



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

COSNTITUTIONAL PETITION NO. 2 OF 2017

IN THE MATTER OF: THE JURISDICTION OF THE HIGH COURT UNDER

ARTICLES 22, 23 & 165 OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: THE ADMINISTRATIVE ACTION AT NO. 4 OF 2015 AND THE

CONSTITUTIONAL RIGHT TO BE HEARD.

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300 (REPEALED)

NOW REGISTRATION OF LAND ACT 2012.

IN THE MATTER OF: SOUTH TESO/OSSURETTE/180

IN THE MATTER OF: THE BUSIA CHIEF MAGISTRATE'S COURT

CIVIL CASE NO. 40 OF 2006.

IN THE MATTER OF: APPLCIATION FOR CONSERVATORY AND DECLARTORY

ORDER TO PRESERVE THE RIGHTS TO OWNERSHIP OR PROPERTY, DUE PROCESS AND FAIR HEARING.

REDEMPTA OGWATAI IMOO.....PETITIONER

= VERSUS =

MOSES OMUSE EKABATEN.....1ST RESPONDENT

THE CHIEF MAGISTRATE, BUSIA COURTS.....2ND RESPONDENT

HON. THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. By an amended Petition filed on 22/11/2017, the Petitioner pleaded that she purchased 1.5 acres from Alfred Ekabten Ingaa – deceased who owned LR. No. South Teso/Osurette/180 in the year 2004. That she took possession of the sold portion and when the vendor erred with the boundary of the sold portion, she sued him before the Amukura Land Disputes Tribunal which case the Petitioner won when the tribunal found in her favour on 20/1/2006. That Land Disputes Tribunal award was subsequently adopted in court on 31/5/2006.

2. She pleaded further that out of the blues, the 1st Respondent filed Busia CMC Civil Case No. 40 of 2006 suing his father (1st defendant) and the Petitioner as the 2nd defendant. That the Petitioner proceeded to file her statement of defence in that suit on 8/2/2017. That by this time, the Petitioner was living and doing business in Mombasa. It is her claim that she was never served with any notices for hearing in CMCC 40/06 which then resulted in the case proceeding ex parte. The trial magistrate proceeded to render judgment in favour of the 1st respondent on 4/2/2009. The Petitioner avers that she only learnt of the judgment in early 2017 when she returned home.

3. That she proceeded to file an application to set aside the ex parte judgment on 3/2/2017. However, the said application was dismissed on 5/6/2017 an action which the Petitioner pleads has locked her out of justice. She therefore filed this Petition stating that the following of her

rights have been breached;

- a) *The 1st Respondent herein (who was plaintiff) had no locus standi to sue.*
- b) *The Petitioner herein (as the 2nd Defendant) was not served with notice to attend court for the hearing or at all and was condemned unheard, and*
- c) *The 1st Defendant had long died in 2007 and no legal representative was appointed as provided for under the Rules of Court and, if anything, the case against the 1st Defendant had abated in 2008.*
- d) *There is a mistake on the face of the record of the Magistrate's court as the hearing on 19/11/2008 erroneously proceeded and judgement delivered on 4/2/2009 based on the draft amended plaint which had not properly been made part of the pleadings. That amounted to a miscarriage of justice.*
- e) *The 2nd Respondent's injunctive orders not only amounted to a miscarriage of justice, but were issued in vain as the same had been overtaken by events, the Petitioner was already in occupation of land and had built thereon a home where her family lives to-date.*
- f) *The orders amounted to impeaching the 1st defendant's title obtained on first registration.*
- g) *The orders did not accord with the prayers in the plaint.*

4. Consequent to the above breaches, the Petitioner seeks reliefs on the following terms;

- a) **That a conservatory order does issue against implementation of any and/or any arbitrary orders in which execution is sought and is imminent against Petitioner.**
- b) **That a declaration does issue that the due process was not followed in the decision making process by the 2nd defendant in Civil Case No. 40 of 2006 and that the Petitioner's rights to a fair hearing and to ownership of property were thereby violated.**
- c) **That an order does issue that the due process be followed in conformity with the Constitution to determine issues over land No. South Teso/Osurette/180 or any part thereof and that the Petitioner shall be involved at all stages.**
- d) **That an order of certiorari does issue to remove into this court and quash the proceedings, judgment of 4/2/2009 and the Ruling of 5/6/2017 and delivered on 11/7/2017 by the 2nd Respondent in Civil Case No. 40 of 2006.**
- e) **That the costs of this Petition be provided for.**

5. The 1st Respondent filed a replying affidavit on 22/11/2018 and further replying affidavit on 17/2/2020 in opposition to the Petition. In the replying affidavit, the 1st Respondent deposed that; in or about 2004, the Petitioner approached Ekabten – deceased to lease his 1.5 acres of land for a sum of Kshs.55,000. That the Petitioner paid Kshs.47,000 leaving a balance of Kshs.8,000. That the suit land had been bequeathed to the 1st Respondent. He deposed that Ekabten did not know how to read or write so he thumb-printed the agreement unknowingly. He continued that he filed Busia CMCC 40 of 2006 to stop the illegal actions of the Petitioner.

6. The 1st Respondent pleaded that the Petitioner was a resident of Malaba town where she conducted business and not Mombasa as she alleges. That the Petitioner was afforded administrative action by the 2nd Respondent because she was served with summons and hearing notices on diverse dates. The 1st Respondent proceeded to annex as *Exh.000-1* copies of affidavit of service sworn by the process server who served the hearing notices upon the Petitioner. He deposed that the amended petition was commissioned by a stranger hence should be dismissed/expunged. Further that the petition was defective for lack of verifying affidavit.

7. In the further replying affidavit, the 1st Respondent deposed that the Petitioner has no *locus standi* to sue him. The 1st Respondent deposes that the Petitioner did not plead with precision the cause of action herein to enable the Court and the Respondents understand the Constitutional issues being raised. That the court should invoke the doctrine of Constitutional avoidance and dismiss the Petition because there is no demonstration of breach of fundamental rights. He deposed further that the Petitioner had the right of appeal in Civil Case No. 40 of 2006 to the High Court if she was aggrieved with the Judgement but instead clothed this Petition as an appeal thus amounting to abuse of the court process. He urged the Court to dismiss the Petition with costs.

8. The 2nd and 3rd Respondents filed grounds of opposition stating the following;

- a) *That the Petition is misconceived, incompetent, bad in law, frivolous, vexatious and an abuse of the court process and the Honourable ought to invoke its inherent powers under rules 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure rules 2013 and stuck out this constitutional Petition.*
- b) *That the Petition as filed does not meet the constitutional threshold of filing constitutional Petitions.*

c) That the orders of Certiorari by Petitioner is Statute barred and is not available to the Petitioner herein.

d) That the Petitioner has not satisfied the conditions for grant of orders of conservatory orders.

e) That a competent court with jurisdiction had already pronounced itself on judgement concerning the suit parcel of land No. South Teso/Osurette/180 and the Petitioner did not appeal as required under the Civil Procedure Act, neither did she Appeal the dismissal of the Application for stay by the Court through its ruling dated 5/6/2017.

9. The parties took directions to argue the Petition through filing of written submissions. Only the Petitioner and the 1st Respondent filed theirs. The Petitioner filed her submissions on 27th July 2020 and further submissions on 23rd September 2020. The submissions rehashed the facts as pleaded by both sides and also identified the documents relied on by herself and the 1st Respondent.

10. On issues of law, the Petitioner submitted that the Constitution 2010 enlarged the scope of *locus standi* in Kenya under its article 22 and 258. Further that article 47 and 23(3) confer jurisdiction on this court to grant judicial review while article 165(6) gives the court supervisory powers. The Petitioner submits that the principle of precise pleadings cannot be used to lock out parties with genuine disputes. The Petitioner submitted further that the sale agreement of 3/11/2004 conferred on her 1.5 acres of land comprised in L.R No. South Teso/Osurette/180.

11. That having taken occupation of and built on the suit portion, the lack of Land Control Board consent did not extinguish the Petitioner's rights. The Petitioner proceeded to list the violation she blames the Respondent for *inter alia*:

(i) He caused the boundary marking out the sold portion to be uprooted. The Land Disputes Tribunal elders who visited the land confirmed that the boundary had been uprooted.

(ii) He prevailed upon the seller to apply to the Land Control Board for consent to transfer the entire suit land to him (1st Respondent) as a gift and obtained the Letter of Consent on 11/2/2005.

(iii) On 2/2/2006 he filed Busia CMC Civil Case No. 40 of 2006 against both the seller, as first defendant and the Petitioner, as second defendant.

(iv) He extracted *ex-parte* interim order that amounted to an abuse of the process of the court as it purported to order what had not been prayed for in the plaint.

(v) On 28/3/2006 the 1st Respondent caused the seller to execute a Power of Attorney through which the 1st Respondent was purportedly given powers to deal with the land in any manner whatsoever on behalf of the registered owner.

(vi) The 1st Respondent obtained final judgement, after *ex-parte* hearing, of a permanent injunction against the Petitioner.

12. It is the Petitioner's submissions that the manner in which the Civil Case was handled violated her rights under article 47(1) of the Constitution. That the decision of the 2nd Respondent was unreasonable and unfair since the 2nd Respondent failed to interrogate why the seller was not sued as a co-plaintiff. That the 2nd Respondent failed to note that the land had not changed hands and the plaintiff before him was not the legal representative of the deceased.

13. The 1st Respondent's submissions were filed on 29th July 2020 and 18th August 2020. He urged the court to strike out the Petition for being defective as the same was not signed by the Petitioner nor was it accompanied with a verifying affidavit. On this point, the 1st Respondent relied on the holding in the Case of **Sahazi Vs Cherogeny (1984) KLR 814** thus, **"The requirement that a petition be signed by the petitioner is not a formality. Equity demands that a Petitioner assumes the responsibility to her petition by signing it."**

14. He also took issue that the supporting affidavit to the Petition was commissioned by a person lacking a valid practising certificate. The 1st Respondent further submitted that there exist other adequate avenues to resolve the dispute besides this Petition. He relied on the Case of **Gabriel Matara & 2 others Vs MD Kenya Ports Authority (2016) eKLR**. The 1st Respondent submits that there was no valid agreement between the Petitioner and Ekabten – deceased for non-compliance with section 6 and 22 of the Land Control Act Cap 302. That the Petitioner cannot have a claim against the 1st Respondent since the 1st Respondent is not the legal representative of Alfred Ekabten – deceased.

15. In response to the Petitioner's averment that she was not given a fair hearing, the 1st Respondent submitted that the Petitioner was served with a plaint and she entered appearance and filed a defence. That she was also served with hearing notices and if she felt aggrieved, she had the right of appeal within the stipulated time. He concluded that in spite of the Petitioner being served with orders of 19/3/2009, she continues to remain in occupation of the suit land with impunity. The 1st Respondent urged the court to dismiss the Petition and also find that there is no valid sale agreement between the Petitioner and Alfred Ekabten – deceased.

16. In replying to the issue of signing of the Petition, the Petitioner cited the provisions of rule 2(f) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 which provides that **"the Petition shall be signed by the Petitioner or the advocate of the Petitioner."** In response to the submission on invalidity of the sale agreement, the Petitioner submits that the Petition concerns violation of rights under article 40 and 47 of the Constitution through Case No. 40 of 2006 not recovery of land. The Petitioner further referred the court to the Case of **Willy Kimutai Kitilit Vs Michael Kibet (2018) eKLR** where it was held that equitable doctrines of constructive trusts and proprietary estoppel were applicable and enforceable to land subject to the Land Control Act hence lack

of Land Control Board consent did not preclude the court from giving effect to the equitable principles. The Petitioner denied that this Petitioner was an appeal against the judgement in Case No. 40 of 2006. She submits that the Petition seeks protection against the violations as the judicial process followed in Case No. 40 of 2006 was *ultra vires* the well-known legal principles that every suit must have a cause of action and every party must have locus to sue or be sued.

17. In light of the pleadings filed and the submissions rendered, I frame the following questions for determination:

- a) *Whether or not there was a violation of the Petitioner's rights in CMCC 40 of 2006.*
- b) *Whether or not the remedies sought are available to the Petitioner.*
- c) *Whether or not this Petition is an abuse of the court process.*

18. The Petitioner has pleaded that she purchased 1.5 acres portion of land number South Teso/Osurette/180 from Alfred Ekabten Ingaa – deceased in the year 2004. That the deceased died before transferring the sold portion to her. That the 1st Respondent who is the son of the deceased seller sued the Petitioner and his father in Busia CMCC 40 of 2006. The Petitioner pleaded that she filed a defence in that suit but never participated in the hearing as she was not served with hearing notices. It is this process that she complains violated her rights under article 47 of the Constitution.

19. The right provided for under articles 47 and 258 came into effect in August 2010 which date was after the judgement complained of had been delivered on 19th March 2009. The Petitioner ought to have cited the provisions of the old Constitution where his right lies to be given effect under 261 of this Constitution (the transitional and consequential provisions). It is therefore irregular for the Petitioner to apply the provisions of Constitution 2010 retrospectively.

20. Be that as it may, has the Petitioner demonstrated any violations of her rights? In paragraph 9 of the amended Petition, the Petitioner pleaded that the decision making process by the 2nd Respondent in 2009 manifested a miscarriage of justice because it was conducted notwithstanding that:

- (a) *The 1st Respondent herein (who was plaintiff) had no locus standi to sue.*
- (b) *The Petitioner herein (as the 2nd Defendant) was not served with notice to attend court for the hearing or at all and was condemned unheard, and*
- (c) *The 1st Defendant had long died in 2007 and no legal representative was appointed as provided for under the Rules of Court and, if anything, the case against the 1st Defendant had abated in 2008.*
- (d) *There is a mistake on the face of the record of the Magistrate's court as the hearing on 19/11/2008 erroneously proceeded and judgement delivered on 4/2/2009 based on the draft amended plaint which had not properly been made part of the pleadings. That amounted to a miscarriage of justice.*

21. The Petitioner did not annex the pleadings in BSA CMCC 40 of 2006 to this Petition. I am therefore unable to ascertain whether or not she raised the issue of *locus standi* of the 1st Respondent to bring that suit in her defence. Secondly even if it was raised, this is an issue that can be raised on appeal but does not amount to a violation of a right. Similarly, the contention of non-service of hearing notices can easily be dealt with under Order 10 rule 11 before the Court that conducted the hearing. The Petitioner indeed exercised this right when she filed the application to set aside the *ex parte* judgment which application was dismissed in 2017. The Petitioner had the right to appeal the order of dismissal. She did not explain to the Court why instead of appealing, she filed this petition.

22. The issues raised in paragraph 9(c) had nothing to do with case against the Petitioner since the suit against the Petitioner did not abate. The same can still be taken up by way of appeal and not filing of a fresh suit. In regard to paragraph 9(d), again there was no record of pleadings annexed for this court to confirm this allegation. The Petitioner in paragraph 10 pleaded that the orders of permanent injunction granted were overtaken by events and did not accord with prayers in the plaint. The copy of the order issued on 19/3/2009 was annexed as RII/5. The order given stated thus, **“That a permanent injunction is issued restraining the 1st and 2nd defendants by themselves, their agents, servants and or legal representative from entering, tilling, cultivating and or in any way trespassing onto land parcel No. SOUTH TESO/OSURETTE/180.”**

23. The Petitioner did not elaborate how the order issued did not accord to the prayers in the plaint. As stated earlier, there was no copy of the plaint attached. This allegation has also not been proved. The Petitioner stated that her rights to acquire and own land as enshrined in the Constitution has been infringed and/or violated through the decision of the 2nd Respondent in Civil Case No. 40 of 2006 in which due process was not followed. In the Case of *Hardkison Vs Hardkison (1982) ALL ER 567* it was held that **“It's an obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged.”**

24. The order and/or decree issued in BSA CMCC 40 of 2006 has not been set aside or varied. It remains invalid. The Petitioner has not pleaded that the 2nd Respondent which conducted the proceedings lacked jurisdiction to entertain the matter. Her allegation that the order issued in that case is violating her right cannot stand when the said order/decreed has not been varied and or declared null and void.

25. **Can the reliefs prayed for in the Petition be granted?** It has been held by the Courts severally that where there is an efficacious remedy provided in law, the same ought to be resorted to. The Court of Appeal in the Case of *Speaker of National Assembly Vs Njenga Karume (2008) IKLR 425* held that; **“Irrespective of the practical difficulties enumerated .. these should not in our view be used as a justification**

for circumventing the statutory procedure ... In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions."

26. In the Case of *Yusuf Gitau Vs Building Center (K) Ltd & 4 others (2014) eKLR, Mohamed Ibrahim, JSC* held thus; *"A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court"*.

27. In the case of *Fatuma Mohamed Sharif vs The Principal Magistrate's Court Kajiado & Others, Petition No. 67 of 2014*, the petitioner claimed that his constitutional rights were violated when the Kadhi's Court heard a succession case, which in the view of the petitioner, did not have the requisite jurisdiction. Mumbi J, in dealing with the matter, held that the proper avenue was to file an appeal or review the decision but not to file a constitutional petition. The court cited with approval the decision in the case of *Kemrajh Harrikissoon vs Attorney General of Trinidad and Tobago (1979) WLR 63* wherein it was observed as follows:-

"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress ...is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action..." .

28. In the case of *Judy Watiri Wambugu vs Chief Land Registrar & Others, Nakuru High Court, Constitutional Petition No. 49 of 2012*, the petitioner claimed that her rights to own property were violated by the issuance of another title based on a parallel land register to other parties by the Land Registrar. Waithaka L J, was of the view that the matter could not be resolved solely by invocation of the constitution as this will involve statutory determinations based on the provisions of the land statutes. The petition was struck out and the petitioner granted leave to pursue his claim under private law.

29. In light of the comparative case law cited herein above, I hold the view that this Petitioner ought to have pursued her claim by filing an appeal against the decision of 2nd Respondent dismissing her application but not to commence a new suit through a constitutional petition. The manner in which she approached the court is irregular as it amounts to asking the court to sit on appeal through the back door. I am not persuaded that the reliefs sought can be granted in the manner the court has been approached. Secondly, in view of the missing pleadings that were not annexed, I find the violations complained of not satisfactorily proved.

30. Consequently, I reach a finding that the Petition lacks merit and is hereby struck out. Each party is ordered to meet their respective costs of the Petition.

Dated, signed and delivered at BUSIA this 10th day of November, 2020.

A. OMOLLO

JUDGE