



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**  
**PETITION NO. 9 OF 2014**

**BENJAMIN K.KIPKULEI.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT**

**R U L I N G**

1. On 28/2/2014 the Petitioner, **Benjamin K. Kipkulei**, filed a petition dated the same day and sought a raft of orders of declaration, an order for rectification of the register over title no. LR MN/I/5194 registered as CR 21127, an order of prohibition against the Respondents and persons claiming under them from interfering with the petitioners proprietary and/or possessory rights of enjoyment of the suit property, costs and any orders deems just, fit and or appropriate by the court.

2. The facts founding the petition are that at all material times the petitioner was the Registered Proprietor of all that parcel of land known as **MN/I/5194 and registered as C.R. 21127** till the 16/6/2007 when certain persons went to the premises and forcefully evicted the petitioner's agent then on the premise. That group, the petitioner described as extremely hostile, asserted to be acting behalf of the one **MUSK-DEER LIMITED** who had acquired proprietary rights over the property pursuant to court orders issued in **CMCC No. 2094 OF 2006, MUNICIPAL COUNCIL OF MOMBASA -VS- BENJAMIN N KULEI**.

3. Having perused the record of those court proceedings in that suit the petitioner, contends and avers that there was evident and concerted efforts to deprive him of the property wrongfully, unlawfully, fraudulently and arbitrarily in contravention and breach of his constitutional rights guaranteeing right to property, fair trial and not to be condemned unheard. That assertion is grounded on the facts, as held by the Petitioner, that he has never held a postal address **no. 80294 Mombasa** and that his postal address as shown in the document of title and the 2<sup>nd</sup> Respondent's Records and confirmed by the Postal Corporation of Kenya was **Post Office Box No. 30040 Nairobi**. That address, **no. 80294 Mombasa**, the Petitioner swears has never belonged to him is the address upon which process was allegedly served upon him. It is added that the law makes it mandatory under the Rating Act that a demand be served and that without a demand properly served, the court lacked jurisdiction to entertain the suit, leave alone determine it and proceed in the manner complained about. There is an additional complaint that not only the provisions of the Rating Act, but also the provisions of the Civil Procedure Act and the Constitution were all breached with a consequence, in his view, that all the proceedings taken before and after the decree were all never taken properly and were to that extent null and void.

4. Attempts were made at setting aside the *ex parte* proceedings, before the trial court but the declined jurisdiction on the basis that it had become *functus officio*. Against that decline of jurisdiction the petitioner appealed and the proceedings on that appeal have, in the opinion of the petitioner, revealed even more unprocedural and wrongdoings on the part of the Advocate for the Respondent and the auctioneer who sold the property. Based on the aforesaid grounds and complaints, the petitioner in his words prays for orders that :-

**1. A declaration that your Petitioners' fundamental rights to the protection of his property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been breached.**

**2. A declaration that the Respondent and its agents and for the Subordinate Court acted inconsistently with and in breach of their powers, duties and obligations under the Provisions of The Rating Act (Cap 267, Laws of Kenya) Civil Procedure Act and Rules, Auctioneers Act as well as Articles 10, 21, 22, 27, 40, 47 50 and 159 of The Constitution.**

**3. A declaration that the Petitioner, BENJAMIN KIPKULEI's name as proprietor was wrongfully, illegally and unlawfully removed from the register relating the property known as L. R. No. MN/I/5194 registered at the Land Titles Registry, Mombasa as C.R. 21127.**

**4. An Order directing the Land Titles Registrar Mombasa County, to rectify his records in the register to reflect the name of BENJAMIN KIPKULEI as the proprietor of the said property known as L.R. No. MN/1/5194 registered at the Land Titles Registry, Mombasa as C.R. 21127 as stated in the original Title Deed is issued to him on the 18<sup>th</sup> February 1991.**

**5. Consequently, an order prohibiting the Respondents whether by themselves or through any other person purporting to derive Title through or under them from interfering with your Petitioners proprietary and/or possessory rights or enjoyment of the suit property.**

**6. The costs of and consequent upon this Petition be paid and borne by the Respondent.**

**7. All other or such orders or relief as this Honourable Court may deem just and fit or appropriate to grant.**

5. To that petition the Respondent filed a Replying affidavit by one Hamisi Mwanguya who described himself as the County Secretary, Mombasa County and a person who was swearing the affidavit based on the Records held by the Respondent. I take it that the deponent was not in the employment of the Respondent at the time the acts complained about took place or if he was, then was not concerned with the processes leading to this matter. What comes out strongly from that affidavit is that there was never any record that Ms. Meenye & Kirima advocates were ever contracted or instructed by the Respondent and its predecessor to collect rates on its behalf or indeed do any legal work for it because the firm had never been prequalified as a professional service provider as the law required.

6. The deponent then delves into the assertion by Meenye & Karima Advocates that they had been instructed by one Hon. Lenny Kivuti t/a Geomaps and contents that there is no record of any contract between the Municipal Council of Mombasa and the said Lenny Kavuti and further that none had been exhibited in the documents filed.

7. On the propriety of the proceedings before the Chief Magistrates Court, the deponent says and agrees with the Petitioner that there was never a demand for payment of rates as is mandatory under the law in that there was no demand in the prescribed form and signed by either the town clerk or in Town Treasurer. To the respondent, that went to jurisdiction without of which no proper proceedings were ever initiated or undertaken. Next critical observation by the deponent is whether or not the conditions set by the court for sale were ever complied with and in particular, the conditions regarding payment of the purchase price. The conditions were in no vague terms but very unequivocal that the payment of 25% was to be immediately and the balance of 75% within 30 days after sale. However, the deponent refers

the court to a letter by the auctioneer dated 26/3/2007 indicating that the sale took place on the 16/3/2007 and that the balance of the purchase price '*would be paid after the vesting order and registration of the property in favour of the purchaser*' to show that the court orders were altered midstream and by the purchaser and the auctioneer. The deponent further exhibits a letter dated 19/4/2007 by which the purchasers advocate one **Atkinson Cleasby & Satchu advocates** wrote to **Ms. Meenye & Karima Advocate** seeking an undertaking for the release of the completion documents and promising that the purchaser was organizing a bank cheque for the balance of the purchase price. Indeed the balance of the purchaser price is shown to have been forwarded to Ms. Meenye & Kiriba Advocates on the 24/4/2007.

8. On those disclosed facts including a demand by the purchaser that an undertaking be given for obtaining a vesting order and grant of vacant possess prior to payment of the balance of the purchase price contrary to the conditions of sale, the deponent contents that no valid sale was conducted nor concluded. In addition, to the deponent, the payment of the purchase price was to be made to the court or the Respondent a failure that, to him, vitiated any legality that could have been attached to the sale. On such basis the Respondent contest the interested party's taken position as a '*Purchaser For Value Without Notice*' as not being honest but merely rhetoric and not in consonance with the conditions of sale it was to flow from.

9. There is yet another short affidavit shown by one Shedd Dennies Simotwo whose only tenure and effect is to deny and assert that it is '*highly unlikely*' that he appended his signature to the verifying affidavit verifying the plaint before the court as he says his name is as disclosed in his affidavit filed herein and not as stated in the verifying affidavit in the suit before the lower court. The totality of the two affidavits sworn on behalf of the Respondent is that the Respondent distances itself from the proceedings giving rise to the sale of the petitioner's property and in effect supports the petitioner's petition that the sale was in violation of the law and due process and should be declared unconstitutional.

10. The real opposition to the petition is mounted by the interested party, MUSK-DEER LIMITED, who filed a replying affidavit by one ASHOK DHOSHI and a witness statement by one PETER KINYUA MUCHENDU, the auctioneer. The statement by the auctioneer, who appeared to have preferred to be a witness to the interested party rather than himself be heard as an interested party, having been the person whose conduct in the sale was questioned and vilified, was to the effect that he did receive letter of instructions for Ms. Meenye & Kirima Advocates to proceed with the sale of several properties among them the suit property herein. That letter of instructions enclosed a notification of sale and conditions of sale issued by the subordinate court.

11. The auctioneer adds that pursuant to the instructions he did instruct one **Maina Chege**, a valuer to undertake the valuation of the suit property. A copy of the valuation report attached reveals the open market value of the property to be Kshs.20,000,000 with a forced sale value of Ksh.14,000,000/-. Pursuit to the valuation the property was advertised to be sold by public auction and sold to the interested party at Kshs.15,000,000/-. The Auctioneer expresses shock at the stand taken by the Respondent on the alleged lack of Ms. Meenye & Kimina Advocate's instructions from it and states that the said firm instructed him on several matters to which no complaint had been raised. The Auctioneer contests the accusations levelled against him of irregularities denies having colluded with the interested party in the sale but contends that he complied with the entire legal procedures attendant to such sale. He, as is expected, owns up to the fact that he is unable to comment on the propriety of the proceedings before the trial court to which he sold the property but steers clear of the complaint that the payment of the purchase price was done contrary to the conditions of sale.

12. Additionally, on behalf of the interested party an affidavit was sworn by one ASHOK DHOSHI and his position is that he did attend a properly conducted auction pursuant to a court order and that he was to that extent an innocent purchaser for value without notice as to any impropriety.

13. There is a further affidavit, (it ought to have been called a supplementary affidavit) by the petitioner sworn on the 9/4/2015 and filed in court the same day. It is clearly intended to be an answer to the averments by the Interested Party and to assert that paragraphs 8, 9, 10 of MR. ASHOK DHOSHI'S Affidavit, reveal the impropriety in the process of sale and that the resultant title is itself a nullity.

14. That is, from my reviewing of the papers filed herein, the state of parties' positions regarding the petition. I may only add that the advocates who acted in the proceedings now challenged in the matter, Ms. Meenye & Kirima, who ought to be the depositories of the true facts of how those proceedings were conducted and could have been of much needed help to court in shedding additional light on what they did or did not do right did not participate actively in the petition. It appears they did not want to participate in the proceedings as can be seen by their letter to the Deputy Registrar dated 18/3/2016 in which the firm stated:-

**“This is to confirm that this firm is not a party to and has no interest in the above matter and we do not wish to be represented in the proceedings therein by any advocate”.**

15. I think that position was clearly the natural and logical one to be taken by the advocate regard being had to the fact that one G K Meenye had on 11/1/2011 sworn an affidavit filed in Mbs HCCA No. 178 of 2007 and denounced the sale. I will return to that affidavit at a later stage in this decision.

### **Analysis and determination**

16. The foundation of the duty of every person to comply with the dictates of the Constitution is to be found at Article 3. Under that article, the constitution provides:-

#### **3. Defence of this Constitution**

**(1) Every person has an obligation to respect, uphold and defend this Constitution.**

**(2) Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.**

17. By definition at Article 260, a person includes a company, association or other body of persons whether incorporated or unincorporated. Under this description a state organ, like the court, is of equal obligation to not only respect and defend but also to uphold the constitution, its principles and values.

18. One of the core values of the constitution under article 10(2)b is the respect for fundamental rights and freedoms of the individual. Those rights include the right to own property in any part of the Republic of Kenya and the right not to be arbitrarily deprived of such ownership.

19. In this petition the petitioner has alleged arbitrary and unlawful deprivation of the suit property by the conduct of the Respondent which it alleges was done unlawfully and arbitrarily as the court process leading to the same is alleged to have been anything but in accordance with the law. It is equally alleged that the petitioner's right to a fair hearing was breached and denied. To this Court, the determination of the petition on the facts pleaded will largely turn upon the interrogation of the process undertaken by the lower court and said to have been conducted pursuant to the provisions of the Rating Act. That interrogation will seek to answer the question whether that process upheld the petitioner's right to a fair trial as anticipated under Article 50 of the Constitution. The constitution at Article 50 says:-

#### **50. Fair hearing**

**(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

As a right this is one of those that the Constitution expressly sanctify under article 25(c) as incapable of limitation. To this court that underscores the level at which Kenyans view this right even within the bill of rights.

20. Now to this court once a party is sued, with the obvious threat and knowledge that a court determination when made ought to be fulfilled so that we remain in the realm of being governed by the

rule of law, rather than anarchy, it is critically important that for process to command the respect it ought to command, must be done flawlessly and the highest achievable standards of compliance with not only the substantive law but also the procedural requirements.

21. In the matter before court now the petitioner makes that very grave allegation that there was unlawful and fraudulent scheme to deny him and that he was indeed denied the right to defend himself against the allegation of failure to pay rates to the Respondent. It is alleged that summons to enter appearance were never served as the postal address to which the same were directed did not, does not and has never belonged to him. In order to prove that allegation, he has exhibited a letter from the postal corporation of Kenya dated 21/6/2007 to the effect that Box Number 84029 MOMBASA had been held by different customers since 1992.

22. Indeed there are copies of rates demand notices from the Municipal Council of Mombasa variously dated and demanding from the petitioner various sums of money for rates and the notices at pages 254 & 256 of the petition show and disclose the petitioners postal address as P.O. Box 30040 Nairobi. Of critical note is that the affidavit of G.K. Meenye sworn before Julius Onyoni Opini on the 11/1/2011 and filed in Mbs HCCA No. 178 of 2007, at pages 246 – 249, of the record at paragraph 13, is unequivocal that the address of the petitioner prior to the appointment of Geomaps was indeed 30040, Nairobi but it was never clear when that was charged to read P O BOX 84029, Mombasa.

23. This court can only make a determination of a dispute based on the facts presented by the parties. In this case the uncontroverted fact is that the petitioner has never rented from the Postal Corporation Of Kenya, Post Office Box Number 84029 Mombasa and the Respondent have not availed any evidence to the contrary. In fact there is no assertion that the box number ever belonged to the petitioner. It is to this court a basic learning that a fact that is asserted against a party and not controverted by that party is deemed admitted. In this case therefore the petitioners assertion that he has never owned post office box number 84029 Mombasa has been admitted with the obvious consequence that any service allegedly effect through that address could not have been a service on the petitioner.

24. At this juncture, Mr. Meenye Advocate must be commended by this court for standing up to his calling to stand by the law and to be candid with the court irrespective of the stand taken by a party to the litigation before court. In the aforesaid affidavit, at paragraphs 15, 16, 17, 18, 19 & 20 the advocate says:-

Paragraph 15: THAT I have also scrutinized previous Rates Demand Notes/Invoices issued to the Defendant by the Council, before the appointment of Geomaps/GIS and it appears that the debt allegedly owing is different from the amount shown on the GIS print-out. I attach these in a bundle marked 'GKM 6'.

Paragraph 16: THAT in view of the foregoing I am now convinced that the amount allegedly owing by the Defendant was not factual and/or owing or that the Defendant actually received the Court process at the address given and the default judgment entered against him cannot lawfully stand.

Paragraph 17: THAT furthermore I have also gone through my records and I have not been able to trace any copy of the Notice by the Municipal Treasurer raised under Section 17 of the Rating Act and I agree this is a fatal omission to the commencement of the suit.

Paragraph 18: THAT I am also now convinced that I was misled by Kinyua & Co. Auctioneers that the property was an un-developed plot, partly occupied by squatters, while in fact I have established that it is a substantial property duly occupied by the Defendant and his workers. If I had the proper information I could not have agreed to apply for eviction orders and the Purchaser at the auction would have had to file suit for vacant possession against the occupier.

Paragraph 19: THAT I have also established that the Auctioneers did not have a valuation carried out against/of the property before they offered it for sale by auction and this contravenes the Auctioneers Act and Rules and the sale cannot stand.

Paragraph 20: THAT in view of these anomalies I do not wish to be party to any flawed process and I would rather the ex- parte judgment and all consequential orders made thereon were set aside and the property restored to the Defendant and the Purchaser be refunded its money paid pursuant to such sale.

25. To this court, the lack of service and the admission of the advocate who conducted the proceedings that the same was flawed are sufficient enough to dispose of this petition on the basis that without proper service, there cannot be seen to have been conducted a fair hearing without which no lawful court orders could have ensued so as to validate the sale to the interested party.

26. Service of summons by registered mail is just but one of the available means of effecting service but should always be resorted to as the last line of service. In **Bakari v Mohamed & 2 others [2003] eKLR** the court said:-

**The purpose of service of process is to let the other party involved in the litigation upon whom orders are sought to know that the dispute is before the Court and that way he has a right to take action he may deem right to defend his rights or take any position he deems necessary. This is a fundamental requirement in keeping with the principles of rules of natural justice and the practice of rule of law. The maxim “*Audi Alteram Partem* – No man shall be condemned unheard” is the basis of administration of justice. It is therefore the reason that any decisions made against a party in circumstances which advocates call *ex parte* are liable to be set aside and in such cases the matter is heard again correctly. So the rule is concerned with decisions that effect the rights of a party without the party having been heard.**

27. To this court and in law failure to serve or to properly serve vitiates the process undertaken pursuant to such service. It entitles the party so affected to a right to have the entire process annulled and set aside. However to this court, proceedings undertaken without service and in the fashion disclosed herein and on a matter that was instituted contrary to the statute is was founded upon doesn't only invite setting aside but is null and void. Null and void because it was conducted in violation of the petitioner's right to fair hearing which is constitutionally expressed to be incapable of limitation. Any attempt at emulsion must this be seen to be what it is a violation of the constitution. It might be necessary to quote the court of appeal in the case of **John Akasirwa vs. Alfred Inai Kimuso (C.A. No. 164 Of 1999) (UR)** which held that;

**“Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the court satisfied itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. Hence the need for strict compliance with order 5 Rule 9 [1]. The ideal form of service is personal service, it is only when the defendant cannot be found, and that service on his agent empowered to accept service is acceptable.”**

28. In the matter giving rise to this petition, the Summons To Enter Appearance was issued on the 26<sup>th</sup> June 2006 and the affidavit of G K Meenye at page 161 of the record of the petition says it was sent by pre-paid registered post on 7<sup>th</sup> July 2006, some eleven (11) days thereafter. There is no attempt to explain why personal service could not be effected. Equally there is no evidence that substituted service was ordered by court pursuant to Order 5 Rule 17(1) of the civil Procedure Rules. To this court even if the postal address was the correct one, it would still be a questioned service.

29. I would stop at this juncture and say that the failure to serve or properly serve the Summons To Enter Appearance invalidated and vitiated all the processes leading to and up to the decree reached. that decree itself then cannot stand and it follows that the sale conducted or undertaken against such decree cannot by itself stand if the foundation upon which it was to be erected is found to be no foundation at all. It is like planting a well-structured house on a mire, shifty ground or the path of a storm. It will in the fullness of time tumble, sink or just be swept away. It is incapable for standing as there is no ground firm enough to support it and the forces of nature too strong to withstand.

30. It follows, that if the process leading to the sale and therefore deprivation of the property in the suit land cannot be supported in law then it was not lawfully done. If not lawfully done then it was unlawful, illegal and arbitrary. Such are incapable of support in the eyes of the law and it matters not that the purchaser was not party to such irregularity. In ordinary legal parlance, one cannot pass a title it did not have. Equally an illegality cannot be a foundation of a right but once an illegality shows its face it must be declared so and made right by appropriate remedies being found.

31. In the context of this matter the manifest wrongs can only be made right by the declarations that the process as initiated, progressed and concluded was not legal or lawful because it went against the norms of fair hearing and constitutional safeguards to property. Consequently the court finds that the petitioner's right to fair hearing and protection of right to property were contravened and violated hence the ultimate product of such violations being the cancellation of the plaintiff's name from the register and the transfer of the property to the interested party were unconstitutional and therefore null and void and must be reversed and hereby ordered to be reversed. I do not, on the face of the position taken by the Respondent, find it necessary to grant prayer (e) and (g) of the petition.

### **Conclusion**

32. The upshot of the foregoing is that the petition dated 28th February, 2014 is allowed in terms of prayers (a), (b), (c), and (d). In particular and for the avoidance of doubt I grant to the petition orders as follows:-

**a) An order of declaration that the Petitioners' fundamental rights to the protection of his property have been breached and violated.**

**b) An order of declaration that the Petitioners' fundamental rights to fair hearing have been breached and violated.**

**c) A declaration that the proceedings taken before the Subordinate Court were conducted in breach of the Provisions of The Rating Act (Cap 267, Laws of Kenya) Civil Procedure Act and Rules, Auctioneers Act as well as Articles 10, 21, 22, 27, 40, 47 50 and 159 of The Constitution.**

**d) A declaration that the Petitioner, BENJAMIN KIPKULEI's name as proprietor was wrongfully, illegally and unlawfully removed from the register relating the property known as L. R. No. MN/I/5194 registered at the Land Titles Registry, Mombasa as C.R. 21127.**

**e) An Order directing the Land Registrar, Mombasa County, to rectify his records in the register to reflect the name of BENJAMIN KIPKULEI as the proprietor of the said property known as L.R. No. MN/1/5194 registered at the Land Titles Registry, Mombasa as C.R. 21127 in terms of the original Title Deed is issued to him on the 18<sup>th</sup> February 1991.**

33. On costs the court takes notice that the Respondent and the advocate who acted for it in the lower court readily conceded the plaintiff's petition but the interested party strenuously opposed the petition even on the face of the denunciation of the process by the advocate who conducted the trial for that reason I award the costs of the petition to the petitioner and order that the respondent shall bear 25% while the Interested Party shall bear 75%

**Dated at Mombasa this 6th day of December 2016**

**HON. P J O OTIENO**

**JUDGE**