



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAD COURT OF KENYA AT NYAHURURU**

**PETITION NO 23 OF 2017**

**IN THE MATTER OF ARTICLES 2, 3, 10, 20, 21, 22, 23, 60, 67, 68, 232, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 28, 35, 40, 45, 46, 47, 48, 50, 57, OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**EDWARD THIONG'O WACHIRA.....PETITIONER**

**AND**

**THE CABINET SECRETARY,**

**MINISTRY OF LAND, HOUSING & URBAN DEVELOPMENT.....RESPONDENT**

**JUDGEMENT**

1. On the 30<sup>th</sup> October 2018, the Petitioner herein sought leave of the Court to file an amended Petition to his Petition dated the 30<sup>th</sup> June 2017. Leave was granted with corresponding leave to the Respondent to file his response within 14 days upon service. Further direction was that the Petition be canvassed by way of written submissions.
2. The Petitioner, who has been acting in person, filed his amended Petition dated the 1<sup>st</sup> November 2018, on the 7<sup>th</sup> November 2018. The evidence of the affidavit of service filed in court on the 4<sup>th</sup> December 2018, clearly shows that it is not in contention that service was effected upon the Respondent through the Office of the Hon Attorney General on the 9<sup>th</sup> November 2018 at around 10:19 am. Service was acknowledged whereby the Petitioner's copies of pleadings were endorsed and stamped.
3. Despite the said service, there was no response by the Respondent to the amended Petition. On the 4<sup>th</sup> December 2018, the Petitioner filed his written Submissions.
4. In his amended Petition the Petitioner has sought for the following orders;
  - i. That the Judicial Review by way of an order Mandamus be and is hereby issued compelling the Respondent to provide the Petitioner with copies of all documents contained in the parcel registers for land comprised in titles numbers, NYANDARUA/OL JORO OROK SALIENT/11, NYANDARUA/OL JORO OROK SALIENT/1303, NYANDARUA/OL JORO OROK SALIENT/1969 and NYANDARUA/OL JORO OROK SALIENT/1968 and all subdivisions purported to be created therefrom;
  - ii. A declaration be and is hereby issued that any alleged subdivision of land comprised in titles numbers, NYANDARUA/OL JORO OROK SALIENT/11, NYANDARUA/OL JORO OROK SALIENT/1303, NYANDARUA/OL JORO OROK SALIENT/1969 and NYANDARUA/OL JORO OROK SALIENT/1968 registered by officers subordinate to the Respondent after 27<sup>th</sup> August 2010 and without the consent of Hannah Wanjiru Wachira and her children contravenes the constitution and hence null and void for all intents and purposes
  - iii. A declaration be and is hereby issued that any alleged transfer of proprietorship from the patient to any other person registered by officers subordinate to the Respondent after 27<sup>th</sup> August 2010 and without the consent of Hannah Wanjiru Wachira and her children in respect of land comprised in titles number NYANDARUA/OL JORO OROK SALIENT/11, NYANDARUA/OL JORO OROK SALIENT/1303, NYANDARUA/OL JORO OROK SALIENT/1969 and NYANDARUA/OL JORO OROK SALIENT/1968 and all subdivision purported to be created therefrom contravenes the constitution and hence null and void for all intents and purposes.

iv. A declaration be and is hereby issued that Hannah Wanjiru Wachira and her children Viz. Edward Thiong'o Wachira, Michael Wanjohi Wachira and Sylvia Muthoni Wachira have overriding interest land comprised in titles numbers and all subdivisions purported to be created therefrom.

v. The Respondent to pay damages to the petitioner.

vi. The Respondent do bear the costs of this petition.

5. I have since gained sight of the Petitioner's Petition, which is supported by his affidavit sworn on the 1<sup>st</sup> November 2018, and written submissions. His case is that he instituted these proceedings on behalf of his elderly father one Duncan Kireri Wachira who was of unsound mind and therefore cannot act in his own name. That the proceedings were instituted by the Petitioner in pursuance to public interest, as a member of the family and in pursuance to Articles 22, 57 and 258 of the Constitution.

6. That the Petitioner's parents were in a monogamous marriage. That in the years 1991, 1993 and 1994, the Petitioner's father who shall be referred to as the patient for ease of reference, was registered as the absolute proprietor of the agricultural suit parcels of land known as Nyandarua/Ol Joro Orok Salient/11, Nyandarua/Ol Joro Orok Salient/1303, Nyandarua/Ol Joro Orok Salient/1969 and Nyandarua/Ol Joro Orok Salient/11968 respectively, lands which he held in trust as matrimonial and family properties for his family members being Hannah Wanjiru Wachira (Wife), Edward Thiong'o Wachira (son), Michael Wanjohi Wachira (son), and Sylvia Muthoni Wachira (daughter).

7. It is further the Petitioner's case that in the years 1990's and the year 2007, his father, the Patient, suffered a mental breakdown and has been unable to manage his issues and/or affairs.

8. That it was on the 16<sup>th</sup> April 2012 that officers subordinate to the Respondent arbitrarily and without notice to the family and/or proprietor to property No. Nyandarua/Ol Joro Orok Salient/11 closed its title upon its purported subdivision, giving rise to new titles No. Nyandarua/Ol Joro Orok Salient/22670 and 22800.

9. Further, on or between the 3<sup>rd</sup> November 2014 to 6<sup>th</sup> November 2014, the officers working under the authority and/or control of the Respondent arbitrarily and without notice to the family and/or proprietor to properties No. Nyandarua/Ol Joro Orok Salient/1968, 1969 and 1303, registered one Margaret Wakonyo Njogu as the new proprietor of the said parcels of land.

10. That the Petitioner wrote to the Chief Land Register and 3 other complaining about the fraudulent dealings in respect to parcels of land No. Nyandarua/Ol Joro Orok Salient/11 and 1969 while requesting for the all documents concerning the said parcels of land contained in the parcel file, information which the Respondents and/or his juniors have failed to provide in contravention of Articles 35 and 47 of the Constitution, an act which was likely to deprive the Petitioner and his family members property in the said parcels of land.

11. The Petitioner, while arguing his petition, framed his issues for determination as;

- i. Whether an order of Mandamus should be issued.
- ii. Whether the court should grant prayers (i) and (ii) of the Amended Petition.
- iii. Whether the court should grant prayer (iv) of the amended Petition.
- iv. The quantum of damages that may be awarded to the Petitioner.

12. On the first issue for determination, that the Petitioner while relying on the **Nairobi Petition No. 622 of 2014**, the parties not cited, it was the Petitioner's contention that since the Respondent had contravened his rights under Articles 35 and 47 of the Constitution, that an order for Mandamus ought to be issued as prayed in order to compel the Respondent to comply with the Constitution.

13. On the Second issue, it was the Petitioner's submission that since the Respondent herein had contravened the constitution with respect to the suit properties, pursuant to the provisions of Article 2(4) of the Constitution, the court ought to grant prayers (i) and (ii) of the amended Petition.

14. The Petitioner's answer to the third issue for determination and while quoting Articles 45(3), 68 (c) (iii) 40, and 260 of the Constitution, as well as Sections 12(1) and 14(a) of the Matrimonial Property Act, the Petitioner submitted that his mother, Hannah Wanjiru Wahira has overriding/beneficiary interests over the suit properties which properties ought to be protected.

15. On the last matter to be determined, it was the Petitioner's submission and while relaying on the **Nairobi case No. 97 of 2015** again the citation being incomplete, that an award of Ksh 500,000/ in damages would suffice for the said breach of the Constitution. He prayed for the Petition to be allowed.

### **Analyses and Determination**

16. The Petitioner brings this Petition as a member of the family. It is worth noting that although the Respondent herein was served with the Petitioner's Petition, they did not file a Defence, Replying Affidavit or at least Grounds of Opposition and therefore the Petitioner's case is uncontroverted and unchallenged both in terms of facts and the law. I shall therefore proceed to evaluate his case for the effect of the said uncontroverted evidence

17. Article 258 of the Constitution, which provides that:

*(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*

*(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

*a. a person acting on behalf of another person who cannot act in their own name;*

*b. a person acting as a member of, or in the interest of, a group or class of persons;*

*(c) a person acting in the public interest; or*

*(d) an association acting in the interest of one or more of its members.”*

18. Today, by dint of *Articles 22 and 258* of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest.

19. Pursuant to *Article 22 (3) of the Constitution*, the Chief Justice made rules vide Legal Notice No. 117 of the 28<sup>th</sup> June 2013 referred to as (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 whose overriding objective is to facilitate access to justice for all persons.

20. Where a legal wrong or injury is caused or threatened to a person or class of persons by reason of violation of any constitutional or legal right, and such person or group of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under *Articles 22 and 258* of the Constitution. In filing this Petition, the Petitioner was acting not only on his behalf but on behalf of his family members as well.

21. This being the situation, I have antagonized over this Petition, and being mindful that the same was drawn and filed by a layman, I am constrained to try and figure out the issues herein. I must hasten to point out that it is for the Petitioner to prove on a balance of probabilities that his fundamental freedoms and rights as protected by or under the Constitution have been violated. The Petitioner must establish this by not only clearly identifying the relevant and specific *Articles* of the Constitution but availing evidence, through affidavit or otherwise of such violation as per the required standard set out in respect of the Constitutional Petitions as set out in the case of **Anarita Katimi Njeru vs The Republic (196-1980) KLR 1272 where it was held**, in the words of the Justices Trevelyan and Hancox that;

*We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.*

22. From the above captioned Petition, the Petitioner has cited omnibus provisions of the Constitution, but has provided neither particulars of the alleged complaints, the manner of alleged infringements or jurisdictional basis of the action before the court. No particulars of the alleged violations have been stated. For instance in paragraphs 11, 13 and 14 of the Petition, the Petitioner states as follows:

*‘.....the officers working under the authority and/or control of the Respondent arbitrarily and without notice to the patient’s family .....prejudicial and in a manner that violates the rules of natural justice .....Articles 2, 3, 10, 20, 21, 27, 28, 40, 45, 46, 47, 50, 57, 60 and 232 of the Constitution.....’* no particulars were given.

23. The petition referred to infringement of *Articles 2, 3, 10, 20, 21, 27, 28, 40, 45, 46, 47, 50, 57, 60 and 232* of the Constitution in its title, however, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements save for the infringement of *Articles 40, 35 and 47* of the Constitution.

24. The Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR held as follows:**

*We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.*

25. Having reviewed the petition and supporting affidavit, I find that the same did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya, thus it did not meet the standard enunciated in the **Anarita Karimi Njeru** case (*supra*).

26. From the body of the Petition, I also note that the Petitioner’s complaint is not only against the Respondent, but against officers subordinate to the Respondent whom I believe include the Chief Land Registrar- Nyandarua, the District Land Registrar-Nyandarua as well as a third independent party one Margaret Wakonyo Njogu, parties who were not enjoined in the proceedings.

27. The fact that the officers subordinate to the Respondent caused the Suit lands herein to be registered in the name of a third independent party herein one Margaret Wakonyo Njogu in my humble view, is a question whose resolution requires a full trial hearing and the interpretation of a statute rather than through a constitutional Petition because a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. Further, any orders issued herein would be prejudicial to the said independent private party, Margaret Wakonyo Njogu.

28. In the case of **Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited [2013] eKLR** the court made the following observation:-

*“it is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all.....the courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to the applicant under some other legislative provision, or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights”..*

29. From the facts before me, I find that this petition does not raise constitutional issues and is hereby struck out with no costs as the same was undefended.

**Dated and delivered at Nyahururu this 26<sup>th</sup> day of March 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**