



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISII**

**PETITION NO. 9 OF 2016**

**IN THE MATTER OF ARTICLES 19, 20, 22, 23, 25, 40, 47, 48, 50**

**AND 159 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 22, 23, 25, 40, 47, 48, 50**

**AND 159 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF RIGHT TO PROPERTY, FAIR**

**ADMINISTRATIVE ACTION, EQUAL TREATMENT BEFORE THE LAW**

**BETWEEN**

**DAVID MORANGA OYUGI.....PETITIONER**

**VERSUS**

**KISII COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**ROBERT MAGARE OMBASO.....2<sup>ND</sup> RESPONDENT**

**HEZRON MICHIRA.....3<sup>RD</sup> RESPONDENT**

**AONDO RATEMO MASAMBA.....4<sup>TH</sup> RESPONDENT**

**VINCENT OBIERO.....5<sup>TH</sup> RESPONDENT**

**R U L I N G**

1. The Petitioner instituted the present Petition against the Respondents vide a Petition filed on 1<sup>st</sup> April 2016. The Petitioner averred that he was the lawful allottee of Plot No. 51B Keumbu Market and that he had developed a commercial building thereon which he was utilizing for his own use and leasing out some of the shops. The Petitioner further averred the 1<sup>st</sup> Respondent acting through its agents had unlawfully surveyed and allocated plots on the frontage of the Petitioner's building effectively blocking the frontage to the Petitioner's building. The Petitioner further claimed that the 1<sup>st</sup> Respondent's actions if not restrained would constitute illegal appropriation of part of the Petitioner's plot without due process and/or compensation.

2. The Petitioner contends that the actions of the Respondents constituted a violation of the Petitioner's constitutional rights contrary to the provisions of Articles 40, 47, 48 and 50 of the Constitution. The Petitioner thus seeks a declaration that the Respondents actions had

infringed his rights to property. The Petitioner further sought orders of restraint and damages and costs of the Petition.

3. The 1<sup>st</sup> Respondent filed a replying affidavit through Johnstone O. Ndege the County Secretary on 20<sup>th</sup> September 2016 in opposition to the Petition. The 1<sup>st</sup> Respondent averred that the Petitioner was occupying part of an open air market which he claimed to be part of his plot. The 1<sup>st</sup> Respondent's contention was that the Petitioner was the one who had encroached onto the public land and hence his complaints against the Respondents were baseless.

4. The Petitioner filed a supplementary affidavit on 23<sup>rd</sup> February 2017 in response to the 1<sup>st</sup> Respondent's affidavit where he set out the history of how he acquired the subject property. He stated that the original Plot No. 51 was originally held by one, Francis Orangi Nyagwansa who subdivided it into Plot Nos. 51A and 51B was acquired by one Machoka Momanyi who later sold the plot to the Petitioner and that the County Council gave approval for the transaction vide a letter dated 26<sup>th</sup> April 1995. The Petitioner averred that he was issued a plot card for the plot he had acquired on 27<sup>th</sup> April 1995 after he had paid the necessary dues to the County Council. The Petitioner maintained that he had procedurally acquired the suit premises and that the Respondents had no justifiable reason to interfere with the Petitioner's Plot and that the allocation by the 1<sup>st</sup> Respondent of plots in front of the Petitioner's property was illegal and unprocedural and an affront to the Petitioner's right to the property.

5. On 23<sup>rd</sup> February 2018 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Preliminary Objection on the following grounds:

**1. That the suit is statute barred under the Limitation of Actions Act, Cap 22 Laws of Kenya and the Public Authorities Limitation Act, Cap 39 Laws of Kenya as the cause of action arose in the year 2009.**

**2. That the 2<sup>nd</sup> Respondent being an employee of the 1<sup>st</sup> Respondent and a public officer cannot be sued in his personal names/capacity.**

**3. That the 2<sup>nd</sup> Respondent is protected against personal liability under Section 133 of the County Government Act, 2012.**

**4. The suit as pleaded is bad in law as the Petitioner ought to have instituted a judicial review as opposed to a petition to challenge the alleged administrative action or plead for prerogative orders.**

**5. That the Petitioner has not paid costs in Chief Magistrate's Case No. 619 of 2009 as required under Order 25 Rule 4 of the Civil Procedure Rules.**

**6. That there is no cause of action against the 2<sup>nd</sup> Respondent.**

6. The court on 7<sup>th</sup> February 2017 had given directions that the Petition be heard viva voce as the Court had on the basis of the pleadings and the material placed before the Court formed the opinion that this was not a suitable matter to be determined on the basis of affidavit evidence. The court thus on 3<sup>rd</sup> May 2017 gave directions for the parties to comply with the requirements of Order 11 of the Civil Procedure Rules by exchanging their bundle of documents and witness statements. Rather than comply with the directions, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed the Notice of Preliminary Objection as set out hereinabove.

7. The Court on 2<sup>nd</sup> October 2018 directed that the preliminary objection be disposed of first and the parties were directed to canvass the same by way of written submissions. The Petitioner filed his submissions on 26<sup>th</sup> April 2019 while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their submissions on 12<sup>th</sup> June 2019.

8. The law is settled that a preliminary objection must relate to a point of law which arises from the pleadings and which if argued has the potential of disposing of the suit. A preliminary objection cannot be taken if the facts on which it is founded are disputed and/or if evidence is required to ascertain the facts. In the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] E.A 696** the Court of Appeal laid the test as to what would qualify as a preliminary objection. In the case of Law J.A stated thus:-

**“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”**

In the same case **Sir Charles Newbold, P.** stated as follows:-

**“...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 pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of point by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”**

9. In the present matter as earlier stated, the court after reviewing the pleadings opined that the facts were disputed to the extent that it was not practical to dispose the matter on the basis of the affidavit evidence without oral evidence being taken. That was before the preliminary objection was taken. **Does the preliminary objection pass the test set in the Mukisa Biscuit case (supra)?** I do not think so, and this is why. The Petitioner has brought the instant suit by way of a constitutional petition claiming breach of a fundamental right. Article 22(1) of the Constitution provides as follows:-

**“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”**

10. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents 1<sup>st</sup> ground of Preliminary Objection is that the suit is statute barred under the Limitation of Actions Act and the Public Authorities Limitation Act. The Petition is anchored under the Constitution under Articles 40, 47, 48 and 50 and with respect the statutes the 1<sup>st</sup> and 2<sup>nd</sup> Respondents refer to are subservient to the Constitution and would have no application. The Constitution sets no time limit within which an action may be brought claiming violation of the rights enshrined thereunder. At any rate the Petitioner’s breach of his rights appears to be continuing meaning the Petitioner would be entitled to approach the court for redress. Whether or not the Petitioner’s action ought to be by way of a constitutional reference, in my view would be a matter to be determined after taking the evidence. At any rate under Article 23(3) of the Constitution the Court can grant any of the reliefs itemized thereunder which include:-

**i. A declaration of rights;**

**ii. An injunction;**

**iii. A conservatory order;**

**iv. An order for compensation, and**

**v. An order of judicial review.**

11. Having considered the submissions of the parties and the pleadings, I am not persuaded the preliminary objection has any merit. The Preliminary Objection merely served to shift the focus from having the suit prepared for hearing as directed and in the process valuable time was lost. Just as **Sir Charles Newbold, P.** stated in the **Mukisa Biscuit** case (supra), parties should desist from raising what are otherwise frivolous and/or irrelevant preliminary objections whose only contribution is to increase the costs of litigation and to lengthen the period it takes to finalize the matter.

12. The Preliminary objection is ordered dismissed with costs to the Petitioner.

**RULING DATED AND SIGNED AT NAKURU THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019.**

**J. M. MUTUNGI**

**JUDGE**

**RULING DELIVERED AT KISII THIS 8<sup>TH</sup> DAY OF OCTOBER 2019.**

**J ONYANGO**

**JUDGE**