



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC NO. 115 OF 2015 (FORMER CONST. PET. NO. 28 OF 2013)**

**IN THE MATTER OF: ARTICLES 2(6), 19, 20, 21, 22(2)(a), (3)(d), 23(1),(3) &**

**25, 28, 40, 165(3)(a) (b), (d)(i), (ii) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS UNDER ARTICLE 26(1), (3) 27(1), (2), 28, 29(c), (d) OF THE CONSTITUTION**

**AND RULE 11 (C) & 12 PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF PRACTICE**

**AND PROCEDURE RULE AND ALL OTHER RELEVANT ENABLING POWER & PROVISIONS OF THE LAWS OF KENYA.**

**AND**

**IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL DECLARATION OF**

**HUMAN RIGHTS**

**BETWEEN**

**JANE MANYASI MWANGEMI.....PETITIONER/APPLICANT**

**= VERSUS =**

**1. ISUWIRIYO MANAGEMENT CO. LTD**

**2. BONFACE MWANGOMA MWANDOE**

**3. THE MINISTRY OF INTERNAL SECURITY**

**THE MINISTRY FOR LANDS HOUSING AND URBAN DEVELOPMENT**

**4. THE HON. ATTORNEY GENERAL**

**5. THE LAND ADJUDICATION OFFICER.....RESPONDENTS**

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

1. This petition was filed on 7<sup>th</sup> May 2013 by Jane Manyasi Mwangemi against the 6 respondents claiming ownership of Land Reference Number Ronge/Nyika/2001. She pleaded that she got married to Mwakireti Mukala who was in occupation of the suit title. That they have lived on the land for over 50 years. According to the petitioner, Voi location where he lives was not demarcated and was alienated as public land with no individual titles issued.

2. It is pleaded further that it has come to the petitioner's attention that a title deed was issued to the 2<sup>nd</sup> respondent on 19/8/2006 who then transferred the same to the 1<sup>st</sup> respondent on 10/9/2012 yet the petitioner was not informed. That on 24/4/2013, without warning, Court order or consultation, the respondent severally threatened to violently and brutally demolish the houses of the petitioner and her family without

giving them alternative accommodation.

3. That by dint of Article 2(6) of the Constitution, the petitioner and her family are entitled to fundamental right of housing and prohibition from forced eviction. That by dint of Article 26, they are entitled to the right to life which includes the rights to livelihood and reasonable means of sustaining life. She stated that she is also entitled to rights under Article 25, 28, 29, 35 and 42 of the Constitution.

4. The petitioner prays to be granted the following reliefs;

*a) A declaration that the action by the Commissioner of Lands in giving the 2<sup>nd</sup> respondent title deed over the parcel of land known as RONGE/NYIKA/2001 (suit property) and the Land Registrar of Titles issuing a title deed in the name of 2<sup>nd</sup> respondent at a time when the petitioner was in physical occupation and use of the suit property thereby rendering the petitioner subject to demolition of their houses/homes and family now erected on the said property and forceful eviction there from and potentially subjecting the petitioners to a state of homelessness contravenes the Provisions of Articles 2(5), 25, 28, 43(1) (b), 47(1) of the Constitution of Kenya which guarantees, adequate housing, dignity, respect protection and the right to fair administrative action.*

*b) That this Honourable Court do make such orders issue such writs and give such directions as it deems appropriate to prohibit the respondent(s) from interfering with the peaceful stay of the petitioner on the said suit property until such time as the National Land Commission shall have addressed itself to the validity and propriety of the allocation of the suit property to a business entity over and above landless Kenya citizens.*

*c) A declaration that the forcible, violent and brutal eviction through demolition of homes of the petitioner and her family without according them alternative shelter and/or accommodation leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental right to life guaranteed by Article 25, 26(1) and (3) & 28 of the Constitution of Kenya, and Article 11 of the ICESCR physical and moral health of the family under Article 16 and 18 of the ACHPR read the Article 2(6) of the Constitution of Kenya 2010.*

*d) A declaration that the forcible, violent and brutal eviction through demolition of homes of the petitioner and her family without according them alternative and/or accommodation and leaving the children to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by Article 53(1)(b), (c), (f) and (2) read together with Article 21(3) of the Constitution of Kenya, and Article 28 of the CRC read with Articles 2(6) of the Constitution of Kenya, 2010.*

*e) A declaration that the forcible, violent and brutal eviction through demolition of homes of the petitioners and other elderly persons without according them alternative shelter and/or accommodation rendering them to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the elderly persons to the pursuit of personal development, to live in dignity, respect and freedom from abuse to receive reasonable care and assistance from the State guaranteed by Article 57(b), (c) and (d) as read with Article 21(3) of the Constitution of Kenya.*

*f) A declaration that the petitioners was acquired propriety right over the stated land known as RONGE/NYIKA/2001 and therefore are entitled to be issued with Documents of title by the respondent(s) for the suit land in occupation by them and an order to that effect respectively.*

*g) A declaration that the petitioner and her family are entitled to general, aggravated, exemplary and punitive damages against the respondents jointly and/or severally.*

*h) Such general aggravated, exemplary and punitive damages as may be assessed by the honourable Court.*

*i) Any other or further orders and/or directions that this Honourable Court may deem fit and just to be granted.*

*j) Costs of this petition.*

5. Each of the respondents filed their respective affidavits in opposition to the petition. The 1<sup>st</sup> respondent on 27<sup>th</sup> June 2013 swore a reply through Jacob Mwaluda Kipongoso, one of its directors. Mr. Mwaluda denied that the petitioner or her late husband ever occupied the suit land. He deposed that the land generally in Ronge Nyika location was adjudicated many years ago and formalised in the year 2006 and persons in possession issued with title deeds.

6. The 1<sup>st</sup> Respondent added that the general public of Ronge Nyika participated in the adjudication process and at no time did the petitioner or her late husband raise any objection. That upon purchase and transfer of the suit title, the 1<sup>st</sup> Respondent took possession and started clearing bushes on the suit land. That they engaged a youth group for clearing the bushes and the said youth group through their Chairman has sworn an affidavit to confirm that the suit land was unoccupied. The 1<sup>st</sup> respondent also deposed that it is yet to commence fencing of the suit property. It is the 1<sup>st</sup> respondent's case that the parcel of land being described by the petitioner is totally different from the suit property by virtue of the survey map and photographs annexed as "JMK6 & JKM2".

7. The 2<sup>nd</sup> respondent filed a replying affidavit on 4<sup>th</sup> June 2013 in response to an application. He gave the 1<sup>st</sup> respondent authority to plead and/or swear an affidavit on his behalf as may be required in response to the petition.

8. The 3<sup>rd</sup> – 6<sup>th</sup> respondents filed their replying affidavit through David B. Mwakio on 15<sup>th</sup> April 2014. Mr. Mwakio deposed that he is the Land Registrar Taita Taveta District. That he was aware Ronge Nyika was declared an adjudication section on 6/5/1985 as per copy of the gazette notice annexed as DM1. He deposed that after a long and elaborate process of adjudication, an adjudication record was forwarded to their registry for registration which record indicated Boniface Mwangoma the 2<sup>nd</sup> respondent to be registered as the owner of parcel No. 2001.
9. That as per the adjudication records, there had been no objection or appeals lodged with regard to the registration of the suit property. That as a registered proprietor, the 2<sup>nd</sup> respondent transferred the suit land to the 1<sup>st</sup> respondent. That the Land Control Board consent was also sought and duly granted as shown by the copy annexed and marked as **DM 'IV'**. That in view of the foregoing, the allegations against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents are unfounded and untenable.
10. The petitioner called two witness in support of her Case. She testified as **PW1** on 5/10/2016. She stated that she lives in Mlewa in Voi. She was married to Mwakireti – deceased. **PW1** said she is the one entitled to the suit property since her co-wives live in Mwatate. **PW1** continued that the land belonged to her father-in-law and each person had their share. That the land was demarcated during the lifetime of her husband by the 2<sup>nd</sup> respondent who then kept the papers.
11. **PW1** described the 2<sup>nd</sup> respondent as a cousin to her husband. That the 2<sup>nd</sup> respondent sold the land without giving her any money. She stated that she filed a complaint with the local administration but the 2<sup>nd</sup> respondent did not care as he kept saying he sold his father's land. **PW1's** evidence is that she does not have title but she has always tilled the land from her youth. She urged the Court to give the land back to her.
12. In cross-examination by Andolo advocate for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, **PW1** said she lives on the land and it belonged to her deceased husband. Her husband died in the year 2009. That the demarcation was done while she was away working in the sisal plantations in Taveta. That the land neighbours a river and she has been using it. According to her, the 2<sup>nd</sup> respondent stepped in on behalf of her husband during demarcation. That she never filed any complaint with the adjudication officers. In re-examination, **PW1** said she never met her father-in-law. That she is entitled to the land by virtue of her marriage. That before being employed in the sisal plantation, she had lived on the suit land. She maintained that the 2<sup>nd</sup> respondent stole their land.
13. Hanington Lundi Katamba testified as **PW2**. He is a resident of JOMVU in Mombasa and son-in-law to the petitioner. He stated that he knew the suit property belonged to Mwakireti Mukala – deceased. **PW2** testified that the petitioner lives on the suit land and uses it for cultivation. That in 1978, the petitioner went to Taveta to join her husband who had gone there to search for food. That the petitioner returned in 1991 to find the 2<sup>nd</sup> respondent had surveyed the land. **PW2** continued that the petitioner filed a complaint with the chief but got no assistance. That the petitioner continued living and cultivating the suit land until 2012 when some youths came and informed her the land had been sold. He urged the Court to return the land to the plaintiff.
14. In cross-examination, **PW2** said he was born in Musau area and got married to the petitioner's daughter in 1982. That the plaintiff lives on the land across the river. **PW2** was not present during adjudication. In further cross-examination by Mr. Makuto for 3<sup>rd</sup> – 6<sup>th</sup> respondents, **PW2** said the land belonged to Mwakireti but they have not taken out letters of administration of his estate. That they did a search after the plaintiff complained. In re-examination **PW2** said the land would be the same with the one the petitioner was living on but because of boundaries separating locations. That the dispute arose after adjudication. **PW2** maintained the petitioner had a house on the suit land. This marked the close of the petitioner's Case.
15. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opened their Case with the evidence of Patrick Lezen Ngongodi testifying as **DW1**. He said that he has been the 2<sup>nd</sup> respondent neighbour from 1989. That each person's land was to be surveyed during adjudication. **DW1** said he is a clan elder and the land in dispute did not have any issues during adjudication. That there is no one called Jane living on the suit land.
16. In cross-examination, **DW1** said he has been a clan elder of Marureni Village for 10 years. **DW1** stated that there is no one living in his area called Mwakireti Mukala. That he was not a member of the Adjudication Committee. **DW1** said Voi River separates Voi and Ronge Nyika. That there is no house on the suit land. That the 2<sup>nd</sup> respondent's land end at the river.
17. Bonface Mwangoma the 2<sup>nd</sup> respondent testified as **DW2**. He said that he got his title for the suit land legally. That he got the land in 1959 as it initially belonged to his father Mwamdoe. **DW2** said he used to cultivate the land and adjudication process took place when he was using the land. **DW2** stated further that the adjudication was done in the presence of the Chief, Assistant Chief and the Adjudication Committee. That if there was any complaint anyone was allowed to lodge an objection. He added that he was given the title in the year 2006. **DW2** knew Mzee Mwakireti who died in 2009 after he got his title. The 2<sup>nd</sup> respondent produced a copy of his title as **Dex 1** and Adjudication Records (AR) as **Dex 2**. **DW2** said he does not know the petitioner who lives on the other side of the river.
18. In cross-examination, **DW2** said he is 65 years old. That in 1959, he lived on the suit land with his father while Mwakireti lived across the river. In 2005 when his father died, Mwakireti was living in Taveta. That Mwakireti was buried in Mwatate and the plaintiff came to build on Mwakireti's land which is across the river. That Mzee Mwakireti never claimed the land.
19. JACOB MWALUGA gave evidence as **DW3**. He said he runs the 1<sup>st</sup> respondent company. He adopted his statement dated 2/10/2015 together with the documents in their list. **DW3** said before buying the land, he visited the suit premises and found it in vacant possession. That he also conducted a search which showed the land was registered in the 2<sup>nd</sup> respondent's name. **DW3** added that he was not involved in the adjudication process. That he was not aware of any dispute between the petitioner and 2<sup>nd</sup> respondent. He prayed that he be allowed to continue with the proposed developments on the land.
20. In cross-examination, **DW3** said the company was formed to develop this land. That they did a survey to know whether there were any

people on the land. That they appeared before the land board in Mwatate twice. That he was present when the survey was one and the bushes cleared. That there is a river at the edge of the land. **DW3** said he bought land from a person who had documents. That he engaged an advocate during the transaction. This marked the close of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's Case.

21. MIKE SEGO MANYARIKI the Land Registrar testified as **DW4**. He adopted his affidavit filed in response to the petition as his evidence together with documents annexed thereto which were produced as a bundle as **Dex 4**.

22. **DW4** said he has not visited the disputed boundary as there were no letters written to their office requesting such visit. That once an adjudication register is completed, it is sent to Nairobi for titling. **DW4** did not have Minutes of the Land Control Board that gave the 2<sup>nd</sup> respondent consent to transfer. In re-examination, **DW4** said there is time allowed for raising objection during the adjudication process.

23. John Mbogo Mburu gave evidence as **DW5**. He is a Land Adjudication Officer stationed in Taveta. That during adjudication process, the suit land was given to the 2<sup>nd</sup> respondent. That the petitioner's name does not appear in their records. The records were prepared on 18/4/1997 and he had a copy of the notice done by David Mwakireti stating the conclusion of the adjudication process. That there is no record of objection. This marked the close of the 3<sup>rd</sup> – 6<sup>th</sup> respondents' Case.

24. The petitioner filed her submissions on 24/7/2019. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed theirs on 12/3/2019. The petitioner rehashed the evidence adduced submitting that she elaborately stated the various constitutional provisions that have been infringed and/or threatened as is required in the Case of *Anarita Karimi Njeru Vs The Republic (1976 & 1980) KLR 1272* and upheld in the Case of *Mumo Matemu Vs Trusted Society of Human Rights and 5 Others (2013) eKLR*. That the petitioner was surprised to learn that the 2<sup>nd</sup> respondent was registered as the owner of the suit property and issued with a title thus depriving the petitioner of her right to property under Article 40 of the Constitution.

25. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in their submissions raised the following questions;

*(i) Does the petitioner have locus standi to institute the suit and or maintain it? They answered on the negative because the estate of a deceased person involves several beneficiaries or interested parties. Therefore without letters of administration of her deceased husband's estate, the petitioner lack locus to institute the suit. They referred the Court to the Case of **Julian Adoyo Vs Francis Kiberege 92016) eKLR**.*

26. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also stated that their rights are guaranteed by Section 28 and 143 of the Registered Land Act. On the Sanctity of first registration, the 1<sup>st</sup> and 2<sup>nd</sup> respondents cited the holding in the Case of *Joseph Marisin Vs Joseph Kibilat, NKR Civ. Appeal No. 306 of 1997* thus;

***“Quite clearly this Section envisages that the title by way of a first registration is indefeasible even if obtained by fraud. This must be of necessity be so because the Land Adjudication Committee goes into all claims of ownership of the particular land prior to issuance of the first registration title. That is the law and a court of law cannot interpret the law otherwise than what it clearly lays down.”***

27. It is trite law that parties are bound by their pleadings. Further the burden of proof is on he/she who alleges. The petitioner pleaded that her rights under various Articles of the Constitution were violated and or were threatened to be violated. The petitioner pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were issued with a title deed for L.R. No. 2001 which land belongs to her and her family.

28. In her oral testimony and that of her witness, it was stated that she does not live on the suit land. Instead she said that she is cultivating the land. In the photographs produced by the 2<sup>nd</sup> respondent, the suit land is bushy. The description given by the 2<sup>nd</sup> respondent is corroborated by the affidavit of the Chairman of Thamani Youth Group that were hired to clear the land and the petitioner herself when she pleaded at paragraph 6 that on or about 24/3/2013, the Respondents jointly and severally threatened to demolish the houses of the petitioner and her family after completing to fence the suit property thus render them homeless (underline mine for emphasis)

29. Further the petitioner said she went to Taveta to work and the demarcation was done while she was away. The petitioner also stated that the land belonged to her father-in-law. She referred to the 2<sup>nd</sup> respondent as her step-son. If this is so, then, the 2<sup>nd</sup> respondent also had a right to get a share in the whole land owned by the said father-in-law. The adjudication process was completed in 1997 according to the adjudication records produced as Dex 2 and the title issued to the 2<sup>nd</sup> respondent in 2006.

30. The petitioner's husband died in the year 2009, three years after the issuance of title to the 2<sup>nd</sup> respondent. If indeed the suit land belonged to Mwakireti – deceased, it behoves logic that he did not file a complaint against the 2<sup>nd</sup> respondent in his lifetime. The petitioner chose to call her son-in-law who does not live in the area where the disputed parcel is as her witness. PW2 definitely has no history of this land and his evidence is merely hearsay as he restated what he had been told.

31. The evidence of the 2<sup>nd</sup> respondent was corroborated by DW1, DW4 and DW5. All these witnesses confirmed that the adjudication process was completed and no objection raised against the registration of the 2<sup>nd</sup> respondent as owner of the suit title. DW4 stated that adjudication process takes a long time. The letter dated 6/9/1985 was copied to various offices inter alia the District commissioner Taita/Taveta with sufficient copies to District Officers. The letter was also copied to the information officer Taita/Taveta District who was requested to give the content wide publicity.

32. Once the information on adjudication process was circulated through the local administration and the area information office, there was compliance with the Adjudication Regulations. The petitioner was living and working within Taita Taveta District therefore the burden

shifted on her to lay a basis why she and/or her family were not able to access the public information. In evidence, she said thus;

***“The land was demarcated by the 2<sup>nd</sup> respondent and he kept the papers”.***

This is inferred to mean she was aware of the demarcation exercise and yet she never raised any objection. She waited until 2012 when the 2<sup>nd</sup> respondent sold the land but failed to share the money with her. She did not give account why she wanted a share of the proceeds.

33. The petitioner did not specify which information she wanted to be provided with under Article 35. PW2 said they did a search which revealed the land was registered in the 2<sup>nd</sup> respondent’s name. Without being specific to the information required to be provided I am unable to find that this right has been breached. The petitioner also said she was entitled to Article 43 rights. The 2<sup>nd</sup> respondent said that his land ends at the edge of the river. The petitioner lives across the river from the suit land. There is no evidence of interference of the land she is in occupation of which was established to be distinct from the suit land. Therefore the petitioner failed to discharge how this right has been violated or is likely to be violated.

34. The declarations sought in the prayers are not supported by any evidence. The suit land was given to the 2<sup>nd</sup> respondent pursuant to an adjudication process and not by the Commissioner of lands as pleaded. The petitioner has not led sufficient evidence to challenge the title of the 2<sup>nd</sup> respondent which was a first registration. As a registered proprietor, the 2<sup>nd</sup> respondent had a right to dispose of the land as he did to the 1<sup>st</sup> respondent. I also find that no Case has been made against the 3<sup>rd</sup> – 6<sup>th</sup> respondents.

35. Consequently, I do make a finding that this petition is without merit. The same is dismissed with costs to the respondents.

**Dated and signed at BUSIA this 4<sup>th</sup> day of June, 2020.**

**A. OMOLLO**

**JUDGE**

**Judgment delivered electronically by email this 9<sup>th</sup> Day of June, 2020 due to Covid-19 pandemic.**

**A. OMOLLO**

**JUDGE**