



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CONSTITUTIONAL PETITION NO. 49 OF 2012**

**IN THE MATTER OF ARTICLES 20, 22, 23, 40, 47, & 60 OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF VIOLATION OF THE RIGHT TO PROPERTY KNOWN AS LAND  
REFERENCE NO. 20591/53, NAIVASHA**

**AND**

**IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CAP 281 AND REGISTERED  
LAND ACT, CAP 300**

**BETWEEN**

**JUDY WATIRI WAMBUGU ..... PETITIONER**

**VERSUS**

**CHIEF LAND REGISTRAR .....1ST RESPONDENT**

**COMMISSIONER OF LANDS ..... 2ND RESPONDENT**

**SETTLEMENT FUND TRUSTEES ..... 3RD RESPONDENT**

**SIAN ENTERPRISES LIMITED ..... 4TH RESPONDENT**

**DAHIR ABDI KADIR ..... 5TH RESPONDENT**

**TRADE AND DEVELOPMENT ..... 6TH RESPONDENT**

**AGRICULTURAL DEVELOPMENT CORPORATION.. 7TH RESPONDENT**

**KANGA ONE LIMITED..... INTERESTED PARTY**

**RULING**

1.The petitioner **Judy Watiri Wambugu**, filed this petition on **25<sup>th</sup> October, 2012** against Chief

Land Registrar and six others, seeking the following orders and declarations:

- a. **A declaration that the petitioner in the lawful proprietor of land Reference Number 20591/11/17) comprised in a certificate of Title registered in the Registry of Titles at Nairobi as Number I.R 102595/1 and whose dimensions abutments and boundaries are delineated and described on land survey**
- b. **survey office at Nairobi.**
- c. **An order of certiorari do issue to bring to this Honourable Court, for the purpose of being quashed and/or cancelled, the register opened by the 1<sup>st</sup> Respondent in respect of the following titles.**

- (i) **Title Number Nakuru/Moi Ndabi Scheme/1259**
- (ii) **Title Number Nakuru/Moi Ndabi Scheme/1260**
- (iii) **Title Number Nakuru/Moi Ndabi Scheme/1261**
- (iv) **Title Number Nakuru/Moi Ndabi Scheme/1262**
- (v) **Title Number Nakuru/Moi Ndabi Scheme/1396**

(c) **An order of prohibition do issue to prohibit the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents by themselves, servants, agents or whomsoever from in any matter interfering with or issuing title documents to the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents or any other person or entity.**

(d) **A declaration that the certificate of Title registered as No. I.R 102595/1 in respect of Land Reference No.20591/53 is conclusive evidence of ownership and that Petitioner is the absolute and indefeasible proprietor of the suit property.**

(e) **A conservatory order do issue to prohibit and restrain the Respondents by themselves, their agents servants or whomsoever from in any manner alienating the petitioner's property known as Land Reference No.2051/53 and /or interfering with the petitioner's possession of the property or issuing new title documents.**

(f) **Damages**

(g) **Costs and incidental to the petition.**

2. Simultaneously with the petition, the petitioner filed a Chamber Summons dated **18<sup>th</sup> October, 2012** on even date seeking among others; **A conservatory order to prohibit and restrain the Respondent by themselves, their agents, servants or whomsoever from in any manner alienating the petitioner's property known as Land Reference No.20591/53 and/or interfering with the Petitioner's possession of the property or issuing new title documents pending determination of this petition.**

3. In reply to the Chamber Summons counsel for the 4<sup>th</sup> respondent filed a Notice of Preliminary Objection dated **18<sup>th</sup> January, 2013**. The objection relates to the competence of the petition, in that it does not seek interpretation of any Constitutional rights or issues.

4. The preliminary objection is couched in the following terms:

a) **The proceedings before the court do not seek interpretation of any constitutional rights or issues and do not seek declarations on any fundamental Constitutional questions of law and this claim therefore ought not to have been brought to court by way of Petition.**

b) **The proceedings before the court seek determination of competing private rights to**

property between private person and private corporation and therefore can only be determined by a substantive suit for recovery of the said property.

c) The petitioner herein has asked the court to make factual findings on issues of fraud and illegality as particularized in the petition and this end cannot be achieved or litigated through a Constitutional Petition but can only be properly determined through a substantive formal law suit where evidence will be heard and tested in cross examination.

d) There is no Constitutional matter between the State and its citizens to be determined in this Petition and therefore the Petitioner has come before the court using an entirely erroneous process for determination of its grievances and the Court is not empowered to make any of the orders sought or grant any of the relief sought in a Constitutional Petition.

e) There is no matter of public interest raised in the petition that warrants or justifies the use of this procedure to articulate the plaintiff's grievances and all reliefs sought by the Petitioner are available through filing of a private suit.

5. By consent, the parties to these proceedings agreed that the preliminary objection be disposed off by way of written submissions. The 4th Respondent filed his submissions dated **18th June, 2013** in support of the objection whereas the Petitioner's submissions are dated 28th October, 2013.

6. The 4th Respondent in its submissions asked the court to strike out the petition as it did not meet the threshold set by court in which a Constitutional question will arise. Counsel for the 4th Respondent relied on **Kapi Limited and Ian Shaw V Pyrethrum Board of Kenya**, Petition No. 54 of 2012, Nakuru where Wendoh J. enunciated the threshold set in **Anarita Karimi Njeru V A.G** (1979) KLR 154 on the importance to set out with reasonable degree of precision that of which the petitioner complains, the provisions of the Constitution infringed and the manner in which they are alleged to be infringed. According to counsel the petition does not seek to enforce specific rights protected by the Constitution.

7. Counsel for the 4th Respondent, further submitted that the entire claim ought not to have been brought by way of Petition but rather as an ordinary suit. He contends that the subject matter relates to competing private rights to a parcel of land and the issues emanating therefrom touch on fraud which can only be determined in a substantive suit. This according to counsel will allow evidence adduced to be tested through cross examination.

8. Counsel for the Petitioner opposed the Preliminary Objection by the 4th Respondent. She differed with the 4th Respondent that the issues arising in the petition are private rights. It was her submissions that the core of the dispute is whether the government through the 1st Respondent can deprive a person property by allocating to other people without compensation and following a lawful process. According to him, these issues are public interest issues and are not limited to private citizens. They involve violation of Article 40 (3) and (4) of the Constitution, 2010.

9. Further, the Petitioner submits that the Bill of Rights under Article 20 (1) of the Constitution applies to all state organs and all persons. The petitioner has a right to institute court proceedings claiming that a right to owning property has been violated by the state. He relied among other cases on **Evelyne College of Design Limited V Director of Children's Department and Another** (2013)eKLR, **ADAN Abdirahani Hassan & Others V Registrar of Titles and Others** (2013)eKLR and **Republic V Commissioner of Lands and Registrar of Titles Exparte Yellow Horse Inns Limited** (2013)eKLR where the court adjudicated on similar disputes arising from violation of Article 40 of the Constitution of Kenya.

10. The objections before me in effect raise only one issue: whether the petition raises constitutional issues or is it simply a private law claim disguised as a constitutional petition for presentation before this court.

11. It is also important to consider briefly the question whether a claim of violation of constitutional

rights can be brought as against a private individual. This court has taken a view that such a claim depends on the nature of the right and not all claims involving state and public entities should be presented as a constitutional issue. I agree with the sentiments expressed in **Minister of Home Affairs V Bickle & Others** (1985) L.R.C. Cost 755 cited with approval by Lenaola J. in **Hon. Uhuru Kenyatta V The Nairobi Star Limited** High Court Petition No. 187 of 2012:

**It is an established practice that where a matter can be disposed of 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 V The State AIR (1956) Hyd. 22 ... 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 provisions 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 declaration of rights.”**

12. I also agree with Counsel for the 4th Respondent on the threshold set by our courts to determine whether or not a petitioner's right has been violated or is likely to be infringed. In **Anarita Karimi Njeru V A.G. (1979) KLR 154**, Kneller and Hancox JA held as follows:

**“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 shall 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.”**

13. In my view therefore, the Petitioner must show the precise complaint, the exact provision of the Constitution and the manner in which it is has or is likely to be infringed.

14. In the present case, the Petitioner is seeking a declaration that the 1st and 3rd Respondents fraudulently caused a second parallel register for the suit property to be opened. Her prayers include a declaration that she is the lawful proprietor of the suit property; an order of certiorari to bring to this court for purposes of being quashed the parallel register opened by the 1st Respondent; an order of prohibition to prohibit the 1st, 2nd and 3rd Respondents from issuing title documents to the 5th, 6th and 7th Respondents or any person; a conservatory order to prohibit and restrain the Respondents from interfering with the Petitioner's possession of the property and damages. From the above, I am of the view that the matter herein is not precisely a constitutional issue. It is my view that the issues raised cannot be effectively addressed by application of the Constitution only. The allegations alleged do not provide the exact provision of the constitution infringed and the manner in which it has been infringed.

15. To my mind, the case is hinged on a parallel register created by the 1st Respondent. The court in determining the issues shall rely on statute including the **Registration of Titles Act Cap 281** (now repealed), **Registered Land Act, Cap 300**(now repealed) and the new land laws. The issue of contention is whether the 1st respondent acted contrary to the provisions of **Section 12 (1) (i)** and **13 (2)** of the **Registered Land Act Cap 300** (now repealed). As such the court will be called to decide the matter on the basis of the evidence tendered before it.

16. In my view therefore the 4th Respondent is correct that this matter should never have been filed as a Constitutional

Petition alleging violation of fundamental rights.

17. For the above reasons, I do hold that the Preliminary Objection has merit and on all grounds the Petition before me is hereby struck out and the Petitioner is granted leave to pursue his claim under private law. As to costs, I do order each party to bear its own costs because the dispute is not fully settled and maybe pursued in the right forum.

**Dated signed and delivered in open court at Nakuru this 20<sup>th</sup> day of June 2014.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Tombe for the 4<sup>th</sup> Respondent

Mr Onyancha holding brief for Mrs Wambugu for the petitioner

Emmanuel Maelo: Court Clerk

**L N WAITHAKA**

**JUDGE**