



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
Constitutional Petition 6 of 2011

PETER
MUCHERU.....PETITIONER

VERSUS

OL-KALOU LAND CONTROL BOARD.....1ST RESPONDENTS

THE LAND REGISTRAR, NYANDARUA COUNTY.....2ND
RESPONDENTS

THE HON. ATTORNEY GENERAL.....3RD
RESPONDENTS

JUDGMENT

The petition dated 11/4/2011 was filed by Peter Mucheru Njuguna against Ol Kalou Land Control Board, the Land Registrar, Nyandarua County and the Hon. Attorney General. The petitioner alleges that **Article 35** as read with **Article 22, 40, 47, 48** and **262** and **Article 19** of the **6th Schedule** of the **Constitution**, have been breached as relates to him. As a result he seeks the following orders:-

- a) **The respondents are compelled to produce and make available to the petitioner within seven (7) days of service of this court's order on them certified copies or the documentation kept by their respective offices with regard to:-**
- i) **All applications made to Ol Kalou Land Control Board for letters of consent to deal in any manner with parcels Nyandarua/Passenga/46, 226 and 227;**
 - ii) **Letters of consent issued by Ol Kakou Land Control Board in respect of any transaction affecting parcels Nyandarua/Passenga/46, 226 and 227 or any other subdivision created there from;**
 - iii) **Letters of consent used at the Lands office, Nyahururu in registration or applications for registration of all transactions affecting parcels Nyandarua/Passenga/46, 226 and 227;**
 - iv) **Rulings of the Ol Kalou Land Control Board on all applications made to the said board in 1993 and 1997 with regard to parcels Nyandarua/Passenga/46, 226 and 227;**
 - v) **Rulings or any other decision(s) of the land Registrar, Nyandarua on all applications for registration of transfer, lease or any other instruments or transactions capable of registration under the applicable law made or presented to the said office in 1993 and 1997 with regard to parcels Nyandarua/Passenga/46, 226 and 227;**
- b) **If for any reason the first and/or the second respondents are unable to supply the information**

sought by the petitioner, or any part thereof, they shall give to the petitioner within seven days from the date of service of this order upon them their certified reasons in writing why they are unable to supply the information and documentation sought by the petitioner;

c) Further, an order for discovery against the respondents of all the information prayed for in prayer 1 above;

d) An order for compensation in damages be made;

e) Costs of this petition shall be borne by the respondents.

The petition is premised on grounds found in the petition and a supporting affidavit sworn by the petitioner. The petition was opposed and the Attorney General filed grounds of opposition to the effect that the petition is an abuse of the court process; it lacks clarity and precision in the prayers; that the petitioner has not shown an interest in the properties in question; the documents that the petitioner seeks to access are Government documents to which he has no access and lastly, that the search certificates issued to the petitioner are sufficient.

The petitioner appeared in person and in support of the petition, he deponed that he is the son of the late Paul Njuguna Mucheru and Joyce Wanjiru Mucheru (deceased) who owned land Nyandarua/Passenga/46, measuring 13.6 Ha. In 1993, he learnt that the said land in which his parent's graves are, had been registered in the names of Paul Njuguna Mucheru and Eunice Muthoni Njuguna, the deceased's third wife; the petitioner placed a caution in the land on 29/6/1993; but Paul Njuguna applied for its removal and the Registrar allowed it on 20/8/1994, an appeal was lodged to the Chief Land Registrar on 21/9/1994. The Registrar upheld the Land Registrar's decision on 21/5/1997 and the caution was removed. The said land was then subdivided into plots Nyandarua/Passenga/226 and 227 and certificates issued in the names of Eunice Muthoni and Paul Njuguna. He conducted searches on the said plots on 30/6/09 and found that they were now registered in the names of Daniel Mwangi Mango and Eunice Muthoni. He then tried to obtain from the lands office certified copies of documents used in the above transfers to establish their authenticity but the Land Registrar insisted that searches were sufficient. He also tried to get documentation from the Ol Kalou Land Control Board but none were forthcoming. The petitioner believes that the above transactions were done fraudulently and that is why he wants all rulings and documentations in relation to the pieces of land. The petitioner contends that the respondents were legally bound to give the petitioners certified copies of the documents he required and failure to supply them resulted in the infringement of his rights of access to information. The petitioner further contends that failure to access the documents has denied him an opportunity to seek legal redress.

Mr. Njuguna, learned counsel for the state vehemently opposed the petition based on the grounds of opposition filed. He urged that the petition is bad in law and an abuse of the court process because in his view, there is a dispute of ownership of the land parcel Nyandarua/Passenga/46 which was later subdivided and transferred to Paul Njuguna Mucheru. Eunice Muthoni Njuguna and Daniel Mwangi and certificates issued in their respective names as Plots 226 and 227. Mr. Njuguna argued that the petitioner has not demonstrated which interest he has in the said land because being a son to the original owner does not automatically give him an interest in the suit land.

It is the respondents contention that access to information is relative; That the petitioner obtained search from the Land Registrar, has exhibited proceedings of the Land Disputes Tribunal, the decision of the Chief Land Registrar confirming the decision of the Land Registrar to which he had a right of appeal to the High Court which right he never exercised.

The other issue raised up by the learned State Counsel is that in his own affidavit, the petitioner has admitted learning from the documents retrieved from the Lands office, he had the ruling of the Chief Land Registrar and it is not known what information has not been availed him. Lastly, it was the counsel's submissions that the disputed land was subdivided and transferred to other parties namely Eunice Muthoni, Paul Njuguna Mucheru and Daniel Mwangi who should have been brought into this petition as interested parties.

The applicant complains of breach of his fundamental right to access information as guaranteed under **Article 35** of the **Constitution**. This is not one of the rights that may not be limited as provided under **Article 35** of the **Constitution**. It means that the right is not obsolete. The **Article** reads as follows:-

“Art.35 (1) Every citizen has the right of access to –

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The state shall publish and publicise any important information affecting the nation.”

It is the duty of the petitioner to demonstrate that his said rights have been breached. Upon considering the petitioners affidavits and submissions; it is not clear what interest the petitioner has in the suit land in respect of which he seeks to obtain documents from the Land’s office in Nyahururu. All that the petitioner has told the court is that the subject land was his father’s land which was secretly transferred. He did not tell the court whether he was a beneficiary to the land or not. The fact that it was the petitioner’s father’s land does not automatically give him a right to the said land.

The applicant disputes the transfer of the land to other people who are not before court. This petition raises the issue of ownership of the subject land. It was incumbent upon the applicant to join the said people to these proceedings as Interested Parties because the orders that might be given might affect the rights to their land. The three persons may be unaware of these proceedings and they should not be condemned unheard.

The courts have over the years set down the criteria which an applicant approaching the court for breach of his fundamental rights has to establish. In **Anarita Karimi Njeru v Rep. (1979) KLR 154 at pg 156** Kneller and Hancox JJ delivered themselves as follows:-

“We would however, again stress that if a person is seeking redress from the High Court in 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 a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

The question is whether the petitioner has met the above threshold. In this case the petitioner has told the court that he did searches on 29/6/09, and 30/6/09 in respect of the suit land. The certificates of search were issued by the Lands office meaning that information was given to the petitioner as to the status of the land. He is also privy to the ruling of the Chief Land Registrar confirming the decision of the Land Registrar to remove the petitioner’s caution from the suit land. It means that the petitioner has obtained information from the Lands office. He then claims to have attempted to obtain from the Lands office certified copies of the documentation issued in all the transactions that have taken place on the land in order to establish their authenticity but the Land registrar insisted that he does a search. The petitioner has not shown any evidence that these attempts were ever made. He also claims to have applied for records kept by Ol Kalou Land Control Board in regards to the transactions that have taken place on the land but he was not given. The petitioner has not shown any application by way of letter or otherwise or any application made to the respondents and it was declined. Although **Article 35** of the **Constitution** provides generally that one is entitled to information, it does not state that one is entitled to all information held by the State. For example information on state security may not be availed to everybody. In this regard, the law has set out the documents that the Lands office will issue upon request when one wants to know the status of the land. Since the petitioner learnt that the land was no longer in the names of his father, if he wanted to challenge that status, it is upto him to file a suit and the Land

Registrar or officer from the Land Control Board can then be called upon to produce the said documents in court. Alternatively, there is procedure for compelling public officers to perform their duties if they have failed to do so. That is by way of an order of mandamus in Judicial Review. It is my view that not every breach amounts to a breach of a fundamental rights. Where a statute or the **Constitution** provide the manner in which a party should approach the court, that process should be followed. Otherwise there is the danger of trivialising the **Constitutional** process by making every breach a violation of the Constitutional rights. On the above point, the Privy Council said as follows in the case of **Kemrajh Harrikisoon v Attorney-General of Trinidad and Tobago [1979] WLR 62 (pg 64):-**

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicants to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

Back home, in the case of **Speaker of the National Assembly v Karume (2008)1 KLR 425**, the Court said:-

“There was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should have been strictly followed.”

The above decisions do stress the point that not every breach of a right raises a **Constitutional** issue and the **Constitutional** process should be invoked only where it is deserved. The Petition lacks merit and is hereby dismissed.

DATED and DELIVERED this 25th day of July, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Petitioner in person

N/A for the respondents

Kennedy – Court Clerk