



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 27 OF 2018**

**IN THE MATTER OF ARTICLES 1 (1) (3) (B) 1(4), 3, 10, 19, 20, 21, 22, 23, 27, 28, 40, 47, 50, 73, 174, 176, 185, & 258 OF THE CONSTITUTION OF KENYA 2019**

**-AND-**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACT NO. 4 OF 2015**

**BETWEEN**

**MICHAEL KOOME MBURUGU ..... PETITIONER**

**-V-**

**THE COUNTY GOVERNMENT OF ISIOLO ..... RESPONDENT**

**J U D G M E N T**

1. Before me is a Constitutional petition dated 19<sup>th</sup> November, 2018, in which the petitioner has sought the following reliefs: -

- a) A declaration that the respondent's refusal to issue a consent to charge L.R NO. Isiolo Township Block 4/144 is contrary to the provisions of Articles 40 and 47 of the constitution and therefore illegal and unlawful;
- b) An order of judicial review, calling to the high court, the decision by the respondent to refuse consent to charge to the petitioner for quashing;
- c) An order of mandamus, compelling the respondent and all its relevant officers mandated to issue consent to charge a property to forth with issue the said consent to the petitioner;
- d) An order for general damages for the malicious, unlawful and illegal actions of the respondent to withhold consent to the petitioner;
- e) Costs and interest of the petitioner.

2. The petitioner's case is set out in the body of the petition and the supporting affidavit. That he is the registered proprietor of **L.R NO. Isiolo Township Block 4/144, ("the said property")** and he had previously used the said property as collateral for financial facilities for various businesses; that the Bank of Baroda ("the bank") held a charge and a first further charge over the said property. That around September 2018, he desired to obtain further credit from the bank whereby the bank prepared a 2<sup>nd</sup> further charge in respect thereof.

3. The documents in respect thereof were prepared and lodged with the Land Registrar for registration and the petitioner applied a consent to charge to enable him register the same. However, without any reasons the respondent refused to issue the said consent. This is so despite the respondent having given such consent on two previous occasions when he charged the same property.

4. The petitioner therefore contended that his rights to enjoy the commercial benefits from his property under **Article 40 of the Constitution** had been violated and continued to be violated by the respondent. That his right to fair administrative action under **Article 47 of the Constitution** had been violated.

5. The petition was opposed via a replying affidavit filed in court on 29<sup>th</sup> November 2018 sworn by Rashid Mude Arale the chief officer for roads and physical planning of the respondent. He contended that the said property was the subject of a pending suit in **Meru ELC case No. 83 of 2017. ("the said suit")** That in the said suit, one Mary Mohammed had sued the petitioner as well as the respondent over ownership of

the said property. That the said suit was still pending and ownership had not been determined. That in the premises, the respondent could not issue any consent or authority until the ownership had been determined.

6. It was submitted for the petitioner that he was entitled to enjoy his property under **Article 40 of the Constitution**. That one mode of such enjoyment, was to use that property as collateral to procure loans to do business. That having invested heavily in the property by establishing a hotel thereon, the decision of the respondent had denied him enjoyment of his rights appurtenant to him being the proprietor of that property.

7. On the other hand, it was submitted for the respondent that the petitioner had deliberately failed to disclose that together with one Asha Jabril Mohammed, they held title deeds in respect to the suit property. That this had led to the filing of **Meru ELC No. 83 of 2017**, which suit was still pending. That by virtue of the fact that the said suit was still pending, it was not possible to know who between the parties held a valid and genuine title deed. That it was therefore reasonable to withhold the issuance of the consent,

8. It was further submitted for the respondent that, granting the reliefs sought would be tantamount to determining ownership of the suit property thereby rendering **Meru ELC No. 83 of 2017**, nugatory.

9. I have carefully considered the affidavits on record and the submissions of Learned Counsel. The petition seeks for, inter alia, a declaration that the respondent's refusal to issue a consent to charge **L.R No. Isiolo Township Block 4/144** is contrary to the provisions of **Articles 40 and 47 of the constitution** and therefore illegal and unlawful. On the other hand, the respondent contends that the petitioner was guilty of non disclosure of material facts that ownership of the suit property is in dispute in **Meru ELC No. 83 of 2017**. That since the ownership of the said property is in dispute, the respondent could not issue any consent or authority to either the petitioner or any other party until that was determined.

10. The petitioner produced evidence to show that he was registered as a proprietor of the property. He also produced evidence to show that he had previously charged the said property twice, on 16/11/2016 and 15/12/2017, respectively. On those two occasions, the respondent is said to have given its consent.

11. The petitioner alleged that he had in or about September, 2018 applied for the respondent's consent to further charge the said property but the respondent declined to give its consent. That fact was not denied by the respondent. What comes out from the record is that, although the petitioner applied for the consent to charge in September, 2018, the respondent failed to give the consent and further failed to give reasons for such failure. The question before this court therefore is, **is the respondent in breach of Article 47 of the Constitution as it relates to the petitioner?**

12. **Article 47 of the Constitution** provides: -

***“1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons or the action”.***

13. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, the Court of Appeal stated:-

***“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed”.***

14. In the present case, while the documents are said to have been presented to the respondent in September, 2018, the respondent not only refused to make a decision of either rejecting the application or allowing it, it failed to give reasons for its action.

15. Its failure to make a decision one way or the other, led to the rejection of the documents by the Land Registrar dated 16<sup>th</sup> November, 2018. The act of the respondent meant that it had declined to grant the consent sought yet it gave no reasons for its declining

16. To my mind, by having failed to either give consent or reasons for refusal to give consent for over two months that was in blatant breach of **Article 47 (1) of the Constitution**. Under that article, there is a constitutional obligation to the respondent to act expeditiously, efficiently, reasonably and procedurally. By failing to act from the time the documents were presented to it until the petitioner came to court, the respondent had failed to act expeditiously or efficiently. It failed to give reasons for its inaction to the petitioner within a reasonable time. Obviously, the respondent was in breach of the petitioner's right to fair administrative action under **Article 47 of the Constitution**.

17. The respondent only tried to give the reasons in these proceedings. It alleges that the ownership of the subject property is in dispute with a third party; that there is an active litigation in court where the respondent has been threatened to be enjoined.

18. While Judicial Review proceedings such as the one before me, albeit under a constitutional petition, does not concern itself with the merit of a decision but its process, I will nevertheless comment on the “reason” given by the respondent. The respondent states, that the suit that is pending must determine the issue of ownership first before it can act.

19. That is a spurious reason. First, the respondent had not shown that an order had been issued in the said suit restraining it from giving the consent. Secondly, no order had been made against the petitioner in those proceedings to restrain him from enjoying his proprietary rights thereon. Finally, the respondent cannot purport to hold brief either for the other claimant in the said suit or the bank. In purporting to do so, it has violated the rights of the petitioner and there would be sanctions therefor.

20. To my mind, the issue before this court is not that of ownership but whether the respondent acted within the parameters of **Article 47 of the Constitution**. Did the respondent act expeditiously, reasonably and efficiently once the application was made? The obviously answer is no. Once violates the constitution, the court is obligated to act and defend it. This is one such instance.

21. The respondent has breached the petitioner's right. He is entitled to compensation. The petitioner submitted for KShs.3,000,000/- and cited the case of **Kenya Human Rights & Another v. Non-Governmental Organizations Co-ordination Board & Another [2018] eKLR**. In that case, Mwita J held:-

***“In the case of Tinyefuze v. Attorney General of Uganda [1997] UGGC3, the constitutional court of Uganda observed that the provisions of the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour on those on whom the rights have been conferred by the Constitution and that if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course”.***

22. I entirely agree with the said sentiments. In that case, the court awarded the successful petitioner KShs.2 million as compensation. In the present case, had the respondent acted in without breaching the Constitution, the present matter would not have been necessary. Due to the respondent action, there has been a delay of the petitioner accessing on his loan for about 2 months. I will award the petitioner damages of KShs.1,000,000/= against the respondent.

23. Accordingly, I allow the petition and make the following orders: -

- a) **A declaration that the respondent's refusal to issue a consent to charge L.R No. Isiolo Township Block 4/144 is contrary to the provisions of Articles 40 and 47 of the constitution and therefore illegal and unlawful;**
- b) **An order hereby issues to remove to this court and hereby quashes the decision by the respondent to refuse to consent to charge L.R. No. Isiolo Township/Block 4/144.**
- c) **An order of Mandamus hereby issues compelling the respondent, its officers and agents that are mandated to give consent to charge property to forthwith issue the consent to the petitioner to charge L.R. No. Isiolo Township/Block 4/144.**
- d) **Kshs.1,000,000/= as general damages for the illegal and unlawful actions of the respondent.**

24. The petitioner will also have the costs of the petition.

**SIGNED at Meru;**

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED at Meru this 13<sup>th</sup> day of December, 2018.**

**F. GIKONYO**

**JUDGE**