



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

PETITION NO 4 OF 2017

**IN THE MATTER OF : ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES
2,10,19,20,21,22,23,27,35,40(1), 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA.**

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 67

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF: MATHENGETA FARMERS COMPANY LIMITED

AND

IN THE MATTER OF: THE PETITION OF DISHON MUTHAMA NZINA & 26 OTHERS

BETWEEN

DISHON MUTHAMA NZINA.....1ST PETITIONER

JOSEPH NJOROGE WAWERU.....2ND PETITIONER

SAMUEL M. MUNGUTI.....3RD PETITIONER

VERONICAH WANGARI KARANJA.....4TH PETITIONER

PHILIP MAKAU MULWA.....5TH PETITIONER

SAMUEL KIMANI NDUBU.....6TH PETITIONER

PHELIS NDUNGE KITUUNGO.....7TH PETITIONER

MBATHA MUEMA.....8TH PETITIONER

LUCY WAITHERA KINYENI..... 9TH PETITIONER

MUTUKU KIKONDE..... 10TH PETITIONER

GRACE MBOKA.....11TH PETITIONER

NG'ANG'A MUTAHL..... 12TH PETITIONER

JOHN MUCHINA NGUGI.....13TH PETITIONER

MARY WANJIRU WAKABA.....14TH PETITIONER
BETH WANJIKU WAKABA.....15TH PETITIONER
SAMUEL KAMAU CHOMBA.....16TH PETITIONER
MARY NDUNGE.....17TH PETITIONER
LITHA MWELU KAHILIRO.....18TH PETITIONER
MUKII MUTUKU.....19TH PETITIONER
HANNAH WAITHERA..... 20TH PETITIONER
SIMON MWANGI GATERE..... 21ST PETITIONER
JOSEPH MUSKA MATHA.....22ND PETITIONER
SIMON NDUNGU.....23RD PETITIONER
WILSON KATHINI KABUTI.....24TH PETITIONER
TERESIA NJERI NDUNG’U..... 25TH PETITIONER
MILICAH MUTHONI NDUNG’U..... 26TH PETITIONER
JOSEPH NJUGUNA.....27TH PETITIONER

VS

THE HONOURABLE ATTORNEY GENERAL..... 1ST RESPONDENT
REGISTRAR OF TITLES.....2ND RESPONDENT
THE CHIEF LAND REGISTRAR.....3RD RESPONDENT
NATIONAL LAND COMMISSION.....4TH RESPONDENT
THE CHIEF REGISTRAR OF COMPANIES.....5TH RESPONDENT

AND

FRANCIS NGIGI..... 1ST INTERESTED PARTY
DANIEL MWAURA.....2ND INTERESTED PARTY
JACOB MUTUA.....3RD INTERESTED PARTY

RULING

1. On the 23/10/17 the Petitioners filed a petition against the named Respondents and interested parties alleging contravention of rights and fundamental freedoms in Articles 2,10,19,20,21,22,23,27,35,40(1),47 of the Constitution .

2. The facts relied on are briefly stated that: the Petitioners are former members of the now defunct Mathengeta Farmers Limited, a Company initially with 420 members [hereinafter called the Company]. That the Company was duly dissolved without their consent or authority; that the Company purchased land from one white settler by the name Bernard Harley Land Ref. No. 534 measuring 1,761.97 acres at the then price of Kshs. 280,000/=; that the parcel was subdivided into 432 plots and each member was allocated 3.0 acres out of which 0.1 of an acre was designated for residential plots. That at the time of dissolution, the Company owned Block No. 2 (LR No. 5995/1) measuring 160 acres (called the unallocated land).

3. That the Company’s properties comprising the unallocated land ended up in the hands of unauthorized third parties in contravention of the rights of the petitioners. That the said contraventions have continued unabated at the instigation of the interested parties and under the watch

of the Respondents.

4. Simultaneously the Petitioners filed a Notice of Motion of even date seeking the following orders;

- a) That this matter be certified as urgent and that service in the first instance be dispensed with.
- b) That the Petitioner /Applicant be allowed to serve the interested parties being Francis Ngigi, Daniel Mwaura and Jacob Mutua through any local daily of wide circulation in the likely event that personal service proves to be challenging.
- c) That pending the hearing and determination of this application a conservatory order be granted restricting the transfer, subdivision, charging, leasing, constructing or any other activity capable of violating the proprietary rights of the petitioners with regard to all those properties known as Makuyu/Kambiti/Block II/417, Makuyu/Kambiti/Block II/63, Makuyu/Kambiti/Block II/857, Makuyu/Kambiti II/481, Makuyu/Kambiti II 401, Makuyu/Kambiti II/258, Makuyu/Kambiti II/384, Makuyu/Kambiti II/67, Makuyu/Kambiti II /266, Makuyu/Kambiti II/246, Makuyu/Kambiti II/168, Makuyu/Kambiti II /82, Makuyu/Kambiti II /113, Makuyu/Kambiti II /88, Makuyu/Kambiti II/414, Makuyu/Kambiti II /253, Makuyu/Kambiti II/252 as owned by the petitioners.
- d) That pending the hearing and determination of this petition the Registrar of Companies be compelled to provide all relevant information to the petitioners through this Honourable Court held by them with regard to the formation and eventual dissolution of the Company known as Mathengeta Farmers Company Limited.
- e) That pending the hearing and determination of this petition the offices of the Registrar of Titles and the Chief Land Registrar be compelled to present to the Petitioner through this Honourable Court the history and documentation touching on the transfer of the Parcel of Land known as 55591/1 which consists of one hundred and Sixty (160) Acres as at the time of dissolving Mathengeta Farmers Company Limited.
- f) That pending the hearing and determination of this application a conservatory order be granted restricting the transfer, subdivision, charging, leasing, constructing or any other activity capable of violating the proprietary rights of the petitioners with regard to all those properties known as Makuyu/Kambiti/Block II/417, Makuyu/Kambiti/Block II/63, Makuyu/Kambiti/Block II/857, Makuyu/Kambiti II/481, Makuyu/Kambiti II 401, Makuyu/Kambiti II/258, Makuyu/Kambiti II/384, Makuyu/Kambiti II/67, Makuyu/Kambiti II /266, Makuyu/Kambiti II/246, Makuyu/Kambiti II/168, Makuyu/Kambiti II /82, Makuyu/Kambiti II /113, Makuyu/Kambiti II /88, Makuyu/Kambiti II/414, Makuyu/Kambiti II /253, Makuyu/Kambiti II/252 as owned by the petitioners.
- g) That costs for this application be provided for.

5. The application is grounded on the following grounds;

- a) That the rights of the Petitioners herein continue to be infringed under the watch of the Respondents herein and it is important for the information sought be provided and the conservatory orders be granted.
- b) That the 1st Petitioner herein, being one of the former shareholders of the Company has been forced to flee his home after his life is threatened on different occasions a fact that is attributed to the objects of the petition herein.
- c) That some of the shareholders herein are of old age and other members of the Company are deceased and they would wish for the matter to be put to rest and the violation of their rights be redressed.
- d) That the Petitioners deserve to be heard and at the very least be given reason why the Respondents did not protect their rights and as a matter of fact set the ball rolling for the violations they have suffered so far.
- e) That it is in the interest of justice that this application be heard for the expedient determination of the petition here in.
- f) That the Petitioner's rights continue to be violated and only this Honourable Court can avert the violations and the historical injustices meted out on the petitioners herein.

6. The petition has been supported by the Affidavits sworn by 1st, 3rd, 16th Petitioners, Simon Kimani Ndabu and Veronica Wangari Karanja on their own behalf and as representative of the rest of the Petitioners.

7. The 1st Petitioner gave the history of the land in issue as follows; That in 1975 the Company bought 1,761.97 acres from a white settler called Bernard Harley. The Company comprised of 420 members. The land was subdivided into 420 pieces consisting of 2.9 acres. Out of the 3-acre entitlement 0.1 acres each was set aside for members residential plots. This was agreed in a members meeting in 1981. They commissioned a land surveyor one, Geoffrey Kanyi Gichu to survey the land and each member paid the surveying fees set @900/= a share. That the surveyor produced the 1st survey map on which the land members were allocated 11 shares each and issued with share certificates on 6/3/83. That in 1988 some members were issued with title deeds.

8. That it would appear that the surveyor left a huge chunk of land undivided to the members. That later other maps alleged to be fraudulent emerged. That members had not agreed how to deal with the undivided portion of the land.

9. That they learnt on 19/10/91 that their Company had been dissolved by the directors without following the legal procedure like obtaining the approval of shareholders in a general meeting. That they also got information at the same time that some portions of their land was

allocated to non-members and further that the Directors gave themselves extra land without the authority of the members.

10. That they approached the Registrar of Companies who reinstated the Company only for it to be deregistered again on 11/2/94. That they were intimidated and threatened with arrest by the administration and the interested parties. He gave an account of his personal experience when he was accosted and injured by unknown persons who were claiming his land LR Makuyu /Kambiti/Block 11/63. That he later learnt that his said plot had been fraudulently sold to 3rd parties using a fraudulent survey map created by the interested parties. Further subdivisions were carried out bringing the number of plots to 481 from the original 420 plots approved by the members in 1981.

11. He cites a suit Joseph **Mungai Karanja vs Dishon Muthama Civil case No. 116 of 2012** where he lost the case to the Plaintiff and yet he never sold his land to the said Karanja.

12. That his right to quiet enjoyment of his property and that of the Petitioners has been infringed by the interested parties. That the Respondents have not addressed the matter with conclusion despite seeking help from their offices severally. He has annexed correspondences to various Government agencies, National Land Commission, office of the President, County land secretary, Office of the Director of Public Prosecution inter alia. He reported threats by interested parties as he sought justice for his land.

13. Veronica Wangari Karanja deponed that she is the widow of Joseph Karanja Kinuthia the then registered owner of LR Makuyu/Kambiti Block II/417. That she is unable to obtain title or even an official search of the said land from the Lands Registry. That the land was subdivided into 2 portions without her consent and the land forcefully taken away from her. She depones that she has not sold her land. She associated herself with the affidavit of the 1st Petitioner.

14. Veronica Wangari Karanja too whilst associating herself with the contents of the affidavit of the 1st Petitioner, added that she is the widow of Joseph Karanja Kinuthia, deceased, a former member of the Company and registered owner of LR Makuyu/Kambiti Block II/417/Block 11/417. She too recounted similar experience on how she lost her family land.

15. The 3rd Petitioner herein stated that he is one of the shareholders of the Company and associated himself with the affidavit of the 1st Petitioner. He stated that he bought land LR No. Makuyu/Kambiti Block II/857 in 1993 at 10,000/= but was issued with a title backdated to 1988 (when titles were initially issued) instead of the year of purchase 1993. He urged the Court to cancel the titles.

16. Samuel Kamau Chomba and Simon Kimani Ndabu reiterated the contents of the earlier Petitioners.

17. In opposing the Notice of Motion the interested parties filed grounds of opposition as follows;

- a) The Petition is incompetent and an abuse of the Court process as some of the Applicants are widows of some shareholders who are deceased and the widows have not been appointed by Court as the legal representatives of their estates.
- b) The Applicants are shareholders of a dissolved Mathengeta Farmers Company Limited and in law can only sue the Company and not shareholders.
- c) Francis Ngige, Daniel Mwaura and Jacob Mutua have no interest in the property indicated in the Notice of Motion and their names should be expunged from the record.
- d) If there is no application by the three to be joined as interested parties in this petition the Applicants cannot in law appoint them. They can only join them as Respondents.

18. Francis Ngige, deponed on his behalf and that of the 2 interested parties and stated that the application is incompetent, an abuse of the process of the Court as the 3rd, 7th, 8th, 9th, 11th, 14th & 17th Petitioners lack letters of administration for the estates of the deceased spouses.

19. Further that the suit should have been filed by the Company as the shareholders and directors cannot be sued for omission and commission of the Company. That the Interested Parties have no interest in the suit properties mentioned in the Notice of Motion. That the Petitioners have not established any cause of action against them.

20. The 1st, 2nd, 3rd and 5th Respondents raised grounds of opposition in which they stated that the Petitioners lack merit as they are members and shareholders of a non-existent Company. That the Petition is Resjudicata and the Petitioners have failed to show how the Articles of the Constitution relied on have been infringed by the 1st, 2nd, 3rd and 5th Respondents. That the petition is frivolous vexatious and misconceived and should be dismissed with costs.

21. It is to be noted that the National Land Commission did not file any response to the petition.

22. The application was canvassed by way of written submissions which I will highlight them hereunder;

The Petitioner Submissions.

23. The Petitioners have submitted on the issues set forth below:-

Whether the grounds of opposition are competent.

24. Citing the celebrated case of **Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors Limited (1969) EA 696**, the Petitioners argued that the interested parties and Respondents should raise points of law in their Preliminary Objection and not issues of fact that would require the Court to call for facts. That the points of facts raised by the parties are issues that are for trial and not in a Preliminary objection. They argued that the question of whether or not the Petitioners rights have been infringed is an issue of trial as evidence would have to be adduced for the Court to reach a determination on the question.

25. They further submitted that the issue of whether this application is frivolous vexatious abuse of the process of Court can only be determined on trial by the Court.

26. They argued that no suit should be dismissed summarily unless it appears hopeless that it discloses no reasonable cause of action. That so long as it shows a mere semblance of a cause of action it should be allowed to proceed to trial. See the case of **D T Dobie Company Limited vs. Joseph Mbaria & Anor (1980) eKLR**.

Whether the Petition is Resjudicata.

27. They cited section 7 of the Civil Procedure Act which lays down the principle of Resjudicata.

That the issue of violation of Constitutional rights of the Petitioners has not been litigated before. They cited the case of **Kenya National Union of Teachers (Nakuru Branch) vs John Mawiga Kirika & 2 Others Nakuru HCC No. 83 of 2003 and Yat Tung Investment Company Limited vs Dao Heng Bank Ltd (1975) Ac 581** to support their position. On that score they argued that the cases heard at the Magistrates Court were unrelated to infringement of Constitutional rights.

Whether the Respondents have proved infringements of their rights by the Respondents.

28. Quoting Rule 4(1) of the Constitution (Protection of Rights and fundamental freedoms) practice and procedure Rules 2013 the Petitioners have argued that their rights have been violated as stated in the case of **Rose Wangui Mambo vs. Limuru Country club and 19 Others Nairobi HCCC No. 160 of 2013** that stated that a person who alleges (not proves) that his fundamental rights have been contravened has a Constitutional right to seek redress in the High Court. In the same vein the Petitioners contend that it would be a travesty of justice if their case is dismissed at the preliminary stage.

Whether there was a misjoinder of parties on the part of the Defendants?

29. Reacting to the Interested Parties contention that they have been wrongly joined in the suit, the Petitioners have argued that to the contrary the reliefs sought are against the Government of Kenya agencies and the interested parties have been enjoined to afford them the opportunity to respond to the allegations as facilitators of the violations. They clarified that they are not seeking enforcement of rights of the Petitioners against interested parties as they are not part of the remedy they sought from the Court. They argued that even if there was misjoinder, Rule 5 (b) of the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules 2013 states that a petition shall not be defeated by reason of the misjoinder or non joinder of parties. That in any event the Court has powers under Rule 5 (d) (i) to order that the name of any party improperly joined be struck out. That Rule 18 allows for amendments.

Whether some of the Petitioners lack locus standi to bring forth this petition.

30. The Petitioners submitted that though the widows have filed the petition without letters of representation, they are bringing the suit on their individual capacities and as part of the group and that they are entitled to so file this petition under Rule 4(2) (i) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure Rules, 2013 which states that a person acting as a member of or in the interest of a group or class of persons may institute a suit. That the Petitioners have sought orders on behalf of the original shareholders of the Company at the time of dissolution. They reiterated that should there be misjoinder, the same is not fatal to their petition as the same can be cured by amendment. That the orders sought are for the benefit of the shareholders inclusive of the families of those that are deceased.

Whether the Petitioners are sued in their correct juristic person.

31. The Petitioners admit that the Company is nonexistent and the shareholders have sued in their own names. That any orders obtained by a Company that has been dissolved such as theirs could be void. See **Kanyi Naran Partel vs Olkalou Saw Mill Limited Nairobi HCCC NO 1521 of 1971**. That the issue whether or not the shareholders are well suited in the petition is an issue of fact best canvassed in the trial.

1st, 2nd, 3rd & 5th Respondents submissions.

32. The 1st, 2nd, 3rd & 5th Respondents have raised 5 issues.

Whether the Petitioner has legal standi?

33. The Respondents have submitted that some of the Petitioners are widows and have not proved any evidence of letters of administration so as to clothe them with legal capacity to sue on behalf of the estates of former members. They referred to Veronica Wangari Karanja (4th Petitioner, widow of Joseph Karanja Kinuthia who was a member of the Company and Lucy Waithera Kiyeni. Others like Samuel Kamau Chomba stated that he was not a member of the Company but bought land from a member. The Respondents have argued that those Petitioners lack the requisite locus standi to seek relief from the Court without obtaining letters of administration.

Whether the Registrar of Companies should be compelled to provide information with regards to the formation and dissolution of the Company.

34. The Respondents have argued that the petition is untenable by reason that it has been filed 20 years after the dissolution of the Company. Citing section 339 (6) and 340 of the Companies Act (repealed) and the decision in the case of **John Blasious Ogati Matundura of Gusii Mwalimu Investment vs – AG (2016)** the Respondents submitted that the order sought to compel the Registrar of Companies to provide information regarding the Company that was dissolved more than 20 years is an abuse of the Court Process.

Whether the Registrar of titles and the Chief Land Registrar should be compelled to present to the Petitioner the history and documentation touching on the transfer of the suit land?

35. The Petitioners submit that there is no evidence that the Petitioners have requested for the information on the transfer of the parcel known as LR No. 5995/1-) from the Chief Land Registrar and the said Chief Land Registrar has failed to so provide. That the Respondents have not demonstrated any compelling basis to support their contention for them to be provided with information through compulsion of their said officers and through the Court.

Whether the conservatory orders should be issued restricting any transfer, subdivision, charging, leasing, constructing or any activity with regards to the said parcels of land.

36. The Respondents have argued that though the Petitioners have sought conservatory orders to restrain dealings in property which allegedly is in the hands of third parties, those third parties have not been made parties to the suit. They are then strangers. The Respondents have argued that no order can be given to affect third parties without being accorded the opportunity to be heard. Further that the Petitioners have not demonstrated that the Registrar of title and the Chief Land Registrar have acted in contravention of the law.

Interested Parties Submissions

37. The parties have argued that the application as drawn is an abuse of the process of the Court on account that the Company does not exist to avail all documents sought by the applicant. That some of the petitioners have no capacity to sue and that finally the interested parties have no interest with all the dealings with the dissolved Company and that the enjoinder was done without their consent.

Analysis and determination

38. After considering all the arguments made by the parties, the Pleadings, the law and the relevant authorities the following issues are for determination;

- a) Whether the petition is resjudicata?
- b) Whether the Petitioners have locus standi?
- c) Whether there was misjoinder of parties on the part of the interested parties.
- d) Whether the Registrar of companies should be compelled to provide information with regards to the formation and dissolution of the Company.
- e) Whether the Registrar of Titles/ Chief Land Registrar should be compelled to present to the Petitioner the documents touching on the transfer of the suit land?
- f) Whether the Respondents have proved infringement of their rights.
- g) Whether conservatory orders should be granted.
- h) Have the petitioners demonstrated how the Respondents have violated their rights?
- i) Whether the Company should be reinstated?

Is the Petition Resjudicata?

39. The Respondents stated that the Petition is Resjudicata in their grounds of opposition. However they did not address the Court on the same in their submissions. It is on record that the 1st Petitioner disclosed the existence of a case **Joseph Mungai Karanja vs. Dishon Muthama Civil Suit No. 116 of 2012**. This suit is stated to have been in respect to the title to LR No. Makuyu/Makuyu Block 11/63 between the parties stated thereon. There is no evidence that the Petitioners did file any other case with regards to violation of rights.

40. Section 7 of Civil Procedure Act provides as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been

heard and finally decided by such Court”.

For resjudicata to be invoked the following must be present;

- a) A matter directly and substantially in issue in the subsequent suit was directly and substantially in issue in a former suit;
- b) The former suit must have been between the same parties or parties claiming under them or having a common interest in the subject matter of the suit;
- c) The parties must have litigated under the same title in the former suit;
- d) The Court which decided the former suit must have been competent to try the suit;
- e) The matter in issue must have been heard and finally decided in the former suit

The doctrine of resjudicata is two fold; to protect an individual from being subjected to litigation twice on the same cause of action and it is in the public interest that there should be an end to litigation.

41. In the instant matter, there is no evidence that the matter in dispute and in the disclosed suit stated above is similar to the instant petition. The parties are not the same neither are the parties under whom they or any of them claim nor litigating under the same title. The parties in this petition are seeking intervention of the Court in remedying alleged violation of rights by the Respondents and by extension the interested parties. No disclosures were made on a case in Thika CMCC Court (reference not given) and HCCA No 807/2001 as to the parties and the nature of the claims/cause of action. The Respondents too have not adverted evidence on how it is an issue. It is therefore not supported and consequently, I hold and find that the petition is not Resjudicata.

Locus Standi

42. According to Black’s Law Dictionary, 9th Edition (page 1026) Locus standi is defined as “the right to bring an action or to be heard in a given forum”. According to the 1st, 2nd, 3rd & 5th Respondents, Veronica Wangari Karanja (widow) (4th Petitioner), Lucy Waithera Kinyeni (widow) (9th Petitioner) and Samuel Kamau Chomba (non member) (16th Petitioner) have no locus to file suit. That the widows do not have the locus to the reliefs in the case and that the non-member should seek relief from the vendor who sold him the land. The interested parties have argued that the suit is incompetent because 7th, 8th 9th, 11th, 14th & 17th Petitioners have no capacity to sue without letters of administration for the estate of the deceased former shareholders.

43. Section 4 of the Constitution al (Protection of rights and fundamental freedoms) Practice and Procedure Rules 2013) provides that where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

- (2) In addition to a person acting in their own interest, Court proceedings under sub rule (1) may be instituted by—
- (i) a person acting on behalf of another person who cannot act in their own name;
 - (ii) a person acting as a member of, or in the interest of, a group or class of persons;
 - (iii) a person acting in the public interest; or
 - (iv) an association acting in the interest of one or more of its members.

44. Article 22 of the Constitution provides:

“(1) Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

“(2) In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;*
- (b) a person acting as a member of, or in the interest of, a group or class of persons;*
- (c) a person acting in the public interest; or*
- (d) an association acting in the interest of one or more of its members”*

45. Equally Article 258 provides:

“(1) Every person has the right to institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

“(2) In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members”

46. The learned Counsel for the Petitioners has urged the Court that the Petitioners are suing in their individual capacity and as part of the group. That under Rule (b) of the Constitutional (Protection of rights and fundamental freedoms) Practice and Procedure Rules 2013 a Petition shall not be defeated by reason of misjoinder or non-joinder of parties, and the Court may in every proceedings deal with the matter in dispute. That the petitioners ought not be denied their rights on the basis of a technicality. She urged the Court to deem any misjoinder curable by Article 159(2)d of the Constitution .

47. The petitioners have filed the suit on grounds of alleged contravention of their right to own property as enshrined in Article 40 of the Constitution. With respect, the provisions of Article 22 and 258 of the Constitution presuppose that a person may file suit on his own behalf and also on behalf of another living person who cannot act in their name; or a person acting as a member of a group or a class of persons.

48. In the instant petition the Court has examined the record and noted that the 4th, 7th, 8th, 9th, 11th, 17th petitioners have filed suit on behalf of the original shareholders of the Company who are deceased. No letters of representation have been disclosed in that regard.

49. In **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) (2016) eKLR A.C. MRIMA J.** was of the view that:-

“13. Under section 2 of the Law Reform Act and Section 4 of the Fatal Accidents Act, the person who is entitled to bring a cause of action in respect to the estate of a deceased person is a personal representative or an executor or administrator respectively. In that case such a person ought to first obtain an appropriate grant so as to have the necessary locus standi. (See the Court of Appeal cases of **Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another (1982-88) 1 KAR and Trouistik Union International & Another vs. Jane Mbeyu & Another, Civil Appeal No, 145 of 1990**). The grant may be a full grant or a limited grant”.

Further the learned judge held that:-

“ 28...Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

50. Under section 2 of the Civil Procedure Act a “legal representative” is defined as:-

“a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

51. In addition, section 82 of the Law of Succession Act provides that

“...it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased.”

A personal representative is defined under section 3 of the Act as the

“...*executor or administrator, as the case may be, of a deceased person*”.

52. In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. From the above it is clear that the matter of the persons cited above are not personal representatives of the original shareholders rendering the suit incompetent before this Court. This ground of opposition succeeds to the extent that it refers to the named petitioners.

Misjoinder

53. The interested parties have argued that they have no interest in the properties mentioned. That their names have been joined without any cause or consent. That they have no interest with the dissolved Company. The Petitioners have not shown the interest of the Interested parties in this matter other than to accuse them of harassment and threats. Section 2 of Constitutional (Protection of rights and fundamental freedoms) Practice and Procedure Rules 2013) defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation; A “Respondent” means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom; No evidence has been shown that the interested parties applied to be enjoined to the petition. The persons named in the

petition as drafted certainly cannot be said to be interested parties. This ground of opposition is upheld.

Should the Registrar of Titles and Registrar of Companies be compelled to give information requested by the petitioners through the Court?

54. I understand the case of the Petitioners against the Respondents as follows; that their rights of property have been infringed by the interested parties, former directors of Company and third parties as the Respondents watched. That the Respondents have not protected their rights. They therefore are claiming that the Respondents should produce some records through the Court.

55. According to Article 35 of the Constitution ;

“every citizen has the right of access to—

a) information held by the State; and

b) information held by another person and required for the exercise or protection of any right or fundamental freedom”.

The right to information Act No 31 of 2016 section 8 makes provisions on how a party may apply for the information being sought. There is no evidence that the Petitioners have requested for the information in respect to the formation and eventual dissolution of their Company nor the history and documentation touching on transfer of parcels No 5591/1. It would appear that the petitioners sought assistance from various offices and agencies of Government except the office of the Registrar of companies and the Chief Land Registrar. It is the duty of a litigant to present their case in the best possible way before the Court for adjudication. It is never the business of the Court to assist a litigant to procure material that he requires to use to litigate his case. Allowing that would be a real abuse of the process of the Court. The Petitioner has not complied with statutory provisions in seeking information and the same was denied. I am afraid this ground of opposition succeeds.

Whether the petition is properly instituted by the petitioners.

56. In the case of in **Foss vs. Harbottle (1843) 67 ER 189** it was held that the proper plaintiff in any proceedings or action in respect of a wrong done to the Company, is the Company itself. This rule was applied in the cases of **Rai and Others vs. Rai and Others [2002] 2 EA 537** and **Grace Wanjiru Munyinyi & Another vs. Gedion Waweru Githunguri & 5 others [2011] eKLR**. In a recent case, **Arthi Highway Developers Ltd vs Westend Butchery Ltd & 6 Others Civil appeal No. 246 of 2013** reiterated the summing up of the rule by Lord Denning M.R in **Moir vs. Wallerstainer [1975] 1 All ER 849 at pg 857**, thus:-

“It is a fundamental principle of our law that a Company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the Company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle (1843) 2 Hane 461. The rule is easy enough to apply when the Company is defrauded by outsiders. The Company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the Company is the only person who can sue.”

57. There are however exceptions to this rule as enunciated in the case of **Rai and Others vs. Rai and Others [2002] 2 EA 537 as follows**

a) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the Company.

b) Where it is alleged that the personal rights of the plaintiff shareholder have been or are about to be infringed.

c) Any other case where the interests of justice require that the general rule, requiring suit by the Company, should be disregarded.”

58. According to the Petitioners the Company was dissolved on 19.10.93 and therefore as shareholders they are unable to sue under the Company. That the only remedy available to them is to sue in their own names. As to whether the petitioners are properly before the Court, is best left for the trial Court to examine.

Conservatory orders.

59. The registered owners of the lands mentioned in prayer 3 & 5 are not the Petitioners. The Petitioners have not claimed that they are the owners. They are saying the titles came from the mother title LR No. 5995/1 Measuring 160 acres. The Registered owners of the Plots are not disclosed. The Court is not in a position to know whether or not they are parties to the Petition. To issue conservatory orders against the persons not known or are not parties to the suit is not satisfactory at this stage. It is against the Constitutional right to fairness and the right to be heard to condemn a party unheard. In that regard the Court declines this prayer.

Have the petitioners demonstrated how the Respondents have violated their rights?

60. This is a question best left to the trial Court to determine. It would be premature to so determine it at this point.

Company reinstatement

61. The Respondents have gone into great length to explain why they cannot provide information because the Company was dissolved some

20 years ago. That section 912 of the Companies Act provides for the procedure for restoration of a Company. The case of the Petitioners at the application stage is not reinstatement of the Company. The Advocates for the Respondents have addressed the Court on matters on the petition. The Applicants did not seek reinstatement of the Company. It is not in the application. The limitation raised in section 339 and 912 of the Companies Act is on reinstatement of a Company. This is a matter reserved for the trial Court.

62. It is clear that the petitioners have petitioned on their own behalf as shareholders to protect their individual interests in the properties that they believed were owned by their dissolved Company. There appears to be no public interest in that regard and I see no reason why costs should not follow the event.

Final orders:

63. The upshot is that the final orders are as follows;

- a) The application, in so far as, it relates to the 1st -3rd, 5th, 6th, 10th, 12th -13th 15th -16th, 18th -27th petitioners is upheld.
- b) The application in so far as it relates to the 4th, 7th, 8th 9th, 11th, 14th and 17th petitioners, the objection is successful and the application is dismissed.
- c) The petition, as filed in so far as the petition relates to the 4rd, 7th, 8th 9th, 11th, 14th and 17th petitioners, is incompetent and is hereby struck out.
- d) The petition in so far as it relates the named interested parties is struck out.
- e) Costs shall be in the cause

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH MAY 2018

J G KEMEI

JUDGE