



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC PETITION NO. 3 OF 2017

(FORMERLY NYERI ELC PETITION NO. 4 OF 2013)

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 & 40
OF THE CONSTITUTION

BETWEEN

GRACE WANJIRA MITAMBO.....PETITIONER

VERSUS

KIRINYAGA COUNTY COUNCIL.....1ST RESPONDENT

KIRINYAGA COUNTY.....2ND RESPONDENT

JUDGMENT

The tenacity and verve of **GRACE WANJIRA MITAMBO** (the Petitioner herein) to pursue what is clearly a lost cause must be admired. She is the wife of **KARARE MITAMBO** (deceased) who, at the time of his death in 1966, was the registered proprietor of land parcel No. BARAGWE/RAIMU/38 (the suit property). That property was however acquired by the then **KIRINYAGA COUNTY COUNCIL** sometime in 1984 for purposes of expansion of **KIRINYAGA TOWNSHIP** and the deceased was given land parcel No. MWEA/NGUCWI/149 in exchange for the suit property. This exchange was pursuant to a letter from the Commissioner of Lands and addressed to the District Commissioner Kirinyaga headed "**AQUISTION OF LAND BY WAY OF EXCHANGE**". Notwithstanding the fact that the Petitioner, through her late husband acquired the land parcel No. MWEA/NGUCWI/149 in exchange for the suit property, she took advantage of lapses in the Lands office and proceeded to sub-divide the suit property into various plots some of which she sold to other parties. This became the subject of **NYERI HIGH COURT CIVIL CASE No. 265 of 1997** where **JUMA J.** (as he then was) made an order of permanent prohibition prohibiting the Petitioner and others from in any way dealing with the suit property.

The Petitioner was dissatisfied with that judgment and together with his son and others, lodged in the Court of Appeal at Nyeri **CIVIL APPEAL No. 242 of 2000**. That appeal was similarly dismissed with costs on 9th July 2004. In dismissing that appeal, the Judges expressed themselves as follows which is relevant to this Petition:

“Having considered the evidence both oral and documentary as adduced in the Superior Court and having evaluated the same, we have come to the same conclusion as did the learned Judge that there was, indeed, exchange of plot 38 with MWEA/NGUCWI/149 and with that exchange the late MITAMBO’s interest in plot 38 was extinguished. It followed that his wife (1st Appellant) and his son (2nd Appellant) had no title to pass to a third party. Clearly, the two Appellants (1st and 2nd) cannot have it both ways – to acquire MWEA/NGUCWI/149 by exchange and retain plot 38 which was subject of exchange. This is an example of one who wants to eat his cake and have it”.

Plot 38 is of course the suit property herein and one would have thought that that judgment brought to a conclusion any dispute relating to the ownership of that property.

However, the Petitioner is indefatigable in her quest for what she considers to be a violation of her Constitutional rights with respect to the suit property. Almost then years after that judgment, she moved to this Court through this Petition dated 18th April 2013 and originally filed at the **NYERI HIGH COURT** seeking the following orders:

A. A declaration be issued that the acquisition of the Petitioner’s parcel of land namely L.R No. BARAGWE/RAIMU/38 by the 1st Respondent is illegal.

B. A declaration that the proper title to the suit property herein namely L.R No. BARAGWE/RAIMU/38 belongs to the Petitioner.

C. An order that the whole parcel of land known as L.R No. BARAGWE/RAIMU/38 be returned to the Petitioner.

D. In the alternative to (c) above, this Court be pleased to issue an order for compensation to the Petitioner by the 2nd Respondent for the portion compulsorily acquired by the 1st Respondent at the current market rate.

E. Any further relief which this Honourable Court may deem fit to grant.

F. The Respondent be ordered to bear costs of this petition.

The petition is supported by the Petitioner’s affidavit and several annextures and may be summarized as follows:

1. That the suit property was originally registered in the names of her late husband **MITAMBO MACABI** who died in 1966 after which she and her son obtained letters of administration to his Estate and sub-divided it into three plots Numbers 1489, 1490 and 1491.

2. That in 1997, she together with her son and others were sued in **NYERI HIGH COURT CIVIL CASE No. 265 of 1997** and a judgment against them was delivered on 7th December 2007. That being dissatisfied, they filed **COURT OF APPEAL CIVIL APPEAL No. 242 of 2000** at **NYERI** which never questioned the illegalities perpetrated by the **KIRINYAGA COUNTY COUNCIL** including the allegation that her late husband had been compensated in 1974 whereas he had died eight years earlier and also the fact that the plaintiffs in **NYERI HIGH COURT CIVIL CASE No. 265 of 1997** were in influential position and thus able to manipulate records and influence decision. That there was no written agreement between her late husband and the **KIRINYAGA COUNTY COUNCIL**. That there were serious contradictions between the pleadings filed in the **HIGH COURT** at **NYERI** and the evidence adduced including a clear contradiction as to whether her late husband exchanged the suit property with the **KIRINYAGA COUNTY COUNCIL** or whether the same was compulsorily acquired. That the illegal actions of the **KIRINYAGA COUNTY COUNCIL** cannot be legitimized either through the findings in **NYERI HIGH COURT CIVIL CASE No. 265 of 1997** or **CIVIL APPEAL CASE No. 242 of 2000** as the issues of the illegalities by the said **COUNCIL** were never brought in issue. That as a result, she has

suffered greatly as she had already sold some of the parcels resulting from subdivisions of the suit property and the fact that this dispute has been handled by different Courts does not take away her right to approach the Court over the violation of her Constitutional rights. She is therefore entitled to compensation for the value of the suit property because the execution of the decree will amount to a violation of her fundamental rights and freedoms under **Articles 22, 40, 48 and 50 of the Constitution.**

In opposing the petition, **PETER K. GACHATHI** the interim County Secretary to the 2nd Respondent filed a replying affidavit in which he deponed that the petition is vexatious, frivolous, a gross abuse of the Court's process and raises no Constitutional issues for determination. That in the entire petition, the Petitioner has maintained a deafening silence about land parcel No. MWEA/NGUCWI/149 which was received by the Petitioner as part of compensation in respect of land parcel No. BARAGWE/RAIMU/38. That having lost both in the High Court and Court of Appeal, the Petitioner is a vexatious litigant and this petition should be dismissed with costs.

The record shows that on 9th July 2014, **STEPHEN MURIITHI NJERU** and **JAMES KAMARU MATHENGE** filed an application through **A.P. KARIITHI** advocates seeking various orders including being enjoined in this petition. However, it would appear that the said application was never prosecuted. The parties having agreed to have the petition canvassed by way of written submissions, the same were subsequently filed by all the parties by 4th November 2016.

I have considered the petition, the reply by the 2nd Respondent and the submissions by counsel. At this point, it is important to mention that the petition was originally filed by the firm of MUSYOKA & MUIGAI Advocates before the firm of KIMUNYA & COMPANY Advocates came on record for the Petitioner on 9th July 2014. The submissions on behalf of the Petitioner have however been filed by the firm of GITHUI & PARTNERS Advocates although there is no indication on the record as to when they came on board.

The petition is founded under the provisions of **Articles 22, 27 and 40 of the Constitution.** Counsel for the Respondents **MR. KAGIO** has taken issue

with the fact that the alleged violations have not been pleaded with particularity and has cited the case of **ANARITA KARIMI NJERU VS REPUBLIC 1976-1980 K.L.R 1272**. That complaint is not without merit. Apart from citing the provisions of the Constitution alleged to have been violated by the Respondents, the Petitioner did not plead the particulars of the alleged violations and the manner of the alleged infringements with precision as was held in **ANARITA NJERU** case (supra). For instance, in paragraph 14 of the petition, it is pleaded thus:

“The Petitioner avers that under Article 40 of the Constitution, there is an absolute prohibition against compulsory acquisition or possession of her land through the agency of State power including executive, legislative or judicial exercise of power. The same rights were protected under Section 75 of the former Constitution of Kenya”.

And in paragraph 18, it is pleaded that:

“The Petitioner avers that the taking of possession of her land in execution of the Court’s decree will amount to a violation of the Petitioner’s fundamental rights and freedoms under Articles 22, 40, 48 and 50 of the Constitution”.

I do not consider those pleadings to meet the standards set out in the **ANARITA NJERU** case (supra) which were also echoed in the case of **MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & OTHERS 2013 e K.L.R** where the Court of Appeal proceeded to state as follows on the issue of pleadings:

“In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antiethical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (CAP 21) and Section 3A and 3B of the Appellant Jurisdiction Act (CAP 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party”

Imprecise pleadings is however not the only transgression that the Petitioner herein is guilty of. In his replying affidavit in opposition to this Petition, **PETER K. GACHATHI** the 2nd Respondent’s Secretary has described it as vexatious, frivolous and an abuse of the Court process raising no Constitutional issues. He also describes the Petitioner as a vexatious litigant. In my view, that assessment of the petition is justified. The employment of the judicial process to the irritation and annoyance of other parties such as where a party files several suits over the same subject matter or is forum shopping is clearly an abuse of the Court process. A suit is frivolous when it has no substance, is fanciful or the party is trifling with the Court – **CHAFFERS VS GOLDS MID (1894) 1QBD 186**. It is vexatious when it has no foundation or chance of succeeding. In such cases, the Court must exercise its inherent jurisdiction to dismiss it for being an abuse of the Court process – **YAYA TOWERS LTD VS TRUST BANK LTD C.A CIVIL APPEAL No. 35 of 2000**. This petition clearly falls within that category of frivolous and vexatious suits. The suit property has been the subject of previous litigation upto the Court of Appeal. A final decision was made. This petition is a forum shopping exercise. Nonetheless, I will determine it on its merits.

As indicated above, the Petitioner has invoked **Articles 22, 27 and 40 of the Constitution**. **Article 22 of the Constitution** simply recognizes the right of a person to institute proceedings claiming that a right or fundamental freedom in the Bills of Rights has been denied, violated or infringed or is threatened with violation. **Article 27** on the other hand provides for equality before the law. I do not see the relevance of that provision in this petition or how it was violated in respect to the Petitioner bearing in mind that the decision relating to the ownership of the suit land was made by a Court of competent jurisdiction after hearing her case. **Article 40** guarantees a person’s right to own and acquire land and if that land is to be acquired by the State, prompt payment in full of just compensation shall be made and any person has a right to move to Court if that right is violated. The Petitioner appears to be under the wrong impression that the suit property was compulsorily acquired by the State presumably under the **repealed Land Acquisition Act (CAP 295)** which was the law then in force before its repeal with the commencement of

the Land Act on 2nd May 2012. That explains why among the remedies sought is:

“In the alternative to (c) above, this Court be pleased to issue an order for compensation to the Petitioner by the 2nd Respondent for the portion compulsorily acquired by the 1st Respondent at the current market rate”

However, it is now clear beyond peradventure that the suit property was acquired by the Respondents in exchange with land parcel No. MWEA/NGUCWI/149. It was therefore a voluntary exchange of parcels of land not a compulsory acquisition as provided under the repealed Land Acquisition Act (CAP 295). The Court of Appeal made that clear to the Petitioner in the paragraph cited above from its judgment delivered on 9th July 2004. That is why the case of AMACHERRY LTD VS ATTORNEY GENERAL 2014 e K.L.R cited by her counsel in support of her case does not aid her because in that case, the Petitioner had not relinquished his land in exchange for anything. It has been grabbed. That case is clearly distinguishable from this Petition where it has already been established as a fact that the suit property was acquired “*in exchange*” for another parcel of land. That decision having been made by a Court whose decision is binding on this Court, to decide otherwise would amount to sitting on appeal over the decision of a superior Court. Clearly therefore, there can be no basis upon which the Petitioner can allege a violation of her Constitutional right with regard to the suit property. Her deceased husband had the option to accept (which he did) the offer of land parcel No. MWEA/NGUCWI/149 in exchange for the suit property. Having accepted that offer, neither he nor his successors, including the Petitioner, can now turn around and allege a violation of any Constitutional rights with regard to that property and this Court must disabuse her of any such notion by dismissing this petition.

The up-shot of the above is that this Petition is wholly without merit. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

28TH JULY, 2017

Judgment delivered, dated and signed in open Court this 28th day of July 2017

Ms Manyasa for Mr. Kagio for Respondents present

No appearance for Petitioner though notified

Right of appeal explained.

B.N. OLAO

JUDGE

28TH JULY, 2017