



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. CONSTITUTIONAL PETITION 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 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IN THE MATTER OF THE REGISTERED LAND ACT (REPEALED) CHAPTER 300 LAWS OF KENYA SECTIONS 159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 & 2 OTHERS.....DEFENDANTS

RULING

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**, 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.

2. The Petitioners claimed to have lawfully acquired *Title Nos. Gaturi/Nembure/5385-5396* (hereinafter the *suit properties*) from the late Emilio Munyi Mithuro (hereinafter 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. Simultaneously with the filing of the petition, the Petitioners filed a notice of motion dated 21st September 2018 under certificate of urgency seeking some interim orders. The application was brought under **sections 1B and 3A of the Civil Procedure Act (Cap 21) Order 40 Rules 1 & 4, Order 51 Rule 3 of the Civil Procedure Rules 2010** and **all other enabling provisions of the law**. The Petitioners sought the following orders in the said application;

a. That a temporary injunction do issue restraining the Respondents from evicting the Applicants/Petitioners, transferring, alienating, occupying or otherwise dealing in any manner with *Title No. Gaturi/Nembure/5385 to 5396* pending hearing and determination of this application.

b. That the court be pleased to order a stay of implementation of the award, decree and or the orders of the Chief Magistrate's Court at Embu in civil case No. 61 of 1980 dated the 9th October 2017 and amended at Embu on the 22nd of November 2017 pending hearing and determination of this application.

c. That a temporary injunction do issue restraining the Respondents from evicting the Applicants, transferring, alienating, occupying or otherwise dealing in any manner with *Title No. Gaturi/Nembure/5386-5396* pending hearing and determination of this petition.

d. That the court be pleased to order a stay of implementation of the award, decree and or the orders of the Chief Magistrates court at Embu in Civil Case No. 61 of 1980 dated the 9th October 2017 and amended at Embu on the 22nd of November 2017 pending hearing and determination of this petition.

4. The said application was based upon the same grounds contained in the petition and it was supported by an affidavit sworn jointly by all the eleven (11) Petitioners on 11th September 2011. The Petitioners stated that the deceased who was their father transferred the suit properties unto them shortly before he died in 1999. They stated that they were not joined in the proceedings before the Chief Magistrate's Court and that it was wrong for the court to issue an order against the deceased without joining and hearing his legal representatives. They also claimed that the decree before the Chief Magistrate's Court was already statute-barred hence could not be lawfully executed.

5. The Petitioners further contended that unless a temporary injunction was issued their fundamental rights and freedoms would be greatly violated and that they stood to be evicted from the suit properties. They consequently urged the court to grant them some interim orders of protection.

6. When the said application was listed for *inter partes* hearing on 23rd October 2018 none of the Respondents attended court for hearing despite service. Consequently, the court allowed the Petitioners' advocate to prosecute it through oral submissions. The Petitioners' advocate relied on the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358** and submitted that the requirements for the grant of an interlocutory injunction had been satisfied. The Petitioners later on filed additional authorities in support of their said application.

7. The court has looked at the scanty material on record regarding the proceedings before the Chief Magistrate's Court. The only thing which the Petitioners have exhibited is a copy of the amended order dated 9th October 2017 which is the subject of the petition. The court has been kept in the dark as to the rest of the proceedings.

8. The court has seen a copy of the ruling dated 16th November 2005 by the Hon Khaminwa J in *Embu HC Civil Appeal No. 17 of 1997 Emilio Munyi Mithuro Vs Musa Njau Mithuro*. It would appear from that ruling that the deceased and the 1st Respondent were engaged in long running litigation over the years. As far as I can gather from that ruling, the two parties in that ruling were brothers who were engaged in a land dispute over *Title No. Gaturi/Nembure/1457* (hereinafter *parcel 1457*) which was later on sub-divided by the deceased thereby giving rise to the suit properties. That process was undertaken in 1999 or thereabouts during the pendency of the proceedings before the Chief Magistrate's Court.

9. It would appear that the Land Disputes Tribunal (hereinafter *the Tribunal*) resolved the dispute between the warring brothers whereby the 1st Respondent was awarded a portion of parcel 1457. The award of the Tribunal is the one which was apparently registered and adopted as a decree before the Magistrate's court. It would further appear that the deceased was aggrieved by the award of the Tribunal and challenged the award and decree before the High Court. That appeal was ultimately dismissed on 4th December 1991 during the lifetime of the deceased.

10. It would further appear from the material on record that after the deceased subdivided parcel 1457 he transferred the resultant subdivisions to the Petitioners during the pendency of the suit before the subordinate court. It is not clear how the proceedings could have proceeded in the Chief Magistrate's Court and the High Court for so long whereas the Petitioners' claim to have been completely in the dark.

11. Be that as it may, the court is far from satisfied that the Petitioners have established a *prima facie* case in the circumstances of this petition. The mere fact that their father, the deceased, died before conclusion of the proceedings does not amount to a constitutional issue. The fact that they believe that the decree before the Chief Magistrate's Court was statute-barred is not a constitutional issue either. The court is not persuaded that the Petitioners were not aware of the proceedings before the Chief Magistrate's Court and the High Court between the deceased (their father) and the 1st Respondent (their uncle) which proceedings have been pending since the 1980s.

12. 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*.

13. There is no indication on record whether or not the Petitioners have ever approached the Chief Magistrate's Court with an application for review or setting aside within the legal mechanism laid down for resolution of civil cases. There is no indication that the Petitioners have been denied audience by the Chief Magistrate's Court or that there has been any impediments in accessing justice from that court.

14. It is not every alleged violation of a civil, procedural or constitutional 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*”.

15. For the foregoing reasons, the court finds no merit in the Petitioner's notice of motion dated 21st September 2018 and the same is consequently dismissed with no order as to costs.

16. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 28th day of MARCH, 2019.

In the presence of the 1st Petitioner and in the absence of the rest of the parties.

Court clerk Muinde.

Y. M. ANGIMA

JUDGE

28.03.19