



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

CONSTITUTIONAL PETITION NO. 3 OF 2019

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES
40 AND 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 22, 40 AND 64 OF
THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE LAND ACT

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

BETWEEN

PHILEMON MORARA APIEMI.....1ST PETITIONER

EDWIN ONDUSO APIEMI.....2ND PETITIONER

VERSUS

CHIEF LAND REGISTRAR.....1ST RESPONDENT

REGISTRAR OF LANDS

KAJIADO LANDS REGISTRY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

By a Petition dated the 21st February, 2019 the Petitioners pray for;

(a) A declaration that the Petitioners rights under Article 40 and legitimate expectation to fair administrative action under Article 47 of the Constitution have been and continue to be violated by the Respondents by their failure to effect registration of the subject property No. Kajiado/Kitengela/8206.

(b) An order do issue against the 1st and 2nd Respondents compelling them to effect registration and issue title to property No. KAJIADO/KITENGELA/8206 in favour of the Petitioners.

(c) The Petitioners be awarded general damages against the Respondents for losses and inconveniences suffered as a result of their Constitutional rights.

(d) The Petitioners be awarded the costs of the Petition.

The 2nd Respondent by a replying affidavit dated the 20th May, 2019, sworn by Paul Tanui the Land Registrar explained that there is a pending caution on the suit land. He stated that the suit land resulted from a subdivision of Kajiado/ Kitengela/ 4260 which was partitioned from Kajiado/ Kitengela/ 1967. Further, vide Civil Suit No. 159 of 1991 a Court had issued Orders restraining the Land Registrar from transferring the said land, and a restriction was later entered as the owner of the said land had died. He states that on the same date the restriction was removed vide a Ruling in Civil Suit No. 159 of 1991, the parcel was gifted to Patrick Kangethe Njuguna on 18th October, 1995. He avers that on 17th July, 2003, a caution was placed on the parcel of land by Jacob Muiru on the claim of being Administrator Purchaser. However, subdivision was done on Kajiado/ Kitengela/ 4260 which yielded thirteen (13) parcels including the suit land. He questioned why the Petitioners had taken so long in the process of registering the transfer of title and the urgency the Petitioners had suddenly developed, 19 years after the said transaction commenced.

The Petition was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the materials presented in respect to the Petition including the rivaling submissions, the issue for determination is whether the Petitioners are entitled to the Orders sought in the Petition.

The Petitioners in their submissions insist the replying affidavit filed by the 2nd Respondent offends the provisions of section 5 and 8 of the Oaths and Statutory Declarations Act as it is not signed. Further, that the same is defective and should be expunged off from the court's record. In support of this argument, they relied on the cases of **Antony Muli Nzioka v Attorney General (2020) eKLR and Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & Other (2018) eKLR**. The Petitioners submitted that the Court should not consider any documents filed by the Respondents as they had not filed a Memorandum of Appearance as per Order 9 Rule 1(b) of the Civil Procedure Rules, 2010. The Petitioners further submitted that they have rightfully and legally acquired the suit land, as per the Sale Agreement and Patrick Kangethe Njuguna was the duly registered proprietor. They contended that they had requested for registration of title from the Respondents in their name upon obtaining Land Control Board Consent, Valuation Report and Paying stamp duty but the Respondents refused to register the suit land in their favour. To buttress their averments, they relied on the case of **Hanington Malingi Janji vs Katana Pekeshe and 7 Others (2013) eKLR** including Article 40 of the Constitution. Further, they claimed their right to own property had been infringed upon. They submitted that the Respondents claim that the title could not be registered in their favour due to an existence of a caution was unfounded and malicious, as none existed at the time, they lodged documents for registration. They referred to the Green Card and insisted that no caution existed except one which they registered during the purchase of the suit land but had the same was withdrawn. They further referred to the Respondents' admission that the suit land was part of the sub division of a property where caution was placed on the mother title but the same was removed vide a court order in Civil Suit No. 159 of 1991. They reiterated that the Respondents failed to uphold and respect the Constitution as stipulated in Article 3 and relied on the case of **Isaiah Otieno and Others -vs County Government of Vihiga eKLR** to support this argument. It was their submission that the Respondents violated their right to fair administration and rules of natural justice as per Article 47 of the Constitution and relied on **Judicial Review Miscellaneous Application No. 36 of 2016, Republic – vs- National Police Service Commission**. The Petitioners contended that they had demonstrated they are proprietors and hold beneficial interest over the suit land yet the Respondents failed to register the title in their favour hence infringing on their constitutional rights. Further, that it is 20 years since the Sale Agreement was executed and the Respondents have failed to register suit land in their favour hence it's only fair that the court awards them general and exemplary damages as per Article 159(2) of the Constitution and as held in the case of **Godfrey Julius Ndumba Mbori & Another v Nairobi City County NRB CA Civil Appeal No. 55 of 2012 (2018) eKLR** .

The Respondents' in their submissions stated that caution by law is estoppel in dealing with the suit land. Further, no dealing can be registered on the suit land unless the Petitioners' request the court to remove it. They contend that the registered owner would be prejudiced if the suit land was registered in the Petitioners' favour. To support their arguments, they relied on Section 73 of the Land Registration Act and the case of **Mwangi Rukwaro & Another v Land Registrar, Nyeri (2019) eKLR**. They further submitted that the Court should comply with the procedure and ascertain the interest of the cautioner. The Respondents submitted that the Petitioners' rights under Article 40 and 47 of the Constitution have not been infringed upon as they lodged the documents with the Land Registrar for registration in their favour in 2012 upon execution of the Sale Agreement in 2000. Further, upon conducting a search on the suit land, the Petitioners found a pending caution and despite this position, they subsequently applied for payment of stamp duty which was duly assessed. They contend that the Petitioners' have not demonstrated that non-registration of the suit land in their favour has hindered development thereon, neither have they shown any loss suffered due to failure to register the said land in their favour. They explained that since 2012, the Petitioners knew there was a caution registered on the suit land yet they ignored it and never sought for its removal. To buttress these averments, they relied on the case of **Kenya National Highway Authority v Shalien Masood Mughal & 5 Others (2017) eKLR**. They further argued that the Petitioners' rights were not violated as a caution and or restriction prohibits transfer, charge or any registration of any interest in the suit land. They submitted that the Petitioners are not entitled to general damages as the same had not been proved. Further, that the award must be upon violation, which the Respondents must be at fault. They sought for the Petition to be dismissed with costs.

In the Petition, the Petitioners contended that on or about 20th December, 2000 they entered into a Sale Agreement with one Patrick Kangethe Njuguna for the purchase of the suit land. The claim to have conducted a search at the Kajiado Lands Registry wherein it was confirmed that Patrick Kangethe Njuguna was owner of the suit land. They explained that in May 2012, they embarked on the transfer process to have the suit land registered in their names. They confirm having adhered to the due process necessary for the transfer of the suit land to wit: Obtaining requisite Consent from the Land Control Board; requisitioning for the valuation of the suit land for purposes of stamp duty from the Chief Valuer Department of Lands and paying the assessed stamp duty. Further, that on 18th May, 2012, they lodged duly signed Transfer Form, Booking Forms, Banking in Slips for Stamp Duty for purposes of registration and also paid the registration fees while waiting for the completion of the said process by the 2nd Respondent. They aver that the 1st and 2nd Respondents have without lawful cause failed to execute their mandate to register the suit land in their names. Further, they have never been informed of any reason for failure to process the said registration. The Respondents on the other hand insist there is a pending caution which estopped them from registering suit land in the Petitioners' names. They proceeded to provide the history of the suit land and insisted that the cautioner's right had to be protected. Further, the Petitioners have not sought for removal of the said caution.

The Petitioners claim the replying affidavit offends the provisions of section 5 and 6 of the Oaths and Statutory Declarations Act. On perusal of the replying affidavit in the court file, I note it has been duly signed by Paul Tanui and commissioned. I hence do not find it defective and

will decline to expunge it from court records. They claim the Respondents failed to file a Memorandum of Appearance as per Order 9 Rule 1(b) of the Civil Procedure Rules, 2010 hence the Court should not consider any documents they have filed. From the Petitioners' averments, I opine they seek to rely on technicalities which offends the provisions of article 159 (2) (d) of the Constitution that states as follows: '***in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.***'

On perusal of the Sale Agreement, I note the same was executed in December, 2000 but the Petitioners commenced the process of registration of the transfer in 2012 which is twelve years later. Further, they have not explained why they took twelve (12) years to commence the process of obtaining the consent of the Land Control Board, Pay Stamp Duty and yet there was already an existing caution. They have not furnished court with any evidence to confirm they sought for the removal of the caution which the 2nd Respondent declined to do. In the case of **ANARITA KARIMI NJIRU VS ATTORNEY GENERAL [1979] KLR 54**, it was held that any Petitioner seeking redress under the constitution must state his claim with precision, referring to the Constitutional provisions which have been violated.

Further in the case of **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**, it was held that:

"...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. 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"

The Petitioners claim to be in possession of the suit land. They have not indicated if the Respondents have tried to deny them access to the said land. The Petitioners furnished correspondence with the Respondents following up on the missing Green Card in respect to the suit land. They have not indicated if they sought for reconstruction of the Green Card. They have not controverted the Respondents averments on the history of the suit land. To my mind, I find that the Petition is premised on private law as the Land Registration Act stipulates the process of removal of caution as well as transfer of land. I further note that the Vendor is not a party to these proceedings yet the Sale Agreement indicated the completion date was on or before 15th April, 2001. As per the Certificate of Official Search dated the 23rd February, 2010 which was furnished by the Petitioners, it confirms that there is indeed a caution pending and the Petitioners have not indicated if they adhered to Section 73 of the Land Registration Act to apply to have the same removed. To my mind, there were several gaps over this transaction which the Petitioners have failed to explain.

The Petitioners sought for general damages but have failed to prove what damages they have suffered from since they had waited for 12 years after entering into a Sale Agreement before commencing the process of registering the suit land in their names after the completion date indicated in the Sale Agreement. In the circumstances, I will decline to award them General as well as Exemplary Damages.

It is against the foregoing that, I find the Petitioners do not have a remedy under the Constitution but should have adhered to the process in the Land Registration Act including the Land Act for reconstruction of Green Card as well as removal of a Caution before they could be registered as owners of the suit land.. **It is my considered view that certain issues raised in this Petition require adducing evidence which I opine cannot be undertaken in this forum but in a civil suit.**

In the circumstances, I find the Petition unmerited and will proceed to strike it out.

I direct each party to bear their own costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 3RD DAY OF MAY, 2021

CHRISTINE OCHIENG

JUDGE