



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CONSTITUTIONAL PETITION NO. 1 OF 2020

IN THE MATTER OF ARTICLES 1,2,3,10,19,20,21,22,23,40,43,47(1),48,50,60,

162,165(3) (b),258 AND 259 1(b) OF THE CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND

PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)

HIGH COURT PRACTICE AND PROCEDURE RULE, 2006, RULES 11-23

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOM UNDER ARTICLES 20,27,28,40,43,47,50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF NAKURU SUCCESSION CAUSE NUMBER 93 OF 2013

BETWEEN

GRAYS JEPKEMOI KIPLAGAT.....PETITIONER

VERSUS

ZAKAYO CHEPKOGA CHERUIYO.....RESPONDENT

RULING

1. The Petitioner has brought the present petition apparently to enforce the terms of an Agreement of sale entered into between the Petitioner and the Respondent on 2nd August 2012 where the Respondent agreed to sell to the Petitioner a portion of 8 acres out of land parcel plot **LR No.202 Pokor/Keben/Kures/533**. The property at the time of the sale agreement was registered not in the name of the Respondent, but in the name of his deceased father, Judah Cheruiyot Chesire. The Petitioner by the petition has sought various declaratory orders including an order of specific performance directing the respondent to transfer 8 acres and a plot measuring 50 ft by 100 ft out of land parcel **Pokor/Keben/Kures/533** and also has sought vacant possession and a permanent injunction. Simultaneously with the petition the petitioner also filed a Notice of Motion application seeking an order for the registration of an inhibition against the title pending the hearing and determination of the petition.

2. The Respondent in response and in opposition to the petition filed a replying affidavit by himself and a further replying affidavit by his brother one Hoses K Sogomo. At the same time the Respondent filed a preliminary objection to the petition dated 16th June 2020 setting out the following grounds of objection:-

(a) That the Petition is fatally defective in form and substance having been lodged as an appeal against the Decision of Hon. A K

Ndungu J on 16th March 2016 in Nakuru Succ Cause No.93 of 2013- Estate of Judah Cheruiyot Chesire.

(b) That the entire petition is resjudicata in view of the Ruling of Hon. A K Ndungu declaring the agreement between the parties herein as “without force of law and was a nullity”

(c) That no constitutional issues are discernable in the entire petition to warrant its admission and adjudication before the Honourable Court.

(d) That the petition is an abuse of the Court process.

3. The court on 16th July 2020 gave directions that the preliminary objection be heard and be disposed of first. The parties were further directed to canvas the preliminary objection by way of written submissions. Both the Respondent and the petitioner filed their respective submissions as per the court’s directions.

4. The court has considered the grounds taken in support of the preliminary objection and is satisfied the same raise points of law and consequently meet the threshold of what constitutes a preliminary objection as was established in the case of **Mukisa Biscuit Manufacturing Co Ltd –vs- West End Distributors Ltd (1969) EA 696**. In the case **Sir Charles Newbold,P** expressed himself as follows:

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

5. The preliminary objection by the Respondent under ground **(a)** was challenging the competency of the petition on the basis that the petition was defective as it was more or less an appeal against the decision of the succession Court in **Nakuru HC Succ Cause No. 93 of 2013- Estate of Judah Cheruiyot Chesire**. Challenge of the competency of the suit goes to the jurisdiction of the Court to entertain the suit and thus is a legal issue. Further whether or not the petition is Resjudicata is a legal issue that can properly be taken as a preliminary objection. Finally, whether or not the petition raises a Constitutional issue is equally a legal issue that can be taken as a preliminary objection.

6. Having found that the preliminary objection is properly taken by the Respondent, I now turn to consider whether or not the preliminary objection has any merit.

7. The petitioner in the instant petition alleges that her fundamental rights and freedoms under Articles 20,27,28,40,43,47 and 50 of the Constitution have been violated. Her petition is predicated on an agreement for sale of land dated 2nd August 2012 pursuant to which she claims she purchased a portion of 8 acres which was to be excised out of land parcel **Pokor/Keben/Kures/533** for the consideration of Kshs1,200,000/= which she asserts she fully paid. The petitioner averred that even though she took possession of the portion sold to her, the Respondent subsequently purported to unlawfully rescind the Agreement and sometime in 2013 the Respondent together with some of his siblings restrained the petitioner from accessing the portion she had purchased. The Petitioner acknowledges the Respondent was selling to her a portion of his beneficial interest in the property of his deceased father, Judah Cheruiyot Chesire who died on 17th April 2008. That the Respondent’s deceased father’s estate became subject of succession proceedings in Nakuru High Court Succession Cause No. 93 of 2013 where the petitioner sought to have her interest in the 8 acres acknowledged and distributed to her. The succession court ruled that the Petitioner was not a beneficiary of the Respondent’s late father’s estate and declined to order any distribution of the estate to her.

8. The petitioner averred that the respondent was issued title to the suit land as a beneficiary of his deceased father’s estate and was in the process of effecting transfer of the same to a third party to defeat justice to the petitioner. The petitioner asserts that if the Respondent effects the transfer to a third party, the petitioner’s rights to land will be infringed and will be in violation of her constitutional rights which she urges the Court to protect by granting the prayers sought in the petition.

9. I have set out, albeit briefly, the facts giving rise to the petition to contextualize the consideration of the merits or otherwise of the preliminary objection. As to whether or not there is a competent constitutional petition before the Court, it is necessary to consider whether the petition satisfies the threshold of what constitutes a constitutional petition as per the principle established in the case of **Anarita Karimi Njeru -vs- The Republic (1979) eKLR** which principle was later restated by the Court of Appeal in the case of **Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**. The principle established in the **Anarita Karimi Njeru** case (*supra*) was that a Constitutional petition should set out with a degree of precision the petitioner’s complaint, the provisions infringed and the manner in which they are alleged to be infringed. The **Mumo Matemo case** (*supra*) reaffirmed the principle in the **Anarita Karimi case** when the Court at paragraph 44 of the judgment stated as follows:-

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive or elegant drafting , without remedy by the 1st respondent”

10. Further at paragraph 87(3) in the same judgment the Court on its findings stated as follows:-

“It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the

claims relating to the alleged violations of the constitution of Kenya and the Ethics and Anti-corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

11. It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints.

12. In the petition before the Court the petitioner's complaints arise from a sale agreement she entered into with the respondent which she claims to have performed her part of the bargain but the Respondent allegedly failed to perform his part of the bargain to complete the transaction. **How does this become a Constitutional matter?** Both the petitioner and the Respondent admit there was the sale agreement dated August, 2012 and that the land the subject of the sale formed part of land parcel **Pokor/Keber/Kures/202** which was at the time of the agreement registered in the name of the Respondent's deceased father. Further the petitioner and the respondent conceded that the sale Agreement became the subject of interpretation in Nakuru HC succession cause No.93 of 2013 (estate of Judah Cheruiyot Chesire (Deceased). Hon. Justice A K Ndungu making his ruling in the succession cause on 16th March 2016 stated as follows:-

“ Grays Jepkemoi Kiplagat's case is that she entered into agreement with Zakayo Cheruiyot for the sale of eight (8) acres to her at 1.2 million and she paid the full purchase price. This was on 2nd August, 2012. She is therefore entitled to the share in the estate sold to her.

The protest herein turns on a point of law. The land in question (8 acres) purportedly sold by Zakayo on 2nd August 2012 forms part of the estate of Judah Cheruiyot Chesire (deceased).

A grant of administration intestate was made to Philip Sogomo A Cheruiyot and Hosea K. Sogomo on the 9th of September 2014. This was long after the purported sale by Zakayo. Section 82 (b) (ii) of the Law of succession Act Cap 160 Laws of Kenya provides:-

“No immovable property shall be sold before confirmation of grant.”

It follows then that since no grant had been issued and confirmed at the time Zakayo purported to sell the land to Grays and whether this sale was in the knowledge of all beneficiaries or not, the said sale was without the force of law and was a nullity.”

13. The court in the said ruling was clear that the agreement entered into between the petitioner and the respondent was a nullity and was illegal as the respondent lacked the capacity to enter into such an agreement as he was not the administrator of his late father's estate and no grant of representation had been confirmed in regard to the estate. The Petitioner did not appeal the ruling and the finding the Court made, in my view correctly, remains on record. If the agreement was illegal and therefore a nullity, the same could not confer on any party any rights that could be enforced by way of a Constitutional Petition. For a party to seek to enforce a right by way of a Constitutional Petition such right should be identifiable and must have crystallized. In the instant matter the sale Agreement of 2nd August 2012 did not confer any right or interest to the portion of land to the Petitioner as the agreement was a nullity *abinitio* and hence the petitioner acquired no right or interest over the land capable of being violated and hence enforceable by way of a Constitutional petition .

14. Although I have in my foregoing discussion adverted to grounds (c) and (d) of the preliminary objection that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court. See the case of **Abraham Kaisha Kanziku -vs- Governor of Central Bank & others (2006) eKLR**.

15. In the case of **Godfrey Paul Okutoyi & others –vs- Habil Olaka & Another (2018) eKLR** Chacha , J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated:-

65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

16. In the case of **Bernard Murage -vs- Fine Serve Africa Ltd & others (2015) eKLR** the Court stated:-

“ Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

17. In the case of **Patrick Mbau Karanja -vs- Kenyatta University (2012) e KLR Lenaola**, J (as he then was) expressed himself as follows in regard to when the Constitutional interpretative mandate of the Court may be invoked:-

“I should only say this as I conclude; in Francis Waitaha -vs- Kenyatta University Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in Teitinnang -vs- Ariong (1987) LRC (const.) 517 where it was held as follows:-

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. The Constitution, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by the Constitution under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

18. Lenaola, J went on to observe as follows after citing the above case:-

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.

19. I fully associate myself with the sentiments expressed by Chacha, J and Lenaola, J in the above referenced cases and I agree that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights provisions of the Constitution should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. There ought to be a clear delineation of constitutional matters and the ordinary civil suits. In the present matter the Petitioner has predicated her petition on the sale agreement dated 2nd August 2012 which she claims the Respondent breached. This was a private Commercial contract. The enforcement of the terms of the contract cannot invite the invocation of violation of Constitutional provisions requiring enforcement by way of a Constitutional Petition. There exists sufficient statutory legal provisions that govern enforcement of private commercial contracts and the petitioner ought to have invoked the jurisdiction of the ordinary Civil Court .

20. In the premises I am satisfied that in the present matter there was no violation and/or infringement of any Constitutional provisions under the Bill of Rights to justify the Petitioner to invoke the Constitutional jurisdiction of this Court. The Constitutional petition is not sustainable and constitutes an abuse of the process of the Court and is accordingly ordered struck out.

21. Although I have upheld the preliminary objection taken by the Respondent there is admission that indeed the petitioner paid to the Respondent a sum of Kshs.1,185,000/= (A sum the respondent offered to refund) pursuant to the illegal sale agreement. Unless this amount is refunded to the petitioner by the respondent, the Respondent will be unjustly enriched and the Court will not countenance such a situation. The Respondent ought not to be permitted to be unjustly enriched out of a transaction that he was clearly a prime mover notwithstanding he lacked the capacity to enter into the impugned Agreement for sale. The Court has to do substantive justice to the parties without appearing to condone illegality. The Respondent has no right to the sum of Kshs1,185,000/= paid to him and he ought to make a refund. The Court therefore orders that the respondent makes a refund of Kshs.1,185,000/= to the petitioner free of any interest within 30 days from the date of this ruling failing which the petitioner to be entitled to recover the amount from the respondent together with interest at court rates from the date of the delivery of this ruling.

22. The net result is that the respondent’s preliminary objection is upheld and the constitutional petition is struck out save that the respondent is ordered to make a refund of **Ksh1,185,000/=** paid by the petitioner to the respondent pursuant to the illegal sale agreement as herein above, I make no order for costs on the preliminary objection and the petition.

23. Orders accordingly.

Ruling dated signed and delivered virtually at Nakuru this 21st January 2021.

J M MUTUNGI

JUDGE