



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC PETITION NO.10 OF 2018

IN THE MATTER OF ARTICLE 61 AND 64 OF THE CONSTITUTION OF KENYA

SAMWEL KENGERE MAGETO.....PETITIONER

-VERSUS-

ESTHER KWAMBOKA SIRIMANI.....RESPONDENT

JUDGMENT

INTRODUCTION

1. On 15th March 2018, the Petitioner filed this suit vide a Petition dated 26th September 2018 seeking that 0.5 acres of land parcel number NYARIBARI/CHACHE/NYANTURAGO/24 (hereinafter referred to as “**the suit property**”) registered in the name of the Respondent be declared as his and a title deed be issued to that effect.

2. He claims that he bought a portion of the suit property measuring approximately 0.5 acres from one Moyabe Mabuya and Maranga Mabuka (deceased) in 1984. The said Moyabe Mabuya was the original owner thereof. He took possession of the said portion and planted thereon tea bushes and other crops. He avers that the said portion is his only source of livelihood.

3. The Respondent’s late husband one Sirimani Blasio Matara also bought part of the suit property from Moyabe Mabuya and Maranga Mabuka. The Respondent’s late husband undertook succession proceedings and caused the suit property to be transmitted solely to himself leaving the Petitioner out despite the fact that he was in occupation of 0.5 acres of the suit property. After her father died, the Respondent commenced succession proceedings vide **KISII HC SUCCESSION CAUSE NO. 92 “B” of 2007** without involving the Petitioner. The suit, (**KISII CMCC NO 810 OF 2002**) abated after the death of the Petitioner’s husband who was the Plaintiff. The Respondent in her Replying Affidavit dated 20th June, 2008 acknowledged the same.

4. In response to the Petition the Respondent filed a Replying Affidavit on 30th November, 2018 in which she claims that the suit property which measures approximately 1.6 acres is registered in the name of her late husband, Sirimani Blasio Matara. She further claims that her late husband bought the suit property from one Obonyo Mayaye who died in 1979. Her husband commenced succession proceedings concerning his interest in the estate of the late Obonyo Mayaye vide **KISII HC SUCCESSION CAUSE NO. 139 OF 1993**. There was no objection from anybody and thus the court confirmed the Grant and her late husband was subsequently registered as the owner of the suit property.

5. The Respondent’s late husband filed a suit vide Kisii HCC NO. 184 OF 1997 seeking eviction orders against the Petitioner. The matter was later transferred to the Chief Magistrate’s Court at Kisii for hearing and was renamed, **KISII CMCC NO 810 OF 2002**. The court later referred the suit to the then D.O Keumbu for arbitration and the verdict was that the Petitioner was to move out. The verdict of the Arbitration was adopted as the judgment of the court on 10th February, 2005 and a decree dated 14th February, 2005 was extracted. The Respondent’s husband later died on 30th June, 2006 and she commenced succession proceedings vide **KISII HC SUCCESSION CAUSE NO 92 “B” of 2007** in respect of her husband’s estate being the suit property.

6. The Petitioner filed an objection which was eventually dismissed and a Ruling entered in her favor on 7th March, 2018 and her Grant for Letters of Administration confirmed on 14th June, 2018. The decree dated 10th February, 2005 in **KISII CMCC NO 810 OF 2002 (formerly Kisii HCC NO. 184 OF 1997)** declaring the Petitioner a trespasser on the suit property and ordering him out has not been set aside

7. The Respondent contends that the Petitioner’s claim that he bought the property from one Moyaye Mabuka and Maranga Mabuka is false because the two were strangers to the suit property given that the green card only bears the name of the late Obonyo Mabuka who sold the same to her late husband

8. The Respondent also filed a Notice of Preliminary Objection which she termed as a Notice of Preliminary Points of law where she alleged

that;

- a) The Petition is *Res-judicata*.
- b) The Petition discloses no cause of action.
- c) The Petition is frivolous and vexatious.
- d) It is an abuse of the process of the court.

9. The parties agreed to dispose of the matter by way of written submissions. The Petitioner filed his written submissions on 2nd December while the Respondent filed her written submissions on 26th January, 2021.

ISSUES, ANALYSIS AND DETERMINATION

10. Before considering the issues that arise from the averments of the parties herein above and their subsequent written submissions, it will be critical for me to first and foremost determine whether the Petition before me has met the threshold of what constitutes a Constitutional Petition.

11. The threshold was summarized in the case **Anarita Karemi -vs- Republic 1976-1980 KLR** where **Trevelyan & Hancox, JJ** held as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

12. Further in **Ostenah Ogero Taracha v Ethics & Anti-Corruption Commission & Attorney General [2017] eKLR** the court held that:

It is not however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved. Section 107 (1) of the Evidence Act Cap. 80 Laws of Kenya is clear in this regard and provides as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

The letter and spirit of the above provision has been captured in several decisions of the superior courts including but not limited to the cases of Anarita Karimi Njeru -vs- Republic [1979] eKLR and Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR. Ancillary to the foregoing is the requirement that any prospective petitioner ought to set out his or her complaint with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed.

13. The heading of this Petition is captured partly as...“**IN THE MATTER OF ARTICLES 61, 64 OF THE CONSTITUTION**” The Petitioner has not indicated whether the said Articles of the Constitution have been violated by the Respondent. Even if I was to assume that that was the case, the Petitioner has neither mentioned nor attempted to demonstrate how the said provisions of the Constitution have been violated with precision and clarity to enable me ascertain whether or not a right has been infringed by the Respondent.

14. Article 61 of the Constitution of Kenya provides that;

1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.

(2) Land in Kenya is classified as public, community or private.

15. Article 64 on the other hand provides that;

Private land consists of --

(a) registered land held by any person under any freehold tenure;

(b) land held by any person under leasehold tenure; and

(c) any other land declared private land under an Act of Parliament.

16. There is no correlation between the above provisions of the Constitution and the averments raised in the Petition to enable me make a declaration that the Constitutional Rights of the Petitioner have been infringed.

17. From the foregoing therefore and without delving into the issues raised by the Respondent in opposition to this Petition, I find and hold

that the Petition does not meet the threshold of a Constitutional Petition and I dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF APRIL, 2021.

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J.M ONYANGO

JUDGE