



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

CONSTITUTIONAL PETITION NO. E004 OF 2021

EVANGELINE KARUGWATA GIKONOPETITIONER

VERSUS

JOYCE NKUENE CYPRIANO..... 1ST RESPONDENT

DAVID MWITI CYPRIANO 2ND RESPONDENT

RULING

A. THE PRELIMINARY OBJECTION

1. The 1st and 2nd respondents have raised a preliminary objection dated 10.3.2021 on the grounds:-

1. The petition is against private citizens who holds no public office, authority, mandate or power with no judicial, quasi-judicial administrative or executive responsibilities capable of giving rise to the claim by the petitioner over breach of her constitutional rights and freedoms hence the same cannot be founded.

2. The grievances as set out in the petition are tortious in nature hence the court lacks jurisdiction to entertain it.

3. The petition is bad in law, incompetent, non-sustainable and fatally defective in law.

2. Parties were directed to canvass the preliminary objection through written submissions dated 10.11.2011 and 6.12.2021 respectively.

3. The 1st and 2nd respondents take the view it was not their duty, as private citizens to observe, respect, protect, promote and fulfill the rights and freedoms of the petitioners and that the Constitution regulates the relationship between a government and its citizens.

4. In the instant case given the 1st and 2nd respondents holds no office or authority, it is inconceivable to be sued for infringing or denying the petitioner his constitutional rights and freedoms. They rely on **Chelimo A. Marsin & 7 Others –vs- Officer Commanding GSU Camp Kirindon GSU Camp & 7 Others [2011] eKLR** on the proposition that individuals or group of individual owe no duty to another so as to give rise to an action under the Bill of Rights hence such a case cannot be sustained.

5. Secondly, it is submitted a claim on how the suit land was allegedly fraudulently, registered in favour of the 1st and 2nd respondents was tortious in nature and ought to be filed in a normal suit other than a constitution petition.

6. Lastly, it is submitted an infringement of a constitutional right can only be perpetrated by the state or state organs and not a private individual against another hence the petitioner's remedy could only lie under the private law and not through a constitutional petition.

B. RESPONSE

7. The petitioner submitted the preliminary objection does not meet the threshold of what a preliminary objection is as outlined in **Mukisa Biscuits Co. Ltd –vs- West End Distributors Ltd. [1996] E.A 696** and also **Avatar Singh Bhamra & Another –vs- Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004.**

8. The petitioner further submitted the petition should be sustained and heard on merits. Reliance was placed on:

a. David Nyekorach Matsanga & Another –vs- Philip Waki & 3 Others [2017] eKLR on the proposition that a preliminary objection should not be raised where facts had to be ascertained or where what was sought is the exercise of judicial discretion.

b. Independent Electoral & Boundaries Commission –vs- Jane Cheperenger & 2 Others [2015] eKLR on the proposition that it was improper to resort to the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially and on merits instead of summarily and that judicial time and resources would be preserved for hearing a matter on merits.

9. Lastly, it was submitted that the dispute was not tortious in nature only but touched on the infringement of the petitioner's constitutional rights and freedoms.

C. PLEADINGS

10. The petition dated 25.1.2021 is premised on **Articles 10, 20, 23, 24, 25, 40, 47 and 50 of the Constitution** the subject being **L.N. Nkuene/Taita/1630**. The respondents as described as sister-in-law and nephews and legal representative of the estate of Cypriano Kaiji Gikono and currently owners of **L.R. Nkuene/Taita/1631** hereinafter the property, initially part of **Parcels No. Nkuene/109**; gathered by the late Gikono M'Ibeere who had directed the petitioner to occupy a portion and the remainder to be equally divided between his two sons namely Cypriano Kaiji Gikono(deceased) and Francis Nyamu Gikono (deceased) who were minors by then.

11. The petitioner avers upon Cypriano Kaiji Gikono reaching the age of majority, he took up the papers to follow up but failed to share with her a portion contrary to the deceased's wishes. Whereas Francis Nyamu Gikono got his share as **L.R No. Nkuene/Taita/489**, he accommodated her on his land and later on in 1999 subdivided it into **L.R No. Nkuene/Taita/1630 and 1631**. It is alleged Parcel No. L.R 1630 was sold to M'Aburi M'Mung'atia but thereafter he gifted her Parcel No. 1631 since he did not have wife or children.

12. The petitioner avers in October 1999, the Francis Nyamu Gikono obtained a land control board consent in her favour and gave her the same to effect or complete the process. That unfortunately, he was taken ill and succumbed on 8.11.1999.

13. Following his death, Cyprian Kaiji Gikono made false accusations of forgery against her and she was charged in Meru Criminal Case No. 315 of 2000, and convicted. She eventually successfully appealed against the conviction and sentence which was overturned on 13.11.2007 in **Meru HCCR No. 237 of 2001**.

14. The petitioner avers; by the time the appeal was determined, a **Meru Succession cause No. 63 of 2000** had been filed by Cypriano Kaiji Gikono now deceased and the Parcel No. 1631 was registered in his name which registration she avers was illegal and unprocedural since the lower court decision had only directed that the land reverts to the name of the deceased pending an appointment of a legal representative and which decision was reversed by the High Court on appeal meaning the land was supposed to revert to her name.

15. The petitioner avers prior to the appeal, she had unsuccessfully sought a revocation of the grant but the court held that she had initially gotten the land through a criminal enterprise.

16. The petitioner avers she filed **Meru HCCC No. 26 of 2006** against Cyprian Gikono seeking injunctive orders against her eviction but a preliminary objection on res judicata over **Meru Succession cause No. 63 of 2000** was raised and upheld by the court.

17. The petitioner avers the issue of ownership of the property Parcel No. 1631 was never determined on merits in **Meru HCCC No. 26 of 2006** and that she filed **Meru Central District LDT Case No. 68 of 2008** where it was ruled she was the owner notwithstanding, the respondents' father had a grant in **Meru HCC Succession Cause No. 63 of 2000**. The award was adopted on 20.2.2018 and she was issued with a title deed.

18. The petitioner avers the respondents filed **Chuka Succession Cause No. 41 of 2010** over the estate of Cyprian Gikono including **Parcel No. 1631** as part of the estate of Cypriano Gikono. The case was later transferred to **Meru Succession Cause No. 752 of 2013** whereof on 22.7.2017, the respondents proceeded to register the suit land under their names despite her having a title deed hence she avers that it was illegal on their part and the Land Registrar Meru since no orders were sought for cancellation of her name from the land register.

19. The petitioner avers she in **Meru HC Succession Cause No. 752 of 2013** sought vide application dated 23.4.2019 for an injunction and annulment and rectification of grant so as to remove the suit land from being part of the estate of the respondents and the reversion of the land to her. The court declined to issue the orders for lack of a valid vesting order.

20. The petitioner avers the respondents have proceeded to cancel her name and instead inserted theirs. Further she avers the respondents proceeded to file **Nkubu ELC No. 55 of 2019** seeking an eviction order yet she has been on the suit property her entire lifetime of over 80 years with her developments including a homestead and this being her only source of livelihood, unless the respondents are restrained she stands being impoverished and prejudiced. She avers the acts of the respondents were malicious, unlawful, wrongful, illegal, harmful, discriminatory, oppressive and amount to a breach of her constitutional rights and freedoms to own property.

21. She prayed for declaratory orders the registration in favour of the respondents was illegal and unconstitutional, that she was the lawful owner, cancellation and removal of the names of the respondents and a replacement with her names, prohibitory injunction and general damages for violation of her constitutional rights and freedoms.

22. In summary, the cause of action and the complaint in this petition is that the land registrar colluded with the respondents as a consequence they breached her constitutional rights and freedoms as to land ownership, fair hearing, access to justice and discrimination.

A. LAW GOVERNING CONSTITUTION PETITION

23. **Article 165 3 (b) as read together with Articles 22 and 23 of the Constitution** govern the power, process, procedure and reliefs of a party seeking to enforce the bill of rights.

24. **Article 22 (3)** directs the Chief Justice to formulate rules to govern the institution and hearing of constitutional petitions and **Sub-Rule 3 (b)** provides that formalities related to the proceedings to be kept to minimum and where necessary the court shall entertain proceedings on basis of informal documentation.

25. **Sub-Rule 3 (2)** requires the court to observe the rules of natural justice and shall not unreasonably be restricted by procedural technicalities.

26. The **Mutunga Rules 2013** regulate the form, contents and manner of the filing, service, amendments and the mode of hearing of a constitutional petition.

27. **Rule 10** thereof governs the form of a petition which includes the description of parties, facts relied upon, articles of the bill of rights (freedoms) infringed, particulars of the breaches, pending suits relating to the matter and reliefs sought.

28. **Rule 3 (8)** grants the court inherent powers to make such orders as may be necessary for the ends of justice while Rule 5 grants the court power to order joinder, substitution and striking out of parties.

29. Under **Rule 5 (b) (c) (d) and (e)**, the court has wide powers to ensure a petition is not defeated on account of misjoinder or non-joinder or where there is a mistake made in good faith and it is necessary for the determination of the matter in dispute the court may order with or without application of either party, require a party whose presence is necessary to enable the court to adjudicate upon and settle a matter be added.

30. Upon addition of a party, the court has powers to order the petition to be amended and served upon the new respondent.

D. FINDINGS

31. The above being the law governing the constitutional petition, the question is whether the preliminary objection herein is well founded in law.

32. **Hassan Ali Joho & Another –vs- Suleiman Said Shahbal & 2 Others [2014] eKLR** the Supreme Court of Kenya held a preliminary objection as consisting of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.

33. The 1st and 2nd respondents are yet to respond to the petition and deny or affirm the facts as pleaded in the petition and which the court has highlighted above.

34. The ruling delivered by this court on 12.5.2021 touched on matters involving the parties spreading across several courts in the past and in present litigation. The court also ordered the matter be heard on priority basis. Instead of the 1st and 2nd respondents filing a response, they have raised a preliminary objection to the petition.

35. The petition as presented largely complies with **Rules 10 of the Mutunga Rules**. Even though it clearly aver that the Land Registrar among others participated in the alleged breach of the petitioner's rights and freedoms, the said party and its principal legal advisor have not been included in the petition.

36. The court under **Rules 5 and 18** of the aforesaid **Rules** has powers as to determine who should be joined as a respondent(s) and or interested party to a constitutional petition.

37. The discretion to do so is unfettered and has to be exercised so as to achieve the ends of justice. **Article 23 (3) (b) of the Constitution** explicitly forbids formalities from limiting the exercise of and a right of a party to seek the enforcement of the **Bill of Rights** before courts of law.

38. The issues raised herein as a preliminary objection is more or less on form and not the substance. Both are issues touching on the exercise of the discretionary powers of the court as to whether the petition meets a constitutional threshold and secondly if the necessary respondents have been enjoined or not and lastly whether non-joinder of parties is fatal to the petition.

39. In my view, the grounds raised as preliminary objection fall short of meeting what is a threshold of a pure point of law likely to dispose of the petition. The respondents are yet to deny or agree with the facts as presented by the petition. **See William Kiprono Towett & 1597 Others –vs- Farmland Aviation Ltd & 2Others [2016] eKLR.**

40. It is also trite law a suit should not in principle be struck out for joinder or non-joinder of a party except when there is a legal bar to maintainability of a suit. **See Chief Land Registrar & 4 Others –vs- Nathan Tirop Koech & 4 Others [2018] eKLR.**

41. The upshot is that the preliminary objection herein fails. The same is dismissed with no order as to costs.

42. Leave is hereby granted to the petitioner to make the appropriate amendments to the petition within 14 days from the date hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 16TH DAY OF FEBRUARY, 2022

In presence of:

Miss Kounyangi for Kaumbi for respondents

Murithi for petitioner

Court Assistant - Kananu

HON. C.K. NZILI

ELC

JUDGE