



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

CONSTITUTIONAL PETITION NO. 2 OF 2017

GRACE WAMBUI GICHUHI.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....1ST RESPONDENT

DIRECTOR OF PHYSICAL PLANNING.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

The facts in this Petition are largely un-controverted because the 1st Respondent and which is the main protagonist in this long standing dispute did not file any response to the Petitioner's Petition dated 9th February 2017 and filed on 10th May 2017.

GRACE WAMBUI GICHUHI (the Petitioner) is, since 27th October 2014, the registered proprietor of land parcel No. SAGANA/TOWNSHIP/230 (the suit plot) which she purchased from one **MOHAN SINGH** on 10th August 1967 at a consideration of Ksh. 470,000 with the intention of putting up rental houses. She therefore fenced the suit plot after depositing thereon building materials and paid to the 1st Respondent the necessary fees and rates. However, for one reason or another, she has been unable to develop the suit plot. First, a gang of three men broke into her house at 3 a.m. on 30th December 2001 demanding the title documents to the suit plot (then known as plot No. D 318) and disclosing to her that they had been paid Ksh. 5,000 to kill her. She was forced to pay the gang Ksh. 7,500 to save her life although they took her sewing machine, rice and a tray of eggs. They then returned again on 12th January 2002 but this time she saw them in advance and escaped but they injured his son on the neck using a panga.

Then on 6th February 2002, two surveyors went to the suit plot, sub-divided it and erected beacons. She reported this to the Clerk to the then Kirinyaga County Council who informed her that somebody from Nairobi wished to purchase the suit plot. So in July 2002, the Petitioner instructed the firm of **J.K. KIBICHO ADVOCATES** to write to the Clerk Sagana Town Council about the interference with the suit plot. She also wrote to the Minister for Lands complaining about the difficulties she was experiencing in obtaining the title to the suit plot and also about one Physical Planner by the name **F.M. NDEREBA** who had caused the sub-division of the suit plot into five plots under the PDP No. CKR/222/12/1. In an un-dated letter signed by the Sagana Town Council Surveyor, the Petitioner was allocated two plots "**K**" and "**L**" carved out of her own property and by a letter dated 18th March 2013, the District Planning Officer Kirinyaga **Mr. W.L. LOKA** informed the Director of Physical Planning in Nairobi that PDP No. CKR/222/12/1 had been prepared pursuant to a letter ref No. PDP/72/VI/52 of 2011. That letter referred to the following documents:

1. Letter dated 17th October 2012 under ref No. KREG/B60/VOL II/28 from the County Works Officer Kirinyaga.
2. Letter dated 7th November 2012 under ref No. KIR/GEN/2/VOL. IV/12/15 from the District Lands Officer Kirinyaga.
3. Letter dated 13th November 2012 under ref No. 12/209/E/KIR/VOL. V/106 from the District Surveyor Kirinyaga.
4. Letter dated 21st November 2012 under ref No. LND 4/1/VOL. 1/35 from the District Commissioner Kirinyaga.
5. Letter dated 21st November 2012 under ref No. DPHO/KW/BP/VOL. 1/29 from the District Public Health Officer Kirinyaga West.

On 22nd and 24th January 2013, notices were issued by the Kirinyaga District Physical Planning Officer that Part Development Plans (PDP) for the suit plot were ready for inspection at the offices of the District Physical Planning Officer Kirinyaga and invited those with representations to raise them. The Petitioner complained about the intrusion to her property both to the Minister for Justice and Minister for

Local Government. The Minister for Justice wrote to the then County Council of Kirinyaga to investigate the Petitioner's complaint. She also wrote to the Minister for Lands complaining how she had been un-able to obtain a title to the suit plot which had also been illegally subdivided. On 1st September 2011, the office of Deputy Prime Minister and Ministry of Local Government wrote to the Clerk Town Council of Sagana requesting to be furnished with a substantive brief on the issues raised by the Petitioner. On 12th September 2011, the said Clerk to Town Council Sagana **Mr. ANTHONY G. GATIMU** replied to the Permanent Secretary Office of the Deputy President and Minister for Local Government that plot No. D 318 was not registered in the names of the Petitioner and that her plots were plot "K" and "L" without disclosing that the two plots had in fact been carved out of the Petitioner's property. It was only until 27th October 2014 that the Petitioner was issued with a title deed to the suit plot following the intervention of the then Minister for Lands **MRS CHARITY NGILU** who had learnt of her plight through the media.

The Petitioner therefore instructed the firm of **MAGUTA KIMEMIA & ASSOCIATES ADVOCATES** (she is now acting in person), to file this Petition in which she has pleaded in paragraph 42 (a) to (h) her loss and damage as:

- *Loss of use of the suit plot.*
- *Financial loss after her building materials became wasted.*
- *Poor health due to depression, mental anguish leading to her being admitted in hospital.*
- *Deprivation of enjoyment and development of the suit plot.*
- *Harassment and un-warranted attacks by gangsters sent to evict her.*
- *Wasted years as the Petitioner sought help from various quarters when she could have been developing her property.*
- *Destruction and vandalism of the Petitioner's house posho mill and vehicles by un-known persons.*
- *Psychological agony.*

The Petitioner therefore seeks judgment against the Respondents in the following terms:

- 1. General damages.*
- 2. Costs.*
- 3. Interests on (a) and (b) above.*

The 1st Respondent, as I have already indicated above, filed no response to the Petition. Records show that the Petition was served on the Governor's secretary on 19th May 2017 by **DAVID M. WAMWATI** a process server of this Court.

The 2nd and 3rd Respondent filed a response to the Petition through a replying affidavit signed by **TIMOTHY W. MWANGI** the Deputy Director of Physical Planning dated 15th August 2017 in which he deponed, inter alia, that:

- *Following the Petitioner's complaint on 5th August 2011 to the Minister of Lands regarding the suit plot, the 2nd Respondent wrote to the District Physical Planning Officer Kirinyaga on 20th September 2011 to investigate the matter.*
- *The District Planning Officer Kirinyaga under a letter dated 26th April 2012 gave a report concerning the Petitioner's complaint as follows:*
 - 1. That according to the Council records, plot No. D 318 Sagana is not registered in the Petitioner's name.*
 - 2. That the Petitioner had on 10th September 2002 been notified by the Council that her plots are "K" and "L" Sagana.*
 - 3. That the Petitioner had on 12th August 2010 applied for a lease of the plot No. D 318 Sagana but was informed that her plots were No. "K" and "L".*
 - 4. That the Petitioner had been making payments to the Council in respect of plots 'K' and 'L' and not plot No. D 318.*
- *That the Petitioner wrote to the 2nd Respondent challenging the contents of the letter from the District Physical Planning Officer Kirinyaga dated 26th April 2012.*
- *The 2nd Respondent wrote to the Minister of Lands on 13th July 2012 seeking authority to prepare a Part Development Plan for plot No. D 318 to the Petitioner which was approved by the Minister and Gazette Notice No. 1404 was issued.*
- *The decision was then communicated to the National Land Commission and the Petitioner was finally issued with a title deed on 27th October 2014 for parcel No. SAGANA/TOWNSHIP/330.*
- *The various correspondences on record show that the 2nd Respondent worked timelessly and diligently towards ensuring that the Petitioner receives justice with regard to her land.*
- *The Petitioner has failed to satisfactorily prove how the office of the 2nd Respondent illegally conducted itself with respect to the suit plot.*

- ***That if the Petitioner incurred any loss and damage, the same lies squarely at the doorsteps of the 1st Respondent and the 2nd Respondent is in no way responsible for such loss and the claim against it should therefore be dismissed.***

The Petition was canvassed by way of written submissions which have been filed by the Petitioner in person and by **Ms MWIHAKI NDUNDU** on behalf of the 2nd and 3rd Respondents.

I have considered the Petition and the submissions by the Petitioner now acting in person, and by **Ms MWIHAKI NDUNDU** for the 2nd and 3rd Respondents.

I must start from the outset by observing that the Petition, though filed by counsel, does not meet the threshold set out in the case of **ANARITA KARIMI NJERU VS REPUBLIC 1976-1980 K.L.R 1272** and reiterated in **MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & OTHERS CIVIL APPEAL No. 290 of 2012 (2013 e K.L.R)** where it was held that a Petitioner alleging violation of Constitutional rights must set out with precision the particulars of the alleged violation. A casual perusal of the Petition dated 9th February 2017 and filed herein on 10th May 2017 shows that apart from a reference to **Articles 22 and 40 (1) (3) and (4) of the Constitution**, it does not in its body explicitly indicate how those Constitutional provisions were violated in respect to the Petitioner. In paragraph 42 thereof, it even alleges what are clearly special damages e.g. loss of use of the suit plot, financial loss of the Petitioner's building material and destruction of her house, posho mill and motor vehicles without even quantifying the loss yet a special damage claim must be specifically pleaded or proved. The lack of clarity is also evident in the fact that counsel then on record even signed it as **"ADVOCATES FOR THE PLAINTIFF"**. Clearly, this Petition is not in compliance with the requirements as set out in the **ANARITA NJERU (supra)** and **MUMO MATEMU** (supra) cases cited above.

Having said so, however, it is clear that no prejudice has been occasioned to the Respondents in this Petition by the lack of precise pleadings. Indeed the 2nd and 3rd Respondents have not raised it in their response which is a clear indication that they knew the nature of the case facing them. Indeed the 2nd and 3rd Respondents have adequately responded to the Petition through the exhaustive replying affidavit of **TIMOTHY W. MWANGI** dated 15th August 2017. Further, **Article 22 (3) (b) of the Constitution** on the Enforcement of the Bill of Rights provides that:

"Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the Court shall, if necessary, entertain proceedings on the basis of informal documentation"

Read together with **Article 159 (2) (d) of the Constitution** and noting that the overriding objectives of the Court is to do justice to the parties, this Court, while reminding parties and their counsel about the need to adhere to set out procedures, will nonetheless consider this Petition on its merits as to do otherwise will result in an injustice to the Petitioner who has been pursuing her rights both in this Court and through other Government agencies for a long time.

The substantive issue raised in this Petition is the violation of the Petitioner's rights to property which is enshrined **in Article 40 (1) of the Constitution** in the following terms:

"Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property

–

a. of any description; and

b. in any part of Kenya".

What runs through this Petition is that whereas the Petitioner lawfully purchased the suit plot way back in 1967 from one **MOHAN SINGH** for Ksh. 470,000 and paid all the requisite fees to the then **KIRINYAGA COUNTY COUNCIL**, the precursor to the 1st Respondent, she has not enjoined the right to develop it due to the illegal machinations mainly by the 1st Respondent's officers. For instance, in its minutes dated 19th June 1991, the **KIRINYAGA COUNTY COUNCIL SPECIAL WORKS TOWN PLANNING, MARKETS AND HOUSING COMMITTEE** confirmed that the suit plot was allocated to the Petitioner. In a letter addressed to the Petitioner on 29th January 1991, the said **COUNCIL** granted her the authority to develop the suit plot – see annexures **GWG 3 (a)** and **(b)** respectively. Yet according to paragraph five (5) of the replying affidavit of **TIMOTHY W. MWANGI**, the same Council stated that according to its records:

"..... Plot No. 318 D Sagana is not registered in the name of the Petitioner".

The 1st Respondent of course did not file any response for reasons that remain un-clear. The result is that the veracity of the evidence of both the Petitioner (who blames all the Respondents for the violation of her rights) and of the 2nd and 3rd Respondents (who have pleaded that the said violation **"lies squarely at the doorsteps of the 1st Respondent"**) remains un-rebutted by the 1st Respondent. From my assessment of the evidence herein, I am satisfied that the 2nd and 3rd Respondents have exonerated themselves from any liabilities in respect to the Petitioner's grievances with respect to the violation of her rights over the suit plot. Indeed it was the intervention by the 2nd and 3rd Respondents through the then Minister for Lands that secured the Petitioner the title to the suit plot. I must therefore dismiss this Petition as against the 2nd and 3rd Respondents.

As against the 1st Respondent, the allegations by the Petitioner have not been rebutted. However, it would be stretching the limits of liability too far to hold the 1st Respondent liable for the destruction of the Petitioner's house, posho mill and motor vehicles bearing in mind that by

her own Petition, the Petitioner has pleaded in paragraph 42 (g) that those persons who destroyed and vandalized those properties are **“unknown”**. The Petitioner has also pleaded that she suffered poor health including depression and mental anguish as a result of the conduct of the 1st Respondent. However, no medical evidence was placed before this Court to prove that allegation. Similarly, any financial loss caused to the Petitioner ought to have been specifically pleaded and proved as a special damage claim. The Court cannot therefore quantify such claims nor award them.

There is no doubt however that the Petitioner’s Constitutional rights as the proprietor of the suit plot were violated by the 1st Respondent and that she is entitled to damages. In her submissions, the plaintiff has not quantified what she considers to be adequate compensation. All that she has stated in the penultimate paragraph of her submissions is as follows:

“Your Lordship, I have full confidence in this Honourable Court and trust that your Lordship will find merit in my most humble Petition, restore justice where my fundamental rights were blatantly infringed by the Respondents and order that I be compensated adequately in damages to at least place me back to where I should be economically if it were not for the illegal acts of the Respondents”.

It is of course always the practice that parties quantify what they consider to be adequate compensation. The Petitioner was however acting in person having parted ways with her counsel for reasons that are not clear. Nonetheless, considering the callous manner in which the 1st Respondent’s officers treated the Petitioner who has been un-able to develop her property, the size of the suit plot and also the fact that the Petitioner now has a title to the property, I find that a sum of Kenya Shillings ten million (Ksh. 10,000,000) will be adequate compensation.

Ultimately therefore and having considered all the evidence in this Petition, I make the following orders:

- 1. The claim against the 2nd and 3rd Respondents is dismissed with no order as to costs.***
- 2. The claim against the 1st Respondent is allowed.***
- 3. The Petitioner is awarded the sum of Kenya Shillings ten million (10,000,000) as general damages as against the 1st Respondent for the violation of her Constitutional rights.***
- 4. The Petitioner is also awarded costs and interests payable by the 1st Respondent.***

B.N. OLAO

JUDGE

14TH MARCH, 2018

Judgment dated, delivered and signed in open Court at Kerugoya this 14th day of March 2018

Petitioner present in person

1st Respondent absent

Ms Ndundu for 2nd and 3rd Respondents present

Right of appeal explained.

B.N. OLAO

JUDGE

14TH MARCH, 2018