



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 62 OF 2012

BETWEEN

YASSIN JAMA, MOHAMMED SHEIKH DAHIYE

AND BISHAK SHEIKH IBRAHIM (Suing in their capacity as the Chairman,

Secretary and Treasurer respectively)

of NAMANGA ISLAMIC CENTRE.....PETITIONERS

AND

THE TRUSTEES OF KOKINI MUSLIM UNION.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

JUDGMENT

1. The undated Petition before me was filed on the 6th of March, 2012 together with a supporting affidavit dated the 5th of March, 2012 sworn by Yassin Jama in his capacity as the Chairman of Namanga Islamic Centre. Filed together with the Petition was a Chamber Summons application dated the 5th day of March, 2012 seeking diverse conservatory orders against the Respondents which orders were granted by consent and parties instructed to put down the Petition for hearing and determination.

Case for the Petitioners

2. It is the Petitioners' claim that they, through Namanga Islamic Centre, have been managing the affairs of a Mosque which is situated on LR No.1692/57 Namanga (*hereinafter, the "suit property"*) on behalf of the Muslim residents of Namanga, Kajiado County. They add that they were given the mandate to manage the said Mosque in 1984 after a dispute that had persisted

between the Muslim residents of Namanga and some individuals who at the time purported to be both the representatives of the 1st Respondent and of the Muslims resident in Namanga.

3. The Petitioners allege that the dispute between the two rival camps was so deep-seated that the Government appointed the then Kadhi in-charge of the Rift Valley Province to mediate on the matter and upon mediation, the Kadhi came up with the following findings:
 - a. *That the property on which the Mosque stands belongs to the Muslim residents in Namanga and not the 1st Respondent.*
 - b. *That there was no trustee of the 1st Respondent resident in Namanga.*
 - c. *That the 1st Respondent had been a stumbling block in the expansion of the mosque and further development of the suit property for purposes of school and other services.*
 - d. *That the representative of the 1st Respondent, one Nasir was engaged in the business of selling liquor and was not a practising Muslim and could therefore not be entrusted with the responsibility of managing the affairs of the mosque and the Muslim community in Namanga, generally.*
 - e. *That the management and administration of the Center should be left in the hands of Muslims resident in Namanga.*
 - f. *That a trust whose membership should be Muslims resident in Namanga, the 1st Respondent, the Provincial Administration and the Kadhi should be incorporated for purposes of advising the Muslim residents in Namanga on how to manage the Centre.*

1. It is the further claim of the Petitioners that since the above findings were made on 23rd March, 1993, the 1st Respondent has stayed away from the management of the suit property. They add that in the interim, the Muslims resident in Namanga completed construction of the Mosque, initiated a Madrassa, an orphanage and a fully fledged community school which produced its first class of Kenya Certificate of Primary Education candidates in 1999. The Petitioners contend that the residents used their personal resources amounting to millions of shillings to expand the Centre and the construction of the classrooms and orphanage without any input from the 1st Respondent at all.
2. The Petitioners aver that they have now learnt that the 1st Respondent has proceeded to fraudulently process title documents for the suit property in its name. They contend in that regard that the suit property was land set aside by Olkejuado County Council for use by the Muslim residents in furtherance of their spiritual needs and requirements and as such cannot be allotted to strangers like the 1st Respondent and they are apprehensive that the 1st Respondent shall take over the entire property and convert it to commercial use. They add that there is a proper procedure for alienation of trust land as per the provision of the Trust Land Act and the same was not adhered to.
3. Further that it has now come to the knowledge of the Petitioners that the Government, through the 2nd Respondent, has expressed its intention to acquire a part of the suit property measuring 0.02293 of an acre or thereabouts for purposes of road expansion and further that the 1st Respondent has lodged its claim for compensation in that regard. The Petitioners through their Advocates have for that reason written protest letters to various government officials, including the 3rd Respondent, requesting for the revocation of the allegedly fraudulent title documents to the suit property but nothing was done, hence the present Petition. It is on the above grounds that the Petitioners pray for the following orders;

“a) An injunction order restraining the 3rd Respondent from making any form of payment by way of compensation for acquisition of part of L. R No. 1692/57 as gazetted by the 3rd Respondent in Gazette Notice Number 11974 and 11975 till

hearing and determination of the Petition herein.

b) An injunction order restraining the 1st Respondent by themselves or through their agents from causing any damage, converting or using transferring or alienating the movable and/or immovable property or in any way interfering with the Petitioner's peaceful possession of the property known as L.R No. 1692/57 till hearing and determination of the Petition.

c) A declaration that the 1st Respondent herein obtained the title document in respect of the suit property fraudulently as the same has not been obtained in accordance with the provisions of the Trust Land Act, and that the said title be revoked.

d) A declaration that the suit property being L.R No. 1692/57 belongs to the Muslim community residents in Namanga for religious and educational purposes and not the 1st Respondent.

e) A mandatory order compelling the 1st Respondent to surrender to the 3rd Respondent the title document for L.R No. 1692/57 which title was fraudulently and illegally obtained.

f) A declaration that any payment made by the 3rd Respondent as compensation for part of the suit property being L.R No. 1692/57 earmarked for acquisition as per Gazette Notice Number 11975 and 11975 be paid to the joint account of the Petitioners to be held in trust for and on behalf of the Muslims resident in Namanga and to be utilized only for purposes of and for the religious and spiritual benefit of the Muslims resident in Namanga.

e) Costs of the suit.”

I need only state that prayers (a) and (b) are superfluous and will not be considered at this stage of the proceedings.

Case for the 1st Respondent

1. The 1st Respondent filed a Replying Affidavit sworn by one, Abdul Kadir Hawa in his capacity as a Trustee and Chairman of the 1st Respondent. Written submissions were also filed on 30th of July, 2013 on its behalf.
2. In summary, it is the 1st Respondent's case that on the 22nd day of February, 1972 the initial trustees of Kokini Muslim Union were duly registered under the provisions of The Land (Perpetual Succession) Act and as such they became a body corporate. That it has at all material times been in full control and possession of the suit property and that the allegations that the Petitioners and their organization are the representatives of the entire Muslim community residing in Namanga are false and unfounded.
3. It is added that the accusations made against 1st Respondent by the Petitioners are false, malicious and baseless because the Petitioners have not provided any particulars of the allegations as is required by the rules of procedure. It is their position that the Petitioners have not adduced evidence to show that the land in question was indeed community and/or trust land prior to its alleged illegal allocation to the 1st Respondent and affirm that a party which alleges any fraud upon another must be able to prove the same and reliance is placed on the holding in **Republic vs. Commissioner of Lands and Another, Miscellaneous Civil Application 58 of 2010** which established the principle that the title of any proprietor shall not be subject to challenge, except on the grounds of fraud or misrepresentation to which he is proved to be a party.
4. The 1st Respondent also contends that it was lawfully issued with a leasehold title for the suit

property for a term of 33 years with effect from August, 1973 and that upon expiration of the same, an application for renewal of the lease was made and approved by Olkejuado County Council on the 10th of November, 2011. The 1st Respondent is therefore surprised that the Petitioners have waited for a period of 40 years from the date when the lease was initially issued to file this suit against them and contends that this is clear evidence of malice and bad faith on their part.

5. Further, that the Petitioners were registered as a society in 1993 which is 20 years after the suit property was lawfully obtained by the 1st Respondent and as such their Supporting Affidavit contains facts based on hearsay evidence and offends **Rule 19 (3)** of the **Civil Procedure Rules 2010** and should therefore be struck off. That in any event, the suit filed by the Petitioners is in the style and fashion of a class action suit but the Petitioners did not invoke the proper procedure when filing it and as such the same should be struck off.
6. The 1st Respondent further contends that it constructed the Mosque and Madrassa on the suit property with donations from well wishers and that more funds were raised to purchase the water tanks and generator that exist on the suit property and without any input from the Petitioner at all. In response to the allegation that it has non presence in Namanga, the 1st Respondent states that at all material times there has been a Kokini Union member living in Namanga and available as its representative and property supervisor.
7. The 1st Respondents answer to the issue of the report prepared by the Kadhi of Rift Valley Province following the persistent disputes between the 1st Respondent and the Petitioners is that the report indeed confirmed that the 1st Respondent solely funded and ran the operations of the Mosque and Madrassa and that there is documentary evidence in the form of letters showing that the 1st Respondents never relinquished control, possession or ownership of the suit property at all. That in any event, the Kadhi was not invited to mediate on the ownership of the suit property and his mandate was limited to the issue of management of the institutions on the suit premises. It appends that it has always paid the land rent and rates due on the said suit property as its lawful owner.
8. With regard to the allegation by the Petitioners that the suit property was set aside as community and/or trust land by the Olkejuado County Council, the 1st Respondent states that such a serious allegation demands that the County Council be enjoined as a party in this Petition so that it could respond appropriately. That in any event, for the Petitioners to be granted an injunction as prayed, their conduct must meet the approval of the Court of equity and they should therefore approach the Court with clean hands and with proof of their allegations. They rely on the holding in **Peter Kinuthia Waithaka vs. Tom Ochieng T/A M'Oketchy Auctioneers & 3 Others (2005) eKLR** where the court held that allegations as serious as fraud must be strictly proved.
9. The 1st Respondent concludes by stating that as the registered lessee of the suit property, it is the rightful party to be awarded compensation by the Government for the compulsory acquisition of part of the suit property and that any adverse orders in that regard will affect the development of Namanga as a border town since the road expansion programme will have to be halted. That therefore the Petition ought to be dismissed with costs as it lacks merit.

Case for the 2nd and 3rd Respondents

10. The 3rd Respondent which filed a response on behalf of himself and the 2nd Respondent confirms that vide Gazette notices Numbers 11974 and 11975 of the 23rd September, 2011 they expressed their intention to acquire approximately 0.5666 acres which is part of the suit property for purposes of expansion of the road network within the Namanga Border Post. That on the 15th of November, 2011 as required by the law, inquiries were held at the District Officer's office in Namanga for purposes of hearing all the claims and complaints regarding compensation to persons with interest in the suit property and other properties earmarked for compulsory acquisition. On that day, both the Petitioners and the 1st Respondent laid claim to the suit property and a

representative of the 1st Respondent presented a title document claiming to be the registered owner of the suit property while the Petitioners claimed that they are currently running a school and mosque on the suit property and as such they were rightful owners thereof by dint of possession and occupation over time. The 3rd Respondent, upon hearing both parties and noting from available records that the suit property was registered in the names of the 1st Respondent nonetheless declined to make any compensatory award to any party until the dispute regarding the ownership and title to the suit property is resolved. It is awaiting that resolution through this judgment.

Determination

11. I have appreciated the straightforward issues in contest raised by the parties in this matter and it is obvious that the dispute and its mutations should have been settled a long time ago for the benefit of the Muslim Community in Namanga as there is no claim that any of the parties is reaping any personal benefit from the suit property.

12. Having stated as above, I am also aware that the two factions belong to the Islamic faith but operate under entities that are established within the law. In that regard, **Khaira & Ors v Shergill & Ors [2012] EWCA Civ 983** Mummery LJ stated that;

"Courts shall adopt the doctrine of judicial abstention or the non-interference principle, which states that the courts of the State are normally reluctant to become involved in adjudicating doctrinal disputes within religious groups other than the established Church of England. State courts will only exceptionally intervene to enforce the laws of a religious group where there is a financial interest and in relation to the disposal and administration of property.... There will inevitably be disputes with a religious aspect which, however controversial and profound to those involved, cannot exclude or limit the jurisdiction of the civil courts to determine civil rights.... Non-justiciability is a salutary principle of judicial self-restraint. It ensures that judges do not overreach themselves and that they abstain from deciding questions that are neither appropriate for, nor capable of decision by, judicial method.... The principle of non-justiciability will only apply when the court is asked to answer questions which are neither questions of law nor are they factual issues capable of proof in court by admissible evidence." (Emphasis mine)

13. I wholly agree and the holding also applies to the present case because it is not disputed that both the Petitioners and the Respondents are registered entities, the former as a society and the latter as a trust, and as such they are capable of suing and being sued within the context of the simple issue rotating around the suit property and the compensatory award that is at stake. I am in fact convinced that it is that issue which ignited the simmering differences between the parties and which has led to the filing of the present Petition and no issue of religious doctrine arises. I deliberately digressed.

14. Compulsory acquisition of property is provided for in both the Repealed Constitution as well as the Constitution of Kenya 2010. In the present dispensation, compulsory acquisition of property is provided for under **Article 40** of the **Constitution** which in **Article 40(3)** states that;

"(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

- i. requires prompt payment in full, of just compensation to the person; and***
- ii. allows any person who has an interest in, or right over, that property a right of access to a court***

of law.”

1. Further, **Section 6(2)** of the **Land Acquisition Act, Cap 295 Laws of Kenya** which was repealed by the Land Act No.6 of 2012 under Part II - (Procedure for Compulsory Acquisition) dealt with preliminary issues prior to compulsory acquisition of land and in that respect, **Section 3** of the Act stated that:

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

I am aware that the 3rd Respondent vide Gazette Notice Number 11974 of the 23rd September 2011 issued a notice to a number of registered land owners in Namanga of the Government's intention to acquire certain parcels of land, including a portion of the suit property.

2. **Section 9** of the **Land Acquisition Act** further stated that:

“The Commissioner shall appoint a date, not earlier than twenty-one days after the publication of the notice of intention to acquire, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land, and shall -

(a) cause notice of the inquiry to be published in the Gazette at least fifteen days before the inquiry; and

(b) serve a copy of the notice on every person who appears to him to be interested or who claims to be interested in the land.”

The evidence on record indicates that Gazette Notice Number 11975 stated that an inquiry for hearing of claims to compensation by persons interested in the properties to be compulsorily acquired, including a portion of the suit property, was scheduled for the 15th of November, 2011 in the District Officer's office in Namanga. The inquiry was indeed held and the Petitioners and 1st Respondent made separate claims to the land and compensation moneys.

1. I also note that in the Gazette Notice, the party named as proprietor of the suit property is the Trustees of Kokini Muslim Union which is the 1st Respondent in this Petition. The evidence on record relating to ownership is a copy of the title to the suit property produced by the 3rd Respondent and which indicates that the Lessee from the Government of Kenya was the Trustees of Kokini Muslim Union.
2. What is the value of the above evidence? In Civil Case 130 of 2012 Ethics and Anti-Corruption Commission & 3 Others vs African Safari Club & 2 Others and Commercial Case 70 of 2013 Altam Group International (K) Limited vs. Kenya Commercial Bank Ltd., the Courts explained the purpose of registration of land and in the former case, Kasango J. stated thus;

“It ought to be noted that under Section 24 of the Land Registration Act, 2012 registration of a person as proprietor of title vests in that person absolute ownership. The rights of such a proprietor are stated in Sections 25 and 26. In the now deleted legislation, The Registration of Titles Act (Cap 281) Section 23 similar provisions were made about a registered proprietor of property. The Court of Appeal had occasion to decide the effects of that Section in the case of Nairobi Permanent Market Society & Others -Vs- Salima Enterprises & Others [1995-1998]EA 232. In that case the Court of Appeal stated as follows- “Under Section 23 of the Registration of Titles Act, a Certificate of Title issued by the Registrar to any purchaser of land was to be taken by the Courts as conclusive evidence that the person named therein was the absolute and indefeasible owner thereof. That title was not subject to challenge except on the

ground of fraud or misrepresentation to which the purchaser was a party. In this instance, it was not disputed that the first Respondent had purchased the land for valuable consideration and that the land had been duly registered in its favour. There was no allegation that the company was a party to any fraud or misrepresentation perpetrated on the Appellants. The order of 20th December 1995 was thus an interference in the first Respondent's rights and the Judge was justified in vacating it."

3. I am in agreement and further, I am well aware of the fundamental and principal guideline of the law of evidence that he who alleges must prove. I am also alert to the fact that the burden of proof in a matter where fraudulent conduct is alleged, is very high and is beyond a balance of probabilities. In furtherance of the earlier point, **Section 107(1) of the Evidence Act Cap 80** states as follows;

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

4. In the Registration of Titles Act (now repealed) "fraud" is defined as to;

"...include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration;"

Applying the above holdings and definition to the present case, the Petitioners ought to have demonstrated that the 1st Respondent, while fully aware of the Petitioner's interest in the suit property, nonetheless proceeded, with fraudulent intent, to have the said interest registered in its name so as to deprive the Petitioner of their legal right in the said property. I have seen no such evidence save the mere assertion in the Petition and submissions.

5. The Petitioners have also alleged that the 1st Respondent obtained the title to the property fraudulently because in fact it has never represented the interests of the Muslim community at Namanga; that the suit property was set aside as trust land for the community's social use; that the procedure for alienation of trust land was never followed; that they doubt that the 1st Respondent is indeed incorporated as a legal entity.
6. On my part, I am satisfied that representation or lack thereof, of the interests of the Muslims resident in Namanga, is not a qualification for proof of ownership of the suit land. As reiterated earlier, only a certificate of title is conclusive evidence of proprietorship and only the 1st Respondent with the support of the 3rd Respondent has produced such evidence.
7. With regard to the contention that the suit property was set aside as trust land for the community's social use and that the procedure for alienation of trust land was never followed, and noting that the registration of transfer regarding the suit property took place under the repealed Registration of Titles Act Cap 281 Laws of Kenya, It was incumbent upon the Petitioners to show that they were/are beneficiaries of land that was lawfully registered as trust land. In that regard in **Mwangangi & 64 Others vs Wote Town Council Civil Case Number 113 of 2004** Wendoh, J. stated that;

"Section 114 of the Constitution of Kenya confers the status of trust land to, inter alia, all land which was in the special areas or reserves and which was registered in the name of the Trust Land Board, or land which was situated outside the Nairobi (area as 12/12/1964) the free hold title to which was registered in the name of a county council. Section 115(2) of the Constitution goes on to provide that each county council holds the trust land vested in it for the benefit of the persons who ordinarily reside on that land. If the land in issue is trust land then the applicants who claim to be residents of Kitui and doing business on it would have an interest in what the council does with the land."

8. From the expression of the law above, and which I agree with, the suit property must have been

gazetted as land in the special area or reserves and whose freehold title was registered in the name of the county council as trustee for persons ordinarily resident on the parcel of land. Applying that principle to the present case, I am not satisfied that the Petitioners have demonstrated that indeed the suit property is Trust Land and what legal and identifiable interest, save that of occupation, they may have over it. The evidence on record indicates that the suit property is held on a leasehold title and registered in the name of the 1st Respondent. It was the Petitioner's duty to place before the court evidence showing the public purpose that the suit property was reserved for, to warrant the surrender of the 1st Respondent's title to the 3rd Respondent. In any event if therefore the suit property was initially trust land and was then registered under the Registration of Titles Act there is absolutely no evidence that the 1st Respondent unlawfully acquired it.

9. I also agree with the Respondents and in furtherance of the above point that the Petitioners ought to have enjoined the County Council of Ol Kejuado in this Petition so that this court is properly seized of any evidence showing that the suit property was at some point in the past reserved for public purposes and vested in the said Council on behalf of the Muslim Residents of Namanga. Without such evidence, the Petitioners' case is much weakened and there is indeed no such evidence on record.

10. From the foregoing, it is obvious that underlying the quest by the Petitioner for the compensation money arising from the intended compulsory acquisition of the suit property is the issue of title to and ownership of it. If that be so, then **Article 162(2)** of the **Constitution** provides that;

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.”

And **Article 165 (5)** of the **Constitution** provides that:

“The High Court shall not have jurisdiction in respect of matters—

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

11. What do the above two provisions mean? That the drafters of the Constitution were avoiding a situation where the High Court and the Status Courts would exercise parallel jurisdiction over the named matters, at the risk of exposing the judiciary to ridicule and judicial antics. In **Petition 170 of 2012 United States International University vs. The Attorney General**, Majanja J. held that;

“The answer to this question is found at Article 165 (5) (b) which categorically states that this court, the High Court, is not to exercise jurisdiction of the Courts established in Article 162 (2) ... This would only leave the Industrial Court as the only other forum for the Exercise of the jurisdiction over cases dealing with matters described in Section 12 of the Industrial Court Act, 2011.... To exclude the jurisdiction of the Industrial Court from dealing with the other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and The Industrial Court. This would give rise to forum shopping thereby undermining the stable and consistent applications of employment and labour laws. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court.”

12. The learned judge's words apply equally and aptly to the Environment and Land Court as they do to the Industrial Court which was the subject of the matter before him.

13. I say so because the **Environment and Land Court Act No. 19 of 2011** clearly provides for the

jurisdiction of the Environment and Land Court at **Section 13** thereof and which states that;

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.” (Emphasis mine)

1. Without appearing as if I am directing the Petitioners as to where they should ventilate their grievances, from the evidence on record and a clear reading of the prayers in the Petition, a Constitutional Petition on a matter which rests purely on title to land should not have been filed in this Court. I am therefore certain that despite my clear and specific findings on the evidence placed before me and which I have expressed elsewhere above, this matter properly belongs to the Environment and Land Court and even if I am wrong and this Court was properly seized of it, I have shown that on the merits, the Petition must fail.
2. But that is not the end of the matter because the Petitioners have also alleged that their fundamental rights and freedoms under **Articles 40, 32, 27, 28, 43, 73, 75, 252, 27, 31** and **47** of the **Constitution** have been violated. Elsewhere above I summarised the case for the Petitioners and sadly the focus of the case was towards ownership and title to the suit property and little was said of the fundamental Constitutional issues in those Articles of the Constitution. In **John D Ashcroft vs. Javaid Iqbal 129 S. Ct 1937**; the Court stated thus;

“Two working principles underlie our decision in Twombly (Bell Atlantic Corporation vs. Twombly 550 US 544, 127 S. Ct; 1955 167 L.Ed 2d 929) First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”

And in **Prince v Law Society of the Cape of Good Hope and Others (Prince I) (1989) ZASCA 90; 1989 (4) SA 731** it was held that;

“Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasize that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the

pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal. (Emphasis mine)

I associate myself with the above findings and emphasize that the Petitioners in seeking a remedy for violation of human rights must plead the alleged violations with some measure of particularity and this was not done in the present case. Mere reliance on **Article 40** of the **Constitution** on the right to property cannot be sufficient when no evidence is placed to show the Court that such a right in fact exists and that the Petitioners have been denied the said right. That is all to say on this aspect of the Petition.

3. In making my final orders, I must tell the Petitioners and the 1st Respondent that they need to find common ground for the collective benefit of the Muslim Community resident in Namanga. I take cognizance of the mediation efforts exercised by the Kadhi of Rift Valley in a bid to bring a cessation of hostilities between the Petitioners and the 1st Respondent but that was close to 30 years ago and the present Petition was narrowed down to money that appeared from the blues. That said, my duty here is to exercise judicial authority as envisaged in Article 160 (1) of the Constitution which provides that;

"(1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

I have discharged that duty.

4. The final Orders to be made are that the Petition herein is dismissed in its entirety.
5. As to costs, let each party bear its own cost because none was litigating for personal gain or benefit.
6. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Mohammed holding brief for Petitioners

Mr. Athuok for Petitioners

Miss Muchiri for 2nd and 3rd Respondents

Order

Judgment duly ready.

ISAAC LENAOLA

JUDGE