



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT**

**AT MERU**

**PETITION NO. 2 OF 2018**

**IN THE MATTER OF ARTICLES 12 (1) (A), 19,20,21,22,23,24,27,28,29 (D),40,47,48,50,60,61,64,68 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 8 (1) OF THE LAND CONTROL ACT**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**SAMSON MURIUNGI MWIREBUA.....PETITIONER**

**-VS-**

**SILAS KIMATHI MUTONGA.....1<sup>ST</sup> RESPONDENT**

**ERIC MAWIRA MBAE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Before me is a Constitutional Petition dated 27<sup>th</sup> March 2018, in which the Petitioner seeks the following reliefs/prayers;
  - a. THAT the Honourable court be pleased to declare Section 8 (1) of the Land Control Act unconstitutional and invalid.
  - b. THAT the Honorable court be pleased to give an order of actual performance by the 1<sup>st</sup> respondent in respect of the agreement for sale dated 29<sup>th</sup> November 2014.
  - c. THAT the Honorable court be pleased to issue an order of Certiorari quashing the decision of the Land Registrar entering a caution on land parcel No. Nkuene/L-Mikumbune/1821.
  - d. THAT the Honorable court be pleased to issue an order of Mandamus compelling the Land Control Board to issue consent regarding parcel No. Nkuene/L-Mikumbune/1821.
  - e. THAT the honorable court be pleased to extend time for application of consent of the Land Control Board.
  - f. THAT the Honorable court be pleased to issue an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents whether by themselves, their agents, servants, assigns and/or any other person acting on their behalf or at their behest from entering/interfering with the plaintiff's right over land parcel No.Nkuene/L Mikumbune/1821.
  - g. Costs and interest.

2. The gist of the Petition is that on or about 29<sup>th</sup> November 2014, the Petitioner had entered into an agreement with the 1<sup>st</sup> respondent to purchase land parcel number Nkuene/L-Mikumbune/1821 measuring 0.047 Ha at a price of Kshs 799,000 and upon execution of the agreement, Petitioner immediately received vacant possession of the same and has occupied the same ever since.

3. It was his contention that at the time of execution of the agreement, the 1<sup>st</sup> defendant handed to him the original title deed and other necessary documents to enable him process his title deed and that since then, the 1<sup>st</sup> defendant kept on promising to obtain the consent of the Land Control Board and in particular made an application on 3<sup>rd</sup> June 2014, though the same was deferred because the 2<sup>nd</sup> respondent had placed a caution on the suit parcel. Thereafter, petitioner made a demand to the 1<sup>st</sup> respondent to transfer the suit parcel to him but this was futile.

4. On or about 6<sup>th</sup> March 2018, petitioners made a demand to both respondents to have the caution removed and to have the land transferred to him, that is when the two respondents demanded that he (petitioner) should start to pay rent of shs. 20,000 monthly.

5. The Petition was opposed via two replying affidavits, one sworn by 1<sup>st</sup> respondent on 9<sup>th</sup> April 2018 and another sworn by the 2<sup>nd</sup> respondent on 18.1.2019.

6. The 1<sup>st</sup> respondent deposed inter alia that there was nothing constitutional in the matter and that the purported dispute herein was a simple claim over alleged sale of land and that he had never sold any land to the Petitioner. He averred that he had borrowed Kshs.187,500 from one Evangeline Nkatha (a shylock) and surrendered to her the title deed of the suit property as security, but how the title deed ended up in the hands of the Petitioner was a mystery. He further deposed that even assuming there was an agreement for sale of land as alleged, there was no blessing of the land control board and section 6 of the Land Control Act was clear that a purchaser would only be entitled to a refund. The respondent thus contended that the entire Petition was misconceived and urged the court to dismiss the same with costs.

7. On the other hand, the 2<sup>nd</sup> respondent deposed inter alia that he had never dealt with the Petitioner and as such he was wondering why he was being dragged in the instant proceedings and that all he had done was to buy a portion of the suit property from the 1<sup>st</sup> respondent. That is why he placed a caution to protect his interests. Consequently, he contended that he had been wrongly sued and as such, his name ought to be expunged from the Petition.

8. It was submitted for the Petitioner Section 8 (1) of the Land Control Act made it mandatory for any person involved in a controlled transaction to make an application to the land control board within a period of 6 months and that section 6 provided clearly that failure to obtain that consent renders the transaction void. It was further submitted that in the present case, the caution on the suit land was placed by the 2<sup>nd</sup> respondent in collusion with the 1<sup>st</sup> respondent and hence, it became futile to obtain the relevant consent. Petitioner therefore contends that he was deprived of the property he has bought.

9. It was further submitted for the petitioners that section 8 (1) of the Land Control Act conferred an undue advantage to the 1<sup>st</sup> respondent, that the aforementioned proviso sanctions the breach of the right to property contrary to Article 40 of the Constitution, and that in so far as the provision only gives this advantage to the respondents, then the same also violates the right to equality and freedom from discrimination under Article 27 of the Constitution. It was also submitted that the Petitioner's right to dignity as captured in Article 28 had been violated. Other Constitutional provisions cited included Articles 60, 61, 64 and 68 which are general principles revolving around the nature of private land such as the suit property.

10. In support of his case, the petitioner proffered the following authorities.

- i. Grace Wachuka Mano vs Francis Kamau Gatiba (2016)eKLR.
- ii. Samuel Kirubi Njuki vs. Margaret Wangari Macharia (2014) eKLR.
- iii. Githunguri Dairy farmers Cooperative Society Ltd v. Attorney General & 2 Others (2016) eKLR.
- iv. Simeon Kioko Kitheka & 18 Others vs. County Government of Machakos & 2 Others (2018) eKLR
- v. Council of Governors & 3 Others vs. Senate & 53 Others (2015) eKLR.
- vi. Raila Odinga & Another vs. Independent electoral and Boundaries Commission & 2 Others, Petition 1 of 2017 SCOK.

11. On the other hand it was submitted for the respondents that the Petition was mainly challenging section 8 (1) of the Land Control Act to be declared unconstitutional and that the Land Control Act was an Act of parliament hence it was public law which was implemented and defended by the government, hence the only way the government could defend this law was through the Attorney General. Failure to enjoin the Attorney General was therefore fatal to the Petition.

12. It was further submitted that the orders sought by the Petitioner could be sought in a simple case and not a Constitutional Petition as they did not relate to any constitutional issues as the petitioner was seeking to have the sale agreement specifically performed by the court by declaring section 8 (1) of the Land Control Act unconstitutional. It was thus submitted that the prayers sought in this Petition could not be granted for reasons that it was now well settled that validity of the agreement involving the sale of agricultural land (controlled transaction) was 6 months hence the agreement between Petitioner and the 1<sup>st</sup> respondent was a nullity by virtue of operation of the law.

13. In support of the case for the respondents, the following authorities were proffered;

1. Registrar of trade unions vs. Nicky Njuguna & 4 Others (2012) eKLR.
2. David Sironga Ole Tukai vs. Francis Arap Muge and two others. COA NAIROBI C.A NO.76 of 2014.
3. Jeremiah Muku vs. Methodist Church of Kenya Registered & Another (Meru H.C.C.C NO.80 of 200).
4. Chokoling vs. AG of Trinidad & Tobago (1981) U.L.R. 108 at page 112 and Maharai vs. AG of Trinidad & Tobago (NO.2) 1979A.C385.
5. Peter Waweru Waitita vs. Cyry J.Karanja (2007)eKLR.

14. I have carefully considered this Petition, the rival submissions and the authorities relied upon by the parties. The petitioner wants this court to declare section 8 (1) of the land control Act as unconstitutional, to order the removal of the caution on the suit land, to extend time for application for the consent of the land control board and to direct the land control board to issue the relevant consent. Further, the petitioner is seeking an injunction to restrain the respondents from dealing with the suit land in any manner. Against this background, I find it necessary to frame the issues for determination as follows;

- a. **whether failure to enjoin the Attorney General in these proceedings is fatal;**
- b. **Whether this petition meets the threshold of a constitutional petition.**
- c. **Whether section 8 (1) of the land control board should be declared unconstitutional.**
- d. **Whether the relief sought herein can be granted.**

**Whether failure to enjoin the Attorney General in these proceedings is fatal**

15. With regard to the 1<sup>st</sup> issue, the gist of the instant Petition is that on or about 29<sup>th</sup> November 2014, the Petitioner entered into an agreement to purchase the suit property of which he took possession of the same. He avers that the transfer of the suit land was not effected because the necessary consent from land control board was not obtained due to machinations of the seller and that a caution had been lodged by respondents. It is not in dispute that the Petitioner has not enjoined the Attorney General, the Nkuene Land Control Board within which the suit property is situated and the Land Registrar in these proceedings. Further, the petitioner has not alleged any impropriety on the part of these government officers.

16. The petitioner has relied on the case *Council of Governors & 3 others v Senate & 53 others [2015] eKLR* to buttress the averment that it was not fatal to enjoin the Attorney General in this case. In the cited case, it was held that:

**“Any rule of procedure that violates a party’s fundamental right and freedom cannot be said to be sound. We do not see any prejudice that the respondent has suffered by the alleged failure of the petitioner to issue the 30 days’ notice to the Attorney General as prescribed under the provisions of section 13 A (1) of the Government proceedings Act. We say so because the issues in contest are solely to do with the conduct of the senate which is an organ of state that can properly be sued as such. In fact the senate entered appearance in its own name and by counsel and we completely see no reason why the failure to either enjoin the Attorney General as a party or failure to give him notice of the intended proceedings will advance (impair/impede) the cause of justice. We therefore decline to strike out the petition as we are conscious that it serves the interests of justice to determine it on its merits and resolve the important issues that it raises”.**

17. I find it necessary to give an extract of the paragraph which succeeded the quote above in the **Council of Governors case (Supra)**. It reads as follows;

**“It is to be observed also that only the court can grant the relief that the petitioner is seeking in this matter, namely the declaration of invalidity of legislation on the basis that it is unconstitutional. The attorney general could not have provided the petitioners with the relief that they seek, and even had we found that the 30 day notice was a requirement, it would have been a procedural step that would serve no purpose in a matter such as this. In the circumstances, we find no merit in the objections by the respondents with respect to the competence of the petition, which we find is properly before us”.**

18. Section 8 (1) of the land control act provides that

**“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto....”.**

19. Section 9 provides for the granting or refusal to grant the consent.

20. From the foregoing, it is apparent that the land control board has to give reasons as to why a consent has been withheld. The petitioner has not stated that the land control board failed to carry out its mandate as provided by the law. How then can the operations of the board be challenged without giving the board an opportunity to be heard?. This case is clearly distinguishable from the council of governors case since in the latter case, the question was centered on section 13A of the government proceedings act, where the said section was found to have

imposed hurdles on the accountability of the government and the issue of giving notice was found to be a procedural step. In the present case, the land control board has a statutory mandate to give consent or to give reasons for failure to give such consent. Thus the board ought to be given an opportunity to defend its stand on the matter.

21. Another distinction is that in the “**Council of Governors case (supra)**” the issues in contest concerned the conduct of the senate and the said senate was considered as an organ of the state. This is not the case in the present suit as the respondents are private individuals yet the issues in contest touch on public law and the operations of public entities like the land control board and the land registrar.

22. Further, the Land registrar is the statutory mandated body or office to register cautions pursuant to the provisions of section 71 of the Land Registration Act. Both entities, that of the Land Registrar and the Land control board would ordinarily be represented by the office of the Attorney General in legal matters.

23. I am in agreement with the submissions and authorities of the respondents that the rules of natural justice require that any person likely to be affected by a court order must be involved in the process leading to that decision. (**See article 50 of the constitution**). Having failed to enjoin the Attorney General in these proceedings, then, the petition must fail.

#### **Whether this petition meets the threshold of a constitutional petition.**

24. I have no doubts that the dispute here in revolves around the ownership of the parcel of land No. Nkuene/I-Mikumbune/1821 which land, the petitioner claims to have bought but the transfer was not accomplished. The Petition is premised on inter alia Articles **12(1)(a), 19, 20, 21, 22, 23, 24, 27, 28, 29 (d), 40, 47, 48, 50, 60, 61,64 and 68 of the Constitution of Kenya**. The question is, does the dispute here in raise constitutional issues?

25. It is trite law that in a Constitutional Petition, a party must state with reasonable precision the alleged Articles of the Constitution that have been infringed and the manner in which the same have been infringed. This principle was set out in the case of **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272**. The same principle was recently restated by the Court of Appeal in the case of **Mumo Matemu v Trusted society of human rights alliance & 5 others [2013] eKLR**.

26. In **H.C.C. Petition no. 22 of 2014 Mombasa, Manase Guyo & 260 Others vs. Kenya forest services & Another**, It was stated that;

**“To succeed in their Petition, the Petitioners are required to state in a clear, concise and precise manner the correlation between the alleged infringement and the action of the Respondent. It was not sufficient to merely cite provisions of the Constitution they belief to have been infringed but to also state the manner in which the provisions were infringed. This is because as it was held in LYOMOKI AND OTHERS VS. ATTORNEY—GENERAL [2005] E.A. 127, the onus, in constitutional Petitions, as in other ordinary civil actions, is upon the Petitioner or the Plaintiff to establish a prima facie case, and thereafter the burden shifts to the Respondents to justify the limitation to those rights”.**

27. In the case of **Jeremiah Muku vs. Methodist Church of Kenya Registered and another (Meru H.C.C.C no 80 of 2005)** cited by the respondent, Justice Ouko stated thus;

**“But it may be remembered that constitutional reference are not a panacea for resolution of all types of legal disputes....”.**

28. In the present matter, section 8 (1) gives **any of the parties** an opportunity to apply for the consent of the land control board. Petitioner has not stated whether he invoked the said section. Further, **section 73 of the Land Registration Act** makes provision of how a caution should be removed. The removal of a caution is certainly not a constitutional issue.

29. It is noted that 1<sup>st</sup> respondent has denied having ever sold any land to petitioner and he has given an account of how he had borrowed money from a shylock using his title as security. The right to property as recognized under article 40 of the constitution are enjoyed by persons who have rights over the land in question. Petitioner’s rights over the suit land are yet to be ascertained. In the process of such ascertainment, evidence needs to be adduced as to how the parties entered into the contract, who and how was the contract breached and whether the contract is still enforceable. These are not constitutional issues. I am inclined to find that the petitioner is attempting to establish his rights over the suit land using this petition.

30. I therefore conclude this issue on constitutional threshold by stating that the petitioner has not stated with reasonable precision the manner in which his rights have been violated save for generally citing constitutional provisions. It is my considered opinion that the instant Petition falls short of the threshold set out in the **Anarita case (supra)** and the same cannot stand.

#### **Whether section 8 (1) of the Land Control Act is unconstitutional.**

31. The said section provides as follows;

**(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto. (Emphasis added)**

**Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit”.**

32. The gist of the Petitioner's Petition inter alia is that Article 27 of the Constitution entitles every person to equality before the law and equal protection and equal benefit of the law and that the Petitioner who is a purchaser had been frustrated by the respondents where by section 8 (1) of the Land Control Act is in favour of the 1<sup>st</sup> respondent and as such the proviso is discriminatory to the petitioner.

33. It is trite law that all statutes are presumed to be constitutional. This position was affirmed by the Court of Appeal of Tanzania in the celebrated case of Ndyanabo vs. Attorney General [2001] EA 495 which was a restatement of the law in the English case of Pearlberg vs. Varty [1972] 1 WLR 534. In the former, the Court held that:

**“Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative”**

34. In Olum & another v Attorney General [2002] 2 E. A the Constitutional Court of Uganda stated as follows:

**“To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional...”**

35. The purpose of the consent pursuant to section 8 (1) of the Land Control Act was discussed at length in the case of David Sironga Ole Tukai v. Francis Arap Muge & 2 Others (2014) eKLR where the Court of Appeal stated that:

**“The Land Control Act remains one of the most litigated statutes in Kenya. As a consequence, a consistent line of case law has emerged, both from this Court and the High Court on the interpretation and application of various provisions of that statute. Those authorities cover a span of 47 years from the date of enactment of the Act in 1967 to this day..... What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the Land Control Act in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land”.**

36. In the instant Petition, the gist of the Petition is refusal by the 1<sup>st</sup> respondent to seek consent of the land control board. However, it is imperative to note that **Section 8 (1) of the Land Control Act** enjoins any party to the transaction to seek the said consent. A party can also seek for extension of time before the High court. The Petitioner in the instant case has not stated that he sought the said consent and the same was denied, nor did he seek for extension of time to make the application and that such an order was not forth coming.

37. I must add that the aforementioned act also has detailed appeal mechanism which parties ought to follow in case of a refusal to grant the consent. Again the petitioner has not demonstrated that he exhausted this appellate mechanism. 31. In Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others [2011] eKLR Makhandia J (as he then was) stated thus;

**“I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights.....”**

38. Taking into totality all the circumstances in this case, I am unable to agree with the Petitioner that **Section 8 (1) of the Land Control Act** is unconstitutional. The onus was on the Petitioner to demonstrate to this court that the said section is unconstitutional an obligation he has failed to discharge.

**Whether the relief sought herein can be granted.**

39. Having established that this petition has failed to meet the threshold of a constitutional petition, then I must conclude that none of the reliefs sought herein can be granted in this suit. The upshot of the foregoing is that the instant Petition is without merit and the same is accordingly dismissed with costs to respondents.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 17<sup>TH</sup> DAY OF JULY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Ojiambo for petitioners

Kirimi for respondent

Petitioner

1<sup>st</sup> respondent

2<sup>nd</sup> respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**