



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

PETITION NO 2 OF 2017

EUNICE WANJIRU MWANGI.....1ST PETITIONER

MARGARET DEBORA MAINA.....2ND PETITIONER

MERCY WANGARI MURWE.....3RD PETITIONER

VS

JOHN NDIRANGU MWANGI.....1ST RESPONDENT

LANDS REGISTRAR MURANGA.....2ND RESPONDENT

JUDGMENT

The introduction and Evidence

1. The Petitioners filed this petition on the 29/6/2017 against the Respondents. The Petition is brought by the Petitioners on their own behalf and on behalf of Mwangi Ndirangu, Lucy Njoki and Josephine Wambui Mwangi (alleged to be of unsound minds).
2. They allege infringement of the rights and fundamental freedoms under Articles 27(5), 40(1), 45(3) and 54 of the Constitution.
3. The Petitioners have pleaded the particulars of fraud on the part of the Respondents under para 16 of the Petition.
4. The facts relied are stated in the supporting affidavit of the 1st Petitioner sworn on the 9/6/17. She deposed that the Petitioners and the 1st Respondent are siblings. Their parents are Mwangi Ndirangu and Lucy Njoki Mwangi. They also have a sister namely Josephine Wambui Mwangi whom they represent.
5. She introduced her parents and sister Josephine as persons suffering from mental conditions which make them unable to make rational decisions. In particular that her mother and Josephine are completely of unsound minds while their father suffers from delusion and brain retardation hampering sound decision making on his part. That he has been suffering from dimensia for a long period of time rendering his faculties limited in normal functioning.
6. It is her position that Parcel LOC2/KANGARI/534 is registered in the name of Mwangi Ndirangu, her father, having inherited it from their grandfather hence it is ancestral/family land. She deposed that they discovered in June 2016 that parcel 534 had been subdivided into parcel No.s LOC2/KANGARI /1838 and 1839. LOC2/KANGARI /1838 was sold and LOC2/KANGARI 1839 was further subdivided to yield LOC2/KANGARI /4189 and 4190. The former was sold and the latter subdivided to birth LOC2/KANGARI /5223-5227.
7. Alarmed and armed with the discoveries they proceeded to the office of the 2nd Respondent where they confirmed the status of the lands in the register. Attempts to inquire from their father did not bear any fruit as he could not understand leave alone remember.
8. With the exception of parcel LOC2/KANGARI /5224 which was sold to a third party the rest of the plots are registered in the names of various family members.
9. They blame the 1st Respondent for subdividing the land and selling without the knowledge and consent, including spousal consent of their parents, which actions are aimed at depriving them of their property. That the acts of the 1st Respondent in collusion with the 2nd Respondent are intended to disinherit them and their mother. The acts are termed fraudulent and breach of the Petitioner's Constitutional Rights. Particulars of fraud have been cited under para 18 of the supporting affidavit.

10. The Petitioners urged the Court to assess the mental status of Mwangi Ndirangu, Lucy Njoki Mwangi and Josephine Mwangi to enable it make informed decisions.

11. The Petitioners sought the following orders;

a. A declaration that the Respondents acts of subdividing and distributing land parcel No LOC2/KANGARI/534 into various parcels was unlawful and breach of the Constitutional Rights of Mwangi Ndirangu, Lucy Njoki Mwangi, Josephine Wambui Mwangi and the Petitioners.

b. A declaration that the Respondents breached the Constitutional Rights of Mwangi Ndirangu, Lucy Njoki Mwangi, Josephine Wambui Mwangi and the Petitioners as laid out in Para 17 of this Petition.

c. An order cancelling and revoking all transactions subdivisions transfer and dealings in land parcel No. LOC2 /KANGARI/534, 4190, 4189,1838, 1839,5223,5224,5225,5226 and 5227 and nay other parcel No derived from parcel LOC2/KANGARI /534.

d. An order directing the 2nd Respondent to revoke all titles derived from parcel No LOC 2/KANGARI/534 and issue a new title reverting the land to Mwangi Ndirangu.

e. Damages for breach of Constitutional Rights.

f. The Respondents pay the costs of the petition.

12. The 1st Respondent opposed the petition vide a pleading christened “Response to ELC Petition dated the 15/6/2017”. The document is dated the 16/10/17. It is attributed to the 1st Respondent however it is signed by the J Ngumo Advocates for the 1st Respondent.

13. The format notwithstanding, the 1st Respondent denied the claim of the Petitioners and asserted that the Petitioners are driven by greed and discontent over their father’s decision to subdivide and transfer his land. He contends that their father is of sound mind. That their father subdivided the land in 1984 and sold parcel LOC2/KANGARI /1838 to cater for medical bills of his wife. That he further subdivided parcel LOC2/KANGARI /1839 into LOC2/KANGARI/ 4189 and 4190 and sold LOC2/KANGARI /4189 to pay family debts in 2008. Kshs 10,000/- being part of the proceeds of sale was given to the 3rd Petitioner by their father.

14. The 1st Respondent states that their father desired to share parcel LOC2/KANGARI /4190 among his children and offered the Petitioners 0.1 acre each which they rejected despite the intervention of the area chief. On the instructions and directions of his father he subdivided parcel LOC2/KANGARI /4190 according to his father’s wishes who signed all the requisite documents. He contends that there is no law that impedes an owner from dealing with his property as he wishes, just as his father did. He stated that their mother too was consulted throughout the process.

15. In respect to deprivation of inheritance, he responded that their father is still alive and the issue of inheritance does not arise. As a registered owner of the land his father cannot be compelled to deal with the land against his will.

16. He denied all particulars of fraud pleaded in para 16 a)-h) and asserted that all legal processes were adhered to in regards to the sub division and transfer of the lands.

17. That their sister Josephine Wambui Mwangi has been allocated parcel LOC2/KANGARI /5225 and refuted claims that no provision was made for her.

18. The 2nd Respondent failed to file any response to the petition.

19. On the 30/7/19 parties took directions before the Court and elected to prosecute the petition by way of written submissions.

20. Further the Petitioners highlighted a litany of irregularities and illegalities in the subdivision and transfer of the land; lack of spousal consent; family consent has been signed by Stephen Mwangi Ndirangu, 1st Respondent and Josephine; Land Control Board application is not signed by the beneficiaries; application for Land Control Board was made on 21/3/17 and consent given the same day which is highly curious; Land Control Board minutes of the Land Control Board were not annexed; the signatures on the transfers are questionable.

21. The Petitioners opined that the 2nd Respondent was duty bound under Section 48(1) and (3) of the Land Registration Act to reject the transfer documents. That the 1st Respondent transacted on behalf of the registered owner of the suit land yet he was not appointed agent or held a power of attorney in view his legal disability. They maintained that the Mwangi Ndirangu, his wife and daughter Josephine are under legal incapacity to execute the transfer documents. That if indeed they are of sound mind then it behoved the 1st Respondent to so prove. They reckon that is why the transfer documents were not attached. That their rights under Art 54 of the Constitution have been violated by treating them with indignity and taking advantage of their disability. They relied in the case of **Paul PKIACH Anupa & Anor Vs The Hon AG & Anor Pet 93 of 2012 ECLR** where the Court emphasised the need for the state and private persons to respect the rights of people living with disabilities.

22. Relying on the case in **Issack M’Inanga Kieba Vs Isaaya Theuri M’Lintari & Anor, COCK No 10 of 2015**, the Petitioners stated that they have rights in the land based on Customary Rights however remote they may be.

23. The 1st Respondent submits that the Petitioners' allegation that they have filed this petition on behalf of Mwangi Ndirangu, Lucy Njoki Mwangi and Josephine Wambui Mwangi is untrue as they are pursuing their own selfish interests.

24. He gave a lengthy history of how the lands were subdivided by his father and various portions sold in 1984 and 2008 to cater for his wife's medical bills and family debts respectively. That being an old man of over 90 years he embarked on the 2017 subdivisions with the aim of sharing the land amongst his family members.

25. As to whether the Petitioners have locus standi to institute the suit, the 1st Respondent submits that having alleged that Mwangi, his wife and daughter have mental disability, they ought to have obtained orders of guardianship to clothe them with locus to file the petition. That to the extent that they failed to do so, they do not have locus and the petition must fail on the count.

26. In respect to whether Mwangi Ndirangu is of unsound mind, the 1st Respondent submitted that there is a presumption that every person is of sound mind until the contrary is proved and the onus of proof is on the person who alleges the contrary. See the case of **Grace Wanjiru Munyinyi & Anor Vs Gideon Githunguri & 5 others (2011) EKLK; Njagi Kanampiu Vs Kellen Nchunguni Riungu & 3 others (2018) EKLK** and **John Patrick Machira Vs Patrick Kiharu Muturi (2002) EKLK**.

27. He submitted that to the contrary Mwangi Ndirangu is of sound mind and there is no evidence placed before the Court to show that he is unsound mind.

28. As to whether the titles should be cancelled the 1st Respondent opined that the titles are now in the hands of third parties and family members who are not parties to the petition and urged the Court to uphold the rights to be heard of those parties as provided under Art 50 (1) of the Constitution which guarantees the right to be heard. Interalia he urged the Court to uphold the rights to fair administrative action, the right to access justice in a Court or a tribunal and the right to Property under the Constitution.

29. He submitted that in any event there is no law that prevented Mwangi Ndirangu in dealing with his property as he wished in his lifetime. That the Petitioners are driven by ulterior motive which is that they are unhappy because their father gave them each 0.1 acres which they rejected for 1.0 acres each. That their allegations that their father is of unsound mind is tantamount to a violation of his rights to dignity contrary to Art 28 of the Constitution.

30. Finally, the 1st Respondent submitted that the said Mwangi Ndirangu did not hold the property in trust for his children.

31. The issues for determination are;

- a. Whether the petition is competent?
- b. If a) is determined in the affirmative, whether the rights of the Petitioners and the persons they represent have been violated?
- c. Costs of the petition?

32. It is not in dispute that the parties to this petition are all related. The Petitioners, Josephine Wambui and the 1st Respondent are the children of Ndirangu Mwangi and his wife Lucy Njoki Mwangi. It is not in dispute that Ndirangu Mwangi owned the parent title LOC2/KANGARI /534 which has been subject of subdivisions and sales from as far back as 1984 to 2017.

33. It is the Petitioners' case that they have petitioned this Court on their own behalf and that of Ndirangu Mwangi, Lucy Njoki Mwangi and Josephine Wambui who are their father mother and sister respectively.

34. Under para 17 of the petition, they have set out the Constitutional Rights that have allegedly been violated by the Respondents as follows;

- a. Art 27 (3) and (5) – the Petitioners have been discriminated on the basis of gender.
- b. Art 40(1) – Mwangi Ndirangu has been deprived of his right to property without his knowledge.
- c. Art 45(3) – Lucy Njoki Mwangi's right to family property has been breached.
- d. Art 54 – the rights of Ndirangu Mwangi, Lucy Njoki Mwangi and Josephine Wambui Mwangi, persons living with disabilities have been breached. They have been subjected to undignified treatment and without respect.

35. The Petitioners have averred that their father is suffering from dementia and unsound mind which has rendered him unable to remember anything, diminished his faculties and limited his ability to handle his affairs, the consequences of which he does not know the manner in which his land was subdivided and transferred over the years from 1984 – 2017. That their mother was deprived of her matrimonial property as the subdivision and transfer was made without her consent and knowledge. She did not give her spousal consent as required by law and none was exhibited. That the 1st Respondent's acts are aimed at disinheriting the Petitioners, their mother and sister Josephine, whom they aver suffer from a mental illness and of unsound mind.

36. The 1st Respondent contends that it is only Josephine Wambui who is mentally sick and that she was given land. He states that their father is of sound mind and that he subdivided his land and sold some portions to meet family needs and lastly in 2017 to share with his family members.

37. The 1st Respondent has argued that the Petitioners have no locus to file the petition. That to the extent that they have alleged unsoundness of mind on the part of the persons they represent in the suit and failed to show evidence that indeed they are legally incapacitated they are bereft of locus.

38. Locus is the right of an individual to be heard in Court proceedings. To have locus to sue in a Court of law a party must have a sufficient interest to the matter in issue.

39. Art 258 of the Constitution provides as follows;

"(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

“Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

(2) In addition to a person acting in their own interest, Court proceedings under sub rule (1) may be instituted by—

(i) a person acting on behalf of another person who cannot act in their own name;

(ii) a person acting as a member of, or in the interest of, a group or class of persons;

(iii) a person acting in the public interest; or

(iv) an association acting in the interest of one or more of its members.

40. The above provisions have been reproduced in the Constitution of Kenya (Protection of Rights and fundamental freedoms) practice and procedure rules, 2013 which state as follows;

41. It is clear from the Constitutional provisions stated above that one may file a petition on behalf of another in a case where a right or a fundamental freedom has been contravened or threatened to be contravened.

42. The Petitioners have filed the petition claiming that the rights of Ndirangu Mwangi, Lucy Njoki Ndirangu and Josephine Wambui who are of unsound minds have been violated by the Respondents.

43. The Mental Health Act in its preamble states as follows;

“ An Act of Parliament to amend and consolidate the law relating to the care of persons who are suffering from mental disorder or mental subnormality with mental disorder; for the custody of their persons and the management of their estates; for the management and control of mental hospitals; and for connected purposes.”

44. **The Act defines a person suffering from mental disorder**” to mean a person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol of substance abuse.

45. The import of the word “found” is that the person has been assessed through a process provided by law and found to be suffering from a mental condition. It is therefore not sufficient for the Petitioners to allege that the persons they represent suffer from unsound mind without

laying evidence before the Court.

“The Court may make orders—

(a) for the management of the estate of any person suffering from mental disorder; and

(b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.

(3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the Court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder”.

2) where there is no known relative or other suitable person, the Court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.

46. The rights of the mentally disabled are protected under Section 26 of the Mental Health Act as follows;

47. The requisite Court under the said Act is the High Court. It is noteworthy that the Petitioners were aware of this provision when they urged the Court under para 20 of the petition to assess the mental status of the three persons. I believe that it is in furtherance of this plea that they filed an application on the 3/9/17 to have the three assessed under Section 28 and 29 of the said Act. This application was later withdrawn I guess when they realized that it was brought in the wrong forum.

48. I have taken time to review the file and the pleadings therein and noted that there is a witness statement attributed to the said Ndirangu Mwangi to the effect that he is of sound mind. This position has been adverted by the 1st Respondent in his response to the Petition. The Court in the absence of evidence will treat the witness statement as untested averments.

49. The issue of the mental soundness or otherwise of Ndirangu Mwangi, Lucy Njoki Ndirangu and Josephine Wambui has elicited arguments and counter arguments from both the Petitioners and the 1st Respondent with each taking a diametrically opposite direction.

50. In my view it would be a travesty of justice if Mr Ndirangu Mwangi’s Constitutional Rights to property are heard in his absence on account of unproven claims of unsound mind. There is no evidence that has been showed that he suffers from dementia or other medical conditions that diminishes his faculties to handle his affairs. This position could have been ameliorated by the production of a medical report by a certified medical practitioner to that effect. As it stands now it is based on mere allegations.

51. It is trite that every person is presumed to be of sound mind until the contrary is proved and the onus of proof is on the person who alleges the contrary. The law presumes that every person is mentally sound unless and until he is proved mentally disordered. See the case of **Grace Wanjiru Munyinyi & Anor Vs Gideon Githunguri & 5 others (2011) EKLR**.

52. The Court has a right to protect the right and interest of Mwangi Ndirangu in either way should he be of sound mind or unsound mind. Currently the latter is questionable and the Court will presume otherwise in which event he should avail himself to advert his rights in person.

53. I am alive to the Provisions of Art 258 read together with Section 4 (1) of the constitutional practice directions and the manner in which the 2010 Constitution removed the bottle necks that hitherto hindered suits that sought constitutional reliefs and redress. Having said that this in my opinion is a case that required proof that the persons being represented are of unsound mind so that the procedure in the Mental Act kicks in and the Petitioners clothe themselves with the requisite locus standi to file the petition.

54. Sadly, it is the finding of the Court that the Petitioners have no locus to represent the persons they purport to represent.

55. The Petitioners themselves based their claim on discrimination, that they have been discriminated against on the basis of gender and their rights to equality have been breached. They have also claimed that they have been disinherited of their customary rights in the land.

56. The yardstick used in enforcement of rights that are fundamental under our constitution that have been threatened or infringed the burden of prove rests with the Petitioner. The specific provisions and evidence in support of such acts of infringement or threats is to be precisely stated. This is the legal position as illustrated In the case of **Anarita Karimi Njeru vs R 1979 KLR 154** where the Court enshrined the principle in our jurisprudence in the following passage;

“we would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, its 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 are alleged to be infringed.”

57. **This test was affirmed by the Court of Appeal in Trusted Society of Human Rights Alliance -vs-AG & 2 others [2012] eKLR.**

58. Similarly in the case of the Court of Appeal in the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others (---Nairobi CA NO. 290 of 2012** reaffirmed the principle in **Anarita Karimi Njeru**). The Court in the **Mumo Matemu** case (Supra) stating

that the petition did not meet the threshold in **Anarita Karimi Njeru** since there was no evidence to support the allegations of violations of constitutional provisions, the Court held:-

"In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to..."

59. In this case the Petitioners have not tabled any facts before the Court to support a plea of discrimination and how their rights under Art 27 have been violated. Further their rights to land through customary rights are subject to a process of legal proof. This was not supported.

60. I have perused the titles the subject of the Petitioners' claims in this petition and note that they are registered in the names of third parties some of whom are family members. The Petitioners did not enjoin these persons. These are necessary persons that are likely to be affected by any orders issued by the Court.

61. My analysis of the whole petition is that the issues raised are in respect to a dispute in a land matter disguised as a petition. The Petitioners have pleaded fraud against the Respondents. These are matters that are subject of proof. They cannot be proved in affidavit evidence as in this case where the parties elected to canvass the petition through written submissions.

62. It is my view that not every land dispute is a violation of Art 40 – the right to property. Also, not every violation of a right to property meets the threshold of a constitutional petition. Constitutional petitions in my view should be left to serious matters that raise constitutional issues which require the application and interpretation of the Constitution.

63. This case is a family land dispute that should be brought as a civil claim/dispute to allow parties tender evidence and its veracity or otherwise is tested through cross examination of witnesses. One cannot have it any other way.

64. In the end I strike out the petition with no orders as to costs.

65. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANGA THIS 28TH DAY OF NOVEMBER 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

1st – 3rd Petitioners: Absent

Onsembe HB for Mr Ngumo for the 1st Respondent

2nd Respondent: Absent

Irene and Kuyiki, Court Assistants