



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAROK

CONSTITUTIONAL PETITION ELC NO. 3 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 22

RELATING TO THE VIOLATION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLE 50 (1)

(FAIR HEARING), 48 (ACCESS TO JUSTICE), 40 (PROTECTION OF RIGHT TO PROPERTY) AND 27 (1)

AND

IN THE MATTER OF SUPERVISORY JURISDICTION OF THE HIGH COURT UNDER ARTICLE 165 (6 AND 7) OF THE CONSTITUTION OVER SUBORDINATE COURT OR ANY PERSON EXERCISING

JUDICIAL FUNCTION

IN THE MATTER OF DENIAL OF ENJOYMENT OF THE FRUIT OF

THE JUDGEMENT DELIVERED ON THE 28TH APRIL 2015 IN

DEFENDANTS FAVOUR IN NAROK CMCC NO. 1 OF 2007

AND

IN THE MATTER OF EVICTION ORDERS ISSUED BY THE SENIOR PRINCIPAL MAGISTRATES AGAINST THE SUCCESS PARTY IN

NAROK CMCC NO. 1 OF 2007

SAMUEL K. NGERECH.....1ST RESPONDENT/PETITIONER

RICHARD .K. BOSEK.....2ND RESPONDENT/PETITIONER

WILSON .K. SANG.....3RD RESPONDENT/PETITIONER

JOSEPH MOSONIK.....4TH RESPONDENT/PETITIONER

-VERSUS-

HON. ATTORNEY GENERAL.....1ST RESPONDENT

AND

JOSEPH KIPKOECH NGERECHI.....APPLICANT/INTERESTED PARTY

RULING

1. The Applicant moved this court by way of a Notice of Motion Application dated 19th March 2019 which was later amended on 28th July 2020. The Applicant is seeking the following orders:-

a. That this court be pleased to dismiss or strike out the Petitioner's Petition.

b. That costs of this application be borne by the Petitioners/Respondent.

2. The application is premised on the grounds of its face, the supporting affidavit of the Applicant together with the annexures thereof.

3. It is the Applicant's contention that the dispute in **Land Parcel Narok CIS/Mara-Lemek/2814 (suit land)** was first dealt with in Narok CMCC No. 1 of 2017 in which the Petitioners allege that they were successful parties; that a further ruling was issued on 23rd December 2015 which the Petitioners failed to challenge in time as directed by the court; that the Petitioners sought leave of court to file an appeal out of time to challenge the aforementioned ruling vide **Narok High Court Misc. ELC Application No. 7 of 2018**; by a ruling delivered on 10th June 2020, leave was granted.

4. Pursuant to the leave granted, the Petitioners filed an appeal vide **Narok High Court Civil Appeal No. 21 of 2020**. The Applicant contends that the dispute surrounding the suit property was already litigated upon by a court of competent jurisdiction hence the intended appeal. Therefore, the instant Constitutional Petition is not proper.

5. The application proceeded by way of written submissions and the Applicant filed his submissions on 7/12/2020. I have perused the affidavit of service on record and note that the Petitioners through their Counsel, were served severally but chose not to participate in these proceedings.

DISCUSSION AND DISPOSITION

6. I have carefully considered the application and the written submissions filed by the Applicant. The only issue for determination is whether the Application is merited and whether the orders sought should be granted.

7. I have taken time to peruse the instant Constitutional Petition filed by the Petitioners. In their Petition, they have asked this court to make several Declaratory Orders alleging violation of their various Constitutional Rights. The gist of their Petition being the warrant of eviction issued by the trial Magistrate in Narok CMCC NO. 1 of 2007 and the subsequent eviction orders issued on 7th November 2018.

8. The Petition is supported by the Affidavit of 1st Petitioner. Annexed to it, is a copy of the Decree issued on 28th April 2015. A reading of it, reveals that the Order was issued in favour of the Petitioners who were the Defendants then. The trial court ordered that the District Surveyor do visit the suit land and comply with order 2 of the Judgement and Decree issued on 28th April 2015.

9. In compliance with the above, District Surveyor did a site visit on the suit land and filed his report in court. The trial court considered the report and delivered a ruling on whether the report by the District Surveyor and the District Land Registrar sufficiently answered the issues raised by the court in its judgement.

10. By a ruling dated 23rd December 2015, the trial Magistrate observed that from the report, among others, the mutation forms issued in respect to the suit land were marred with fraud and irregularities. The trial court further observed that only prerogative writs can be issued against the actions of the land officials; which orders it has no jurisdiction to issue. The trial Magistrate made the following finding:-

“Having so found, I order that the courts determination be concluded by a finding that at this point, after expiry of 30 days window for appeal starting today, the plaintiff shall be entitled without further reference to the defendants to have the defendants evicted from such portion of his land as the defendants are currently in occupation.”

11. A right of appeal and stay of execution were issued within 30 days from the date of the ruling. Subsequently, the trial court did issue an eviction order dated 14th December 2018 against the Petitioners. By an application filed to this court being **Misc. Application No. 7 of 2018**, the Petitioners asked this court to grant an extension of time to file an appeal out of time against the ruling of the trial court dated 23rd December 2015. I thereafter issued the said orders by a ruling delivered on 19th June 2020 and the Petitioners commenced an appeal vide **ELC Appeal No. 21 of 2020**. At the same time, the Petitioners filed the instant Constitutional Petition seeking to quash the eviction orders issued on 7th November 2018.

12. I observe that the resultant eviction orders of 7th November 2018 emanated from the Ruling and Orders issued by the trial Magistrate on 23rd December 2015. If at all there is already a pending appeal from the Ruling and Order issued on 23rd December 2015, there is no justification by the Petitioners to file the instant Constitutional Petition to attack the same Orders on two fronts; that is, through an Appeal and a Constitutional Petition. Naturally, in tandem with the leave to appeal, the Petitioners should have asked for an order of stay of the eviction orders pending their appeal.

13. The law does not give litigants the latitude to appeal against a decision and at the same time allege that their rights have been infringed from the said decision. The Petitioner ought to pick one avenue to ventilate their issues. Their actions respectfully, in my view amounts to “betting” so as to speak and “chancing” where they can get a favourable decision which is an abuse of the court process and a waste of

judicial time.

14. **Mativo J**, in **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** cited with approval the Nigerian Case of **Agwusin Vv Ojichie**. Justice Niki Tobi JSC observed:-

“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two-court process were involved in some gamble a game of chance to get the best in the judicial process.”

15. It is settled law that a litigant cannot pursue *paripassu* two concurrent processes in two different courts which will have the same effect with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. See the finding in **Agnes Muthoni Nyanjui & 2 others v Annah Nyambura Kioi & 3 others [2015] eKLR**.

16. In my humble view, the two processes of both an Appeal and a Constitutional Petition are in law not available to the Petitioners simultaneously. The pursuit of two processes at the same time amounts to an abuse of the court process.

17. I find that the Application by the Interested Party dated 28th July 2020 is merited. To this extent, I am constrained to dismiss the Petitioner’s Petition dated 25th January 2019 with costs to the Applicant.

DELIVERED SIGNED AND READ VIRTUALLY AT MIGORI THIS 30th DAY OF NOVEMBER 2021

MOHAMED N. KULLOW

JUDGE

Ruling delivered in presence of:-

Nonappearance for the 1st - 4th Petitioners.

Nonappearance for the 1st Respondent.

Nonappearance for the Applicant/Interested Party.

Tom Maurice - Court Assistant