



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 14 of 2012**

<b>MUASYA KITHEKA.....</b>	<b>1<sup>ST</sup> PETITIONER</b>
<b>MARY WANJIKU MUCHAI.....</b>	<b>2<sup>ND</sup> PETITIONER</b>
<b>ESTHER WANGARI MUCHAI.....</b>	<b>3<sup>RD</sup> PETITIONER</b>
<b>MONICAH WANJIKU WAIRIMU.....</b>	<b>4<sup>TH</sup> PETITIONER</b>
<b>VIRGINIA WAIRIMU WAITHIRA.....</b>	<b>5<sup>TH</sup> PETITIONER</b>
<b>ANNE WAMBUI NGUNG’U.....</b>	<b>6<sup>TH</sup> PETITIONER</b>
<b>RACHEL WAMBUI MWANGI.....</b>	<b>7<sup>TH</sup> PETITIONER</b>
<b>ANNE WANJIRU KIMANI.....</b>	<b>8<sup>TH</sup> PETITIONER</b>
<b>MARGARET WANJIRU GATERU.....</b>	<b>9<sup>TH</sup> PETITIONER</b>
<b>SIMON NJUGUNA KAGI.....</b>	<b>10<sup>TH</sup> PETITIONER</b>
<b>JOHN MAINA NJUGAGA.....</b>	<b>11<sup>TH</sup> PETITIONER</b>
<b>JOHN NGUNG’U MUTURI.....</b>	<b>12<sup>TH</sup> PETITIONER</b>
<b>LUCY NYOKABI MARION.....</b>	<b>13<sup>TH</sup> PETITIONER</b>
<b>ZEPHANIA KABIRU KARIUKI.....</b>	<b>14<sup>TH</sup> PETITIONER</b>
<b>ESTHER WANJIRU KARIUKI.....</b>	<b>15<sup>TH</sup> PETITIONER</b>
<b>MONICAH NDUTA KIMANI.....</b>	<b>16<sup>TH</sup> PETITIONER</b>
<b>MWANGI ERI KIARIE.....</b>	<b>17<sup>TH</sup> PETITIONER</b>
<b>PAUL CHEGE KIARIE.....</b>	<b>18<sup>TH</sup> PETITIONER</b>
<b>BONIFACE NYANJUI WANGUI.....</b>	<b>19<sup>TH</sup> PETITIONER</b>

LOISE WANGECHI GATERU.....20<sup>TH</sup> PETITIONER

JESSIE KANG'ETHE.....21<sup>ST</sup> PETITIONER

VERSUS

REPUBLIC.....1<sup>ST</sup> RESPONDENT

SAMUEL MAINA NJOROGE .....2<sup>ND</sup> RESPONDENT

JANE WANJIKU NGUGI.....3<sup>RD</sup> RESPONDENT

THE LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT

JUDGMENT

1. The Petitioners in this case are all residents of Thika and are business men and women. They are aggrieved by the 3<sup>rd</sup> Respondent's intention to evict them from their residential and business premises being **Ruiru/Ruiru East Block 2/944 and 943(hereinafter 'subject properties')**.
2. The facts leading up to the dispute are that on diverse dates between the years 2003 and 2007, the Petitioners learnt that all those parcels of land known as **Ruiru/Ruiru Block 2/944 and 943** were being sold by the registered owner. Upon inquiry and conduction of official searches, they confirmed that the 2<sup>nd</sup> Respondent was the true owner of the subject properties. They then him and he informed them that Y-Line Investments was his agent and that he had given the said agent the authority to preside over the subdivision and sale of the properties aforesaid, a fact that was affirmed by Y-Line Investments. The Petitioners then proceeded to execute Sale Agreements in which they bought the sub-divided plots of land at amounts varying between Kshs.50,000/00 and Kshs.60,000/00.
3. Sometime in the year 2006, the 2<sup>nd</sup> Respondent advised the Petitioners that he had terminated the services of his agent and that he would give them temporary certificates in his name, (the certificates were later issued under the title of "S.M. Njoroge Plots"). A number of Petitioners purchased the subject directly from the 2<sup>nd</sup> Respondent and they duly took possession thereof.
4. Matters however took a different turn in the year 2008 when the 3<sup>rd</sup> Respondent entered the subject properties claiming that she was the registered owner of the same. The Petitioners were further shocked when they found out that the subject properties were the subject of a Land Disputes **Tribunal Claim Number 25 of 2007 (Ruiru District)** of which they had not been served with suit papers. The Tribunal gave ownership of the property to the 3<sup>rd</sup> Respondent which holding was adopted by the Chief Magistrate's Court in **DO Case Number 60 of 2008. (Kiambu)**
5. It is the Petitioner's deposition that the 2<sup>nd</sup> Respondent then sought to review the decision of the Tribunal before the High Court being **H. C. Miscellaneous Application Number 106 of 2008.** (Nairobi) The Court ruled that the Applicant had not exhausted the appeal channels stipulated under the then **Land Disputes Tribunal Act, No.18 of 1990** and dismissed the case.
6. The Petitioners reveal that after that they filed **High Court Civil Case Number 542 of 2010 (Nairobi)** in which they sought an Order of injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents but that the Court dismissed it, holding that the issue of ownership had already been determined by the Tribunal.
7. The Petitioners contend that the present threat of eviction is a conspiracy between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to deprive them of their property and hard earned money. They claim that eviction

would be a violation of their right to property under **Article 40** of the Constitution. Further that their rights to equality before the law under Article 27, the right to dignity under Article 28 and the right to freedom and security of person under Article 29 amongst other rights have been violated by the Respondents. The Petitioners are also aggrieved by the fact that despite their being in occupation of the land, they were never served or enjoined as Interested Parties in previous suits and that they were not given a chance to be heard on the issue of the ownership of the Property before the Land Disputes Tribunal.

8. Armed with an eviction Order from the Chief Magistrate's Court, Kiambu, the 3<sup>rd</sup> Respondent sought to execute it against the Petitioners and it is in the face of the imminent eviction that the Petitioners came to court under a certificate of urgency and filed the present Petition together with a Chamber Summons Application dated 19<sup>th</sup> January, 2012 supported by the affidavit of one Muasya Kitheka and in the Petition they sought the following reliefs from this Court;

***“a) A declaration be made that the Applicants' fundamental rights and freedoms under Articles 28, 29c and d, 316, 40, 43, 47 and 48 of the Constitution have been contravened and or likely to be contravened and violated by the Respondents herein.***

***b) A declaration be made that the Applicants have a right to peaceful and quiet enjoyment of properties subject hereto***

***c) An order of Certiorari do issue removing to the High Court for purpose of being quashed the Eviction Order against the Applicants.***

***c) An order of Prohibition do issue against the Respondents and the Commissioner of Police from evicting, harassing, intimidating the Applicant's vis-a- vis at the subject properties.***

***d) Conservative and interim orders of stay of all evictions, eviction proceedings, intended, recommended instituted by the Respondents instituted by the Respondents and or intended for the eviction of the Petitioners herein.***

***e) Any further Order, direction or writ as the Honourable Court deems fit, just and appropriate to grant.(sic)***

***f) Cost of this suit”.***

9. On 26<sup>th</sup> January, 2012 after hearing the Chamber Summons Application, I granted conservatory orders staying the eviction order issued on 11<sup>th</sup> November, 2010 relating to the subject properties pending hearing *interpartes* which orders have been extended to date. From the Submissions on record, it is the Petition and not the Application that is sought to be determined and so I shall do so.

### **Respondents' case**

10. The 2<sup>nd</sup> Respondent supports the Petition. In his Replying Affidavit sworn on the 6<sup>th</sup> February, 2012, Samuel Maina affirms that he did in fact enter into Sales Agreements over the subject properties with some of the Petitioners excluding the 2<sup>nd</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> Petitioners.

11. He contends that the plots in question belonged to him and it is on this basis that he proceeded to subdivide them into various plots and sell them to some of the Petitioners.

12. The 2<sup>nd</sup> Respondent also adds that he was shocked he was informed that the 3<sup>rd</sup> Respondent hitherto a stranger to him was laying claim to the parcels of land. He further states that his appeal over the decision of the High Court was thrown out on a technicality and that although stay orders were not granted, the appellate court has proceeded to hear his appeal on merits and that the said appeal is still pending and is unresolved.

13. He denies collusion with the 3<sup>rd</sup> Respondent contending that the latter had been a stranger to him and insisted that he has been keen to oppose the move to evict the Petitioners out of the subject properties.

14. The 3<sup>rd</sup> Respondent on the other hand was in opposition to the Petitioners' claim and the 2<sup>nd</sup> Respondent's position. In her Replying Affidavit sworn on 5<sup>th</sup> February, 2012, she deposes that she is the registered owner of the subject properties and annexes a copy of the title deed in support of the claim.

15. It was also her case that she was granted a title deed on the 26<sup>th</sup> August, 1994 long before another title was granted to the 2<sup>nd</sup> Respondent in the year 1996.

16. The 3<sup>rd</sup> Respondent contended that the Petitioners have no legal claim over the subject properties as they purchased them from the 2<sup>nd</sup> Respondent who did not have a good title to pass to them and that in any case, her title was superior as compared to that of the Petitioners. Further, she urged that the remedies available were in the nature of a civil claim as against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents and should not have been brought by way of a Constitutional Petition.

17. It was further submitted on behalf of the 3<sup>rd</sup> Respondent that the present suit was an abuse of the court process as the Petitioners have previously filed a suit in the High Court being **High Court ELC No. 542 of 2010** over the subject Property in which they were denied injunctive orders, and that the suit involved the same parties over the same subject properties.

18. Further, the 3<sup>rd</sup> Respondent averred, the 2<sup>nd</sup> Respondent had previously moved to the Court of Appeal vide Misc. Application No. 78 of 2010 in an attempt to stay the orders of the High Court but that the said attempt was dismissed. She urges that the Petition be dismissed with costs.

### **Determination**

19. It is not a bone of contention that the Petitioners previously filed a suit in the Environment and Land division, being **High Court ELC No. 542 of 2010** in respect of the same subject properties. Strangely though, none of the parties found it necessary to file pleadings or determinations from that suit. Nevertheless, I am satisfied, and this fact is unconstested that the suit was filed; that certain orders were issued by the High Court and the 2<sup>nd</sup> Respondent even admitted that there was a pending appeal relating to the same subject matter.

20. I have carefully perused the pleadings and submissions presented before this Court and my deduction is that what the Petitioners are in effect seeking is to have this court sit in review over the judgment of the High Court. I say so because the basis of the suit is the alleged threatened breach of fundamental rights and freedoms by execution an order of eviction issued by the Chief Magistrate's Court and affirmed by the High Court. I must stress that this Court has no jurisdiction to proceed in the manner suggested. (See **Peter Ng'ang'a Muiruri v Credit Bank Limited and Others Nairobi Civil Appeal No. 203 of 2006 (Unreported) & John Githongo and Others v Harun Mwau and Others Nairobi Petition No. 44 of 2012 (Unreported)**).

21. Granting the Orders sought in the Petition would amount to launching a collateral attack on an Order of a court of competent jurisdiction, a course that is constitutionally forbidden (See **Article 165(6)**). The Environment and Land Division is a High Court which, just like this Court, has power to interpret the Constitution and hear allegations of violations or threatened violations of the Bill of rights. A party cannot circumvent the orders of a court of equal and competent jurisdiction or the option of pursuing the claim through the normal appellate process, by filing a Constitutional petition. In the case of **Methodist Church in Kenya Trustees Registered & Another v Rev. Jeremiah Muku and Another CA, Civil Appeal No. 233 of 2008(unreported)** the court delivered itself thus;

***“As the Privy Council said, it is only in rare cases that an error in the judgment or order of a Court can constitute a breach of human rights or fundamental freedoms. It is also clear from the quotation***

***that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review.”***

22. I wholly agree and it is worth mentioning that it is now well settled that the fact that a matter involves enforcement of fundamental rights and freedoms does not oust the operation of the doctrine of *res-judicata*. Thus, where an issue involving the same parties and same subject matter has been substantially dealt with, a party may not seek to rekindle the same through other avenues, including a constitutional petition. (See ***Booth Irrigation v Mombasa Water Products Ltd*** (see ***Booth Irrigation No. 1***), ***Nairobi HC Misc. Appl. No. 1052 of 2004 (Unreported)***, ***Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2011***, ***Richard Nduati Kariuki v Leonard Nduati Kariuki & Another Nairobi Misc Civil Appl. No. 7 of 2006***).

If indeed any relief is to be sought, then that would have been in the ***ELC No. 542 of 2010*** or the Appeal case now pending (including Misc. Appl. No.78 of 2010).

23. Moreover, there is now in place the Environment and Land Court specially constituted to handle matters relating to environment and land. **Article 165(5)(b)** that specifically deals with Jurisdiction of the High Court categorically forbids this Court from handling matters that are within the purview of the specialized courts under **Article 162(2)**.

24. For these reasons, I find that this suit as an abuse of the court process and is hereby struck out but with no order as to costs.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2012**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Coram: Kariuki – Court clerk

*Mr. Nyakundi holding brief for Mr. Mutai for 3rd*

*Respondent*

*No appearance for other parties*

**Order**

*Judgment duly delivered.*

**ISAAC LENAOLA**

**JUDGE**

**21/12/2012**