



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 87 OF 2015

(FORMALLY CONSTITUTIONAL PETITION NO.21 OF 2015)

STEPHEN M. K. MBINU & 267 OTHERS..PETITIONERS/APPLICANTS

-VS-

1. CHUNKY LIMITED

2. MINISTRY OF INTERNAL SECURITY

3. MINISTRY FOR LANDS HOUSING

& URBAN DEVELOPMENT

4. HON. ATTORNEY GENERAL.....RESPONDENTS

RULING

1. The Petitioners commenced the Suit herein against the Respondents by way of a Petition dated 15th April, 2015. The Petitioners' claim is that they are the residents of Chongongwe village in Mwandudu Sub-location, Ksemei Location, Kasemei Division, Kinango District in Kwale County and believe that their ancestral parents came to live in the area around 15th Century and have always lived on the property registered as **Land Reference Numbers 909, 910, 913 and 1042 all of Section VI Mainland North** situated at Chongongwe registered vide Title Numbers **CR.7239, CR 7964 and CR.7553** at Mombasa Land Registry. The Petitioners contend that the land was to be demarcated and alienated as public land reserved for the indigenous people as per evidence from colonial government. It is the Petitioners case that it has come to their knowledge that some individuals were issued with Title Deeds of the Suit Properties without informing the Petitioners of the same despite the fact that they are occupying and using the land for cultivation and farming. It is averred that on 14th March, 2015 without any warning, justification, Court orders, prior notice or consultation, the Local Provincial Administration and the 1st Respondent visited the Suit Land and threatened to violently and brutally demolish the Petitioners' houses and render them and their families homeless and destitute. The Petitioners aver that they are being marginalized as indigenous people and true owners of the Suit Property in favour of absentee land owners who are well connected in the Government and the Petitioners are living in fear of eviction. The Petitioners aver that they are entitled to the protection of the constitution as their eviction would offend their fundamental rights and freedoms under the bill of rights. It is the Petitioners contention that the respondents are obliged to transfer the occupied portions of the Suit Property to the Petitioners.

2. The Petitioners have sought the following prayers: -

a) A declaration that the action by the National Land Commission in giving the 1st Respondent Title Deed over the Suit Property when the Petitioners were in physical occupation and use contravenes the provisions of Articles 2 (5), 25, 28,43 (1) (b) and 47(1) of the Constitution.

b) Conservatory orders restraining the Respondents from interfering with the peaceful stay of the residents of the Suit Property until such time as the National Land Commission shall have addressed itself to the validity and of the allocation of the Suit Property to a business entity over and above landless Kenya citizens.

c) A declaration that the forcible, violent and brutal eviction through demotion of homes of the Petitioners and their families without according them alternative shelter and/or accommodation is a violation of their fundamental rights as guaranteed in the Constitution.

d) A declaration that the Petitioners have acquired proprietary right over the Suit Property and therefore are entitled to be issued with documents of title by the Respondents for plots occupied by them and an order to that effect.

e) General, aggravated, exemplary and punitive damages.

3. The 1st Respondent opposed the Petition through a Replying Affidavit sworn on 17th July 2015 by Divyanshu Panchal. The 1st Respondent contends that it owns the property known as **LR.NO.909 OF SECTION VI M.N.** registered as **Title No. CR.7239** and the same was and has never been demarcated and/or reserved nor alienated as public land. It denied owning the other properties specified in the Petition. It is the 1st Respondent's contention that the Petitioners are trespassing on its property and have no rights hereon and are, as opportunistic professional squatters attempting to arrogate themselves the proprietary rights to the 1st Respondent's land when they have none. The 1st Respondent denied being an absentee landowner and denied having infringed the Petitioners rights. The 1st Respondent avers that the Petitioners are not entitled to the reliefs sought as there is no basis or foundation for them and states that the reliefs sought and the conduct of the Petitioners infringes upon the 1st Respondent's Constitutional rights guaranteed under Article 40 of the Constitution as regards its proprietary rights. The 1st Respondent contends that the photographs attached to the Petitioners affidavit are and have been previously used in other matters where the complainants are making alleged claims to land and some relate to works being carried on in adjoining property belonging to Colfax Limited namely, **PLOT NO.4525/VI/MN** and that the claim herein is a complete fabrication of the facts and true position pertaining to this matter and appears to be brought as a result of the compulsory acquisition of land by the Kenya Railways Corporation for the standard gauge railways project. The 1st Respondent exhibited photographs taken in March 2014 allegedly showing that the alleged claims are false, the semi-permanent or temporary structures having been put up on 2012. It also annexed a Photostat copy of the topographical survey confirming the squatters position on **PLOT MN/909/VI** as per information from Kenya Railways showing that most squatters fall within the railway corridor and are to be compensated for their structures as well as the relevant Kenya Gazette Notice, and copies of pleadings from other matters showing the claim made. It is the 1st Respondent's contention that the claim is fraudulently concocted and simply intended to contrive to deprive them of their property.

4. The 1st Respondent has filed a Preliminary Objection dated 28th July 2015 raising two grounds of Objection namely: -

i. this Honourable Court has no jurisdiction to hear and determine the matters raised by the Petitioners herein;

ii. the Petition herein does not raise any constitutional issue and the Petitioners have failed to identify the specific property to which their rights have been allegedly violated.

5. The Preliminary Objection was canvassed by way of written submissions. The 1st Respondent in its submissions dated 19th June 2016(sic) and filed on 17th June 2017 argued that whilst the Petitioners allege violation of fundamental rights and freedoms under the constitution, they have failed to state with sufficient particularity what those fundamental rights and freedoms are or the manner that they have been infringed and by whom. Counsel submitted that the principles governing the precision with which constitutional Petition ought to be drafted and sufficient particulars given were laid down in the case of **Anarita Karimi Njeru –v- Rep (1976 -1980) KLR 1272** which was cited with approval in the case of **Ledidi ole Tauta & other (2015) eKLR** where the Court held that:

“1. A party seeking redress from the High Court on a matter which involves redress to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which it is infringed.

2. The Petition was not specific; it was merely of a general nature in that it failed to identify with precision the particular property to which the Petitioners lay claim.... Even if the Petitioners claim was to be upheld it would invite a further exercise of determining what the claim related to”

In the Anarita case, the Court stated as follows: -

“we would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference of the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a 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.”

It was also submitted that the foregoing principles have been approved and adopted in the case of **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** where the Court declined to uphold the Petition filed in the High Court on the ground that it was not pleaded with precision and sufficient particularity as is required in the case of Constitutional Petitions and that it did not provide adequate particulars of the claims relating to the alleged violations. The 1st Respondent submitted that the Petition herein has failed to demonstrate with a reasonable degree of precision and particularity what provisions of the Constitution have been violated as well as the manner in which they have been violated and/or the particulars of such violation, and neither have sufficient particulars have been provided to identify the particulars of the property in question as the same is simply fraught with generality.

The 1st Respondent argued that it is not enough just to cite provisions from the Constitution without stating in the body of the Petition what specific ones are invoked, the facts that support reliance on these and how the right accruing thereunder have been breached, if at all. The 1st Respondent further submitted that the Petitioners have failed to identify the specific property to which any rights have been allegedly violated and in respect of which they were calling the Court to protect. It argued that in the Petition, the Petitioners have made a claim over certain parcels of land without reference to any demarcations or specific location considering the fact the 1st Respondent is only the registered owner of the property known as **LR.No.909** registered as **CR. No.7239**. While relying on the principles in Anarita case, the 1st Respondent argued that for one to seek and/or exercise constitutional protection of the right to property, he/she must prove ownership of that property in question starting with the identification of that property and the person who lay claims on it, and submitted that the Petitioners

cannot avail themselves of the process of this Court given the circumstances of this case. According to the 1st Respondent, cases cannot be dealt with justly unless the parties and the Court know the issues in controversy as pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The 1st Respondent urged the Court to find that the Petition is incompetent and that the Petitioners have failed on the aforesaid tenet of law and urged the Court to uphold the Preliminary Objection by striking out and dismissing the Petition with costs.

6. The 2nd, 3rd and 4th Respondents supported the Preliminary Objection and adopted the submissions filed by the 1st Respondent.

7. The Petitioners in their submissions dated 15th September 2017 submitted that pursuant to the provisions of Section 13 of the Environment and Land Court Act, this Court has the powers to hear and determine Applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedoms relating to the environment and land under Articles 42, 69 and 70 of the Constitution, and has the authority to grant orders and relief as the Court deems fit, including interim or permanent preservation orders including injunctions, prerogative orders, award of damages compensation, specific performance, restitution, declaration or cost, which award shall be available. It was submitted that the Petition herein relates to threat made by the 1st Respondent to demolish the houses of the Petitioners where they are resident on Suit Property **Land Reference Numbers 909, 910, 913 and 1042**, all of **SECTION VI/MN** registered vide Title Number **CR. 7239, Cr 7964 and Cr 755** at the Mombasa Lands Registry, the matter falls squarely within the jurisdiction of this Court.

8. The Petitioners submitted that the Petition herein has disclosed constitutional issues worthy of consideration by this Court and relied on the case of **Ernest Kevin Luchidio –vs- Attorney General & 2 others (2015)eKLR** and which, guided by the decision of the Court of Appeal in **Daniel N. Mugendi –vs- Kenyatta University and 3 others (2013)eKLR** stated as follows: -

“... The Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment and Land Court when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects...”

The Petitioners further submitted that they are entitled to protection of right to property as provided for under Article 40 of the Constitution. The Petitioners in their submissions conceded that in a constitutional Petition where there is an allegation of violation of constitutional rights, the Petitioner is obligated to set out, with reasonable degree of precision, the provisions of the constitution that have been violated and the manner in which they have been violated as was set out in the Mumo Matemu case and relied in the case of **Wilson Mutegi Nyaga & 2 Others –vs- County Public Service Board of Kitui (2016) eKLR**. It is their submission that the Petition has quoted the specific Articles of the Constitution and the Sections of law allegedly violated and/or at risk of violation and specified the property, for which they claim their rights attached to, and have given detailed information of why they are owners of the property and how the Respondents have jointly and severally violated their rights in relation to the ownership or otherwise of the suit property. They further submit that they have specifically pin pointed the properties in issue contrary to the 1st Respondent's allegations. It is therefore the Petitioners' submissions that the Petition herein has met the threshold set out for constitutional matters and they urged the Court to dismiss the Preliminary Objection.

9. The issue for determination is whether the 1st Respondent's Preliminary Objection has merit and should be upheld. The first Preliminary Objection is in relation to the jurisdiction of the Court. The *locus classicus* on jurisdiction is the celebrated case of **Owners of Motor Vessel “Lilian S” v- Caltex Oil (Kenya) Ltd (1989) KLR 1** where Nyarangi JA held as follows:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Clearly, if this Court lacks jurisdiction the matter will be at an end as I will have to down my tools and take no further step.

10. The Petition herein was brought pursuant to the provisions of Articles 2 (6), 19, 20, 21, 22 (2) (a), 3 (d), 23(1), (3), 25, 28, 40, 165 (3)(a), (d), (i) (ii) of the constitution of Kenya, Rule 11(c) and 12 Protection of Fundamental Rights and Freedom of Practice and Procedure Rules and Articles 25 of the Universal Declaration of Human Rights. The Environment and Land Court Act No.19 of 2011 was enacted to give effect to Article 162 (2) (b) of the Constitution which made provision for the establishment by Parliament of a Court to hear and determine disputes relating to the environment, use and occupation of, and title to land. The Environment and Land Court Act under Section 13 makes provisions for jurisdiction of the Environment and Land Court established under Section 4 of the Act. Under Section 13 (2) the Court has power to hear and determine disputes relating to environment and land, including disputes: -

a) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, mineral and other natural resources;

b) Relating to compulsory acquisition of land;

c) Relating to land administration and management;

d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.

Section 13(3) of the Environment and Land Court Act provides: -

3 Nothing in this Act shall preclude the Court from hearing and determining Applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

Section 13(7) of the Act provides that in exercise of its jurisdiction under the Environment and Land Court Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including –

- a) Interim or permanent preservation orders including injunctions;
- b) Prerogative orders;
- c) Award of damages;
- d) Compensation;
- e) Specific performance
- f) Restitution
- g) Declaration; or
- h) Costs.

11. Having regard to the Constitutional provision under Article 165 (5)(b) and Section 13(3) of the Environment and Land Court Act it is my view that in constitutional matters touching on the violation and/or infringement of the fundamental bills of rights and freedoms in as far as the same relate to the environment and Land Court has jurisdiction to deal with the Petition herein and I disallow the ground of Objection that this Court has no jurisdiction to hear and determine this matter.

12. The other Objection taken by the 1st Respondent is that the Petition does not raise any constitutional issue and the Petitioners have failed to identify the specific property to which their rights have been allegedly violated. In the Petition herein, the Petitioners allege violation of their fundamental rights and freedoms under the Constitution. It cannot therefore be stated that the Petition does not raise any constitutional issues. However, I have to determine whether the Petitioners have failed to state with sufficient particularity what those fundamental rights and freedoms are or the manner that they have been infringed and by whom.

13. It is well established that a Petitioner who seeks redress under the Constitution must state his claim with precision by reference to the provisions of the Constitution violated and the manner of the alleged violation. In the case of *Anarita Karimi Njeru –v- Attorney General (1970)*KLR 154 the Court held:

“we would however again stress that a person is seeking redress from the High Court on a matter which includes a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should be set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

The principle in the *Anarita Karimi* case (supra) was re-affirmed by the Court of Appeal in the case of *Mumo Matemu –v- Trusted Society of Human Rights Alliance and others (2013)* eKLR where it was stated as follows:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions, and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point... cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional Petitions is an extension of this principle.”

The same principle was also considered in the case of **Ledidi ole Tauta & others v- Attorney General & 2 Others (2015)**eKLR.

14. The Petitioners aver that they are residents of Dumama’s of Chongongwe village in Mwandudu Sub-location, Ksemei Location, Kasemei Division, Kinango District in Kwale County and believe that their ancestral parent came to live in the area around 15th century. The Petitioners further aver that they have openly, peacefully and without interruption lived in the said village since 1848 and that the Suit Property is ancestral land which was dispossessed from their ancestors during adjudication in favour of aliens. The Petitioners allege that there was a land commission report made in 1932/1935 for the restitution of the Durumas but the same has been neglected by successive governments. The Petitioners have sought *inter alia* a declaration that the allocation of the suit properties to the 1st Respondent contravenes the provisions of the Article 2 (5), 25, 28, 43 (1)(b), 47(1) of the Constitution and that their eviction is unconstitutional. The Petitioners have also sought a declaration that they have acquired the Suit Properties.

15. From the Replying Affidavit filed by the 1st Respondent, the 1st Respondent has admitted owning the property known as **LR.NO.909** but categorically denies owning the other properties specified in the Petition. The Petitioners have not included the owners of those other

properties as parties to this Petition. The Petitioners also seem to seek for declarations against the National Land Commission who have not even been made a party to the Suit. In my view the allegations in the Petitions are too general and the Petition has not passed the test established in the case of **Anarita Karim Njeru v-s Attorney General (supra)** as elaborated in the case of **Mumo Matemu –v- Trusted Society of Human Rights Alliance & Others (supra)**. The Petitioners have made a claim over several parcels of land without reference to any demarcation or specific locations considering that the 1st Respondent is only the registered owner of one of properties. I therefore uphold ground 2 of the 1st Respodent’s Preliminary Objection.

16. In the result I find that the Petition herein lacks merit and the same is ordered dismissed with costs to the 1st Respeudent.

Delivered, signed and dated at Mombasa this 26th February, 2018.

C. YANO

JUDGE