



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

PETITION NO. 18 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

(SUPERVISORY JURISDICTION AND PROTECTION OF

FUNDAMENTAL RIGHTS IN THE BILL OF RIGHTS)

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

BETWEEN

DAVID KENYANYA MAGARE.....1ST PETITIONER

BENARD MOSOTI KENYANYA.....2ND PETITIONER

VERSUS

LUTHAFAL JIWA RANJWANI.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF KISII..... 2ND RESPONDENT

JINAT INVESTMENTS CO. LTD.....3RD RESPONDENT

THE COUNTY LAND REGISTRAR, KISII.....4TH RESPONDENT

THE HON ATTORNEY GENERAL 5TH RESPONDENT

AND

DIAMOND TRUST BANK LIMITED.....INTERESTED PARTY

J U D G M E N T

1. The 1st and 2nd Petitioners who are father and son respectively filed this Petition on 19th June 2013 against the Respondents claiming land parcel **Kisii Municipality/Block III/77** had variously illegally and unlawfully been transferred to various parties culminating in the transfer

to the 4th Respondent (now 3rd Respondent as per amended Petition) on 12th October 2006. The Petitioner's in particular averred that the 1st Petitioner's signature was forged in transfer instrument dated 6th March 1992 resulting with the 1st Petitioner being divested of the suit property without payment of any valuable consideration.

2. The Petitioners pray for orders:

(a) A declaration that the transaction involving the disposition of the property Kisii Municipality/Block III/77 by way of transfer to the 8th Respondent (Highland Tyres Ltd) and all subsequent dispositions to the 4th and 6th Respondents are illegal, unconstitutional, null and void.

(b) An order for the cancellation of the registration of the property Kisii Municipality/Block III/77 in the names of the 4th Respondent and a corresponding order for the rectification of the register to have the property registered in the 1st Petitioner's names.

(c) Mesne profits and general damages.

(d) An order of mandatory injunction directing the 4th Respondent, its agents, servants or employees to hand over vacant possession of the property Kisii Municipality/Block III/777 to the Petitioners and in default thereof the 4th Respondent be evicted therefrom.

(e) Costs of this petition

3. The Petitioners amended the Petition with leave of the court given on 4th March 2015. The amendment effectively removed some of the Respondents from the Petition but otherwise the content as against the remaining Respondents remained virtually the same. During the pendency of the Petition, the 1st Petitioner died on 27th April 2016 and the 2nd Petitioner obtained Ad Litem grant on 23rd February 2018 ostensibly to continue with the Petition in his behalf but no formal substitution was sought and/or obtained.

4. Dr. Anil Ratilal Tailor, a director of the 3rd Respondent, Jinat Investment Co. Ltd (initially 4th Respondent) swore a replying affidavit dated 29th June 2013 in reply to the Petition. He deposed that the 3rd Respondent was a bonafide purchaser for value of land parcel Kisii **Town/Block III/77** for which the 3rd Respondent paid the sum of kshs. 16Million in 2006. The 3rd Respondent denied having had any knowledge whatsoever of any fraud that any of the predecessors in title before them may have been privy to and/or involved in and asserted their title was absolute and indefeasible. The 3rd Respondent further averred that the Petitioner's claim was statutorily time barred and was defeated by laches. He contended there was inordinate delay in instituting the present action.

5. The Interested party Diamond Trust Bank Limited filed a Notice of Preliminary Objection dated 18th November 2013 on 19th November 2013 on the following grounds:-

1. That the Petition is an abuse of process as the subject matter of the Petition has been caught up by the Limitation of Actions Act, Cap 22 Laws of Kenya specifically Section 7 of the said Act.

2. That the Petition is an abuse of the court as it seeks to enforce the provisions of the Constitution of Kenya [2010] and the Land Act No. 6 of 2012 retrospectively.

6. The Interested party further on 3rd November 2014 filed a replying affidavit sworn by Stephen Kodumbe the Company Secretary of the Interested Party in reply to the Petition. The Interested party deposed that it has extended to the 3rd Respondent banking facilities at various times against the security of **LR No. Kisii Municipality/Block III/77** registered in the name of the 4th Respondent as per the instruments of charge and further charges annexed as "SK5" – "SK8" all aggregating to security for the total of kshs. 207,300,000/=. The Interested party deposes that before accepting the said property as security they had carried out extensive due legal diligence which established the property was registered in the 3rd Respondent's name in unencumbered status and that all rates dues to Kisii Municipal had been settled on a regular basis as they fell due. The Municipal Council had issued the requisite consents for charging the property. There was no evidence that the Petitioners had raised any objection to the transfer of the property to the 3rd Respondent and/or to the 4th Respondent charging the suit property. The Interested party further stated they dealt with the 3rd Respondent at arm's length and denied any complicity in any fraud.

7. Although the court had on 20th July 2015 given directions for the Petition to be heard viva voce when the parties appeared before me on 4th October 2018 they agreed that the Petition be disposed of on affidavit evidence and by way of written submissions. The court gave directions that the Interested parties preliminary objection be canvassed together with the main Petition and invited the parties to exchange written submissions.

8. The Petitioners submissions were filed on 21st January 2019 while the 3rd Respondent and the Interested party filed their submissions on 8th April 2019 and 8th May 2019 retrospectively. I have reviewed the pleadings and I have considered the submissions filed by the parties and I consider that the following issues arise for determination:-

(i) Whether the Petition is sufficiently particularized to satisfy the threshold of what constitutes a Constitutional Petition?

(ii) Whether the Petition is sustainable owing to lapse of time?

(iii) Whether following the death of the 1st Petitioner, the 2nd Petitioner had capacity to continue with the Petition on behalf of the 1st Petitioner?

(iv) What reliefs and/or orders should the court make?

9. The Petitioners have approached the court by way of a constitutional petition claiming their fundamental rights and freedoms guaranteed under the Constitution had been contravened. The 1st Petitioner claims that by virtue of having been granted a lease of land parcel **Kisii Municipality/Block III/77** for a term of 99 years from 1st December 1963 he was conferred property rights as envisaged under Article 40 of the constitution and Section 25, 26 and 27 of the Land Registration Act, 2012. It is these rights the 1st Petitioner claims were violated when the property was allegedly fraudulently transferred from the 1st Petitioner's name. The 1st Petitioner alleges that the transfer instrument dated 6th March 1992 was forged as he was not the one who signed it. On that account the 1st Petitioner claimed that his constitutional rights were infringed.

10. It is now settled law that a party who seeks a constitutional relief must meet and satisfy some conditions. The petition must in clear terms and with some degree of specificity demonstrate the Articles of the constitution that have been violated and in what manner. Mumbi Ngugi, J. in the case of **Anne Njoki Kinyanjui -vs- Barclays Bank of Kenya Ltd [2015] eKLR** considering the threshold for constitutional Petitions stated at paragraphs 20 and 21 of her judgment as follows:-

20. Under Article 22 the Constitution has given every person the right to approach the court claiming a right or fundamental freedom has been violated or infringed, or is threatened with violation. Decisions of this court have settled the conditions that a party seeking constitutional relief must meet. The Petitioner has an obligation to demonstrate which Articles have been violated and the manner of violation with respect to her. See Anarita Karimi Njeru [1976 – 80] 1KLR 1272 and Trusted Society of Human Rights Alliance -vs- Attorney General & Others High Court Petition No. 229 of 2012.

21. Further, as stated by Ouko, J. in the case of Pussaghia Giuseppe –vs- Attorney General Malindi High Court Civil Case No. 15 of 2005, it is not enough to state that a right has been violated. One must demonstrate the manner of violation. In addition, where a party has a remedy under some other legislation, the court will decline to determine whether or not there has been a constitutional violation. Courts have held in many decisions that it would be improper to convert every issue into a constitutional issue and present it before the constitutional and human rights Division for determination.”

11. The Supreme Court has taken a similar position that where there is some other forum where a matter can be determined, the matter ought to be referred to that other fora for determination and not to be couched as a constitutional petition. In the case of **Communications Commission of Kenya & 5 Others -vs- Royal Media Services Ltd & 5 Others [2014]eKLR**, the Supreme Court after reviewing the various provisions of the Copyright Act and comparative judicial pronouncements stated at paragraph 258:-

“From the foundation of principle well developed in comparative practice, we hold that the 1st, 2nd and 3rd Respondents claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright infringement claim, and it was not properly laid before that court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the appellate court.”

12. In the present matter, the 1st Petitioner claims his property was in 1992 fraudulently transferred to a party (Highland Tyres Ltd) who infact is not a party to the petition its name having been deleted following the amendment of the Petition. **Would the claim by the Petitioners constitute a constitutional issue?** This court in the case of **Josephine Nyabonyi -vs- Agricultural Corporation [2018] eKLR** while considering whether a challenge to a chargee's power of sale over a charged property could constitute a constitutional issue stated at paragraph 13 and 14 of the judgment thus:-

13. In the instant matter, there clearly was no constitutional issue that warranted the court to be petitioned to determine such as a constitutional issue. Parties ought not to disguise ordinarily civil matters as constitutional matters. The charge that the Petitioner as chargor entered into with the 1st respondent as a chargee constituted a contract as between the parties and in the event of any breach of any terms of the contract, the remedy lay in a civil action in the civil court and not in the constitutional court. Section 159 of the Registered Land Act provides that:

“Civil suits and proceedings relating to the title to, or the possession of land, or to the title to a lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration shall be tried by the High Court”. (in the instant case the ELC).

14. At any rate a constitutional petition needs to state in precise terms the specific provisions of the Constitution that it is alleged have been violated and in what manner the provisions are said to have been violated. The Constitutional petition by the Petitioner in the present case does not satisfy the test in the case of Anarita Karimi Njeru -vs- R [1979] 1 KLR 1272 where the court held that there was necessity from a person seeking redress for an alleged constitutional violation to be specific as to the right violated and provide particulars of the violation. The court in that case stated as follows:-

“We would however again stress that if a person is seeking redress from the High Court or an order which invokes reference to the constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they alleged to be infringed.”

13. In the case of **Meme -vs- Republic [2004] 1 E. A 124** and **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & Others**

[2013] eKLR, the Courts have stated the test as to what qualifies as a constitutional reference. In the case of **Meme -vs- Republic** [supra] the Court stated as follows:-

“Where a person seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the Applicant’s instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants.”

14. Applying the principles discussed in the above cases cited, I find no basis upon which I can hold there is a competent constitutional petition before me. I see nothing constitutional on the claims made by the 1st Petitioner against the Respondents. He claims his property was fraudulently transferred in 1992. **How does that become a constitutional issue? When for instance did he discover the fraud and what did he do about it?** The Petition appears deficient in those details yet it is not possible if you claim ownership of a property such as the Township property in the instant matter to be oblivious of any happenings affecting the property. The property is developed and no doubt there must have been a tenant in occupation. From 1992 when the alleged fraud occurred did the 1st Petitioner continue exercising rights of ownership such as receiving rent, and if not, what action did he take and/or why did it take the Petitioners over 20 years to bring the present Petition? The Petition has not answered and/or attempted to provide any answers to these questions which raises the issue of bonafides on the part of the Petitioners in bringing the instant Petition. The Petition even if it was found to be sustainable, would invariably be found to have not been brought without unreasonable delay. The laches doctrine would operate to defeat the Petition.

15. Based on the pleadings, it is my considered view that the issues raised in the Petition were clearly of a civil nature and there was nothing constitutional about them. Whether or not there were fraudulent transactions was a matter for a civil court to determine. It does appear to me, that the Petitioners by making what was essentially a matter for the civil jurisdiction of the court a constitutional reference, were groping hoping to walk away from the strictures of the Civil Procedural Rules and the Rules of Evidence. The court would be failing in its duty if it allowed that to happen. The petition in my view is brought in abuse of the process of the court and is unsustainable.

16. Having found and held that the petition does not satisfy the test of what constitutes a Constitutional Petition and that the same constitutes an abuse of the process of the court, I need not consider the other issues framed as it would be an exercise in futility. At any rate, the Petitioners may consider if they still have any options they can pursue through the civil jurisdiction of the court and I do not wish to prejudice them by expressing my opinions and neither should I shackle the hands of the judge before whom such a matter could be presented.

17. For the reasons I have advanced hereinabove, I order the Petition dismissed with costs to the 3rd Respondent and the Interested party.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF JULY 2019.

J. M. MUTUNGI

JUDGE