violation of dues inherent dignity it would be demonstrated inter alia, that such action has been taken by another, intentionally, maliciously or spitefully calculated to injure the other persons sense of self-respect or worthiness in a manner that will lower his or her standing in society for that is what dignity entails.”**

67. Likewise in Paragraph 35, the Petitioner avers that she has a right to information. In **CHARLES OMANGA & 8 OTHERS VS. ATTORNEY GENERAL & ANOTHER [2014] e KLR** the courts said-

**“How is a right to information threatened unless a person has been requested and has been denied the information. A person moving the Court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated.”**

68. In this regard the Petitioner has failed to show how her right to human dignity, to information and to the numerous other provisions of the Bill of Rights cited, have been violated or are threatened.

69. In summary, I am satisfied that the Preliminary Objection raised by the Respondent is a true Preliminary Objection which disposes of the Petition. I am in particular satisfied that-

- a. This Court lacks the jurisdiction to hear and determine the matters raised herein and the proper province is the Environment and Land Court established pursuant to Article 162(2) of the Constitution,
- b. The Petition herein is sub-judice,
- c. The Petitioner has no *locus standi*, to file and prosecute the Petition herein.
- d. The Petition offends the principles of drafting Constitutional Petitions,
- e. The Petition is otherwise an abuse of the court process.

70. For all these reasons, the Preliminary Objection dated and filed on 3<sup>rd</sup> September, 2014 succeeds, and the Petitioner's petition dated and filed on 6<sup>th</sup> December, 2013 is hereby dismissed and, considering the condition of the petitioner, with a direction that each party bears its own costs. It is so ordered.

**Dated, delivered and signed at Mombasa this 25<sup>th</sup> day of March, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In presence of:

Mr. Lumatete for the Petitioner

Mr. Kondele for the Respondent

