



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC PETITION NO.4 OF 2020

ESTHER SARANGE NYANG'AU.....PETITIONER

VERSUS

MOSES NYABUTO MOREKA.....1ST RESPONDENT

MOSES NYABUTO MOREKA.....2ND RESPONDENT

DANIEL OTONDI NYANG'AU.....3RD RESPONDENT

THE LAND REGISTRAR-KISII COUNTY4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

1. This Judgment is with respect to the Petition dated 16th July, 2020 wherein the Petitioner sought a declaration that she is the absolute owner of land parcel No. SOUTH MUGIRANGO/NYANTARO 1187 Measuring 1.0 acres (hereinafter referred to as 'the suit property') and that all subdivisions emanating from it which are SOUTH MUGIRANGO/NYANTARO/ 2551, 2552, 2853, 2856 and 2857 be cancelled forthwith.

2. In support of his Petition, the Petitioner in her Supporting Affidavit averred that the suit property belonged to her and her late husband one Nyang'au Okachi to whom she was married in 1960. Her husband got registered as the proprietor of the suit property in 1970 and was issued with a title deed in the same year. They lived on the suit property for a period of 50 years with all their 9 children.

3. In 2016 the Plaintiff received a demand letter from a Nyeri Advocate demanding that she moves out of the suit property as the same had allegedly been sold off. Upon looking at the agreement attached to the letter, she discovered that the 1st and 2nd Respondents had purchased the suit property by way of fraud as they used a wrong identity number of her husband and also forged his signature.

4. She made subsequent complaints to Etago Police station, Office of the Director of Public Prosecution, the Commission for Administrative Justice and the Ministry of Lands and Physical Planning. Despite her efforts to ensure that the fraudulent subdivisions were nullified she did not make any headway necessitating the filing of this suit.

5. In response to the Petition, the 1st, 2nd and 3rd Respondents filed a Replying Affidavit dated 5th October, 2020 sworn by the 1st Respondent. The 1st Respondent averred that, the Petitioner had sued 2nd and the 3rd Respondents in this court in case number KISII ELC NO. 361 wherein the subject matter is LR NO. SOUTH MUGIRANGO/NYANTARO/ 2551, 2552, 2853, 2856 and 2857. The said suit is still pending determination of this court. They therefore contend that the filing of this suit seeking ownership of the said parcels through this Petition is an abuse of the court process.

6. It is their belief that this court will resolve the issue of ownership of the aforementioned parcels in suit; KISII ELC NO. 361. It is also their averment that the Petitioner has not shown any sufficient cause for seeking the orders in the Petition and thus the Petition should be dismissed.

7. The court thereafter directed the parties to file their written submissions. However, it was only Petitioners who filed their submissions.

ISSUES FOR DETERMINATION

8. Having considered the Petition, the Petitioner's Supporting Affidavit, the Replying Affidavit filed by the 1st Respondent and the written

submissions filed by the Petitioner, I deduce the following as the main issues for determination.

a) Whether the Petition meets the threshold of a Constitutional Petition.

b) Whether the Petition is barred by the doctrine of *Sub-judice*.

ANALYSIS AND DETERMINATION

Whether the Petition meets the threshold of a Constitutional Petition

9. Any person who wishes to institute a claim through a constitutional claim must ensure that he or she has met the threshold set in the case *Anarita Karemi -vs- Republic 1976-1980 KLR* wherein *Trevelyan & Hancox, JJ*, summarized it 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.”

10. 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.

11. From the foregoing cases, it is clear that the Petitioner was called upon to state with clarity, the alleged violation and/or threatened violation of the fundamental rights, the manner in which the fundamental rights are being violated and or threatened to be violated and provision of the constitution, that anchor the impugned rights. In an attempt to meet the threshold, the Petitioner has listed articles 24 (1) (d), 25 (c), 17 (2), 28, 40 (2), 47 and 156 but failed to with clarity and precision state how the Respondents more particularly the 1st, 2nd and 3rd violated those provisions.

12. It is crucial to note that the reason why there is such a threshold in Constitutional Petitions is that courts must at all times guard against improper transmission of normal disputes or ordinary issues of litigation being clothed as Constitutional Petitions. In as much it is a principle of law that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court, in deciding whether to entertain a suit, courts must take into account the existence of such a remedy and its application to the issues at hand. This position was adopted from the case of *Francis Oyagi Vs Samwel Motari Mangare and 2 Others (2018) eKLR* where the Honourable Court observed that;

“The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.”

13. The claim raised by the Petitioner in the Petition is a private law claim whereby she is seeking a declaration that she is the absolute owner of land parcel No. SOUTH MUGIRANGO/NYANTARO 1187 measuring 1.0 acres and all subdivisions emanating from it which are SOUTH MUGIRANGO/NYANTARO/ 2551, 2552, 2853, 2856 and 2857 be cancelled forthwith. These remedy that Petitioner wants this court to grant is one that can be achieved by them instituting an ordinary suit through a plaint and not through a constitution court.

14. Thus, I find that the Petition before me does not meet the threshold of what constitutes a Constitutional Petition and that the claim therein is an ordinary civil claim that can be canvassed through a plaint and not a constitutional reference.

Whether the Petition is barred by the doctrine of *sub-judice*.

15. Section 6 of the Civil Procedure Act expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. This simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

16. It is common ground between both parties that the instant suit was filed despite the existence of another suit (KISII ELC NO. 361 of

2016) which is still pending. The only addition as far as the parties are concerned is the inclusion of **The Land Registrar-Kisii County and The Hon. Attorney General**. The facts and reliefs sought are wholly if not substantially similar to the earlier suit given that it concerns the suit property and the subdivisions thereon.

17. The Supreme Court of Kenya in **Kenya National Commission on Human Rights VS Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)** had occasion to pronounce itself on the subject of *sub judice*. It aptly stated:

”....[67] The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.....”

18. The basic purpose and the underlying object of *sub judice* is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed at preventing multiplicity of proceedings.

19. I find that the Petitioner has presented the same issues which are currently being litigated in the earlier case (KISII ELC NO. 361 of 2016), This suit presents an untenable scenario of not only having parallel proceedings on the same issues involving the same parties but also a great risk of these courts granting conflicting orders. This suit falls within the ambit of what constitutes abuse of the court process.

20. Having established that the Petition did not meet the threshold of a Constitutional Petition and the suit is barred by the doctrine of *Sub Judice*, I have no choice but to dismiss the Petition with costs to the Respondents.

Dated, signed and delivered at Kisii this 11th day of June, 2021.

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J.M ONYANGO

JUDGE