



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

PET NO. 20 OF 2018

JOYCE SHANGUI KIBE & 7 OTHERS.....PETITIONERS

VERSUS

JEREMIAH PARKIRITO & 6 OTHERS.....RESPONDENTS

RULING

The petitioners in the matter herein filed the petition on 19th December, 2018 seeking various declaratory orders: -

1. A declaration that the revocation of the title deeds and nullification of the deed plan to the parcels of land Cis Mara/Olopusimoru/299,472,499 and 500 then in the petitioners' name without following the due process violated the petitioners' right to own property as guaranteed under Article 40(3) (a) and (b) not to be deprived off its property.
2. A declaration that the revocation of the title deeds and nullification of the deed plans to the parcel of land known as Cis Mara/Oloposimoru/299,472,499, and 500 pursuant to an ultra vires order was illegal, irregular and it breached the petitioners right to property guaranteed under article 40 (3) (a) (b) not to be deprived off its property.
3. A declaration that the issuance of a decree against persons not parties to Narok Misc. Land Case No. 15 of 2002 was arbitrary and breached the petitioners' right to fair hearing as enshrined in article 47 of the Constitution of Kenya.
4. A declaration that issuance of a decree in matter when the petitioner had not been served with a decision of the Olokurto Land Tribunal was irregular arbitrary and in contravention to petitioners' right to a fair hearing as enshrined in Article 47of the constitution.
5. A declaration that the issuance of the order dated 8th August, 2008 by the 5th Defendant after a decree was issued was irregular arbitrary and in violation of the Petitioners right to a fair hearing as enshrined in article 47 of the constitution.
6. A declaration that by issuing an order varying the decree herein and as well varying and/or amending the decision of Olokurto Land Tribunal the 5th Respondent acted ultra vires.
7. Judicial Review orders do issue to remove into High Court to quash the decision of the 5th Respondent to issue a decree when the petitioners had not been served with the decision of the Olokurto Land Tribunal.
8. Judicial Review order do issue to remove into the High Court to quash the orders of the 5th Respondent dated 8th August, 2008 after a decree had been issued and in excess of his/her powers.
9. Judicial orders do issue to remove into the High Court to quash the decision of the 6th Respondent to revoke titles to the parcels of land known as Cis Mara/Olopusimoru/299,472,499 and 500 in names of Petitioners and issue fresh ones in the names of the 1st to 4th respondents.
10. Judicial Review orders by way of mandamus compelling the 6th responden to revoke the titles and deed plans of the parcels of land known as Cis Mara/Olopusimoru/299,472,499 and 500 issued to the 1st to 4th respondents and/or their employee, agents or anybody else claiming them.
11. Judicial review orders by way of mandamus compelling the 6th Respondent to reinstate the title deeds and deed plans as they were before the irregular and/or arbitrary revocation and/or cancelation.
12. Judicial Review orders by way of mandamus compelling the 6th respondent to issue title deed to the petitioners.

13. Compensation for the losses suffered by the petitioners due to the actions of the respondents.

14. Compensation in terms of market value of the parcels of land known as Cis Mara/Olposimoru/299, Cis Mara/Olposimoru/472, Cis Mara/Olposimoru/499, Cis Mara/Olposimoru/500.

Upon the filing of the above the 1st to 4th Respondents raised Preliminary Objections on the point of law to the Petition and raised the following grounds:-

1. That the proceedings before the court do not seek interpretation of any constitutional rights or issues and do not seek declarations on any fundamental Constitutional questions of law instead a Judicial Review motion disguised as a constitutional Petition and this claim therefore ought not to have been brought to court by way of a petition.
2. That the petitioners have approached the court through an entirely erroneous process in some matter res judicata-litigated upon and settled.
3. That the petitioners invoked the wrong procedure in asking the court to give orders of Judicial Review in nature whereas they have purported to approach the court through a constitutional petition and the application thereto offends the mandatory provisions of the law, more specifically the Limitation of Actions Act, and which the petitioners herein are intent on mischievous circumventing.
4. That the petitioners have also invoked the wrong procedure in asking the court to give orders of judicial review yet they have not filed a judicial review application nor have they sought leave to file any such proceedings as is mandatory in law.
5. That the petitioners herein have asked the court to make factual findings on issues of ownership to land which cannot be achieved or litigated through a constitutional petition but can only be properly determined through a substantive law suit where viva-voce evidence will be heard and tested in cross examination.
6. That there is no constitutional matter between the state and its citizens to be determined in this petition and therefore the petitioners have approached the court through an entirely erroneous process for determination of their competing private rights as to ownership of land and this court cannot grant any of the orders sought in a constitutional petition.
7. That there is no matter of public interest raised in the petition that warrants or justifies the use of this procedure to articulate the petitioners' grievances and all the reliefs sought by the petitioners are lawfully available through filing of a private law suit.
8. That the petition is founded on a grossly and incurably defective affidavit, which is for expunging.
9. That the purported petition is an abuse of the courts process, with grave infractions to well set precedents in **Re Mumo Matemu - versus- trusted society of human rights alliance and in Re Annarita Karimi Njeru** on the contents and framing of a petition.
10. That the prayers, including, those of certiorari and mandamus sought by the Applicant against the Respondents are untenable in law for the abovementioned reasons and seeks summary dismissal of the petition herein.

The Respondents submitted that the petition does not comply with rule 4 of the constitution of Kenya (protection of Rights and fundamental freedoms) practice and procedure as the petitioner has not demonstrated any violation and that what is before the court is a judicial review application discussed as a constitutional petition.

The 1st to 4th respondent in their preliminary objection stated the contentions raised in the petition are res judicata as the same was litigated upon and settled and that the petitioners want to circumvent the provisions of the Limitations of Actions Act and thus the petition is an abuse of the process of the court.

The respondent further argues that the petition does not raise substantial constitutional questions of laws as the petitioners have asked the court to make factual determination on the issues of ownership of the land as the same can only be determined by means of a full trial where evidence will be heard and tested in cross examination and that the petitioners have approached the court to determine competing private rights and that the prayers sought of certiorari and mandamus are untenable in law in the circumstances.

The Respondents notice of preliminary objection was supported by the 5th and 6th respondents who also contend that the petition as framed before the court is res judicata and that the petitioners cannot re order a case which was litigated upon and settled.

The 5th and 6th respondent contend that the petitioners ought to have filed a civil suit to ventilate their claim of ownership and not by filing a constitutional petition and prayed that the preliminary objection be allowed.

When the preliminary objection came up for hearing before court I directed that the same be disposed off by way of written submissions. The 1st to 4th respondents in their submissions filed in court submitted that the petitioners have not complied with the mandatory provisions of the law to the extent that they have not demonstrated how their rights were violated and with a reasonable degree of precision and they referred the court to the decisions held in East Africa Pentecostal Churches registered trustees and 175 others and further that the petitioners have not demonstrated how their rights were violated.

On whether the petition raised constitutional issues the 1st to 4th respondents submitted that the petition as framed clearly seeks the

determination of private conflicting claims to a parcel of land and that the issues that are raised can only be determined through a full trial and that there is no constitutional matter to be determined between the state and its citizens.

The 1st to 4th respondents contested that what is before court is a Judicial Review Application and not a constitutional Petition and that the issues are with regard to tilting which is an administrative function undertaken by state officers and the issues contained in the petition are res judicata and it is this belief that the matter herein was litigated before the land disputes tribunal in which its findings were later adopted by the chief magistrate court and therefore what the petitioners have done was to file an appeal but instead filed the instant petition and further thus avoided to file an application for Judicial Review Application.

The petitioners in response to the preliminary objection submitted that the petitioners have clearly outlined with a degree of precision and contend that their rights were breached as contained in paragraph 4,2 and 5 of the petition and have elaborated that their titles were cancelled and they further stated that striking out of a matter is something in which the court should be cautious and must be done in the clearest of circumstances.

The petitioners also contend that their petition is based on complaints that they have against Government officials and more specifically the Senior Resident Magistrate Narok and Land Registrar Narok and that the actions of the two officials have led to the breach of their fundamental rights and that the rights of Judicial Review was not available to them.

On whether the Petition is a Judicial Review Application which is disguised as a constitutional petition it is the petitioners' submissions that if a petition is brought under article 22 of the constitution and the court finds there was a breach the court ought to grant them.

The petitioner further submitted that the petition is not time barred even though the same was filed several years after.

I have read Notice of Preliminary Objection before and the submissions filed in support thereof and in opposition and the issues for determination before the court is briefly summarized as hereunder.

1. Whether the petitioner as proved breaches to constitutional provision with respect to petition
2. Whether the petition is res judicata

It has been established severally that preliminary objection by their very nature are objections, if sustained by the court could substantially settle the issues between the parties and/or conclusively determine the matter to the extent that there will be no need for further hearing and it is from the above position that I will endeavour to answer the preliminary objection that is currently before me.

On whether the petition as constituted is res judicata, the 1st respondent contend that the issues raised in the petition have been heard and determined by the Land Disputes Tribunal and consequently adopted by the Narok Chief Magistrate and thus the matter is therefore res judicata.

Section 7 of the CPA is the anchor of what and when does the suit become res judicata and state it means that the issue dispute must directly and substantially be issued on those that were previously litigated upon. In the instant suit it is not disputed that the prayers contained in the petition are related to what the parties litigated before at the Lands Disputes Tribunal and later adopted by the Narok Magistrate court and that being so, I find that the Petitioners ought to have filed an Appeal to challenge the decision rather than file the instant petition and for the above reasons I find that the petition as framed is res judicata and further that the prayers that the petitioners seek could very well be litigated by way of a Judicial Review Application and not by way of a petition.

On whether the petition enumerates the constitutional breaches with a degree of a precision it is clear that the petition faults the actions of the Chief Magistrate Narok and the Land Registrar Narok in discharge of a Judicial function which the only recourse the petition had was to appeal against decision and the registrar who acted on the orders of a court of competent jurisdiction.

In view of the above I find that the preliminary objection is merited and I thus dismiss the petition with costs to the respondents.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **2nd** day of **July, 2019**

Mohammed Noor Kullow

Judge

2/7/19

In the presence of:-

Kimemia holding brief for Mutuku for the petitioners

Respondents in person

CA:Chuma

Mohamed Kullow

Judge

2/7/19