



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT NAKURU

PETITION NO 30 OF 2013

**IN THE MATTER OF: ARTICLES 20, 21, 22, 23, 40, 47 AND 60 OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF VIOLATION TO THE RIGHT TO PROPERTIES KNOWN AS LAND
REFERENCE NUMBERS 20591/50 AND 20591/51, NAIVASHA**

AND

**IN THE MATTER OF THE REGISTRATION OF TITLES ACTS, CAP 281 AND THE
REGISTERED LAND ACT, CAP 300 AND THE SURVEY ACT, CAP 299**

BETWEEN

ARTHUR KAMAU KARIUKI.....PETITIONER

VERSUS

CHIEF LAND REGISTRAR.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

SETTLEMENT FUND TRUSTEES.....3RD RESPONDENT

DIRECTOR OF SURVEY.....4TH RESPONDENT

PRIME WAYS COMPANY LIMITED.....5TH RESPONDENT

LALLY FARM LIMITED.....6TH RESPONDENT

RULING

Introduction

1. The petitioner has filed this matter alleging violation of his rights under **Articles 20, 21, 22, 23, 40, 47 and 60** of the Constitution Kenya, the Registration of titles Act, Cap 281, the Registered Land Act, Cap 300 and the Survey Act, Cap 299. In his petition dated **12th August, 2013** he seeks the following orders;

- i. **Declaration that the Petitioner is the lawful proprietor of Land reference Number 20591/50 and 51 (“the suit properties”)**
- ii. **Orders of *Certiorari* against the 1st respondent to quash the titles: Nakuru/Moi Ndabi Settlement Scheme/1267 and 1322,**
- iii. **Orders for prohibition against all the respondents from issuing title documents to any other person,**
- iv. **A conservatory order to issue against the respondents from interfering with the Petitioner’s right to the suit properties,**
- v. **That the 5th respondent vacate the suit properties**
- vi. **General damages**
- vii. **Costs of the Petition.**

2. Contemporaneously with the Petition, the Petitioner filed a notice of Motion seeking conservatory orders prohibiting the respondent by themselves, their agents, servants or whosoever from in any manner alienating the Petitioner's properties known as land reference No. 20591/ 50 and 20591/51 and /or interfering with the Petitioner's possession of the properties or issuing new title documents pending determination of this Petition.

3. Before this application could be set down for hearing, the 5th respondent issued a Notice of Preliminary Objection on **19th November, 2013** summarized in the following terms, that;

- i. **This is a private claim disguised as a public interest claim**
- ii. **The Constitutional Petition is bad in law and ought not to be presented as such as it is an abuse of the court process**
- iii. **The claim is barred by the Limitation of Actions Act as the alleged decisions were made in 1995 and 1999, which are outside the 12 years period**
- iv. **The Orders of *Certiorari* and Prohibition can only be sought under Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules**
- v. **the claim is *res judicata***
- vi. **it seeks to challenge first registration as provided for under Section 28 of the Registered Land Act as well as breaching Sections 4, 143(1) (2) and 144(1) and (2) of the Registered Land Act, 2012.**

4. On **5th February, 2014** parties agreed to dispose the Preliminary Objection by way of written submissions. The petitioners had earlier filed their written submissions on **28th November, 2013** while the 5th respondent filed theirs on **5th February, 2014**. The 1st to 4th respondents and the interested parties did not file any submissions despite being given an opportunity to do so.

5. The court has perused the court record and noted that the 2nd respondent did not enter appearance, file any documents and did not attend court to canvass the preliminary objection. No affidavit of service was filed to confirm service of the preliminary objection upon the 2nd respondent. From the above, the court can only conclude that the 2nd respondents were not served with the preliminary objection and therefore not aware of the objection before court.

The Facts

6. The facts relating to the dispute and the Petitioner's case are set out in his amended Petition dated **22nd August, 2013** and the affidavit in support of the Petition filed and sworn on **30th July 2013** by **Arthur Kamau Kariuki**. The main depositions of the Petitioner are that he is the registered proprietor of Land reference Number **20591/50** and **51** comprised in Certificate title number **I.R 144176** and **144175** having purchased the suit properties from the interested party for a consideration of Kshs 1,160,000.

7. That prior to the registration, he conducted a search and ascertained that the suit properties were available for transfers and were unoccupied. Subsequent to being issued with the respective titles, he

sought possession of the suit properties but found the 5th respondents employees therein who informed him that the properties belonged to the 5th respondent and registered under title numbers Number Nakuru/Moi Ndabi settlement scheme/ 1267 and 1322.

8. Upon making enquiries, he discovered that by a transfer registered as **IR 79245/22** the 3rd respondent had been registered as proprietor of **L.R. No. 20591/57(original number 20591/11/21)** which transfer conveyed all the land comprised in deed plan number **2251137**. He also found that the 1st respondent had opened a parallel register for the suit properties under the Registered Land Act, Cap 300 at Naivasha Lands Registry and had caused the issuance of a new map in respect of the suit property to be prepared in which the suit properties were identified with RLA title numbers and were curved and divided into five parcels.

9. After making the above discoveries, he purchased two survey plans which revealed that the 3rd respondent's land was defined and limited to exclude the Petitioners properties and the Petitioners properties excluded the 3rd respondent's properties. He decided to seek technical survey opinion from a private licensed surveyor, **Gilbert Ayoo** who advised that;

- a) **the settlement fund trustees acquisition of L.R. 20591/57 was converted to general boundary beyond its limits**
- b) **the Settlement Trustee encroached onto L.R 20591/50 and 51 without his authority**
- c) **the renumbering of L.R. 20591/50 and 51 into L.R Number Nakuru /Moi Ndabi settlement scheme/ 1267 and 1322 was irregular**

Submissions

10. In its written submissions dated **5th February, 2014** the 5th respondent contends that this Petition as filed does not meet the threshold of constitutional matters as it does not raise any constitutional question. According to **Mr Kinyanjui**, Counsel for the 5th respondent, this is a matter dealing purely with interests in land which should be litigated in Civil courts. To support his contention he relied on the cases of **Stephen Saitoti Kapaiku v Cocacola Sabco Nairobi Bottlers Ltd & Ministry of Public Health & Sanitation (Nairobi HC Petition 338 of 2012)** and **Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd (Nairobi HC Petition 187 of 2012)**.

11. Counsel also submitted that the matter was time barred, as the alleged acts occurred in 1995 and 1999 outside the 12 years period required by law to file an action for recovery of land. He relied on the cases of **Official receiver and Liquidator of Rural Urban Credit Finance v Simon Kanana Kariuki [2013] eKLR**, **Kilundo Malului v Waa [2008] eKLR** and **Esther Gacherebu Mirangi v Samuel Meangi Mburu [2013] eKLR**.

12. In addition, Counsel stated that the orders of Mandamus, Certiorari and Prohibition could only be sought under sections 8 and 9 of the Law reform Act and **Order 53** of the **Civil Procedure Rules** therefore this suit should have been brought within 6 months of the action. They relied on the cases of **Republic v National Cereals and Produce Board ex Parte Alfred Kibet Too [2012] eKLR**, **Martin Kioi& 2 others v Johnson Miano& 9 Others [2013] eKLR** and **Stanley OlonanaNtutu& 12 Others v District Land Registrar, Narok [2013] eKLR**.

13. Finally, Counsel for the applicant submitted that the matter was *res judicata*, as the court had already made pronouncements over the same subject matter in **Milimani HCCC No 31 of 2009** and that first registration on land was indefeasible as per **Section 28** of the Registered Land Act. To buttress this point they relied on the cases of **C.O. Okere v Esther Nduta Kiiyukia & 2 Others [2007] eKLR**, **Gladys WanjiruNgacha v Teresia Chepsaat & 4 Others (2008) eKLR**, **Mugogo v Sihowa (1988) KLR 256** and **Ambale v Masolia (1986) KLR 241**.

14. **Mr. Munene** Counsel for the Petitioner, relied on the Petitioner's written submissions dated **27th November, 2013**. It was his contention that the petition raises constitutional issues; that there are valid claims sought to be prosecuted which include the determination of whether the Government can deprive a citizen (in this case the petitioner) of his property by allocating it to other people without compensating him and/or following a lawful process, whether state organs can act in excess of the statutory provisions in executing their duties and whether the 1st 3rd and 4th respondent failed to accord the Petitioner a hearing or give him written reasons in advance if they intended to acquire his land or register it in the 5th respondent's name. The aforesaid issues involve violation of multiple rights conferred upon the Petitioner by the Constitution including Article 40 (3)(4) and (6) and Article 73.

15. Finally Counsel for the Petitioner submitted that this was not a "*private rights dispute*" as alleged by the applicant and that **Article 22** of the Constitution granted any person the right to institute proceedings against violation of fundamental rights and freedoms. Furthermore, this preliminary objection was an example of the technicalities that were referred to in **Article 22(3) (d)** which should be kept to a minimum. They relied on the following cases: **Evelyn College of Design Ltd v Director of Children's Department & Another** [2013] eKLR, **Adan Abdirahman Hassan & Others v Register of Titles & Others** [2013] eKLR, **Republic v Commissioner of Lands and Registrar of Titles ex parte Yellow Horse Inns Limited** [2013] eKLR, **John Mukora Wachuhi v Minister of Lands & 6 others** [2013] eKLR, **Power Technics Limited v Attorney General & 2 Others** and **Ephantus Kimotho Kimani & 6 others and the Hon Attorney General & Another** [2013] eKLR.

16. The Interested Party filed grounds of opposition dated **31st January, 2014** in support of the Petitioner's case in the following terms; that the claim herein indeed constitutes a violation of the right to property under **Article 40** of the **Constitution** and that this matter is properly before this court as it is an action brought under **Articles 21, 22 and 23** of the **Constitution**; that the Limitation of Actions Act is inapplicable as the fraud they allege was recently discovered by the Petitioner. Furthermore, the provisions of the **Registered Land Act (repealed)**, namely **Section 28(b)** read with **Section 12** and **Section 4** prohibits dealings contrary to public policy.

Determination

17. The court has considered the objection and the submissions filed, but before making any determination, it is important to consider whether the objection fits the test for a preliminary objection.

In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, Newbold, V.P**, observed as follows:

" Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

18. Applying the above test, I am of the view that the grounds raised by the 5th respondent in their preliminary objection are not pure points of Law and I will explain why briefly.

19. On the first ground raised on whether the claim is statute barred, the 5th Respondent alleges that the transactions occurred between **1995** and **1999** outside the 12 year period under **Section 7** of the **Limitation of Actions Act**. On the other hand, the Petitioner contends that the titles held by the 5th defendants were obtained fraudulently but he only discovered the fraud sometime in 2012. Under **Section 26** of the Limitation of Actions Act, where fraud is alleged to have been discovered in the case of an action for which a period of limitation is prescribed, then the period of limitation begins to run when fraud or mistake has been discovered. In the instant case, the petitioner has raised serious allegations of fraud by the actions of the 1st 3rd and 4th Respondents which facts if any, must be ascertained by the court

but through the process of a full trial where evidence will have to be adduced.

20. On the second ground on whether the petition is *res judicata*, it is the 5th respondent contention that this matter is *res judicata* because issues of ownership and occupation of the suit property were determined in **Nairobi Milimani HCCC No 31 of 2009**. I respectfully disagree. While the suit properties may have been the subject matter in that suit, the Petitioner was not a party in that suit and neither were the 1st, 2nd, 3rd, 4th and 6th respondents. That suit was between **John Kariuki & John Kinyanjui Theuri T/A Kinyanjui Njuguna & Co. Advocates** against **Standard Assurance (K) Ltd** where parties recorded a consent. This matter cannot be said to have been decided to finality and did not involve similar parties over the same subject as required by Section 7 of the Civil Procedure Act.

21. On the third issue on whether prayers for judicial review can be sought in a Constitutional Petition, the 5th respondent simply needs to look at **Article 23(3) (f)** of the Constitution of Kenya, 2010 to get his answer. The Article sets out judicial review as one of the reliefs that a court can grant in a Constitutional Petition.

22. On the fourth ground on whether first registration can be challenged, the 5th Respondent is of the opinion that under **Section 28** as read with **Section 143 (1) and (2)** of the **Registered Land Act Cap 300 (now repealed)**, a first registration is indefeasible and cannot be cancelled even on the face of fraud. Therefore, a bona fide purchaser for value without notice obtains a lawful title in respect of the suit property. **Section 80** of the **Land Registration Act, 2012** has since changed this position in that courts may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that the registration was obtained, made or omitted by fraud or mistake and that the proprietor who is in possession had knowledge of the fraud or mistake. This means that first registrations no longer hold the special place they did under the Registered Land Act Cap 300 (repealed) and can be challenged just like subsequent registrations where material evidence is presented to the court of fraud or mistake. The Petitioner has alleged fraud on how the 6th respondent obtained their title. These allegations as earlier stated, cannot be fully established except through a full trial by adducing evidence.

23. Seeing that all the other grounds in the Preliminary Objection have failed the test according to the Mukisa Biscuit case, this court is left with only one issue to determine which is whether the Petition before the court raises any constitutional issues or it is simply a private law claim disguised as a Constitutional Petition.

24. It is the opinion of the court that the Petitioner has raised serious arguable points in this case on whether the actions by the 1st, 2nd, 3rd and 4th respondents are constitutional or not.

There is much that will need to be ascertained, for instance;

- a) whether Article 40 (3) of the Constitution which bars the state from depriving a person of property or right over any interest in property and Article 40 (4) which obliges the state to compensate any citizen whose property has been compulsorily acquired under the provisions of Article 40(3) have been violated.
- b) Whether the 3rd respondent in allocating the suit properties to the 6th respondent was in violation of Article 40(3)
- c) The validity of the titles issued to the 6th respondent in view of the provisions of Article 40(6)
- d) whether the actions of the 1st, 3rd and 4th defendants in dealing with the Petitioners land were consistent with the provisions of Article 73 of the Constitution.
- e) whether the 1st, 2nd and 3rd respondents violated Sections 30,33 and 43 of the survey Act by altering the survey marks and creating a parallel survey plan

f) whether the 3rd respondent contravened the provisions of the Registered Land Act by converting and registering the suit properties under the registered Land Act thus contravening sections 12,14,17 and 18 of the Registered Land Act(repealed).

25. The mere fact that a party has an option of urging his/her claim in other fora is no bar to bringing a Constitutional Petition to pursue the same matter. In the case of **Rashid Odhiambo Aloggoh & 245 others and Haco Industries Ltd, CA No. 110 of 2001**, the appellants filed a Constitutional Petition before the High Court which was dismissed on the ground that the petitioners had other lawful avenues which they should have pursued. The Petitioners dissatisfied with the decision of the High Court preferred an appeal and the court of Appeal in reversing the orders of the High Court and remitting the file back to the High Court for re-hearing de novo stated; **“Because of the approach adopted by the High Court, namely that the appellants had other lawful avenues open to them, that court failed to determine whether the complaints made by the appellants were true and if they were true, whether they amounted to or constituted a violation of section 73, 74 and 80 of the constitution as contended by the appellants.”**

26. Following the decision of the court of appeal cited hereinabove, it is my duty to ascertain the truth of the contentions by the Petitioner and if found to be true whether they amount to violation of the provisions of the constitution which have been cited.

27. For the reasons given hereinabove, I find that the preliminary objection has no merit and the same is hereby overruled with costs to the Petitioner.

28. I have noted from the pleadings that the suit property has already been transferred from the 6th respondent to the 5th respondent. To prevent further transfers it is important to preserve the suit property pending the hearing of the application by notice of motion dated **12th August, 2013**.

29. The court therefore makes interim orders and directions as follows:

1. Pending the inter parties hearing of the application dated 12th August, 2013 or further orders by the court, a Conservatory order is issued prohibiting and restraining the respondents by themselves or whosoever from in any manner alienating the properties known as land reference No. 20591/50 and 20591/51 or issuing new title documents.

2. Parties are invited to agree on a convenient date for hearing of the application.

Dated signed and delivered in open court at Nakuru this 3rd day of October 2014.

L N WAITHAKA

JUDGE

PRESENT

Ms Langat holding brief for Mr Odhiambo for Interested Party

Ms Wambugu holding brief for Mr Munene for the Petitioner

Mr Kirui holding brief for Ms Katambi for 1-4 Respondent

Mr Musila holding brief for Mr Kariuki for 5th and 6th Respondent

Emmanuel Maelo : Court Assistant.

L N WAITHAKA

JUDGE