



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CONSTITUTIONAL PETITION NO. 4 OF 2018

IN THE MATTER OF ARTICLES 2(1), (4) 19(2), (3), 21(1), 22(1) 23(1), (3), 27, 28, 40, 159(2), 162(2) (b) AND 165 (3)(b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28, 40, 45 (1) AND 50 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT (REPEALED) CHAPTER 300 LAWS OF KENYA SECTION 159

AND

IN THE MATTER OF THE JUDICATURE ACT CHAPTER 8 LAWS OF KENYA

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT SECTION 13

BETWEEN

LAWRENCE NJERU MUNYI & 10 OTHERS.....PETITIONERS

VERSUS

MUSA NJAU MITHURO.....1ST RESPONDENT

THE LAND REGISTRAR EMBU LAND REGISTRY.....2ND RESPONDENT

THE DISTRICT SURVEYOR – EMBU.....3RD RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. By an undated and unsigned petition filed on 21st September 2018 expressed to be based upon **Articles 2(1), (4), 19(2), 21(1), 22(1), 23(1), (3), 27, 28, 40, 159(2), 162(2) (b) and 165 (3) (b) of the Constitution of Kenya 2010** (*the Constitution*), the Petitioners sought the following reliefs;

- a. A declaration that the Petitioners’ fundamental right to have their dignity respected and protected has been infringed, violated, and threatened by the Respondents.*
- b. A declaration that the Petitioners’ right in association with others to acquire and own property has been infringed, violated, and threatened by the Respondents.*
- c. A declaration that the Petitioners are the rightful owner of Title No. Gaturi/Nembure/5385-5396, which land they lawfully acquired from Emilio Munyi Mithuro.*

d. A declaration that the purported decision and subsequent orders of the Chief Magistrates Court at Embu dated the 9th October 2017 and amended on the 22nd November 2017 was a violation of the Petitioners' rights.

e. An order of certiorari to issue to remove to this honorable court for purposes of being quashed the decision of the Chief Magistrates Court at Embu and orders issued on the 9th day of October 2017 and amended on the 22nd November 2017.

f. A declaration that any attempted disposition or cancellation of title number Gaturi/Nembure/5385-5396 done by anyone other than the Petitioners are fraudulent and a violation of the Petitioners' constitutional rights.

g. Costs of the petition

h. Such other order(s) as this honourable court shall deem just and fit to grant.

B. THE PETITIONERS' CASE

2. The Petitioners claimed to have lawfully acquired *Title Nos. Gaturi/Nembure/5385-5396* (the *suit properties*) from the late Emilio Munyi Mithuro (the *deceased*). They were aggrieved that their titles to the suit properties were cancelled by the Chief Magistrate's court in *Embu CMCC No. 61 of 1980* whereas they were not parties thereto. They also complained that by the time the order of cancellation was issued the deceased was long dead. That is really the gist of the petition.

3. The said petition was supported by the affidavit sworn jointly by the 11 Petitioners on 21st September 2018 which reiterated and expounded upon the grounds set out in the petition. They stated that they acquired the suit properties from the deceased during his lifetime and that they were not privy to the proceedings whereby their titles were cancelled by the Chief Magistrate's court. It was further contended that the decree or order purporting to cancel their titles was statute-barred under the **Limitation of Actions Act (Cap. 22)** hence it was unenforceable. Consequently, the Petitioners considered that the cancellation of their titles was a violation of their constitutional rights under Articles 20, 21, 22, 23, 27, 28, 40 and 50 of the Constitution of Kenya.

C. THE 1ST RESPONDENT'S RESPONSE

4. The 1st Respondent filed a replying affidavit sworn by Immaculate Ruguru Njeru on 24th February 2020 in opposition to the said petition. She swore the said affidavit in her capacity as the legal representative of the estate of Musa Njau Mithuro (*Musa*). She stated that Musa and the deceased were brothers who had a land dispute with respect to *Title No. Gaturi/Nembure/1457 (parcel 1457)* which was later sub-divided into *Title Nos. Gaturi/Nembure/5385-5396*.

5. It was contended that the said land dispute was determined in *Embu CMCC No. 61 of 1980 – Emilio Munyi Mithuro V Musa Njau Mithuro* whereby it was declared that parcel 1457 belonged to the two brothers in equal shares. It was further contended that before the said decree could be implemented the deceased sub-divided parcel 1457 into parcel Nos. 5385-5396 and fraudulently transferred them to the Petitioners. It was the transfers to the Petitioners which were cancelled by the Chief Magistrate's court.

6. It was further contended that the deceased and the Petitioners had challenged the decree and orders of the Chief Magistrate's court before both the High Court and the Court of Appeal without success. It was contended that the deceased and the Petitioners had over the years frustrated execution of the decree and orders of the Chief Magistrate's court in which Musa was the successful party and that the instant petition was yet another ploy to delay conclusion of the land dispute which has been pending in court for 40 years. Accordingly, the court was urged to dismiss the petition with costs.

D. THE 2ND & 3RD RESPONDENTS' RESPONSE

7. The 2nd & 3rd Respondents did not file any response to the petition despite service.

E. DIRECTIONS ON THE HEARING OF THE PETITION

8. When the petition was listed for directions on 25th February 2020 it was directed that the petition shall be canvassed through written submissions. The Petitioners were granted leave to file any further or supplementary affidavits together with their written submissions within 30 days. The Respondents were granted 30 days upon the lapse of the Petitioners' period to file their submissions. The parties were given the liberty to highlight their submissions on 25th May 2020.

9. The material on record shows that the Petitioners did not file any submissions within the stipulated period or at all even though the 1st Petitioner was present in court when directions were given. The 1st Respondent filed submissions on 29th May 2020 whereas the 2nd & 3rd Respondents did not file any. In those circumstances, the court had to dispense with highlighting of submissions.

F. THE ISSUES FOR DETERMINATION

10. The court has considered the petition, the affidavit in support thereof, the annexures thereto, the 1st Respondent's replying affidavit, and the entire material on record. The court is of the opinion that the following issues arise for determination:

a. Whether the petition raises any constitutional issues.

b. Whether the Petitioners have demonstrated a violation of the constitutional rights cited in the petition.

c. Whether the Petitioners are entitled to the reliefs sought.

d. Who shall bear costs of the petition.

G. ANALYSIS AND DETERMINATIONS

a. Whether the petition raises any constitutional issues

11. Although the Petitioners filed the instant petition alleging violation of their constitutional rights and freedoms under various articles of the **Constitution**, the material on record reveals that the Petitioners were aggrieved on account of two matters only. First, the Petitioners contended that their title deeds for the suit properties were irregularly or unlawfully cancelled in proceedings they were neither aware of nor privy to. Second, they contended that, in any event, the decree or orders sought to be executed were statute-barred under the **Limitation of Actions Act (Cap. 22)**. The rest of the grievances were merely ancillary matters which flowed from the decree and orders granted by the Chief Magistrate's court.

12. The material on record indicates that the dispute between the deceased and Musa in *Embu CMCC No. 61 of 1980* was referred to some elders who returned a verdict awarding Musa one half of parcel 1547. That decision was apparently adopted as a judgement by the court. It would also appear from the material on record that the deceased unsuccessfully challenged the said decision before the High Court.

13. The material on record further indicates that during the pendency of active litigation either before the High court or the Chief Magistrate's court the deceased sub-divided parcel 1547 to parcel Nos. 5385-5396 which he then transferred to the Petitioners thereby depriving the successful party in the litigation (Musa) his half portion of parcel 1547. The said transfers and titles were subsequently cancelled by the Chief Magistrate's court after the demise of the deceased. The Petitioners unsuccessfully challenged the cancellation of their titles before the Court of Appeal at Nyeri in *Nyeri Civil Appeal No. 96 of 2012 – Lawrence Njeru Munyi & 13 Others Vs Musa Njau Mithuro*. That appeal was struck out as incompetent on 6th May 2014.

14. It would appear that the Petitioners decided to bid their time for another four (4) years before filing the instant petition on 21st September 2018 for the purpose of forestalling or frustrating execution of the orders by the Chief Magistrate's court directing cancellation of their titles which were obtained *pendente lite*.

15. The court is unable to discern any constitutional issues in the instant petition. The grievances of the Petitioners all arise from legal proceedings which were undertaken before various courts of competent jurisdiction. The Petitioners had every opportunity to challenge the decrees and orders made in the course of the long running litigation spanning forty years. Clearly, their attempts to overturn the impugned orders were unsuccessful even before the Court of Appeal.

16. The court does not accept the view that any irregularities in the conduct of civil proceedings would necessarily give rise to constitutional issues even in cases where parliament has provided a mechanism for appeal. The allegation that the decree or other order of the Chief Magistrate's court has become statute barred does not constitute a constitutional issue. The court is not persuaded that the Petitioners were not aware of the pendency of *RMCC No. 61 of 1980* since the material on record does not support that view. There is ample evidence on record to demonstrate that the deceased and Musa were brothers who were involved in litigation over parcel 1547 since 1980. There is evidence on record to demonstrate that the Petitioners filed *Embu Misc. Application No. 21 of 2014 – Lawrence Njeru Munyi & Others V Musa Njau Mithuro* over the same subject matter. Even if the Petitioners were to demonstrate that they were unaware of *CMCC No. 61 of 1980* that would not necessarily constitute a constitutional issue.

17. It is not every alleged violation of a civil, procedural or legal rule which would result into a constitutional issue necessitating the filing of a constitutional petition. As was observed by Nyamu J in the case of **Kenya Bus Service Ltd & 2 Others Vs Attorney General [2005] 1KLR 787 at page 799;**

“In addition, although there is no direct local authority on the point, the holding No. 3 in the Trinidad and Tobago Constitutional case of Re-Application by Bahader [1986] LRC (Const) 297 at page 298 represents our position as well;

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution.” See *Harrikson Vs Attorney General of Trinidad and Tobago [1979] 3 WLR 62 applied*”.

18. There is no doubt that the Petitioners' grievances could be addressed through the appellate system established by various laws enacted by parliament. It has been held that where parliament has provided a specific procedure for redressing a grievance, that procedure must be strictly followed. In the case of **Peter Muturi Njuguna V Kenya Wildlife Service [2017] eKLR** it was held, *inter alia*, that:

“The issue of exhausting specific procedure has been considered at length by this Court as well as the High Court in many decisions. In *The Speaker of the National Assembly -vs- Karume [2008] 1 KLR 426 (EP)*, this Court stated that, where there is a specific procedure provided for redress of grievances, that procedure ought to be strictly followed. Similarly in *Kimani Wanyoike -vs- Electoral Commission Civil Appeal No. 213 of 1995 (UR)* which was decided before the cause of action in this matter arose, the Court held:-

“where there is a law prescribed by either a constitution or an act of Parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed”.

19. The court is of the opinion that the Petitioners are trying to circumvent the established appellate process in an attempt to nullify the decree and orders of the Chief Magistrate’s court through the instant petition. That is why the Petitioners are seeking an order to quash the decision and order of the Chief Magistrate’s court dated 9th October 2017 and amended on 22nd November 2017 for allegedly violating their constitutional rights. The rest of the prayers sought in the petition relate to matters which were directly and substantially in issue in previous proceedings and which were conclusively determined by competent courts. In **Kenya Bus Service Ltd & 2 Others V Attorney General [2005] 1 KLR 787** it was held that an unchallenged court order cannot be the basis of a constitutional application for the purpose of preventing execution.

b. Whether the Petitioners have demonstrated a violation of their constitutional rights

20. The court has found and held that the petition does not raise any constitutional issues within the meaning of **Chapter 4 of the Constitution**. It would, therefore, follow that the question of whether or not the Petitioners have demonstrated violation of the constitutional rights cited in the petition is moot. Accordingly, the 2nd issue is answered in the negative.

21. The court is of the opinion that even if the petition had raised constitutional issues, the Petitioners are guilty of non-disclosure of material facts in consequence whereof they became disentitled to any remedy. The court adverted to such non-disclosure or concealment of material facts in its ruling dated 28th March 2019 on the Petitioners’ application for interim orders as follows:

“The court is also not inclined to grant any interim orders because the court has discovered that the Petitioners have not made a full and faithful disclosure of all material facts. The court is aware that the Petitioners filed Embu Misc ELC Application No. 21 of 2017 – Lawrence Njeru Munyi & Others Vs Musa Njau Mithauro in which they sought stay of execution of certain orders of the Chief Magistrate in Embu CMCC No. 61 of 1980 pending appeal. The ruling on the said application was delivered by this very court on 19th July 2018 dismissing it with no order as to costs. The court is also aware that the Petitioners herein had unsuccessfully sought to challenge the process of execution and cancellation of their titles in Nyeri Civil Appeal No. 96 of 2012.”

22. In **Kenya Bus Service Ltd & 2 Others V Attorney General (supra)**, Nyamu J (as he then was) referred to his earlier holding in *HCC Misc. 1052 of 2004 Booth Irrigation V Mombasa Water Products* as follows:

“In HCC Misc 1052 of 2004 BOOTH IRRIGATION v MOMBASA WATER PRODUCTS LTD this court held inter-alia:

(i) Res judicata does apply to Constitutional matters

(ii) An unchallenged court order cannot be the basis of a Constitutional application (to prevent execution)

(iii) Non disclosure of material facts is sufficient to warrant the dismissal of a Constitutional application

(iv) A Constitutional court has inherent powers to prevent abuse of its process

(v) A Constitutional application brought in violation of fundamental principles of law is incompetent and should be dismissed.” (emphasis added)

c. Whether the Petitioners are entitled to the reliefs sought

23. The court has found and held that the petition does not raise any constitutional issues. The court has also found that the Petitioners have not demonstrated violation of the constitutional rights cited in the petition. The court is also of the view that the Petitioners are guilty of non-disclosure of material facts in the petition. It would, therefore, follow that the Petitioners are not entitled to the reliefs sought in the petition or any one of them.

d. Who shall bear costs of the petition

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the petition. The court has found that the petition raises no constitutional issues and it would appear to have been mischievously filed solely for the purpose of forestalling execution of the decree and orders issued by a court of competent jurisdiction. Accordingly, the 1st Respondent shall be awarded costs of the petition as against all the Petitioners jointly and severally. However, the 2nd & 3rd Respondents shall not be awarded costs since they did not participate in the proceedings.

H. SUMMARY OF THE COURT’S FINDINGS

25. In summary, the court makes the following findings on the issues for determination:

- a. The petition does not raise any constitutional issues.
- b. The Petitioners have not demonstrated any violation of their constitutional rights.
- c. The Petitioners are not entitled to the reliefs sought in the petition, or any one of them.
- d. The 1st Respondent shall be awarded costs of the petition against the Petitioners jointly and severally.

I. CONCLUSION AND DISPOSAL ORDER

26. The upshot of the foregoing is that the court finds no merit in the Petitioners' undated petition filed on 21st September 2018. Accordingly, the same is hereby dismissed in its entirety. The 1st Respondent is hereby awarded costs of the petition to be borne by the Petitioners jointly and severally. It is so decided.

JUDGEMENT DATED and SIGNED in Chambers at EMBU this 4TH DAY of JUNE, 2020 and delivered via the zoom platform in the presence of Ms. Ndorongo for the 1st Respondent, Mrs. Njoroge for the Attorney General for the 2nd & 3rd Respondents and in the absence of the Petitioners.

Y.M. ANGIMA

JUDGE

04.06.2020