



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL, LAND & JUDICIAL REVIEW DIVISION**

**PETITION NO. 64 OF 2012**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLES 3, 10, 19, 20, 21, 22, 23 (ENFORCEMENT OF BILL OF RIGHTS) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER ARTICLES 27, 28, 31, 35, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE GOVERNMENT LANDS ACT (CAP 280 LAWS OF KENYA); REGISTRATION OF TITLES ACT (CAP 281, LAWS OF KENYA); AND PUBLIC OFFICERS ETHICS ACT (CAP 183, LAWS OF KENYA)**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006 AND SECTION 19 OF THE SIXTH SCHEDULE, TRANSITIONAL CLAUSES CONSEQUENTIAL PROVISIONS OF THE CONSTITUTION OF KENYA 2010.**

**BETWEEN**

**GRACE LILA ACHILA.....PETITIONER**

**AND**

**THE CHIEF LAND REGISTRAR .....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS .....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**ARJAN HARJI PATEL.....4<sup>TH</sup> RESPONDENT**

**KOKILA DILIP DOSHI .....5<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner via a Further Amended Petition filed this petition against the Respondents on the **21<sup>st</sup> May, 2018**. The petitioner seeks that judgment be entered jointly and severally against the Respondents as follows:-

- a) An order do issue directing the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Respondents forthwith to secure 146162 for CR 31835, File Reference 110058 for CR 28181 and the second File Reference 110058 in respect of L.R No. MN/I/3886 in a strong room and to provide certified copies of the same for safe storage at the High Court as evidence in this matter.
- b) A Declaration do issue that by wrongfully issuing a second title and occupying L.R No. MN/I/3886 the Respondents have acted in violation of Petitioners indefeasible title L.R No. MN/I/3886 and her right to protection of property as provided under Article 40 of the Constitution 2010 and Section 70 and 75 of the Constitution (Repealed)
- c) An order of Mandamus do issue directing the Registrar of Titles, to forthwith cancel any ownership record and certificate of title issued to the 4<sup>th</sup> and 5<sup>th</sup> Respondents in respect of L.R No. MN/I/3886 or any sub-division thereof and retain the title issued to the Petitioner.
- d) An Order do issue evicting the 4<sup>th</sup> and 5<sup>th</sup> Respondents or their agents, servants and or employees from harassing, threatening or otherwise adversely interfering with the Petitioner's inalienable proprietary rights with respect to the Property known as L.R No. MN/I/3886.
- e) An Order of Mandamus do issue directed at the Commissioner of Police to forthwith assist in the protection of the Petitioners rights to L.R No. MN/I/3886.
- f) The property be assessed as to its value and estimated rental income by a Valuer appointed by the Court and compensation be assessed by the Court.
- g) Mesne profits in the amount of Kshs. 120,000/- per month from 14<sup>th</sup> March, 1996 until vacant possession be granted to the Petitioner.
- h) General Damages for breach of fundamental and freedoms and costs of this Petition be granted to the Petitioner.
- i) In the alternative to prayers c, d and e and without prejudice to the foregoing, damages be granted to the Petitioner as set out in Paragraph 23(i) of this Petition.
- j) Any other relief that this Honourable Court deems fit and just to grant be issued.

### **Background facts and the Petitioners' case**

2. The Petitioner's case may be gathered from the Petition as well as the Affidavit by GRACE LILA ACHILA sworn in support of the Petition on **21<sup>st</sup> May, 2018**.

3. The petitioner contends that she is the lawful registered proprietor of land more particularly known as L.R No. MN/I/3886 (formerly known as Mombasa Nyali Un-surveyed Plot Number 82) Situated in Mombasa and that the Petitioner was issued a title deed from the Ministry of Lands and as such remains the rightful owner of the same having never sold or transferred it. The Petitioner further contends that sometime in 1998 the Petitioner went to visit the said parcel of land and found strangers working on the land after which she conducted search at the Lands Office which showed that she was the only registered proprietor. The Petitioner later learned that there were other files opened for the same parcel of land in the 4<sup>th</sup> and 5<sup>th</sup> Respondents' name and unlawful title deeds issued to them. Upon making inquiries the Petitioner was informed that the Commissioner of Lands through the Principal Registrar of Titles made admission that the property belonged to and was registered in the names of the Petitioner and that the other existing files opened were dubious.

4. The Petitioner further avers that she raised the issue with the District Criminal Investigations Officer and that despite the fact that the 4<sup>th</sup> and 5<sup>th</sup> Respondents were directed to desist from interfering with the parcel of land they have continuously failed to do so.

5. The Petitioner contends that after the 2<sup>nd</sup> Respondent received the complaint, it wrote to the Petitioner advising her to seek alternative government land to be allocated to her. However the Petitioner states that the 2<sup>nd</sup> Respondent had no Jurisdiction over the said directive which was made without due process and in breach of the rules of Natural Justice for failing to accord the Petitioner any or sufficient opportunity of being heard.

6. The Petitioner contends that the Chief Land Registrar of Titles, Mombasa had no power to issue letter of allotment and grant multiple co-existing Titles in respect of the suit property and that the Lands Registry was notorious for creating false records.

7. The Petitioner avers to be a resident of Mombasa and aware that the suit property is located in a high end area of Mombasa and could be worth over Kshs. 45 Million and that should the Respondents proceed with their actions unhindered the Petitioner will suffer grave and irreversible consequences, loss and damages and her constitutional rights and protections will be defeated.

8. The petitioner further contends that her fundamental rights and freedoms under the Constitution of Kenya have been infringed and violated as follows:-

## **Particulars of Rights Violated**

- a. The right to equal protection and equal benefit of law
- b. The right not to have property seized
- c. The right not to be deprived of her property, or interest in, or right over her property.
- d. The right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- e. The right to information held by the state
- f. The right to the correction or deletion of untrue or misleading information that affects the person.
- g. The right not to have the state discriminate against her whether directly or indirectly.

## **Respondent's case**

9. The Respondent's case is based on the Replying Affidavits of both **KOKILA DILIP DOSHI** (the 5<sup>th</sup> Respondent) and **SAMUEL KARIUKI MWANGI** on behalf of the 1<sup>st</sup> Respondent (The Chief Land Registrar)

10. The 5<sup>th</sup> Respondent's Affidavit also serves for the 4<sup>th</sup> Respondent.

11. The 5<sup>th</sup> Respondent avers that one Dr. Julia Ojiambo received a letter of allotment from the Commissioner of Lands in regard to the suit property offering to grant her 99 years lease from 1<sup>st</sup> November, 1982 which offer she accepted on 12<sup>th</sup> February, 1996.

12. The 5<sup>th</sup> Respondent further avers that by an agreement in writing dated 12<sup>th</sup> February, 1996 Dr. Julia Ojiambo agreed to sell the suit property to the 4<sup>th</sup> and 5<sup>th</sup> Respondents for a consideration of Kshs. 1, 500,000/= and that on the 27<sup>th</sup> February, 1996 the same Dr. Ojiambo executed a transfer in respect of the suit property which was consented to by the Commissioner of Lands who went ahead and executed the grant in respect of the suit land for a term of 99 years from 1<sup>st</sup> November, 1982 in the favour of the 4<sup>th</sup> and 5<sup>th</sup> Respondents.

## **Submissions, Analysis and Determination**

13. I have considered this petition, supplementary affidavit, the response thereto; submissions by counsel for the Petitioner as well as the 4<sup>th</sup> and 5<sup>th</sup> Respondents. The issues the court is called upon to decide are:-

- a) Whether this honourable court has jurisdiction to entertain this Petition.
- b) Whether this petition has met the threshold of constitutional petitions as provided in the case of **Anarita Karimi njeru vs. Republic (1976-1980)1 KLR 1972**.
- c) Whether the Petition offends the principle of Constitutional Avoidance.

14. Since the issue of Jurisdiction has been raised by the Petitioner herein, this Court will before anything else endeavour to establish whether it has Jurisdiction to delve into the merits of the dispute between the parties. Jurisdiction is everything and without it, the court must down its tools. If this court finds it lacks jurisdiction then it will not analyse the other issues other than Jurisdiction flowing from the submissions of all parties.

15. In the case of **Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour & Travel; Civil Appeal No.13 of 2016 [2016] eKLR –the Court of Appeal sitting at Mombasa stated:-**

**“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”**

16. Also in the case of **Samuel Kamau Macharia v. KCB and Others [2012] eKLR** it was held:

**“A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court can only exercise jurisdiction as**

**conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...the Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.”**

17. It is to be noted that in her Submissions, the Petitioner invites the court **“to examine the respective documents of title to determine the legality of each with a view to decide whether or not they have been regularly obtained.”** This court must emphasise that the kind of invitation being made to this court to do is a reserve of a special court called Environment and Lands Court which has the legal capacity to examine the legality of, and allocate titles. It is not the preserve of a constitutional Court, which can only come in as a last resort.

18. On whether this Petition has met the threshold of constitutional petitions:

The **Supreme Court** in the case of **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR thus:-

*“[349] Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in **Annarita Karimi Njeru v. Republic, (1979) KLR 154**: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”*

19. As much as the Petitioners have alleged a violation of her rights we should bear in mind that the crux of the Petitioner’s case is based on an alleged double allocation of Parcel of Land Known as of L.R No. MN/1/3886. I would not wish to delve into the details of the alleged contract as that would be tasking this Court into a trial over the same. From the foregoing the Petitioner in my view has failed to demonstrate the basis of her grievance and the link between her and the Articles of the Constitution alleged to have been contravened and as a result her petition fails to meet the irreducible minimum expected for a Court to determine what a litigant’s claim is in a constitutional matter.

20. The petitioner has failed to demonstrate how her right to equal protection and equal benefit of law, right not to have property seized, right not to be deprived of her property, or interest in, or right over her property, right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, right to information held by the state, right to the correction or deletion of untrue or misleading information that affects the person, right not to have the state discriminate against her whether directly or indirectly, have all been infringed.

21. In **Benard Murage v Fine Serve Africa Limited & 3 others** [2015] eKLR the Court stated that **“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first;”**

22. The finding hereof that the Petitioner ought to ventilate his grievances in the Environment and Lands Court considering this is a matter that specifically seek to establish title or ownership of Land. This Court is expressly barred from determining such issues.

23. The Court of Appeal in **Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others** [2017] eKLR... stated that:

*“The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See **International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012**, and **Speaker of National Assembly vs Njenga Karume** [2008] 1KLR 425.”*

24. The High Court in **International Centre for Policy and Conflict and 5 others –vs- The Hon. Attorney-General & 4 others** [2013] eKLR observed as follows;

**“[109] An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.”**

25. In **Minister of Home Affairs -vs- Bickle & Others (1985) L.R.C. Cost.755** Georges CJ held as follows:

*“It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (**Wahid Munwar Khan vs. The State AIR (1956) Hyd.22**). The judge went on to add that: “Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”*

26. In the circumstances, this Court finds that it ought not to entertain the current action brought by way of a petition. The Petitioner should avail herself to appropriate forum for determination of title to, or ownership of Land.

27. It is clear to this court that litigation in this matter will continue in some forum and since there are existing temporary conservatory orders

of Injunction to safeguard the suit property being MOMBASA L.R No. MN/I/3886this court hereby extends that temporary injunction for a period of 90 days after which if need be further relief may be sought from an appropriate forum.

**Dated, Signed and Delivered in Mombasa this 2<sup>nd</sup> day of April, 2019.**

**E. OGOLA**

**JUDGE**

In the presence of:

Mr. Nanji for 4<sup>th</sup> and 5<sup>th</sup> Respondents

No Appearance for others

Mr. Kaunda Court Assistant