



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC PETITION CASE NO. 5 OF 2018**

**IN THE MATTER OF ALLEGED OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 20(1)-(4), 21, 22, 23, 40, 47, 48, 50(1), 50(2) (a, c, d, e, f, k, (5)a, b, (6), 57, 159, 165 AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS), PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTERS OF:**

**NYERI CR. NO. 962 OF 1982 REPUBLIC VS GEORGE WACHIRA KIRIRA**

**NYERI HCRA NO. 510 OF 1982 REPUBLIC VS GEORGE WACHIRA KIRIRA**

**NYERI HCC NO. 286 OF 1982 JOE MAINA RUTHUTHI VS GEORGE WACHIRA KIRIRA**

**ARISING FROM ARBITRATION PROCEEDING THEREFROM**

**BETWEEN**

**GEORGE WACHIRA KIRIRA.....PETITIONER**

**AND**

**DEPUTY REGISTRAR, HIGH COURT NYERI.....1<sup>ST</sup> RESPONDENT**

**NANCY WARUINGI T/A PROVIDENCE AUCTIONEER.....2<sup>ND</sup> RESPONDENT**

**JOE MAINA RUTHUTHI .....3<sup>RD</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR, NYERI.....4<sup>TH</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL.....5<sup>th</sup> RESPONDENT**

**JUDGEMENT**

1. The Petitioner filed his Petition dated the 10<sup>th</sup> September 2015 on an equal date. The Petition was supported by an affidavit sworn by the Petitioner on 10<sup>th</sup> September 2018, wherein he sought for the following orders;

a. A declaration that the Respondents jointly and/or severally have contravened the aforementioned provisions of the Constitution of Kenya.

- b. A declaration that the Petitioner was the rightful and lawful owner of parcel No. Ruguru/Kiamariga/410.
- c. A declaration that the arbitral proceedings without participation of the Petitioner and all the consequential orders emanating therefrom have contravened the right of fair trial of the Petitioner as contained in the Constitution.
- d. A declaration that the Petitioner's right to administrative action that is expeditious, effective, lawful reasonable and procedurally fair as provided for by Article 47 of the Constitution and guided by the principles of natural justice were in their entirety violated.
- e. A declaration of the purported auction conducted by Messrs. Providence Auctioneers and subsequent notification of the sale referring to a disposition of parcel Ruguru/Kiamariga/410 to the 3<sup>rd</sup> Respondent and the ensuing vesting order in favour of the 3<sup>rd</sup> Respondent have contravened the Petitioner's Constitutional rights to property.
- f. A declaration that the order made by the Land Registrar Nyeri, vesting the property upon the 3<sup>rd</sup> Respondent be declared unconstitutional be and is hereby lifted and consequently the Petitioner (sic) as the duly registered proprietor of the property known as LR Ruguru/Kiamariga/410.
- g. A declaratory order that the failure by the Deputy Registrar Nyeri to schedule the Petitioner's Criminal Appeal Case HCCRA 510 of 1982 Nyeri, violated the right to fair trial of the Petitioner.
- h. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' decisions were grossly unreasonable, high handed, biased, oppressive, ultra vires, in defiance of logic and unacceptable moral standards and therefore ab initio (sic)
- i. A declaration that the arbitral award which was in favor of the 3<sup>rd</sup> Respondent for special damages, general damages together with costs incidental to the proceedings in as far as it attributes any responsibility for the loss of the Petitioner's property or otherwise affects the Petitioner as unconstitutional.
- j. Damages for trespass to land.
- k. Damages for loss of quiet and enjoyment and possession of property.
- l. Damages for mesne profit.
  - i. Permanent injunction restraining the 3<sup>rd</sup> Respondent from entering, trespassing and/or any acts either by himself or servants or any other persons acting directly under his instructions from interfering with the proprietary interest in LR Ruguru/Kiamariga/410 of the Petition (sic) in whatsoever manner.
- m. Damages for breach of fundamental Constitutional rights of the trial.
- n. The costs of the Petition be provided for.
- o. Such other order(s) as this honorable Court shall deem fit and just to grant.

2. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, filed their grounds of opposition to the Petition to the effect that the Petitioner was trying to revive a matter that had already been heard, determined and finalized by Courts of competent jurisdiction and therefore the same was Res judicata. That the said Petition was therefore incurably defective.

3. On the 26<sup>th</sup> February 2019, the Court gave directions that the Petition be disposed by way of written submissions wherein after, parties filed their submissions, and save for the State Counsel for the 1<sup>st</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents who chose to rely on their written submissions, the rest of the parties highlighted on their respective submissions on the 20<sup>th</sup> November 2019.

4. I have considered all the parties' submission and highlight herein. The Petitioner's case is based on the fact that the Petition dates back to the year 1982 where there had been a dispute between the Petitioner and the 3<sup>rd</sup> Respondent that led to the Petitioner being charged and convicted in Criminal Case No. 962 of 1982 on the 6<sup>th</sup> October, 1982.

5. That during his imprisonment (of 20 months) he had filed an Appeal before the High Court being Nyeri HC Criminal Appeal No. 510 of 1982. As he awaited the hearing of the criminal Appeal, the 3<sup>rd</sup> Respondent had instituted Arbitration proceedings without his sanction and notice as he was still in custody. That he had neither been consulted nor called for any hearing of the arbitration or to approve the choice of Arbitrator as is required by the Arbitration rules. The only time he had been summoned was during the delivery of the Arbitration award, which award was in favour of the 3<sup>rd</sup> Respondent.

6. The Petitioner had subsequently been ordered to pay damages of Kshs.80,000/- and special damages of Kshs.22,000/- plus costs.

7. The 3<sup>rd</sup> Respondent then filed enforcement proceedings before the Nyeri High Court being No. 286 of 1982. The Petitioner being dissatisfied with the decision of the Arbitration filed numerous applications through numerous advocates challenging the manner in which he had been denied a chance to participate in the Arbitration proceedings.

8. That after the award had been enforced, the 3<sup>rd</sup> Respondent appointed the 2<sup>nd</sup> Respondent to proclaim the Petitioner's land which was title No. Ruguru/Kiamariga/410 measuring approximately 6 acres. The sale by the auctioneer was to recover Kshs.102,000/- plus costs. It was the Petitioner's contention that the property at the time was valued at Kshs.1,600,000/- and therefore the 2<sup>nd</sup> Respondent ought to have returned the balance of the proceeds, after the sale by auction, to him.
9. The Petitioner's effort to challenge the said under-sale by the 2<sup>nd</sup> Respondent was declined by Court based on procedural technicalities for reason that the suit had been filed out of time. The Petitioner had rushed to the Court of Appeal vide Civil Appeal No. 139 of 2008 wherein he had challenged the sale on grounds of collision and illegality. The application was dismissed on grounds that the Appeal had been filed out of time.
10. The 3<sup>rd</sup> Respondent had subsequently sought for eviction orders against the Petitioner who was evicted and the vesting orders registered in favour of the 3<sup>rd</sup> Respondent. As a result, the Petitioner had been rendered a pauper who now resided on the road reserves thus the reason for filing the present Petition claiming that the Respondents herein had contravened the provisions of the Constitution. He thus sought to be declared the rightful and lawful owner of parcel No. Ruguru/Kiamariga/410.
11. The Petitioner further sought that the arbitral proceedings without his participation and all consequential orders emanating therefrom contravened his right to fair trial as contained in the Constitution and therefore orders be issued pursuant to his prayers (in a-o) as contained in the Petition dated 10<sup>th</sup> September, 2018.
12. The Petitioner's submission on whether a Constitutional matter was civil or criminal in nature as contained in the Respondent's preliminary objection where they had cited Section 6 of the Judicature Act, was that the matter was neither Civil nor Criminal in nature as the issues raised were Constitutional matters pegged on issues of fundamental rights. He relied on the decided case of **Joel Oonsare vs Governor Trans Nzoia County & 16 Others [2014] eKLR**, and **CNM vs WMG [2018] eKLR** where the Court cited the South African case of **Fredericks & Others vs MEC for Education and Trading, Eastern Cape & Other [2002] 23 ILJ 81 (CC)** to buttress his submission.
13. The Petitioner invited the Court to consider the provisions of Article 47 of the Constitution in his submission that his rights had been violated and had continued to be violated wherein he prayed that he be granted the appropriate reliefs sought herein. His argument had been that his right to property, fair hearing, administrative action, access to justice and right of older members of society under Articles 40, 50, 47, 48, and 57 respectively had been infringed.
14. On the issue of the Petition being Res-judicata, the Petitioner's submission was that the doctrine of Res-judicata was a judicial device for finality of Court decisions which was subject to special circumstances of fraud, mistake or lack of jurisdiction. That the Respondents had not annexed any Judgment emanating from the High Court No. 580 of 2012 or any matter in the Civil Appeal duly determined and further that the rulings herein were not final orders in the circumstance. They relied on the case of **Silas Make Otuke vs Attorney General & 3 Others [2014] eKLR** to buttress their submissions.
15. In response and opposition of the Petition herein, Counsel for the 3<sup>rd</sup> Respondent submitted that the case had not started as an arbitral matter but by way of a Plaint in the High Court registered as Nyeri High Court No. 286 of 1982 where there had been a Plaint and a defence filed and whereby the Applicant had fully participated in the matter. On the 20<sup>th</sup> September 1984, by consent, and in the presence of the Petitioner, the matter had been referred for arbitration, and an award issued.
16. That subsequently the award had been filed, wherein the Petitioner had filed an application dated the 12<sup>th</sup> January 1986 to set it aside, which application was later withdrawn with costs and the award adopted on the 7<sup>th</sup> November 1994 as judgment of the Court with no opposition from Counsel for the Petitioner.
17. Subsequently the costs had been assessed on 20<sup>th</sup> December, 1996 at Kshs.64,565/-. The execution proceedings were thus commenced as the Applicant did not pay the cost. The 3<sup>rd</sup> Respondent then filed an application for the Petitioner's land to be sold by public auction to satisfy the decretal amount wherein the Deputy Registrar granted the prayers so sought that the land be sold by Public Auction and the decree holder (3<sup>rd</sup> Respondent) be allowed to bid. This was after the Court had noted that the judgment debtor (Petitioner), having been served, had declined to appear in Court.
18. That the 3<sup>rd</sup> Respondent paid and purchased the property at the public auction wherein after it had been registered in his name and he had commenced eviction proceedings, that the Petitioner had woken up from his slumber and had embarked on the application to set the sale aside.
19. Vide a Ruling of the 21<sup>st</sup> November, 2001 Justice Juma had dismissed the said application wherein the Petitioner filed an Application seeking to review the dismissal of the application which application was again dismissed on 11<sup>th</sup> December, 2002. The Petitioner not being satisfied filed yet another Application to set aside the ruling of 11<sup>th</sup> December, 2002 which Application was dismissed yet again on 15<sup>th</sup> November, 2007.
20. The Petitioner then filed an application to the High Court seeking for enlargement of time to file a notice of Appeal in the Court of Appeal. The application was dismissed on 6<sup>th</sup> March, 2008 as it was incompetent.
21. An application to the Court of Appeal dated 4<sup>th</sup> January, 2008 was then filed for leave to file and serve Notice of Appeal in Court of Appeal Civil Application No. 139 of 2008 which application was allowed and the Petitioner was granted 14 days to file and serve his notice of Appeal. The said Notice was filed within time but the Petitioner did not serve it within the stipulated 14 days and as such, on the 4<sup>th</sup>

November, 2009 the Notice of Appeal was struck out.

22. The Petitioner then filed a fresh application to file the Notice of Appeal out of time in Civil Appeal No. 11 of 2013 which Application had been heard and dismissed on the 26<sup>th</sup> November, 2013 by the Court of Appeal wherein the Petitioner had then filed a reference to the full bench of the Court of Appeal. The reference had been heard and subsequently dismissed again by the full bench of the Court of Appeal on the 10<sup>th</sup> December, 2013 as per the findings annexed in the 3<sup>rd</sup> Respondents' response.

23. The 3<sup>rd</sup> Respondent's further submissions was that what the Petitioner now sought to recover was his land by revisiting the dismissal order of Justice Juma, which order was not Appealed against. That no Constitutional provisions had been breached as the Petitioner had fully participated in all forums in this case. That secondly there had been no fraud committed.

24. That the matter was Res Judicata as it had been handled by Courts of competent jurisdiction and was between the same parties wherein it had been finally determined.

25. That the Petition was incompetent as the Petitioner was now trying to achieve what he had not achieved after exhausting all the provisions of the Civil Procedure Act and Rules and the Court of Appeal Rules.

26. The 3<sup>rd</sup> Respondent relied on the authority in the case of **Yasmin Rashid Ganatra & Another vs Gulzar Abdul Wais & Another [2017] eKLR** to submit that the present Petition did not meet the threshold of a Constitutional Petition against him and therefore the same ought to be dismissed with costs.

27. Counsel for the 2<sup>nd</sup> Respondent's submission was that the auctioneers had come into play at the end of the tither where they had been duty bound to execute Court orders. That they had been taken through all processes that the Petitioner went through in which all of them had been dismissed.

28. That the 2<sup>nd</sup> Respondent was carrying out Court orders and was protected by the provisions of Section 6 of the Judicature Act. That as per their annexure of the Court's findings in Civil Case No. 467 of 2010, the same had also stated the duties of an auctioneer pursuant to executing Court orders in good faith. No bad faith could be attributed to the 2<sup>nd</sup> Defendant as she was not a party to proceedings.

29. That Article 47 of the Constitution was not available to the Petitioner. That this was a judicial process and not an action process. That the right to a fair trial had not been denied to the Petitioner and therefore the Petition was improper before Court and should be dismissed with costs.

30. The 1<sup>st</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents' submissions coupled with their grounds of opposition was to the effect that the Petition was an abuse of the Court process since none of the Petitioners' rights had been breached. That the Petition was founded on previous litigation between the 3<sup>rd</sup> Respondent and the Petitioner which litigation had been heard and determined by Courts of competent jurisdiction way back in 1982. That the matter had been forwarded for arbitration by consent which arbitration was heard and determined in favour of the 3<sup>rd</sup> Respondent and an award adopted as a judgment of the Court.

31. That after the Petitioner having failed to satisfy the decree of some of those costs, the 3<sup>rd</sup> Respondent had commenced execution proceedings which led to the sale by auction of the Petitioner's suit land and the subsequent eviction of the Petitioner therefrom.

32. That it had been after the said sale and eviction that the Petitioner had embarked on filing a flurry of applications which had been heard and determined to their respective logical conclusion. That the Petition lacked merit and the same ought to be dismissed. Their grounds of objection was that the Petition was fatally and incurably defective because the Petitioner was trying to revive a matter that had been fully heard and determined by Courts of competent jurisdiction and therefore the same was res judicata and an abuse of the Court process and should be dismissed with costs.

#### **Determination.**

33. The present matter revolves around the adoption of an arbitration award on the 7<sup>th</sup> November 1994 in the High Court of Nyeri Civil Case No. 286 of 1982, which award resulted into the Petitioner's land being publically auctioned. The 3<sup>rd</sup> Respondent had bought the same, had it registered in his name and consequently commenced eviction proceedings against the Petitioner with the result that the Petitioner was eventually evicted.

34. The Petitioner's claim on the other hand is that he was neither consulted nor called for any hearing at the arbitration proceeding because at the time he had been incarceration. His lack of participation in the proceedings before the arbitrator therefore led to deprivation of his parcel of land No. Ruguru/Kiamariga/410. His argument was that his right to property, fair hearing, administrative action, access to justice and right of older members of society under Articles 40, 50, 47, 48, and 57 respectively had been infringed.

35. The Respondents on the other hand are in opposition of the said Petition for reasons that no. of the Petitioner's Constitutional rights had been breached as the Petitioner had fully participated in all forums in this case. That the Petition was incompetent as the Petitioner was now trying to achieve what he had not achieved after exhausting all the provisions of the Civil Procedure Act and Rules and the Court of Appeal Rules and lastly that the matter was Res Judicata as it had been handled by Courts of competent jurisdiction and was between the same parties.

36. I find the issues for determination as follows.-

**i. Whether a Constitutional Petition can be lodged between two private parties?**

**ii. Whether this Petition is Res judicata**

37. The question of what constitutes a Constitutional question was ably illuminated in the South African case of **Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others [2002] 23 ILJ 81 (CC)** in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak* noted that:

“The Constitution provides no definition of “Constitutional matter.” What is a Constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of the Constitution, Constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State, the interpretation, application and upholding of the Constitution are also Constitutional matters. So too, is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine Constitutional matters and issues connected with decisions on Constitutional matters is clearly an extensive jurisdiction.”

38. Further in the case of **Francis Gathungu Waithaka vs Kenyatta University (2012) eKLR** Lenaola J, as he then was, agreed with the Respondent that private Law matters should not be dubbed constitutional violations and adopted the finding in **Teitinnang vs. Ariong [1987] LRC (Const).517**, in which the court had held as follows;

**“Dealing now with the question, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Constitution? The rights and duties of individuals and between individuals are regulated by private laws.**

**The Constitution on the other hand is an instrument of government. It contains rules about the Government of a country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me and so I hold.....”**

39. In the case of **Alphonse Mwangemi Munga vs. African Safari Club [2008] eKLR** the court held that:

“The notion that wherever there is a failure by an organ of government or a public authority or public officer to comply with the Law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The Right to apply to the High Court under Section 6 (our Section 84) of the Constitution for redress when any human right or freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures of invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the Court under the Section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court, as being solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

40. I have considered the Submissions by all parties herein as well as the annexures therein and given the above set of facts, I am not persuaded that the Petition herein discloses any violation of Constitutional rights as alleged. It must be kept in mind that the bill of rights are sacrosanct and should be safeguarded to be invoked only when it is extremely necessary to do so.

41. In was also held in the case of **C N M v W M G [2018] eKLR** that Courts abhor the practice of parties converting every issue in to a Constitutional question and filing suits disguised as Constitutional Petitions when in fact they do not fall anywhere close to violation to Constitutional Rights. I therefore conclude that the Petition has not met the threshold of a Constitutional Petition.

42. Having found as above I shall now deal with the second issue for determination on whether the Petition is Res Judicata High Court of Nyeri Civil Case No. 286 of 1982.

43. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

**“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”**

44. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

i. it prevents multiplicity of suits which would ordinarily clog the Courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and

ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings

45. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are the same;
- iii. Sameness of the title/claim;
- iv. Concurrence of jurisdiction; and
- v. Finality of the previous decision.

46. I have looked at the attached proceedings of the High Court of Nyeri Civil Case No. 286 of 1982, the arbitration award dated the 26<sup>th</sup> January 1985, and the fact that the said arbitration award was adopted as an order of the court. I have also considered the subsequent applications which sought to set the award aside and the fact that the said applications were dismissed. I have also considered the Petitioner's subsequent Applications in Nyeri Court of Appeal Civil Appeal No. 32 of 2009, Nyeri Court of Appeal Civil application No. 370 of 2009, Nyeri Court of Appeal Civil application No. 11 of 2013.

47. I find that the issues and parties in the previous suit which were substantially the same in the subsequent suit were determined by Courts of competent jurisdiction.

48. In the case of **E.T vs Attorney General & Another (2012) eKLR**, it was held that:

**The Courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction**

49. In the case of **Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177** the Court quoted **Kuloba J.**, in the case of **Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported)** where he stated,

**‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to Court, then I do not see the use of the doctrine of *res judicata*.....’**

50. The upshot of the foregoing is that matters in this case were conclusively decided vide High Court of Nyeri Civil Case No. 286 of 1982, and therefore the present case is *res judicata* and an abuse of the Court process, the same is hereby dismissed with costs to the Respondents.

**Dated and delivered at Nyeri this 13<sup>th</sup> day of February 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**