



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC PETITION NO.E01 OF 2021**

STEPHEN RANJI.....1<sup>ST</sup> PETITIONER

PETER MWANGI.....2<sup>ND</sup> PETITIONER

JAMES KIRAGU.....3<sup>RD</sup> PETITIONER

SIMON KAMAU KING'ORI.....4<sup>TH</sup> PETITIONER

SIMON NGIGI NGUGI.....5<sup>TH</sup> PETITIONER

REV. PETER GATUMA.....6<sup>TH</sup> PETITIONER

JOHN KAROMO.....7<sup>TH</sup> PETITIONER

JOHN MACHARIA MUGANE.....8<sup>TH</sup> PETITIONER

*(Suing on their own behalf and on behalf of BLOCK 16 SELF HELP GROUP)*

**VERSUS**

JOSEPH KIHARA MUTHUKIA.....1<sup>ST</sup> RESPONDENT

PATRICK NDEGWA MUNYUA.....2<sup>ND</sup> RESPONDENT

THE DISTRICT LAND REGISTRAR, NAKURU.....3<sup>RD</sup> RESPONDENT

**J U D G M E N T**

1. The petitioner instituted the present petition vide the petition dated 28<sup>th</sup> January 2021 filed in court on 29<sup>th</sup> January 2021. The Petitioners are members of a Self Help Group known as "Block 16 Self Help Group" and have brought the petition on their own behalf and on behalf of the Group. The petitioners claim is that land parcels Nakuru Municipality Block 16/729 and Nakuru Municipality Block 16/730 registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively were public utility plots as they formed part of the road reserve. The petitioners averred that the respondents irregularly and unlawfully acquired the suit

properties in violation of the petitioner's constitutional rights.

2. The petitioners sought the following reliefs against the respondents:-

*(a) A declaration that the petitioners are the rightful and lawful allottees of all the parcel of land known as Road Reserve, unalienated public utility.*

*(b) A declaration that the petitioner's rights guaranteed and protected under section 75 of the repealed constitution and Articles 27,28,29,40,47,48 and 50 of the Constitution, 2010 have been violated by the respondents.*

(c) a declaration that the issuance of the lease by the 3<sup>rd</sup> respondents to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' over parcels of land known as Nakuru Municipality Block 16/729 and 730 was null and void ab initio and ineffectual to confer any right/interest or title upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the first instance.

(d) An order for rectification on the land register by cancellation of the Lease title held by the 1<sup>st</sup> and 2<sup>nd</sup> respondents ( Patrick Ndegwa Munyua and Joseph Kihara Muithukia) in respect of all or any of those parcels of land known as Nakuru Municipality Block 16/729 and 730 respectively so as to restore the said parcels of land as Public land to be utilized as police Post by the petitioners'.

(e) An order compelling the respondents to deliver vacant possession of all those properties known as Nakuru Municipality/block 16/729 and 730 by putting the petitioners in possession and in default the respondents and/or its tenants if any be evicted from the properties.

(f) An order prohibiting the respondents either by themselves, their agents, representatives or assigns from re-entering, taking possession of, alienating or in any other way whatsoever interfering with the petitioners' quiet possession of all those properties known as Public Land and fraudulently registered as Nakuru Municipality /Block 16/729 and 730 respectively.

(g) In the alternative an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves, their agents, servants, employees or otherwise howsoever to give the petitioner either by themselves and or their agents or employees full unfettered physical access to all those parcels of land known as Public Land and fraudulently registered as Nakuru Municipality/block 16/729 and 730 for purposes of retaining as police post.

(h) Costs of this petition.

3. The petitioners case is that they had sought and had been granted approval to set up a police post on the disputed land on the basis that the land was public land and/or a road reserve. They stated they expended substantial sums of money in erecting the temporarily police post. The petitioners acknowledged the 1<sup>st</sup> and 2<sup>nd</sup> respondents sued one Thomas Ngotho in Nakuru CMCC No. 551 of 2011 seeking injunctive orders in regard to the two parcels of land Block 16/729 and 730. They however averred they were not parties in the said suit.

4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed replying affidavits in opposition to the petition and also filed preliminary objections to the petition. The 1<sup>st</sup> respondents preliminary objection dated 23<sup>rd</sup> February 2021 was to the effect that the petitioners lacked the *locus standi* to bring the petition and further that the petitioners having disobeyed the orders of the lower court they ought not to be heard in the petition. The 2<sup>nd</sup> respondent vide his notice of preliminary objection dated 24<sup>th</sup> February 2021 contended that in Nakuru CMCC No.551 of 2011 Thomas Njenga Ngotho (defendant) was representing the interests of Block 16 Self Help Group and as judgment in the suit had been rendered the petition was *resjudicata*. Further as the petitioners claim the suit properties were public property and were allocated to them for purposes of setting up a police post, the petitioners lack the *locus standi* to present the petition. The 2<sup>nd</sup> respondent further contended that the petition lacked specificity and does not satisfy the threshold for a constitutional petition.

5. The court on 9<sup>th</sup> March 2021 directed that the petition be heard and determined on the basis of affidavit evidence, documents and submissions of the parties. The court dispensed with the hearing of the interlocutory application on terms that the prevailing status quo be maintained and preserved pending the hearing and determination of the petition.

6. The court gave directions that the parties exchange their submissions within 60 days. When the matter was mentioned on 14<sup>th</sup> June 2021 only the 2<sup>nd</sup> respondent had filed submissions. Gakinya advocate for the 1<sup>st</sup> respondent indicated he fully associated himself with the submissions filed by the 2<sup>nd</sup> respondent. The court granted the petitioners leave of 10 days from the mention date to file their submissions. At the expiry of the said 10 days and as at the date of preparing this judgment no submissions had been filed by the petitioners.

### **The petitioner case.**

7. The petitioners case as expressed in the petition, the supporting affidavit and the further affidavit sworn by Stephen Ranji is that the petitioners are members of Block 16 Self Help Group duly registered with the Ministry of Gender Children & Social Development as per the certificate of registration issued on 20<sup>th</sup> September 2010. The petitioners are residents of and own properties within Block 16, Bondeni area of Nakuru County. The petitioners aver that land parcel Nakuru Municipality Block 16/729 and 730 fall within a road reserve and was therefore public land. They aver that owing to insecurity they made a request to the Local Administration to be allowed to establish a police post vide a letter dated 4<sup>th</sup> February 2011 addressed to the D.O Lanet Division and that the D.O vide a letter dated 4<sup>th</sup> February 2011 to the District Commissioner Nakuru recommended approval of the request. The Town Clerk Municipal Council of Nakuru vide a letter dated 18<sup>th</sup> March 2011 apparently granted approval for a temporary AP police post and the letter was in the following terms:-

*Re: proposed administration Police post At St. Mary's Area- Nakuru Municipality.*

*We are in receipt of an application from Block 16 Self Help Group (St. Mary's area) residents seeking to put up an office on a road reserve in the estate. The council cannot permit permanent development on road reserve.*

*However, the residents are allowed to place a container on the space to serve as an office on temporary basis. The council shall cause to vacate the site on notice if any works shall be required to be undertaken on the road reserve.*

*The container thereon shall be habitable as verified by the public Health Department and shall remain non-residential. In addition,*

*the site/plot shall not constitute part of any disputed public or private land allocation.*

*Signed by*

*K K Mbulusi*

*Town Clerk*

CC

*Administration Police Base Commandant*

*Nakuru*

*The chairman*

*Block 16 Self Help Group Residents*

*St. Mary's Area- Nakuru*

8. The petitioners state they took occupation and possession and expended substantial resources in setting up the police post. The petitioners averred that soon after they had been allocated the land the 1<sup>st</sup> and 2<sup>nd</sup> respondents appeared and deposited some building materials intending to put up a fence which would in effect Block access to some of their members residences. The 1<sup>st</sup> and 2<sup>nd</sup> respondents claimed they held title documents to the land. The petitioners stated their chairman then one Thomas Ngotho confronted the 1<sup>st</sup> and 2<sup>nd</sup> respondent to prove how they had acquired title to the land. The 1<sup>st</sup> and 2<sup>nd</sup> respondents maintained the parcels of land were owned by them on the basis of the titles they held. The petitioners maintained the titles held by the 1<sup>st</sup> and 2<sup>nd</sup> respondents could not be genuine since the survey records do not even show they exist.

9. The petitioners admit vide the sworn affidavit (paragraph 12 and 16) that Thomas Njenga Ngotho was their chairman and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents indeed sued him in Nakuru CMCC No.551 of 2011 for encroachment and activities on land parcels Nakuru Municipality Block16/729 and 730 seeking permanent orders of injunction. The suit before the subordinate court was duly heard and determined. The subordinate court having found the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the duly registered proprietors of the suit properties and their titles had not been challenged issued an order of permanent injunction restraining the defendant in the suit from in any manner interfering with the suit properties.

#### **The Respondents case.**

10. The respondents submit that the petitioners instant petition in effect is an indirect assault on the decision made in Nakuru CMCC No.551 of 2011 and is therefore brought in abuse of the court process and ought to be dismissed. The respondents assert that the petitioners are in effect invoking the court constitutional jurisdiction to settle what is essentially a matter for the Civil jurisdiction. The respondents in their submissions that the petitioners suit constitute abuse of the constitutional jurisdiction process rely on the case of **Grays Jepkemoi Kiplagat -vs- Zakayo Chepkonga Cheruiyot (2021) eKLR** where this court observed as follows:-

*“although I have in my foregoing discussion adverted to grounds (c) and (d) of the preliminary objection that there are no constitutional issues that warrant adjudication by the court and that the petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the constitutional court”.*

11. The respondents also placed reliance on the cases of **Godfrey Paul Okutoyi & others -vs- Habil Oloka & Another (2018) eKLR and Japheth Ogada Origa -vs- Vice Chancellor University of Nairobi & 2 others (2018) eKLR** to support their submissions that the petition need not satisfy the threshold of what qualifies as a constitutional petition. The present constitutional petition in my view falls within the realm of what should be adjudicated before the Civil Courts.

12. The Respondents additionally have submitted that the petition is *resjudicata* having regard to the determination in Nakuru CMCC 551 of 2011 where the legitimacy of the titles to land parcels Nakuru Municipality Block 16/729 and 730 was in issue. The respondents contend that one Thomas Njenga Ngotho who the evidence shows was a member of the petitioners Self Help Group claimed the parcels of land were public land allocated to the residents to construct a police post. The issue was determined by a competent court and the titles in favour of the respondents were upheld.

13. The Supreme Court in the case of **Kenya Commercial Bank Ltd -vs- Muiri Coffee Estates Ltd & Another (2016) eKLR** while considering the application of *Resjudicata* doctrine at paragraph 54 of their judgment observed as follows:-

*“ (54) The doctrine of res judicata in effect allows a litigant only one bite of the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further relief not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy on the adjudication process. The doctrine prevents a multiplicity of suits which would ordinarily clog the courts, apart from occasioning unnecessary cost to the parties; it ensures the litigation comes to an end, and the verdict duly*

translates into fruits for one party, conclusively”.

14. At paragraph 58 of the judgment the Supreme court further stated as follows:-

*“(58) Hence, whenever the question of resjudicata is raised a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issue determined in the previous case. The court should ascertain whether the parties are the same, or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction”*

15. Applying the principles governing the application of the doctrine of *Resjudicata* to the present case, I am persuaded Nakuru CMCC No.551 of 2011 involved the same parties as in the instant petition. Thomas Njenga Ngotho was a member of the petitioners Self Help Group and was in fact their chairman at the time of the suit. He was in the suit propagating the interest of the petitioners.

16. In the judgment rendered by the subordinate court it is clear what was in issue was whether land parcels Nakuru Municipality block 16/729 and 730 were on public land namely a road reserve that had been allocated to residents of Block 16 to establish a police post. The defendant (Thomas Njenga) gave evidence that the community was allocated the land. There is no doubt that in the suit before the subordinate court, he represented the petitioners. The documents exhibited in the subordinate court are the same documents which exhibited in support of the petition. Though the petitioners may not have been active parties in the suit before the subordinate court, they were aware of the suit and Thomas Njenga (defendant) represented them in the proceedings. In the premises it is my finding that the present petition is *resjudicata* as the issues being raised are substantially the same issues that were raised in the previous suit.

17. The respondents have further submitted that the petition lacks specificity and does not pass the test enunciated in the case of **Anarita Karimi Njeru -vs- The Republic (1976-1980) KLR 1272** and further restated by the Court of Appeal in the case of **Mumo Matemu -vs- Trusted Society of human Rights Alliance & 5 others (2013) eKLR** where the court of Appeal at Paragraph 41 of its judgment stated thus:-

*“(41) We cannot but emphasize the importance of precise claims in 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 coterminous with exactitude. Restated, although precision must remain a requirement as it is important it demands neither formulaic prescription of the factual nor formalistic utterance of the Constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearing, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude exact is to miss the point”*

18. The court further at paragraph 42 of the judgment stated:-

*“--- Cases cannot be dealt with unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are tenet of the substantive justice, as they give fair notice to the other party. The principle in **Anarita Karimi Njeru (supra)** that established the rule requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.*

19. In the case of **Grays Jepkemoi Kiplagat -vs- Zakayo Chepkonga Cheruiyot (supra)** this court stated thus:-

*“ it is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints”*

20. In the present petition, the petitioners have merely set out articles of the constitution that they allege the respondents have violated. The facts set out under paragraph 32 to 43 of the petition on which the petition is based are the same facts that were presented below the court before in Nakuru CMCC No. 551 of 2011 and the court made a determination. There is no definitive evidence that land parcels Nakuru Municipality Block 16/729 and 730 fall within a road reserve. The Agencies Kenya Urban Roads Authority, Kenya National Roads Authority or Kenya National Highways Authority who have mandate over roads are not parties in the petition to affirm whether or not the suit plots are on a road reserve. Further the Kenya National Police Service who exercise mandate over police stations and/or posts have not affirmed the establishment of a police post on the disputed property site.

21. The petitioners have not in my view pleaded the petition with the specificity required to enable the respondents to make an appropriate response. Besides, the petitioners have not demonstrated they have constitutional rights that have crystallized and therefore capable of being violated. The matters the subject of the petition have previously been litigated as aforesaid and the petition is *resjudicata* and is brought in abuse of the court process and the same is unsustainable.

22. The upshot is that I find the petition lacks merit and I order the same dismissed with cost to the respondents.

**JUDGEMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF JULY 2021.**

**J M MUTUNGI**

**JUDGE**