



**Kanegeni v County Government of Nyeri (Constitutional Petition
E008 of 2022) [2024] KEHC 9796 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CONSTITUTIONAL PETITION E008 OF 2022
DKN MAGARE, J
JULY 25, 2024**

BETWEEN

STEPHEN KARIUKI KANEKENI PETITIONER

AND

COUNTY GOVERNMENT OF NYERI RESPONDENT

JUDGMENT

1. The Petition dated 9/9/2022 sought the following reliefs:
 - i. The Honourable court be pleased to declare that all the acts of the Respondent are unconstitutional, null and void.
 - ii. A declaration that the acts of transfer of Nyeri Municipality Block 1/129 to the other parties were procured in infringement of the rights of the Petitioner and are null and void.
 - iii. An order of nullification of the entries of the title as aforementioned.
 - iv. Alternatively, the Respondent to pay compensation equal to the value of the property in Nyeri Municipality Block 1/129.
2. The grounds of the petition were in material that on 4/9/2022, the Petitioner successfully bided in an auction in respect of the property in Nyeri Municipality Block 1/129 and paid Kshs. 180,000/- to the Respondent.
3. It was pleaded in the petition that before the said sale, the owner of the property successfully set aside the auction.
4. However, the Petitioner later learned that the Respondent had transferred the property to other third parties without due process. The Respondent also refused to refund the Petitioner's money.



5. It was the Petitioner's case that the transfers were occasioned by the Respondent despite pending court proceedings. Further, it was the Petitioner's case that the Respondent did not follow due process of the law and in fact informed on the Petitioner's right to fair administrative action.
6. The Respondent filed Replying Affidavit and also raised a Preliminary Objection on the ground of res judicata. The court dismissed the Preliminary Objection.
7. The Respondent therefore relies on its Replying Affidavit dated 30/8/2023. It was deposed that there was nothing constitutional in the Petition since the dispute was purely commercial.
8. It was also contended that the matters in dispute were not for the jurisdiction of this court as the same ought to have been filed in the Environment and Land Court.

Submissions

9. The Petitioner filed submissions dated 20/6/2024. It was submitted that the Petitioner raised breach of private rights to the land and was as such a proper Constitutional Petition. It was further submitted for the Petitioner that this court was empowered to award compensation for constitutional breaches. The Petitioner did not however cite authorities in support of the Petition.
10. On the part of the Respondent, they filed submissions dated 18/6/2024. It was submitted that the petition did not raise constitutional issues. The Respondent further submitted that the claim for compensation was barred under Section 4(I) (a) of the [Limitation of Actions Act](#) as the same would not be brought after the end of 6 years being based on contract. They cited South Nyanza Sugar Company Limited v Charles M. Nyathathe (2022) eKLR.
11. It was also submitted that the court has no jurisdiction to deal with cancellation of transfers as sought since this was a preserve of the Environment and Land Court. They relied on Section 13(2) of the [Environment and Land Court Act](#). Reliance was also placed on Owners of Motor Vessel Lillian S V Caltex Oil K Limited (1989) eKLR. I was urged to dismiss the petition.

Analysis

12. The Respondent's case was chiefly that this court lacked jurisdiction to entertain the matter. On jurisdiction, it has been said for the umpteenth time that jurisdiction is everything. This means that this court must only handle those matters it is required to handle.
13. I note the issues related to the transfer of title where it is alleged that due process was not followed to the disadvantage of the Petitioner. The suit premises were said to have been subject to sale by auction. The Petitioner thus seeks the nullification of entries of title in Land Registration No. Nyeri Municipality Block 1/129. The English nomenclature in the petition therefore clearly related to matters under Section 13 of the [Environment and Land Court Act](#).
14. Therefore, by dint of Article 165 (5) of [the Constitution](#), this court has no jurisdiction to hear this case. Under article 165 (5)2 of [the Constitution](#), it is provided as doth:

The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162.
15. It is my understanding that jurisdiction is everything. The court is bound to take jurisdiction where it has and down its tools where it does not have jurisdiction. My senior brother Nyarangi JA, as then



he was, immortalised these words, in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR as follows: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

16. This means, that the court cannot assume jurisdiction that it does not have nor eschew jurisdiction it has. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, The supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

17. The Petition is thus wrongly before this court. Therefore, I down my tools. What then do I do with this petition? In Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, the high court stated as doth: -

“105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in



Suzanne Butler & 4 Others v Redhill Investments & Another the Court stated the test in the following words:

"When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.

Even though the provisions are clear that jurisdiction in land-related matters belongs to this court, I note that the said provisions are less clear on what "land-related" means. The determination on what land related means has been left for courts to interpret. In order to make a determination as to whether the issues before are land related my attention has been drawn to the decision in the case of Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR, which decision I agree with. In the said case the court stated that;

"In all honesty, it would not be possible for such direction to come from *the Constitution* or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here.

When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

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In my view, the following factors are significant in determining the nature of the contract:

- a. The language of the contract.
- b. The nature of the business of the vendor.
- c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials.
- d. The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and the remedies sought by the Plaintiff” (emphasis mine).

18. There are no mixed questions for this court and for the land court. All the questions were questions related to land. Therefore the petition is a nullity. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

19. The court cannot transfer a nullity. Consequently, the Petition is struck out. Each party shall bear its own costs.

Determination

20. The upshot is that I make the following orders: -

- a. The Petition is improperly filed to this court and the same is hereby struck out.
- b. Each party to bear their own costs.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF JULY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kibicho for Nderi for Petitioner

Mr. Wahome for the Respondent

Court Assistant – Jedidah

