REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 3 OF 2018

IN THE MATTER OF PROTECTION OF RIGHTS OF PROPERTY UNDER CHAPTER FOUR (4) BILL OF RIGHTS ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND PROTECTION UNDER CHAPTER ONE ARTICLES 2, (2), 3, 4, 5, 6 AND ARTICLE 3, ARTICLES 10, 19, 20, 22, 23, 25, 27, 29, (c) (d) (f), 31 (b), 33 (1) (a), 35 (a) (b) (2), ARTICLES 40 (1), 2 (b) (3) (5) , ARTICLE 46 (1) (C), 47 (1) 48, ARTICLES 50 (1) (4), 159 (d) (e) AND ARTICLE 160 (1) OF THE CONSTITUION OF KENYA

IN THE MATTER OF LAND PARCEL NO. ABOTHUGUCHI/LOWER KAONGO/700 AND NO. ABOTHUGUCHI/LOWER KAONGO/701 BEING REF WAIVER OF LOAN REPAYMENT DATED 13TH JANUARY 2004 LETTER.

BETWEEN

MICHAEL KUNGU KIGIA..PETITIONER

VERSUS

AGRICULTURAL FINANCE CORPORATION........................1ST RESPONDENT

MANAGING DIRECTOR (PRESENT)......................................2ND RESPONDENT

OMURENDE IYADI..3RD RESPONDENT

GEOFFREY MWIREBUA..4TH RESPONDENT

HENERY KIMANI..6TH RESPONDENT

A.F.C. MANAGER MERU..7TH RESPONDENT

JUDGEMENT

1. By a petition dated 19th July 2016 expressed to be brought under the provisions of the Constitution of Kenya 2010 for alleged violations of **Articles 2(2), (3), (4), (5), (6), 3, 10, 19, 20, 22, 23, 25, 27, 29 (c) (d) (f) 3(b), 33 (1) (a) (b) (2), 40 (1), 2 (b) (3), (5), 46 (1) (c), 47 (1), 48, 50 (1), (4), 159 (d) (e)**, the Petitioner sought the following reliefs against the Respondents;

a. A declaration that the fundamental rights and freedoms of the Petitioner as enshrined in the Constitution have been breached.

b. An order to declare the judgement issued on 25th April 2016 by the Chief Magistrate Meru null and void.

c. An order for release of Title deeds for Title Nos. Abothuguchi/Lower Kaongo/700 & 701.

d. Costs of the petition.

e. Such further or better orders the court deems fit and expedient.

2. The Petitioner pleaded that on diverse dates in the year 1994 he obtained some loans from the 1st Respondent (herein *AFC*) which were later on written off with parliamentary approval through Sessional Paper No. 1 of 2002. He further stated that although a letter dated 13th January 2004 was issued by the Managing Director of AFC to that effect, the same was never acted upon and the said letter was never transmitted to him.

3. The Petitioner further pleaded that AFC thereafter continued demanding alleged loan arrears in consequence of which he filed *Meru CMCC No. 257 of 1996* whereby it was alleged that the 6th Respondent made false statements and affidavits to the prejudice of the Petitioner. It was the Petitioner's case that AFC had unlawfully withheld or detained his title deeds for *Title Nos. Abothuguchi/Lower Kaongo/700 and 701* (hereinafter *the suit properties*) which had been tendered as security for repayment of the loans which were written off.

4. The Petitioner contended that the said actions on the part of AFC were a violation of his "constitutional right to farming" and other fundamental rights under the Constitution of Kenya hence the petition.

5. The Petitioner did not give a description of the Respondents in the petition as required by law. Apart from the 1st and 2nd Respondents, it is not clear who the rest of the Respondents are and the reason for their joinder in the proceedings. A perusal of the affidavits which were filed in the course of the proceedings, however, indicates that the other Respondents could be present and former employees of AFC who may have offended the Petitioner in one way or another.

6. Although the Petitioner did not come out clear in the petition on the fate of *Meru CMCC No. 257/96*, his application for various interlocutory orders filed on 20th July 2016 indicated that the suit was fully heard and a judgement delivered on 20th April 2016 dismissing his suit with costs.

7. When the said application for interim orders was ultimately listed for hearing on 12th September 2018 the court was of the view that it would be prudent to dispose of the main petition rather than spend more time on the interlocutory application. Accordingly, with the consent of the parties present the court made an order dispensing of the interlocutory application. The court granted the Respondents 21 days to file a response to the petition with liberty to the Petitioner to file a further affidavit within 14 days upon service. The court further directed the parties to file and exchange written submissions within 28 days upon service of the Petitioner's further affidavit.

8. The record shows that Rashid Ngara Advocate filed a replying affidavit on 9th October 2018 on behalf of the 1st, 2nd, 6th Respondents. The Replying affidavit was sworn by Anastasia Wachira, Head of Loan Recoveries at AFC, on 26th September 2018 in opposition to the said petition. It was stated that on diverse dates between 1985 and 1994 the Petitioner obtained various loans (3 No.) from AFC which were secured by a charge over the suit properties. It was further stated that the Petitioner defaulted in repayment of the loans.

9. The said Respondents further stated in the replying affidavit that sometime in 2003 AFC wrote off specific seasonal crop loans of borrowers who were affected by the 1996 drought and the 2003 *El-nino* phenomenon in consequence of which the Petitioner's seasonal loan of Kshs 90,000/- granted in 1994 was written off. The other two loans were said to be in heavy arrears as the Petitioner had never serviced them.

10. The Respondents further stated that after the Petitioner lost in *Meru CMCC No. 257 of 1996 – Michael Kungu Kigia Vs AFC* steps were taken to realize the securities for the two loans in arrears in consequence of which the suit properties were auctioned pursuant to AFC's statutory power of sale on 3rd August 2018.

11. The Respondents therefore contended that the instant petition was malicious and an abuse of the court process. They urged the court to dismiss it with costs.

12. The record shows that the Petitioner filed a "Reply" sworn on 8th November 2018 in response to the replying affidavit of 26th September 2018. Whereas the Petitioner filed his written submissions on 9th November 2018, the Respondents did not file their submissions until 22nd March 2019.

13. Before embarking on the resolution of the petition, the court would like to quickly dispose of some technical and procedural issues which were raised by the Petitioner. The Petitioner contended that the Respondents had failed to file a response to the petition for over two years; that the replying affidavit sworn on 26th September 2018 was filed outside the 14 days granted by the court; and that advocate Rashid Ngaira had mischievously entered on record only for the 1st, 2nd, and 6th Respondents and not all the Respondents as intimated earlier.

14. The court takes the view that under the provisions of **Article 159 (2) (d) of the Constitution of Kenya 2010 and section 19 (1) of the Environment and Land Court Act 2011**, the court has an obligation to administer substantive justice without undue regard to procedural technicalities. Whereas it is true that the Respondents did not file an answer to the petition for over 2 years, there is no justification for shutting out the Respondents from being heard. Their response to the petition is finally on record, even though it was filed out of time. **Section 19 (1) of the Environment and Land Court Act** stipulates that;

> **"(1) In any proceedings to which this Act applies, the court shall act expeditiously, without undue regard to technicalities of procedure."**

15. The court is further of the opinion that Mr. Rashid Ngaira was not under any general, legal obligation to represent all the Respondents. His representation would depend entirely on the instructions from the instructing client bearing in mind that either the advocate or client may freely change his mind on representation at any time. The court finds that nothing really turns out on this point.

16. The court has perused the material on record and the submissions on record on the petition. Whereas the Petitioner contended that the Respondents had violated his constitutional rights by their aforesaid actions, the Respondents contended that the petition did not raise any constitutional issues for determination. The Respondents further contended that the petition was *res judicata* and otherwise an abuse of the court process.

17. The court is of the opinion that the following issues arise for determination in this petition;

a. Whether the matters raised in the petition dated 19th July 2016 can be determined in a constitutional petition.

b. Whether the petition is *res judicata* or otherwise an abuse of the court process.

c. Whether the Petitioner is entitled to the reliefs sought in the petition.

d. Who shall bear the costs of the petition.

18. The 1st issue raises some interesting legal questions bearing in mind the background and context of the petition. The genesis of the dispute between the parties cannot be ignored. The previous litigation cannot be ignored either. In fact, one of the reliefs sought in the petition is for the court to nullify the judgement of the *Magistrates' court in Meru CMCC No. 257/96* dated 25th April 2016 whereby the Petitioner's suit was dismissed.

19. The material on record shows that as a result of the 3 credit facilities alluded to hereinbefore, AFC sought to realize the 2 securities by issuing notices to sell the suit properties under its statutory power of sale. The Petitioner was aggrieved by the threatened sale and filed a suit before the Chief Magistrate's court at Meru seeking to forestall the intended sale.

20. The record shows that the suit was fully heard and both the Petitioner and AFC called witnesses in the matter. By a judgement delivered on 25th April 1996 the court found that the Petitioner was in default in servicing his loan obligations and consequently dismissed his suit with costs to AFC. The court refused to be drawn into the issue of the write-off of the loans since it was not contained in the pleadings before him.

21. There is no indication on record whether the Petitioner challenged the said judgement by way of appeal as provide for under the **Civil Procedure Act (Cap 21)**. There is, however, indication of the Petitioner having filed a complaint with the Judicial Service Commission against the trial magistrate and another complaint with Law Society of Kenya against the Respondents' advocate. The instant petition was thereafter filed on 20th July 2016 alleging violation of the Petitioner's constitutional rights with respect to the same loan facilities which were the subject of the civil suit before the Chief Magistrate's court at Meru.

22. The question which calls for an answer is whether the Petitioner's grievances can be ventilated through a constitutional petition. In the case of **MWK Vs AG [2017] eKLR,** the Petitioner (a minor) was convicted of a criminal offence by the Magistrate's court. She thereupon filed a constitutional petition alleging violation of her constitutional rights by officers of the Kenya Police Service. She also sought an order to quash the criminal conviction on account of the alleged constitutional violations.

23. In considering whether such a conviction could be quashed through a constitutional petition, Mativo J stated as follows;

> **"…in my view, the Petitioner ought to have challenged the said conviction either by way of an appeal or by way of a revision as provided for under the provisions of the Criminal Procedure Code [39]. <u>There is a well laid down statutory mechanism of challenging the said conviction. It would be inappropriate for this court to exercise its jurisdiction and quash the said decision."</u> (Emphasis added).**

24. The said judge also referred to the Supreme Court decision in **Yusuf Gitau Abdallah Vs Building Centre (K) Ltd and 4 Others [2014] eKLR** and quoted the following passage therefrom;

> **"A party cannot be heard to move the court in glaring contradiction of the judicial hierarchical system of the land on the pretext than 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 framework move the apex court."**

25. The Respondents cited several authorities for the proposition that not every violation of the law or legal provision gives rise to a constitutional question. The Respondents relied on **Mombasa Constitutional Petition No. 45/2011; Four Farms Vs Agricultural Finance Corporation [2014] eKLR; Kenya Bus Services Ltd Vs Attorney General [2005] 1KLR 787; Martha Karua Vs Radio Africa & 2 Others [2006] eKLR and Harrikson Vs Attorney General of Trinidad & Tobago [1980] AC 265.**

26. In the case of **Kenya Bus Services Ltd & 2 Others Vs AG** (supra) Nyamu J whilst dealing with an application under **section 84** of the retired **Constitution** alleging violation of fundamental rights observes ad follows at P. 798;

> **"The constitutional mandate given to the High Court under section 84 of the Constitution is a serious one. The courts cannot countenance the process being trivialized or abused and applications falling under this category can in my view be challenged and dismissed or struck out. Judgements of competent courts cannot be challenged in a constitutional court except on grounds of lack of due process or anything that borders on unconstitutionality."**

27. In the said case, Nyamu J made the following important observations 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 Bahadur [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."**

28. It is, therefore, evident that the Petitioner cannot simply ventilate every alleged violation of the law as a constitutional issue. The record of proceedings is clear that the dispute between the Petitioner and AFC before the Chief Magistrate's court was purely contractual or commercial in nature. It must have been so construed by the Petitioner himself in consequence whereof he filed that civil suit. There is no indication that he was denied the right to a fair hearing. The record shows that he was accorded a chance to fully ventilate his case. A judgement on the merits on the case was thereafter delivered.

29. It cannot be said that upon delivery of the judgment, the Petitioner suddenly had a brain wave whereupon he discovered that his constitutional rights had been contravened by the actions of AFC. The court is of the view that if no constitutional issues were raised before the Chief Magistrate's court then no legitimate constitutional issues can arise in this petition save, perhaps the rights in relation to a fair hearing before that forum. Even if there were any violations of such rights, the same could be legitimately pursued before the superior court by way of appeal. The court, therefore, finds that the matter raised in the petition cannot legitimately be ventilated in a constitutional petition.

30. The 2nd issue is whether the petition is *res judicata* or otherwise an abuse of the court process by virtue of previous litigation between the Petitioner and AFC. There is no dispute that the facts giving rise to the suit before the Chief Magistrate's court have also given rise to the instant petition. The parties are essentially the same except that the Petitioner has joined some current and former employees of AFC as Respondents. The credit facilities which were in issue before the Magistrate's court are the very same before this court. The issue of whether or not the loans were written off was canvassed in the earlier proceedings even though the court could not rule on it because it was not part of the pleadings.

31. The test for *res judicata* was aptly summarized in the case of **Kamunye & Others Vs The Pioneer General Assurance Society Ltd [1971] EA 263 at page 265** as follows;

> **"The test whether or not a suit is barred by res judicata seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time. Green-halgh Vs Mallard, [1947] 2 All E.R 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply Jadva Karsan Vs Harnam Singh Bhogal (1953), 20 E.A.C.A 74,"**

32. Similarly, in the case of **ET Vs Attorney General and Another [2012] eKLR** Majanga J made the following pronouncements on the application of the doctrine of *res judicata*;

> **"57: The court must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs National Bank of Kenya Limited and Others (2001)EA 177 the court held that 'parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J,in the case of Njangu vs Wambugu and Another Nairobi HCCC No. 2340 of 1991 (unreported) were he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.."**
>
> **58. In my view the addition of the Attorney General and the exclusion of the Petitioner's mother, who was present in the first suit are merely cosmetic changes which do not affect my conclusions. The issue of paternity of the petitioner is the common thread running through both suits and it is the matter that was compromised by the agreement endorsed by the court. It cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as a party to evade the general principle."**

33. On the basis of the material on record, the court is of the view that although the Petitioner has added the employees of AFC as parties to the petition, those changes are merely cosmetic. The addition of the constitutional flavor does not aid the petition either. It is merely meant to hoodwink the court into believing that there is a new cause of action. The truth of the matter is that the cause of action which the Petitioner had before the Magistrate's court has never changed. The facts and issues have remained the same since the delivery of judgement on 25th April 2016. The Petitioner had the opportunity to plead his entire case before the Magistrate's court. He had the opportunity to join the five (5) AFC staff members as parties in the earlier suit.

34. The question of whether the doctrine of *res judicata* could apply to constitutional petitions was considered and answered in the case of **John Florence Maritime Services Ltd and Another Vs Cabinet Secretary for Transport and Infrastructure & Others [2015] 2EA**

236. The Court of Appeal made the following pronouncement thereon;

> "**"The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgements by reducing the possibility of inconsistency in judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature."**

35. The court is, therefore, of the opinion that the instant petition is not only *res judicata* within the meaning of the applicable law but also an abuse of the court process. The Petitioner is simply trying to relitigate matters which were directly and substantially in issue in a previously decided case. The court has a duty to stop such abuse of the court process.

36. The 3rd issue is whether the Petitioner is entitled to the reliefs sought in the petition. The court has already found that the grievances of the Petitioner cannot validly form the subject matter of a constitutional petition. They cannot be canvassed and determined in such a petition. The court has also found that the instant petition is *res judicata* and an abuse of the court process. It would therefore follow that the Petitioner is not entitled to the reliefs sought in the petition or any one of them.

37. The 4th issue is on costs of the petition. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful parties should not be awarded the costs of the petition. Accordingly, the Respondents who participated in the proceedings shall be awarded costs of the petition.

38. The upshot of the foregoing is that the court finds no merit in the petition dated 19th July 2016. The court finds it incompetent and an abuse of the court process. The same is accordingly struck out with costs to the 1st, 2nd and 6th Respondents respectively.

39. It is so decided.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **28TH** day of **MARCH, 2019.**

In the presence of the Plaintiff in person, Mr Rashid Ngaira for the 1st, 2nd & 6th Respondents and in the absence of the 3rd, 4th and 5th Respondents.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

28.03.19