



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC PET. NO. 5 OF 2015**

**M C S**

***alias B (who brings the petition***

***on her own behalf and her minor children)***

**S Y**

**F P**

**J N**

**M K**

**B C.....PETITIONER**

**VERSUS**

**BENJAMIN KAPTOKOIL LOITONGOR.....1<sup>ST</sup> RESPONDENT**

**SIMION KACHAPIN KITALEI.....2<sup>ND</sup> RESPONDENT**

**WILFRED LONGONYANG.....3<sup>RD</sup> RESPONDENT**

**EQUITY BANK LIMITED.....4<sup>TH</sup> RESPONDENT**

**COUNTY LAND REGISTRAR TRANS-NZOIA.....5<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed this petition on 4/3/2015 seeking the following orders:

(a) A declaration from this Honourable Court that the sale, transfer of *West Pokot/Siyoi [particulars withheld]* and the subsequent demolition of the petitioners' home and eviction were unconstitutional and unlawful *ab initio*.

(b) A declaration from this Honourable Court that the transfer of *West Pokot/Siyoi [particulars withheld]* to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents without the mandatory spousal consent is null and void.

(c) An order of this Honourable Court cancelling the transfer of *West Pokot/Siyoi [particulars withheld]* to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and restoring the property to its original registration and restoring the petitioners to the property.

(d) An order of this Honourable Court discharging the charge by the 4<sup>th</sup> respondent over *West Pokot/Siyoi [particulars*

*withheld*].

**(e) General and exemplary damages for the unlawful demolition, purported eviction and suffering indignity, inconvenience, embarrassment and discrimination.**

**(f) General exemplary damages for the unlawful detention of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners at Kapenguria Police Station cells.**

**(g) That costs of this petition be provided for in favour of the petitioners.**

2. The diversity of the persons who are joined as respondents in this petition is great: The plaintiff's husband, a County Governor, a C.E.C. Member for Agriculture, a Bank, a County Land Registrar and his Senior, the Chief Land Registrar and the Attorney General. They are all parties who according to the petitioner should bear blame for the wrongs that the petitioner outlines in her petition.

3. The origin of the petition lay in the disposal of the parcel of land known as **LR. No. West Pokot/Siyoi [particulars withheld]** measuring **1.6 Ha** situate in West Pokot County by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents allegedly without any spousal consent having been granted by the petitioner who states that she the 1<sup>st</sup> respondent's wife.

4. The petitioners' case is that the land in question was purchased in 1994 through the joint efforts of the petitioner, her relatives. She stated in her supplementary affidavit that her family contributed 3 cows which were sold and the proceeds applied towards the purchase of the property. The petitioner avers that upon hearing rumours of sale of land, she registered a caution over it but she later learned that the same had been removed and the land transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents without her consent. In turn the 2<sup>nd</sup> and 3<sup>rd</sup> respondents charged the land to the 4<sup>th</sup> respondent for Kshs.1,269,000/=.

5. The petitioner alleges that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents "were well aware and ought to have known" that the property was a matrimonial home and that they charged the property to the 4<sup>th</sup> defendant to defeat the property rights of the petitioners to her home. On the 16<sup>th</sup> August, 2014 the 1<sup>st</sup> respondent and 5 other persons attempted to pull down the petitioners' matrimonial home, while removing the family's personal effects and loaded them on a lorry; but upon the petitioner raising alarm, people from her neighbourhood helped her to successfully fend off the invasion.

6. The petitioner further claims that he reported the incident to Kapenguria Police Station and the 1<sup>st</sup> respondent was arrested and subsequently released on the same day. The petitioner states that on 18/8/2014 her son S Y had been arrested for allegedly breaking the windscreen of one of the vehicles used in the abortive invasion of her home, while the petitioner herself was arrested on the same day as she protested against the police station. Both were released the following day. It is this arrest and detention that the petitioner aver flies in the face of Section 8 of the penal code. She alleges that the purpose of the detention was to allow the police to allow the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to complete the destruction of the matrimonial home and physical eviction of the petitioner and her children from that home. The petitioner pleads that that was the state of affairs that she found upon her release: all her 3 houses had been pulled down and all her household goods and iron sheets taken away; her children had been scared and scattered.

7. The petitioner states that by reason of the foregoing, the petitioner and her children have been deprived of their constitutional rights to shelter, their human dignity and their freedom. She also claims that they have been discriminated against by the police on the basis of her gender and economic status. The petitioner claims that since her unlawful eviction, and the destruction of her home, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have used their influence as Governor and Minister respectively in the West Pokot County Government and have stationed Kenya Police Reservists on the disputed property and thus denied the petitioner and her children access thereto, as the two respondents undertake a permanent development on the property. As a consequent, the petitioner has been rendered homeless destitute depending on the goodwill of their neighbours, have been embarrassed and grossly abused and their basic human rights violated by the respondents.

8. She avers that instead of the police acting to protect her on the basis of her complaints regarding the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents they facilitated the violations of the Constitutional rights of the petitioner and her children.

9. The petitioner also accuses the Land Registrar Staff in Trans-Nzoia County of having "endorsed and registered" a transfer of the LR. No. West Pokot/Siyoi [particulars withheld] to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the absence of spousal consent to the transaction, after removing the petitioners' caution "with total impunity".

10. That is the background, as per the petitioner, to the prayers in her petition.

11. The affidavit in support of the petition is headed "verifying affidavit and it is a one page affair, comprising of four paragraphs, just the kind that would be apt in a suit commenced by way of plaint as commanded by the Civil Procedure Rules. That affidavit is remarkable in its paucity of evidence, and it is noteworthy that all the documents filed with it in the same bundle and are not exhibits explained by any statements of fact in the affidavit.

12. The petition is opposed. The 1<sup>st</sup> respondent filed a replying affidavit dated 4/9/2015. The 1<sup>st</sup> defendant terms the petition as incompetent and bad in law as the petitioner has not set out their rights that have been infringed or threatened; in addition, the petitioner has failed to disclose the constitutional provisions violated and the nature of the injury caused or likely to be caused to the petitioner. He avers that by selling of the land the 1<sup>st</sup> respondent has not deprived the petitioner and her children of their rights to shelter and their dignity as he has put up houses for them on an 8 acre piece of land that the 1<sup>st</sup> respondent allocated the petitioner, to wit, LR No. West Pokot/Kishaunet/ [particulars withheld]. He also denies abrogating his parental responsibility over the petitioner's children as he still caters for their maintenance and welfare including school fees.

13. The 1<sup>st</sup> respondent denies that he with the petitioner acquired the land in question and that the petitioner never contributed to its acquisition. As such, the petitioner has no claim to the said land.

14. The 1<sup>st</sup> respondent avers that he pulled down the house on the land to give vacant possession to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents after the petitioner failed to move to the house he had built for her on LR No. West Pokot/Kishaunet/ [particulars withheld] and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had acquired the land in this petition for valuable consideration.

15. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a replying affidavit sworn by the 3<sup>rd</sup> respondent on 4/5/2015. Their defence is that they purchased the land on which the petitioner had been living from the 1<sup>st</sup> respondent pursuant to the latter's request which request was borne out of fear that the chargee, Kenya Industrial Estates, may have auctioned the land for default. They aver that the charge did not indicate that the petitioner was wife to the 1<sup>st</sup> respondent and the petitioners had never objected to the land being charged or auctioned. After purchase, the land was registered in their names. They aver that they have a constitutional right to acquire property and they did not use their position in society to acquire the land. Interestingly enough, part of their defence is that the petitioner has not adduced any evidence to prove that she is wife to the 1<sup>st</sup> respondent or that her children are the 1<sup>st</sup> respondent's!

16. The 4<sup>th</sup> respondent filed a replying affidavit through one Paul Chongo its credit manager. Its defence is that it merely advanced the 2<sup>nd</sup> respondent a loan facility of Kshs.10,010,000/= for purposes of purchasing LR. No. West Pokot/Keringet /[particulars withheld], and the security offered for that loan was the title to LR. No. West Pokot/Siyoi /[particulars withheld]. The 4<sup>th</sup> respondent states that its interest in the suit land is limited to the charge in its favour, and it would be ready and willing to discharge the charge upon being furnished with another security in place of the suit property.

17. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents filed a response to the petition by way of a replying affidavit dated 24/7/2017 sworn by the County Land Registrar one A. Kavehi. He stated that LR. No. West Pokot/Siyoi /[particulars withheld] was first registered in the name of one Julius Njiri Karani before it was transferred to the 1<sup>st</sup> respondent on 26/7/2001. On 20/5/2013, the petitioner lodged a caution against the title. The caution as procedurally removed after a notice of intention to remove it was sent to the last known address in accordance with the Land Registration Act 2012. Consequently, the land was procedurally transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents vide a transfer dated 3/2/2013 which was accompanied by the requisite completion documents including consents and application for consents of Land Board, valuation form, payment receipts, and original title to the land.

18. The entries in the green card were subsequently made in good faith and in honest and genuine belief that all the documents presented for registration were in order and nothing stopped the transaction. The Land Registrar, the deponent states, acted within his constitutional and statutory mandates. However, he adds that there is no constitutional basis disclosed by the petitioner as the matters pleaded in the petition can be disposed of by way of an ordinary suit and that the petition should fail for lack of precision in pleading and for lack of evidence.

19. I have perused the court record and established that all the parties except the 4<sup>th</sup> respondent filed their written submissions in respect of the petition. I have considered those written submissions. Upon an analysis of the record, I find that the issues arising in this petition are as follows:-

**(1) Were any constitutional rights of the petitioner or her children violated?**

**(2) Should be transfer of LR. No. West Pokot/Siyoi /[particulars withheld] to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents be nullified for want of spousal consent and unprocedural removal of caution and should the charge by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in favour of the 4<sup>th</sup> respondent be discharged?**

**(3) What orders should issue?**

**(1) Were any constitutional rights of the petitioner or her children violated?**

20. The proper document in which to plead the particular rights violated in respect of any petitioner is the petition. The evidence of that violation must be presented in the form of an affidavit. The case of **Anarita Karimi Njeru [1979] KLR 154**, and **[1979] KLR 162**, is authority for the proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat. That has obviously not been done in respect of this petition. It is not important to give just some narrative of the happenings. The court must not be left to assume what constitutional violation the petitioner is complaining about or what provisions of the constitution his claim is brought under.

21. Other than citing various Articles of the constitution in the title to the petition, the petitioner has done nothing else in the body and the prayers in the petition to relate these to the complaints that she has against the respondents. She has also not attributed any violation of any particular provisions of the constitution to any respondent.

22. How can the court proceed to find for the petitioner in the face of such a defective document? Where can this court start unless it makes a myriad assumptions of what the petitioner intended to say? I find that the petitioner has not established that any constitutional provisions were violated with regard to her or her children. I find that the petition before me has violated the rule in the **Anarita Karimi case (supra)**.

**(2) Should the transfer of West Pokot/Siyoi '[particulars withheld] to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents be nullified?**

23. According to the plaintiff The grounds upon which the transfer of West Pokot/Siyoi /[particulars withheld] to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should be nullified is that there was no spousal consent, and secondly, the removal of the caution was unprocedural. Concerning the first

issue, that is, of spousal consent, there is no evidence of marriage between the parties. There is a supplementary affidavit of the petitioner in which she buttresses the allegation of being a wife to the 1<sup>st</sup> respondent following the 1<sup>st</sup> respondent's responses on that issue.

24. Constitutional petitions must not be reduced to the level of ordinary litigation whereby even the most mundane of issues are subject to dispute. When a party approaches a court for constitutional remedies, it is on the basis that certain basic facts are not subject to question, they having been already established by way of evidence.

25. What is normally in issue in a petition is whether on the basis of the facts as pleaded, the petitioner's rights have been or are likely to be violated. It would be improper to lower the standards of constitutional proceedings to the level where the court has to deviate from the main issue of violation of rights in order to determine whether parties were married to each other or not before proceeding to rule on whether rights have been violated.

26. In this case, an investigation into the issue of whether the petitioner and the 1<sup>st</sup> respondent were a married couple, much as it is relevant to the declaration as to whether there was spousal consent or not, would necessarily make this court deviate unnecessarily from its core mandate of determining whether the constitutional rights of the petitioner and her children have been violated.

27. Whether the constitutional rights of the petitioner and her children have been violated. That is so because proof of marriage is subject to evidence without which proof this court would be unable to declare that spousal consent was necessary and that lack thereof nullified the transfer. I find that the inclusion of such an issue in the dispute would reduce these proceedings to the level of ordinary litigation, which effect should be avoided as there are procedures laid out under the Civil Procedure Act and other statutes for the institution of proceedings for remedies relating to private rights.

28. To buttress this point I refer to the case of **Fredrick Mworira v District Land Adjudication Officer Tigania West/East & 3 others [2016] eKLR [Meru Petition No. 129 Of 2011]** where the court stated as follows:

**“32. The Constitution is the Umbrella of all Statutory Laws and all subsidiary legislation. I agree with the opinion of the Hon. Justice Muriithi in ABDALLAH MANGI MOHAMED VERSUS LAZARUS & 5 OTHERS [2012] e KLR (op.cit) where he said:-**

**“.....Where there is a dispute as to the applicant's entitlement to property and where there exists a Statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicant's claim to the property rather than clog the Constitutional Court with applications for enforcement that require prior determination. The improper practice of making all private disputes as to ownership of property as applications for enforcement of Constitutional rights to property should be discouraged”.**

**33. I am also in total agreement with the holding of the apposite Court in SPEAKER OF NATIONAL ASSEMBLY VERSUS KARUME [1992] KLR 425 where the Court said “.....where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”. This position was adopted with approval by Hon. Justice. M.J. ANYARA EMUKULE, J, in MOMBASA HIGH COURT PETITION NO. 18 of 2013: ANNE WAMUDA & 3 OTHERS VERSUS KENYA RAILWAYS CORPORATION & ANOTHER [2015] e KLR (op.cit).**

29. On the issue of the removal of caution there is no appropriate response from the petitioner to the County Land Registrar deponement that a proper notice of intention to remove the caution was issued as required by the Land Registration Act.

30. However I must reiterate that these two allegations discussed herein above have not been linked by way of express pleading to violation of any clauses of the constitution and therefore this court cannot determine whether there was any violation of the constitution in connection thereto.

31. Consequently, without any proof of lack of spousal consent and unprocedural removal of a caution, it is not possible for this court to find that the charge in favour of the 4<sup>th</sup> respondent violates any constitutional rights of the petitioner or her children and so the court cannot issue orders that it be discharged. There is no proper basis too for nullifying the transfer in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for the same reason.

**(3) What orders should issue?**

32. The petitioner has failed to prove her allegations in the petition. The petitioner never attained or went beyond the required threshold of filing a proper, well-articulated petition, supported by credible evidence. Consequently I find that the petitioner has not proved any of her allegations in this petition as would be required in this kind of proceedings. I therefore dismiss her petition with costs to the respondents.

Dated, signed and delivered at Kitale on this 8<sup>th</sup> day of **March, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**8/3/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Majanga for 2<sup>nd</sup> and 3<sup>rd</sup> respondent

Mr. Majanga holding brief for Ingosi for 1<sup>st</sup> respondent

Ms. Cheloti holding brief for Samba for petitioner

D.L. Were for 4<sup>th</sup> respondent (absent)

A.G. for 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondent (absent)

**COURT**

Judgment read in open court in the presence of Counsel for the petitioner, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent and in the absence of the 4<sup>th</sup> - 7<sup>th</sup> respondents.

**MWANGI NJOROGE**

**JUDGE**

**8/3/2018**