



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 48 OF 2016

IN THE MATTER OF ARTICLES 40, 42, 60, 64, 68, 69, 162(2) (B)

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO PROPERTY

BETWEEN

RIFT VALLEY ENTERPRISES LTDPETITIONER

AND

DISTRICT LAND REGISTRAR1ST RESPONDENT

PAULINA NEKESA KODE2ND RESPONDENT

AND

DANIEL K. YEGO.....1ST INTERESTED PARTY

CHEBII CHEROGONY KANDIE.....2ND INTERESTED PARTY

STEPHEN KIPRONO MARITIM.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. Proceedings herein were commenced by way petition filed on 22nd September 2016 by Rift Valley Enterprises Limited, a limited liability company incorporated pursuant to the provisions of the Companies Act. The petitioner is what is commonly referred to in Kenya as a land buying company. The 1st respondent is the custodian of land records within Nakuru County while the 2nd respondent is a private citizen. The Interested Parties are said to be beneficiaries of a borehole situated within a parcel of land known as Miti Mingi/Mbaruk Block 3/4123 (hereinafter referred to as plot 4123).

The Petition

2. It is pleaded in the petition that the petitioner is the owner of plot 4123 on which there is a borehole and water trough from which 20,000 people and 70,000 animals are watered since the year 1972. The petitioner allocated the plot to a self-help group known as Ainoptich Borehole Water Project through a letter dated 21st May 2000 but no title deed was issued. Following subsequent disputes and decision thereon by the Land Disputes Tribunal, the tribunal decided that plot 4123 be subdivided into two: Miti Mingi/Mbaruk Block 3/5056 (hereinafter referred to as plot 5056) which was to be given to Ainoptich Borehole Water Project and Miti Mingi/Mbaruk Block 3/5057 (hereinafter

referred to as plot 5057) which was to be given to the 2nd respondent. There were appeals to the Provincial Appeals Committee and to the High Court whose final outcome was that the initial decision of the Land Disputes Tribunal was set aside. However, while the appeals were still pending, the 2nd respondent subdivided plot 4123 into plot 5056 and plot 5057 and registered them in her name with the assistance of the 1st respondent.

3. It is further pleaded that the 2nd respondent was never a shareholder of the petitioner and that registration of plot 5056 and plot 5057 in the 2nd respondents name was obtained fraudulently and illegally. Some particulars of fraud are listed. The respondents have since subdivided and sold parts of plot 5056 and plot 5057 and have therefore violated the right to property as provided for under Articles 40 and 60 of the Constitution. The petitioner therefore prays for:

- a. A declaration that the 2nd respondent has never been a shareholder or had any association with the petitioner herein.*
- b. A declaration that the subdivision of plot no. 3/4123 was illegal hence, null and void and hence the registration of land parcel plot no. 3/5056 and plot no. 3/5057 to the 2nd respondent's name is fraudulent and illegal.*
- c. An order that titles of plot no. 3/5056 and plot no. 3/5057 be revoked and the original title L.R. No. Miti Mingi/Mbaruk Block 3/4123 be restored and subsequently registered in the name of the petitioner.*
- d. Compensation at market value for the original parcel of land at market value (sic) and under the law as well as general damages for violation of the petitioner's right to property.*
- e. That the respondents be condemned to pay for the cost (sic) of this petition.*

Evidence in support of the petition

4. The petition is supported by an affidavit sworn by Elijah Kiplagat Kipkemei Chelaite, the chairman of the petitioner. It is deposed therein that through a letter dated 21st May 2000, the petitioner allocated plot 4123 to the self-help group known as Ainoptich Borehole Water Project. A copy of the said letter and a transfer dated 19th July 2000 is annexed. There has been a dispute over the plot between Ainoptich Borehole Water Project and the 2nd respondent. The dispute was presented to the District Land Disputes Tribunal and the tribunal decided that the plot be subdivided into two. Members and officials of Ainoptich Borehole Water Project were dissatisfied with the decision. They appealed to the Provincial Appeals Committee which upheld the decision of the District Land Disputes Tribunal. The Interested Parties herein appealed to the High Court and the court set aside the initial decision of the District Land Disputes Tribunal. Before the appeals were determined, the respondents subdivided plot 4123 into plot 5056 and plot 5057 and registered them in the name of the 2nd respondent.

5. It is further deposed that "there was an infiltration by swindlers into the affairs of the petitioner between 1980 up until 1985 where about 1587 fake certificates were issued" and that persons known as Zakayo Sitonik, Samson Tuimising and John Kelong signed many blank certificates against which the then secretary of the petitioner inserted names of people who were not members of the petitioner. That once a person becomes a member of the petitioner he is issued with a share certificate. For one to get a title deed, there must be a clearance certificate. The clearance certificate held by the 2nd respondent is fake since it was signed by one of the directors who had been removed in 1999. That for a shareholder to be allocated land by the petitioner, he had to pay survey fees according to the shares held by him and he would then be given a receipt stamped and signed at the back by all the three Allocation Committee Members. The 2nd respondent did not have that receipt.

6. Additionally, it is deposed that a suit concerning the property being Nakuru ELC Case No. 98 of 2013 was filed and determined. A copy of the judgment is annexed to the affidavit. Finally, it is also deposed that the respondents have since subdivided and sold parts of plot 5056 and plot 5057. Copies of Certificates of Search are annexed.

1st Respondent

7. The 1st respondent did not respond to the petition or participate in the case in any way despite being served.

2nd Respondent's Response

8. The 2nd respondent opposed the petition through her replying affidavit sworn on 25th October 2016. She deposed that she is the registered proprietor of plot 4123 having been issued with a title deed in respect thereof on 30th June 2000. She later surrendered the original title to the land registry to facilitate the subdivision of the plot to Miti Mingi/Mbaruk Block 3/5056 (Barut) and Miti Mingi/Mbaruk Block 3/5057 (Barut). She is the owner of the new plots. She annexed copies of the titles. She further stated that she became registered proprietor of the plots by virtue of her membership of the petitioner and after following all the procedures. She added that the petition is an abuse of court process since it seeks only private law remedies.

Interested Parties' Response

9. The Interested Parties responded to the petition through an affidavit sworn by Daniel K. Yego, the first Interested Party. They support the petition. The deponent reiterated the petitioner's position that the 2nd respondent became registered proprietor of the plots fraudulently and illegally.

Submissions

10. The petition was heard by way of written submissions. The petitioner's submissions were filed on 6th December 2017, the 2nd respondent's on 14th December 2017 and the Interested Parties' also on 14th December 2017.

11. It is submitted on behalf of the petitioner that the petition meets the threshold set in the case of **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272** and that the petitioner's right to property under Article 40 had been violated owing to the respondents' action of registering plot 4123 in the 2nd respondent's name and further subdividing it into plot 5056 and plot 5057. Citing **Vekariya Investments Limited v Kenya Airports Authority & 2 Others [2014] eKLR**, counsel for the petitioner submitted that since the 2nd respondent obtained the land illegally, she cannot claim protection under the constitution since her claim to the land is extinguished under Article 40(6). Finally, citing Article 48 of the constitution and **Arnacherry Limited v Attorney General [2014] eKLR**, counsel for the petitioner submitted that the petitioner is entitled to the relief sought including KShs 4 Million being compensation.

12. For the 2nd respondent it is submitted that although titled as a petition, what the petitioner has put before the court is essentially a claim for private law remedies and that the 2nd respondent being a private citizen, no relief could be sought against her as a respondent in a constitutional petition. That since the 2nd respondent became registered proprietor of the suit land on 30th June 2000 and the petition herein was filed on 22nd September 2016, the claim is time barred under the provisions of section 7 of the Limitation of Actions Act. It is further submitted that the petitioner has not established any claim on the merits. Finally, the 2nd respondent relied on the cases of **Republic v The Chief Land Registrar, Muranga & Another ex Parte Paul Ndirangu Mwangi & Anor [2010] eKLR** and **Hon. Uhuru Muigai Kenyatta v The Nairobi Star Publications Limited [2013] eKLR**. Accordingly, the 2nd respondent urged the court to dismiss the petition with costs.

13. The Interested Parties generally supported the petition in their submissions. They argued that the 2nd respondent acquired the property fraudulently and that the law cannot therefore assist her. They relied on the case of **Henry Muthee Kathurima vs Commissioner of Lands & Another [2015] eKLR**.

Analysis and determination

14. I have considered the petition, affidavits filed, submissions and authorities cited by the parties. The following issues emerge for determination:

- i. Whether there exist other sufficient and adequate avenue to resolve the dispute.
- ii. Whether the petitioner is entitled to the relief sought.
- iii. Who bears the costs?

Whether the matter is properly before the court as a constitutional petition

15. There is no dispute that pursuant to **Article 22** of the Constitution, every person has the right to institute proceedings in court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Under **Article 260**, "person" is defined to include a company, association or other body of persons whether incorporated or unincorporated. Further, under **Article 48**, the State is under a duty to ensure access to justice for all persons. Needless to state, the petitioner herein, a limited liability company, has a right to access the court to seek redress for violation of a right in the Bill of Rights.

16. Nevertheless, right of access to the court is not everything. All litigants whether a petitioner in a constitutional petition or a plaintiff in an ordinary civil claim must not only make allegations, they must also properly plead and prove their case. They must discharge the burden of proof. In **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another (Presidential Petition No. 1 of 2017)** the Supreme Court stated:

[129] The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. Black's Law Dictionary defines the concept as "[a] party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production." With that definition, the next issue is: who has the burden of proof?

[130] The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: "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 that those facts exist." ...

17. Having chosen to approach the court through a constitutional petition, the petitioner must satisfy the court that there is no effective remedy available to it under statute. Not every dispute should be turned into a constitutional matter. Where ample statutory avenues for resolution of a dispute are available, the constitutional court will defer to the statutory options and decline to entertain the dispute. There are many decisions to that effect. In **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR** the Court of Appeal stated:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation. ...

Back home and in a string of cases, this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights.
...

Then there is the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-

“...In our view, there is considerable merit in the submission that where there is 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...” ...

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.

18. Similarly, in Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others [2014] eKLR the High Court stated:

For instance, if there are alternative civil or other remedies available to a party, then courts may decline to exercise jurisdiction. In the case of Isaac Ngugi v Nairobi Hospital & 3 Others (supra) the court held as follows regarding the application of the Constitution to private relationships; ...

[23] For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly.”

19. The petitioner’s case briefly is that it owned plot 4123 and that the 2nd respondent fraudulently and illegally acquired the plot and subdivided it into plot 5056 and plot 5057 which she also registered in her name. Some of the reasons proffered to support the alleged fraud and illegality are that the 2nd respondent was not a valid shareholder of the petitioner and that the share certificate and clearance certificate held by the 2nd respondent are not genuine. The clearance certificate is said to be fake since it was signed by a person who according to the petitioner was not a director of the petitioner. There are allegations of unprocedural and illegal activities conducted within the petitioner, a limited liability company incorporated under the **Companies Act**. It is also alleged that some of these activities were carried out by persons who purported to be directors of the petitioner when they were in fact not such directors. These allegations are made by the petitioner itself. If that be the case, the first port of call must be proceedings under the **Companies Act** and other related statutes. There may be need to inquire into the petitioner’s Articles and Memorandum of Association to determine if the persons who carried out the activities referred to were directors. There will be need to take oral evidence at a hearing. There is no scope to deal with such matters in a constitutional petition.

20. The petitioner concedes that the 2nd respondent is the registered proprietor of plot 5056 and plot 5057 pursuant to titles issued under the **Registered Land Act** which has since been repealed and replaced by the **Land Registration Act, 2012**. The petitioner alleges that the 2nd respondent obtained registration of the plots fraudulently. If that be the case, there are ample provisions under the **Land Registration Act, 2012** for redressing that. Again, it will be necessary to take oral evidence at a hearing regarding the allegations of fraud.

21. Though the petitioner claims that its right to property under Articles 40 and 60 of the constitution have been violated, the reality is that plot 4123 was prior to its subdivision registered in the name of the 2nd respondent. Even post subdivision, the resultant parcels being plot 5056 and plot 5057 are not registered in the name of the petitioner. As such, the petitioner cannot lay any claim to the plots without first having the 2nd respondent’s registration cancelled through the available statutory means. The petitioner has not shown that those statutory avenues of redress as regards title to the parcels of land and as regards the petitioner’s internal affairs are inexistent or inadequate.

22. In view of the foregoing discourse, I find and hold that there are other sufficient and adequate avenues available to resolve the dispute. I therefore decline to exercise constitutional jurisdiction in this matter.

Whether the petitioner is entitled to the relief sought

23. The petitioner has sought several remedies as enumerated at paragraph 3 above. In view of my finding that there are other sufficient and adequate avenues to resolve the dispute, it is axiomatic that the remedies sought cannot be granted in this petition. These proceedings must come to an end at this point, even if it appears to be a narrow issue upon which to determine the matter. In Maurice Adongo Anyango v Kenyatta International Convention Centre [2018] eKLR, the Court of Appeal stated:

We do not think given the circumstances of this case that the judicial review orders sought were the most efficacious remedies.

Furthermore, this Court has in several decisions held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. See for instance Speaker of the National Assembly v Karume (supra). The appellant’s claim was based on a contract of employment. A specialized court exists to deal with employment matters and it would cause jurisdictional rivalry and/or confusion if courts would allow litigants to shuffle between any courts, even if they are of equal status. Accordingly, we cannot fault the Judge for determining the application on that narrow issue. It was sufficient to dispose of the application. ...

Who bears the costs?

24. Costs are normally at the discretion of the court. Needless to state, such discretion must be exercised judiciously. The 2nd respondent has urged me to dismiss the petition with costs. I have anxiously considered the matter. The 2nd respondent has had to defend this matter, obviously at some cost. If I were to order that each party bears own costs, there would be injustice to the 2nd respondent. As previously noted, the 1st respondent did not participate in the matter while the Interested Parties supported the petition. Thus the 1st respondent and the Interested Parties are not entitled to any costs.

Conclusion

25. In the end, I dismiss the petition with costs to the 2nd respondent.

26. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 28th day of September 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Khalayi holding brief for Mr Kipkoech for the petitioner

No appearance for the 1st respondent

Mr Okeke for the 2nd respondent

No appearance for the Interested Parties

Court Assistants: Gichaba & Lotkomo