



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1404 OF 2004(OS)

JEPHTHAN NJAGI KARINGO.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

AND

SAMUEL NGUNU KIMOTHO.....1ST INTERESTED PARTY

MAAKA MUKUHI MUGWERU.....2ND INTERESTED PARTY

JOSEPH NG'ANG'A NJUGUNA.....3RD INTERESTED PARTY

JOSVIR TRADERS & AGENCIES.....4TH INTERESTED PARTY

JUDGMENT

Introduction

The Plaintiff instituted this suit by way of an Originating Summons dated 28/12/2004. He alleges that his fundamental rights and freedoms have been breached on grounds that the subdivision of the land comprised in L. R. 13041 Ruaraka into three separate portions was obtained by fraud. Further, that the said partition has resulted in the contravention of his fundamental rights to due protection of law and from deprivation of property. The Plaintiff therefore prays for the following orders:

1. A declaration that the partition of L.R. 13401 in Ruaraka has been done in a way that has deprived the Plaintiff of the protection of law in contravention to Section 70(a) of the Constitution, and deprivation of property in further contravention of Section 70(c) and 75 of the Constitution of Kenya.
2. An order consequential to the above declaration, directing the Chief Lands Registrar to cancel all entries resulting in the issuance of separate titles to the property formerly comprised in L.R. 13041 and to rectify the same so as to restore the said title to L.R. 13401.
3. Costs of the application.

A brief account of the background to the Plaintiff's Originating Summons is necessary to appreciate the

context in which this suit is filed. The Plaintiff purchased a parcel of land on 19th October 1999 measuring about 0.5 acres and which was to be excised from L.R. No. 13041. The vendor was Gichuhi Kimira, is his father in law. Gichuhi Kimira, Samuel Ngunu Kimotho (the 1st Interested Party herein), and Simon Mugweru Wathurwa (who is since deceased and legally represented herein by the 2nd Interested Party), were once business partners. However, out of some irreconcilable differences, Gichuhi Kimira and the 1st and 2nd Interested Parties instituted two suits which were consolidated as HCCC No. 880 and 908 of 1977, where they sought determination of their business partnership including taking of accounts, inquiries thereof, appointment of a proper person to collect get in and receive the debts of the partnership.

The High Court in its judgment of 6/10/1989 in the two consolidated suits held in favour of the 1st and 2nd Interested Parties, directing that the partnership between the parties be dissolved and wound up, and that a proper person be appointed to oversee the dissolution and winding up process. Being aggrieved with the High Court's decision, Gichuhi Kimira filed an appeal in the Court of Appeal being **Gichuhi Kimira –vs- Samuel Ngunu Kimotho & Another, Civil Appeal No. 186 of 1995**. The appeal was heard and dismissed on 24/4/1998 save for an amendment on the effective date of the dissolution of the partnership, to the effect that the partnership thereof be dissolved and wound up effective 20/4/1977. The Plaintiff's case which is summarized hereafter arises from actions that were undertaken following the said court order.

The Plaintiff's Case

The Plaintiff swore a Supporting Affidavit on 28/12/2004 wherein he deponed that at the time of purchase of the land forming part of LR 13041, he was aware that the land was subject to a dispute between Gichuhi Kimira and two of his partners. However, that a decree embodying the orders made by the courts has been the subject of many applications which are pending at the High Court and in the Court of Appeal.

That upon inquiry with the Lands Registry, he established that on 28/9/2000 a Partition Deed drawn by one G. Gachathi Advocate was presented to the Land Registrar seeking to subdivide L.R. 13041 into three portions. It was the Plaintiff's disposition that on making enquiries with the Law Society of Kenya he learnt that the said G. Gachathi last took out a practicing certificate in 1995. Consequently, that the partition was fraudulent and a nullity for having been drafted by a person not qualified to practice law under the Advocates Act.

The deponent alleged further that the said Advocate unlawfully colluded with one Ernest Kamau in a conspiracy to subvert the course of justice, after the Deputy Registrar of the High Court had for valid reasons rejected a similar document allegedly drawn by one A. Abaja who did not possess a valid practicing certificate. The Plaintiff also alleged that he established that the sub-division certificate purportedly issued to Samuel Ngunu Kimotho by the City Council of Nairobi under the Physical Planning Act was a forgery.

The Plaintiff deposed that in addition to the above, he established that the Chief Land Registrar did not follow the Lands Office's procedures and the City Council of Nairobi did not follow the procedures set out under the physical Planning Act in effecting the sub-division in question. The Plaintiff referred the Court to annexure "JNK 13" a letter signed by one J. M. Gitau and deposed that the said officer, without any authority, purporting to act for the Chief Land Registrar wrote the letter dated 28/8/2000 bearing Reference No. 52298 indicating that the Government had approved the sub-division of LR 13041.

The Plaintiff also referred the Court to annexure "JNK 14", an advertisement in the print media on 3/10/2003 indicating that L.R. 13041 owed the City Council Kshs.2,568,453.80 in unpaid rates. It is his disposition that if indeed the Council approved the sub-division, no such rates would be due, as payment of rates is a condition precedent to getting clearance. The Plaintiff deposed that on further inquiry at the Council, he established that as at November 2004, the outstanding rates on L.R 13041 was Kshs.3,165,070.10, which the Plaintiff deposed is further confirmation that the sub-division of the land was fraudulently obtained.

The Plaintiff deposed that in view of the foregoing, he made a report at the C.I.D Headquarters and an inquiry File under No. 65/2004 was opened after investigations were done and recommendations made to the Attorney General for the arrest and prosecution of the offenders. The Plaintiff deposed that since the recommendations were made, no prosecution has been preferred to date. The Plaintiff stated that he is apprehensive that further subdivision to L.R. 13041 will be made with a view of making it impossible to restore the original title.

Gitobu Imanyara, the advocate for the Plaintiff filed two sets of submissions dated 27/6/2006 and 15/4/2013. Counsel reiterated the contents of the application and supporting affidavit. Counsel submitted that section 34 of the Advocates Act forbids an unqualified person to prepare documents. Thus, the partition deed that was used to sub-divide L.R. 13041 and issue three separate titles is incompetent and consequently, the Title Deeds emanating from the partition deed are a nullity. Counsel cited authorities in respect to an unqualified advocate, to wit, **Kenya Power & Lighting Company Ltd v Nyeri Trade Center, Civil Appeal No. 148 of 2004** and **Hon. Wilson Ndolo Ayah v National Bank of Kenya Ltd, HCCC No. 1723 of 1997** where the Court rendered the documents prepared by an advocate that had not taken out a practicing certificate as incompetent. It was counsel's submission that since L.R. 13401 has never been legally partitioned and sub-divided, then purchase agreements entered into by the 3rd and 4th Interested Parties and other potential buyers of sub-plots are a nullity.

Counsel submitted that there were Court Orders directing sub-division of L.R. 13401. It was his submission that these orders were not served upon the City Council of Nairobi and Land Control Board to procure the necessary consents. Counsel submitted that it was unnecessary to forge and present a sub-division certificate No. 2927 meant for a different property to the Commissioner of Lands as if it were an authorization of sub-division for L.R. 13401, whereas there is a Court Order directing sub-division. Counsel referred the Court to the Plaintiff's annexures "JNK 26 – 32" which confirm that the City Council of Nairobi had never been requested and therefore has not authorized the subdivision of L.R. 13401. Counsel submitted that the Court of Appeal in C.A No. 186/1995 ordered that a proper person be appointed by the parties within 30 days to wind up the activities on L.R. 13041. It was counsel's submission that no such person was appointed in accordance with the order and therefore the status of L.R 13041 could not be and has never been lawfully changed. Counsel submitted that it is without doubt that the 1st and 2nd Interested Parties were perpetrators of fraud.

Counsel referred the Court to the proceedings and ruling in **Nairobi Chief Magistrate's Criminal Case No. 1767 of 2005** wherein the 1st Interested Party had been charged with an offence of forgery contrary to Section 350 of the Penal Code. Counsel invited the Court to invoke the provisions of Article 165(6) and (7) of the Constitution which gives the High Court supervisory jurisdiction over subordinate courts including calling for a record of any proceedings and issue directions it considers appropriate to ensure fair administration of justice, and Section 34 of the Evidence Act which provides that evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding.

Counsel referred to various excerpts of the proceedings in the criminal case in support of the Plaintiff's contention that the sub-division process was not carried out in accordance with the Department of Lands procedures and the Physical Planning Act. Counsel invited to take judicial notice that the Magistrate handling the criminal case was found unfit to hold judicial office by the Judges and Magistrates Vetting Board, for reasons, among others, "callousness" she displayed in handling a criminal case.

1st and 2nd Defendants' Case

Rosina N. Muke, a Land Registrar in the Ministry of Lands and Housing, swore a Replying Affidavit on 22/7/2005 in response to the Plaintiff's Originating Summons. It was her disposition that the transfer of instrument in respect of L.R. 13041, the subject matter this suit, was presented to the Ministry of Lands for registration on 20/9/2000, and that the registration was in respect of a transfer of 2/3 shares from the then registered owner Gichuhi Kimira to Samuel Ngunu Kimotho and Samuel Mugweru Waithimwa. The deponent stated that the said transfer was in consideration of a Court Decree issued on 30/3/1990 in HCC No. 880 of 1977 consolidated with HCCC No. 908 of 1977.

The deponent stated that the then registered owner Gichuhi Kimira failed to execute the transfer, and it was thus executed by the Deputy Registrar High Court. Subsequently, the Court appointed Ernest Kamau to sell off assets belonging to the Partnership between Gichuhi Kimira, Samuel Ngunu Kimotho and Simon Mugwero Waithimwa. As result, the property was divided into three portions and each partner issued with a separate title deed by way of partition. The deponent stated that Ernest Kamau signed the partition documents on behalf of Gichuhi Kimira.

The Land Registrar deposed that there is no way the officer registering the partition would have known that the Advocate who drew the said partition and witnessed the parties' signatures did not hold a valid practicing certificate, neither would he have known that the subdivision and rates clearance certificate form City Council of Nairobi were not genuine. The deponent contended that there was no fraud in the above transaction and that said partition was properly registered. In support of the depositions, the deponent annexed a copy of the transfer instruments and copies of the titles marked RNM 1 & 2, respectively.

Rotich Cherogony, Litigation Counsel at the Attorney General Chambers filed submissions on behalf of the 1st and 2nd Defendants dated 26/4/2006, wherein Counsel reiterated the contents of their response. In summation, Counsel submitted that the suit is a protracted battle between the Plaintiff's father in law and the Interested Parties, and therefore the 1st and 2nd Defendants ought not to have been involved. Counsel submitted that the suit should be dismissed for being frivolous and an abuse of the court process.

1st and 2nd Interested Parties' Case

Samuel Ngunu Kimotho swore a Replying Affidavit on 9/11/2005 in response to the application, wherein he deposed that the Plaintiff is a stranger to the proceedings related to LR No. 13041 and that his claim if at all is against one Gichuhi Kimira who is entitled to a one third (1/3) portion LR No. 13041 as clearly set out in the Plaintiff's affidavit in support of the Originating Summons. It was his disposition that pursuant to an order of the Court of 6/10/1989 in HCCC No. 880 & 908 of 1977, the 1st and 2nd Interested Parties together with Gichuhi Kimira were awarded equal shares over L.R. No. 13041.

The deponent stated that an appeal against the award by Gichuhi Kimira was dismissed on 24/4/1998 save for a minor amendment on the decree. Similarly, the deponent stated that Gichuhi Kimira's applications for stay of execution both in the High Court and in the Court of Appeal have been dismissed, including: an application filed on 1/10/1996 by Gichuhi Kimira's wife and children seeking a stay of execution of the High Court Decree which was dismissed on 16/10/1996; and HCCC No. 1768 of 2002 by Gichuhi Kimira seeking injunction orders which was also dismissed. As a result of the dismissed applications, execution proceedings are ongoing.

The deponent stated that in a subsequent application filed on 14/7/1995, the Court ordered that the shares of each partner with regard to L.R 13041 having been ascertained, the best option was to have the farm sub-divided into the three equal portions in terms of its value, and each co-owner to be given a portion. Further, that the proper person appointed by the court for purposes of enforcing the judgment do have the land valued and thereafter sub-divided for distribution purposes. Kimotho deposed that pursuant to this decree, the proper person in the year 2000 caused the Commissioner of Lands to have the suit property surveyed and subdivided into three equal shares as decreed by the High Court.

It was his disposition that Gichuhi Kimira had been in occupation of the entire suit premises since the commencement of the suit, and efforts to procure vacant possession of their respective portions of L.R. 13041 now being LR 13041/1/ and 13041/2 have been futile as Gichuhi Kimira has failed to co-operate in delivery of possession and relinquishing of the above two portions to him and the 2nd Interested Party. Further that Gichuhi Kimira has violently refused to part with the possession by stationing himself at the suit premises and obstructed the 1st and 2nd Interested Parties from enforcing the decree in HCCC 880 and 908 of 1977.

The deponent stated that on perusal of the application and affidavits in support, it is evident that the

Plaintiff is, for all purposes, suing on behalf of Gichuhi Kimira in seeking injunctions over the suit property, as the Plaintiff has no claim against the two portions registered in his favour and that of the 2nd Interested Party. Further, that the 3rd and 4th Interested Parties are purchasers of L.R No. 13041/1 registered and their involvement has absolutely nothing to do with the Plaintiff herein or Gichuhi Kimira.

It was the deponent's contention that this suit was instituted after efforts to obtain a stay of execution in both courts failed. Further, that Gichuhi Kimira's application for reference to a Constitutional Court in HCCC No. 880 of 1977 was rejected by the Chief Justice on 15/10/2004. Thus, as observed in the directions given by the Chief Justice, there are no constitutional issues in this case and there is therefore no merit in this entire suit. In support of the response, the deponent annexed the decree issued by the High Court on 6/10/1989; the order of the Court of Appeal in CA No. 186 of 1995; High Court rulings dismissing Gichuhi Kimira's applications; the High Court order directing sub-division of L.R. 13041; the letter from the Commissioner of Lands dated 9/11/2000 indicating the sub-division plan and the three subdivided titles from L.R. 13041 being L.R. 13041/1, 13041/2 and 13041/3.

The 1st and 2nd Interested Parties did not file any submissions.

3rd and 4th Interested Parties' Case

Joseph Ng'ang'a Njuguna swore a Replying Affidavit on 2/11/2005 wherein he deposed that he and his partner purchased LR No. 13041/1 measuring 6.9 acres for Kshs.19,665,000 by way of a sale agreement dated 16/6/2004 from its registered proprietor one Samuel Ngunu Kimotho. The deponent stated they carried out due diligence by conducting a search to confirm that the title was free of encumbrances, and that a copy of the certificate of lease dated 16/2/2001 was availed to them. The deponent stated that they took possession, obtained the requisite approval from the City Council of Nairobi and proceeded to sub-divide the property into 24 distinct plots prime for urban development.

The deponent stated that following the approvals by the Council, they established the beacons for the 24 plots, fenced the land, provided electricity and other services as well as tarmacked a road to serve all the sub plots at costs of over 10 million shillings. Thereafter, by a letter dated 6/4/2005, the Ministry of Lands and Housing gave its approval to the sub-divisions as a prelude to issuance of individual titles for the sub plots. The deponent stated that as they developed the land they also continued to sell the sub plots to interested buyers who are eager to have the titles processed so as to develop their plots.

Joseph Ng'ang'a Njuguna swore a further Replying Affidavit on 4/4/2013 in wherein he reiterated the dispositions made in his previous affidavit. He deposed further that he and the 3rd Interested party are not privy to the matters complained of in the Originating Summons, and are not in a position of their own knowledge to respond to all the allegations made in the supporting affidavit of the Plaintiff, as the matter took place before they purchased LR Number 13041/1. The deponent, however associated himself with the submissions of the Defendants and other Interested Parties, and deposed that it is clear that the Plaintiff is litigating on behalf of Gichuhi Kimira and that the suit is a proxy suit by a defeated litigant trying to revive a lost cause through the back door.

Mbigi Njuguna, advocates for the 3rd and 4th Interested Parties filed submissions dated 28/5/2013. Counsel submitted that the Plaintiff's claim, if at all, lies against Gichuhi Kimira the registered owner of L.R. 13041/3. Counsel submitted that the Plaintiff is already in possession of his portion of 0.5 acres and he cannot therefore be heard to say that his rights to property have been violated. Further, that the Plaintiff has no right to claim parcels of land, that is L.R. 13041/1 and L.R. 13041/2, which belong to other parties and that it is obvious that he is claiming for Gichuhi Kimira, whose numerous suits against his former partners have since been determined. Consequently, counsel submitted that this suit is *res judicata*.

On the allegation of fraud on the part of the Interested Parties fronted by the Plaintiff, counsel submitted that the Magistrate's ruling in CM Criminal Case No. 1767/2005 absolved the accused (the 2nd Interested Party) of the charge of forgery when the Court found that the accused had no case to answer. Counsel

submitted that the Plaintiff's selective reliance on the proceedings was in bad faith as he failed to also indicate that the partition process was proper. It was counsel's submission that even if the charge of forgery were to be proved, there is no way that it would affect the Plaintiff who is already in possession and occupation of the property.

Counsel referred the Court to Article 24 of the Constitution, submitting that constitutional rights are not absolute as they are subject to the rights of others. Thus it was improper for a failed litigant in a dispute to move the Constitutional Court for a declaration that his constitutional right to property rights had been violated. Counsel cited the case of **Richard Nduati Kariuki v The Hon. Nduati Kariuki & Another, Misc. Civil Appl. No. 7 of 2006 (O.S)** in this regard.

Counsel submitted that the Plaintiff failed to disclose that the LR No, 13041 was closed and titles issued in respect of the sub-divisions thereof L.R. 13041/1, 13041/2 and 13041/3 issued in other people's names. Counsel cited the cases of **Omega Enterprise (Kenya) Limited v Kenya Tourist Development Corporation & 2 Others Civil Appeal No. 59 of 1993** and **Green Hill Investments Ltd v China National Complete Plant Export Corporation, (2002) 1 KLR 384** where the Courts' decisions were that it was irregular to obtain orders against a person who was not a party to the case. It was counsel's submission that the non-disclosure together with the non-joinder of the registered owners of the other titles was a means by which the Plaintiff wanted to obtain orders to cancel titles obtained through successful litigation. Counsel urged the court to dismiss the suit.

The Issues and Determination

The Plaintiff does not dispute that there is a court order directing the sub-division of L.R. 13401 into three portions. His claim is that arising from the said sub-division his right to property and protection of the law have been violated. The key issues therefore before this court are firstly, whether in the circumstances of this case, the Plaintiff had a right to property and due protection of the law, and secondly, if so whether the Respondents have violated these rights. The last issue is whether the Plaintiff is thereby entitled to the relief sought.

In determining these issues, a question arises as to which Constitution will be our point of reference. This suit was instituted in 2004 before the promulgation of the Constitution in 2010. The Courts have held that a Plaintiff cannot claim for alleged violation of rights under the current Constitution in respect of violations that allegedly occurred prior to its promulgation. Refer to **Joseph Ihuo Mwaura & 82 Others-v- The Attorney General, Petition No. 498 of 2009** where this Court (Majanja J.), observed as follows:

“The Constitution promulgated on 27th August 2010 is not retrospective hence its provisions would not apply to matters that occurred before the effective date of the Constitution. Unless otherwise provided, the provisions of the Constitution, 2010 cannot govern matters done under a different legal regime.”

However where the Act complained of results in a violation of a continuing nature, then it is possible to consider the application of the provisions of the current constitution. See **B.A. & Another v Standard Group Limited & 2 Others, [2012] eKLR**. In this suit, the dispute before court is one of the alleged deprivation of the Plaintiff's rights on the basis of a partition of L.R. No. 13041 into three separate portions done by the Defendants and Interested Parties before the coming into effect of the new Constitution. The provisions of the repealed constitution are therefore the ones that are applicable.

The Plaintiff relied on section 70(a) and (c) and Section 75 of the repealed Constitution in his arguments on the violation of his rights to property and protection of the law. Section 70 of the repealed Constitution provided as follows:

“Fundamental rights and freedoms of the individual.

Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other

local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

(a) life, liberty, security of the person and protection of the law;

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest”

Section 75 of the said Constitution had provisions on the protection from deprivation of property, and laid out the circumstances when property could be compulsorily acquired.

The Plaintiff's right to property in the circumstances of this case is his claim to 0.5 acres within L.R. No. 13041, which he avers to have purchased from Gichuhi Kimira, who is his father-in-law. The Plaintiff avers that since the sub-division of L.R. 13401 was procured by fraud, it has resulted in the contravention of his fundamental rights to due protection of law and from deprivation of his property. In response thereto, the 1st and 2nd Interested Parties maintain that they are lawful owners of the sub-division (portions 1 and 2) of L.R. 13401 having been so awarded by an order of this Court which was endorsed by the Court of Appeal. It is their submission that the Plaintiff purchased 0.5 acres on portion 3 of the L.R. 13401 belonging to Gichuhi Kimira, which he is in occupation of, and has erected permanent buildings thereon.

The applicable principle of law in this regard is that it is the Plaintiff who has the responsibility to plead the case that discloses a violation of fundamental rights and freedoms with due particularity. This principle was established in the case of **Anarita Karimi Njeru v Attorney General, (1979) KLR 154** where the Court held:

“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 case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

I note that the Plaintiff does not dispute the Defendants and Interested Parties' averments that the said Gichuhi Kimira is the registered owner of L.R. 13041/3. Indeed the Plaintiff in his supporting affidavit avers that at the time of purchase, he was aware of the litigation surrounding L.R. 13041, and that he was prepared to wait for the resolution before taking his portion. He however did not bring any evidence of his attempts to have the portion of the said property that he bought from Gichuhi Kimira transferred to him using the due process of the law once the court dispute was resolved.

Further, he has also not shown how the Defendants and Interested Parties have prevented Gichuhi Kimira from transferring to him the 0.5 acres from his portion L.R. 13041/3. It is therefore not possible in the circumstances to find that the Respondents have infringed any right of the Plaintiff to property. This is for the reason that the party who sold the Plaintiff the said property is Gichuhi Kimira and not the Respondents, and it is to Gichuhi Kimira that the Plaintiff must look for fulfilment and enforcement of his entitlement to the said property.

In addition, while it is the case that arising from the sale agreement between the Plaintiff and Gichuhi Kimira, the Plaintiff acquired an entitlement to the property sold to him, for the right to property to exist that is capable of constitutional protection, it must be a vested right and must have accrued to the claimant according to the relevant statutory laws and applicable equitable principles. It is stated as follows in this regard in **Halsbury's Laws of England, 4th Edition (Re-issue) Vol. 8(2)** at paragraph 165:

“The protection under the Constitution of the right to property does not obtain until it is possible to lay claim in the property concerned.....an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law.”

The Plaintiff has not shown any title or other evidence of his accrued rights to any property, and this court cannot therefore grant him remedies with respect to a property that for all intents and purposes is non-existent. I therefore find that the Plaintiff has not established any right to property that is capable of being or has been infringed by the Defendants and Interested Parties for the foregoing reasons.

On the infringement of his right to due protection of the law, the Plaintiff’s case is that subsequent to the court order directing the sub-division of L.R. 13401 into three portions, the Defendants herein together with the 1st and 2nd Interested Parties failed to follow the laid down procedures in effecting the sub-division process. In response to this allegation, the Lands Registrar averred that the transfer instrument was presented to the Lands Office and was in pursuance to a Court Order. She deponed that the transfer and the partition deed were executed by the Deputy Registrar of the High Court and Ernest Kamau, the appointed proper person, respectively, in place of Gichuhi Kimira who failed to execute the said documents. The Lands Registrar contended that the partition process was proper as there is no way the registration officer would know that the documentation presented to him was not genuine.

The Interested Parties on the other hand aver that the Plaintiff is a stranger to the proceedings culminating to the order of sub-division and he therefore cannot bring suit for the cancellation of subsequent titles from L.R. 13401. The Interested Parties contended that it is evident that the Plaintiff is, for all purposes, suing on behalf of Gichuhi Kimira in a bid to have titles cancelled and the property reverted back to L.R. 13401.

I note that the issues being raised by the Plaintiff as regards the sub-division processes have been the subject of, and addressed in previous proceedings before courts of law. The allegations of fraud made by the Plaintiff herein were the subject of a criminal case in **Nairobi Chief Magistrate’s Criminal Case No. 1767 of 2005** whereby the 1st Interested Party was charged with the offences of forgery, uttering a false document and false swearing with regard to the said sub-division. This case was heard between 2005 and 2008, where 14 prosecution witnesses testified. At the close of the prosecution case, the trial Magistrate found that the prosecution had failed to establish a case to warrant placing the accused person on his defence, and consequently, acquitted the accused on all the three counts. Counsel for the Plaintiff urged this Court to take judicial notice of the fact that the particular trial Magistrate was found unfit to continue serving as a judicial officer by the Judges and Magistrates Vetting Board on reasons including the insensitivity in handling a criminal case.

There is no evidence adduced by the Plaintiff that there is an appeal filed by the prosecution arising out of the ruling. Thus, as it is, the ruling remains unchallenged and consequently, the 1st Interested Party was absolved of any allegation of fraud in procuring the sub-division of L.R. 13401. It is trite law that an unchallenged court order cannot be a basis for one to file a constitutional reference. See the case of **Booth Irrigation V Mombasa Water Products Ltd, HCC Misc. 1052 of 2004** reiterated in **Kenya Bus Services Ltd & 2 Others v Attorney General & 2 Others, [2005] eKLR**.

This Court does take note that the Magistrate who presided over the criminal case was removed from office by the Judges and Magistrates Vetting Board. However, the Plaintiff did not raise a complaint regarding the criminal case before the said Vetting Board. Indeed, upon perusal of the Board’s findings, the criminal case referred to is not the criminal case subject matter herein. It is my finding therefore, that notwithstanding that the said Magistrate was found unfit to continue serving as a judicial officer, her findings remain in force unless challenged on appeal.

In addition among the pending applications in annexure “JNK 3” to the Plaintiff’s Originating Summons is an application by a Notice of Motion dated 18th November 2003 filed in **HCCC Civil Suit No 880 & 908 of 1997- Samuel Ngunu Kimotho & Another vs Gichuhi Kimira**, seeking orders that the partitioning and sub-division of LR No. 13041 carried out by the proper person appointed by the court

and the 1st and 2nd Interested Parties be vacated and set aside, and that any titles issued thereto be cancelled for having been obtained fraudulently, unlawfully and/or unfairly. The Plaintiff in this suit is therefore relitigating claims already made by Gichuhi Kimira in a private law dispute in the name of a constitutional claim, and to this extent this suit borders on being an abuse of the process of court.

In this regard I also note that the process of partition and sub-division arose out of the orders given by Akiwumi J. (as he then was) in the judgment delivered on 6th October 1989 in **HCCC Civil Suit No 880 & 908 of 1997- Samuel Ngunu Kimotho & Another vs Gichuhi Kimira** that a proper person be appointed to wind up the partnership between the 1st Interested Party, 2nd Interested Party and Gichuhi Kimira who were the parties in the said case. Further orders by Bosire J. (as he then was) issued on 2nd October 1996 authorised the proper person appointed by the court to subdivide L.R. 13401 and distribute it among the 1st and 2nd Interested Parties and Gichuhi Kimira. The judgment by Akiwumi J. (as he then was) was upheld by the Court of Appeal in **Gichuhi Kimira –vs- Samuel Ngunu Kimotho & Another, Nairobi Civil Appeal No. 186 of 1995** on 24th April 1998. The proper forum and parties therefore to any dispute as regards the process of sub-division would be the parties involved in the execution of the judgment given therein. The said sub-division cannot therefore be the subject of any constitutional proceedings involving the Plaintiff as he was not a party in the said case which was essentially a business and private law dispute between the 1st and 2nd Interested Parties and Gichuhi Kimira, nor was he involved in the process of execution.

Lastly, it is difficult to see what prejudice is being suffered by the Plaintiff for reasons that there are court orders in existence that the property known as L.R. 13401 be sub-divided into 3 portions. Whatever process of sub-division is carried out Gichuhi Kimira will still get one portion of the said property and no more, from which portion the Plaintiff is to get his 0.5 acres, and this court reiterates in this regard that it is to Gichuhi Kimira that the Plaintiff must look to for satisfaction of his claim. This court therefore finds that the Plaintiff's right to protection of the law has not been infringed, as he has not brought any evidence to show that he has sought that protection in the first place by pursuing his claims against Gichuhi Kimira using the normal civil law processes.

The Orders

For the foregoing reasons this court therefore finds that the Plaintiff has not proved his case and is not deserving of the reliefs sought. The suit herein is therefore dismissed and the Plaintiff shall bear the costs of the suit.

Dated, signed and delivered in open court at Nairobi this __26th__ day of __March__, 2014.

P. NYAMWEYA

JUDGE