



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CONSTITUTIONAL PETITION NO. 1 OF 2016

IN THE MATTER OF ARTICLES 2, 3, 19, 20, 21, 22, 23, 35 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE RIGHT OF ACCESS TO INFORMATION HELD BY THE STATE

ERUSMUS NJIRU MUTO.....PETITIONER

VERSUS

THE DISTRICT LAND REGISTRAR EMBU.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. By an amended petition amended on 17th May 2017 and filed on 18th May 2017 brought under Articles 2, 3, 19, 20, 22, 23, 35 & 47 of the Constitution of Kenya, the Petitioner sought the following reliefs against the Respondents;

a. That the failure of the District Land Registrar Embu to provide the Petitioner with particulars of the court in which Succession Cause No. 92 of 2015 in which Rusia Gicuku Muto was a party and through which Rusia Gicuku Muto was registered as the proprietor of land parcel No. Kyeni/Kigumo/1829 by transmission was filed and to furnish the Petitioner with copies of the grant of letters of administration and certificate of confirmation of grant in Succession Cause Number 92 of 2015 is unlawful and is a violation of the Petitioner's constitutional right to access to information held by the state as enshrined in the constitution of Kenya.

b. An order directing the District Land Registrar Embu to within seven days furnish the Petitioner with;

i. Particulars of the court in which Succession Cause Number 92 of 2015 in which Rusia Gicuku Muto was a party was filed.

ii. Certified copies of the grant of letters of administration and certificate of confirmation of grant in Succession Cause Number 92 of 2015.

2. The said petition was precipitated by the 1st Defendant's failure to respond to a request for information by the Petitioner on at least two occasions as particularized in paragraph 11 of the petition. The petition was supported by the Petitioner's own affidavit sworn on 15th December 2016. The 2nd Defendant was joined in the petition as the Chief Legal Adviser of the Government of Kenya.

3. The Respondents filed grounds of opposition dated 3rd April 2017 through the office of the Attorney General. It was denied that the petition raised any constitutional issue or the violation of any fundamental rights. It was further stated that the Petitioner's rights were not absolute but limited as provided for under **Article 24 of the Constitution of Kenya 2010**.

4. The Respondents further opposed the petition on the basis that the Petitioner had failed to point out with reasonable precision the particular provisions of the Constitution which were violated and in what manner they were violated as was decided in the case of **Anarita Karimi Njeru Vs R [1979] KLR 154**. It was also stated that the petition was incompetent, misconceived, frivolous, vexatious and otherwise an abuse of the process of court.

5. When the petition was listed for directions on 6th April 2017, the Respondents requested that the petition be disposed of through written submissions. The Petitioner consented to the request and the Petitioner was granted 14 days to file and serve his submissions whereas the Respondents were to file and serve theirs within 14 days upon service. The matter was stood over to 8th May 2017 for mention to confirm compliance and fix a date for judgement.

6. When the matter was mentioned on 8th May 2017, counsel for the Respondents informed the court that the matter could be resolved amicably and the documents sought provided without the necessity of a hearing. The petition was consequently stood over to 27th June 2017 for mention to confirm settlement and possibly record a consent.

7. When the matter was mentioned on 27th June 2017 there was no settlement. The matter was subsequently mentioned again on 21st September 2017, 18th October 2017, and 21st November 2017 without any settlement being reached. The court consequently fixed the petition for judgement on 29th March 2018. When, however, it was discovered later on that the court recess was scheduled to commence on 22nd March 2018, the court gave notices for delivery of judgement on 21st March 2018.

8. The court has noted that the Respondents did not file any replying affidavit to controvert the factual foundations of the petition. There was no denial that a request for information and documents was made to the 1st Respondent in 2015 and 2016. The 1st Defendant did not respond to the request. It was not contended that the information and documents sought could not be availed to the Petitioner under the law. The court also notes that the Respondents did not file any written submissions despite having requested to be allowed to do so way back on 6th April 2017.

9. Mr. Okwaro for the Petitioner submitted that the petition was based upon violation of **Article 35 of the Constitution of Kenya** which guarantees every citizen the right to access information held by the state. Mr Okwaro also relied on **section 4 (3) of Access to Information Act, 2016** which was enacted by parliament pursuant to Article 35. It was, therefore, the Petitioner's submission that the Petitioner's constitutional right had been violated and as such was entitled to seek judicial relief under **Articles 22 and 23 of the Constitution**.

10. The court has considered the amended petition, the Petitioner's supporting affidavit, the grounds of opposition and the Petitioner's written submissions on record. The court has considered the provisions of **Article 35 of the Constitution** and the provisions of the **Access to Information Act, 2016** which provides for the matter of access to information. The court is satisfied that a request in writing was made to the 1st Respondent on at least two occasions without any response or compliance. It was not alleged that the documents sought were not available or that they were excluded from access by law.

11. The court finds that no legitimate reason or explanation has been given by the Respondents on why the documents and information sought should not be provided. The court is satisfied on the basis of the material on record that the Petitioner's constitutional right to access information held by the state under Article 35 has been violated by the Respondents by the failure to supply the documents sought.

12. The court finds no merit in the Respondent's grounds of opposition and the same are hereby dismissed. The Petitioner has clearly demonstrated which fundamental right was violated and the manner in which and by whom it was violated. Access to information is a constitutional right. Such right may be subject to the limitations stipulated in Article 24, but the burden of proving that any limitation is reasonable and justifiable in the circumstances lay with the Respondents. The Respondents completely failed to demonstrate any such justification for derogation from the right.

13. The Respondents' contention that the petition was incompetent, misconceived, frivolous, vexatious or otherwise an abuse of the court process was not demonstrated at all. In fact, no particulars thereof were given and neither did they file any submissions thereon. Those general allegations are accordingly rejected.

14. The upshot of the foregoing is that the court finds merit in the Petitioner's amended petition amended on 17th May 2017 and the same is hereby allowed as prayed. The Respondents shall bear the costs of the petition.

15. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 21st day of MARCH, 2018

In the presence of Mr Okwaro for the Petitioner and Ms Njoroge for the Attorney General for the 1st and 2nd Respondent.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

21.03.18