



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC PET. No. E004 OF 2021**

**IBRAHIM WAKHANYANGA**

**ABDALLA WAMERE**

**HUSSEIN MUNYENDO.....PETITIONERS**

**VERSUS**

**CHIEF MAGISTRATE'S COURT KAKAMEGA.....1<sup>ST</sup> RESPONDENT**

**ANN WESONGA NAMBIRO**

**(As legal representative and administratrix of the estate of the late**

**PETER NAMBIRO MUBATSI.....2<sup>ND</sup> RESPONDENT**

**ANN WESONGA NAMBIRO.....3<sup>RD</sup> RESPONDENT**

**AND**

**THE HON. ATTORNEY GENERAL for the**

**LAND REGISTRAR KAKAMEGA.....INTERESTED PARTY**

**JUDGMENT**

1. By petition dated 7<sup>th</sup> June, 2021 the petitioners averred that they are the registered proprietors of L.R Wanga/Koyonzo/1065 presently comprised in L.R No Wanga/Koyonzo/1225 and LR No Wanga/Koyonzo/1226. That the first respondent issued orders to the second respondent on 22<sup>nd</sup> May 2007 in Kakamega CMCC No. 626 of 1990 purporting to evict the petitioners from the parcel of land known as LR No Wanga/Koyonzo/1226. That they said orders were never executed and as a result lapsed on or about 22<sup>nd</sup> May 2019 by virtue of Limitation of Actions Act. That on 17<sup>th</sup> March 2021, the first respondent issued orders purporting to reinstate and enforce the lapsed orders and which orders began to be executed in May 2021.

2. The petitioners further averred that the orders issued on 17<sup>th</sup> March 2021 were issued contrary to Articles 48 and 50 of the Constitution of Kenya 2010 in that the first respondent among others failed to satisfy himself that the applications had been served or that the petitioners were given an equal opportunity to be heard. Further that at the time the orders of 22<sup>nd</sup> May 2019 were issued, the petitioners had acquired title to the parcel of land known as LR No Wanga/Koyonzo/1226 by adverse possession.

3. The petitioners therefore prayed for the following orders:

*a) A declaration that the joint, unlawful and illegal acts of the respondents complained of herein are offensive to and violate the provisions of Articles 1(3)(c), 2(1), 3(1), 10(1)(b), 19, 20, 21(1), 22, 23(1) & (3), 25(c), 27 (1), 40(1) & (3), 47, 48, 50 (1), 60 (1) (b), 61 (2), 64 (a), 159, 160, 165(1), (3) (a), (b) & (e), 169 (1) (a), 258 & 259 of the Constitution, 2010 and consequently unconstitutional.*

b) A permanent injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein, their agents and or representatives and or anyone or public officer claiming under them or at their instruction or order restraining them from continued execution, enforcement and or implementation of the said orders of the 1<sup>st</sup> Respondent complained of herein.

c) An order of certiorari to remove into this Honourable court and quash the said order of the 1<sup>st</sup> Respondent purporting to reinstate the 1<sup>st</sup> Respondent's orders issued way back on 22/05/2007 and lapsed on or about 22/05/2019 purporting to evict the Petitioners from the suit land herein.

d) An order of general damages for violation of constitutional rights and fundamental freedoms and unlawful, irregular eviction hereinabove stipulated.

e) An order of special damages to the tune of KShs. 7,527,600/= for malicious, unjustified and unauthorised damage to property, to wit, a house, trees, crops and other structures.

f) Costs of this Petition.

4. Together with the petition, the petitioners filed Notice of Motion dated 7<sup>th</sup> June, 2021, seeking conservatory orders.

5. The petition was supported by an affidavit sworn jointly by the first and second petitioners. They deposed that they are the joint registered proprietors of the whole of the parcel of land known as L.R. No. N. Wanga/Koyonzo/1065 comprised in L.R No Wanga/Koyonzo/1225 and LR No Wanga/Koyonzo/1226. That they acquired title to L.R. No. N. Wanga/Koyonzo/1065 by way of transmission from their deceased father, one Javary Wamere vide Mumias DM Succession Cause No. 42 of 1976. That they obtained title to the parcel of land known as LR No Wanga/Koyonzo/1226 by adverse possession.

6. They then proceeded to give what they termed as a historical background. That the first respondent herein issued orders on 26<sup>th</sup> March 1991 in Kakamega Chief Magistrate's Court Civil Case No. 626 of 1990 declaring the petitioners as lawful heirs in respect of L.R. No. N. Wanga/Koyonzo/1065 and cancelling its subdivision into 1225 and 1226. That later on 22<sup>nd</sup> May 2007, the first respondent issued orders of eviction of the petitioners from L.R. No. N. Wanga/Koyonzo/1065 but the said orders were never executed or enforced and consequently, they lapsed on 22<sup>nd</sup> May 2019 by virtue of limitation of actions. That on 17<sup>th</sup> March 2021, the first respondent purported to issue orders reinstating the lapsed orders of 22<sup>nd</sup> May 2007. That neither the said orders nor the initiating applications were ever served upon the petitioners and they were therefore condemned unheard, contrary to natural justice and law.

7. The first and second petitioners further deposed that the application leading to the orders of 17<sup>th</sup> March 2021 sought to revive orders that had lapsed and which were issued to Michael Almasi Ongaro, a long-deceased person in respect whose estate the second and third respondents had no legal capacity to act. That based on the orders of 22<sup>nd</sup> May 2007 the second and third respondents purported to evict the petitioners and embarked on wanton destruction of the petitioners' property. That the orders were made without any notice, formal and or substantive proceedings or any recognized claim before the court and in total disregard of law or jurisdiction, thus rendering the orders administratively unfair and an impediment to access to justice.

8. In response, the first respondent and interested party filed grounds of opposition in which they took the position *inter alia* that if aggrieved by the first respondent's ruling the petitioners ought to have filed an appeal and not a constitutional petition.

9. On their part, the second and third respondents filed a detailed replying affidavit sworn by the second respondent. Additionally, they filed Notice of Preliminary Objection dated 5<sup>th</sup> August, 2021, in which they sought striking out of the petition on the following grounds:

1). *The petition offends and or goes counter to the hackneyed principle of "Constitutional Avoidance" as the issues raised by the petitioners, if at all, can and ought to be raised and determined through alternative legal or Civil processes and through the interpretation of ordinary statutes including the Limitation of Actions Act, the Civil Procedure Act, the Land Statutes and the Evidence Act, among others and this court is thus devoid of jurisdiction to entertain and or determine the petition.*

2). *Both the petition and application raise no bonafide or plausible Constitutional issue but are instead a red herring, diversionary and a total abuse of the due process of court.*

3). *The petition and application are Res Judicata and Otiose as all the issues raised therein were raised and determined in previous proceedings already concluded including inter alia KAKAMEGA PMCC NO. 626 OF 1990; KAKAMEGA HC MISC. NO. 55 OF 1991; KISUMU CACA NO. 10 OF 1993; KAKAMEGA HCC NO. 136 OF 1997 (OS); KISUMU CACA NO. 84 OF 1998; KAKAMEGA HCCA NO. 12 OF 1996; KAKAMEGA HCCA NO. 59 OF 2007 and KAKAMEGA HCCC NO. 132 OF 2014.*

4). *That the court has power to grant leave to a party to execute and if the petitioners feel aggrieved by the grant of such leave or if they challenge service of process upon them the option open to them is review, setting aside or even appeal and the sub-ordinate court's orders in issue are not subject to challenge by way of a Constitutional petition as that amounts to an appeal through the back door and is unprocedural, irregular and through a procedure not known or admissible or recognised in law.*

5). *The eviction or execution sought to be stayed was carried out successfully on 29<sup>th</sup> April, 2021 and the petition and application have already been over-taken by events and are merely academic as the court does not issue orders in vain.*

6). *The Court of Appeal has already ruled in KISUMU CACA NO. 84 OF 1998 that land parcel NO. N. WANGA/KOYONZO/1065*

is no longer in existence and that the petitioners have no right or claim to the suit land parcel NO. N. WANGA/KOYONZO/1226 either by adverse possession or otherwise and the current petition is an appeal against the said judgment which is irregular, incompetent and not allowed or unknown in law and the petition raises contentious issues that cannot be dealt with through a Constitutional Petition.

7). *The petition herein is a non-starter, incompetent, incurably defective, untenable, statute barred, improperly before court and a mockery of justice and both the petition and application ought to be struck out with costs.*

10. By agreement of parties, the application was dispensed with and parties instead focused on the petition and the preliminary objection. In view of the principles applicable while determining a preliminary objection, I have opted not to reproduce, at this stage, the contents of the replying affidavit filed by the second and third respondents. If the preliminary objection is upheld then there will be no need to enquire into the evidence adduced by the second and third respondents. If on the other hand the preliminary objection is dismissed, I will summarize and consider the said evidence.

11. The petition and the objection were canvassed through written submissions. The petitioners raised two issues in their submissions: whether the preliminary objection is merited and whether the petition is merited. On the first issue, they argued that the petition raises the question of rights to property, fair hearing, fair administrative action, access to justice which are questions of the Constitution. On the second issue, they argued that orders granting leave to execute orders issued on 22<sup>nd</sup> March 2007 and eviction of the petitioners from the suit property are substantive in nature and could only arise from substantive claims and or suits, not through such a motion as was before the first respondent. They relied *inter alia* on the cases of **C N M v W M G [2018] eKLR** and **Philip Muchiri Mugo v Mbeu Kithekwa [2015] eKLR** and urged the court to allow the petition as prayed.

12. The first respondent and interested party did not file any submissions.

13. The second and third respondents filed submissions and argued that the petition offends the principle of constitutional avoidance. They relied on the Supreme Court case of **Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR** as well as the case of **Bandari Investment Company Limited v National Police Service & others [2021] eKLR**.

14. I will deal first with the preliminary objection since it raises jurisdictional issues. Jurisdiction is the entry point in any matter that the court is called upon to determine and is the very lifeblood of any proceedings. Without it, the proceedings come to a certain end and the court cannot take any further step. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**.

15. As the Supreme Court stated in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**:

*A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ....*

16. The petitioners have moved the court under **Article 22** of the **Constitution of Kenya 2010** claiming that their rights or fundamental freedoms in the Bill of Rights have been violated. Their complaints emanate from and revolve around orders made by the first respondent on 22<sup>nd</sup> May 2007 and on 17<sup>th</sup> March 2021 in Kakamega CMCC No. 626 of 1990. The petitioners are parties to the said case. They claim among others that they were not served prior to issuance of the orders, that the first respondent had no jurisdiction to issue the orders, that the orders were not enforceable since became statute barred pursuant to **Limitation of Actions Act** and that in any case, they had acquired title to the suit property by adverse possession again pursuant to **Limitation of Actions Act**.

17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR** as follows:

*... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in **Communications Commission** case (supra).*

*[17] In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ....*

18. Similarly, the same court stated in **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR** thus:

*Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.*

...

*A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.*

19. The petitioners claim that their right under **Articles 40, 47, 48** and **50** of the **Constitution of Kenya 2010** have been violated, based primarily on the manner in which orders made by the first respondent on 22<sup>nd</sup> May 2007 and on 17<sup>th</sup> March 2021 in Kakamega CMCC No. 626 of 1990 were issued and enforced. Inescapably, validity of the said orders must be determined before the issue of violation of rights under the Constitution can arise.

20. The issues raised by the petitioners can amply be addressed through ordinary statutory and subsidiary legislation avenues. If the first respondent proceeded without jurisdiction, then the petitioners ought to have raised that through appeals against the particular decisions. If the complaint is that orders were issued without the petitioners being served then an application for setting aside ought to have been filed. Additionally, they have the option of seeking review if they can surmount the applicable test. If their claim is that the orders ought not to have been enforced by virtue of **Limitation of Actions Act** then the petitioners ought to have raised that before the first respondent which was the court executing the orders. All those options are available under the **Civil Procedure Act** and rules made thereunder.

21. As regards the petitioners' claim that they have become entitled to the suit property by adverse possession, there are ample provisions under the **Limitation of Actions Act** and the **Civil Procedure Act** for bringing and prosecuting such a claim.

22. In totality, the issues raised in the petition are not within the jurisdiction of the constitutional court in view of the doctrine of constitutional avoidance. I find merit in the aspect of the preliminary objection that raised the doctrine of constitutional avoidance. That being the case, I do not need to consider the other grounds raised in the preliminary objection.

23. A case filed in a court without jurisdiction is dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR.**

24. In the result, the petition herein is struck out with costs to the respondents and interested party.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF MARCH 2022.**

**D. O. OHUNGO**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

**MR NYIKULI HOLDING BRIEF FOR MR SHIFWOKA FOR THE PETITIONERS**

**NO APPEARANCE FOR THE 1ST RESPONDENT AND INTERESTED PARTY**

**MS ALIGULA FOR THE 2ND AND 3RD RESPONDENTS**

**COURT ASSISTANT: E. JUMA**