



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 5 OF 2018

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS

UNDER ARTICLE 40 AND ENFORCEMENT OF THE SAID RIGHTS UNDER

ARTICLES 22, 23, 159 AND 165 OF THE CONSTITUTION OF KENYA

YUDA IMUNYA alias YUDA K. IMUNYA.....PETITIONER

VERSUS

ATANASIO KIBAARA.....1ST RESPONDENT

THE LAND ADJUDICATION OFFICER TIGANIA EAST.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Through an application dated 4.11.2021 the petitioner urges the court to vary and or set aside the directions made on 13.10.2021 with an order that the petition be heard through viva voce evidence and secondly that the summons dated 16.11.2016, 2.3.2017 and 7.4.2017 and supplied by the 1st respondent in his bundle of documents be subjected to forensic analysis and a report be filed in court. The application is supported by an affidavit of the petitioner sworn on the even date.
2. The grounds upon which the application is made are that the signatures appearing on the said documents are different, ID numbers referred to do not belong to the petitioner and lastly the day, time and the place of service is not stated.
3. Further the petitioner states the person by the name Joshua Imunga is not known to him and is not a relative. The petitioner therefore takes the view there is need to subject the documents to forensic analysis after which he would require to cross-examine both the 1st and 2nd respondents as well as the makers of the aforesaid documents through oral hearing given the gravity of the issues raised.
4. The petitioner filed this petition on 17.7.2018 averring he was a recorded owner of **Parcel No. 5392 Karama Adjudication Section** bought from one Adrian Baiyenia Kaumbuthu in 1995. He stated in 2016 the 1st respondent purported to trespass into his land during the pendency of **Meru ELC No. 245 of 2015**. At the time it was averred the ELC case was part heard.
5. The petitioner pleaded that on 2.5.2018 at 3.30 p.m., he was served with A/R proceedings and which in his view were backdated, secretly done and brought too late so as to deny him an opportunity to be heard and or appeal hence violating his constitutional rights as to access to justice, equal protection before the law and right to protection of property.
6. He sought for:- a declaration that the A/R objection was determined before being given an opportunity to be heard and while the ELC case was still pending in flagrant abuse of his constitutional rights; certiorari to quash the A/R proceedings and the decision made on 24.7.2017, and prohibition against the 2nd respondent from entertaining any dispute over the suit land in view of the existence of Meru ELC Case No. 245 of 2016.
7. The 1st respondent filed an answer to the petition dated 10.12.2019, insisted he was not party to the allegation on paragraph 5 of the petition, stated he resided on the land and at paragraph 6 averred the petitioner had failed to appear for A/R case on 23.11.2016 and instead chose to file the ELC case.

8. At paragraph 7 thereof, the 1st respondent averred the petitioner had been summoned thrice hence the committee had no choice but to proceed with the case in his absence.
9. At paragraph 8, the 1st respondent averred he was not duty bound to effect service of documents on behalf of the committee. He alluded he would be raising a preliminary objection on locus and mode of approach of court by the petitioner.
10. The record does not indicate if the petitioner ever responded to the answer to the petition in any manner.
11. Be that as it may the court proceeded to issue summons dated 18.2.2020 and 1.10.2020, since no action was forthcoming from the parties. After several mentions, the parties appeared before the court on 23.2.2021 in which orders were given for responses to be filed to pave way for a pretrial. The petitioner filed his bundle on 7.6.2021.
12. The orders were not complied with by the respondent's leading to directions issued on 13.10.2021 for the parties to comply and the matter be disposed of by way of written submissions.
13. The 1st respondent filed his bundle of documents dated 19.10.2021 in which he attached the three summons, the subject issue in this application.
14. The petitioner submits the respondents must have colluded and or forged the summons and urges the court under **Section 76 (1) of the Evidence Act** to compare the same, maintains they were never served upon him as alleged or at all and hence the basis for a forensic report and secondly an opportunity to testify orally to cross-examine the respondents and or the makers of the documents since it was an attempt to defeat ends of justice in **Meru ELC No. 245 of 2016** which is a grave injustice to depict he had ignored summons which he claims are fabricated and were actually never served upon him.
15. The petitioner has attached the Meru ELC decision made on 12.5.2021.
16. It is not clear if the petitioner and the 1st respondent who were the only parties to the case brought to the attention of the court the pendency of this petition before the aforesaid matter was heard and determined.
17. Be that as it may at paragraph 5 of page 4 of the Meru ELC judgment, the petitioner denied service of any summons at page 7 admitted he is a brother of the 1st respondent and at page 11 thereof the A/R objection issue was raised and made references to the summons dated 23.11.2016 where the petitioner failed to appear and at page 12 there is a mention the summons were not signed but had only a thumb print.
18. Looking at the foregoing it cannot be true the petitioner only came to know of the existence of the disputed summons in October 2021. The issue was alive in the previous case and again was pleaded as early as December 2019 by the 1st respondent.
19. The court record indicates parties were ordered to comply with **Order 11** of the **Civil Procedure Rules**. The parties have not fully complied with the said orders for over six months. The purpose of **Order 11** is to narrow down issues, agree on the mode of calling for expert's evidence, agree on timelines for trial and the mode of trial.
20. A party coming to court must be prepared with evidence and make deliberate efforts to call for that evidence through discoveries and a notice to produce. The petitioner has not demonstrated any efforts he has made to subject the summons to forensic audit since 2017 and 2019 respectively. He has not told this court if he has made a complaint to the makers or originators of those documents that is the 1st respondent. It is his duty as a Kenyan to report and make a formal complaint if he holds a strong view that the said documents are forgeries. He has not told the court if he made an OB entry and or complaint which has not been acted upon so as to seek for the court's intervention.
21. There is an investigative arm of government which is the first port of call and which does not need to be directed by this court to undertake its investigations.
22. Having said that the petitioner/applicant is at liberty to make a formal report with the Land Fraud Unit of the DCI and thereafter file the report if he intends to rely on it as part of his evidence in this matter.
23. Regarding the issue of review of an order on the mode of hearing the petition as indicated above the petitioner seeks for specific orders based on specific claim on the infringement of his constitutional rights.
24. The petition was brought in 2018 and hence as indicated above the applicant has taken no reasonable efforts to have it heard expeditiously. Given that the intended investigations once lodged might take time, it would be putting the cart before the horse to review the mode of disposal of the petition before all parties file and exchange responses.
25. The petitioner is ordered to put his house in order and set down the petition for hearing within six months.
26. My finding is the application is premature at this stage.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20TH DAY OF DECEMBER, 2021

In presence of:

Kieti for 2nd and 3rd respondents

C.P. Mbaabu for petitioner

Otieno C. for the 1st respondent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE