



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
PETITION CASE NO. 20 OF 2014

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 40, 47, 165(3), 262 & SECTION 7 OF PART
1 OF THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF: THE LAND ACT, 2012

AND

IN THE MATTER OF: THE REGISTERED LAND ACT, CHAPTER 300, LAWS OF KENYA
(REPEALED)

AND

IN THE MATTER OF: TITLE NUMBERS KWALE/SHIMONI/406, 412 AND 758

BETWEEN

ARNOLD MBAABUH the duly appointed Attorney of

GERALD KITHINJI MWIRICHIA.....PETITIONER

AND

1. SHEIKH MAHMOUD ABDULRAHMAN.....RESPONDENT

2. PRITAM SINGH PANESAR.....RESPONDENT

3. DISTRICT LAND ADJUDICATION AND SETTLEMENT

OFFICER, KWALE.....RESPONDENT

4. DISTRICT LAND REGISTRAR, KWALE.....RESPONDENT

RULING

1. This Ruling relates solely to the Amended Chamber Summons dated and filed on 26th June, 2014 in which the Petitioner, Arnold Mbaabu, a purported Attorney of one Gerald Kithinji Mwirichia seeks a list of interim orders, including –

(a) – (d)

(f) that pending the hearing and determination of the Petition herein, ... the District Land Registrar, Kwale, together with the Fifth Respondent, the National Land Commission, be compelled together to carry out a full investigation and disclose to the court, the manner in which the First Respondent, Sheikh Mahmoud Abdulrahman became registered as the owner of the parcel of land known as KWALE/SHIMONI/406 (the suit property);

2. The Petitioner's/Applicant's case is essentially that the transfer of the suit property by the First Respondent to the Second Respondent was an act of fraud perpetrated by the First Respondent with the active participation or connivance of the Third and Fourth Respondents, and these alleged acts of fraud violated the Petitioner's right to property guaranteed under Section 75 of the former and now repealed Constitution, and preserved under Article 40 of the Constitution of Kenya, 2010 (the Constitution).

3. Despite service by advertisement in the Standard and People Daily of 17th July, 2014, neither the First, Fourth (the District Land Registrar) and the Fifth Respondent (the National Land Commission) responded either to the Petition or the Amended Petition. The Third Respondent, the District Land Adjudication and Settlement Officer has replied by a Replying Affidavit sworn and filed on 1st December, 2015 by Nicholas Sanya, the Deputy Director Land Adjudication and Settlement. This deponent has essentially repeated what is contained in paragraphs 1 – 4 (inclusive) of the Grounds of the Amended Chamber Summons that –

(1) the suit property was first demarcated to Hamisi Masudi, Marinda Ali, Mwanaulu Fosi and Mwandasi Mwamadi as proprietors in common on 3rd June, 1980, as per the Demarcation Rough Book;

(2) upon publication of Register (of adjudication), an objection No. 152/89-90 was raised against the above Entry by Gerald Kithinji Mwirichia claiming ownership by purchase;

(3) the objection was heard on 27/04/1980 and allowed as witnessed by the objection proceedings marked "NS2" of the said Affidavit;

(4) the parcel was consequently transferred to Gerald Kithinji Mwirichia and the Adjudication Record was amended accordingly;

(5) the suit property was not subject of an appeal to the Minister and a Certificate of Finality was issued;

(6) the final Adjudication Register was forwarded to the Chief Land Registrar, per letter dated 6/12/2002, Ref. 2A/14/14/3/6/25 Vol. 25.

4. With the above Affidavit, the Petitioner has information that the suit property was upon the complaint of Gerald Kithinji Mwirichia, adjudicated in favour of the said Gerald Kithinji Mwirichia, and the Final Adjudication Register was forwarded to the Chief Land Registrar, then under the Registered Land Act (Cap. 300, Laws of Kenya) now repealed. It is clear to me therefore this is a matter of public record, and is obtainable upon a search in the Lands Registry at Kwale.

5. From the Replying Affidavit of the Second Respondent, the information sought by the Petitioner as to how the First Respondent became the registered proprietor of the suit property if the Entries or any of

them as the Petitioner pleads were fraudulent, then with respect to counsel for the Petitioner, is a matter of evidence to be established by the Petitioner as the person alleging fraud. Section 107 of the Evidence Act [Cap 80 Laws of Kenya] provides that whoever alleges the existence of any fact, must prove it unless such person demonstrates such facts or circumstances are within the special knowledge of the Defendant or Respondent.

6. The information sought by the Petitioner under Article 35 of the Constitution is not information specially in the knowledge of either the Fourth or Fifth Respondents. It is information in the public domain by virtue of its being available by an official search in the Lands Register.

7. Since that was the only prayer or order sought in the Amended Chamber Summons, the application must fail and is therefore dismissed.

8. The Third Respondent sought in its Replying Affidavit an order dismissing the Petition forthwith. That would be a preemptory order without granting the Petitioner an opportunity to ventilate his claim, though his **locus standi** is being challenged, and that is a matter counsel for the Petitioner needs to consider in light of the orders below.

9. As already stated, the Petition herein is premised upon fraud, and fraud is a matter to be proved in evidence. The claim against deprivation of property ought to be properly contested by an ordinary civil action in the Environment and Land Court not as a Constitutional Petition.

10. In that regard therefore I direct that this Petition be and is hereby transferred to the Environment and Land Court to be given a new number in that court, and be prosecuted in priority as an ordinary civil action.

11. Though the Amended Chamber Summons is dismissed, and costs usually follow the event, I direct that the costs occasioned by the Amended Chamber Summons do abide the outcome of the civil action under the Environment and Land Court.

12. There shall be order accordingly.

Dated, Signed and Delivered in Mombasa this 9th day of March, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Miss Muyaa for Petitioner

No Appearance for Respondents

Mr. Silas Kaunda Court Assistant