



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**PETITION NO. 6 OF 2019**

**IN THE MATTER OF ARTICLES 1, 2, 10, 22, 27, 40, 47, 73, 174, 185 & 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

**AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 10, 27, 73, 174, 185 & 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE COUNTY ASSEMBLY SERVICES ACT NO. 24 OF 2017**

**AND**

**IN THE MATTER OF RULES NO. 1, 2, 14, 20, 21 & 22 OF THE PRACTICE DIRECTIONS OF PROCEEDINGS IN THE ENVIRONMENT & LAND COURT -2011**

**BETWEEN**

**JAMES KIMWETICH KULEI.....PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF UASIN GISHU.....1<sup>ST</sup> RESPONDENT**

**REUBEN KIPKORIR SEREM.....2<sup>ND</sup> RESPONDENT**

**ISAACK A. ROP KIRISWA..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The Petitioner filed an Amended Petition dated 30<sup>th</sup> April, 2019 together with an Affidavit in s and sought for the following prayers:

***a) THAT a declaratory order holding that the proprietary interest in land parcel unregistered Plot No.81 Mugundoi Market situate within Uasin Gishu county measuring approximately 1/8 Acre vests in the Petitioner absolutely.***

***b) THAT a declaration do issue pursuant to Article 2(4) of the Constitution of Kenya, 2010 that the acts and/or omissions of the Respondents in interfering with the lawful activities of the Petitioner, destroying suit property - unregistered Plot No.81 Mugundoi Market situate within Uasin Gishu county measuring approximately 1/8 Acre , barring access to petitioners to the property violated the Petitioner's proprietary rights and are a nullity and invalid for failure of compliance with articles 1, 10, 28,***

40, 47,64 and 186 of the Constitution of Kenya, 2010 and the Respondents have no mandate whatsoever to interfere with the Petitioner while enjoying and /or carrying out his activities on the suit property.

c) **THAT the Respondents be compelled by an order of a mandatory injunction to bar the Respondents whether by themselves, servants and or agents trespassing and / or from interfering, with the Petitioner's activities on the suit property.**

d) **THAT the Respondents be ordered to pay punitive damages for the blatant breach of the provisions of articles 10, 28, 40, 47, 64 and 186 of the Constitution of Kenya, 2010.**

e) **THAT the 2<sup>nd</sup> Respondent be compelled to compensate the Petitioner the value of the suit property at the market rate and in the alternative, an order compelling the 2<sup>nd</sup> Respondent to execute documents to have the transfer of the suit property in the names of the Petitioner:**

f) **THAT the in the alternative, should the Respondents decide to deprive the Petitioner of his land, the respondents be compelled by an order of mandamus compelling the Respondents to jointly and or severally pay Kshs .1,700,000,000/= being fair compensation for the true market value of the suit land herein as per current Valuation.**

g) **THAT the costs of the Petition be awarded to the Petitioner.**

h) **THAT any other appropriate relief that the court may deem fit to grant.**

The Petitioner raised the following issues in the Amended Petition aforementioned:

a) **The Petitioner bought Plot No. 81 Mugundoi Trading Centre from the 2<sup>nd</sup> Respondent and a sale agreement dated 17<sup>th</sup> February, 2014 was drafted and executed.**

b) **At the point of purchase of the suit land, the 3<sup>rd</sup> Respondent, the then chairman of Mugundoi Trading Centre, pointed out and marked the boundaries of the suit land with beacons in the Petitioner's presence.**

c) **The 2<sup>nd</sup> Respondent colluded with the 1<sup>st</sup> Respondent for the 3<sup>rd</sup> Respondent to relocate the Petitioner to a property situate on a road reserve.**

d) **On 8<sup>th</sup> March, 2019 the Petitioner was forcefully removed from the suit property by the 1<sup>st</sup> Respondent's enforcement officers who demolished the Petitioner's permanent house together with his household items valued at Kshs. 1,700,000.00.**

e) **The Petitioner's eviction by the 1<sup>st</sup> Respondent was conducted without following the due process and without a decree of the Court therefore it contravenes Article 47 of the Constitution of Kenya.**

f) **The 1<sup>st</sup> Respondent's decision to evict the Petitioner without according him a hearing and without issuing an eviction notice contravenes Article 47 of the Constitution of Kenya which guarantees the right to lawful, reasonable, procedural and fair administrative action.**

g) **The Respondent's decision to deny the Petitioner access to the suit land contravenes Article 10(1), (2)(a), (b), (c) and (d), 40 and 64 and 186 (sic) of the Constitution of Kenya.**

h) **The 1<sup>st</sup> Respondent's acquisition of the Petitioner's land contravenes the provisions of the Compulsory Acquisition Act.**

The 1<sup>st</sup> Respondent filed a Response to Petition vide an affidavit sworn by **KENNETH MBEKA** both dated 7<sup>th</sup> August, 2019 where he averred any person undertaking a development project must seek approval from the County Government as is required by Sections 29 to 33 of the Physical Planning Act. And that there was no evidence to the effect that the aforesaid approval was sought and granted. That such failure contravenes Section 30(1) of the Physical Planning Act.

The 1<sup>st</sup> respondent also stated that the Petitioner was issued with a Notice to stop the construction but did not heed the notice.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed an Affidavit sworn by **REUBEN KIPKORIR SEREM** and **ISAAC A. ROP KIRISWA** on 16<sup>th</sup> May, 2019 in Reply to the Amended Petition and stated that when the Petitioner purchased the suit land, the area map had already been amended and approved and the said map showed the boundaries, the beacons and the road reserve.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents further stated that the Petitioner dug a pit latrine on the suit land after its boundaries and beacons were pointed out to him and destroyed the beacon markers and began constructing a permanent house on parcel No. 80 which belongs to Kibuit Chepsaigut and which is adjacent to the suit land.

The respondents also averred that the construction of the permanent house was done without the consent of the Mugundoi Trading Centre Committee and without the approval of the Department of Physical Planning of Uasin Gishu County Government.

Counsel agreed to canvas the petition vide written submissions which were duly filed

## PETITIONER'S SUBMISSIONS

Counsel for the petitioners submitted that the 2<sup>nd</sup> Respondent breached the Sale Agreement dated 17<sup>th</sup> April, 2014 and as such the Petitioner is entitled to a refund of the market value of the suit land together with the penalty for breach of contract.

Counsel relied on the case of **SOLOMON NDEGWA KURIA V. PETER NDIRU GITAU [2019] eKLR** to buttress the position.

It was counsel's submission that the 2<sup>nd</sup> Respondent sold Plot No. 81 to petitioner even though the said parcel of land was non-existent.

Counsel further submitted that the Replying Affidavit sworn by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents ought to be struck out for offending the mandatory provisions of Order 19 rule 5 of the Civil Procedure Rules, 2010 and relied on the case of **THOMAS MALINDA MUSAU & 2 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS (2013) eKLR** where the court held that jointly sworn affidavits offend the express provisions of the law as they defeat their primary purpose and they are incurable under the provisions of Article 159 (2) (d) of the Constitution.

Counsel also submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file an authority to swear on behalf of the 1<sup>st</sup> Respondent and that failure to attach the aforesaid authority violates Order 4 rule 1 of the Civil Procedure Rules, 2010 and as such the same should be struck out and cited the case of **MICROSOFT CORPORATION VS MITSUBISHI COMPUTER GARAGE LIMITED (2001) 2EA 460**.

Counsel urged the court to allow the petition as prayed.

## 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENT'S SUBMISSIONS

Counsel reiterated the contents of the replying affidavit and submitted that the Petitioner's claim has not met the threshold of particularity and precision required of a Constitutional Petition.

It was counsel's further submission that the Petition does not state the exact Articles of the Constitution that have been violated by the respondents. Counsel cited the case of **JAPHETH ODODA ORIGA V VICE CHANCELLOR UNIVERSITY OF NAIROBI & 2 OTHERS (2018) eKLR** where the Court stated as follows:

*“It is a principle in Constitutional Litigation that a party seeking reliefs through a Constitutional Petition on the basis of violation of the Constitution, Constitutional Rights and fundamental freedoms, the Petitioner must plead with a higher degree of precision; show constitutional or fundamental freedoms violated, the manner of violation, the Constitutional provision in question or violated and the jurisdictional basis for the litigation...”*

*... the court reiterated the principle that was set out in the case of Anarita Karimi Njeru v Republic No.1(1979) I KLR 54 and which was echoed in the case of Mumo Matemo v Trusted Society of Human Rights Alliance Civil App.290 of 2012 (2013)e KLR and stated that:-*

*“The court reaffirmed the principle of precision in Constitutional petitions observing that the Petition before the High Court referred to articles of the Constitution in the title but provided little or no particulars as to the allegations and the manner of the alleged infringements without enumerating any particulars.”*

Ms Tum submitted that the lack of precision and particularity in the Petition has made it difficult for the respondents to ascertain the allegations of infringement made against them thus making it very difficult for them to know what to respond to.

Counsel therefore urged the court to dismiss the petition as it does not raise any cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

## ANALYSIS AND DETERMINATION

The first issue that the court needs to determine is whether this petition meets the threshold of a constitutional petition as per the principle established in the case of **Anarita Karimi Njeru -vs- The Republic (1979) eKLR** which principle was later restated by the Court of Appeal in the case of **Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**. If it passes the test then the court will move further to determine the issues that arise but if it fails then that would be the end of the case.

The principle established in the **Anarita Karimi Njeru** case (*supra*) was that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. The **Mumo Matemo case** (*supra*) reaffirmed the principle in the **Anarita Karimi case** when the Court at paragraph 44 of the judgment stated as follows: -

*(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1<sup>st</sup> respondent”*

The court further stated in the same judgment that: -

***“It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”***

In the case of **MANASE GUYO & 260 OTHERS V KENYA FOREST SERVICES [2016] eKLR** the Court stated as follows:

***“To succeed in their Petition, the Petitioners are required to state in a clear, concise and precise manner the correlation between the alleged infringement and the action of the Respondent. It was not sufficient to merely cite provisions of the Constitution they believe to have been infringed but to also state the manner in which the provisions were infringed. This is because as it was held in LYOMOKI AND OTHERS VS. ATTORNEY—GENERAL [2005] E.A. 127, the onus, in constitutional Petitions, as in other ordinary civil actions, is upon the Petitioner or the Plaintiff to establish a prima facie case, and thereafter the burden shifts to the Respondents to justify the limitation to those rights”.***

In this petition the petitioners have disguised their claim through a constitutional petition. Even though the petitioner has and is seeking for compensation and a declaration that there was breach of contract. The petitioner has generally mentioned some articles of the constitution; the petitioner has not proved the violation of rights against the respondents.

This petition arises from a sale agreement dated 17<sup>th</sup> May 2014 between him and the respondents. How does this become a constitutional matter? In the case of **Godfrey Paul Okutoyi & others –vs- Habil Olaka & Another (2018) eKLR** Chacha, J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated:

***65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”***

I find that the Petitioner seeks to invoke a constitutional remedy in a matter where he has raised no constitutional issues for the Court’s determination.

I therefore find that the petition does not meet the threshold of a constitutional petition and is therefore dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021.**

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**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***