



**THE REPUBLIC OF KENYA**

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

**PETITION NO E004 OF 2021**

**MISHECK KARIUKI GICHURU..... PETITIONER**

**=VERSUS=**

**INSPECTOR GENERAL OF POLICE..... 1ST RESPONDENT**

**THE DIRECTORATE OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT**

**SUB COUNTY CRIMINAL INVESTIGATION**

**OFFICER, RUIRU SUB-COUNTY.....3RD RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION..... 4TH RESPONDENT**

**THE DISTRICT LAND REGISTRAR, THIKA..... 5TH RESPONDENT**

**THE ATTORNEY GENERAL.....6TH RESPONDENT**

**RULING**

**Background**

1. The petitioner, **Misheck Kariuki Gichuru**, brought this petition on or about 27/5/2021. He contended that he held a power of attorney donated to him by one **Veronica Ngithi Muiruri** [the donor] on whose behalf he brought the petition. He further contended that the donor was the proprietor of **Land Parcel Number Ruiru/Ruiru East Block 1/1407 [the suit property]**. It was his case that sometime in 2014, he visited the suit property and found that **Hannah Wangari Willy, Gorretti Wairimu Willy, Joseph Muchiri Waihoru** and **James Waihoru** had trespassed on it. With the authority of the donor, he made a report to the police. The police opened an investigation file and carried out investigations relating to the complaint. The police investigations entailed, among other things, taking copies of records held in the Lands Registry in relation to the suit property.

2. He further contended that, in a bid to regain the suit property, the donor filed **Thika ELC Case No. 667 of 2017** against the four alleged trespassers together with the Land Registrar. The said suit was subsequently transferred to **Ruiru Senior Principal Magistrate Court** and registered as **Ruiru SPMC E & L Case No. 103 of 2019. [The case was pending at Ruiru SPM Court at the time of bringing this petition.]** The four alleged trespassers subsequently produced in the trial court a green card [land register] and a title deed indicating that they were the owners of the suit property. He added that in an effort to obtain documents to debunk the claim of the alleged trespassers, he sought copies of documents held in the Police Investigations File to no avail. Similarly, the Land Registrar failed to provide him with copies of the documents in the land records file, contending that the documents never existed in the Lands Registry. He contended that the 5th respondent had deliberately altered the land records to defraud the donor her land. It was therefore his case that his rights under **Articles 35, 40** and **75** of the Constitution had been contravened.

3. Consequently, he invited this court to determine the following verbatim questions:

**a) Whether the failure to produce to court the investigation file in regard to complaint number OB14/06/2014 is contravention of Article 35 of the Constitution of Kenya 2010.**

**b) Whether failure to make known the contents thereof by the respondent is in contravention of Article 35 of the Constitution 2010.**

**c) Whether the actions of the 5th respondent in altering the land records of the suit property deprived the petitioner the rights bestowed on him by Article 40 of the Constitution of Kenya 2010.**

- d) *Whether the actions of both the 3rd and 5th respondents are in contravention of Article 75 of the Constitution of Kenya 2010*
- e) *Whether the contraventions in Article 75 by either and or both the 3rd and 6th respondents warrants their removal from office.*
- f) *Whether the actions of the respondents' amount to an attempt at denying the fundamental rights of access to justice.*

4. He sought the following reliefs against the respondents in the petition:

- i. *A declaratory order that the 5th respondent's actions in falsifying land records of the suit property whether in his capacity as a public officer is illegal, unconstitutional, ultra vires and a breach of the petitioner's fundamental rights.*
- ii. *A declaratory order that the 3rd respondent's failure to charge the 5th respondent for altering the land records of the suit property is illegal, unconstitutional, ultra vires and a breach of the petitioner's fundamental rights hence unlawful null and void.*
- iii. *A declaratory order that the 4th respondent's failure to call for the investigation file and prosecute the crimes committed by the 5th respondent in altering land records is illegal, unconstitutional, ultra vires and a breach of the petitioner's rights.*
- iv. *A declaratory order that the 3rd respondent's failure to produce the investigation file or make known the contents of the investigation file is illegal, unconstitutional, ultra vires and a breach of the petitioner's rights.*
- v. *A declaration that the 3rd and 5th respondents have failed the integrity test and ought not to continue holding public office and or public trust.*
- vi. *A mandatory order compelling the 3rd respondent to produce the original investigation file or reconstructed file with the unaltered proprietary ownership records of Title No. Ruiru/Ruiru East Block 1/1407.*

#### **Response by the 1st, 2nd, 3rd, 5th and 6th Respondents**

5. The 1st, 2nd, 3rd, 5th and 6th respondents filed grounds of opposition dated 15/6/2021, urging the court to dismiss the petition on the following grounds:

- i. *The application is fatally defective as th same was not filed in the Senior Principal Magistrate Court at Ruiru prior to being filed in the Environment and Land Court at Thika and should the trial court proceed to hear and determine Civil Case No. 13 of 2019 the judgment will most likely be against him.*
- ii. *The applicant has not met the threshold to warrant the orders sought as highlighted in Halsbury's Law of England, 4th Edition, Vol 37 page 330 and 332.*
- iii. *The application has not been filed mala fides (sic) as against the 1st, 2nd, 3rd and 5th and 6th respondent as custodian of the land records, the District Land Registrar, Ruiru has already filed his witness statment and availed all records within his custody in the trial court proceedings and the land records the ptitioner is allegedly referring to are not in the custody of the District Land Registrar.*
- iv. *The petitioner is forum-shopping as the ongoing proceedings in Senior Principal Magistrates Court Case No. 103 of 2019 are yet to be heard and determined and the issues raised are an afterthought meant to derail the case and the same cannot be stayed in this court.*
- v. *The application is frivolous, vexatious and misconceived against the respondents.*
- vi. *The application is an abuse of court process.*

#### **Preliminary Objection and Submissions thereon**

6. On his part, the 4th respondent filed a notice of preliminary objection dated 9/7/2021, urging the court to strike out this petiton on the following grounds:

- i. *The court lacks jurisdiction to entertain the matter.*
- ii. *The petition discloses a purely civil dispute which is disguised as a constitutional issue contrary to laid down procedures in the civil procedure code and is an abuse of the court process.*
- iii. *The petition in its entirety offends the provisions of Article 157 (10) of the Constitution of Kenya 2010.*
- iv. *The petition is an attempt to cause the 4th respondent to breach the provisions of Article 245(2) (b) of the Constitution by directing investigations, an issue which is beyond the mandate of the 4th respondent.*

v. *The 4th respondent is a stranger to the file known as OB14/06/2014 and the prayers sought against the 4th respondent are not actionable on matters beyond his constitutional mandate.*

vi. *Pursuant to Article 157(4), the 4th respondent has no capacity in directing any of the respondents in design of discharging their mandate and as such, the 4th respondent should not be a party to this suit and should be removed forthwith.*

vii. *The petition does not expressly disclose any infringement of any of the fundamental rights of the petitioner by the 4th respondent.*

7. The above preliminary objection by the 4th respondent is the subject of this ruling. It was canvassed through written submissions dated 15/9/2021. The 4th respondent identified the following as the four issues falling for determination in the preliminary objection: (i) *Whether the court has jurisdiction to hear the petition in relation to matters of criminal investigations;* (ii) *Whether the petitioner has specifically demonstrated the infringement of his rights by the 4th respondent;* (iii) *Whether the entire petition is an abuse of the process as prescribed under Article 157 (10) of the Constitution;* (iv) *Whether this court has jurisdiction to direct the 4th respondent to discharge its constitutional mandate.*

8. On the question as to whether this court has jurisdiction to entertain this petition, the 4th respondent cited **Articles 162 and 165** of the Constitution and the Supreme Court decision in **Republic v Karisa Chengo & 2 others [2017] eKLR** and submitted that only the High Court is seized of jurisdiction to issue the orders sought in this petition because they relate to criminal investigations.

9. On whether the petitioner has specifically demonstrated infringement of his rights, the 4th respondent cited the decisions in (i) **Anarita Karimi Njeru v Republic(1979)eKLR** and (ii) **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013]eKLR** and submitted that the petitioner has failed to specifically demonstrate how the 4th respondent infringed his rights.

10. On whether the entire petition is an abuse of the process of the court, the 4th respondent submitted that the petitioner was seeking orders to assist him prosecute **Ruiru SPMC E & L Case No 103 of 2019** and had curiously omitted to join the defendants in the said civil suit as parties to this petition. Counsel added that under **Article 157**, the Director of Public Prosecutions was independent in the exercise of his mandate.

#### **Submissions by the 1st, 2nd, 3rd, 5th and 6th Respondents**

11. The Attorney General, through **Ms Mwihaki Ndundu – Senior State Counsel**, filed written submissions dated 23/11/2021 on behalf of the 1st, 2nd, 3rd, 5th and 6th respondents. The Attorney General supported the preliminary objection. The learned Senior State Counsel identified the following as the two issues falling for determination in the preliminary objection: (i) *Whether this court has jurisdiction to hear the petition;* and (ii) *Whether the petitioner is entitled to the orders sought.*

12. On whether this court has jurisdiction to hear this petition, the Attorney General cited Articles 162 and 165 of the Constitution together with the Supreme Court decision in **R v Karisa Chengo & 2 others [Supreme Court Petition No. 5 of 2015] 2017 eKLR** and argued that since Article 165(5) precludes the High Court from entertaining disputes reserved for the Environment and Land Court, it should by the same token be inferred that the Environment and Land Court too cannot hear disputes reserved for the High Court. The Attorney General added that the order sought in the petition can only be granted by the High Court, contending that this court has no jurisdiction to determine issues relating to criminal investigations and prosecutions and whether a state officer has met or does not meet integrity threshold to hold a public office.

13. The Attorney General further submitted that issues relating to ownership of the suit property over which this suit had jurisdiction to adjudicate were pending determination in **Ruiru SPMC E & L Case No 103 of 2019**. The Attorney General argued that, in the circumstances, this petition was an abuse of the process of the court and was meant to delay the determination of the land dispute in the SPM Court.

14. The Attorney General added that this petition was an attempt to direct the Director of Public Prosecutions contrary to the provisions of Article 157 of the Constitution. The Attorney General further contended that this court did not have jurisdiction to direct how police investigations should be conducted. On whether the petitioner was entitled to the orders sought in the petition, the Attorney General submitted that the petitioner had failed to prove infringement of his rights with regard to the environment and land. The Attorney General urged the court to strike out the petition as it was a waste of precious judicial time.

#### **Petitioner's Submissions**

15. The petitioner filed written submissions dated 29/10/2021 through the firm of *C.G. Waithima & Co Advocates*. Counsel for the petitioner submitted that this petition was provoked by the proceedings before the **Ruiru SPMC Court in Ruiru SPMC E & L Case No 103 of 2019**. It was the position of counsel for the petitioners that this petition did not raise a dispute or contestation on ownership of any land and/or in particular the suit property. Counsel contended that what was presented in this petition was a plea for determination of the constitutionality of, inter alia, the 3rd respondent's refusal to provide to the petitioner land records relating to the suit property, upon demand and the 3rd respondent's non-compliance with the trial courts summons to appear in court and produce the land records of the suit property. Counsel argued that Article 35 of the Constitution obligated public bodies to provide to the general public information in their custody.

16. It was the position of counsel for the petitioner that the petitioner had been forced to invoke the jurisdiction of this court under Article 165(3) (b) and (d) (ii) for the purpose of interpretation and enforcement of the petitioner's constitutional rights. Counsel contended that the magistrate court did not have jurisdiction to interpret or enforce the bill of rights and issue reliefs arising out of infringement of constitutional rights, hence the need to bring this petition.

17. Counsel argued that the petitioner had demonstrated that the 3rd respondent had maliciously withheld from him and from the trial court the land records relating to the suit property, which records were central to the determination of the dispute pending in the magistrate court. He added that the petitioner had demonstrated that the respondents had jointly or severally, by their actions and/or inactions, violated Articles 40, 48, and 244 (a), (b), and (d) of the Constitution. Counsel argued that the preliminary objection was a camouflage by the 4th respondent to cover up its own omissions and those of the 3rd respondent. Counsel argued that the preliminary objection under consideration offended the principle on what constitutes a preliminary objection as set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696* because it raised issues of fact. Counsel urged the court to dismiss the preliminary objection on the above grounds.

### **Analysis and Determination**

18. I have considered the grounds set out in the preliminary objection dated 9/7/2021 together with the parties' respective submissions. I have also considered the constitutional and statutory frameworks relevant to the key issues in the preliminary objection. Further, I have considered the prevailing jurisprudence on the key issues in the preliminary objection. Parties did not agree on a common statement of issues falling for determination in the preliminary objection. Having considered the grounds set out in the preliminary objection and the submissions presented to the court; and having perused the petition together with the responses to the petition, the following are, in my view, the two key issues that fall for determination in the preliminary objection are: (i) Whether at this point of adjudication of the ownership dispute relating to the suit property by the Ruiru SPM Court, this court is properly seized of jurisdiction to entertain and adjudicate the issues raised in this petition and grant the reliefs sought in the petition; and (ii) Whether this petition is an abuse of the process of the court. I will make brief contemporaneous pronouncements on the two issues because they are intertwined.

19. It is now settled law that this court is vested with jurisdiction to adjudicate questions relating to rights and fundamental freedoms in the bill of rights in our Constitution in so far as they relate to the environment and the use, occupation and title to land. It is also settled law that the Employment and Labour Relations Court is vested with jurisdiction to adjudicate similar questions in so far as they relate to employment and labour relations. Under **Article 165(3)(b) of the Constitution**, the High Court is vested with jurisdiction to adjudicate disputes relating to all other questions on rights and fundamental freedoms in the bill of rights.

20. Counsel for the petitioner submitted that this petition is not a dispute or contestation on ownership of land, and in particular the suit property. Counsel for the petitioner contended that this petition is a plea for determination of the constitutionality of, inter alia, the respondents' refusal to avail to the petitioner records relating to the suit property. If indeed all that this petition is about is the petitioner's right of access to information, then this is a matter that falls within the jurisdiction of the High Court.

21. The petitioner has made it clear in the petition and in his written submissions that this petition was triggered by the ongoing trial in **Ruiru SPM E & L Case No 103 of 2019**. His gravamen is that the 3rd respondent has, in the police investigations file, land records relating to the suit property, which records the donor requires in order to effectively debunk the defence put forth by the defendants in the said suit. Secondly, he contends that the 5th respondent has altered land records in the Land Registry with a view to defeating the donor's case in the magistrate court. To the extent that this petition has been brought while key questions relating to the said dispute are still pending before the trial court, I share the view of both the Attorney General and the Director of Public Prosecutions that this is not the proper forum where the issues raised in this petition should be raised. I say so because the Civil Procedure Rules, the Evidence Act, and the Magistrate Court Act have legal frameworks on compellability of witnesses and production of documents held by persons or entities that are not parties to a civil suit. Under Section 10 of the Magistrate Act, the magistrate court has powers to punish for contempt. What that means is that where a witness has been summoned to attend a magistrate court and produce documents but the witness deliberately fails to honour the court summons, the magistrate court is empowered to punish the witness and compel adherence to the order of the court. This is the mechanism which the petitioner should utilize as opposed to instituting a fresh petition to compel production of evidence in an ongoing trial in a different court.

22. Secondly, questions as to whether the land records have been altered are pending determination in the trial court. Similarly, whether or not specific documents are in the police investigations file is a question to be determined when the file is produced before the trial court as and when the trial court issues an appropriate order for production of the file. Through this petition, the petitioner wants the court to make declarations on questions that are pending determination in the trial court. That is certainly an abuse of the court process. If the petitioner or the donor genuinely want the respondents to be compelled to produce certain documents, they have every right to make an appropriate formal application before the trial court.

23. For the above reasons, it is my finding that this court is not the proper forum where to ventilate the grievances raised in this petition. Further, it is my finding that this petition is an abuse of the process of the court. The result is that the petition is struck out. The donor will be at liberty to move the trial court appropriately for orders compelling the relevant parties to produce to the trial court documents the donor wants produced in the trial court. Because of the nature of the issues raised in the petition, there will be no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF FEBRUARY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Kenyora for the Petitioner

Ms Ndundu for the 1st, 2nd, 3rd, 5th and 6th Respondents

Court Assistant: Lucy Muthoni