



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC PETITION NO. 6 OF 2017

(Formerly Machakos ELC Petition No. 19 of 2012)

IN THE MATTER: ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULE 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION ON FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006 AND RULE 3 (1) OF THE HIGH COURT PRACTICE AND PROCEDURE RULES

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 23, 27, 35, 40, 47, 48, 65 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF AN AGREEMENT BY DAIMA BANK LIMITED FOR FINANCIAL ASSISTANCE BY WAY OF A TERM LOAN OF KSHS. 5, 000,000/=

AND

IN THE MATTER OF: ARTICLE 40 AND ARTICLE 157 (6) (a) (b) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

GIDEON SITELU KONCHELLA 1ST PETITIONER

PATRICK NYORO MAKERIA 2ND PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR, KAJIADO 2ND RESPONDENT

DAIMA BANK LTD (IN LIQUIDATION) 3RD RESPONDENT

JUSTUS WACHIRA KINYUNGU & OTHERS 4TH RESPONDENT

RIBSHARK LIMITED 5TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 6TH RESPONDENT

JUDGMENT

By an Amended Petition dated that 29th October, 2012 and filed on 30th October, 2012 the Petitioners seek the following orders:

1. There be a declaration that the purported sale of land reference number KAJIADO/ KAPUTIEI – NORTH/ 3282 and KAJIADO/ KAPUTIEI – NORTH/ 3283 to KEMRI STAFF WELFARE ASSOCIATION and subsequently to 366 purchasers by Daima Bank Limited (in Liquidation) was unlawful, illegal, unconstitutional and null and void for want of consent of charge from the Land Control Board.

2. There be a declaration that the sale of the suit premises was unconstitutional as it deprived the Petitioners of their fundamental right to own, use, possess and enjoy their said properties i.e Land Reference Number KAPUTIEI – NORTH/ 3282 and KAJIADO/ KAPUTIEI – NORTH/ 3283 contrary to Article 40 of the Constitution of Kenya 2010.

3. A further declaration that the process to charge the properties to secure a loan of Kshs. 5,000,000/= in favour of the Petitioners was unlawful as they were denied a right to participate in Nairobi HCCC No. 102 of 2002 involving Gideon Sitelu Konchella Vs Daima Bank (K) Limited and HCCC No. 627 of 1998 involving Daima Bank Limited Vs Gideon Sitelu Konchella and another contrary to Articles 22(1) and 23(1) of the Constitution of Kenya 2010.

4. An order of this Honourable Constitutional Court directing the Director of Public Prosecution Republic of Kenya under Article 157 (4) (10) (11) of the Constitution of Kenya 2010 to immediately order for criminal investigation into the fraudulent nature and process of charging, subdividing and selling Land Reference number KAPUTIEI – NORTH/ 3282 and KAJIADO/ KAPUTIEI – NORTH/ 3283 that was done without the consent of the Land Control Board, no statutory notices of sale, no evidence of drawdown on the principal loan to the Petitioners.

5. Costs of the Petition.

The Petition is supported by the grounds set out on the face of it including the affidavit of GIDEON SITELU KONCHELLA and PATRICK NYORO MAREKIA who are the Petitioners herein where they aver that they were proprietors of land reference numbers KAJIADO/KAPUTIEI-NORTH/3282 KAJIADO/ KAPUTIEI – NORTH/ 3283 respectively that were irregularly and unlawfully charged to DAIMA BANK LIMITED (IN LIQUIDATION) and fraudulently sold to JUSTUS WACHIRA KINYUNGU & 365 others for value. The 2nd Petitioner denies knowledge of the judgement from Hon. Justice P.J. Hewett dated the 22nd May, 2001 that varied the terms of the loan. Both Petitioners contend that their fundamental rights and freedoms to own, use, possess, and enjoy their suit premises has been interfered with. They claim that the indebtedness of RIBSHACK LIMITED to DAIMA BANK LIMITED (IN LIQUIDATION) was unsecured. The Petitioners state that by a letter of offer dated 31st January, 1996 the said DAIMA BANK LIMITED (IN LIQUIDATION) called the said Petitioners to apply for Kshs. 5,000,000/= which would be transferred from the said DAIMA BANK LIMITED (IN LIQUIDATION) to RIBSHACK LIMITED to reduce RIBSHACK'S LIMITED indebtedness to the Bank. The Petitioners claims that there was no valid charge on their properties as the same was registered and concluded without the valuation of their properties which was a condition precedent. , no valid Land Control Board Consent was procured before the Charge, and this was in breach of the provisions of the Land Control Act Cap 302 Laws of Kenya. The Petitioners want the Director of Public Prosecution under Article 157 (4) (10) (11) of the Constitution to be compelled by the court to commence and order for criminal investigations in the above mentioned fraudulent conduct of the respondents, who unlawfully and unconstitutionally deprived them of their right to own Land Reference numbers KAJIADO/KAPUTIEI-NORTH/3282 and 3283 which had belonged to them.

They contend that the subdividing, selling and transferring of the suit premises was unlawful and contrary to Article 22 (1) of the Constitution of Kenya, 2010 as it took away the Petitioners' right of ownership. They insist the District Land Registrar, Kajiado through the office of the Honourable Attorney General and DAIMA BANK LIMITED (IN LIQUIDATION) acted contrary to Article 22 (1) 23 (1) of the Constitution of Kenya as the Petitioners' right to be heard fairly was violated in Nairobi High Court Civil Suit No. 102 of 2002 involving Gideon Sitelu Konchella –vs- Daima Bank Limited and Nairobi HCCC No. 627 of 1998 involving Daima Bank Limited –vs- Gideon Sitelu Konchella as the cases were never concluded on merit and instead proceeded ex parte denying the Petitioners right to a fair trial. The Petitioners' right to own property was further violated by the District Land Registrar through the Attorney General and Daima Bank Limited (in liquidation) by paying the loan amount of Kshs. 5,000,000/=, by DAIMA BANK LIMITED (IN LIQUIDATION) to RIBSHACK LIMITED for purposes of reducing a guarantee executed by Sceneries Limited on account of RIBSHACK LIMITED without the Petitioners' knowledge and consent. Further that the selling of their properties through Westminister Merchants on or about the 24th day of October, 2001 without a current valuation report, without being served with a Notification of Sale nor being given the mandatory 45 days notice as well as not conducting a public auction was a violation of their rights. They insist that the 3rd Respondent's amending the letter of offer and making it ambiguous, unfair and unenforceable as term "c" of the said letter of offer on the variation of interest was contrary to Section 44 of the Banking Act which forbade the increase by the said DAIMA BANK LIMIED (IN LIQUIDATION) of its rate of interest or other charges except with the prior approval of the Minister of Finance.

The 1st and 2nd Respondents opposed the Petition and filed Grounds of Opposition where they stated that the Petition did not disclose any violation of the petitioners' Constitutional Rights. They were further in support of the replying affidavit filed by the 3rd Respondent.

The 3rd Respondent opposed the Petition and filed a replying affidavit sworn by MICAH NABORI and also grounds of opposition dated the 28th November, 2012. The 3rd Respondent confirmed that the Petitioners were registered proprietors of the suit properties i.e Land parcel numbers KAJIADO/ KAPUTIEI NORTH/ 3282 and 3283 respectively. It contended that the Petitioners approached the 3rd Respondent for a loan and the 3rd Respondent accepted, vide the terms contained in the letter of offer dated the 3rd January, 1996 which was signed on 30th January, 1996 for a term loan of kshs. 5 million and a subsequent charge to that effect. Further that the 1st defendant accepted to charge his suit property and a legal charge was executed in favour of the 3rd Respondent dated the 19th February, 1996. It contends that both Petitioners defaulted in repaying the loan culminating in the 3rd Respondent exercising its statutory power of sale. Further, the 3rd Respondent instituted legal proceedings for recovery of the loan vide Nairobi HCCC No 627 of 1998 where it sought for the outstanding amount of Kshs. 15, 177, 199.95 including interest of 4% and on 30th July, 1990 a consent judgement was entered for the principal sum of Kshs. 5 million, while the balance of the outstanding amount and interest was to be negotiated. Since parties failed to agree, the matter proceeded to full hearing and Justice Hewett J. upon hearing parties on 22nd May, 2001, entered final judgment for the 3rd Respondent against the 1st Petitioner. It explains

that the 1st Petitioner applied for stay pending appeal before Justice Osiemo who delivered a ruling dated the 23rd October, 2001 where we dismissed the said application with costs, leading to the 3rd Respondent proceeding to execute the decree. It confirms that the 1st Petitioner later filed a suit to wit Nairobi HCCC NO. 102 of 2002 dated the 13th November, 2001 and lodged in court on 30th January, 2002. It reiterates that the 3rd Respondent exercised its statutory power of sale and sold by public auction land parcel number KAJIADO/ KAPUTIEI – NORTH/ 3282 as evidenced by the agreement of Sale between DAIMA BANK LIMITED and PENDO HOLDINGS LIMITED dated the 22nd March, 2002 as well as land reference number KAJIADO/ KAPUTIEI – NORTH/. 3283 as indicated in the Sale Agreement between DAIMA BANK LIMITED and PENDO HOLDINGS LIMITED dated the 4th April, 2002 for Kshs. 6, 125,000 and in total realized Kshs. 12, 250,000 after the sale. The 3rd Respondent confirms that the said amount did not satisfy the decree and the 1st Petitioner approached the 3rd Respondent to settle the outstanding decretal amount by paying a liquidated sum of Kshs. 3 million which the 3rd Respondent acceded to and upon payment of the same amount, the issues between 1st Petitioner and the 3rd Respondent were fully settled. Further, that the 2nd Petitioner has never questioned and or contested the sale of the charged land for a period of over 10 years.

The 3rd Respondent confirms that HCCC No. 102 of 2002 by the 1st Petitioner was dismissed with costs, for want of prosecution, on 14th March, 2005 by Justice Azangalala. The 3rd respondent reiterates, that the Petition herein is an affront to the principle of res judicata.

The 4th Respondents filed a replying affidavit dated the 30th April, 2012 where they stated that they were strangers to the transactions or contract between the Petitioners, the 3rd Respondent as well as the 5th Respondent. Further, that it would be unfair and contrary to the spirit of the Constitution to hold them liable for a breach of a right they did not know anything about. They contend that the alleged claim in the Petition herein is founded on an alleged contract by the Petitioners which is time barred by law and has been brought in an attempt to circumnavigate the relevant Acts of Parliament. The 4th Respondents explain that through a Cooperative Society took loans for purposes of buying the suit properties, which they did; further that the suit lands were subsequently subdivided and new numbers issued by the Ministry of Lands. They insist that they enjoy the right to own property as envisaged by Article 40 of the Constitution.

The 6th Respondent filed a replying affidavit and stated that the Petition was frivolous, malicious, bad in law and otherwise an abuse of the process of the court. The 6th Respondent stated that under article 157 of the Constitution the Director of Public Prosecutions is mandated to exercise state powers and functions of prosecution including the institution, undertaking over, continuance and or termination of criminal proceedings amongst other functions. The 6th Respondent insists that by the Petitioners asking court to direct the Director of Public Prosecutions to order criminal investigations into the fraudulent nature and process of charging, subdividing and selling the suit lands not only undermine the Constitution but also asks the Court to conduct investigations and at the same time be an arbitrator. Further, that the Petitioners have not demonstrated the efforts they made to have the said claims of fraudulent deals done by the Respondents in respect of the suit lands reported to any police station for purposes of investigation, which were not acted upon.

The Petitioners and the Respondents filed their submissions that I have considered.

Analysis and Determination

Upon perusal of materials presented in respect of the Petition herein including the supporting, supplementary and replying affidavits as well as the submissions herein, the following are the issues for determination:

- b) Whether the Petitioners' Constitutional Rights to own property has been violated.**
- c) Whether the Respondents conduct constitutes a violation and contravention of the Constitution.**
- d) Whether the Petition should be deemed as res judicata**

I note there have been two suits that have been heard and determined by Courts of Competent Jurisdiction in respect of the suit lands. Further, that the 1st Petitioner attempted to Appeal against an order of the High Court, but the Application for leave to appeal was dismissed. I note the Suit lands were sold as a result of a decree issued by the Honourable Court, after the Petitioners had defaulted in repaying the loans they had taken from the 3rd defendants.

Section 7 of the Civil Procedure Act, stipulates as follows in relation to res judicata: ‘ **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.**’

In the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** referred to **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that :-

‘ in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.’

From the foregoing, I find that the issues raised in the Petition herein were already heard and determined vide Nairobi HCCC No. 627 of 1998 as well as Nairobi HCCC No. 102 of 2002 and is hence res judicata. I concur with the 3rd Respondent that the suit herein is an affront to res judicata.

As to Whether the Petitioners' Constitutional Rights to own property has been violated.

The principles of determining whether violations to Constitutional rights within a Petition are well established in the cases of **Uhuru Muigai Kenyatta Vs Nairobi Star (2013) eKLR** and **Roshanara Ebrahim Vs Ashleys Kenya Limited (2016) eKLR** where the Court has been emphatic that not every violation falls within the ambit of Constitutional Petition.

I note the issues of the procurement of the loan including the sale of the suit lands was already heard and determined in wit Nairobi High Court Civil Suit No. 102 of 2002 involving Gideon Sitelu Konchella –vs- Daima Bank Limited and Nairobi HCCC No. 627 of 1998 involving Daima Bank Limited –vs- Gideon Sitelu Konchella. Further, I find that the allegations of violations raised by the Petitioners are issues of private law that are governed by the Land Control Act, The Registered Land Act (Repealed), and the Banking Act. I find that the Petitioners already had two forums within the two cases, where the issues of the process of charging the suit land as well as the Chargee exercising its statutory power wrongly was heard and determined. I note that the 1st Petitioner even proceeded to repay the loan after the proceeds from the sale of the Charge property had been factored into the loan and there was a remaining balance. I find that infact the Petitioners' have instituted this Petition to cloth their claim against the 3rd Respondent in a different apparel so as to vex the Respondents especially the 4th Respondents who had purchased the suit lands for value without notice. The Petitioners relied on the Case of **COCKMERE BRICK CO. LTD AND ANOTHER VS MUTUAL FINANCE LTD (1971) 2 EA ALL E 12 633 THE COURT OF APPEAL** observed that: '**in exercising the power of sale, the mortgagee was not merely under a duty to act in good faith, honestly and without reckless disregard for the mortgagors' interest but also to take reasonable care to obtain whatever was the market value of the mortgaged property at the moment he chose to sell it.**'

I find that this case law would suffice if the two High Court Cases had not been heard and determined but in the current scenario, if indeed the Petitioners felt that the 3rd Respondent failed to adhere to the proper legal processes before exercising its statutory power of sale over the suit lands, they had a remedy in instituting a claim for damages as envisaged under section 90 of the Land Act but not in this forum. I find that the Petitioners' claim that they were not granted an opportunity to be heard in the High Court cases does not hold, because in Nairobi HCCC No. 627 of 1998 involving Daima Bank Limited –vs- Gideon Sitelu Konchella, it was a Consent Judgement. It is it is trite law that a Consent Judgment can only be set aside in the same cause and fraud, coercion as well as misrepresentation is proved before the same can be set aside. While in Nairobi High Court Civil Suit No. 102 of 2002 involving Gideon Sitelu Konchella –vs- Daima Bank Limited, 1st Petitioner failed to prosecute his case culminating in the same being dismissed for want of prosecution. The 2nd Petitioner did not challenge the outcomes of these two cases and chose to keep mum until the instant Petition. It is against the foregoing that I find that the Petitioners' fundamental rights and freedoms to own, use, possess, and enjoy their suit premises has not been interfered with nor violated as claimed.

As to whether the Respondents conduct constitutes a violation and contravention of the Constitution.

I note that the 3rd Respondent granted a term loan facility to the Petitioners who charged the suit land. I note the Petitioners failed to repay the loan culminating in the 3rd Respondent exercising its statutory power of sale. I note the dispute over the loan was heard and determined in a court of competent jurisdiction and the 1st Petitioner even proceeded to pay the balance of the disputed amount. In the case of **ANARITA KARIMI NJERI Vs R (1976 – 1980) KLR 1272** it held that the Petitioner must state and identify the rights with precision and how the same have been infringed upon. I find that in the current Petition, the Petitioners have not precisely identified with precision which of their rights were infringed upon by each of the Respondents. From the averments by the 3rd Respondent, I find that it indeed adhered to the due processes before exercising its statutory power of sale. Further, the 4th Respondents who bought the suit land were purchasers for value without notice and have proceeded to subdivide the said land which now have new titles. The Court cannot interfere with the 4th Respondents rights to enjoy a property which they freely purchased.

It is against the foregoing that I find the Amended Petition dated that 29th October, 2012 and filed on 30th October, 2012 unmerited and dismiss it with costs to the Respondents.

Dated signed and delivered in open court at Kajiado this 26th day of June, 2018

CHRISTINE OCHIENG

JUDGE