



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 33 OF 2018

EDWARD THIONG'O WACHIRA.....PETITIONER

-VERSUS-

THE CABINET SECRETARY,

MINISTRY OF LANDS AND PHYSICAL PLANNING.....RESPONDENT

AND

MARGARET WAKONYO NJOGU.....1ST INTERESTED PARTY

BLUE URBAN LIMITED.....2ND INTERESTED PARTY

JUDGMENT

1. The petitioner brought these proceedings on 9th May 2018 through a petition dated 8th May 2018. The petition was supported by an affidavit and supplementary affidavit sworn by the petitioner, Edward Thiong'o Wachira on 8th May 2018 and 10th August 2020 respectively. The Respondent did not respond to the petition despite service. The 1st Interested Party opposed the petition through a replying affidavit sworn on 16th November 2020 while the 2nd Interested Party opposed the petition through a replying Affidavit sworn by Evanson Thuo Waweru on 18th November 2020.

2. The Petitioner sought the following reliefs;

i. A declaration that the purported transfer of proprietorship from Duncan Kireri Wachira to Margaret Wakonyo Njogu registered at Nairobi by officers subordinate to the Respondent on or about 15th May 2015 in respect of land comprised in Land Reference Number 330/694 (hereinafter referred to as "Plot No. 330/694") and any subsequent dealing therewith contravenes the constitution and hence null and void for all intents and purposes;

ii. A declaration that the purported transfer of proprietorship from Duncan Kireri Wachira to Margaret Wakonyo Njogu registered at Nairobi by officers subordinate to the Respondent on or about 21st July 2017 in respect of land comprised in Land Reference Number 11781/31(hereinafter referred to as Plot No. 11781/31") and any subsequent dealing therewith contravenes the constitution and hence null and void for all intents and purposes;

iii. A declaration that Hannah Wanjiru Wachira and her children namely; Edward Thiongo Wachira, Michael Wanjohi Wachira and Sylvia Muthoni Wachira have overriding interest over parcels of land comprised in Plot No. No. 330/694 and Plot No. 11781/31.

iv. The Respondent does pay damages to the Petitioner;

v. The Respondent does bear the costs of the Petition.

The Petitioner's case:

3. The Petitioner contended that he instituted these proceedings in his own interest, on behalf of his father one, Duncan Kireri Wachira now deceased whom he claimed to be of unsound mind, as a member of and in the interest of Duncan Kireri Wachira's family and in the public interest.

4. The Petitioner contended that Duncan Kireri Wachira (hereinafter referred to only as "the deceased") was married to the petitioner's

mother, Hannah Wanjiru Wachira (hereinafter referred to only as “the petitioner’s mother”) in 1967 and during the union, they got four (4) children including the petitioner who were born between 1968 and 1989.

5. The Petitioner averred that the deceased acquired Plot No. 330/694 and Plot No. 11781/31(hereinafter together referred to as “the suit properties”) in 1990 and 1996 respectively. The Petitioner averred that the deceased held the said properties in trust for his family comprising of his said wife and children.

6. The Petitioner averred that from 1990 onwards, the deceased developed a mental disorder known as psychosis and in 2007, he developed dementia hence he was unable to manage his affairs.

7. The Petitioner averred that on 19th January 2015 one, Washington Nderitu Komu t/a Nderitu Komu & Co. Advocates (hereinafter referred to only as “the advocate”) commenced proceedings in the lower court namely, Nairobi CMCC No.170 of 2015 (hereinafter referred to only as “the lower court suit”) in the name of the deceased against the Petitioner using forged documents.

8. The Petitioner averred that on 20th January 2015, a fraudulent application for a Provisional Certificate of Title was made at Lands Department Central Registry, Nairobi supported by a fraudulent affidavit of the deceased in respect of Plot No. 11781/31. The Petitioner averred that the Certificate of Title was handed over to Solomon Njuguna Munyutu (ID No. xxxxxxxx) by the Respondent’s officers in breach of the deceased’s and deceased’s beneficiaries’ rights under Article 31 and 40 of the Constitution of Kenya 2010.

9. The Petitioner averred that between 1st May 2015 and 13th May 2015, the deceased was examined by a psychiatrist Dr. Pius Kigamwa who formed the opinion that the deceased’s cognitive functions were deranged and as such he could not manage his affairs.

10. The Petitioner averred that on or about 15th May 2015, a fraudulent conveyance in respect of Plot No. 330/694 was drawn by the advocate bearing a forged signature of the deceased and purporting to convey the property to the 1st Interested Party and the same was filed at the Lands Department, Central Registry, Nairobi.

11. The Petitioner averred that the officers subordinate to the Respondent without notice to the deceased and his family and in a manner that violated the rules of natural justice, Sections 28 and 46 of the Land Registration Act, 2012, Sections 12(1) and 14 (a) of the Matrimonial Property Act, 2013, Section 4 of the Fair Administrative Actions Act, 2015, Section 10 of the Public Officer Ethics Act, 2003 and Articles 2, 3, 10, 20, 21, 27, 28, 40, 45, 47, 48, 50, 57, 60 and 232 of the Constitution of Kenya, 2010 acted on the said fraudulent conveyance and registered Plot No. 330/694 in the name of the 1st Interested Party.

12. The Petitioner averred that on 4th November 2015, one, Peter Mwangi Muya t/a Recovery Concepts Auctioneers took possession of Plot No. 330/694 on the instruction of the advocate after the Petitioner had filed an application before this court (Nairobi ELC Misc. Civil Application No 283 of 2015) to strike out the proceedings that had been instituted in the lower court in the name of the deceased.

13. The Petitioner averred that on 24th February 2016 or thereabouts officers junior to the Respondent once again without notice to the deceased and his family or consent of the beneficiaries illegally and contrary to Sections 27 and 28 of the Land Registration Act, 2012, Sections 12(1) and 14(a) of the Matrimonial Property Act, 2013, Section 4 of the Fair Administrative Action Act, 2015, Section 10 of the Public Officer Ethics Act, 2003 and Articles 2, 3, 10, 20, 21, 27, 28, 40, 45, 47, 48, 50, 57, 60 and 232 of the Constitution of Kenya, 2010 caused a fraudulent conveyance drawn by the advocate and purported to be executed by the 1st Interested Party in favour of the 2nd Interested Party in respect of Plot No. 330/694 to be registered. The Petitioner averred that the Petitioner’s mother appointed him on 30th January 2017 to act generally as her agent.

14. The Petitioner averred that on 21st July 2017 or thereabouts, officers junior to the Respondent once again without notice to the deceased and his family or consent of the deceased and his beneficiaries and without a duly appointed guardian of the deceased, without payment of stamp duty or consent of the Land Control Board illegally and contrary to Sections 27 and 46 of the Land Registration Act, 2012, Sections 12(1) and 14(a) of the Matrimonial Property Act, 2013, Section 6 of the Land Control Act, Section 4 of the Fair Administrative Action Act, 2015, Section 10 of the Public Officer Ethics Act, 2003 and Articles 2, 3, 10, 20, 21, 27, 28, 40, 45, 47, 48, 50, 57, 60 and 232 of the Constitution of Kenya, 2010 caused a fraudulent transfer purported to have been executed by the deceased in favour of the 1st Interested Party in respect of Plot No. 11781/31 to be registered.

15. The Petitioner averred that the Respondent’s violation of the Constitution is likely to arbitrarily and illegally deprive the deceased, his family and beneficiaries of the suit properties and cause the public to be swindled by persons fraudulently registered as proprietors of the properties.

16. The Petitioner averred that on 9th January 2018, the office of the Attorney General disowned a marriage certificate that was allegedly issued to the 1st Interested Party following her alleged marriage to the deceased on 20th June 2015.

The Interested Parties’ case:

17. In her affidavit, the 1st Interested Party denied Petitioner’s allegations that the deceased was of unsound mind. The 1st Interested Party averred that she was legally married to the deceased on 29th June 2015 and that the marriage between the deceased and the Petitioner’s mother was legally dissolved after the Petitioner’s mother deserted the deceased and moved to the USA 25 years ago.

18. The 1st Interested Party averred further that the Petitioner and his siblings had a strained relationship with the deceased and had put pressure on him to allocate them his properties while he was still alive. The 1st Interested Party averred that an order was made in NRB HC.

MISC APPL. No. 128 of 2019 that the deceased remains in her custody. The 1st Interested Party contended that she took care of the deceased until his death and that she arranged for his funeral which the Petitioner neither got involved nor attended.

19. The 1st Interested Party averred that the Petitioner had no proprietary interest in the suit properties. The 1st Interested Party averred that the suit properties were given to her as gifts by the deceased and the deceased duly executed the necessary instruments of transfer which were registered in accordance with the law.

20. On its part, the 2nd Interested Party averred that, around December 2014, its officials discussed with the deceased the possibility of the 2nd Interested Party purchasing Plot No. 330/694 at Kshs.260 Million which offer the deceased accepted. The 2nd Interested Party averred that on 26th June 2015, it conducted a search that confirmed that the property was registered in the name of the 1st Interested Party.

21. The 2nd Interested party averred that consequent to that search, it entered into a sale agreement with the 1st interested Party and procedurally purchased Plot No. 330/694 at Kshs.260 Million.

22. The 2nd Interested Party averred that the petition raised matters that belonged to family law domain and not constitutional issues. The 2nd Interested Party averred that the issues raised in the petition should have been dealt with in Nairobi Succession Cause No.105 of 2020 that was pending hearing.

The submissions:

23. The Petitioner, the 1st Interested Party and the 2nd Interested Party filed submissions dated 11th January 2021, 20th September 2021 and 2nd June 2021 respectively.

24. The Petitioner submitted on a number of issues. In summary, the Petitioner submitted that he had legal standing to institute the petition. The Petitioner also submitted that the purported marriage between the deceased and the 1st Interested Party was not valid and that the transfer of the suit properties from the name of the deceased to that of the interested parties was fraudulent.

25. On her part, the 1st Interested Party submitted that the Petitioner had failed to demonstrate how the Respondent had infringed on his constitutional rights. In support of this submission, the 1st Interested Party cited Anarita Karimi Njeru v Republic [1980] eKLR.

26. The 1st Interested Party submitted further that the issues raised in the petition had been raised, heard and determined in the multiple suits filed in respect to the suit properties such as Nyahururu ELC Petition No.23 of 2017 and NRB. Milimani CMCC No.170 of 2015. The 1st Interested Party submitted that the petition was *res judicata*. In support of this submission, the 1st Interested Party cited Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR.

27. The 2nd Interested Party submitted that the Petitioner had no *locus standi* to institute a constitutional petition on behalf of the deceased as there was no written authority given to him by the deceased and he was not the administrator of the estate of the deceased.

28. The 2nd Interested Party submitted that the petition had no merit since the Petitioner failed to prove the allegations of fraud on which it was based.

Issues for determination.

I have considered the petition and the response thereto by the Interested Parties. I have also considered the submissions by the advocates for the parties and the authorities cited in support thereof. The parties raised various issues in their submissions. In my view, the following are the issues that arise for determination in the petition before the court;

- a) Whether the petitioner had *locus standi* to institute the petition
- b) Whether the petition is *res judicata*.
- c) Whether the petition has merit.
- d) Who is liable for the cost of the petition?

Whether the petitioner had *locus standi* to institute the petition:

29. Article 22 of the Constitution provides that:

“22. Enforcement of Bill of Rights

(1) 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.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- a) a person acting on behalf of another person who cannot act in their own name;
- b) a person acting as a member of, or in the interest of, a group or class of persons;
- c) a person acting in the public interest; or
- d) an association acting in the interest of one or more of its members.”

30. Article 258 of the Constitution on the other hand provides as follows:

“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members.”**

31. In Priscilla Nyokabi Kanyua v Attorney General & Another [2010] eKLR the court stated as follows on *locus standi* in constitutional petitions;

“In Albert Ruturi , J.K. Wanywela & Kenya Bankers Association v The Minister of Finance & Attorney General and Central Bank of Kenya the position of locus standi in relation to the application of a purposeful approach as against a contextual one was finally put to rest by the Court. The Court emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population.”

32. Also, in International Community of Women Living With HIV Registered Trustees v Co-ordination Board & 2 others; Teresia Otieno (Interested Party) [2021] eKLR, the court stated that:

“25. From the aforesaid Articles the Constitution (Article 258) is clear that every person has a 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 and further may do so claiming the constitution has been contravened or is threatened with contravention.

26. The Constitution gives guidance on who is the “person” referred to under Article 22 and 258 of the Constitution in its interpretation as defined in the Constitution under Article 260 of the Constitution where it is clearly stated, in this constitution, unless the context requiring otherwise; -“person” is defined as follows:-

“person” includes a company, association, or other body of persons whether incorporated or unincorporated.”

33. The Petitioner stated that he brought this petition in his own interest and on behalf of the deceased, the deceased’s family and the public at large.

34. I am not satisfied that the Petitioner had a right to bring the petition herein on behalf of the deceased whom he claimed was of unsound mind. First, I have not seen an order from a competent court declaring the deceased to be of unsound mind. Even if the deceased was of unsound mind, there is no evidence that the Petitioner was appointed as a guardian of the deceased. With regard to his siblings and his mother, only his mother gave him a power of attorney to act on her behalf. For the rest, the Petitioner has not indicated any disability that would have prevented them from joining the Petitioner as co-petitioners in the petition. As for the public, the Petitioner has contended that the public was deprived of stamp duty by the unconstitutional acts of the Respondent. I am of the view that on account of the personal and public interest that the Petitioner claims to be pursuing in this petition, he has a *locus standi* to maintain the petition. Whether or not he will be able to establish those interests is another issue.

Whether the petition is *res judicata*:

24. Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been

subsequently raised, and has been heard and finally decided by such court.”

35. In Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, the Court of Appeal stated as follows on *res judicata*:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

a) The suit or issue was directly and subsequently in issue in the former suit.

b) The former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

36. It is not disputed that what is in dispute in this petition is the legality of the transfer of the suit properties from the deceased to the Interested Parties. It is not disputed that the Petitioner filed a petition against the Respondent herein in the Environment and Land Court at Nyahururu in 2017 namely, Edward Thiong’o Wachira v Cabinet Secretary Ministry of Land, Housing & Urban Development [2019] eKLR in which he had sought among others, a declaration that the transfer and subdivisions of certain parcels of that were initially registered in the name of the deceased were unlawful. I have read the judgment that was delivered in that petition in 2019. It is clear that the properties in dispute in this petition were not included in the Nyahururu petition although the parties to that petition were the same as the parties before this court save for the 2nd Interested Party. The Nyahururu petition was also struck out rather than being dismissed. It is my finding therefore that this petition is not *res judicata*.

Whether the petition is merited:

37. The Petitioner stated that his rights under the Articles Article 2, 3, 10, 20, 21, 27, 28, 40, 45, 47, 48, 50, 57, 60 and 232 of the Constitution of Kenya, 2010 had been violated.

38. Apart from citing these provisions of the Constitution, the Petitioner did not provide particulars or demonstrate how his rights in those Articles of the Constitution or the rights of those he claims to represent were violated by the Respondent having regard to the fact that the suit properties had at no time been owned by the Petitioner, the Petitioner’s mother or the Petitioner’s siblings. The rights that the Petitioner, his siblings and mother are claiming in the suit properties are of a private nature and the same are yet to be established. This is very clear from the issues that were framed by the Petitioner in his submissions. With regard to the rights of the deceased, the deceased died on 22nd October 2019 while this petition was pending. The Petitioner is not his legal representative and was never appointed his guardian or a manager of his estate while he was alive and said to be of unsound mind. The Petitioner cannot therefore purport to be protecting the deceased’s constitutional rights.

39. It is now settled that constitutional right violations or threatened violations must be pleaded with reasonable degree of precision. This principle was established in Anarita Karimi Njeru v Attorney General [1979] KLR 154 where the court stated as follows:

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

40. In Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR the court stated as follows:

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

41. The Petitioner as I have mentioned cited several Articles of the Constitution of Kenya, 2010. The Petitioner did not however explain either in the petition or the submissions how the said Articles of the Constitution relate to the dispute at hand. The dispute in my view is between the Petitioner and the Interested parties and have nothing to do with the Respondent. The Petitioner made general allegations of breach of several provisions of the constitution. I am however unable to relate the alleged violations to the Petitioner whose interest in the suit properties is yet to be established as mentioned earlier. In my view, the dispute before the court concerns the validity of the title held by

the 1st and 2nd Interested Parties over the suit properties. That is an issue that should have been determined as a civil dispute rather than through a constitutional petition. It is common ground that the suit properties are not registered in the name of the Petitioner, the Petitioner's mother or any of the Petitioner's siblings. The Petitioner's claim is that the deceased held the suit properties in trust for his family comprising of the Petitioner's mother, the Petitioner and the Petitioner's siblings. The Petitioner has also claimed that the Petitioner's mother has a claim over the suit properties under the Matrimonial Property Act, 2013.

42. The Petitioner's contention is that the deceased was of unsound mind and that the purported marriage that he entered into with the 1st Interested Party was a nullity. The Petitioner has contended that being of unsound mind, the deceased was not in a position to transfer the suit properties to the 1st Interested Party. The Petitioner has contended that the deceased's signatures in the instruments of transfer were forged and that in any event, the transfer of the suit properties to the Interested Parties was carried out in breach of the trust that the same were held by the deceased and the Petitioner's mother's rights under the Matrimonial Property Act, 2013.

43. To determine; whether the deceased was of sound mind when he is said to have executed the instruments of transfer and conveyance that conveyed the ownership of the suit properties to the 1st Interested Party, whether the deceased solemnized a valid marriage with the 1st Interested Party, whether the Petitioner's mother had any matrimonial rights over the suit properties and whether the deceased held the suit properties in trust for the Petitioner, his mother and siblings require evidence. These are issues that cannot be determined with finality on the basis of affidavit evidence and submissions before the court.

44. I am of the view that the Petitioner should have brought the complaints the subject of the present petition by way of a civil suit in which the parties should have adduced oral evidence. As this court has stated many times, constitutional petitions should be left for those cases raising purely constitutional questions and where facts are to a large extent not contested and where they are contested, the court should have no difficulty determining them on affidavit evidence. In the case before me, I have been called upon to determine among others whether the Interested Parties acquired the suit properties fraudulently. Fraud is a matter of fact that has to be established by evidence. Affidavit evidence in my view will not suffice for that purpose. Due to the foregoing, I am of the view that although the dispute before the court raises valid questions for determination, the same was not properly brought to court.

45. It is also not clear why the Petitioner decided to bring this petition against the Cabinet Secretary Ministry of Lands and Physical Planning who is not involved in land registration instead of the Chief Land Registrar. Even if the Petition had been brought against the Chief Land Registrar, I doubt if it would have made any difference. Land Registrars register documents that have been presented to them. They have statutory duty to do so. If any of the documents registered is not valid on account of fraud or any other illegality, there are provisions in law for dealing with the same. It does not in my view become a constitutional issue.

46. In the case of Leonida Aloo Odhiambo v Attorney General & another [2020] eKLR, the court stated as follows:

“18. Further, it is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of an action only when it is necessary for the decision of the case to do so and that if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights. See the case of Uhuru Muigai Kenyatta(supra).”

Conclusion:

47. In the final analysis and for the foregoing reasons, it is my finding that the petition before me does not raise valid constitutional issues and that the same has no merit. The petition is dismissed with costs to the Interested Parties.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF MARCH 2022

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Edward Thiongo Wachira, the Petitioner in person.

Mr. Mahinda for the 1st Interested Party.

N/A for the Respondent

N/A for the 2nd Interested Party

Ms. C.Nyokabi-Court Assistant