



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PET. NO. 2 OF 2016

JAMES KIGEN ROTICH PETITIONER

VERSUS

STELLA CHEPKOGEI MCLEAN 1ST RESPONDENT

NANCY WANJIKU GATUNA 2ND RESPONDENT

EQUITY BANK LIMITED 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The petitioner filed this petition on **18/4/2016** seeking the following orders:

(a) **A declaration that the petitioner is the lawful owner of Eldoret Municipality Block 21/King'ong'o/1668.**

(b) **That the objection proceedings taken out by the 2nd respondent and all the consequential orders be set aside.**

(c) **A declaration that the petitioner's rights under Article 27, 40 and 159 of the Constitution were violated by the 1st and 2nd respondents.**

(d) **An order directing the 3rd respondent to release the title documents for title number Eldoret Municipality Block 21/(King'ong'o) 1668 to the petitioner with duly executed transfer forms in terms of the certificate of sale and vesting order issued by the Principal Magistrate on 30th August, 2012.**

(e) **Costs.**

2. The facts of this case are that the suit land **LR Eldoret Municipality Block 21/(King'ong'o)1668** which was owned by the 1st respondent was charged to Equity Bank Limited the 3rd respondent and the 1st respondent defaulted in repayment of the loan monies and the 3rd respondent caused it to be sold to the petitioner on the **15th November 2011** at a public auction for **Kshs. 600,000/-**. A vesting order was made by the court in his favour. However the 2nd respondent applied before the Senior Principal Magistrate Kitale and obtained an order staying the vesting order and the court found that the 2nd respondent had an interest in the property. Thereafter the court file is alleged to have gone missing.

3. The petitioner's case is that the orders made by the Principal Magistrate declaring that the 2nd respondent had acquired a legally recognizable interest in the suit property violated the petitioner's right of protection to property as the property had already vested in the petitioner. The petitioner states that the magistrate's order violated his right to equal protection of the law under **Article 27(1)** of the constitution, hence this petition.

4. The 1st respondent filed a replying affidavit she swore on the 9th October 2017. Her response is as follows: that no public auction took place on 15th November, 2011; that the petitioner was not the successful bidder; that the certificate of sale has been backdated; that the attachment and sale was set aside at the instance of the 2nd respondent in **Kitale CMCC 136/2009** and the petitioner was also actively involved in that suit; that the suit land was not available for attachment as the 2nd respondent had purchased in 1987; that an application for review in the **Kitale CMCC 136/2009** could have resolved the petitioner's grievance; that there is no constitutional issue arising in this petition; that the court's decision below was correct in law; that by the time the attempt was made to dispose of the suit land the 2nd

respondent had already acquired title to it by way of adverse possession; that the file never went missing but was in the typing pool as the petitioner had filed an appeal **HCCA Kitale No. 104 of 2015**; that the monies paid can be recovered from the 3rd respondent; that there was no violation of any right of the petitioner. That the petitioner has not acquired right to the land; that there was no legal charge registered against the suit land in favour of the 3rd respondent;

5. The 2nd respondent filed her replying affidavit dated **11th October 2017** in which she has reiterated almost word for word the defence of the 1st respondent outlined in the preceding paragraph.

6. On **21/12/2017** the 3rd respondent filed a replying affidavit sworn by **Wesley Ngeno** its **Credit Manager** on an undisclosed date. In that affidavit he reiterated the matters stated in paragraph 2 herein above. However the 3rd respondent clarifies that it filed **Kitale CMCC 136 of 2009** seeking recovery of the loan monies and it obtained judgment in its favour. The 3rd respondent posits that an auction was conducted by its agents and the petitioner was the highest bidder. It denies that it has failed or refused to release the title documents to the suit land and has not violated the petitioner's rights and the petitioner has no cause of action against it.

7. The petitioner filed his submissions on the 6th June 2018 and the 1st and 2nd respondents on 30th May, 2018. I have perused the record and found no submissions filed on behalf of the 3rd and the 4th respondent. The 4th respondent did not also file any response to the petition.

8. I find that the issues arising in this petition are as follows:-

(1) Has the petitioner established that any of his rights under the constitution has been violated?

(2) Has the petitioner used the proper procedure?

(3) What orders should issue?

(1) Has the petitioner established that any of his rights under the constitution has been violated?

9. The petitioner's case is that his rights under **Article 27(1)** of the Constitution have been violated. He avers that his rights to equal protection of the law and right to protection to property have been violated. In addition he states that his rights under **Article 159** of the Constitution has been violated in that he was denied justice. This court must investigate whether the rights said to be provided for by those clauses exist and if so, whether they have been violated in relation to the petitioner.

10. However, it must first be noted that there is no supporting affidavit attached to the petition as is normally the case in cases begun by way of petition.

11. This leaves the court to consider only the petition without any evidence adduced by way of an affidavit. I note that without an affidavit the statements in the petition remain mere conclusory statements unsupported by any evidence. In my view it is the evidence contained in an affidavit that this court would consider in order to arrive at its conclusion. Without it, this court's hands are tied. I do note that there was no supplementary affidavit filed by the petitioner to counter the matters contained in the respondents' filed affidavits. Without any affidavit filed in the petition, the only sworn evidence in this matter is that coming from the respondents. If it has not been controverted it may pass for the truth. I find that this court can not explore the issue of whether the rights exist or whether they have been violated with regard to the petitioner in the absence of affidavit or a supplementary affidavit. This petition is in my view fatally defective for want of a supporting affidavit and it must be struck out for that reason.

(b) Has the petitioner used the proper procedure?

12. The second issue is in relation to procedure. There is an appeal pending in relation to the decision in **Kitale CMCC No. 136 of 2009**. The parties admit that it has not been determined. Many of the issues raised in this matter relate to the merits of the decision of the Court below whose decision is already being appealed from in **Kitale HCCA No. 104 of 2015**. This court can safely presume that those matters will be finally laid to rest in the decision that will emanate from that appeal. It is unnecessary to deal with them in this petition because the appeal is already filed. Even if the appeal had not been filed, this court would still decline to determine those issues herein for the sole reason that that appeal procedure is the appropriate one. A constitutional petition must be reserved for matters that are purely constitutional in nature where violation of constitutional rights can be established to have occurred. Allowing litigants to resort to constitutional petitions even where there are other statutory processes that can resolve the matters adequately should not be allowed, and this is clearly seen in the decisions of the courts in **Harrikissoon Vs. Attorney-General Of Trinidad And Tobago [1980] A.C. 202** and **Alphonse Mwangemi Munga & 10 Others V African Safari Club Limited [2008] eKLR**.

13. In view of what I have stated above, I find no merit in this petition. The same is struck out with no orders as to costs.

Dated, signed and delivered at Kitale on this 26th day of September, 2018.

MWANGI NJOROGE

JUDGE

26/9/2018

Coram:

Before- Mwangi Njoroge, Judge

Court Assistant – Picoty

Mr. Analo for 3rd respondent

N/A for the petitioner

N/A for respondents 1, 2 and 4

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

26/9/18