



**Supermarketing and Distribution Limited v Mpimpi & 2 others (Petition
7 of 2019) [2023] KEELC 17717 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 17717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
PETITION 7 OF 2019
MN GICHERU, J
MARCH 7, 2023**

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 10 READ WITH 260 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 40, 47(1) & (2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012 AND IN THE MATTER OF THE LAND REGISTRATION ACT, NO.3 OF 2012 AND IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015

BETWEEN

SUPERMARKETING AND DISTRIBUTION LIMITED PETITIONER

AND

JOSEPH LANTEI MPIMPI 1ST RESPONDENT

THE RESIDENT MAGISTRATE , KAJIADO 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. This judgment is on the petition dated 25/4/2019. The petitioner seeks the following reliefs against the respondents.
 - a. A declaration that the order of the second respondent directing the release of the original title deeds for L.R. Kajiado/Dalalekutuk/2129 and 2130 to the first Respondent and the act of the first Respondent retaining the said original title deeds thus defeating the efforts of the Petitioner to dispose off the said property which is security to recover the loan as guaranteed by the first Respondent is conduct that is in itself and in its implication a violation and unlawful fetter against the Petitioner's right to own property as guaranteed by articles 40 and 260 of the [Constitution](#).



- b. A declaration that the conduct of the first and second respondents in filing Kajiado Chief Magistrate’s Court Miscellaneous Civil Case No. 49 of 2018, Joseph Lantei Mpimpi –versus-Leah Wanjiru and Kiplang’at Ng’eno and ordering release of the original title deeds over L.R. Kajiado/Dalalekutuk/2129 and 2130 (suit parcel) to the first Respondent before and without hearing the Petitioner egregiously violated the petitioner’s right to fair Administrative Act as guaranteed under articles 25 and 47(1) of the Constitution of Kenya, section 4 of the Fair Administrative Actions Act, 2015, the Rules of Natural Justice-*Audi Alteram Partem*, the right not to be condemned unheard and the resultant order of the 2nd respondent of 28/9/2018 is accordingly null and void.
- (c) A writ of Certiorari to remove in to the court and quash the impugned decision of the second respondent issued on September 28, 2018 in suit No. 49 of 2018 (*supra*) releasing the title deeds to the suit land to the first respondent.
- (d) An order directing the release of the original title deed over the suit parcels to the petitioner within seven days of the Decree of the court, to dispose off the said property strictly in accordance with the Deed of Guarantee dated and release the outstanding debt and any surplus thereof to be restored to the first Respondent.
Alternatively to (d) above.
- (e) If the first respondent shall be inclined to retain the suit property, the first respondent to pay the petitioner the sum of Kshs. 430, 056, 570.85 together with interest thereon at 2% per month from the date of filing of the suit until and inclusive of payment in full, within 30 days of the decree of the court.
- (f) General damages for violation of fundamental rights of the Petitioner.
- (g) Any other relief befitting under article 23(3) of the Constitution of Kenya.
- (h) Costs of this Petition on indemnity basis.

2. The Petitioner’s case is as follows.

On or about the 1/10/2015 the petitioner concluded an agreement for sale and purchase of goods with Simba Merchandising Company (K) Limited for supply of hardware and hardware goods for a continuous period of contract of five years from the date of the agreement. On 8/10/2015 the first respondent secured credit facilities by the petitioner in favour of Simba Merchandising Company (K) Limited vide a Deed of Guarantee and securization.

- 3. The first respondent pledged his property L.R. 2129 and 2130 (suit property) or any portion thereof in cause of default by Simba in payment of the value of the goods supplied, that the said property would be disposed off to recover the entire outstanding sum.
- 4. In addition to the foregoing, the first respondent appointed the Director of the petitioner, Mr. Paresh Chamdra Pranlal Madhvani, as his attorney through a special power of attorney dated 8/10/2015 that was duly executed by the Respondent over the suit property giving him authority and mandate to dispose off the property as aforesaid but strictly upon occurrence of the aforesaid events.
- 5. On 24/1/2016, the power of attorney was duly registered at Kajiado South and Central District Land Registry in respect of the suit property.



6. The first respondent gave the petitioner's advocates the original title deeds for the suit land. In addition he gave blank transfers for the suit land duly executed by himself.
7. The petitioner performed its obligation as per the agreement after which they duly invoiced Simba for Kshs. 85, 400, 000/-. Simba defaulted in payment.
8. In accordance with clauses 3, 4, 5, 6 and 7, the petitioner served a notice upon the first Respondent by a letter dated 22/2/2016 informing him of Simba's default and requesting him to make good the debt.
9. The first respondent did not pay. The petitioner's advocates released the title deeds to the suit property to the Petitioner's director Mr. P.C.P Madhvani. The petitioner placed a caution over the land pending its disposal to recover the debt.
10. From that time, events turned in a bizarre manner because the first Respondent made false accusations against the petitioner's Director to the police who was ordered to produce the original title deeds for the suit land and surrender them to the police.
11. The first respondent filed Civil Case No. 49 of 2018 and obtained orders for the release of the title deeds. The Petitioner was never served with any court process in Case No. 49 of 2018. He was therefore condemned unheard. It is for the above stated reasons that the Petitioner filed this petition.
12. In support of the petition, the petitioner filed the following evidence.
 - a. Copy of the agreement dated 1/10/2015 between super marketing and distribution limited and Simba Merchandising Co. (K) Limited.
 - b. Copy of agreement dated 8/10/2015 between Simon Merchandising Co. (K) Limited and the first Respondent.
 - c. Copy of special power of attorney dated 8/10/2015.
 - d. Copies of transfer instruments for the two land parcels.
 - e. Other relevant documents.
13. The Petition is opposed by first respondent who has sworn a replying affidavit dated 26/7/2019. He replies as follows.

Firstly, he admits entering into a lease agreement with Simba Merchandising Company (K) Limited for title deeds numbers Kajiado/Dalalekutuk/2129, 2130 and 2132.

Secondly, the agreement was for mining and prospecting only and the lessor was to pay Kshs. 260, 000/- per month for the land.

Thirdly, the petitioner's advocates used trickery to insert other clauses in the lease agreement. These clauses include the power of attorney and the transfer forms which the first respondent believed were part and parcel of the lease agreement.

Fourthly, the petitioner sold L.R. No. 2134 without the knowledge of the first respondent and he only managed to salvage the 2129 and 2130 through police action.

Finally, the first respondent was never told that his land was being used as security by Simba Merchandising Ltd. He contends that the entire process was fraudulent and the petition should be dismissed.



14. In addition to opposing the Petition, the first respondent has also filed a cross petition dated 26/7/2019 in which he seeks a declaration that the sale of L.R. 2134 be declared null and void and the title to revert to the first respondent and the agreement of 1/10/2015 to be declared null and void.
15. In support of his defence to the petitioner's petition and in support of his own cross petition, the first Respondent filed a verifying affidavit and a copy of the agreement dated 8/10/2015. He also filed a replying affidavit also dated 26/7/2019.
16. The second and third respondents filed grounds of opposition dated 15/1/2019 denying being party to the contractual agreement between the petitioners and the first respondent. They called for the dismissal of the petitioner's claim against them.
17. At the trial which took place on 27/5/2021 and 24/5/2022, the petitioner's managing director and the first respondent testified physically in open court and they were cross-examined by the adversary's counsel.
18. Counsel for the petitioner and the first respondent filed written submissions on 15th and August 31, 2022 respectively. The issues raised in the submissions are as follows.
 - i. Whether the order of the court in Kajiado Chief Magistrate's Court Miscellaneous Case No. 49 of 2018 Joseph Lantei Mpimpi –versus- Leah Wanjiru and Kiplang'at Ng'eno of September 25, 2018 was regular?
 - ii. Jurisdiction of this court vis-à-vis the claim by the 1st respondent as contained in the replying affidavit and cross – petition.
 - iii. As a consequence, whether orders and reliefs under the petition should issue.
 - iv. Whether this case should have been brought as a petition or other suit.
19. I have carefully considered the petition in its entirety including the affidavits, the documents, the submissions and the case law cited therein. I agree with counsel for the parties that the four issues raised above will determine this suit. I make the following findings.
20. On the first issue, I do not have enough material placed before me by any of the parties in this suit to make me reach any reasonable conclusion on the regularity or otherwise of the suit before the lower court. Only the court order dated 25/9/2018 was filed by the Petitioner.
 Neither the pleadings nor the proceedings were ever filed. Without the entire record of the lower court and the alleged irregularities being pointed out, this court cannot reach any conclusion on the decision by the trial magistrate.
 Secondly, on this issue, it is not clear to me why the Petitioner did not seek to join that suit in the lower court and set aside the orders made therein. Nothing in law precluded the Petitioner from taking that line of action.
21. Regarding the second issue, I find that if this court has jurisdiction to hear the petitioner's Petition, it also has jurisdiction to hear the first Respondent's cross petition. The Petitioner cannot be heard to say otherwise. It cannot approbate and reprobate at the same time.
22. On the third issue, I find that the orders and reliefs sought cannot issue for the following reasons.
 Firstly, the petitioner has not proved that the first respondent was paid any consideration for his land. There is no evidence of any consideration paid.



Secondly, there is no evidence that the first respondent was supplied with any goods worth Kshs. 430, 056, 570.85 or any goods at all. Why should he lose his land yet he got no payment for it? The Petitioner has not proved this crucial aspect of suit.

Thirdly, the petitioner has not joined the shadowy entity called Simba Merchandising in this suit. I say shadowy because from the agreements filed in court, I have not seen any name of the directors or other officers of the company. Simba Merchandising should have been made a necessary party by the Petitioners because they are the defaulters in paying the debt that they allegedly owed the petitioners. It is only if they had been joined in this petition that we would have known why the first Respondent was expected to shoulder their debt responsibility.

23. On the final issue, due to the deficiencies in the entire petition noted above, I am not certain if this suit meets the test in the case of *Annarita Karimi v Republic* [1979] eKLR. What I am certain is that the petition as presented has no merit for the reasons already given.
24. Regarding the cross petition I too find that it has not been proved owing to the inadequacy of the material filed by first respondent.
25. For the above stated reasons, I dismiss the petition and the cross petition. No order as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 7TH DAY OF MARCH, 2023.

M.N. GICHERU

JUDGE

HON. JUSTICE M.N. GICHERU JUDGMENT

