



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 159 OF 2011

BETWEEN

ESTHER NJERI NJENGA.....
PETITIONER

VERSUS

ALVIN KAMANDE NJENGA..... 1ST
RESPONDENT

DERRICK KARIUKI NJENGA..... 2ND
RESPONDENT

JUDGMENT

Petitioner's case

1. The petitioner's case is set out in the amended petition dated 10th November 2011 and concerns a property known as LR LIMURU/NGECHA/114. The petitioner is Esther Njeri Njenga the wife and legal representative of the estate of the late Laban Njenga Mundia (deceased) who died in November 2006.

2. The petitioner avers that the deceased was the registered proprietor of Land Reference Number LIMURU/NGECHA/114 which he lawfully and during his lifetime he subdivided the land into LIMURU NGECHA/1966 – 1975. In 1999, the deceased further subdivided the principal title transferred plots to his children and other beneficiaries, who became absolute proprietors of the properties, as follows:-

- (i) Esther Njeri Njenga – Limuru/Ngecha/1971
- (ii) Andrew Nyoro Njenga – Limuru/Ngecha/1969

- (iii) Bancy Gathoni Njenga – Limuru/Ngecha/1974
- (iv) Lucy Wanjiku Njenga – Limuru/Ngecha/1970
- (v) Sophia Kabura Njenga – Limuru Ngecha/1975

3. The petitioner claims that sometime in October 2008 the respondents filed a suit being Nairobi **HC ELC No. 512 of 2008** involving Alvin Kamande Njenga and Derrick Kariuki Njenga against Esther Njeri Njenga and Judith Nyoro, Lucy Wanjiku Muchekehu, Josephine Nduta Kariithi, Bancy Gathoni Musa and Sophie Kabura Macharia claiming, inter alia, that they fraudulently colluded to obtain LIMURU/NGECHA/1966-1975 or Original Title No. LIMURU/NGECHA/114 for themselves without considering the plaintiffs and other beneficiaries.

4. The plaintiffs' in that suit applied for temporary orders which were issued by the court pending the hearing and determination of the suit. The petitioner attacks the said orders as being contrary to the mandatory provisions of **Order 40 rule 6** of the **Civil Procedure Rules** as they have been in existence for more than twelve months and that they are also manifestly scandalous, frivolous or vexatious, calculated to prejudice, embarrass and are otherwise an abuse of the process of the court they offend the mandatory provisions of **Order 2 Rule 15(b) (c) and (d)** of the **Civil Procedure Rules**. The petitioner also claims that the respondents herein are non-suited and the civil suit should be dismissed.

5. The petitioner avers that the respondent have since abused the said orders by removing beacons, erecting illegal structures and violently ejecting the petitioner and other beneficiaries from the property.

6. It is the petitioner's case that the court should strike out proceedings and the entire suit as the orders issued therein have no relation to the beneficiaries of the estate of the late Laban Mundia Njenga and are therefore punitive, illegal and contrary to law. The petitioner also avers that she is the personal representative of the deceased and pursuant to **section 83** of the **Law of Succession Act** (Cap 160) her duties as a personal representative have been eroded, abused and her fundamental rights to property infringed as a result of the proceedings in **Nairobi ELC No. 512 of 2008**.

7. The petitioner claims that the entire suit is an abuse of the due process of law as the issues raised therein are succession issues governed under the **Law of Succession Act** and in any case the 2nd, 3rd, 4th, 5th and 6th respondents are strangers to the subject matter of the pending suit.

8. The petitioner seeks the following reliefs in the amended petition;

(a) Nairobi ELC No. 512 of 2008 involving Alvin Kamande Njenga & Another –vs- Esther Njeri Njenga and 5 others and the corresponding interim injunctive orders be struck out with costs to the Applicant.

(aa) A declaration that the temporary orders granted in Nairobi ELC No. 512 2008 and the entire suit involving the parties thereto be hereby struck out for being offensive to the Applicant's Constitutional Right to matrimonial property contrary to Article 40 of the Constitution of Kenya 2010 and for being oppressive and abusive to the due process of law.

(b) A declaration that the continued exclusive occupation use and ownership of Land Reference Number LIMURU/NGECHA/1966-1975 BY Alvin Kamande and Derrick Kariuki Njenga, the 1st and 2nd Respondents herein is unconstitutional, illegal and contrary to Article 40 of the Constitution of Kenya 2010 as it has deprived the Applicant and other beneficiaries a right to property.

9. The petition was supported by the petitioner's affidavit sworn on 15th September 2011 which reiterated the contents of the petition. In addition to the petition and the deposition, the petitioner filed written submissions on 14th September 2011 which Mr Wachakana adopted in his submissions.

10. Mr Wachakana submitted that the injunctive orders issued against the defendants in **ELC HCCC**

No. 512 of 2008 are a violation of the proprietary rights of the petitioner, are discriminatory and hence the petitioner is entitled to come to this court to seek relief. He contended that the orders are being enforced against parties who are not parties to the suit that is Judith Nyoro, Lucy Wanjiku Muchekehu, Josephine Nduta Kariithi, Bancy Gathoni Musa and Sophie Kabura Macharia who are not beneficiaries of the estate of the deceased as they are absolute and indefeasible owners of the properties given to them while the deceased was still alive.

11. He contends that this is a breach of **Article 40** of the Constitution as his client is being deprived of her property as administrator of the estate of the deceased. He urged the court to allow the petition.

1st and 2nd Respondents' case

12. When this matter came up for directions on 15th November 2011 Mr Rutto of the firm of *Rutto & Company Advocates* duly attended court on behalf of the 1st and 2nd respondents having filed a Notice of Appointment dated 1st November 2011. Mr O P Ngoge of *O P Ngoge & Company Advocates* attended court for directions on 2nd December 2012.

13. On 7th February 2012, the firm of *Rutto & Company Advocates* represented by Mr Rutto attended court to prosecute its application for leave to withdraw from acting. After hearing arguments and also opposing arguments by Mr Ngoge, I made the following ruling;

RULING

1. *The application before the Court today is a Chamber Summons dated 18th January 2012. It seeks leave for the firm of T K Rutto to cease acting for the respondents. It is supported by the Affidavit of Thomas Rutto sworn on 18th January 2012 who depones that he has not received any instructions.*

2. *When the matter came up for hearing Mr. O P Ngoge opposed the application. Though he was not properly on record. I allowed him to address the court. He argued that he was served with the petition in the matter and he was properly instructed by the respondents. He stated that Mr. Rutto's firm had no instructions to act and that the Notice of Appointment filed on 14th November 2011 was filed without authority. Moreover, he stated that he had participated in these proceedings by attending court on 2nd December 2012 and filing a Replying Affidavit and grounds of Opposition. In his view, the aim of Mr Ruto's firm was to obtain an order so that its fees can be taxed. He also argued that the court should have regard to Article 159 of the Constitution and deal with the matter without undue regard to technicalities.*

3. *Mr. Wachakana did not oppose the application but admitted that he had served the firm of O P Ngoge & Co. Advocates in error as that firm was involved in a related matter where the parties to this matter are litigating.*

4. *I have considered the arguments and in my view the firm of Rutto & Company Advocates is properly on record. A Notice of Appointment of Advocates dated 11th November 2011 was filed on behalf of the respondents. That Notice signifies to the court and third parties dealing with the matter that the respondents have duly appointed that advocate. It is not the obligation of either the court or third party to go behind that document to satisfy itself of the legitimacy of the Notice otherwise the court process would be thrown into chaos.*

5. **Article 159(2) (d)** states that justice shall be administered without undue regard to procedural technicalities. I must emphasise the words "**undue regard**". The Constitution does not do away with all technicalities but directs the court to administer justice without undue regard to technicalities. Some of these technicalities are the rules of the game that level the playing field and ensure that justice is balanced.

6. *The filing of a Notice of Appointment is not a technicality that can be disregarded. It is fundamental in that it gives notice to the world that a party has appointed an advocate and it is that advocate who must be dealt with. Without it, issues of service of court process become difficult and this may impede justice.*
7. *I find that since the firm of Rutto and Co. Advocates had filed a notice of appointment, it must now be granted leave to withdraw from acting. As the 1st respondent is in court and Mr. Ngoge purports to act for them I allow the application dated 18th January 2012, the firm of T K Rutto & Company Advocates is granted leave to withdraw from acting for the respondents. As the respondents are represented herein it shall be unnecessary to serve upon them the order of withdrawal.*
8. *For the avoidance of doubt, if the firm of O P Ngoge wishes to come on record for the respondents, a notice of appointment must be filed.*
9. *Finally, this is not the court dealing with matters of advocate/client fees. The court seized of those issues will address itself to the respondents' concerns if necessary.*
14. The matter came up for directions once again on 24th February 2012. On this date Mr Ngoge attended court behalf of the respondents. As he had not complied with my order at paragraph 8 of the ruling, I made an order directing him to comply with the order by filing a Notice of Appointment. As the 1st respondent was present in person, I fixed the matter for hearing on 13th March 2012.
15. On 13th March 2012 where I made the following order:
- This date was taken on 24th February 2012 in the presence of the 1st respondent, Alvin Njenga in court on that date. I have also seen the letter dated 27th February 2012. I am satisfied that in view of my decision of 7th February 2012 and my further order of 24th February 2012, the respondents had notice of these proceedings and direct that the same proceed for hearing.*
16. In making the order, I was satisfied that the 1st and 2nd respondents were aware of the date and no reason was advanced at least in the letter dated 27th February 2012 to the court. The said letter, written to the court by the respondents, was complaining about the proceedings and ruling I made on 7th February 2012. It was for all intents and purposes rehashing the arguments that were made in court on 7th February 2012 and which were considered in my ruling.
17. After I had heard the matter on that date, Mr O. P. Ngoge came to court at about 10.20 am and brought to the court a Notice of Appointment of Advocates under Protest which stated:
- TAKE NOTICE that the firm of O.P. Ngonge & Associates Advocates was instructed to accept service of the petition filed herein on the 16th September 2011 on behalf of the respondents and has been fully engaged in this matter from the very beginning on behalf of the respondents a fact which is recognised by the petitioner who effected service of the petitioners subsequent pleadings on the said firm of Advocates.*
- Henceforth all correspondences including service of all courts process should be addressed on the said firm of Advocates on behalf of the respondents.*
18. This notice one again attempts to re-litigate the issues I had ruled on in my decision of 7th February 2012.
19. The above notwithstanding, I have considered the Replying affidavit of Alvin Kamande Njenga sworn on 26th January 2012 and the respondents written submissions dated 17th February 2012. Though they are filed by the firm of O P Ngoge & Company Advocates, I am exercising my discretion to avoid an abuse of the court process by Mr O. P. Ngoge, Advocate, which would be detrimental to his clients. These are proceedings for enforcement of fundamental rights and even taking into account the provisions

of **Article 159**, I am obliged to consider what is on record and therefore the respondents' case, the conduct of Mr O. P. Ngoge notwithstanding.

20. Mr Alvin Kamande depones that this petition is an abuse of the court process in view of the existence of **Nairobi HC ELC 512 of 2008**. Further, the written submissions dated 17th February 2012 support this position. The thrust of the respondents' argument is a grievance by the petitioners can be cured by an application to be filed in the existing suit instead of filing the petition.

21. The respondents are concerned that this petition invites the court to review the decision of a court of concurrent jurisdiction. That this court is not an appellate court and it cannot proceed in the manner suggested by the petitioner. They urge the court to dismiss the petition.

3rd Respondent's case

22. The third respondent filed grounds of opposition dated 6th March 2012 which opposed the petition on the following grounds.

- (1) *The petition is totally incompetent, incurably defective, bad in law and amounts to an abuse of the Court process.*
- (2) *The petitioner having failed to apply to lift the interim orders or appeal the said orders in Nairobi High Court Civil Case No. 512 of 2008 cannot challenge the order through this petition.*
- (3) *The declaratory orders sought ought not to issue as the High Court cannot strike out the decision of another high Court with the same jurisdiction.*
- (4) *The Honourable Judge who issued the orders in Nairobi High Court Civil Case No. 512 of 2008 acted in good faith in the lawful performance of his judicial function as provided in Article 160(5) of the Constitution.*
- (5) *The petition does not disclose any violation, infringement or threat to the petitioner's fundamental rights and freedoms and the same should be dismissed with costs.*

23. Ms Muchiri, who appeared for the respondent adopted the written submissions dated 6th March 2012 which elucidated the grounds of opposition. She urged the court to dismiss the petition as it is an abuse of the court process.

Issues for determination

24. The only two issues for determination in this matter. The first is whether there is a breach of the petitioner's right to property protected under the Constitution has been infringed. The second is whether this court should allow the petition in light of case **HC ELC 512 of 2008**.

Whether there is breach of the right to property

25. **HC ELC No. 512 of 2008** is a suit between Alvin Kamande Njenga and Derrick Kariuki Njenga and Esther Njeri Njenga, Judith Nyoro, Lucy Wanjiku Muchekeru, Josephine Nduta Kirithi, Bancy Gathoni Musa and Sophie Kabura Macharia and it is in respect of original title No. LIMURU/NGECHA/114 which belonged to the deceased.

26. On 29th September 2009 after interpartes hearing Justice Mbogholi Msagha issued the following orders;

- (1) *That a temporary injunction be and is hereby issued stopping any further transaction by the defendants on the suit parcels of Land until the determination of the suit herein.*

- (2) That the defendants by themselves, their agents and or servants be and are hereby temporarily restrained from interfering, transferring, selling, disposing the suit parcels of land pending the hearing and determination of the suit.
- (3) That status quo be maintained until the determination of the suit herein.
- (4) That the defendants by themselves, their agents and or servants be and are temporarily restrained by an Order of the Court from interfering with the Plaintiffs/Applicants peaceful enjoyment or occupation of the suit parcels of land (LIMURU/NGECHA/1966-1975) pending hearing and determination of the suit originally Title number Limuru/ Ngecha/114.
- (5) That the determination of Limuru Case Number 167 of 2008 and Limuru Criminal case No. 887 of 2008 be and are hereby suspended, stopped and/or terminated until the determination of suit herein.
- (6) That this Honourable Court do and hereby issue an order for a caveat LIMURU/NGECHA/1966-1975 to be served upon Kiambu Land Registrar until the case herein is determined.
- (7) That costs of the application be in cause.

27. It is this suit and injunctive orders that the petitioner's seek to have struck out on the basis that it infringes the petitioner's right to property protected under the Constitution.

28. The applicable Constitution in this matter is the former Constitution as the acts which are impugned pre-date the promulgation of the Constitution and the Constitution unless otherwise stated, is not retrospective in its application. See the case of **Joseph Ihuro Mwaura & 82 Others v The Attorney General & Others Nairobi Petition No. 498 of 2009 (Unreported)** at para 56. I shall therefore consider this petition to have been brought under the former Constitution.

29. The first part of **section 75** of the Constitution protects a person against acts that amount to compulsory acquisition of property without due process and compensation. The second part permits acts that would ordinarily be a breach of **section 75**. However **section 75 (6)** provides, in part, as follows;

75. (6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) -

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property -

(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations; [Emphasis mine]

30. The issuance of court orders including the court order made in **HC ELC No. 512 of 2008** in civil proceedings fall within the provisions of **section 75(6)(a)(iv)** of the Constitution hence there is no breach of the Constitution in this respect.

Abuse of the court process

31. As regards the filing of a multiplicity of suits, the court considered the effect thereof in the case of **Retired Major Sharack Mutia Muia v Prof. Kivutha Kibwana & Others, Nairobi Petition No 281 of 2006 (Unreported)** stated as follows, '**[26]Section 84 of the Constitution is a separate right, the right for a person whose rights are violated, infringed or threatened to move the High Court unhindered. The Court should exercise great circumspection in interfering with the gateway of enforcement lest the rights guaranteed under the Constitution become worth the paper they are written on. [27]This view is not inconsistent with the power of the Court to prevent abuse of its process or do justice. Allowing of abuse to take root in our system breeds impunity and the direct result is that the**

efficacy of Court orders is lessened thereby undermining the same rights that are to be enforced. [28]Under section 84, the Court is entitled to take into account the issue of subjudice and consider whether indeed, it affects the rights to be enforced. The Court is not powerless and cannot gloss over the abuse of its process merely because the matter before it is dressed as an enforcement of fundamental rights action. It must act when called upon to halt an abuse of its process in appropriate circumstances.”

32. I adopt these principles and apply them to this case and hold that this petition seeks to determine the matters in issue in **HC ELC No. 512 of 2008**. It is an abuse of the court process.

Jurisdiction of the High Court

33. It is beyond dispute that **HC ELC 512 of 2008** and this suit involve the same parties and the litigation involves the same subject of land. The High Court in adjudicating **HC ELC 512 of 2008** is exercising its ordinary jurisdiction granted to it by the Constitution to resolve disputes. Such exercise cannot be said to infringe on the parties rights as they are in a forum intended for that purpose.

34. The orders which are attacked are orders of the High Court. There is no difference between the High Court exercising its ordinary jurisdiction and exercising special jurisdiction under **Article 22** of the Constitution. This court sitting to determine enforcement of fundamental rights and freedoms cannot intervene in concurrent proceedings by the High Court as the High Court even when exercising ordinary jurisdiction has jurisdiction under **Article 165(3)** to give effect to and enforce the provisions of the Constitution including the bill of rights. This obligation is also imposed by **Articles 20** and **21** of the Constitution.

35. It is not demonstrated that the right to seek further relief either by way of appeal or review has been impaired in any manner. As has been submitted by the third respondent, the petitioner is entitled to set aside, discharge or review the orders in the pending suit and should proceed to do so in that suit. Any attack on the orders as contended by the petitioners under **Order 40** of the **Civil Procedure Rules** can only take place in the pending suit and not by way of a collateral attack under the guise of an action to enforce fundamental rights and freedoms under the Constitution.

Disposition

36. I must therefore conclude that these proceedings lack merit as no breach of constitutional right is disclosed. The amended petition is also an abuse of the court process.

37. I therefore dismiss the amended petition with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 19th day of March 2012.

D.S. MAJANJA

JUDGE

Mr Wachakana instructed by Wachakana & Company Advocates for the petitioner.

Mr O P Ngoge instructed by O P Ngoge & Company Advocates for the 1st and 2nd respondent.

Ms Muchiri, Litigation Counsel, instructed by the State Law office, for the 3rd respondent.