



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CONSTITUTIONAL PETITION 102 OF 2017

(FORMERLY MILIMANI ELC NO. 1238 OF 2013)

IN THE MATTER OF ARTICLES 19, 70(C) 74(1), 75(1) & (2), 84(1)

& (2)(A) AND 118(2) (B) & 4 (B) OF THE CONSTITUTION OF KENYA, 2008

AND

IN THE MATTER OF RULES 11, 12, 13 & 14 OF THE CONSTITUTION OF KENYA

(SUPERVISORY JURISDICTION AND PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF SECTIONS 3, 6, 17, 18 & 19 OF THE LAND ACQUISITION ACT, 1968

AND

IN THE MATTER OF PART IV OF THE TRUST LAND ACT, CAP 288

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT, 1968

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHT TO ACQUIRE AND OWN PROPERTY AND PROTECTION FROM DEPRIVATION OF PROPERTY

AND

IN THE MATTER OF COMPULSORY ACQUISITION OF 460 ACRES OF LAND PARCLE NO. 184 GICHICHE ADJUDICATION SECTION IN MBEERE DISTRICT

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 70(C), 74(1), 75(1) & (2)
AND 118(4) (B) OF THE CONSTITUTION OF KENYA, 2008**

BETWEEN

JOSPHAT NGUYU NGARI.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY LIMITED....2ND RESPONDENT

HARRISON NJOKA NDOGORA.....INTERESTED PARTY

AND

NJOGU NJOKA.....APPLICANT

RULING

1. By a notice of motion dated 18th September 2018 brought under the provisions of **Articles 159(1) and 259(1)(c) of the Constitution of Kenya, 2010** and **Rule 19 of the Constitution of Kenya (Protection of Rights and Fundamentals Freedoms) Practice and Procedure Rules, 2013** and all other **enabling provisions of the law** the Applicant sought the following *orders*;

- a. That Njogu Njoka the Applicant be made the Petitioner in place of Josphat Nguyu Ngari.
- b. That costs of the application be provided for.

2. The said application was based upon the grounds stated on the face of the notice of motion. It was stated that the original petitioner, Josphat Nguyu Ngari was deceased; that the cause of action survived the deceased and that the application was filed without unreasonable delay.

3. The said application was supported by an affidavit sworn by the Applicant on 18th September 2018. It was stated that the Applicant had been authorized by members of *Nditi* clan to apply for substitution of the deceased petitioner who died on 14th August 2016. The Applicant attached a copy of a written authority signed by nine “committee members” of *Nditi* clan purporting to allow him to swear the supporting affidavit and any other necessary affidavits in the petition.

4. The Applicant further stated that the delay to apply for substitution was occasioned by the fact that *Nditi* clan had to conduct elections and nominate a new trustee following the death of the petitioner who had filed the petition on behalf of members of the clan.

5. The Interested Party filed a replying affidavit sworn on 14th January 2019 in opposition to the said application. It was stated that neither the deceased petitioner nor the Applicant were ever elected by *Nditi* clan to represent the clan in any litigation. It was denied that the deceased was ever authorized by the clan to file the instant petition. He further stated that he was the *bona fide* representative of *Nditi* clan and who was authorized to file *Embu Petition No. 2B of 2015* (Formerly *Nairobi HC Petition No. 596 of 2014*).

6. The Interested Party further stated that the petition herein has already abated by operation of law and that no prayer for revival of the petition had been sought. The Interested Party further opposed the application on the ground that the Applicant and his advocate had concealed the death of the petitioner from the court since 2016 as a consequence of which the court had conducted further proceedings herein and even delivered a ruling on an application.

7. The 2nd Respondent filed a replying affidavit on 5th February 2019 in opposition to the said application. It was sworn on 4th February 2019 by George Drammeh Akelola who described himself as a Senior Legal Officer of the Respondent. It was contended that no evidence had been tendered to demonstrate that *Nditi* clan held any elections to elect officials or that the Applicant was elected as a trustee of the clan. It was further contended that the petition herein had already abated by operation of law since the petitioner died more than two years ago.

8. The Applicant filed a further affidavit sworn on 14th February 2019 in response to the Replying affidavit by the Interested Party. He stated that the Interested Party had never been authorized by *Nditi* clan to file any petition on its behalf and that the written authority he used to file *Embu Petition No. 2B of 2015* was fraudulent and most of the signatures thereon were forgeries. It was further stated that the petition had not abated since there was no law which provided for abatement of petitions.

9. The Applicant also filed a further affidavit sworn on 14th February 2019 in response to the 2nd Respondent’s replying affidavit. It was contended that the 2nd Respondent bore the burden of proving that he (the Applicant) was not an office bearer of *Nditi* clan.

10. When the said application came up for hearing on 5th February 2019 it was directed that the same be canvassed through written submissions. The parties were given timelines within which to file and serve their respective submissions and the application was fixed for ruling on 16th May 2019. By the time of preparation of this ruling, however, none of the parties had filed their written submissions.

11. The court has considered the Applicant's said notice of motion, the replying affidavits in opposition thereto as well as the Applicant's two further affidavits. The court has also considered the material on record as well as the amended petition. The court has noted that the parties have raised matters which go beyond the scope of the application for substitution in their various affidavits. The court shall, however, confine itself to matters relevant to the application only.

12. The court is of the opinion that the main issue for consideration herein is whether the Applicant has made out a case for his joinder as the petitioner in place of the deceased petitioner.

13. The court has noted that the Applicant has not made reference to the **Civil Procedure Rules** (hereinafter *the Rules*) which provide for substitution of parties to a suit in the event of death. The court has also noted that the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** (hereinafter *Mutunga Rules*) do not provide for substitution of deceased parties in a petition.

14. So, does that mean there can be no substitution of a deceased party in a constitutional petition? The court does not think so. The court is of the opinion that where the Mutunga Rules are silent on the matter of substitution of parties resort can be had to the Rules made by the Rules Committee under the **Civil Procedure Act (Cap. 21)**. The Mutunga Rules were promulgated to facilitate the hearing and disposal of applications for enforcement of Fundamental Rights and Freedoms of the individual under the **Article 22** of the **Constitution of Kenya 2010**. They were not intended to be exhaustive of the rules applicable to the resolution of constitutional suits.

15. The court is of the view that if the provisions of **Order 24 of the Rules** are suitable for application to all suits governed by the **Civil Procedure Act**, they may well be suitable for application to petitions filed under the Mutunga Rules pursuant to **Article 22** of the **Constitution of Kenya**. The court will accordingly adopt the provisions of **Order 24** of the **Rules** to the instant application.

16. The provisions of **Order 24 Rule 3** of the **Rules** stipulate as follows:

“3(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.”

17. It would appear from the material on record that the deceased petitioner was suing on behalf of members of Nditi clan. It would also appear that the petitioner died on or about 14th August 2016 aged 94. It would appear that Nditi clan waited a period of more than two (2) years before filing the instant application for substitution. It is thus clear that under the provisions of **Order 24 rule 3** of the Rules the action had clearly abated by operation of law. There was no prayer by the Applicant for either enlargement of time or for revival of the petition. The court, therefore, finds that the instant application is incompetent and must fail.

18. There is a second reason why the instant application must fail. There is no evidence on record to demonstrate that the Applicant was ever elected or appointed as a representative of Nditi clan in place of Josphat Nguyu Ngari. Although it was claimed that the petitioner's death occasioned fresh elections to elect other representatives and a trustee, there was no material placed on record to demonstrate that the Applicant was ever elected or appointed as a representative or trustee of Nditi clan. The burden of proof in that regard rested with the Applicant and not the Respondents or the Interested Party as suggested by the Applicant. **Section 109** of the **Evidence Act (Cap. 80)** stipulates as follows;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

19. The court has considered the written authority dated 19th September 2018 filed with the application. The said document does not state that the Applicant was ever elected or appointed to represent Nditi clan in the petition. The nine persons who signed it simply purported to authorize him to swear the supporting *affidavit* and any other *necessary affidavits* and not to conduct the litigation as a whole. That document only contained limited authority which was expressly limited to affidavits only.

20. The third and most serious reason why the application must fail is that the Applicant failed to disclose to the court earlier that the petitioner was deceased and as a consequence allowed the court to conduct further proceedings for two years and deliver a ruling on an application whilst the petitioner was long deceased. No or no valid explanation was rendered by the Applicant or his advocate to justify such non-disclosure of an important material fact which may affect the validity of the proceedings conducted between 2017 and 2018.

21. For the foregoing reasons, the court finds no merit in the Applicant's notice of motion dated 18th September 2018 and the same is consequently dismissed with costs to the Respondents and the Interested Party.

22. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **16TH** day of **MAY, 2019**.

In the presence of Mr. Gachuba for the Petitioner and Mr. Siro for the 1st Respondent and holding brief for Mr. Wanjeri for the 2nd Respondent. Mr. Karwanda holding brief for Mr. Wachira for the Interested Party.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

16.05.19