



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA TA NAIROBI**

**ELC NO 440 OF 2013**

**IN THE MATTER OF ARTICLES 35, 40,60,64,68 and 159 2(d) OF THE CONSTITUTION OF  
KENYA**

**AND**

**IN THE MATTER OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL  
TO OWN LAND AND TO DEAL WITH IT FREELY AT WILL**

**AND**

**IN THE MATTER OF THE INDIVIDUAL RIGHTS TO UNLIMITED ACCESS TO  
INFORMATION RELATING TO PARTICULAR DETAILS AND RECORDS OF THIS LAND**

**EDWARD GACHIGUA NDERITU.....PETITIONER**

**VERSUS**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR KAJIADO COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**RULING**

The application before this court for consideration is the Notice of Motion dated **8<sup>th</sup> April 2013**, brought under Sections 25, 26 and 34 of the Land Registration Act, 2012, Article 60 (1)(a & b), 64, 159(2(d) and all the enabling provisions of Law. The Petitioner seeks for the following orders:-

- a. *That this Honourable court be and is hereby pleased to allow the petitioner to deal with **LR No. Kajiado/Musiro/92**, pending hearing and determination of the suit herein on **LR No Kajiado/Musiro/90**, **LR No.Kajiado/Musiro/92**,and **LR No Kajiado/Musiro/93**[suit properties]*
- b. *That this Honourable court be pleased to order and direct the respondents by themselves, their agents and service to allow the petitioner to exercise all dealings on **LR No. Kajiado/Musiro/92**, as informed by his viable commercial decisions, without any inference whatsoever.*

This application is premised on the grounds stated on the face of the application and the petitioner's supporting affidavit wherein he stated that he purchased the suit properties in 1991 and was registered as the absolute proprietor. He contends that he is not able to carry out searches on the said

properties and yet he has not been given the reasons for the refusal by the 2<sup>nd</sup> Respondent. That the act of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent of denying him information relating to the aforesaid parcels of lands yet he is the registered proprietor infringes on his rights guaranteed by the constitution. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent have abdicated their statutory requirement relating to the Constitution of Kenya and the Land Laws and more especially the Land Registration Act, 2012. That since he was in dire need of medical treatment in Europe, he expected to sell one of the properties herein so as to raise funds for his treatment. He further averred that he has scouted for a prospective buyer for land parcel **LR No. Kajiado/Musiro/92**, and the said buyer was ready to buy the property immediately but the 1<sup>st</sup> and 2<sup>nd</sup> Respondents could not allow any dealings on the property. He added that the orders sought will not prejudice the respondents as he is the absolute proprietor of **LR No. Kajiado/Musiro/92**, therefore he should be allowed to deal with the parcel of land.

There is no reply to this application by the Respondents and there is no evidence of service. The application was first brought to court under certificate of urgency on 10<sup>th</sup> April 2013. The orders of the court were that the applicant serves the Respondents and takes a hearing date at the registry. On 3<sup>rd</sup> July 2013 the applicant's advocate explained to the court that he had served the respondents but he did not have the affidavit of service to show that he had served and sought for a date to enable him serve the Respondents. The court gave a hearing date for 26<sup>th</sup> September 2013. On 26<sup>th</sup> September 2013 he again informed the court that he had not filed a return of service and sought for another date to which the court made an order that the applicant files a proper return of service. From the court records, it is only the return of service for the hearing notice that was filed but there is no evidence that there was service of the petition together with the application to the Respondents.

The law requires a petition and any application like the one before this court to be served upon the respondents and in this regard, I am in agreement with the holding in **Kumbatha Naomi Cidi –vs- County Returning Officer Kilifi & others – Malindi EP No.13 of 2013**, where the court held that, **“failure to serve a petition is a matter that goes to the very core of the proper and just determination of the petition and cannot be wished away.”**

It is therefore clear that service of the petition and application upon the respondents is not a matter of choice by the petitioner. It is a compulsory step that must be taken by the petitioner as a requirement for a fair hearing as provided under **Article 50 (c) of the Constitution**, which provides that every person has the right to **“have adequate time and facilities to prepare a defence”**. What this means is that where a petition has not been served upon a respondent as is the situation in this case, then the respondent(s) are denied the opportunity and adequate time to prepare their defence. The failure to serve this application together with the petition has its ramifications and the petitioner stands to lose for the reasons that he will not get any orders sought in his petition. In the case of **Naomi Cidi –vs- The County Returning Officer Kilifi & 3 others – Malindi Election Petition No.13 of 2013**) the court held that,

***“Any pleading filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. Service of pleading accords the opposite party the chance to be heard. It is my considered opinion that this petition is a petition that never was.”***

It is therefore my finding that since the application was not served upon the Respondents, no orders can be granted as sought. The petitioner should however serve the Respondents with the petition dated 8<sup>th</sup> April 2013 and take dates from the registry for priority basis.

For the above reasons, the Petitioner's application dated **8th April 2013** is dismissed.

Costs shall be in the cause.

It is so ordered.

**Dated, Signed and delivered this 16TH day of APRIL 2015**

**L. GACHERU**

**JUDGE**

**In the Presence of:-**

.....for the Plaintiffs/Applicant

.....for the Defendant/Respondent

**Hilda: Court Clerk**

**L. GACHERU**

**JUDGE**