



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 5 OF 2017

MICHAEL BETT SIROR.....1ST PETITIONER

BETHAM INVESTMENT CO. LTD.....2ND PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

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

AND

1. STEPHEN SUGUT

2. JEREMIAH CHERUIYOT

3. JACKSON KOECH

4. JOSEPH MITEI

5. RAPHAEL KOECH

6. KIPKEMOI RUTTO

7. PAUK K RUTTO

8. K. KETER

9. BENJAMIN TIROP

10. KIMUTAI NG'ENY

11. CHERUIYOT CHEPKWONY

12. VERONICA CHEPCHOR

13. ROSEBELA MAIYO.....INTERESTED PARTIES

JUDGMENT

1. On **4th June 2019**, the Petitioners, through Ngigi Mbugua and Company Advocates and Walter Wanyonyi & Co Advocates, filed the amended petition dated **3/9/2019** pursuant to leave of this court granted on **14/5/2019**. In the petition, they sought the orders set out verbatim as hereunder:-

(a) An order of prohibition against the 1st Respondent, staying permanently processing (of) titles in favour of the interested parties over property Land Reference Number LR. 6614/6 South East of Kitale Municipality commenced or at all is *res sub*

judice, and that any titles so made and processed of the property Land Reference Number LR. 6614/6 South East of Kitale Municipality and the resultant sub titles L.R. 6614/51-67 all inclusive.

(b) A declaration that under Article 67 and 68 Constitution (sic) and the National Land Commission Act, 2012 the 1st Respondent can only regulate conversion of grants of public land as defined under Article 62 of the Constitution of Kenya and that the jurisdiction does not extend to private land as defined by Article 64 of the Constitution of Kenya, 2010.

(c) A declaration that Land Reference Number LR. No. 6614/52-67 South East of Kitale Municipality registered in the name of the 1st petitioner herein and Land Reference Number. LR. No. 6614/51 registered in the name of the 2nd petitioner, being private property, in terms of Article 64(b) of the Constitution of Kenya, the 1st respondent lacks jurisdiction to revoke the same allegedly under the Constitution or Statute of the National Land Commission Act, 2012 or direct the revocation of the Certificate of Titles and that the titling programme being undertaken without jurisdiction are *ultra vires*, null and void.

(d) A declaration that the conduct of the 1st respondent herein against the petitioner has infringed, infringed and violated the petitioner's inviolable right to a fair administrative action and fair hearing protected under Articles 25, 27, 47 and 50(1) of the Constitution.

(e) A declaration that the respondents breached the petitioners' legitimate expectation that he would hold his title to the suit property until and unless otherwise as declared unlawful as by law provided.

(f) A declaration that the 1st respondent has infringed, infringed and/or violated the petitioners' right to property decreed under Article 40 as read with Article 60 (1) (b) of the Constitution.

(g) An order of permanent injunction directed at the 1st Respondent and interested parties, their agents, officers or any other person whoever or howsoever acting on their behalf from unlawfully interfering in any way whatsoever with the 1st and 2nd petitioners' proprietorship or title Land Reference Number LR. No. 6614/52 -67 and LR. No. 6614/51 respectively.

(h) The honourable court be pleased to award the petitioners general damages against the 1st respondent and interested parties jointly and severally for losses and inconveniences suffered by the petitioner.

(i) The honourable court be pleased to award the 1st and 2nd petitioners exemplary damages against the 1st respondent for breach of the petitioners' fundamental rights.

(j) The costs consequent upon this petition be borne by the respondents and interested parties in any event on indemnity basis.

(k) The honourable court do make any such other or further orders as it may deem just and expedient in the circumstances to remedy the violation of the petitioners fundamental rights.

2. This court will refer to two supporting affidavits in this decision: the amended petition is supported by a 30 paragraph supporting affidavit sworn on even date by the **David Kipchumba Siror** who deponed that he is the 2nd petitioner's director; the original unamended petition is supported by the sworn affidavit of the 1st petitioner dated 14/6/2017 which also doubled up as the supporting affidavit in respect of the application for conservatory orders also dated 14/7/2017.

3. Briefly stated, the petitioners' case is that the 1st petitioner is the registered proprietor of **L.R 6614/51** measuring **430 acres** and the 2nd petitioner is the registered proprietor of Land Reference **LR. Nos. 6614/52-67**; that the said parcels were the resultant titles of property known as **LR. No. 6614/6** which was private property and of which it is alleged that the 1st petitioner was a purchaser for value from a firm known as **Estates and Investments (1961) Ltd in November 1970**; that at the time of acquisition he never knew of any defect in title; that the 1st petitioner engaged the various responsible government agencies for the subdivision of **L.R 6614/6** into **17** portions, that is, **L.R Nos. 6614/51-67** (inclusive.) However, the 1st respondent commenced a titling programme in favour of the interested parties who have claimed proprietorship of the suit land; it is claimed that the 1st respondent has taken to denying the 1st petitioner access to documents regarding the suit land and shown bias in favour of the interested parties and that the interested parties' documents are forgeries, a fact alleged to have been ignored by the 1st respondent, this risking prejudice to the 1st petitioner's title.

4. In the 2nd petitioner's supporting affidavit dated 3/6/2029, it is deponed that the 2nd petitioner is the proprietor of **LR. No. 6614/51** measuring **430 acres**; that it learned about the alleged illegal subdivision and the subsequent preparation of **360** illegal title deeds by the titling centre, an office under the docket of the Director Of Survey in **July 2017**; that when the petitioners learnt of the illegal subdivisions, they wrote a letter to Chief Lands Registrar and copied to the Director of Survey, the Principal Secretary and Cabinet Secretary, Ministry of Lands and Physical Planning, raising an objection against the issuance of the about 360 purportedly illegal titles to members of public; that pursuant to the said letter, the Chief Lands Registrar wrote a letter to the District Registrar, dated **23/10/2017** recalling the illegal title deeds back to Nairobi from the District Lands Registrar Trans Nzoia County (that is after the filing of this petition); that on **14/7/2017**, the 2nd petitioner sent its representative to the County Lands Registrar and confirmed that indeed **360** illegal title deeds had been prepared in respect of the 1st and 2nd petitioner's private property known as **LR. Nos. 6614/52-67** and **LR. No. 6614/51** respectively; however, it failed to obtain copies of the said documents and resorted to making a report to the Director of Criminal Investigations who was allegedly denied access to the documents by ministry officials; that during the pendency of this petition, the Chief Land Registrar served the 1st petitioner with a request to surrender the original title to **LR No. 6614/4**. The petitioners allege a plot to defeat his title to the land, which would be purportedly distributed to the interested parties. It is alleged that investigations by the DCI revealed existence of two file records for the same

property and a conversion of **LR. No. 6614/4** into **Cherangani/Nzoia /Block 14 (Tunen Farm)** although the properties purported to have been subdivided on the ground was **LR. No. 6614/51-67** which are the petitioner's properties. The petitioners allege that they have been kept in the dark regarding the conversion, subdivisions and creation of parallel files over their property which activities they allege to be a violation of their constitutional rights as they subject the petitioners' land to the risk of being distributed to members of the public. It is averred that many of the interested parties already had pending suits between them and the 1st petitioner before the filing of this petition. These are **Kitale ELC No. 96 of 2015; Kitale ELC No 117 of 2016** and **Kitale ELC No 26 of 2019**.

5. In a surprising averment the 2nd petitioner's supporting affidavit also alleges that the **360** title deeds prepared by the respondents, the conversions and the opening of a new registry Index map have since been cancelled and this fact communicated to some of the interested parties by way of a letter from the Ministry's Principal Secretary, **Dr. Nicholas Muraguri** dated **23/5/2019**.

6. The 1st respondent filed a reply to the amended petition on **3/12/2019** signed by **S. Mbutia, Senior Litigation Counsel** on **28/11/2019** wherein it is stated that the petitioners have no reason to sue and have no cause of action against the respondent; that the 1st respondent is not liable for any act of commission or omission as against the petitioners or to the prejudice of the petitioners as alleged in the petition; that the 1st respondent was not asked by any state organ and did not acquire the parcel in issue **LR. No. 6614/6** South East Kitale, for state or for any third parties at all; that acquisition of private land is the exclusive mandate of the 1st respondent in law and that the said mandate has not been invoked with respect to the suit land in issue; the 1st respondent are not parties, are not aware and were not involved in the conversions and changes on the parcel numbers from **LR. No. 6614/6** South East Kitale and Land Reference No. **Cherangani/Nzoia Block 14/Tunen** nor any other parcels, or with any correlated mutations, surveys, sub divisions, allocations, Registry Index Mappings and titling. With that counsel urged the court to dismiss the petition with costs.

7. The 2nd respondent filed its response to the petition on **5/2/2020** which was signed by **M.W. Odongo**, Senior State Counsel on **4/2/2020** wherein he denied the contents of the petition. It is stated in that response that the suit land was registered in the name of the 1st petitioner and subsequently, as the petitioner states, subdivided according to the petitioner's desired scheme.

8. The 2nd interested party filed his sworn affidavit in response to the petition on **1/12/2017** and a further affidavit on **16/9/2019**. In the first affidavit, he avers that the 1st petitioner is not entitled to the entire suit land because in **1976** he bought **37** acres from him and paid for it by way of remission of **Kshs. 11,666/-** to the Agricultural Finance Corporation which had threatened to realize security vested in the suit land in respect of an outstanding loan; that he has been residing on the suit land since **1984** and developed the same; that the 1st petitioner has refused to transfer the portion to him despite issuance of land control board consents and has on the contrary attempted to invalidate the consents in **NBI HC Misc. 28 Of 1978-Michael Bett Siror Vs The Trans Nzoia Land Control Board** and also in **Kitale ELC No. 96 of 2015 -Jackson Koech Vs Michael Bett Siror**. He exhibits various documents purportedly in proof of the transaction and maintains that the petitioner's title to the land is subject to a trust in favour of the **360** occupants on the land. He also admits to having filed **Kitale ELC No. 117 of 2016** against the 1st petitioner to compel his transfer of the portion he purchased. He states that no violation of constitutional rights has been committed against the petitioners and that the titling process should be allowed to proceed. In his second affidavit he reiterated the contents of the first affidavit and further deposed that the shareholding of the 2nd petitioner consists of the nuclear family members of the 1st petitioner and therefore the 2nd petitioner is by implication deemed to know the history of the current dispute; that the subdivision that led to transfer to the 2nd petitioner was nevertheless conducted without the consent of the interested parties. Finally he states that if the new titles have been cancelled as alleged by the petitioners then the substratum of this petition is no longer in existence and the petitioner's grievances no longer exist.

9. The 3rd interested party filed his replying affidavit on **12/3/2020** where he avers that he filed a suit vide **Kitale Land Case No. 96 of 2015**, against the petitioner claiming **300** acres part of **LR. No. 6614/6** and the 1st petitioner filed an application in that suit seeking to have the suit struck out which application was dismissed; that an appeal was preferred and the same was dismissed; that in a bid to defeat the 3rd interested party's pending suit, the 1st petitioner subdivided the suit land and even transferred part thereof to other parties; that the subdivision of **LR. No 6614/6** has been fraudulent and intended to defeat his claim and those claiming under him.

10. There is on the record another affidavit expressed to be sworn on behalf of the 1st 3rd and 13th interested parties in the petition by **Jackson Koech** who is the 3rd interested party. In that affidavit the deponent states that he, the petitioner and a Mr. Chebii jointly purchased the land comprised in **LR. No. 6614/6** during or about the year **1969**; that Mr. Chebii withdrew from the purchase and he was refunded his contribution; that the petitioner was registered as the sole proprietor solely because the policy then did not permit registration of more than one person; that a memorandum agreeing on the future subdivision of the land between the deponent and the 1st petitioner was executed in **1970**; that he and his group claim **300** acres out of the whole parcel; that he and the petitioner invited third parties into the suit land to assist in the repayment of a loan and by **1977** there were **14** persons on the land including the petitioner and the interested parties; he exhibits a copy of a land control board consent for transfer of the suit land from the petitioner to the **14** persons as well as a photocopy of a decree dated **28/9/1982** in **Kitale RMC Land Case No. 6 of 1982** between him and the 1st petitioner over the suit land; that the number of occupants in the suit land as at the present is **360** and the Ministry of Lands has created an area list accordingly and prepared titles to the parties reflecting the actual occupation on the ground; that the interested parties are therefore not trespassers on the suit land; that the subdivision conducted by the 1st petitioner is aimed at depriving the interested parties of their land; that the dispute herein raises no constitutional issues and that no constitutional violations have been committed against the petitioners.

11. The 12th interested party filed her replying affidavit on **5/2/2020** and sworn on **4/2/2020** where she deposes that the 1st petitioner and one Samuel Chebii (since deceased) entered into a partnership for the purchase of the suit property in the year **1970** and thereafter Samuel Chebii sold his shares to Jackson Koech; that the suit property was then charged to Agricultural Finance Corporation (AFC) and the 1st petitioner's name was registered purely for him to hold in trust for the parties awaiting clearance of the loan; that when the two principals (Michael Bett Siror and Jackson Koech) realized that they were not in a position to offset the facility and in facing an imminent danger of losing the suit property, they invited willing buyers promising that the purchase price will be applied towards offsetting the loan with AFC; that the purchasers including the 12th interested party diligently made payments towards the purchase price of the sale property and only later

realized that the 1st Petitioner was not remitting the payments to AFC towards the settlement of the facility; thus there was imminent danger of losing the property which position pushed the purchasers to start making payments directly to AFC; that the 12th interested party took possession of her portions of the suit land together with her family and they have been in occupation from 1975 to date; that the 1st petitioner has gone to great lengths with the objective of robbing the interested parties their rightful possession through misrepresentation of facts and filing a litany of cases thus ensuring that the issues touching on the suit property never go for full trial.

12. The 1st petitioner filed a further affidavit on **14/1/2021** in response to the 1st and 2nd respondent, 2nd, 3rd and 12th interested party's replying affidavit. In it he alleges that the 1st and 2nd respondents do not deny the amended petition. He also maintains that the interested parties are merely peripheral to the claims of violations of rights and the alleged concessions by the 1st and 2nd respondent, and that their claims fall under private and not public law. He alleges that they have secured a forum to advance their respective cases in the various civil suits pending before the Environment and Land Court at Kitale, that is **ELC No. 117 of 2016, ELC No. 96 of 2015 and ELC No 26 of 2019**. He also states that the interested parties have admitted to having applied for the illegal transactions to wit conversion, mutations, subdivision, and titling over the land, and that after the petitioners complained and the DCI investigated the matter the newly created index maps and titles in respect of the suit land were cancelled. He exhibits several documents as alleged proof of interference with his land by the 1st and 2nd respondents' officers. He also terms some of the documents exhibited by the interested parties as "void" for "refusal" to "comply with the provisions of the contract" and others as "false consents obtained fraudulently through fraudulent applications;" others are alleged to be "forged" or irregularly obtained by a person working in the land Board who is a interested party to these proceedings.

13. On **30th July 2020**, the 2nd petitioner also filed a further affidavit in response to the 2nd 3rd and 12th interested parties' and the 1st and 2nd respondents' replies to the amended petition. In that affidavit he raises matters similar to those raised in the further affidavit of the 1st petitioner. He exhibited several documents as alleged proof of interference with his land by the 1st and 2nd respondents' officers.

14. On **12th March 2020**, this court directed that the instant petition be argued by way of written submissions. In compliance thereto, the 2nd interested party filed his submissions on **30/9/2019**, the petitioners filed theirs on **14/1/2021**, and the 2nd respondent filed its on **25/1/2021**. I have perused the court file and I have not found any submissions filed on behalf of the other parties.

DETERMINATION

15. I have carefully considered the entire petition, the answer thereto and the submissions on record and I find that the main issues in dispute before me are as follows:

(a) Whether the instant petition has attained the threshold required of a constitutional petition;

(b) Whether any constitutional rights of the petitioners have been violated by the respondents;

(c) Who should bear the costs of this petition?

16. The issues are addressed as herein below.

(a) Whether the instant petition has attained the threshold required of a constitutional petition

17. The petitioners filed the instant petition for enforcement of the allegedly violated rights as envisaged under **Article 22 (1)** of the **Constitution (supra)** which reads;

"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

18. The petition is further founded on **Article 23 (1) of the Constitution**.

19. It is not in dispute that the suit land is registered in the petitioners' names. It is also not lost on this court, from the exhibits submitted by the interested parties that there has been a long litigation battle over the subject suit land for a very long period. Some of the litigation is yet to be concluded for example, **Kitale ELC 117 of 2016** between the 1st petitioner and the 3rd interested party over the same suit land as mentioned by the 3rd interested party. The dicta of the court in some of the matters over the suit land appears to be too weighty to be ignored. For example, in **Kitale ELC Land Case No. 96 of 2015 - Jackson Koech Vs Michael Bett Siror**, the 1st petitioner herein applied for the plaint to be struck out on the basis that, *inter alia*, there was no consent of the land control board granted and that as such the transactions between him and the plaintiff in that case were null and void. The court observed as follows regarding multiplicity of suits:

"...there is no contention that the Plaintiff has previously filed suits against the Defendant. There was Nairobi HCCC No 2028 of 1998 Stephen Sugut & 2 others -Vs- Michael Bett Siror. There was also Kitale HCCC No 129 of 2001 Michael Bett Siror - Vs- Jackson Koech. The Plaintiff who was a Defendant in this case had raised a counter-claim. These two cases were dismissed for want of prosecution.

10. The Plaintiff then filed Kitale HCCC No 136 of 2000. Stephen Sugut & 12 others -Vs- Michael Bett Siror. He later withdrew this case. The Applicant contends that the Respondent should have filed an application to reinstate the dismissed suits instead of filing fresh ones. In answer to the Applicant's contention, the Respondent stated that the Applicant had filed an application to reinstate Kitale HCCC No. 129 of 2001 (Michael Bett -Vs- Jackson Koech) but that application was

dismissed. He annexed a ruling of the court dismissing the application.

11. A party is at liberty to bring a fresh suit if a previous one has been dismissed for want of prosecution. He is free to do so subject to limitation. The Defendant had mounted a counter-claim in Kitale HCCC NO 129 of 2001.”

20. The court also stated as follows regarding the consent of the land control board:

“14. Though the Applicant contends that there was no consent of the land control Board sought and obtained, there is evidence that consent was given to him to sub divide the land for his benefit and 13 others. The consent was given at the Board meeting held on 7/12/1977. There was an argument by Mr. Kigamwa that the Plaintiff's name does not appear in the consent given in 1977 and that in any case the consent was given seven years after the agreement between the parties. There was no requirement that the Plaintiff's name had to appear on the consent. It is indicated that the sub division was to benefit the Defendant in this case and 13 others. The Plaintiff could as well be among the 13 persons who were to benefit. It cannot be assumed that since the consent did not name him, then he was not to benefit. The Plaintiff was the main actor in all this arrangement. The fact that the consent was obtained seven years after the agreement is immaterial. The fact remains that it was obtained. I therefore find that this suit cannot be defeated on account that there was no consent of the Land Control Board obtained. Consent had actually been applied for and obtained.”

21. These are excerpts from only one of the cases between the 1st petitioner and one of the interested parties. The petitioners have admitted the existence of several cases between the first petitioner and the interested parties. It is therefore clear to see from the contents of both the petitioners' and the interested parties' affidavits that there are pending disputes in the courts in the form of ordinary civil suits by way of plaint regarding title to the suit land.

22. I find the position of the respondents in this matter quite interesting: the interested parties maintain that it was not the 1st respondent but the Ministry of Lands which was involved in the titling of the 360 portions resulting from the subdivision of the suit land while the Ministry denies involvement. The interested parties maintain that the Ministry of Lands has created an area list accordingly and prepared titles to the parties reflecting the actual occupation on the ground. The interested parties claim to be in possession of a portion of the suit land.

23. The presence of the interested parties, all joined by the petitioners, has changed the landscape of this litigation considerably in that it has brought to the fore the interested party's claims in respect of the suit land. However, I am satisfied that a portion of the suit land is occupied by a section of the interested parties, and I think that the petitioners have not sufficiently addressed the issue of whether only the land so occupied was subdivided and issued with titles (which are admitted by the petitioners to have been later cancelled,) or how the concerned interested parties came to be in occupation of the land, and the extent of their individual portions. These are matters that can not be dealt in this petition.

24. It should also be recalled that there is a ruling in this same petition delivered on the **29th May 2020** dismissing the petitioner's application for judgment on what was then said to be admission of the petitioner's claims in the instant petition. I still do not consider the petitioners as having discharged their duty of proof of the alleged admissions at the main hearing of this petition.

25. The Government is the custodian of all land records and if it avers in a solemn manner in judicial proceedings as it has through its Chief Legal Adviser the Attorney General that there is no interference with the petitioners' titles and that they are still intact as it has done in this case, then that must be believed. Not only that; it must be subsequently firmly held to that position, lest it plays hide and seek with its citizens on the issue. I state this with the certainty that all the petitioners want is an assurance that their titles are safe from any depredation instigated by the interested parties for indeed this court must, in order to do justice in this particular case, have a bigger picture in mind and the bigger picture is that there is a tussle between the petitioners and the interested parties who claim to own a portion of the land. Under those circumstances, foisting any liability upon the respondents would be unjust to them.

26. Nevertheless, perchance there was any attempt by the Respondents at the instance of the interested parties to subdivide the suit land and issue the interested parties with titles, then it can only be surmised that the respondents acted pursuant to what they perceived to be the just conclusion: the issuance of titles to persons who claimed the land. The obvious and admitted existence of the interested parties' claims removes the petitioners' claim from the realm of public law to private law. It renders any possible act of the respondents at the interested parties' instance to be purely a civil dispute in which one or both of the latter two parties may be condemned to shoulder civil liability in contrast to a situation where the respondents would have acted unprovoked purely on their own. In my view, the presence of the interested parties' claims and their possible role in the matters the petitioners complained of have the effect of making the instant petition fall short of attaining the threshold required of a constitutional petition. It remains an ordinary civil dispute and the intervention by any government office charged with land surveys and issuance of title can not be said to have incurred constitutional repercussions to warrant the lodging of a petition. This must be so because it is the duty of the responsible office in the government to effect titling of land as soon as possible after a basis has been shown to exist, and it is evident that the interested parties have been engaged in a struggle to compel the responsible government departments to issue titles to the land they have occupied for a long time. That is the only decades-old battle that is evident from these proceedings in which the respondents have been caught up by virtue of their being record keepers and issuers of title.

27. The final conclusion is that the petitioners have cleverly woven their case so as to include the respondents so as to be able to lay claims of constitutional violations while having full knowledge that the existing dispute between them and the interested parties who are claimed to have instigated the survey and titling of the suit land, is civil in nature.

28. In this kind of dispute, a hearing in which the documents the parties hold as evidence of their entitlement to the land would have to be examined and tested for their veracity would have to occur, and that can only be in an ordinary suit commenced by way of plaint; as has been said herein before, there is already litigation pending in court over the suit land between the petitioners and a section of the interested parties. Courts have in the past held that private law claims should not form the basis of constitutional petitions and should be resolved by using the usual process of civil litigation.

29. In the case of Benjoh Amalgamated Limited & Another V Kenya Commercial Bank Limited (2007) eKLR, the court held:-

“The Petitioners remedy lies in the ordinary civil courts, and not the Constitutional Court. The Petition raises no constitutional issue and having filed nine previous cases, and an appeal to the Court of Appeal which was unsuccessful, the Petitioners Petition can fittingly be described as an abuse of the Court process and with nine previous suits an appeal to the Court of Appeal this Petition and another suit to be pending before the Milimani Commercial Courts, the Petitioners and their servants or agents can be truly described as vexatious litigants.

In as much as the Court is invested with power under Section 84 (2) of the Constitution to issue such writs and give such directions as it may consider appropriate for the purposes of the enforcement of any of the provisions of Section 70 to 83 (inclusive) of the Constitution, it may likewise issue writs and directions in relation to the abuse of its process.

Before I conclude this Ruling, I make reference for the Respondent’s citation of Order VI rule 13 (1) (B) and (D) of the Civil Procedure Rules.

Whereas I accept that the Petition herein is indeed scandalous, frivolous or vexatious, and is an abuse of the process of court, these are legal principles which are applicable to ordinary civil suits, and there is a real danger of debasing the practice and procedure of the Constitutional Court under Chapter V (Bill of Rights) of the Constitution into a civil procedure process. I think this must be guarded against. I make the distinction that whereas principles of law found in the Civil Procedure Code comprising the Civil Procedure Act, and the Civil Procedure Rules where they are not inconsistent with the Constitution may be borrowed, care must be taken to ensure that civil procedure rules are not indiscriminately invoked and applied to constitutional applications. Under the current practice and procedure, rule 22 of those rules is adequate to invoke the legal principles of scandalous, frivolous and vexatious litigation or abuse of the court process without incorporation of orders of the Civil Procedure Rules. Reference to Order VI rules 13 (1) (B) and (D) of the Civil Procedure rules is to that extent incompetent.”

30. In the case of Petro Oil Kenya Limited v Kenya Urban Roads Authority [2018] eKLR the court stated as follows:

“A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case. Whether or not the suit property was hived from a road truncation is not an issue which I can determine on the affidavit evidence before me...Whether or not the Petitioner acquired the suit property lawfully is an issue that can only be determined in a civil suit and not in a Constitutional Petition. The courts have said over and again that the mere fact that constitutional rights are alleged to have been violated or are threatened does not make the dispute a constitutional one calling for the filing of a petition under Article 22 of the Constitution. The court can still uphold constitutional rights in a normal civil suit.”

31. In the light of the foregoing this court finds that the petition does not meet the threshold required of a petition.

(b) Whether any constitutional rights of the petitioners have been violated by the respondents

32. In order for a petitioner to succeed in any constitutional petition, the law requires that the petitioner must demonstrate that the constitutional rights subject matter of the petition have actually been denied or violated or are threatened with denial or violation.

33. The matters raised by the petitioners in this petition could have been brought up in any of the pending litigation between him and the interested parties. Joinder of the respondents herein in that litigation should have been considered.

34. Upon considering the petition, the rival affidavits and the submissions and on the basis of the analysis above regarding the first issue listed for determination, I am not satisfied that any violation of the rights and fundamental freedoms of the petitioners under the constitution has occurred, or is threatened, and the petitioners have therefore fallen short of satisfying this court that the orders sought should be granted.

35. This petition has no merit and it fails, and it is hereby dismissed.

(c) Who should bear the costs of this petition?

36. The petitioners brought this petition and dragged in the respondents while having full knowledge of the prior existence of the civil dispute between them and the interested parties in which the matters herein could have been adequately resolved.

37. It is unfortunate that this petition has been used by the petitioners to further delay the conclusion of that other litigation that may in addition resolve the issue of ownership of the suit land with finality.

38. The petitioners shall therefore bear the costs of this petition.

Dated, signed and delivered at Kitale via electronic mail on this 15th day of April, 2021.

MWANGI NJOROGI

JUDGE, ELC, KITALE.