



REPUBLIC OF KENYA

High Court at Malindi

Petition 8 of 2011

IN THE MATTER OF: ARTICLE 40(1)

AND

IN THE MATTER OF: CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTISE AND
PROCEDURE RULES 2006

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 40(1)

BETWEEN

1. PIRY JOHNSTONE MUYE.....PETITIONER

AND

1. THE ATTORNEY GENERAL

2. THE REGISTRAR OF TITLES, MOMBASA

3. THE COMMISSIONER OF LANDS.....RESPONDENTS

JUDGMENT

1. The Petition as filed on 17th June, 2012 seeks two declarations and directory orders in the petitioner's favor, in respect of the land parcel identified as No. LR MN/111/11217. The petition prayers are as follows:

“a) An order declaring that the respondent's actions in refusing to register the petitioner as the rightful owners of parcel No. LR. No. MN/III/11217 are unconstitutional and a vacation of his embedded constitutional right.

b) A declaration that the petitioner is the rightful and bona fide owner of land reference no. LR. No.

MN/111/11217 and any other prior title issued to a third party either by mistake or through fraud ought to be canceled at the earliest and/or as the court shall direct.

c) An order directing the director of physical planning and the director of survey to either jointly or severally to prepare survey plans (PDP) in favor of the plaintiff it enable him be issued with the title documents.

d) An order directing the respondents to issue land title documents of land reference LR. No. MN/111/11217 in favor of the petitioner.”

2. The petition is expressed to be brought in enforcement of the petitioner's right to own property under article 40(1) of the Constitution, and is based on the petitioner's claim to have occupied the same for over 50 years. The respondents through Miss Lutta have opposed the petition arguing that indeed what is presented in the petition is an ownership dispute. Pointing to the petitioner's annexures PJM 3 the respondents argue that the land in question belongs to one David Langat and or Dreams Thousand Co. who are not parties to the suit and that the petitioner has failed to demonstrate the alleged violation of his rights.

3. Having considered all the material canvassed in respect of the petition I am of the view that it is misconceived. Reading carefully through the petition one would be forgiven to conclude that this is really a claim based on adverse possession either against the Government (a legal impossibility) or against an undisclosed third party (Langat), dressed up as a petition.

4. A party who alleges a constitutional violation is duty bound to demonstrate the nature of the right and how it has been violated (see *Anarita Karimi Njeru v Republic (No. 1) [1979] KLR*). It is true that article 40 of the Constitution entitles any person to own property in any part of Kenya. But the said article does not entitle any person to gratuitously acquire other people's property, outside of the procedure and substance of relevant law. What the petitioner is basically demanding of the court is that the court allots and awards to him government or other third party's land, on the basis that he has lived there for 50 years. As I understand the petition, it is not brought to advance his right to fair administrative action to which he has alluded.

5. As presented, this petition does not advance any constitutional issue for determination by this court. The undated Hansard Report copy annexed as PJMI to the supporting affidavit contains many pointers there are other claimants to the suit property besides the petitioner, contrary to the assertion to the contrary contained in paragraph 4 of the supporting affidavit. One of the paragraphs in the Hansard Report on a page titled SBW C1 11.5.2004 quotes a Mr. Khamis (MP) who was apparently pursuing this mater on the petitioner's behalf as stating:

“On a point of order, Mr. Speaker, Sir. This is a very important issue because the situation on the ground is very volatile. The truth of the matter is that this plot originally belonged to a former Hon. Member of Parliament; the Hon. Stanley Metto. He sold it to somebody called David Langat, who sold it to another company of Asians who are trying to build something there. The truth of the matter is that, this old man (presumably the petitioner) has lived there for 25 years.”

6. This is therefore clearly a civil dispute over land ownership that should be handled as such. Wendo and Dulu JJ recently reiterated the prudential rule in constitutional law in the **High Court Petition No. 306 of 2008 – Kipkoech Kangogo & 98 others vs The Board of Governors Sacho High School (NBI)** by stating that:

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action where infringements of rights can find a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution.”

If the reverse were to be the norm, all manner of legal absurdities would arise, as any and every disrepute would be turned into a constitutional matter.

From the foregoing reasons, I dismiss the petition but order that each party bears its own costs.

Delivered and signed at Malindi this **26th November 2012** in the presence of Mr. Sifuna for the petitioner, Respondents absent.

Court clerk – Evans.

C. W. Meoli

JUDGE