



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

PETITION NO 6 OF 2016

IN THE MATTER OF ALLEGED CONTRAVENTION/BREACH/INFRINGMENT/THREAT OF PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF ARTICLE 3,19,,22,23,27,28,31,33,40,47,50 AND 165 OF THE CONSTITUTION OF KENYA

BETWEEN

PIUS ISAIGA &57 OTHERS.....PETITIONERS

VERSUS

SAMMY KIPROTICH KOSGEI.....1ST RESPONDENT

KIPLAGAT KOSGEI.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE CABINET SECRETARY MINISTRY OF

INTERNAL AFFAIRS AND CORDINATION OF

NATIONAL GOVERNMENT.....4TH RESPONDENT

THE ATTORNEY GENERAL5TH RESPONDENT

JUDGEMENT

INTRODUCTION

1. The petitioners claim to be descendants of Ten (10) plaintiffs who had filed Eldoret High Court Civil Case No 237 of 1975 against Kipkosgei Arap Cheptulu (deceased). The first and second respondents are sons of the deceased who hold grant of letters of administration ad litem in respect of the estate of the deceased.

2. Tito Amalemba and 9 others had filed a case against the deceased in Eldoret High Court in which they were claiming orders of specific performance among other prayers. The ten plaintiffs were claiming to have bought land from the deceased. The ten plaintiffs obtained ex-parte judgment against the deceased

but this judgment was set aside and the file transferred to the lower court where it was registered as Eldoret SRMCC NO 794 of 1979.

3. During one of the court appearances the plaintiff applied for adjournment which adjournment was granted on condition that the plaintiffs were to pay a certain amount of fees as adjournment costs failing which the case was to stand dismissed. The plaintiffs never complied with the court order and the case was subsequently dismissed and an order of their eviction from the deceased's was issued.

4. The plaintiffs preferred an appeal to the High Court at Eldoret. The appeal was later transferred to Kakamega High Court where it was registered as Kakamega High Court Civil Appeal no 49 of 1991. The appellants never took any step to prosecute their appeal which was dismissed for want of prosecution on 12.3.2015. It is after the dismissal of the appeal that the first and second respondents obtained letters of administration ad litem in respect of the estate of the deceased and applied to substitute the deceased. The application for substitution was allowed and the process of execution started. It is this process of execution which triggered this petition. The petitioners had tried to be enjoined in Eldoret SRMCC NO 794 of 1979 but their application was dismissed. The petitioners also made an objection in Eldoret High Court Succession Cause No 221 of 2015 which is pending determination.

5. The petitioners now seek the following reliefs: -

i) A Permanent injunction restraining the respondents' whether acting by themselves, through their agents, employees, servants or any manner whatsoever from harassing, intimidating, evicting, threatening to evict, executing a warrant of removal pursuant to a judgment in civil suit no 794 of 1979 at Eldoret.

ii) A declaration that the judgment in civil suit number 794 of 1979 at Eldoret has been overtaken by events and is statutorily barred.

iii) A declaration that Eldoret Residents Magistrate's courts civil case no 794 of 1979 abated and no decree or order arising therefrom is executable.

iv) A declaration that the petitioners have had and enjoyed uninterrupted, open and peaceful possession of the property previously known as Nandi/Kapkangani/272 and now property known as Nandi/Kapkangani/1371-1384 since 1969 and it has not been through force, not in secrecy and have acquired the same through adverse possession.

v) A declaration that the petitioners' constitutional rights as per 13 above have been violated and/or threatened to be violated.

vi) General damages for infringement of the petitioner's rights and freedoms under the constitution of Kenya, 2010.

vii) Costs of and incidentals there to be paid to the petitioners by the respondents.

viii) Any other orders.

PETITIONERS CASE

6. The petitioners contend that all the plaintiffs in Eldoret SRMCC 794 of 1979 are deceased. That on 4.3.2015, the first and second respondents with full knowledge that all the plaintiffs in that suit had died, made an application seeking enlargement of time to execute the decree. The first and second respondents obtained the orders ex-parte but that those orders were set aside vide ruling delivered on 2.9.2015. That on 18.6.2016 the County Commissioner Nandi in the company of other security agents who were accompanied with a surveyor went to the suit properties and threatened to evict the petitioners. That thereafter there have been verbal summons from the office of the County Commissioner and police who are threatening to evict the petitioners.

THE FIRST AND SECOND RESPONDENTS CASE

7. The first and second respondents have opposed the petitioner's petition through grounds of opposition dated and filed in court on 12.6.2016 as well as replying affidavits sworn on 11th August 2016 and a further affidavit sworn on 18th October 2016

8. The first and second respondents contended that the petition herein is res judicata and is a gross abuse of the due process of law. That the petitioners have no locus standi to bring up this petition. The first and second respondents contend that they moved to execute the decree of the court after an appeal filed was dismissed for want of prosecution. That the decree and orders of execution were directed at the original plaintiffs and all those claiming under them. That the petitioners have failed to show how they came to the suit land and that they have no interest in the land capable of being protected.

THE THIRD, AND FOURTH RESPONDENTS CASE

9. The third, fourth and fifth respondents have basically supported the petitioners' case through a replying affidavit sworn by Denis O. Omuko on 10.10.2016. The 3rd, 4th and 5th respondents contend that the original ten (10) plaintiffs having died and that since there was no substitution, the case abated and that no decree can be executed after the expiry of 12 years. That this court has to balance the interests of the first and second respondents and those of the petitioners and find that it will cause greater harm to the petitioners than the first and second respondents.

ANALYSIS OF PETITIONERS AND RESPONDENTS CASES AND ISSUES FOR DETERMINATION

10. I have carefully gone through the petition herein, the opposition thereto by the first and second respondents as well as the contradictory positions of the 3rd, 4th and 5th defendant as clearly shown in the replying affidavit sworn 10.10.2016 and the submissions filed on 25th October 2016. The 3rd, 4th and 5th respondents seem to support the petitioners case in the replying affidavit sworn on 10.10.2016 but they make a complete turn in their submissions where they vehemently oppose the petition and call for its dismissal.

11. The dispute which resulted in this petition arises from a property known as LR No Nandi/Kapkangani/272 which was registered in the deceased's name on 29th April 1983. This is the first time the register was opened. The deceased obtained title deed on 4th July 1983. The property was 11.2 hectares. This title was closed on subdivision on 30th October 2013 and it resulted into LR NO Nandi/Kapkangani/1371 to 1384.

12. The petitioners who claim to be descendants of the ten (10) plaintiffs allege that the ten (10) bought portions of the land from the deceased and that the ten (10) have been on their portions since 1969 and that the descendants of the ten (10) have now increased and they are about 400 in number as at the time the petition was filed.

13. It is clear from the history of this case that neither the ten (10) original plaintiffs nor the petitioners have shown that they have any recognizable interest in the land in question. During the life time of the ten plaintiffs, they did not bother to take out letters of administration to continue with the case. There is no single document annexed to the affidavit in support of the petition to show that there was any purchase by any of the ten (10) plaintiffs. A constitutional petition has to be brought by a person who is shown to have some claim to the land in issue for him or her to claim that his or her constitutional rights have been infringed or are threatened. **Halsbury's Laws of England, 4th edition (Re-issue) Vol 8(2)** at paragraph 165 provides as follows:-

“The protection under the constitution of the right to property does not obtain until it is possible to lay claim in the property concernedan applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law.”

14. A number of issues emerge for determination. I will deal with them one by one.

Whether this petition is res judicata.

The first and second respondents contend that this petition is res judicata while the petitioner's contention is to the contrary. Eldoret SRMCC No 794 of 1979 was not heard on merits. It was dismissed on grounds that the plaintiffs had not complied with court orders as regards court adjournment fees. Equally, Kakamega High Court civil appeal No 49 of 1991 was not heard on merits. It was dismissed for want of prosecution. It is therefore clear that this petition is not res judicata.

Whether the decision made in Eldoret SRMCC No794 of 1979 has been overtaken by events or that it is statutory barred

15. Following the dismissal of Eldoret SRMCC No 794 of 1979, the trial magistrate made further orders that the ten(10) plaintiffs were trespassers and ought to be evicted therefrom. The ten (10) plaintiffs filed an appeal against the magistrate's decision to the High Court. There was therefore no eviction which could be done. There is no evidence whether there was stay of execution of the decree pending the outcome of the appeal. What is however clear is that the appeal to the High Court was dismissed for want of prosecution on 12.3.2015. It is after the dismissal of the appeal that the first and second respondents moved to execute. It cannot therefore be argued that the decree is stale or has been overtaken by events. The first and second respondents were just waiting for conclusion of the appeal case and they cannot be blamed for not executing even if there were no stay orders which I have clearly observed I am not in a position to confirm as no evidence was placed before me. I therefore find that the judgment in Eldoret SRMCC No 794 of 1979 is still valid and can be executed and is not statutory barred.

Whether the petitioners have acquired any prescriptive rights over the suit properties

16. The petitioners in one of their prayers are seeking a declaration that they have acquired portions of the land by adverse possession. Acquiring land through adverse possession has a special procedure on how to go about it. This procedure was not followed. The procedure is by coming through originating summons. Even if the petitioners are seeking to be declared as having acquired the land by adverse possession, evidence herein is that the 10 original plaintiffs started staying on the suit land since 1969. The first case by the 10 plaintiffs was filed in 1975. This was after six years from the time of occupation. The effect of filing of the 1975 case is that under the law of adverse possession, time stopped from running. The petitioners or their forefathers cannot therefore have any claim based on adverse possession. I therefore do find that the petitioners have not acquired the suit land by way of adverse possession. In any case the register for the suit property in the name of the deceased was opened on 29th April 1983. If any time was to run, it would not have started running against him until he became registered as owner of the suit land. Any period before that the property was government property and limitation period cannot run against Government land.

Whether the suit in Eldoret SRMCC No 794 of 1979 abated and if so whether a decree arising from that suit can be executed

17. There is no evidence placed before this court to show if any of the 10 plaintiffs is deceased. The only evidence on record is that regarding death of the deceased who was a father of the first and second respondents. A litigant cannot just say that so and so is dead without proof of that fact. The law of evidence is clear that whoever alleges has to prove. It is difficult for this court to make a finding that all the 10 plaintiffs in Eldoret SRMCC No794 of 1979 are dead and that the suit therefore has abated. Not even an attempt was made to say when the plaintiffs are said to have died. Even if it be true that the original plaintiffs have all died, it is their suit which abated as against the deceased. The deceased had already obtained a decree in his favor for eviction of trespassers from his land. The first and second respondents have taken over and they are at liberty to evict any trespassers from the suit land. The first and second respondents are not seeking to evict the petitioners in their capacity as representatives of the alleged deceased persons. I therefore find that execution can be perfectly carried out against any trespassers on the suit land.

Whether any constitutional rights of the petitioners have been infringed or have been threatened

18. I have demonstrated herein above that there was a case filed by the 10 plaintiffs. This case was dismissed. An appeal was preferred which appeal was too dismissed. There is therefore no basis upon which the petitioners can claim any right to the suit land which was owned by the deceased and has since been subdivided. The petitioners cannot claim protection under Article 40 of the constitution as none of their rights have been infringed.

19. The right to a fair administrative action as enshrined under Article 47 of the constitution has not been violated. The petitioners have been participating in all court proceedings pertaining to this case and the previous ones. The petitioners sought to be enjoined in Eldoret SRmcc No 794 of 1979. Their applications was dismissed. The petitioners filed objection proceedings in Eldoret High Court Succession Cause No 221 of 2015. The objection is yet to be determined. They cannot therefore be heard to complain that they have not been heard fairly.

20. The first and second respondents were seeking to enforce a valid court order. As expected, security agencies have to assist in implementing the courts orders. There was therefore no discrimination or any indignity exhibited by the police seeking to explain to petitioners that there was a court order which they were expected to supervise its compliance. That order is yet to be implemented and therefore there is no violation whether real or threatened of Article 27, 28 and 29 of the constitution. One cannot violate another's right by enforcing a lawful order which is carried out in accordance with the law.

21. The petitioners have not stated in what manner their constitutional rights have been violated .In the case of **Anarita Karimi Njeru – versus- The Republic (1976-1980) KLR 1272**, it was stated as follows :-

“we should 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 which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”

In the instant case, the petitioners have not established the basis of their claim to the suit land and the provisions alleged to have been infringed and how their rights have been infringed. I therefore find that no constitutional rights of the petitioners' have been infringed or are threatened to be infringed. The petitioners' have absolutely no basis upon which to bring this petition.

CONCLUSION

22. This petition is clearly an abuse of the process of the court. It is seeking to fault the decision in Eldoret SRCC No 794 of 1979. This is not the purpose of a constitutional petition. I find no merit in this petition which is hereby dismissed with costs to the first and second respondents. The third to fifth respondents expressly said that they do not want costs of the petition.

Signed at Nairobi.

E.OBAGA

JUDGE

Dated, and delivered at **Kitale** on this **30th** day of **May, 2017**.

F.M.NJOROGE

JUDGE

In the presence of:-

M/S Oketch for Mr. Murgor for respondent

Court Assistant - Isabella