



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 679 OF 2006

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 40, 47, 19, 22, 23, 50, 62 AND 64
OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF LAND REFERENCE NOS. 11509, 11510 AND 11511 LOWER KABETE
NAIROBI AND THE REGISTRATION OF TITLES ACT CAP. 281 OF THE LAWS OF KENYA**

BETWEEN

JULIE NYAWIRA MATHENGE..... PLAINTIFF

V E R S U S

KENYA INSTITUTE OF ADMINISTRATION.....DEFENDANT

THE ATTORNEY-GENERAL.....THIRD PARTY

KENYA ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

R U L I N G

1. The Petitioner appeared before me this morning seeking a hearing date before this court of her Petition dated 12th July, 2011 which seeks among other the following orders:-

A declaration be and is hereby issued that the Plaintiff is the absolute and indefeasible owner of all those parcels of land known as **L.R. 11509, 11510 and 11511** situated along **Lower Kabete Road, Nairobi.**

2. A declaration do issue declaring that the suit properties namely L.R. 11509, 11510 and 11511 do not constitute public land within the meaning of Article 62 of the Constitution of Kenya but actually accords to the definition of Article 64 of the Constitution of Kenya 2010, and is private land belonging to the Plaintiff.

5. A declaration that the decision of the Registrar of Titles, represented by the Third Party to revoke the Plaintiff's titles aforesaid is arbitrary, unlawful and unconstitutional for offending Articles 40 and 47 of the Constitution of Kenya, 2010 and is thus null and void.

6. A declaration that the Defendant, the Third Party and the Interested Party whether by themselves or by their agents or other government officers are estopped from denying the Plaintiff's property rights to the suit properties by virtue of the fact that the Plaintiff has paid stand premium, Land and Local Authority Rates at all material times.

7. The Respondents be jointly and severally ordered:-

(a) To effect a surrender of L.R. Nos. 11509, 11510 and 11511 to the Plaintiff unconditionally.

8. Upon the issuance of the orders of this court as above, this court do issue orders declaring HCC 679 of 2006, HCC 324 of 2010 and 325 of 2010 to be duly determined in so far as affects the Plaintiff and to be marked as concluded in terms of the orders herein.

2. The Respondent the 3rd party and the Interested Party oppose the hearing of this petition by this Court on several grounds. Mrs. Kimani for the Defendant argues that this is a land matter that should be dealt with by the Land and Environment Division. Rule 23 of the Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual***) High Court Practice and Procedure Rules, 2006 she submits requires that where a Constitutional issue arises before a court seized of a matter, the court should treat the issue as a preliminary point and hear and determine it. She also objects to the service of the petition on other parties who are not parties in the matter pending before the Land and Environment Division. She also objects to the orders sought in respect of other matters yet there has been no order for consolidation of the matters.

3. The Petitioner is supported by Mr. Njuguna who appears for one of the parties in HC ELC No. 324 of 2010. Mr. Menge for the Attorney-General and Mrs. Natome for the Interested Party both concur with Mrs. Kimani in opposing the hearing of this petition in this Court.

4. I have considered this matter in Light of the Prayers sought in the petition and the provisions of Rule 23 of the **Gicheru Rules**. The orders sought by the Petitioner would in effect result in determination of the matters in civil case No. 679 of 2006 and the other cases set out in the petition all of which relate to title to land and which properly fall within the purview of the Land and Environment Division. I am of the view that section 23 of the Gicheru Rules require the court seized of this matter to determine the Constitutional issue and then proceed with the substantive issues relating to title before it.

Section 23 provides as follows:-

“Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.”

5. This matter is one of many in which issues touching on the Constitution have been raised in matters pending before the court. Doubtless similar situations will arise in matters pending before the various divisions of the High Court. It is important therefore that a decision be taken as to the appropriate way of addressing such constitutional issues. For that reason, I am directing that this matter be placed before the Presiding Judge of the Constitutional and Human Rights Division for his directions.

Dated and signed at Nairobi this 31st day of October, 2011.

MUMBI NGUGI

JUDGE.