



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC PETITION NO 2 OF 2018**

**ARTHUR JUGUNA KAMAU.....PETITIONER/APPLICANT**

**VERSUS**

**EUNICE WANGARI KARANJA.....1<sup>st</sup> RESPONDENT**

**COUNTY LAND REGISTRAR.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. On the 22<sup>nd</sup> February 2018, the Petitioners filed their Petition dated 21<sup>st</sup> February 2018. Coupled with the said Petition, the Petitioners also filed an application under certificate of urgency where they sought for interim injunctive orders against the Respondents seeking that they be restrained from further subdividing, selling, trespassing and/or in any manner interfering with the suit premises namely Nyandarua/Ol Kalou Central/1088.

2. On the 22<sup>nd</sup> February 2018, the court, suo motto directed that service be effected for inter parties hearing. Instead of effecting service, the Applicants filed another similar application dated the 23<sup>rd</sup> February 2018 seeking the same orders against the Respondents.

3. On the 5<sup>th</sup> March 2018 when the parties appeared before me, the Applicant sought to have the application dated the 21<sup>st</sup> February 2018 marked as abandoned so that they could proceed with the hearing of the application dated the 23<sup>rd</sup> February 2018. The court obliged them.

4. Service of the said application was effected and whereas there was no response from the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondents filed their response to the Petition dated the 21<sup>st</sup> February 2018 thereby raising a point of preliminary objection to the same to the effect that the court had no jurisdiction to hear the petition by virtue of the fact that the same offended the provisions of Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.

5. Since the said Preliminary Objection touched on the jurisdiction of the court and sought to strike out the whole suit, the court directed that the said preliminary Objection be disposed of in the first instance by way of written submissions with further orders that parties do maintain the status quo.

6. Parties filed their respective submissions and took direction that the court delivers its ruling based on the said written submissions.

**The Respondent's submission on the Preliminary Objection.**

7. The 1<sup>st</sup> Respondent's Preliminary Objection dated the 19<sup>th</sup> March 2018 was based on three issues namely;

- i. That the court lacked jurisdiction to hear this matter by virtue of the provisions of Section 7 of the Limitation of Actions Act.
- ii. That the petition was incompetent, fatally defective and an abuse of the court process.
- iii. That there had been no violation of any Constitutional rights to warrant invocation of Article 22 of the Constitution and hence the matter was purely one of a civil nature.
- iv. That the prayers sought were incapable of being granted as the petitioner was not a party to the Nyahururu Chief Magistrate's Succession Cause No. 83 Of 2006.

8. Briefly, the 1<sup>st</sup> Respondent's argument is that the issues filed by the Petitioner herein were not issues under the constitutional forum but rather issues under the Land and Environment Court because the cause of action was founded on an action to recover land whose limitation is

subscribed by Section 7 of the Limitation of Actions Act.

9. The Respondents' further submission was to the effect that the Petitioners' claim to the suit property commenced in the year 1986 more than 3 decades to the filing of the present Petition, thus making it statute barred, bad in law, incompetent thus denying this court the jurisdiction to hear and determine the same. They submitted that the Petitioner was guilty of inordinate delay in prosecuting this Petition.

10. To buttress their submissions on this point, the 1<sup>st</sup> Respondent relied on the decided cases of;

**i. Owners of the Motor vehicle vessel Lilian S vs. Caltex Oil (Kenya) Ltd [1989] KLR 1**

**ii. Mtana Lewa vs. Kahindi Ngala Mwangandi [2015] eKLR**

11. The 1<sup>st</sup> Respondent further submitted that the petition ought to be dismissed for reasons that the Petitioner, in his petition, had not sought for a declaration that any of his constitutional rights had been infringed to which effect the said Petition failed to meet the threshold for a constitutional petition as was stipulated in the case of **Anarita Karimi Njeru vs. Republic [1979] eKLR**.

12. The Respondents further relied on the provisions of the Constitution (Protection of Rights and Fundamental Freedoms) practice and procedure Rules No. 4(1) and 10(2) which rules stipulated the procedure on how an aggrieved party may make his/her application to the high court where any of their rights and Fundamental freedoms have been infringed and/or violated. That the said provisions also provided for the ingredients to be included in such a petition, ingredients, which were missing in the present petition.

13. Lastly the Respondent submitted that although the Petitioner in the present petition alleged to have brought action on behalf of one John Kamau Njuguna (deceased) yet he had not exhibited any evidence proving that he had authority to do so. The respondent thus sought for the Petition to be struck out with costs to the 1<sup>st</sup> Respondent.

#### **The Petitioner's submission on the Preliminary Objection;**

14. The Petitioners' submission on the issue of jurisdiction was to the effect that the Petition did not revolve around the recovery of the land or ownership as submitted by the 1<sup>st</sup> Respondents, but rather, it was to challenge the process adopted by the respondent to obtain the title deed for the suit premises and the grant of the letters of Administration. That indeed the Petitioner is the owner of the suit premises although the title deed was un-procedurally issued to the 1<sup>st</sup> Respondent.

15. That the Petitioner was not seeking to recover the suit premises as she was already in occupation of the same rather it was the 1<sup>st</sup> Respondent who was bent on recovering the same.

16. The Petitioner confirmed that the present suit commenced in the year 1986 prior to the filing of the present Petition and that there has been continuous litigation between the disputant families contrary to allegations by the 1<sup>st</sup> Respondent that that there has been nothing going on since the dispute arose.

17. That the commencement of the dispute was instituted in the year 2004 before the district tribunal by Hezekiah Karanja Njagi which dispute was illegally determined on the 15<sup>th</sup> September 2004. An appeal was lodged at the Provincial Appeals Committee which was determined on the 17<sup>th</sup> February 2010. The Petitioner then filed Judicial Review No. 117 of 2011 at the Nakuru High Court, which was determined on the 31<sup>st</sup> May 2017.

18. That the petition could not have been filed in the year 1986 since the prayers sought range from the action taken by the Respondent that occurred as late as the year 2017 and 2006.

19. The Petitioner admitted that he was not party to the proceedings in the Nyahururu CMCC No. 83 of 2006 which proceedings gave rise to the grant of letter of Administration in P & A dated the 6<sup>th</sup> September 2006, this was because the Petitioner's family was not informed of the existence of the same thus they were pre-empted from challenging the same.

20. That the 12 years limitation period had not lapsed and of it did, a challenge to the succession proceedings had no time limit. That the objections by the 1<sup>st</sup> Respondent were purely cosmetic and did not override the hearing of the substantive issues of the Petition.

21. In the year 2017, the directions for subdivision of the suit land by the 2<sup>nd</sup> Respondent was issued after the superior court sitting in Nakuru in Judicial Review No. 117 of 2011 had declared the entire proceedings of the District and Provincial Disputes Tribunals illegal.

22. On the issue of incompetency of the petition, it was the Petitioners' submission that the 1<sup>st</sup> Respondent had not demonstrated the fatalities in form and/or substance on the face of the Petition other than stating that the Petitioner had not laid down the violations of the Constitution.

23. It was the Petitioner's submission that indeed their Petition had clearly stated that the Petitioner had been denied the quiet enjoyment of the property by unlawful process adopted by the 1<sup>st</sup> Respondent in reference to the proceedings in the District and Provincial Appeals Disputes Tribunals. Secondly, that the 2<sup>nd</sup> Respondent's action of the issuance of a title deed when there was a pending dispute and immediately directing the survey of the suit premises a day after the court's determination was unlawful.

24. It was their submission that the process of the law was what they were questioning and that they had outlined their injury suffered in their

petition.

25. The Petitioner submitted that although the 1<sup>st</sup> Respondent had raised the issue that the relief sought by the Petitioner in their petition was civil in nature, yet the Petitioner was calling upon the court to make a determination on declaration of rights. That under Article 23(3) a-b of the constitution, the court had jurisdiction to hear and determine issues similar to what Civil Court can determine.

26. The Petitioner further submitted that the fact that they had not been party to the proceedings that had issued orders against his interest, forms reason why this court should hear the merits of the petition. That there was no limitation on the manner in which a party could challenge a decision of the court as it could be by way of review, appeal or even by a petition like the present one.

27. That vide the annexure marked as ANK 1 in the Petitioner's supporting affidavit, the Petitioner had authority to institute the Petition to any matter, cause or case as would arise and/or to defend such a matter, cause or case.

28. The Petitioner relied on sections 159(1) (D) and sections 22(3) (B) of an unspecified Statute of the law.

29. The Petitioner also relied on the decided cases of;

i. **Nkakuru ELC Petition No. 35 of 2014, Lekinyot Ole Lanke vs. Attorney General and 2 others.**

ii. **Nyahururu ELC Petition No. 9 of 2012, Boniface David Chege and 33 others vs. Attorney General and 4 others.**

30. I have considered the Respondents' application on a point of Preliminary Objection to the effect that the court lacks jurisdiction over this matter by virtue of the provisions of Section 7 of the Limitation of Actions Act, that the petition was incompetent, fatally defective and an abuse of the court process, there had been no violation of any Constitutional rights to warrant invocation of Article 22 of the Constitution and that the prayers sought were incapable of being granted as the Petitioner had no locus standi having not been party to the Nyahururu Chief Magistrate's Succession Cause No. 83 of 2006.

The matters for determination.

i. Whether the Preliminary Objection raised is sustainable.

ii. Whether the said Preliminary Objection has merit and should be upheld.

31. The leading authority on what constitutes a preliminary objection is the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed that:

*“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.*

In the same case Sir Charles Newbold, P. stated:

*“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.*

32. In the Petition dated 21<sup>st</sup> February 2018 and filed on the 22<sup>nd</sup> February 2018, the Petitioner moved this Court for orders that the proceedings and final orders of the Nyahururu Principle Magistrate in Succession Cause No. 83 of 2006 for the Estate of Hezekiah Karanja Njagi be declared null and void. The Petitioner further sought for a declaration that the issuance of the title deed to the 1<sup>st</sup> Respondent on the 31<sup>st</sup> May 2007 was illegal null and void, further that there be a declaration nullifying the sub division done in respect to all that parcel of land namely Nyandarua /Ol Kalou/1088. The Petition also sought for orders that the title deed issued to the 1<sup>st</sup> Respondent herein on the 31<sup>st</sup> May 2007 be cancelled and that the 2<sup>nd</sup> Respondent be directed to issue the petitioner with a new title deed for the parcel of land namely Nyandarua /Ol Kalou/1088.

33. Under Article 22 of the Constitution, a person may institute court proceedings to claim that its rights and/or fundamental freedoms have been denied, violated or infringed, and/or to act on behalf of other persons whose rights are also being violated, or to act in the public interest.

34. Under Article 258 of the Constitution, a person may institute court proceedings to claim that which has been contravened, or is threatened with contravention.

35. In the decided case of **Anarita Karimi Njeru v Republic [1979] eKLR**, the High Court set out considerations which should guide parties as they seek to file a constitutional reference in the High court. In the words of Trevelyan and Hancox, JJ at p 156, he opined as follows;

*“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.*

36. From such a position, it is a requirement that where a Petitioner alleges that there has been a violation of his/her constitutional right, then the person seeking the court’s intervention should set out with reasonable degree of precision the constitutional rights which have been allegedly violated, the manner in which the rights have been violated, the specific constitutional provisions which have been violated and the relief being sought from the High Court.

37. This is so as to enable that the alleged violators of the constitution to know which Articles of the constitution they are alleged to have violated and how they violated them. An allegation that one has violated a constitutional provision is a serious indictment since the constitution is the supreme law of the Republic and binds all Kenyans. This therefore calls for the need to categorically state which provision of the constitution have been violated or is being threatened with violation.

38. **The onus was therefore on the Petitioner to show a prima facie case of violation of his constitutional rights.** The petition before me has not fully complied with this basic test. The same is founded on generalized complaints without any focus on the Constitutional right that has been infringed. To this effect thereof, I find that **the Petition is fatally defective as it does not set out, with reasonable precision, the provisions of the Constitution alleged to have been violated and the manner in which they have been contravened. The petition has not met the threshold test of constitutional proof as per the principle in Anarita Karimi Njeru case(supra)**

39. 1<sup>st</sup> Respondent also raised a preliminary objection on the question of the court’s jurisdiction to entertain the Petitioner’s petition by virtue of the provisions of Section 7 of the Limitation of Actions Act. Her argument, as I understand it, is that the Petitioner’s cause of action is founded on an action to recover land whose limitation is subscribed by Section 7 of the Limitation of Actions Act which prohibits actions for recovery of land after 12 years from the date when the cause of action accrued.

40. That in the present case the petitioner’s claim to the suit land commenced in the year 1986 more than 3 decades to the filing of the present petition and as such, it was time barred.

41. Section 7 of the Limitation of Actions Act provides as follows:

*An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.*

42. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. A look at the pleadings herein, a fact which is not denied by the Petitioner, that indeed the cause of action arose in the year 1986 wherein the present petition was filed in the year 2018 claiming ownership of the suit land.

43. There is no doubt that the period of about thirty two years has lapsed from the date of the cause of action to the date this Petition was filed and no leave for extension of time to file the same outside the twelve year period has been exhibited before this court. It follows therefore that by the time the Petitioner filed this suit, his claim was statute barred.

44. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

45. Limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament.

46. The Court of Appeal articulated the importance of jurisdiction in the case of the **Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367** in which it expressed itself as follows:

*“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....As soon as that is done, the court should hear and dispose of that issue without further ado.”*

47. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The preliminary objection herein succeeds in its entirety with the result that the Petitioner’s Petition is herein struck out with costs to 1<sup>st</sup> Respondent.

**Dated and delivered at Nyahururu this 11<sup>th</sup> day of October 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**