



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. E004 OF 2020

JOHN MARK KIRIMI.....PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

LOYFORD MUTHURI GITANGATA.....3RD RESPONDENT

ROBERT MATUMBI MWORIA.....4TH RESPONDENT

PETER GITONGA NKABU.....5TH RESPONDENT

RULING

1. Before me is a notice of motion dated 6.10.2020, brought under the following provisions of law: Article 159 (2) (b) and 165 (6) of the Constitution of Kenya 2010, Sections 1A, 1B, 3, 3A, 6, 18 and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya and Order 40 & 51 rule 1 of the Civil Procedure Rules 2010. The petitioner/applicant seeks the following orders:

(i) That his application herein be certified as urgent and service thereof be dispensed with and interim orders be granted ex parte in the first instance.

(ii) That this honourable court be pleased to order the stay of proceedings in Nkubu Magistrate's court Environment and land case no. 51 of 2020 (Robert Matumbi Mworira versus John Mark Kirimi), Nkubu ELC case No. 52 of 2020 (Loyford Muthuri Gitangata versus John Mark Kirimi) and Nkubu ELC case no. 53 of 2017 (John Mark Kirimi versus Peter Gitonga Nkabu and Franklin Matumbi Mworira) pending the hearing and determination of this application.

(iii) That this honourable court be pleased to order the transfer of Nkubu magistrate's court's environment and land cases no.s 51 of 2020 (Robert Matumbi Mworira versus John Mark Kirimi), Nkubu ELC case no. 52 of 2020 Loyford Muthuri Gitangata versus John Mark Kirimi) and Nkubu ELC case No. 53 of 2017 (John Mark Kirimi versus Peter Gitonga Nkabu and Franklin Matumbi Mworira) from the Nkubu magistrate's court to the environment and land court of Kenya at Meru and consolidate them with this petition for expedient hearing and determination.

(iv) That the honourable court be pleased to grant an order of temporary injunction against the 3rd, 4th and 5th respondents herein, restraining them jointly and/or severally, either by themselves, their servants, employees and/or agents from trespassing into and interfering with the petitioner's occupation, possession and use of the property known as title no. Nkuene/Taita/1082 and to further restrain the said respondents from constructing any structure whatsoever in the aforementioned property pending the hearing and determination of this application.

(v) That the honourable court be pleased to grant an order of temporary injunction against the 3rd, 4th and 5th respondents herein, restraining them jointly and/or severally either by themselves, their servants, employees and/or agents from trespassing into and interfering with the petitioner's occupation, possession and use of the property known as title no. Nkuene/Taita/1082 and to further restrain the said respondents from constructing any structure whatsoever in the aforementioned property pending the hearing and determination of this suit.

(vi) That these orders be enforced by the county police commander, Meru County.

(vii) That the honourable court issues any other and/or better order it deems fit.

(viii) That costs of this application be provided for.

2. The grounds in support of the application are that the applicant herein filed a suit at Meru, the same being HCC No. 27 of 1995, where the said suit was later transferred to Nkubu Magistrate's court and given a new case number as Nkubu 53 of 2017.
3. The applicant contends that the 3rd- 5th Respondents have been instituting other suits at Nkubu Law courts against the petitioner/applicant herein i.e Nkubu ELC No. 51 of 2020 (Robert Matumbi Mworira versus John Mark Kirimi) and Nkubu ELC case No. 52 of 2020 (Loyford Muthuri Gitangata Versus John Mark Kirimi) while sidelining him and as a consequence, obtaining exparte orders and misinterpreting them and flouting the obtained orders by destroying the applicant's property situated in land parcel No. Nkuene/Taita/1082.
4. The applicant further states that on the 4.9. 2020, the 3rd- 5th respondents trespassed into his land parcel 1082 and demolished several houses on his property and further proceeded to put construction materials to wit, building sand, building stones and ballast in the aforementioned suit parcel.
5. The applicant avers that the 3 suits pending before the magistrate's court at Nkubu as well as the petition herein involve the same parties where the subject matter relates to the same parcels of land to wit L.R No. Nkuene/Taita/1078, 1079, 1081 and 1082 all of which emanated from the sub division of L.R No, Nkuene/Taita/349 which is valued above 20 million thus beyond the pecuniary jurisdiction of magistrate's court.
6. It is against this back ground that the applicant seeks the orders sought in the present application to avoid multiplicity of suits or different judgments over the same subject matter. The applicant avers that the granting of the orders will also minimize costs and time in hearing and determination of the dispute and that no prejudice will be occasioned to the respondents.
7. The applicant has also filed a detailed supporting affidavit reiterating the averments set out in the grounds in support of the application. He has added that he was born and brought up in parcel No. Nkuene/Taita/1082 where he has lived peacefully and uninterrupted since 1948 to date. He has extensively developed the aforementioned parcel, where he had erected commercial and residential permanent houses though those structures were demolished by 3rd and 5th respondents under the security of 1st respondent officer's from Nkubu police station.
8. He also contends that in the year 1995, he had sued his father in Meru HCCC no. 27 of 1995 since the latter was selling the property they were dwelling on as a family and that during the pendency of the suit, his father subdivided the parent land i.e Nkuene/Taita/349 which gave rise to several portions to wit Nkuene/Taita/1078, 1079, 1081 and 1082. His father then transferred parcel No. Nkuene/Taita/1082 measuring 0.047 ha to him (applicant) and he was registered as the owner of the said land parcel.
9. The applicant also averred that his father later sold parcel no. Nkuene/Taita/1079 measuring 0.026 ha and parcel no. Nkuene/Taita/1078 measuring 0.017 ha to the 4th and 5th respondents respectively without disclosing to them that certain area of portions of the aforementioned parcels were taken up by the Nkubu-Thuci road.
10. The applicant contends that when the 3rd- 5th respondents realized that the purchased parcels of land had been affected by the Nkubu-Thuci road, they started evicting and trespassing on his parcel of land No. Nkuene/Taita/1082.
11. The applicant has given a narration of his litigation journey in the suit no. 53 of 2017 where he sought various orders to restrain the respondents from trespassing on plot no Nkuene/Taita/1082. He cites the dates of 8.1.2015, 21.8.2020 and 4.9.2020 as some of the instances when hired goons caused destruction on his property.
12. He contends that he filed an application before the Nkubu court seeking an injunction against 4th- 5th respondents but the same was not handled urgently. He was eventually evicted from his land on 4.9.2020. That is also the time when he was served with court orders in the suits Nkubu ELC 51/2020 and 52 of 2020 where temporary orders of injunction had been issued against him restraining him from entering or remaining on the suit land. He contends that the orders in the two suits were obtained exparte thus infringing on his rights under article 40 of the constitution (rights to own and acquire land).
13. He avers that given the chain of events, the value of land parcels in contention and the actions in the aforementioned suits, he is unlikely to get a fair hearing due to the multiplicity of suits filed before the subordinate courts. He therefore urges the court to allow his application.
14. On 2.11.2020, Mr. Kiety for the Attorney General indicated that the application doesn't concern them hence they did not respond to the same.
15. The 3rd respondent Loyford Muthuri opposed the application vide his replying affidavit dated 28.10.2020. He contends that his only dispute is a boundary one which is being prosecuted in Nkubu case ELC no. 52 of 2020. He states that he is a bonafide owner of parcel no. 1081 while petitioner owns parcel no. 1082, which parcels resulted from the original parcel No. 349. That during the subdivisions, some portions were hived off to pave way for a road which affected all the parties and that perhaps the applicant is ignorant of this fact.
16. The 4th and 5th respondents filed more or less similar affidavits. They contend that the 4th respondent is the owner of parcel Nkuene/Taita/1078 and 1079 which he bought from the 5th respondent. The 4th respondent has availed title deeds indicating that he is the registered owners of the aforementioned 2 parcels. The said parcels are a result of subdivisions of parcel 349. The respondents further state that the petitioner had objected to the aforementioned subdivision vide an application dated 4.5.1994, in Meru CMCC No. 285 of 1994 against his deceased's father. However in a ruling delivered on 16.6.1994, the decision was given in favour of petitioner's father paving way for the subdivision of the original parcel.

17. The respondents aver that it is the petitioner who invaded their properties prompting the 4th respondent to file the suit ELC No. 51 of 2020, where restraining orders were issued against the petitioner.

18. They further state that on 24.9.2020 the petitioner was in court when the court directed the County Surveyor and Land Registrar Meru central to visit the scene, establish the existence of the parcels no. 1078, 1079 and 1082 on the ground, establish the boundaries thereof and file a report. That earlier on, there was a similar report in Meru CMCC No. 187 of 1998 where the land registrar had visited the scene and filed a report.

19. It is averred that the 5th respondent is the one who had sued the petitioner in Meru CMCC No. 187/1998 when the latter had forcefully occupied the land no 1078 and 1079 and petitioner was evicted. However, petitioner appealed in Meru HCA No. 60/2003 which case was dismissed.

20. The 4th and 5th respondents aver that the issue at hand was that of establishing everyone's parcel on the ground hence this is a determined matter being brought through the back door.

Determination

21. I have considered all the issues raised herein. The uncontroverted facts are that the original suit parcel was No. Nkuene/Taita/349, that the said parcel was owned by petitioner's father and that the same has since been subdivided to give rise to other parcels like no. 1079 and 1078 currently registered in names of 4th defendant, 1082 owned by petitioner and 1081 apparently owned by 3rd respondent. It is also not in dispute that the applicant had filed a suit Meru HCCC No. 27 of 1995 against his father which suit was transferred to Nkubu as ELC No. 53 of 2017. Further, it is in the open that 3rd and 4th respondents have filed suits at Nkubu being cases no. 52 and 51 of 2020 respectively against the petitioner. All the three cases before the Nkubu court are active.

22. Going by annexures and averments made by 4th and 5th respondents, there were other suits touching on the suit parcels i.e Meru CMCC No. 285 of 1994, Meru CMCC No. 187 of 1998 and Meru HCCA No. 60 of 2003.

23. Further, it has emerged that the applicant was evicted vide court orders issued in the suits no. 51 and 52 of 2020 at Nkubu. (see paragraph 25 of the supporting affidavit of the applicant).

24. Against this background, this court poses the question; Are the orders sought in the current application warranted? This suit is a constitution petition and the court must be cautious of the impact of constitutional litigation. Constitutional litigation serves to protect fundamental rights and freedoms and to oversee legislative functions of the state. Thus not every issue meets the threshold of a constitutional question and the courts have stated that the mechanisms of constitutional litigation is not available for every claim.

25. It is crystal clear that the orders sought in prayer no. 4 and 5 of the current application (temporary injunction) are meant to scuttle the orders of injunction which had been issued in the two cases no. 51 and 52 at Nkubu. A constitutional petition is not and should not be substituted for a review or an appeal.

26. In both paragraph 25 of the supporting affidavit and paragraph 39 of the petition, the applicant contends that he was evicted on 4.9.2020. It follows that the prayers sought in paragraph 4 and 5 of his application to restrain the respondents from trespassing or interfering in petitioner's parcel no. 1082 are a red herring meant to bring more confusion and reverse what has already been done.

27. The applicant also contends that the orders issued in the two suits were issued exparte and that he was never served. This is certainly not a constitutional issue nor is this an appeal. The court cannot therefore delve into the issue as to whether the applicant was served or not. What is apparent is that the applicant is trying to steal a match against the 3rd -5th respondents by reversing the process of his eviction through this petition.

28. A most disturbing issue is the request by the applicant to have the three suits transferred from Nkubu to this court for consolidated with this petition. The petitioner is the one who filed the suit no. 27 of 1995 (now Nkubu ELC 53 of 2017). What is a suit aged 25 years doing in court? Why should that suit filed 25 years ago be given a fresh breath of life through this petition? I am appalled and dismayed by the turn of events, that the applicant has attempted to lay blame on the doors of the courts stating how he has been denied a hearing date. I would have expected a truthful and candid litigant to have demonstrated vigilance of how he is prosecuting his 25 years old case before the trial court. Instead, he dwells much on the applications he has filed in that suit. He could also have lodged appeals against adverse orders given in the magistrate's court, or he could have sought for review of any such orders.

29. On the issue of jurisdiction, I again find a red herring in the compilation of the valuation report. The suit ELC 53 of 2017 was filed in 1995. At what point did it dawn upon the applicant that the land is worth Ksh.20 million or so. Further, this is not the court which has to down its tools for lack of jurisdiction. If the applicant truly believes that the magistrate's court has no jurisdiction to hear the cases, then he should present this issue before that court so that the trial court can make its determination on whether to down its tools or not.

30. I find that the applicant has not set out any reasonable grounds to warrant issuance of the orders sought. What more the issues raised by the applicant do not meet the threshold of a constitutional petition.

31. In the case of **Abdullah Mangi Mohammed vs Lazarus Beja & 5 others (2012) eKLR** the court held that;

“Where there is a dispute as to the applicant's

entitlement to property and where there exists a statutory mechanism for resolution of the dispute, that statutory and procedure should be utilized in the determination of the applicants claim to the property rather than clog the constitutional court with applications for enforcement of purported rights which require prior determination. The improper practice of making all private disputes as to ownership of property as applications for the enforcement of the constitutional rights to property should be discouraged”.

32. In the case of **Anne Wawuda & 3 Others vs Kenya Railways Corporation & another (2015) EKL**R the petitioners were seeking entitlement to various declarations including right not to be treated in a cruel, Inhuman or degrading manner. A Preliminary objection was raised on grounds inter alia that the high court can only enforce a right which exists and that where there is no right in existence nothing can be enforced. Judge Anyara Emukule while dismissing that petition stated as follows:

*“The petition herein and many like it, has been presented as constitutional petitions when there is no constitutional issue at stake, when the issue is merely a dispute over eviction, or better still a question of adverse possession, merely for the sole purpose of avoiding uncomfortable questions at a hearing for the same injunctions and declarations, through an ordinary civil suit in the civil jurisdiction of the High court. In the circumstances, the court is bound to exercise its inherent power to prevent abuse of its process. In the words of the court in **Kariuki & others vs Dawa Pharmaceuticals company Limited & others (2007) E.A 235**..... Nothing can take away the courts inherent power to prevent abuse or trivializing of its process by striking out frivolous and vexatious application. Baptizing such matters as constitutional cannot make them so, if they are plainly frivolous or vexatious or elevate them to a constitutional status when they are in fact plainly an abuse of the court’s process”.*

Also see - **Annarita Karimi Njeru vs Republic 1979 eKLR**, **Nation Media Group Ltd vs Attorney general (2017) eKLR**.

33. This is a situation whereby the applicant’s suit no 53 of 2017 at Nkubu is active. He has not sought for the consolidation of that suit with the other two suits no.51 and 52 of 2020 before the trial court. The claim of ownership of the suit parcels ought to be determined in those suits and not in a constitutional petition. The upshot of my findings is that the application dated 6.10.2020 is unmerited and and the same is dismissed with costs to 3rd – 5th respondents.

34. Further, the entire suit is hereby struck out but with no orders as to costs as responses in respect of the petition had not yet been filed.

DATED, SIGNED AND DELIVERED AT MERU THIS 10TH DAY OF FEBRUARY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the in open court on 4.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE