



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CONSTITUTION PETITION CASE NO. 01 OF 2019**

**IN THE MATTER OF ARTICLES 19, 20, 21, 33, 23, 25, 27, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010  
AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE RIGHT UNDER ARTICLES 40, 60 AND 64 OF THE  
CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF THE ALLEGED INFRINGEMENT OF THE RIGHT TO FAIR ADMINISTRATION ACTION  
ENSHRINED IN ARTICLES 10, 25, 47 AND 50 OF THE CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 (PROTECTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS) PRACTICE AND PROCEDURE FREEDOMS) PRACTICE AND PROCEDURE RULES 13, 19 AND 23 OF  
2013 AND**

**IN THE MATTER OF ARTICLES 23, 159, 162 (B) OF THE CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012 AND**

**IN THE MATTER OF PHYSICAL PLANNING ACT NO. 6 OF 1996 AND**

**IN THE MATTER OF COUNTY GOVERNMENT ACT 2012 AND**

**IN THE MATTER OF NATIONAL POLICE SERVICE ACT 2011 AND**

**IN THE MATTER OF TITLE KARINGA/NDAGANI3018, THARAKA NITHI COUNTY**

**BETWEEN**

**MUTEGI MUGWETWA.....PETITIONER**

**VERSUS**

**CHIEF OFFICER LANDS, PHYSICAL PLANNING, HOUSING, URBAN DEVELOPMENT,  
ENVIRONMENT AND NATURAL RESOURCES.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR, COUNTY GOVERNMENT OF THARAKA NITHI...2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF THARAKA NITHI.....3<sup>RD</sup> RESPONDENT**

**NATIONAL POLICE SERVICE.....4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. This application concerns a Notice of Preliminary Objection dated 25<sup>th</sup> March, 2019 filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Notice states as follows:

## **NOTICE OF PRELIMINARY OBJECTION**

TAKE NOTICE that at the hearing of Notice of Motion dated **5<sup>th</sup> February, 2019**, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall object to said Notice of Motion and urge this honourable court to strike it out together with the petition herein dated **5<sup>th</sup> February, 2019** on the following principal grounds;

1. The application and the petition does not concern environment use and occupation or title of either the petitioner or the respondent but merely the demolition of unapproved construction on a road reserve and therefore this honourable court lacks the requisite jurisdiction to entertain both the petition and the application.
2. The petitioner's claim raises no constitutional issue. The issues raised are civil in nature and pertain to the boundary between the petitioner's property and the road, and the demolition of unapproved building.
3. The petitioner's claim before this honourable is for compensation for a demolished wall allegedly valued by the petitioner at Kshs.12,000,000/= and therefore this court has no jurisdiction to entertain this suit. Section 7 of the Magistrate's Court Act 2015 grants the magistrate's court pecuniary jurisdiction of up to Kshs.20,000,000/= and therefore this matter is a preserve of the lower court.

**Dated at Chuka this 25<sup>th</sup> day of March, 2019**

**MUTHOMI GITARI & COMPANY**

### **ADVOCATES FOR THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS**

2. The Notice of Preliminary Objection hereinafter referred to as "PO" was canvassed by way of written submissions.
3. The submissions by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are reproduced hereby in exactly the way they have been filed by way of a soft copy and any spelling or other mistakes are, ipso facto, ascribable to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' advocates.

### **1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENT'S SUBMISSIONS IN RESPECT OF THE PRELIMINARY OBJECTION DATED 25<sup>TH</sup> MARCH 2019**

May it Please you my Lord, these submissions are made on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in supporting its notice of Preliminary objection to the petitioner's application and petition dated 25<sup>th</sup> march 2019.

#### **ISSUE 1: That the petition does not concern environment use and occupation or title of either the petitioner or the respondents contrary to section 13 of the environment and Land Court Act and Article 162(2)(b) of the constitution.**

This petition merely concerns a civil claim for compensation for a demolished wall. **Article 162(2)(b) of the Constitution** and **Section 13 of the Environment and Land Court Act** sets out the strict jurisdiction of this honourable court which we humbly submit does not include civil claims for compensation of demolition of illegal structures.

#### **ISSUE 2: The petitioner's claim raises no constitutional issue.**

The claim raised in both the petition and its supporting affidavit is purely civil in nature. It does not touch on any specific infringement of a constitutional provision.

My Lord, a constitutional petition is a litigation initiated to either challenge breach of constitutional provisions or violation or infringement of rights and fundamental freedoms granted or recognized by the Constitution. These must expressly or impliedly recognized and protected rights and fundamental freedoms under the Bill of Rights.

The allegations in the petition and the supporting affidavit are in general terms breaches or failure by the Tharaka Nithi County government to comply with section 45 of the Physical Planning Act by demolishing an illegal structure "without notice". The petition does not allege breach or violation specific constitutional provisions or infringement of specific rights and fundamental freedoms and the manner of such breach violation or infringement.

It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** where the Court stated;

*"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."*

My Lord, this principle was emphasized by the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance & others [2014] eKLR**, where it stated that:

“...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

It is our considered view my Lord that this petition and its supporting affidavit do not in any way show any semblance of a constitutional petition pleading breach of known constitutional provisions, violation of and or infringement of rights and fundamental freedoms. What we get from the petition and its supporting affidavit is a general pleading on breach of a statutory provision capable of redress in a normal suit and not through a constitutional petition.

**ISSUE 3: Section 11 of the Civil Procedure Act (CPA) provides that a suit be instituted in a court of lowest grade competent to try it.**

The claim by the petitioner lies on the magistrate's court. Section 7 (1) (a) of the Magistrate's Court Act 2015 grants the Chief magistrate's court pecuniary jurisdiction of up to Kshs 20,000,000 and not beyond this point. The petitioner's claim is for compensation to the tune of Kshs 12,000,000 which is far below the reach point of the Chief magistrate's court pecuniary jurisdiction.

Though the Environment and Land Court has original jurisdiction in land and environment matters, **Section 11 of the Civil Procedure Act (CPA)** provides that a suit be instituted in a court of lowest grade competent to try it and that the petitioner has not shown that there would be bias if the matter is tried in the lower court.

The *Court of Appeal in CA.No.287 of 2016 held that* Magistrate's Courts have jurisdiction to hear and determine land related matters or cases.

My Lord, these submissions above have clearly manifested that our preliminary objection is merited and we pray that the same be allowed with costs to the respondents.

**DATED** at Chuka this .....8<sup>th</sup> ..... day of .....April,..... 2019

**MUTHOMI GITARI & COMPANY**

**ADVOCATES FOR THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS**

4. The submissions by the petitioner are reproduced herebelow in exactly the way they have been submitted by way of a soft copy and any spelling or other mistakes are ascribable, ipso facto, to the petitioners' advocates.

**PETITIONER'S SUBMISSIONS ON THE PRELIMINARY OBJECTIONS DATED 25<sup>TH</sup> MARCH, 2019**

**YOUR LORDSHIP,**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have raised a Preliminary Objection dated 25<sup>th</sup> March, 2019 against the Petitioner's Notice of Motion dated 5<sup>th</sup> February 2019 and the Petition of even date.

2. It is our Submission that the Preliminary Objection raised by the Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondent Mr. Muthomi does not meet the threshold set out in the case of **MUKISA BUSCUIT MANUFACTURING CO.LTD –VERSUS WEST END DISTRIBUTORS (1969) EA 696** and in the case of **HASAN ALI JOHO & Anor SULEIMAN SAID SHABHAL & 2 OTHERS** Petition no 1 of 2013 (2014) eKLR (paragraph 31) where the Supreme Court in the case of **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION VERSUS- JANE CHEPEREN & 2 OTHERS (2015) Eklr** endorsed the Principle in above mentioned cases and held that:-

“ to restate the relevant principle from the precedent setting case, **MUKISA BUSCUIT MANUFACTURING CO.LTD –VESUS-WEST END DISTRIBUTORS (1969) EA 696**. “ A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.

Examples are an objection to the jurisdiction of the Court or a plea of limitation or a Submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. A 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 has to be ascertained or if what is sought is the exercise of judicial discretion.

3. The Joho decision has been subsequently cited by this Court in **Hassan NYANJE CHARO versus KHATIB MWASHETANI & 3 others** ,Civil Application No. 23 of 2014 ,(2014) eKLR and in **AVIATION & ALLIED WORKERS UNION KENYA versus KENYA AIRWAYS LTD & 3 OTHERS** ,Application No. 50 of 2014 (2015) eKLR in which the Court further stated ( paragraph 15).

“Thus a preliminary Objection may only be raised on a pure question on law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts .The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

4. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law to the extent that the facts in petitioners Notice of Motion and the Petition are undisputed.

5. The issues raised by the 1<sup>st</sup> to 3<sup>rd</sup> Respondent in the preliminary Objection specifically paragraph 1 and 2 are contested by the Petitioner's and this Court will therefore have to investigate the disputed facts.

6. The disputed facts in the preliminary objection are of a nature that would apparently require calling of evidence as to whether the rights of the Petitioner were violated by unlawful acts of the Respondents demolishing his perimeter wall around his suit property known as Title Number Karingani/Ndagani/3880 on Saturday, the 2<sup>nd</sup> February, 2019 under supervision of contingent of Administration Police with Bull Dozers and earth Movers machines within the preview of Article 10, 40, 47 (2), 50 and 60 of the Constitution of Kenya 2010,

7. As to whether the perimeter wall had encroached on the road reserve is a question to be determined by calling of surveyors.

8. It is our submission that paragraph 1 and 2 of the preliminary objection are mere facts and are not pure point of Law.

9. We submit that Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Act 19 of 2011 vests the powers to hear and determine disputes relating to Environment and Land in the Environment and Land Court established under Section 4 of the same Act.

10. Section 13 (2) of the Environment and Land Act No. 19 of 2011 provides that in exercise on its jurisdiction under Article 162 (2) (b) of the Constitution of Kenya, the Courts shall have power to hear and determine disputes relating to Environment and Land, including disputes:-

- a) Relating to Environmental planning and Community Land protection, Trade Climate issues, Land use planning, Title, Tenure Boundaries, Rates, Rents, Valuations, Mining, Minerals and other natural resources.
- b) .....
- c) .....
- d) Relating to public, Private and Community Land and Contracts clauses in action or other instruments granting any enforceable interest in land.

11. The spirit of Article 162 (2) (b) of the Constitution of Kenya was to create a special Court to hear and determine Environment and land dispute which Court has original jurisdiction in matters relating to Environment and Land.

12. We submit the Petitioner's in his Application and Petition specifically in relief sought refers to suit property Known as Title Number Karingani/Ndagani/3880 and on it erected his palatial home in its entirety. The perimeter wall and the Title Number Karingani/Ndagani/3880 are intertwined and inseparable.

13. Your Lordship, the Constitutional issues raised in the petition are weighty and in public interest in respect of government officers who misuse of power, politically motivated for the general public to feel that they can flex their muscles, are above the law and that can intimidate, threaten, execute and exercise their imaginary excessive power without regard to provision of Article 10 of the Constitution.

14. It is the duty of this Court to do justice to the Citizen where there rights are infringed and or violated by the Government and its public servants

15. It is our submissions that the preliminary objection is devoid of merit and should be dismissed with costs to the petitioner.

**Dated at Nairobi this.....15<sup>th</sup> .....day of.....April,.....2019**

**MURIMI MURANGO & ASSOCIATES**

**ADVOCATES FOR PETITIONER**

5. In their submissions the parties have elaborated on the principles enunciated by the authorities they have proffered in support of their diametrically opposed assertions. As the submissions have already been reproduced in full herein, I find it superfluous to regurgitate those principles.

6. The only issue to be determined in this matter is if or if not the Notice of Preliminary Objection succeeds or not. If it succeeds, this will bring to an end this Petition. If it does not succeed, the Petition will be escalated to full hearing.

7. I have considered the submissions and the authorities proffered by the parties in support of their assertions.

8. I find that ground 1 of the Preliminary Objection is not grounded on a pure point of law. It invites arguments regarding why this court lacks jurisdiction to hear this application. This is a matter that can only be canvassed during the full hearing of the Petition. Of course, a wall does not stand on air. It obviously stands on land. This is one of the issues that can be canvassed during the full hearing of the Petition.

9. Ground 2 of the Preliminary Objection also raises arguments as to whether the petition is merely a Civil matter and not a Constitutional matter. This is one of the issues that can be canvassed during the full hearing of the Petition.

10. Ground 3 of the Preliminary Objection raises the issue of whether this court has jurisdiction to hear a matter that involves a claim of less than Kshs.20,000,000/=. I note that this is only one of the orders sought by the petitioner. This is one of the issues that may be canvassed during the full hearing of the petition. It is noted that this court has original and appellate jurisdiction to hear all matters concerning land and the environment.

11. In the circumstances, this Preliminary Objection is dismissed.

12. Costs shall be in the cause.

Delivered in open court at Chuka this **22<sup>nd</sup> day of May, 2019** in the presence of:-

CA: Ndegwa

Dennis Muthomi for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Murimi Murango for Petitioner - Absent

**P.M. NJOROGE**

**JUDGE**