



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL JUDICIAL REVIEW DIVISION**

**PETITION NO. 171 OF 2012**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLES 1, 2, 10, 19, 21, 20, 22, 23, 25, 22, 28, 29, 40, 47, 48,50 OF  
THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS OF  
THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SOCIAL JUSTICE**

**AND**

**IN THE MATTER OF: THE DOCTRINE OF REASONABLENESS AND  
PROPORTIONALITY**

**AND**

**IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)  
HIGH COURT PRACTICE AND PROCEDURE RULES 2006.**

**AND**

**IN THE MATTER OF: ARTICLES 7, 8 AND 17 OF THE UNIVERSAL DECLARATIONS OF  
HUMAN RIGHTS, 1948 AND ARTICLES 3 (A), (B) (4) AND 26 OF INTERNATIONAL  
COVENANT ON CIVIL AND POLITICAL RIGHTS 1996.**

**BETWEEN**

CURRENT INVESTIGATIONS COMPANY LTD. .... PETITIONER

VERSUS

JENNIFER MUTHONI ..... 1<sup>ST</sup> RESPONDENT

JANE WANJIKU HIRAM ..... 2<sup>ND</sup> RESPONDENT

JULIA WAMBUI GAKUGI ..... 3<sup>RD</sup> RESPONDENT

WOMEN TRUST HOUSING WELFARE ORGANIZATION ..... 4<sup>TH</sup> RESPONDENT

HOMELANDS DEVELOPMENT INVESTORS LTD. .... 5<sup>TH</sup> RESPONDENT

THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT

REGISTRAR OF TITLES ..... 7<sup>TH</sup> RESPONDENT

COMMISSIONER OF LANDS ..... 8<sup>TH</sup> RESPONDENT

RULING

1. The application dated 15/5/2012 was filed simultaneously with the petition herein. The application seeks the following orders:-
  - a. **“(Spent).**
  - b. **(Spent).**
  - c. **THAT this Honourable Court do grant temporary orders restraining the defendant (sic) from developing, subdividing and/or selling the said parcel of land known as land reference no 20523 – I.R No. 90435 Athi River.**
  - d. **THAT this Honourable Court do grant conservation(sic) orders against the Respondent (sic), either by themselves, agents, servants, and or employees from harassing, threatening, intimidating or otherwise interfering with the Applicant(s) inalienable proprietary rights in respect of land reference No. 20523 – Athi River pending the hearing and determination of this application or further orders of this Honourable Court.**
  - e. **THAT this Honourable Court be inclined to issue an order directed at the office of the OCPD Athi River to oversee and assist the Applicant herein in enforcement of the orders as granted against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents till this application is heard and determined.**
  - f. **THAT this Honourable Court be inclined to grant such other or further orders as it may deem fit for the interest of justice.**
  - g. **THAT the costs of this application be provided for”**
2. The application dated 28/6/12 seeks orders that the Petitioner’s application be struck out forthwith.
3. The application dated 4/10/12 seeks orders as follows:-
  1. **“(Spent).**
  2. **THAT an order do issue directed at the 5<sup>th</sup> Respondent compelling them to allow the Applicants unlimited access to the suit property.**
  3. **THAT the Defendants (sic) by themselves, agents, servants, employees and/or any person**

acting on the Defendants (sic) command be restrained by way of an injunction from interfering with the Applicant's security agents and/or any other employee from accessing the suit property.

4. **THAT this Honourable Court be inclined to issue an order directed at the office of the OCS Athi River to oversee and assist the Petitioner/Applicant in enforcing the interim orders.**

5. **Costs of this application be provided for."**

4. Following the consent of the parties herein the court gave directions that the aforesaid three applications be heard simultaneously. The applications were canvassed by way of written submissions.
5. In the said submissions, the Petitioner dealt with the applications dated 15/5/2012 and 4/10/2012 and remained silent on the application for striking out dated 28/6/12.
6. The Petitioner relied on the affidavits in support of the applications dated 15/4/2012 and 4/10/2012. The Petitioner also referred to a further affidavit sworn on 12/11/2012, the replying affidavits filed by the Respondents and the 5<sup>th</sup> Respondent's answer to the Petition.
7. The Petitioner's case is that on 14/10/1998, the Petitioner herein was allocated the land parcel **No. LR 20523 Athi River** through a letter of allotment **Ref. No. 33745/XX1**. That the Petitioner paid the requisite fees. The Petitioner was subsequently issued with a certificate of grant **No. LR 90435** under the **Registration of Titles Act**.
8. That in the year 2005, the Petitioner attempted to sell the suit property to **Jennifer M. Morigi** the (1<sup>st</sup> Respondent) of **Women Trust Housing Welfare Organization** (4<sup>th</sup> Respondent) but the transaction failed. That the 1<sup>st</sup> Respondent who had been supplied with the copies of the necessary documents in relation to the transaction posed as the owner of the suit property and made attempts to sell the same using forged documents. This prompted the Petitioner to file **HCCC Mks 61 of 2007** and obtained restraining orders against Respondent 1 – 4. Further restraining orders were obtained against the 5<sup>th</sup> Respondent upon the petition herein being filed.
9. Further attempts by the Petitioner to sell the suit property to the 5<sup>th</sup> Respondent came to an end when the 5<sup>th</sup> Respondent ended up purchasing the same parcel of land from the 1<sup>st</sup> – 4<sup>th</sup> Respondents. The Petitioner blamed the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents of attempting to illegally change the LR number of the suit property to **LR No. 2-523(IR 90435)**. The Petitioner further stated that the 4<sup>th</sup> and 5<sup>th</sup> Respondents' legal capacity was not clear in the absence of any certificates of incorporation and other documents to ascertain their legal personality at the time of incorporation. The application dated 4/10/2012 according to the Petitioner was necessitated by the harassment and intimidation by the police through the instructions of the 5<sup>th</sup> Respondent. That the police officers who have ensured that the Petitioner has been denied access to the suit property.
10. The applications by the Petitioner are opposed by all the Respondents.
11. The 1<sup>st</sup> – 4<sup>th</sup> Respondents in their replying affidavit sworn on 29/10/2012 opposed the Petitioner's **Notice of Motion** dated 4/10/2012. It is contended that the Petitioner has no valid title to the suit property and has never had possession of the same. It is alleged that the Petitioner is being sought by the police on suspicion of forgery. It is further stated that the Petitioner filed HCCC Mks 61/2007 and HCC Misc. Mks 164/10 and has now filed this petition which is an abuse of the court process and should be struck out.
12. The 5<sup>th</sup> Respondent in a replying affidavit sworn on 7/6/2012 expressed doubts over the genuineness of the documents of title exhibited by the Applicant. It is the 5<sup>th</sup> Respondent's contention that it owns **LR No. 20523 Grant No. 126163** which is a different parcel of land from the one claimed by the Petitioner. That the 5<sup>th</sup> Respondent bought its parcel of land from the registered owners, the 4<sup>th</sup> Respondent through its registered Trustees, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. That due to allegations of forgery the Land Registrar lodged a caveat on the two parcels of land which caveat was later lifted after it was confirmed that the land belonged to the 5<sup>th</sup> Respondent. The 5<sup>th</sup> Respondent complained of harassment from the petitioner. The 5<sup>th</sup> Respondent also accused the Petitioner of abusing the court process by filing a civil suit then abandoning the same and filling

- this Petition. The 5<sup>th</sup> Respondent also questioned the absence of any resolution from the Petitioner authorizing the commencement of these proceedings and the appointment of **Ongoto & Co. Advocates**.
13. A further affidavit sworn by **Robert Simon Wambugu** on behalf of the Petitioner terms the averments in the aforesaid replying affidavit of **Wenje Lie** on behalf of the 5<sup>th</sup> Respondent as full of falsehoods. It is stated that there are no two parcels of land in existence as stated in the replying affidavit.
  14. The 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents in opposition to the applications by the Petitioner dated 15/5/12 and 14/10/12 relied on the replying affidavit sworn on 30/10/2012. The application by the 5<sup>th</sup> Respondent dated 28/6/2012 was not opposed.
  15. According to the replying affidavit sworn by **Silas Kiogora Mburugu** the Principle Land Administration Officer in the Ministry of Lands, their records do not have any property known as **LR No. 20523 (IR 90435) Athi River**. That their records reflect **LR No. 20843 (IR No. 126163) Athi River** measuring 4.0 Hectares which was allocated to the 4<sup>th</sup> Respondent, Women Trust Housing Welfare Organization on the 14<sup>th</sup> October 1998 for a period of 99 years. That the 4<sup>th</sup> Respondent met all the requirements set out in the letter of allotment and paid the requisite fees of Kshs.636,100/=.
  16. That in September 2006 a dispute on ownership arose between four parties who included the Petitioner and the 4<sup>th</sup> Respondent. That the dispute was settled by the Ministerial Committee on technical issues which resolved that the 4<sup>th</sup> Respondent was the *bonafide* allottee. That the 4<sup>th</sup> Respondent subsequently paid the land rent arrears amounting to Kshs.2,253,529/= and the title was processed. The 4<sup>th</sup> Respondent subsequently transferred the land to the 5<sup>th</sup> Respondent, **Homelands Development Investors Ltd**. It is further contended that the title to **LR 2052 (IR 90435)** is a fake document.
  17. The Petitioner filed a further affidavit sworn on 12/11/2012 stating that the replying affidavit of the Principle Administration Lands Officer is untrue and the work of high level collusion intended to deprive him of his property. According to the Petitioner, if there was any forgery or criminal acts the same came from the Respondents' side.
  18. In the application dated 28/6/2012 which seeks orders for the striking out the petition, the Applicant's complaint is that a similar suit being **HCCC Mks No. 61/2007** was filed by the Petitioner and the case is still pending. That the Petitioner obtained interim orders which he has never bothered to enforce. It is further argued that the Petitioner has failed to disclose in this Petition the existence of **HCCC Mks No. 61/2007** hence guilty of non-disclosure and of abuse of the court process. No papers have been filed in opposition to the application for striking out dated 28/6/2012.
  19. The two applications filed by the Petitioner are anchored on the constitutional petition herein. The applications seek conservatory orders as well as the right of access to the suit property. The provisions of the constitution relied upon relate to the bill of rights. **Article 19** relates to rights and fundamental freedoms; **Article 20** is on the application of the bill of rights; **Article 21** pertains to the implementation of rights and fundamental freedoms; **Article 40** the right to property; **Article 47** to fair administration action; **Article 48** to access to justice and **Article 50** to the right to a fair hearing.
  20. The law is now settled that a party who alleges the violation of a constitutional right has a burden to cite with reasonable precision the provisions of the **Constitution** which have been violated and demonstrate the manner in which they have been violated. In the case of **Anarita Karimi Njeru –vs- Republic (1979) KLR 154**, the court stated as follows:-

**“We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with 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.”**

21. Although the Petitioner has made reference to various provisions of the **Constitution**, it is quite clear that what lies at the heart of this matter is a dispute over land ownership. Both the Petitioner

and the 4<sup>th</sup> Respondent claim to have been issued with letters of allotment of the suit property on the same day. That is on 14/10/1998. Is this a case of double allocation? There are allegations and counter allegations of fraud, forgery, collusion, validity of sale agreement, criminal charges and police harassment and intimidation. These allegations need to be tested through a full blown out trial where the documents of ownership held by each of the parties can be scrutinized and the makers thereof cross-examined on the genuineness of the same. It is noted that the affidavit evidence on record in support of the petition is that of the Petitioner only. This court's view is that the Petitioner's case would find adequate remedy in a civil suit through the **Environmental Land Court**.

22. In the case of **Re Application by Bahadur [1986] L.R.C (Cost.) 297 at 298**, the Court in **Trinidad & Tabago** 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.”**

23. Principally, the Applicant's complaint is that he has been deprived of his property. As stated in **Minister of Home Affairs vs Bickle & Others (1985) L.R.C Cost. 755, Georges CJ** held as follows:-

**“It is an established practice that where a matter can be disposed off 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 (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22). The judge went on to add that: “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 on some other basis, whether legal is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the rights.”**

24. It is not in dispute that the Petitioner filed **HCCC 61/2007**. The amended plaint dated 13/7/2010 seeks the following orders:-

- a. **“Permanent injunction restraining the defendant (sic) by themselves, their servants, employees and or agents or otherwise from remaining on or continuing trespassing or from otherwise interfering or dealing with LR 20523 (Suit Premises).**
- b. **General damages for trespass.**
- c. **An order prohibiting the Registrar of Titles from entering any dealings or issuing a grant in respect of the suit land during the currency of certificate of grant 90435.**
- d. **Costs and interest.**
- e. **Any other or further relief the court may deem fit to grant.”**

25. In a ruling dated 17/3/2008, this court issued orders of injunction in **HCCC 61/2007** in favour of the Applicant who is the Petitioner herein. Those orders are still in force. Indeed there is a multiplicity of applications in the said civil suit which include contempt of court application, application to enjoin **Homelands Development Investors Ltd** (5<sup>th</sup> Respondent herein) and the **Registrar of Titles** (7<sup>th</sup> Respondent herein). These applications remain pending. It is not clear why the petition herein was filed while the civil suit is still pending.

26. Curiously, the Petitioner has filed no papers in opposition to the application seeking orders for the striking out of the petition. The three applications the subject of this ruling proceeded simultaneously with the consent of the parties as recorded in court on 17/4/13. Be as it may, it is abundantly clear that there are two suits pending before this court in respect of the suit property. In both cases the dispute concerns the ownership of the suit property. In both cases the Petitioner and the 5<sup>th</sup> Respondent claim proprietary rights over the suit property. At the end of the day the court will in either of the cases make a determination regarding who holds a valid title to the suit

property and the damages payable. The conclusion therefore is that this petition is another matter filed to litigate over the same property between the same parties and seeking similar reliefs. The petition is therefore an affront the *sub judice* rule and an abuse of the court process.

27. With the foregoing, the two applications by the Petitioner have failed to meet the threshold for the grant of the orders sought and are hereby dismissed (See **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358**). The application for the striking out of the petition is allowed with costs.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 12<sup>th</sup> day of March 2015.**

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**B. THURANIRA JADEN**

**JUDGE**