



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELC PET. NO 1 OF 2020**

**JOHN MWANGI NYOIKE.....PETITIONER**

**VERSUS**

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

**JAMES KIBE NJOROGE.....2<sup>ND</sup> RESPONDENT**

**NJIBA NJOROGE.....3<sup>RD</sup> RESPONDENT**

**PETER NJARAMBA MUGURO.....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**The Pleadings**

1. Vide a Petition dated the 27/2/2017 and filed on the 27/3/2017 the Petitioner sought the following orders;

- a. A declaration that the Petitioner's constitutional rights under Articles 20, 21, 40 & 47 of the Constitution have been infringed.
- b. A declaration that the Land Registrar has no powers to determine ownership of and/or title to land and the 1st Respondent acted ultra vires in determining Njoroge Njiba as the owners of the suit land Loc 6/Muthithi/2058, formerly Loc6/Muthithi/1147 (part of Loc 6/Muthithi/308) in place of the Petitioner.
- c. A declaration that all dealings and any subsequent registration of the suit land Loc 6/Muthithi/2058, formerly Loc 6/Muthithi/1147 (part of Loc 6/Muthithi/308) in the names of Njoroge Njiba, the 2nd, 3rd and 4th Respondents is/was illegal, null and void and the same be cancelled.
- d. An order of Certiorari bringing into this Court for purposes of being quashed the decision of the 1st Respondent to determine and register Njoroge Njiba as the owner of the suit Loc 6/Muthithi/2058, formerly Loc 6/Muthithi/1147 (part of Loc 6/Muthithi/308) in place of the Petitioner.
- e. An order of mandamus compelling the 1st Respondent to cancel and delete from the record of the suit land Loc6/Muthithi/2058 formerly Loc 6/Muthithi/1147 (part of Loc 6/Muthithi/308) the name of Njoroge Njiba and any of the 2nd, 3rd and 4th Respondents as the owner of the suit land and substituting therefore with the name of the Petitioner as the proprietor/owner of the suit land Loc6/Muthithi/2058 formerly Loc 6/Muthithi/1147 (part of Loc 6/Muthithi/308).
- f. An order for compensation.

2. The Petitioner alleges that he purchased the suit land from one Kariuki Kibe vide an agreement dated the 8/3/2014 whereupon he obtained a title. The said title was a resultant subdivision of the mother title known as Loc 6 Muthithi/308. That without notice the land register was closed and renamed Parcel 2058 and registered in the name of Njoroge Njiba, a deceased person and later fraudulently and unprocedurally transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who subsequently transferred to the 4<sup>th</sup> Respondent. That accordingly he was condemned unheard and was deprived of his land and has suffered loss.

3. The Petitioner averred that the Respondents have breached his constitutional rights under Articles 10(2), 20, 21, 40 and 47 of the Constitution.

4. The 1<sup>st</sup> and 5<sup>th</sup> Respondents opposed the Petition vide their grounds of opposition dated the 28/7/2017. That the actions of the 1<sup>st</sup> and 5<sup>th</sup> Respondents were lawful and in compliance with the Court orders issued in LDT No 2 of 2009 between the 2<sup>nd</sup> Respondent and Kariuki Kibe (Kibe). That the 1<sup>st</sup> Respondent having not been a party in the above suit cannot be blamed for failing to notify the Petitioner of the Suit. That the reliefs of certiorari and mandamus are not available against a decision which was made more than 6 months prior to the date of filing suit.

5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in opposing the Petition stated that there were two parcels of land registered under the same L R No. 308 under RIM 3 and RIM 7& 10 and that the creation of parcel 2058 was meant to correct the error and that Kariuki Kibe did not own parcel 2058 at all and that the Petitioner was duped to buy land that the vendor had no interest in and that his remedy should be from Kariuki.

6. Following suit, the 4<sup>th</sup> Respondent too opposed the Petition vide his Replying affidavit dated the 26/9/2020 and filed on the 28/9/2020. He contended that he obtained title for parcel 2058 legally from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents free from any claims and taint.

### **The evidence of the parties**

7. The Petitioner led evidence and informed the Court that he is the registered owner of parcel No 1147 which he purchased from Kariuki Kibe in 2014 after carrying out the necessary due diligence which revealed that Kariuki Kibe was the registered owner of the suit land. He relied on an official land search dated the 11/9/2005. That upon purchase he took possession of the suit land. He informed the Court that he had no knowledge of LDT No 2 of 2009 nor how parcel 2058 came into being and neither was he consulted when his title for parcel 1147 was cancelled by the 1<sup>st</sup> Respondent.

8. According to his evidence the original parcel of land owned by Kariuki Kibe, being parcel 308, was subdivided into two parcels; 1146 and 1147. Parcel 1146 was acquired by the Government for the construction of Kangari-Kaharati road and Kariuki Kibe was compensated thereto. Parcel 1147 remained in the name of Kibe.

9. The witness faulted the manner in which the title for 2058 was registered in the name of Njoroge Njiba while he was already deceased. Further he stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents lacked the power to transfer the suit land to the 4<sup>th</sup> Respondent in the absence of letters of grant of administration to the estate of the late Njoroge Njiba.

10. In cross, he admitted that he did not know the current status of parcel 1147 since he had not carried out a search on the same having been evicted pursuant to orders of the Court issued in CMCC No 360 of 2015. He informed the Court that he was not aware of the existence of two parcels of land bearing the same registration No of Loc 6/Muthithi/308, one on RIM No 3 and another on RIM No 7 &10. In reexam he confirmed that parcel No 1147 is in RIM 3 and not RIM 7 and that the land is situate along Kaharati- Kangari road.

11. PW2 – James Chege Kariuki testified and informed the Court that he is the son of Kariuki Kibe. That his father sold parcel 1147 to the Petitioner which land is situate along Kaharati – Kangari road at Muthithi centre. That his father was compensated for parcel 308 situate at Muthithi Centre which formed the original land. That he was present with his father during the LDT and the Land Registrar’s proceedings. That his father did not Appeal against the award of the tribunal. That with the permission of the local Chief he evicted the 2<sup>nd</sup> Respondent whom he found on the land so as to give possession to the Petitioner. He admitted that his father did not live on the suit land. He denied that his father owned another piece of land in Gikombora nor that the Land Registrar rectified the title that was sold to the Petitioner.

12. Alice Gisemba testified as DW1 and informed the Court that she is the Land Registrar, Muranga County. She relied on her Replying Affidavit dated the 15/10/2020 as evidence in chief and the list of documents marked PEX No AG 1-12. She stated that according to the records in her possession, the registered owner of parcel 1147 was the Petitioner, the said parcel having been a subdivision of parcel 308. That parcel 1146 was acquired by the Government of Kenya for a road construction.

13. That the title for parcel 1147 was rectified by the Land Registrar pursuant to the orders of the Court in LDT No 2 of 2009. That following the decision of the Land Registrar of 9/6/2014, a new land parcel 2058 was created and registered in the name of Njoroge Njiba. Parcels 1146 and 1147 were then cancelled due to the error that occurred during the registration of the land in the first registration exercise where two parcels of land were erroneously given one registration No 308 but situate on two different locations on the ground but within the same registration area. That there was parcel 308 in RIM 3 and another parcel 308 on RIM 7 & 10. That such an anomaly is not allowed in law and the rectification was to cure the same. That the land in RIM 3 belonged to Kariuki Kibe while parcel 308 in RIM 7 was unregistered. The register was not opened despite the land existing on the ground. That it is the parcel in RIM 3 that was erroneously subdivided into parcel 1146 and 1147 and compensation with respect to parcel 1146 in RIM 3 was made to Kibe.

14. She informed the Court that according to the documents in her record the land was sold by Kibe to the Petitioner whilst status quo orders issued by the Court in 2009 prohibiting any dealings on the land until the process of authenticating the two parcels was concluded. That the 1<sup>st</sup> Respondent issued its determination on the 9/6/2014. She admitted that the parcel 1147 has not been cancelled, a situation she attributed to an oversight on the part of her office.

15. DW2 – Peter Nyaramba Muguro informed the Court that he acquired parcel No 2058 from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents which land he currently occupies. He stated that there is a church constructed on the land. That the Petitioner was evicted from the land before he took over possession. That he was born in the locality and therefore knew Njiba Njoroge the son of Njoroge Njiba. That the land is along Kaharati-Kangari road and prior to the occupation by the Petitioner, the land was occupied by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ sister and her husband who constructed the church currently existing on the land.

16. DW3- James Kibe Njoroge informed the Court that their parcel of land was in RIM 7 & 10 and that it belonged to Njoroge Njiba, his father. That they lived on the land since demarcation and registration. That his father was the 1<sup>st</sup> occupant but later went to live with his elder brother leaving the land to his brother in law and sister. That his brother Apollo was buried on the land. That later his brother Njiba Njoroge tilled the land until he was evicted by the Petitioner. That the dispute was submitted to the LDT which ordered the Land Registrar to determine the proprietorship of the two parcels and rectify the anomalies. He stated that the land is situate in Muthithi and that of the Petitioner is at Nginda, Gikombora. That as a family they lived on the unregistered land though on the RIM 7, it was described as No 308.

17. With respect to the registration of the land parcel 2058, he admitted that his father died in 1986 and by the time the land was registered in his name in 2014, he was long dead. That his father was not a party to the LDT proceedings, the parties having been himself, Jiba Njoroge and his sister. He admitted that he has not Petitioned for the succession of his father's estate.

18. DW4- Wilson Wahuga Kibiru testified and informed the Court that he is the Land Surveyor, Muranga County and was involved in the hearing of the dispute including the site visit of the land in 2014, therefore familiar with the dispute. He produced Registry Index Maps No 3 and 7& 10 marked DEX No 13-15. He explained that there were two plots registered in the survey records as 308 in both RIM No 3 and No 7. That the latter was unregistered land and was later registered as parcel 2058 in 2014 pursuant to the Court orders issued in LDT No 2 of 2009.

19. Parties filed written submissions which I have carefully read and considered. The law firm of **R M Njiraini & Co Advocates** filed written submissions on behalf of the Petitioner. The Petitioner submitted that he purchased the suit land from the registered owner of the land Kariuki Kibe whereupon he was issued with a title. He produced a sale agreement dated the 8/3/2014, title deed, land search which showed the land belonged to Kibe in support of his case. Despite being the proprietor of the land and without notice the register for the land was closed and a new number allocated being 2058. The new land number was then registered in the name of Njoroge Njiba, a deceased person. Later the land was fraudulently and unprocedurally transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who later transferred the land to the 4<sup>th</sup> Respondent. Consequently, he was deprived of his land without being afforded a hearing by the 1<sup>st</sup> Respondent before his title was abolished. Further the Petitioner stated that he was not a party to the Land Dispute Tribunal No 2 of 2009 (LDT).

20. It was the submission of the Petitioner that the Respondents relied on the decision of the LDT to anchor their actions and that the 1<sup>st</sup> Respondent confirmed that the title of the Petitioner was changed to a new number and although the title stands revoked, it is yet to be cancelled. That no notice was issued to the Petitioner who was the then registered owner before the said decision was taken by the 1<sup>st</sup> Respondent.

21. The Petitioner submitted that the land was transferred from Njoroge Njiba, a deceased person without any claim from the said deceased. That the transfers to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were illegal and unprocedural in the absence of grant of letters of administration in the estate of the said Njoroge Njiba. The documents of transfer produced by the land Registrar were disowned by the 2<sup>nd</sup> Respondent and therefore are mere forgeries. Further that the 4<sup>th</sup> Respondent failed to produce any evidence of how he obtained the suit land save to state that he is the current registered owner of the land.

22. The Petitioner argued that as the unchallenged proprietor of the land, he is protected in law under Article 40 of the Constitution and Section 24 and 25 of the LRA. He faulted the 1<sup>st</sup> Respondent in failing to adhere to the orders of the tribunal in that the Tribunal did not order the Registrar to register Njoroge Njiba as the owner of the land. The 1<sup>st</sup> Respondent was also faulted for failing to comply with Section 31 and 80 of the RLA which inter alia provided for the calling of the original title and prohibiting the rectification of a title of an owner in possession who had acquired the land for valuable consideration.

23. In addition, the Petitioner submitted that he was in possession of the land and that explains why the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a suit CMCC No ELC 360A of 2015 – Muranga to evict him. Relying on the case of **PankajKumar Hemraj Shah & Anor Vs Abbas Lali Ahmed & 5 others [2019] eKLR** and section 16 of the Evidence Act, the Petitioner argued that being in possession of the land he had a better right to the land than the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Court held that;

“..... it is trite law that all titles to land are ultimately based on possession in the sense that the title of the main seisin prevails against all who can show no better rights to the seisin. Seisin is a root of a title. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being in possession of the suit land have a better right to the same against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the **Privy Council in Ghana of Wata-Ofei Vs Danquah (1961) All ER 596**, the slightest amount of possession would be sufficient”.

24. Citing the case of **Katiba Institute Vs Attorney General & 3 others [2019] eKLR** and the provisions of Art 10 and 47 read together with the Fair Administrative Actions Act, the Petitioner submitted that his rights to land, fair administration and hearing were violated by the Respondents and in specifics was not notified of the 1<sup>st</sup> Respondent's decision that rendered his title revoked.

25. The 1<sup>st</sup> and 5<sup>th</sup> Respondents' submissions were filed by the Learned Senior State Counsel Ms Mwikali Ndundu on the 24/11/2021.

26. As to whether the Petition meets the threshold of a constitutional Petition, it was submitted in the negative. Relying on the case of **Anarita Karimi Njeru Vs Republic (1976-1980)** and the case of **Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** the Respondents submitted that save from listing the articles of the constitution, the Petitioner has failed to demonstrate the alleged violations of his constitutional rights and fundamental freedoms and that the Petition falls short of the threshold laid down in the listed cases above and urged the Court to dismiss it.

27. As to whether the Petitioner obtained a good title from Kariuki Kibe the Respondents argued that the transfer of the land to the Petitioner by Kibe was fraudulent illegal and through a corrupt scheme because; Kibe was aware of the dispute in LDT No 2 of 2009 and PMCC No 25

of 2009 where he fully participated; the transfer was done while status quo orders barring interference of the title; there were two distinct parcels of land on the ground bearing land number 308 though only one was registered in the name of Kibe; that the family of Njoroge Njiba had been in possession of parcel 1147 since demarcation and allocation and Kibe had never utilized nor been compensated for the land that was acquired by the Government for the construction of Kaharati – Kangari Road. It was the contention of the 1<sup>st</sup> and 5<sup>th</sup> Respondents that Kibe was aware that he had no interest in parcel 1147 at the time of selling to the Petitioner.

28. Relying on the provisions of Art 40 of the Constitution, Section 26 (1) of the Land Registration Act the 1<sup>st</sup> and 5<sup>th</sup> Respondents argued that the Petitioner did not obtain good title from Kibe for the reason that Kibe was not the legal owner of parcel 1147 which was a subdivision of parcel 308 in RIM 7 and consequently the Petitioner did not acquire a good title capable of protection by the law. The 1<sup>st</sup> and 5<sup>th</sup> Respondents grounded their position on the decision of this Court in **Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Anor (2013) eKLR** where the Court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.

29. As to whether the actions of the Land Registrar were legal, the 1<sup>st</sup> and 5<sup>th</sup> Respondents argued that they had power to determine ownership of the land and that they acted within the law in determining Njoroge Njiba as the owner of parcel 2058 in place of the Petitioner. That they acted upon a Court order issued in PMCC No LDT 25 of 2009 which directed the Land Registrar to establish the authenticity and the true proprietorship of parcel 308 in Nginda Location in RIM Sheet No 3 and parcel 308 in Muthithi Location in RIM Sheet No 7 with a view to register and record the two pieces correctly. That the 1<sup>st</sup> Respondent was not a party to the suit and therefore cannot be blamed for failing to notify the Petitioner. That they acted lawfully because the power to determine ownership was given by the Court and therefore was acting in compliance of a valid Court order which remains to be overturned.

30. As to whether the Petitioner is entitled to the orders of certiorari and mandamus, the 1<sup>st</sup> and 5<sup>th</sup> Petitioners placed reliance on the decisions of the Court in **Pastoli Vs Kabale District Local Government Council & others (2008) 2 EA 300 ; Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd CA 185 of 2001 and Republic Vs KRA Exparte Yaya Towers Limited (2008) eKLR** and submitted that Kibe failed to call the Petitioner to participate in the hearings conducted by the Land Registrar on the 14/5/2014 despite being aware that he had sold the land to him. In addition, that the Petitioner failed to demonstrate that the decision of the 1<sup>st</sup> Respondent was tainted with illegality, irrationality or procedural impropriety.

31. Further the 1<sup>st</sup> and 5<sup>th</sup> Respondents faulted the Petitioner for bringing the suit 7 years after the Court orders issued in 2009 and that the delay is inordinate and termed the whole suit as an afterthought and therefore not entitled to the relief of certiorari.

32. The 1<sup>st</sup> and 5<sup>th</sup> Respondents submitted that the decision of the LDT which has been adopted by the Court cannot be challenged by way of a declaration but by way of Appeal or judicial review. That Kibe having failed to challenge the decision of the LDT as provided by law, the same is not available to the Petitioner to raise a challenge against the implementation of the LDT order by the 1<sup>st</sup> Respondent. They urged the Court to hold that where a law has established a procedure or mechanism of dispute resolution, the same must be exhausted rather than seek alternative remedy.

33. The written submissions of the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents were filed by the law firm of **J N Mbutia & Co Advocates**. The Petitioner was faulted for failing to quash the decision of the Court in SPMCC LDT No 25 of 2009 in which the award of the LDT was adopted as an order of the Court. That in the LDT case the registered owner of the suit land was Kibe and not the Petitioner and therefore held no interest in the property at the time. That Kibe did not Appeal the decision of the Court and agreed with the 1<sup>st</sup> and 5<sup>th</sup> Respondents that the Land Registrar implement the said orders and cannot be faulted for complying with the Court orders. That the Petitioner acquired the land on the 19/3/2014, 3 months before the hearing and Ruling by the Land Registrar on the 3/6/14. That being the case, they argued that the title of the Petitioner therefore runs afoul to section 26(1) of the Land Registration Act for the reason that there was a Court order to maintain status quo and barring transactions on the suit land including a transfer. For that reason, they argue that the title of the Petitioner is not protected under the Constitution. Reference was made to Art 40(6) of the Constitution which exempts an illegally acquired title from legal protection.

34. Relying on the case of **Grace Chemutai Koech Vs Francis Kiplagat Chebiror & 2 others (2018) eKLR**, they submitted that even under the doctrine of Lis pendens the transaction is illegal and no benefit can be conveyed by the same whilst the suit is pending determination. In this case they argued that the determination by the Land Registrar was pending and the very action had been expressly prohibited by the status quo orders. They faulted Kibe and the Petitioner for attempting to defeat the Court orders by effecting a transfer of the sale in the face of subsisting Court orders.

35. They argued that the remedy available to the Petitioner is to pursue Kibe for relief noting that he avoided to sue him or call him as a witness in Court.

36. With respect to the prayers for certiorari and mandamus, they faulted the Petitioner for failing to comply with Order 53 Rule 1 of the CPR with respect to seeking leave prior to filing the application. That the Land Registrar's decision was made on 9/6/2014, more than 6 months and the Petitioner should have sought leave. They faulted the Petitioner for filing the Petition to circumvent the strictures of Judicial Review which is the right route to approach the Court when seeking such prayers.

37. On whether the Petitioner is entitled to compensation, the 2<sup>nd</sup> - 4<sup>th</sup> Respondents were of the firm view that the Petitioner did not acquire a good title and his remedy lies in seeking appropriate relief from Kibe and not the Petitioners.

38. With respect to the registration of parcel 2058 in the name of Njoroge Njiba who was by then deceased, the 2<sup>nd</sup> -4<sup>th</sup> Respondents submitted that the Land Registrar erred and that the same should have been registered in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents directly. They also admit that letters of grant of administration ought to have been sought and obtained by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in respect to the estate of Njoroge Njiba deceased before transferring the land to the 4<sup>th</sup> Respondent.

39. Having read and considered the Petition, the evidence adduced viva voce, the rival written submissions and the material placed before me, the following issues fall for determination;

- a. whether the Petition meets the threshold of a constitutional Petition.
- b. what orders should the Court grant?

**Whether the Petition meets the threshold of a constitutional Petition.**

40. The yardstick used in the enforcement of fundamental rights that have been violated, threatened or infringed is that the burden of proof rests with the Petitioner. The specific provisions and evidence in support of such acts of infringement or threats are to be precisely stated.

41. Article 258 of the Constitution provides that every person has the right to institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. That said, it remains the duty of the Petitioner to disclose with a measure of precision the nature of the right that has been violated or is being threatened with violation.

42. The celebrated case of **Anarita Karimi Njeru v Republic (1976-1980) KLR 154** the Court enshrined this principle in our jurisprudence 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 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.**”

43. In the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the Court of Appeal stated thus;

‘(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated....’

44. The Court of Appeal further added;

“Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in **Anarita Karimi Njeru** (supra) that established the rule that requires reasonable precision in framing of issues in constitutional Petitions is an extension of this principle.”

45. In **Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 Others [2014] eKLR**, the court reiterated the trite and tested principle of law that a constitutional Petition ought to state clearly the alleged violation and relief sought as stated in the case of **Anarita Karimi Njeru v Republic (1976-1980) KLR 154**.

46. This Petition is predicated on violation of the Petitioner’s rights under Art 10(2), 20, 21 40 and 47 of the Constitution. The Petitioners main complaint is that the Respondents did not act legally or uphold the principles of Art 10 of the Constitution; failed to protect his rights under Art 20 and 21 of the Constitution; failed to give him a right to be heard during the proceedings conducted by the Land Registrar.

47. Briefly, the case of the Petitioner is that he is the registered owner of parcel 1147 having acquired it through purchase from Kibe. That the 1<sup>st</sup> Respondent without any notice and in total disregard to his proprietary rights revoked his title and issued it to Njoroge Njiba, deceased, which title was fraudulently and illegally transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and later to the 4<sup>th</sup> Respondent. That as a result of issuing another title for the parcel that he already holds a title, he has been deprived of his land without being afforded the right to be heard and that he has suffered substantial and irreparable loss.

48. The 1<sup>st</sup> and 5<sup>th</sup> Respondents’ case is that in creating parcel 2058 and registering it in the name of Njoroge Njiba, they acted in good faith and in compliance with the Court orders issued in LDT No 2 OF 2009 and SPMCC LDT 25 of 2009 where the said award was adopted as the orders of the Court. In any event they faulted the transfer of the land in the name of the Petitioner while orders of status quo were in force and termed it illegal and the said proprietorship having been acquired contrary to lawful Court orders was incapable of protection under Article 40 (6) of the constitution read together with Section 26(1) of the LRA. Consequently, that the Petitioner did not acquire a good title and as such no proprietary rights as alleged by the Petitioner were violated as none has been demonstrated. Furthermore, they aver that being not parties in the LDT and SPMCC No LDT 25 of 2009, they could not have notified the Petitioner of the hearing and eventual ruling of the Land Registrar because the Petitioner had no interest in the land.

49. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have inter alia opposed the Petition and taken cover in the Court orders issued in LDT 2 of 2009 and the adoption in SPMCC No. 25 of 2009 and contend that they acquired the title pursuant to the said orders. The 4<sup>th</sup> Respondent similarly holds the position that his title was acquired lawfully from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents without any notice of any infirmity.

50. It is not in dispute that there are two parcels of land noted on the Registry Index Maps bearing one land registration reference which is parcel 308. Evidence was led by DW4 , the Land Surveyor that the two parcels of land exist on the ground and are on separate locations and that only one was registered.

51. It is clear from the above summary of the parties' dispute that there are arguments, counterarguments forming the core contested matters in this suit. It is clear that the Court is being called to determine the rights of the parties based on their contested positions as put forth before the Court. Key amongst the arguments is that the Petitioner acquired the land whilst status quo orders were subsisting and contrary to the legal principle of Lis pendens, that there was double allocation of land ref number to two plots bearing the same land reference number and the Court is being called upon to determine the legality of each of the existing titles; the process of the acquisition of the titles by each of the parties is not spared and the Court has been invited to determine if they were lawfully acquired.

52. In defending the Petition, the Petitioner submitted that this Court is mandated to ensure the rule of law in governance and cited the case of *Katiba Institute* supra. That under **Article 165(3) (d) CoK** the High Court has jurisdiction to hear any matter relating to interpretation of the constitution. Moreover that under Article 47 Constitution and Section 2 Fair Administrative Action Act, the Respondents disregarded the clear provisions of law in dealing with the suit land thereby violating his constitutional rights. Save for that generalization, the Petitioner did not specify the specific rights that were violated and by whom. The provisions of the Constitution cited breach of his rights under Articles 10(2), 20, 21, 22, 23, 40 and 47 of the Constitution.

53. In my considered opinion, other than stating the above Constitutional provisions the Petitioner failed to succinctly enumerate how those rights were breached. Consequently, the Court is of the firm view that though the suit has been given a constitutional apparel in the manner in which it is framed as a Petition it has all the characteristics of a civil suit such as allegations of ; fraudulent action; transfer of land during the pendency of status quo orders; double allocation of land reference numbers; cancellation of title; want of capacity to transact in the land for want of succession; land is being registered in the name of the deceased person and so forth which should be determined through an ordinary civil suit.

54. In the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, the Court of Appeal held as follows;

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. ....”

55. This Court is bound by the Court of Appeal decision above. I see no reason to deviate from the set precedent.

56. The pleadings of the Petitioner are centered on a case of violation of the right to property amongst other violations. However the Petitioner has gone ahead to argue on land ownership, that is who the land rightly belongs to between him and the Defendants including impugning the title of the Respondents. This in my view is a deviation of the pleadings of the Petitioner. The Petitioner has led evidence which does not support the averments in his pleadings. Such evidence which is at variance with the pleadings in my view must be disregarded. There is a basic principle of law that Parties must not depart from their pleadings. Pleadings play a pivotal role in dispute resolution. Pleadings act as beacons for the benefit of the parties in the suit to remove surprises and also for the Court to be guided on what the issues are before it for determination.

57. In the case of **Chumo Arap Songok Vs David Keigo Rotich [2006] eKLR** the Court held that;

‘the law is now settled that parties to a suit are bound by the pleadings in the suit and the Court has to pronounce judgement only on issues arising from the pleadings unless a matter has been canvassed before it by the parties to the suit and made an issue in the suit through the evidence adduced and submissions of the parties.

58. In this case the pleadings and the evidence led and prayers of the Petitioner are at great variance. That being the case the Petition cannot see the light of day.

59. In the end, and for the reasons aforesaid the petition is hereby struck out.

60. The Petitioner is condemned to pay costs.

61. Orders accordingly.

**DELIVERED, SIGNED & DATED AT THIKA ON THE 25<sup>TH</sup> DAY OF APRIL 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Petitioner: Absent

Ms. Ndundu for 1<sup>st</sup> & 5<sup>th</sup> Respondents

Ms. Murira h/b for Mr. Mbuthia for 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents

Court Assistant: Phyllis