



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**PETITION NO. 7 OF 2016**

**1. PETER NJOGU KARANU**

**2. ANN NJOKI NJOROGE**

**3. MARGARET WAMBUI KIMIT**

**4. CHARLES NJAMA WANGAI**

**5. MARTIN MITHEO.....PETITIONERS**

**VERSUS**

**NYAKINYUA MUGUMO TREES CO.LTD.....1<sup>ST</sup>RESPONDENT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF SURVEYS.....3<sup>RD</sup>RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners filed this petition on 15/9/2016. They sought orders of declaration as follows:-

(a) A declaration that the parallel survey exercise is unlawful and in violation of the rights of the petitioners.

(b) An order that the survey of LR. 1803 carried out by Ms. Mali Survey Services and which was passed and registered on 16<sup>th</sup> April, 2014 is valid.

(c) That the respondents be permanently restrained from carrying on a parallel survey/issuance of title deeds exercise of the shareholders on the basis of any other survey other than the one registered on 16<sup>th</sup> April, 2014, and the ensuing area list.

(d) A declaration that the title documents (indentures) issued to the petitioners are valid and lawful.

(e) An order of Judicial Review to call the order/decision of the Chief Land Registrar into the Honourable Court and quash the same.

2. A Notice of Motion was also filed on the same day seeking conservatory orders, verbatim,:

(a) That this Honourable Court be pleased to certify this application urgent and do hear the same *ex parte* in the first instance.

(b) That this Honourable Court be pleased to issue conservatory orders to halt the parallel process of issuing title deeds commenced by the respondents pending the hearing and determination of this application and pending the hearing and

determination of this petition.

(c) Pending the hearing and determination of this application the respondents do furnish the petitioners with copies of the survey maps/drawing for LR. 1803, consent of the Land Control Board and the area list being used in the purported title issuing process.

3. The Notice of Motion was premised on the grounds that:-

- (a) The 1<sup>st</sup> respondent is the plaintiff in Kitale Environment and Land Court Case No. 103 of 2015 which is pending in court.
- (b) The case was filed with an intention to stop the title issuing process started by the appointed representatives of the 1<sup>st</sup> respondent's members.
- (c) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are also defendants in the said suit which is pending in court.
- (d) The respondents have colluded to stop the title issuing process which was commenced by the said elected members' representatives/directors and embarked on their own process using a body called the National Titling Centre without any information or notice to the applicants.
- (e) The survey of LR. 1803 had been completed and over 200 people had been issued with documents of title.
- (f) The process started but the respondent has not held any consultative meeting with the applicants or brought out an area list for verification by the applicants before starting to issue the title deeds.
- (g) The exercise lacks transparency as some former directors are being given titles for more land that they are not entitled to while some shareholders names have been omitted from the "secret" area list.
- (h) Other members have been relocated from their established home where they have lived for about 40 years.

4. It is alleged that the respondents are issuing titles clandestinely and thus depriving many of the applicants their rightful shares.

5. The petition and the notice of motion and the affidavit in support of the notice of motion are the only documents that were filed on 15/9/2016. The Notice of Motion was dismissed in a ruling on its merits delivered by this court. No supporting affidavit of the petitioners is attached to the petition. No affidavit was filed in support of the petition after the petition was filed.

6. I have noted in the ruling on the application that the land subject matter of the petition is the same land subject matter of **ELC Kitale No. 103 of 2015** and **Eldoret High Court Civil Case No. 98 of 1987** whose final judgement was delivered on 16/10/2012.

7. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents responded to the petition through a replying affidavit dated 12<sup>th</sup> May 2017 by one **Hellen Mutai**, County Land Registrar, Trans Nzoia. The 1<sup>st</sup> respondent filed a reply to the petition dated 3/5/17. The other affidavits that were filed in the course of these proceedings were only in support of interlocutory applications. It is clear therefore that the petition before the court is not supported by any affidavit. Therefore, before this court proceeds any further in analyzing the contents of the petition, or undertaking any other preliminary steps to the determination thereof, it must determine the issue whether the constitutional petition without any supporting affidavit is properly before it.

8. **Rule 10** of the **Constitution Of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013** provides as follows:

**“(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.**

**(2) The petition shall disclose the following—**

- (a) the petitioner's name and address;**
- (b) the facts relied upon;**
- (c) the constitutional provision violated;**
- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;**
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;**
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and**

(g) the relief sought by the petitioner.

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”

9. Rule 11 of the Constitution Of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 provides as follows:

“Documents to be annexed to affidavit or petition

(1) The petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”

10. Rule 4 which is cited in rule 10 provides as follows:

“Contravention of rights or fundamental freedoms

(1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”

11. Adducing of evidence in any trial is crucial. It is that evidence that the court examines against the statements made in the pleadings so as to arrive at a conclusion as to whether the claimant has established a cause of action or not. Without any evidence before it a court of law is unable to move forward even one step in the determination of the matter.

12. There may be special and rare circumstances under civil procedure where parties may state their case for the opinion of the court and where the court may not require evidence, but that procedure necessarily involves the consent of the parties and the agreement that all the facts as pleaded are correct, otherwise an aggrieved party is bound to file proceedings and adduce evidence. In disputed petitions however failing to include affidavit evidence in support of the petition is a great risk for the other side may disagree with the facts as set out in the petition. It is the normal practice to support a petition by way of affidavit evidence at the filing thereof. Further affidavits in support of the petition may be filed with leave of court in the course of the proceedings.

13. In Judicial review affidavits are crucial. In the case of **Commissioner General, Kenya Revenue Authority through Republic v Silvano Onema Owaki T/A Marenga Filling Station [2001] eKLR** the Court of Appeal stated as follows:

“We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:

“The application for leave "By a statement" - The facts relied on should be stated in the affidavit (see R. v. Wandsworth JJ., ex p. Read [1942] 1 K. B. 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.”

At page 283 of the report of the case of R. V. Wandsworth Justices, Viscount Caldecote C.J. said:

“The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.”

The court in the Wandsworth case was considering the provisions of Order 53 of the English Rules of the Supreme Court which are *in pari materia* with our Order LIII of the Civil Procedure Rules...”

14. There is a close correlation in the procedure used in petitions and judicial review applications. In the case of **Petro Oil Kenya Limited v Kenya Urban Roads Authority [2018] eKLR**, the court stated as follows:

“Although in the cases that I have cited, the courts were dealing with judicial review applications strictly so called, the cases are relevant to this petition as some of the reliefs sought in the present petition are for judicial review. That said, the mere fact that the Petitioner invoked inappropriate jurisdiction does not render the petition defective or irregular. The only

setback for the Petitioner is that the court would not be able to grant some of the reliefs sought in the petition which cannot be granted in a petition of this nature.”

15. This court is persuaded that the above dicta is correct.

16. A petition for redress for violation of rights differs from an election petition. In **Dickson Mwenda Githinji vs Gatirau Peter Munya & 2 others (2014) eKLR** the Court of Appeal held that a supporting affidavit in support of an election petition is a mandatory requirement. The court stated that:-

**“Rule 9(3)(b) (now 8(4)(b)) of the Election Petition Rules provides that an election petition shall be supported by an affidavit of the petitioner containing the grounds on which relief is sought. The plain reading of this rule is that an affidavit in support of the petition is a mandatory requirement...”**

17. It would appear from the rules cited that a claimant seeking redress from the violation of a constitutional right has a much less arduous task in presenting his grievance compared to one in an election petition, for the court may accept an oral application (and, according to the rules, the court may reduce this into writing), a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

18. In the case of **Benson Kamanda & 4 others v Bisembe Farmers Co-operative Society Ltd [2016] eKLR** the court observed as follows:

**“In the instant case, as I have observed in this judgment the petition was filed without the supporting affidavit and the documents attached to the petition were contrary to the provisions of the Rule 14 of Gicheru Rules it therefore follows that in terms of Rule 14 of the Gicheru Rules the petition contains allegations without the affidavit evidence intended to accompany the petition to support the allegations in the petition and this makes the petition incompetent.**

In the case of **Patrick Ochieno Obachi & 6 others -v- Kenya Anti-corruption Commission [2010] eKLR**, the court observed as follows on failure to file a supporting affidavit:

**“That is a fatal technicality as it determines the substance, namely the completeness of the petition. It follows that in terms of rule 14 that petition contains allegations without the affidavit evidence intended to accompany the petition to support allegations in the petition and that makes the petition incompetent.”**

The verifying affidavit annexed to the petition does not meet the mandatory requirements of the Gicheru Rules and the documents filed with the petition are strictly speaking not annexures to any affidavit as the same have not commissioned by the commissioner of oaths as exhibits to any affidavit. Consequently, I dismiss the Notice of Motion dated 13<sup>th</sup> September, 2016. The applicants shall bear the costs of the motion.”

19. Of course, the above decision arose from **The Constitution of Kenya [Supervisory and Protection of Fundamental Rights and Freedoms of the individual] High Court Practice and Procedure Rules 2006**, also known as “*Gicheru Rules*” which preceded the current rules. The 2006 rules provided as follows:

**13. “The petition under Rule 12 shall be supported by an affidavit”**

**14. “If a party wishes to rely on any documents the document shall be annexed to the supporting affidavit.**

20. It is therefore clear that by the enactment of **rules 10 and 11 of the Constitution Of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013** the mandatory requirement of filing of an affidavit with the petition has been waived. It appears to have been left to the petitioner to determine if they require to file any affidavit evidence with their petition or not. However that does not necessarily imply that a petition bereft of any evidence is properly before the court.

21. In the **Petro case (supra) Justice Okongo** observed as follows:

**“A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case.”**

22. In **Sanghani Investments Ltd -vs- Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 E.A 354** the court observed as follows:

**“...A declaration does not fall under the purview of judicial review for the simple reason that the court could require *viva voce* evidence to be adduced for determination of the case on the merits before declaring who the owner of the land is. Judicial Review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application...”**

23. In this court’s view however, that waiver does not completely absolve a petitioner from filing a supporting affidavit with the petition if the statements in the petition are merely conclusory and require evidence to support them to establish their correctness.

24. In the case of **Karamorah Impex and Transport Company v Kenya National Highway Authority & 3 others [2017] eKLR** where the counsel for the petitioner purported to be only relying on affidavit evidence and no oral evidence, the petition was dismissed for it was said to be supported by an affidavit which was not signed by the deponent and was thus as good as no affidavit at all.

25. In an adversarial setting where the petition did not originate from an oral application under **rule 10(3)** of the **Constitution of Kenya (Protection Of Rights And Fundamental Freedoms) Practice and Procedure Rules, 2013** it behoves the court to stay above the fray and let the parties conduct their litigation in the best manner they can. The court should not therefore be seen to arbitrarily accept conclusory statements by a petitioner to be the gospel truth and proceed to try the petition on that basis while respondents have taken the trouble to file affidavit evidence; to which the petitioner has not even bothered to counter by his affidavit.

26. In the instant petition the petitioners sought by an application to have the petition heard by way of *viva voce* evidence. This was done long after all parties agreed that the petition would be disposed of by way of written submissions. It would appear that the petitioners themselves were convinced that some kind of evidence, oral or by affidavit, was required in this matter to support their claims in the petition. However they never sought in that application an alternative prayer to be allowed to file a supporting affidavit to the petition, which in my view is quite an appropriate and indeed the normal substitute for *viva voce* evidence in petitions. This court declined that application and ordered the parties to file their submissions. What the petitioners failed to disclose in that application for *viva voce* evidence was that the petition was filed without a supporting affidavit. Subsequently, the petitioners did not apply to regularize their position by filing an affidavit supporting their petition or in response to the respondents' affidavits.

27. The result is that whereas all the other parties have affidavit evidence on the record to support their defence the petitioner has none. In the circumstances of this case where oral evidence was ruled out and no request to file a supporting affidavit was made, it is futile to delve into the merits of such a petition that does not have any supporting evidence.

28. Affidavits are meant to state what their deponents know and indeed should be confined to matters within their knowledge save where they depone to matters based on information and belief. The 1<sup>st</sup> respondent stated as follows in its response to the petition filed on **3/5/2017**:

***“7. In response to the contents of paragraph 10 of the petition the 1<sup>st</sup> respondent maintains that the petitioners have not filed any documentary evidence to demonstrate that the said process has actually taken place to make this court believe their claims.”***

and also as follows:

***“11. The petitioners have miserably failed to demonstrate by way of evidence or at all which fundamental rights and freedoms were violated hence the petition itself is unproven hearsay and devoid of substance and specificity.”***

29. In my view this was an eye opener to the petitioners, a magnanimous call to re-examine their petition, but they failed to take note of it such that three (3) long years later after that reply was filed, they still do not have any affidavit in support of the petition on the record. I can not call that diligence. The matters laid down in the petition require evidence and there is none from the petitioners to aid this court in the determination of this petition. I fail to see how the petitioners can discharge their burden of proof in the outlined circumstances.

30. The upshot of the above is that the petition dated **13/9/2016** is fatally defective and incompetent and I hereby strike it out with costs to the respondents.

**Dated, signed and delivered at Nairobi via electronic mail on this 28<sup>th</sup> day of May 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**