REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 22 OF 2015

IN THE MATTER OF ARTICLE 21(1), 22(3) c, 23(1 AND 3), 24(1) d, e, 25 (c), 27(1 & 2), 28, 29(a), 39, 40(2) a and b, 47 OF THE CONSTITUTION OF KENYA

BETWEEN

FRANCIS NYAKUNDI OYAGI.....PETITIONER

VERSUS

SAMUEL MOTARI MANG'ARE.....1ST RESPONDENT

THE LAND REGISTRAR KISII COUNTY.....2ND RESPONDENT

THE ATTORNEY GENERAL .....3RD RESPONDENT

J U D G M E N T

1. The petitioner filed the instant petition on 19th June 2015. The petition is supported on the affidavit sworn in support thereof by the petitioner dated 17th June 2015. By the petition, the petitioner alleges his constitutional rights have been breached notably by the 1st respondent who has failed and/or neglected to honour his agreement to transfer land parcel **Central Kitutu/Daraja Mbili/720**. The petitioner avers that the respondents have violated his fundamental rights and cites Articles 21, 22, 23, 24, 25, 27, 28, 29, 39, 40 and 47 of the Constitution as having been breached by the respondents.

2. The petitioner avers that in or about 1977 he agreed with the 1st respondent that he would support the 1st respondent in a By-election in Kitutu East Constituency both financially and politically. The petitioner states that he expended a total of kshs. 900,000/= in this endeavour and the 1st respondent agreed that he would refund this sum to the petitioner but failed to do so. However, in lieu of the refund the 1st respondent agreed that he would transfer land parcel **Central Kitutu/Daraja Mbili/720** upon the petitioner paying to him an additional kshs. 600,000/=. The petitioner avers that even though he paid to the 1st respondent the additional kshs. 600,000/=, the 1st respondent failed and/or refused to effect the transfer to him and instead served him with a notice to vacate the premises by 1st July 2015. That provoked the present petition where the petitioner prays for the following orders:-

> **1. That the honourable court be pleased to grant an order declaring that the petitioner herein is the owner of land parcel number Central Kitutu/Daraja Mbili/720.**
>
> **2. That the honourable court be pleased to grant an order compelling the 2nd respondent herein to effect the transfer of Central Kitutu/Daraja Mbili/720 to the name of the petitioner herein.**
>
> **3. That the honourable court be pleased to grant an order compelling the 1st respondent to have Central Kitutu Daraja Mbili/720 registered in the petitioner's name and in default the deputy registrar of this honourable court be ordered to do so on his behalf.**
>
> **4. That the costs be provided for in favour of the petitioner herein.**

3. The 1st respondent filed a reply to the petition together with a counterclaim on 16th July 2015. The 2nd and 3rd respondents did not appear and did not file any responses. The 1st respondent in his reply denied there was any agreement oral or otherwise that the petitioner would support him in the 1977 by-election. He denied the petitioner spent upto kshs. 900,000/= on his account during the by-election. The 1st respondent averred that the petition is bad in law, misconceived and legally untenable. He averred further that no reasonable cause of action is disclosed and that the action is statute barred by limitation as per the provisions of Sections 4 and 7 of the Limitation of Actions Act, Cap

22 Laws of Kenya. The 1st respondent further averred that the suit amounts to and/or constitutes an abuse of the due process of the court.

4. By way of counterclaim the 1st defendant asserts that the petitioner was his tenant in the suit premises from 1997 at the monthly rent of kshs. 2,000/= and that the petitioner had been paying rent as agreed upto 2014 when he ran into arrears prompting the 1st respondent to seek payment of the arrears and when that failed the 1st respondent served a notice to vacate which triggered these proceedings. The 1st respondent in the counterclaim prays for:-

(a) An order for eviction against the petitioner forthwith to be evicted from land parcel number Central Kitutu/Daraja Mbili/720.

(b) Costs of the cross suit be borne by the petitioner.

(c) Such further and/or other relief as the court may deem fit to grant.

5. The court on 16th March 2016 gave directions that the petition be heard viva voce. The petition was basically converted to a plaint and the reply and counter claim to a defence and counter claim necessitating the parties to adduce oral evidence in support of their respective claims. The petition was heard on 9th October 2017. The petitioner was the sole witness who testified in support of the petition and the 1st respondent called one witness in support of the defence.

6. The petitioner testified that in the year 1976 he had been engaged by the 1st respondent's brother to construct a house for him and that when in 1977 the parliamentary seat for East Kitutu Constituency fell vacant following the arrest and incarceration of the late George Anyona who was the area Member of Parliament the 1st respondent's brother and the 1st respondent requested the petitioner to support the 1st respondent in the campaign as he was running in the resultant by-election. The petitioner stated that he agreed to support the 1st respondent and stated he expended a total sum of kshs. 900,000/= in the campaigns which the 1st respondent agreed to refund after he had won the seat. He stated the 1st respondent did not however honour the promise. In 1997 the petitioner testified that the 1st respondent rented him the suit premises at a monthly rent of kshs. 2,000/=. He further stated that he resided in the house as a tenant up to April 2000 when he claimed the 1st respondent approached him to buy the house to enable him (the 1st respondent) meet his then financial obligations following retirement. The petitioner stated that the 1st respondent indicated he was ready to sell the house to the petitioner for kshs. 1,500,000/=. The petitioner stated he at the time reminded the 1st respondent of the sum of kshs. 900,000/= which he expended while campaigning for the 1st respondent and according to the petitioner, the 1st respondent agreed that the said amount could be taken as part of the purchase price so that the petitioner only pays an additional kshs. 600,000/= towards the purchase price.

7. The petitioner stated further that after he agreed to purchase property they entered into an agreement on 5th June 2000 as per document 7A in the petitioner's bundle of documents. The petitioner stated that after entering into the purchase agreement, he ceased to be a tenant and he stopped paying rent to the 1st respondent. It was his further evidence that even when he was a tenant the 1st respondent was not issuing him with receipts for rent payments. The petitioner testified that out of the balance of kshs. 600,000/= he paid an initial deposit of kshs. 380,000/= and that on 7th April 2010 he paid a further kshs. 31,000/= and later on 27th march 2015 he paid to the 1st respondent kshs. 100,000/=. The petitioner stated that the agreement he entered into with the 1st respondent had no time limit and that he was paying the 1st respondent whenever he was in need of money.

8. The petitioner further stated that in addition to paying the 1st respondent the full purchase price he had expended a sum in excess of kshs. 800,000/= in carrying out repairs and/or renovations to the suit property. It was his testimony that he had effected extensive developments to the suit property since he ceased to be a tenant. It was the petitioner's prayer that the 1st respondent be ordered to transfer the suit property to him and he be awarded the costs of the suit.

9. The 1st defendant in his evidence stated that the petitioner was introduced to him in 1997 by one Julius Momanyi. Later in the same year he stated that, a relative of his, one Alfred Mayeka informed him that the petitioner was interested in renting his house on **LR No. Central Kitutu/Daraja Mbili/720**. The 1st respondent testified that he agreed to rent his house to the petitioner as per the tenancy agreement dated 27th July 1997 exhibited as Doc 2 on the 1st respondent's bundle of documents. The monthly rent was kshs. 2,000/= and it was the 1st respondent's evidence that the petitioner was dutifully paying the rent and he was issuing receipts to him.

10. The 1st respondent affirmed that he participated in a by-election in 1977 which he won and it was his evidence that in the entire campaign he did not spend more than kshs. 45,000/=. He said he was campaigning on foot and said that at the time an MP's salary was only kshs. 3,000/= and therefore it would have been impossible and/or ridiculous for one to expend kshs. 900,000/= as claimed by the petitioner in campaigns. He denied that he knew the petitioner in 1977 or that the petitioner participated in his campaign. The 1st respondent testified further that he began construction of the house at Daraja Mbili in 1975 and that he was residing in the house before he moved to his farm in Kitale. He stated that he gave the petitioner notice to vacate his house in December 2014 and that the notice was to expire on 31st March 2015. He further stated that the petitioner instituted this suit after he gave him the notice to vacate.

11. The 1st respondent denied ever signing the agreement dated 6th May 2000 tendered by the petitioner in evidence stating that he saw it for the first time here in court. He denied ever having been paid or receiving the sum of kshs. 380,000/= as alleged by the petitioner. The 1st respondent stated all the payments he received from the petitioner were on account of rent and not purchase of the house as alleged by the petitioner. The 1st respondent was emphatic that the sum of kshs. 100,000/= paid to him by the petitioner was on account of rent arrears. The 1st respondent denied that the petitioner had carried out any developments on the property and stated that the petitioner at any rate did not have any authority to carry out any developments. He prayed for the dismissal of the petition and for the petitioner to be ordered to vacate the suit premises.

12. Under cross examination by Mr. Okenye advocate for the petitioner the 1st respondent stated that his rent had been paid up to 30th June 2015. He reiterated that he had not known the petitioner before he was introduced to him in 1997. He maintained he never sold his house to the petitioner but had only rented it to him. He denied signing the agreement made on 5th June 2000 stating that the signature appearing against his name was not his and that the same was a forgery.

13. DW2 Alfred Ogero Mayieka in his testimony started that he knew the petitioner and the 1st respondent. He affirmed he is the one who introduced the petitioner to the 1st respondent in 1997 for purposes of the petitioner renting the 1st respondent's house in Kisii. DW2 stated in his evidence that the 1st respondent did not at any time inform him he was selling his house to the petitioner.

14. Following the close of the trial the parties filed their final submissions. I have reviewed the pleadings and the evidence and the submissions by the parties and the issues that stand out for determination are as follows:-

(i) Whether there has been a violation and/or any threatened violation of the petitioner's constitutional rights as alleged?

(ii) Whether there was any enforceable contractual agreement between the petitioner and the 1st respondent for the sale and transfer of LR No. central Kitutu/Daraja Mbili/720?

(iii) What orders and/or reliefs should the court give?

(iv) What orders should the court give as relates to the costs of the suit?

15. The genesis of this suit is primed to be some time in 1977 when a by-election was occasioned in Kitutu East Constituency following the arrest and detention of the then area MP, George Anyona. The 1st respondent ran in the by election and won the seat. The petitioner says he supported and campaigned for the 1st respondent and in the process expended a tidy sum of kshs. 900,000/= which he says the 1st respondent agreed to refund to him. That definitely was a colossal sum of money in 1977. The petitioner has not demonstrated how it was made up and neither has it been shown the 1st respondent acknowledged the amount in 1977. It is intriguing why the petitioner did not bring up the issue of the outstanding amount in July 1997 when he agreed to rent the 1st respondent's house and commenced paying rent to the 1st respondent. The issue of kshs. 900,000/= allegedly expended by the petitioner in 1977 on account of the 1st respondent during the latter's campaign for the Kitutu East Constituency seat in a by election only came up in April/May 2000 when the petitioner alleges the 1st respondent agreed to sell his house which he (the petitioner) was renting from him.

16. The 1st respondent has denied knowing the petitioner in 1977 and/or enlisting the petitioner as a campaigner during his campaign in the by election. The 1st respondent has also denied he entered into any agreement to sell his house to the petitioner insisting the petitioner was only a tenant in the suit premises. The 1st respondent denied the sale agreement dated 5th April 2000 (Doc. 7A in the petitioner's bundle) and/or that he received the sum of kshs. 380,000/= as alleged. He denied the signature on the document attributed to him was his signature saying it was a forgery. There was no witness to the alleged agreement and hence it was the petitioner's word against the 1st respondent's word. The burden to prove the existence of the agreement rested with the petitioner in accordance with Section 107, 108 and 109 of the Evidence Act, Cap 80 of the Laws of Kenya.

Section 107 provides:-

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person.

Section 108 provides;

108. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

Section 109 provides:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

17. The parties testified before me and the petitioner in particular did not strike me as being candid and honest. For instance there was no explanation from him as to why it took him over 20 years to seek a refund of the alleged kshs. 900,000/= he said he expended on account of the 1st respondent. while he admitted he rented out the house of the 1st respondent in July 1997, there was no mention then of the alleged liability of kshs. 900,000/= he said the 1st respondent owed him. Equally the alleged sale agreement of 5th Jun 2000 raises doubts as to its existence. Firstly, there was no witness to the same and secondly, it had no conditions or time frame save there was provision that the balance of the purchase price of kshs. 220,000/= would be paid gradually when formalizing the agreement. Although, the petitioner claimed to have expended large sums of money in effecting renovations or improvements on the property, the evidence showed that he paid part of what he claims was purchase price in 2010 and 2015. This leaves one to wonder how an agreement entered into in the year 2000 for the purchase of a property could be completed in 2015. I am inclined to believe the 1st respondent that the alleged agreement dated 5th June 2000 is a creation of the petitioner calculated to wrestle the suit property from him by use of devious means. It is my holding and finding therefore

that the petitioner has not proved there was an agreement whereby the 1st respondent agreed to sell the suit property to him.

18. I have considered at some considerable length whether or not there was a contract of sale between the petitioner and the 1st respondent of the suit property as the existence of the sale agreement or otherwise is the substratum of this suit. The suit in my view is founded on the alleged contract of sale though it is couched as a constitutional petition. The foundation of the petition as I have understood it, is that the petitioner claims to have purchased the property from the 1st respondent, has occupied the property as his own and has effected developments thereon and hence for the 1st respondent to seek to evict him would be a violation of rights to property. The petitioner asserts that his rights under Article 40 of the Constitution relating to protection of property would be violated. I have found and held that the petitioner has not proved he acquired the property through purchase. Indeed the evidence that is not in dispute is that the petitioner was rented the suit property by the 1st respondent. There is evidence that he was paying rent and was being issued with payment receipts by the 1st respondent. I accept the 1st respondent's evidence that the intermittent payments made by the petitioner to him was on account of rent and/or rent arrears. It would be ridiculous for the 1st respondent to have entered into a sale agreement in 2000 and as such purchaser to be effecting payment on account of the purchase in 2015. I am not satisfied there was such an agreement.

19. The petitioner on the other hand has merely generally asserted that his constitutional rights have been violated and/or infringed without any specificity. What comes out from the evidence is that the petitioner is relying on what is alleged to have been a commercial transaction but which he failed to perform. I do not think he can take refuge under the constitution to claim a right that had not crystallized. My view is that the petitioner has failed to demonstrate how his rights under the various constitutional provisions he has cited as the basis of the petition have been violated. In the cases of **Anarita Karimi Njeru -vs- Attorney General [1979] KLR 54, Meme -vs- Republic [2004] 1 E.A 124** and **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & Others [2013] eKLR** the courts have stated the test as to what qualifies as a constitutional reference.

20. In the case of **Meme -vs- Republic** [supra] the court stated thus:-

> **"Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants."**

21. In the present matter the petitioner wants to convert what was purely a private commercial civil matter to a constitutional reference. I see nothing that is constitutional on the claims leveled by the petitioner against the 1st respondent. The petitioner perhaps wanted to walk away from the strictures of procedure and evidence by invoking the Constitution. The court based on the pleadings directed that the matter proceed as a normal civil suit and without doubt the petitioner fell far short of proving his claim against the 1st respondent.

22. What I have discussed and analyzed above disposes of issues (i) and (ii) and in regard to the first issue I hold and find that there has been no constitutional violation of the petitioner's rights as alleged. In regard to the second issue, I have already held that the alleged sale agreement between the petitioner and the 1st respondent was not proved and therefore there was no enforceable contract for the sale and transfer of land parcel **Central Kitutu/Daraja Mbili/720**.

23. It is my further finding that the petitioner occupied and continues to occupy land parcel **Central Kitutu/Daraja Mbili/720** as tenant of the 1st respondent. The instant petition was precipitated by the Notice served on the petitioner by the 1st respondent to vacate the suit premises. The petitioner has claimed that he effected developments in the suit premises but the 1st respondent claimed he never sought his authority to effect any developments. As a tenant the petitioner only had authority to undertake repairs that relate to normal wear and tear and incase of any capital developments he was required to seek and obtain the landlord's authority and/or consent. If the petitioner carried out any such developments he did so at his own risk. He could not claim he was effecting them because the property was his. He was fully aware that the property was owned and was registered in the name of the 1st respondent. One may even be tempted to query how the petitioner could effect the developments yet he was aware he had not fully paid for the property? As per his evidence he paid the balance of the purchase price in 2010 and 2015.

24. The net result is that I find no merit in the petition and the same is ordered dismissed with costs to the 1st respondent. I find the 1st respondent's counterclaim meritorious and proven on a balance of probabilities. I enter judgment in favour of the 1st respondent on the counterclaim on the following terms:-

> **(1) The petitioner to vacate and deliver vacant possession of land parcel Cetnral Kitutu/Daraja Mbili/720 within 60 days from the date of this judgment.**
>
> **(2) In default of compliance with (1) above an eviction order for the forcible removal of the petitioner to issue on application by the 1st respondent.**
>
> **(3) The costs of the counterclaim are awarded to the 1st respondent.**

JUDGMENT DATED, SIGNED and **DELIVERED** at **KISII** this **13TH DAY** of **APRIL, 2018**.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Okenye for Mokua for the petitioner

Ms. Momanyi for Ombati for the 1st respondent

N/A for the 2nd, 3rd and 4th respondents

Ruth court assistant

J. M. MUTUNGI

JUDGE