



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND CORUT**

**AT MERU**

**CONSTITUTION PETITION NO. 16 OF 2017**

**NKANATA KABURIA NGARUNI.....PETITIONER**

**VERSUS**

**LAND REGISTRAR MERU.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENENRAL.....2<sup>ND</sup> RESPONDENT**

**BEATRICE KALAYU JOSEPH.....INTERESTED PARTY**

**JUDGMENT**

1. Vide a petition filed on 5.9.2017, the petitioner NKANATHA KABURIA NGARUNI was claiming entitlement to land reference no. KIBIRICHIA/GATHUINE/49 which was registered in the name of his father, one M’Ngaruni Kirue. He contends that he was born and raised on the suit land for the last 65 years.

2. The petitioner further pleaded that Julia Karoki Ngaruni secretly filed succession cause No. 25/1991 to become the legal representative of the estate of M’Ngaruni Kirue, without the knowledge of the petitioner. Julia Karoki then went ahead and subdivided the original land parcel number Kibirichia/Gathuine/49 into two portions i.e. parcel number 89 and 90 respectively.

3. The petitioner then filed a case SPMCC no. 765/93 against the said Julia Karoki Ngaruni and the defendant was accordingly restrained from selling the land to a third party. However, one Beatrice Kalayu Joseph, the interested party allegedly bought parcel no. Kibirichia/Gathuine/89 in a non-existent public auction and obtained a title. She then filed a dispute before the now repealed land disputes tribunal case no.11 of 2009 against the petitioner herein and the tribunal ruled in her favour.

4. The petitioner having lost in LDT challenged the decision in MERU HC. JR NO. 71 OF 2009, of which the petitioner lost the case on 10.5.2017. The petitioner contends that the decision on in the JR NO. 71/2009 is equally wrong and wanting as the LDT lacked jurisdiction to handle an issue relating to ownership of title to land.

5. That after subdivision of the original Kibirichia/Gathuine/49 one portion i.e. Kibirichia/Gathuine/89 was transferred to the interested party albeit illegally and the other portion Kibirichia/Gathuine/90 was registered in his name. Petitioner contends that the subdivision of parcel 49 was haphazard and unlawful and that the interested party has threatened to evict him from parcels no’s 89 and 90.

6. The petitioner therefore prayed for judgment in the following terms:

**i. Quashing of the subdivision of the original Kibirichia/Gathuine/49 into two portions.**

**ii. A declaration that the subsequent registration of land reference no. Kibirichia/Gathuine/89 in the name of the interested party is wrong and should be quashed.**

**iii. A declaration that the sub-division and transfer having been illegal the petitioners rights were trampled upon.**

**iv. A permanent injunction restraining the interested party from evicting the petitioner and his family from Land Reference Number Kibirichia/Gathuine/89 and or from the entire Original land parcel No. Kibirichia/Gathuine/49.**

**v. Costs of this petition.**

7. The interested party opposed the petition vide her replying affidavit filed on 19.1.2018 where she avers that she is the registered owner of land parcel no. Kibirichia/Kathuine/89. A copy of a title availed as annexure "BKJ1" reveals that the interested party became the registered owner of this parcel on 23.4.1997. The interested party has termed the petitioner as a vexatious litigant who has been frustrating her enjoyment of the fruits of the judgments of the courts and her right to own property as enshrined under the constitution.

8. She also averred that she had filed before the Meru central district land disputes tribunal case no. 11 of 2009 seeking the eviction of the petitioner from her land, which case she won. However, the petitioner having been dissatisfied with that decision filed the Judicial Review case no. No. 71 of 2009 at Meru seeking to quash the decision of the Tribunal, but the Judicial Review case was dismissed with costs.

9. The interested party has stated that the petitioner did not prefer any appeal against the decisions of the courts and that the petitioner had declined to comply with the courts judgment and had threatened to harm him if she used the land.

10. The interested party also deponed that the petitioner had not attached any documents to show the existence of a succession cause no. 25/1991 or SPMCC 765/93 and therefore this petition and application are a fishing expedition. She also stated that the allegations by applicant that he had lived on the land for 65 years were false. The interested party prays for the dismissal of the Petition with costs.

11. The respondents have also opposed the suit vide the grounds of opposition filed on 19.9.2019 where they aver that the petition is incompetent, misconceived, misplaced and that the same is an abuse of the court's process and therefore, the Petition ought to be dismissed with costs. The particulars set forth in the grounds of opposition are as follows;

**i. There are no particulars of facts and law that are attributable to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.**

**ii. The exceptions provided for under section 26 of the land registration act have not been properly pleaded to warrant interference with the protection afforded to good title.**

**iii. The petition is an abuse of court process as various suits relating to the suit property have been heard and conclusively determined in court.**

**iv. The petitioner's locus is doubtful given that no evidence is available to demonstrate her administrative capacity.**

12. On 29.10.2019, the court gave directions for the petition to be canvassed through written submissions of which the petitioner and the interested party have duly complied.

13. In his submissions, the petitioner reiterated the averments set out in the petition, while concluding that his rights are protected in the constitution. The petitioner relied on the case of **Giella vs Cassman Brown** and case of **Rudi Marguard Electronic Ltd vs Vallery Jimo & 4 others (20150 eKLR)**.

14. For the interested party, it was submitted that the petitioner's mother (Julia Karoki Ngaruni) took grant of representation over the estate of M'Ngaruni Kirue (Petitioner's father) who was the owner of the original suit land. Julia then subdivided the original parcel NO. Kibirichia/Gathuine/49 into two portions as parcel 89 and 90 of which parcel 89 was sold to the interested party.

15. She contends that the dispute went before the Land Dispute Tribunal which ruled in the favour of the interested party as confirmed in Meru CMCC No. LDT 23 of 2009. Efforts to challenge the jurisdiction of the tribunal in the judicial review 71 of 2009 bore no fruits.

16. The interested party avers that this case is res judicata to the previous cases. It is further submitted that: **"Finally that the maxims of equity glossing over the law give us principles that should guide decision making such as equitability, seeking equity whilst doing equity. Vigilance as opposed to indolence and clean hands. From these maxims it can be argued that the petitioner was awarded L.R No. Kibirichia/Gathuine/90 and the same is registered in his name to date, he should show equity and let others live in peace. The fact that the subdivision was made in the process of administration of the deceased estate and he received his rightful share shows a lack of equitability or clean hands on the petitioner's part for claiming the entire parcel/estate to himself".**

17. The interested party therefore prays for the dismissal of the suit.

#### **Determination**

18. I have considered all the issues raised herein as well as the submissions of the parties. Firstly, I note that petitioner is claiming the suit land because it belonged to his father. He has cast aspersions on the filing of succession cause no. 25/1991 where Julia became the legal representative of the estate of M'Ngaruni. This is however not the proper forum to challenge the decision of the succession court. Furthermore, the petitioner has not demonstrated that he has a grant in respect of the estate of his father. In the case of **Zipporah Nkoyai vs James Kaberia & 2 others Meru ELC No. 29 of 2012**, I cited section 4 of the law of succession act, while holding as follows in respect of a petitioner who was claiming her father's property:

***"For the petitioner to stake a claim on the property of M'Elongi Ndegwa she had to submit herself to the law applicable either the law of succession act or any other written law....."***

19. The petition fails for want of a grant of representation.

20. Secondly, I find that petitioner is claiming ownership of the suit land which means that this petition is not the proper forum to have such

a claim determined. In the case of Abdullah Mangi Mohammed vs Lazarus Beja & 5 othes (2012) eKLR, the court held that;

**“Where there is a dispute as to the applicant’s entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, that statutory procedure should be utilized in the determination of the applicant’s claim to the property rather than clog the constitutional court with applications for enforcement of purported rights which require prior determination. The improper practice of making all private disputes as to ownership of property as applications for the enforcement of the constitutional right to property should be discouraged”.**

21. In the case of John Mukora Wachihl vs. Minister for lands & 6 others Nairobi petition no. 82 of 2010 and consolidated with petitions 83 – 92 of 2010, Mumbi Ngugi J. stated that the right to property as recognized in article 40 of the constitution 2010 and section 75 of the repealed constitution as concerns right to land could only be enjoyed by registered proprietors of land.

22. In the case of residents of Anne Wawuda & 3 others v Kenya Railways Corporation & another [2015] eKLR, Emukule A. Judge stated that:

**“By presenting the petition under article 22 of the constitution, the petitioner has ignored and side-stepped the aforesaid provisions of the constitution, the judicature act, the civil procedure act, the land act, the limitation of actions act, the evidence act and not least the environment and land court act, laws which govern issues relating to eviction disputes. This court cannot allow the petitioners to ignore the statutory framework established under the constitution for resolution of disputes relating to land or the environment. The petition herein and many like it, has been presented as constitutional petition, when there is no constitutional issue at stake. When the issue is merely a dispute over eviction or better still a question of adverse possession, merely for the sole purpose of avoiding uncomfortable questions at a hearing for the same injunctions and declarations through an ordinary civil suit in the civil jurisdiction of the high court”.**

23. My conclusion is that this is an ordinary dispute which raises no constitutional issues. If petitioner was unhappy with the issuance of the grant to Julia (who apparently is his mother), he should have sought for revocation of such grant in the proper court? If he has cause to believe that the title held by interested party was unlawfully obtained, again recourse is in challenging the validity of the same in an ordinary suit.

24. Thirdly, I find that petitioner has admitted that the dispute did spill over to the land dispute tribunal where an award was made in favour of the interested party. Efforts to challenge the tribunal’s decision in the judicial review case no. 71 of 2009 were fruitless. Filing this petition in the background of the dismissal of the judicial review case amounts to an abuse of this court’s process. It is as if the petitioner is using this court as an appellate forum against my own decision in the Judicial Review case. The petitioner cannot have a second or is it a third bite of the cherry! In light of the decision in Meru central district land dispute tribunal case no. 11 of 2009 and Meru J.R case No. 71 of 2009, I find that his petition is res Judicata.

25. I will again revisit the decision in the case of Anne Wawuda & 3 others v Kenya Railways Corporation & another [2015] eKLR Supra, where Judge Emukule stated thus;

**“In the circumstances, the court is bound to exercise its inherent power to prevent abuse of its process. In the words of the court, in Kariuki & others vs Dawa Pharmaceuticals company limited & others (2007) E.A 235, .....Nothing can take away the court’s inherent power to prevent abuse or trivializing of its process by striking out a frivolous and vexatious application. Baptizing such matters constitutional cannot make them so, if they are plainly frivolous or vexatious or elevate them to a constitutional status when they are in fact plainly an abuse of the court’s process”.**

26. This court cannot purport to overturn the decision of the tribunal or my own decision in the Judicial Review case simply because this is a petition.

### **Conclusion**

27. In the final analysis I find that the suit is not merited. The same is dismissed with costs to respondents and interested party.

**DATED, SIGNED AND DELIVERED AT MERU THIS 30<sup>TH</sup> DAY OF APRIL, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

### **ORDER**

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

