REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA AT KERUGOYA

ELC CONSTITUTIONAL PETITION NO. 1 OF 2016

PAULINE KANYIBA NJOGU.....APPLICANT

VERSUS

WANJAO MWARANO.....1ST RESPONDENT

JOHN MURIUKI MWARANO.....2ND RESPONDENT

DEDAN MURIUKI GITHINJI MWARANO.....3RD RESPONDENT

LAND REGISTRAR KIRINYAGA.....4TH RESPONDENT

JUDGMENT

By a Constitutional Application dated 13th February 2015 and filed herein on 17th February 2015, the Applicant **PAULINE KANYIBA NJOGU** sought the following orders against the Respondents:

> ***1. That the Applicant's fundamental rights to own property has been infringed by ordering that land parcel No. MUTIRA/KAGUYU/3216 do revert to the original owner WANJAU MWARANO the 1st Respondent, without her consent.***
>
> ***2. That the order of the Chief Magistrate's Court at Kerugoya in Civil Case No. 233 of 1999 and other orders have since been executed and yet the Applicant was not a party to the suit neither was she notified yet she had the proprietary right over the land subject of this suit.***
>
> ***3. That the Honourable Court in exercise of its supervisory powers be pleased to call for Kerugoya Chief Magistrate's Court Civil Suit No. 233 of 1999 and quash all orders infringing on the Applicant's Constitutional rights.***
>
> ***4. That the Honourable Court be pleased to order reinstatement of the register to the position reflecting the Applicant as the registered proprietor of L.R No. MUTIRA/KAGUYU/3216 as it was before the Un-constitutional acts of the Respondents.***
>
> ***5. Costs of the petition.***

In support of the application, which is essentially a Constitutional Petition premised under ***Articles 22 (1) and 230 of the Constitution***, the Applicant has sworn an affidavit alleging that she is the registered proprietor of the land parcel No. MUTIRA/KAGUYU/3216 (the suit land) and holds the original title deed which is annexture **PKN-1.** That she has developed the suit land and was not aware of Kerugoya Chief Magistrate Civil Case No. 233 of 1999 until she went to the Land Registrar and found that an order

had been made on 15th July 2014 reverting the suit land to the original owner who is **WANJAO MWARANO** the 1st Respondent herein. The cancellation of her title deed to the suit land was therefore in breach of her Constitutional right to own land.

In opposing the application, the 1st Respondent **WANJAO MWARANO** filed a replying affidavit in which he deponed, inter alia, that this application is brought with unreasonable delay as the Applicant was aware of Kerugoya Chief Magistrate's Civil Case No. 233 of 1999 since the year 2002 as per the annexed letter – **WMI.** That the Applicant chose to sleep instead of pursuing her interest in the suit land and this application is an afterthought. That the Applicant in an attempt to steal the suit land from him, made him sign back-dated agreements and only deposited Ksh. 20,000 into his account but never paid him any single coin thereafter. That although he never attended the Land Control Board, he was tricked into signing transfer forms after which the Applicant entered the suit land. That the CID Kerugoya later investigated the deal which they found to be a fraud and so the Court nullified the transaction and the title to the suit land reverted to him as per the proceedings – annexture **WM 2.** That the Applicant went to sleep instead of enjoining herself in that suit. That the Applicant cannot now reverse orders issued 13 years ago and she is therefore barred by the ***Limitation of Actions Act*** and although the Applicant claims that she had the title to the suit land, she did not obtain it properly as no land can cost Ksh. 20,000.

The 2nd and 3rd Respondents did not file any replying affidavit to the application.

The 4th Respondent filed a Preliminary Objection to the application and raised the following grounds:

> ***1. That this Honourable Court lacks the jurisdiction to hear and determine the Originating Summons as filed pursuant to the provisions of Article 162 (2) (b) of the Constitution of Kenya 2010 as read together with Section 13 of the Environment and Land Court Act.***
>
> ***2. That the Applicant's Originating Summons as filed contravenes the mandatory provisions of Section 3 (1) of the Public Authorities Limitation Act hence the Applicant's tortuous claims against the 4th Respondent is statute barred, incurable, defective, fatally incompetent and an abuse of Court process.***
>
> ***3. That the 4th Respondent will suffer prejudice if this instant application is head and determined as filed.***

The 4th Respondent therefore seeks orders striking out the Originating Summons with costs.

When the application was placed before me on 15th March 2016 having been transferred from the High Court by **HON. LIMO J.** where it had erroneously been filed, it was agreed by counsel for the Applicant and the 1st, 2nd and 4th Respondents that both the Preliminary Objection and the application be canvassed simultaneously by way of written submissions which have been filed.

I have considered the application, the rival affidavits by the Applicant and the 1st Respondent and annextures thereto, the 4th Respondent's Preliminary Objection and the submissions by counsel.

I must first consider the 4th Respondent's Preliminary Objection because if it is up-held, then that will bring to a close the Applicant's case. I must however express my displeasure about the not so elegant drafting of this application which, as I have indicated above, is really a Constitutional Petition. It should therefore have been referred to as such not as an application. I will save it by invoking the provisions of ***Article 159 (2) (d) of the Constitution*** and will also henceforth refer to it as a Constitutional Petition.

A Preliminary Objection, as is now well settled following the decision in ***MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696***, must confine itself to pure points of law. In this case, the 4th Respondent has raised issues questioning this Court's jurisdiction to handle this petition and also that it is statute barred. Those are pure issues of law which I will now interrogate.

JURISDICTION:

It is now trite law that where a Tribunal or Court has no jurisdiction to handle a dispute, it must down its tools. In the ***OWNERS OF THE MOTOR VEHICLE LILLIAN 'S' VS CALTEX OIL KENYA LTD 1989 K.L.R 1***, the Court made it clear that the moment a Court determines that it has no jurisdiction in a matter, it shall proceed no further and must down its tools. The argument raised by the 4th Respondent is that this Court lacks jurisdiction in view of the provisions of ***Article 162 (2) (b) of the Constitution*** as read together with ***Section 13 of the Environment and Land Court Act***. ***Article 162 (2) (b) of the Constitution*** provides as follows:

> ***"Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to –***
>
> ***(a) -***
>
> ***(b) the environment and the use and occupation of, and title to land".***

Section 13 of the Environment and Land Court Act sets out the jurisdiction of this Court and the various remedies that it can award. ***Section 13 (1***) is very explicit. It states:

> "***The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land".*** Emphasis added

This Constitutional Petition concerns an infringement of the Petitioner's rights to own land. It cannot therefore be correct to submit, as counsel for the 4th Respondent has done, that this Court lacks the jurisdiction to determine this petition. I don't think any Court is best suited to handle this Constitutional Petition other than this Court and I must therefore reject that argument for which no authority was cited.

THAT THIS PETITION IS STATUTE BARRED:

As indicated above, this petition is brought under the provisions of ***Articles 22 and 230 of the Constitution of Kenya 2010.*** There is no statutory period prescribed for the commencement of a Constitutional Petition and therefore the limitations provided under either the ***Limitation of Actions Act*** or the ***Public Authorities Limitation Act*** are not applicable in this case. ***Article 22 (1) of the Constitution*** provides that:

> ***"Every person has the right to institute Court proceedings claiming that a right or fundamental freedoms in the Bill of rights has been denied, violated or infringed or is threatened"***

Article 230 of the Constitution is of course inapplicable because it deals with the Salaries and Remuneration Commission. However, ***Article 258 (1) of the Constitution*** states that:

> ***"Every person has the right to institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention".***

I am aware, though, that some Judges have dismissed Constitutional Petitions where the parties have moved to Court after an un-reasonable delay. For instance, **MUMBI NGUGI J.** in ***LUCY MUTHONI VS THE HON. ATTORNEY GENERAL CONSTITUTIONAL PETITION No. 374 of 2012 (2016) e K.L.R*** dismissed a Petition filed some 16 years after the event describing that delay as unreasonable. See also ***JAMES NDERITU VS HON. ATTORNEY GENERAL CONSTITUTIONAL PETITION No. 180 of 2011*** where **MAJANJA J.** while appreciating that there is no limitation period for filing proceedings to enforce fundamental rights nonetheless found that un-explained delay of 24 years was inordinate adding that a person whose Constitutional rights have been infringed should have some zeal and motivation to enforce that right. In my view, the fact that no limitation period is provided for under the Constitution within which a Petition alleging violation of a fundamental right can be instituted behoves

the Courts to be very hesitant in closing the door to a litigant who approaches the seat of justice to seek redress. In the circumstances of this case, the Petitioner is aggrieved by an order issued on 15th July 2014 taking away the suit land which order she only became aware of when she visited the Land Registry. This Petition was filed on 17th February 2015 and even if delay was a factor, I would not consider that period to be un-reasonable delay. I therefore find no merit in the Preliminary Objection by the 4th Respondent which I hereby dismiss.

I shall now consider the Constitutional Petition on its merits.

The Petitioner has alleged a violation of her Constitutional rights to own property following the orders issued by the Court in Kerugoya Chief Magistrate's Civil Case No. 233 of 1999 which reverted the suit land to the original owner who is the 1st Respondent without her consent. She has annexed to her Petition a copy of the title deed to the suit land in her names dated 27th November 2001, photographs of structures on the suit land and an order dated 25th September 2002 but issued by the Senior Resident Magistrate on 15th July 2014 which reads:

> "***That the land parcel No. MUTIRA/KAGUYU/3216 do revert to the original owner WANJAO MWARANO awaiting outcome of this suit"***

See annextures **PKN 1-3.** It is instructive to note that the parties in Kerugoya Chief Magistrate's Civil Case No. 233 of 1999 (as per annexture **PKN 3)** are **DEDAN MURIUKI GITHINJI** as plaintiff and **WANJAO MWARANO** and **JOHN MWARANO** as defendants. **WANJAO MWARANO** is of course the 1st Respondent herein. The Petitioner is not a party in that case although there is also another order issued in the same case on 25th September 2014 enjoining the Petitioner as a party in that case and restraining both the plaintiff and the two defendants from interfering, disposing or in any way dealing with the suit land. It is clear from annexture **PKN 3** however that even as the orders dated 25th September 2014 were being issued, orders had been given as far back as 25th September 2002 reverting the suit land to **WANJAO MWARANO** the 1st Respondent herein ***"awaiting the outcome of"*** Kerugoya Chief Magistrate Civil Case No. 233 of 1999. It is not clear how such an order could be issued awaiting the outcome of a pending suit. The 1st Respondent has in his replying affidavit dated 13th April 2015 deponed in paragraphs 4 and 5 thereof that the Petitioner was aware about the existence of Kerugoya Chief Magistrate's Civil Case No. 233 of 1999 because a letter dated 29th April 2002 (annexture **WM 1**) had been addressed to her but "***she chose to go to sleep instead of protecting her interest***". The letter under reference was only addressed to the plaintiff in the Kerugoya Chief Magistrate's Civil Case No. 233 of 1999 demanding that he removes the caution placed on the suit land. All this time, the Petitioner herein remained the registered proprietor of the suit land and her interest therein was protected by virtue of the provisions of ***Sections 27 and 28 of the repealed Registered Land Act*** under which the title to the suit land was registered. Similar provisions are found in ***Sections 24 and 25 of the Land Registration Act 2012***. Under ***Section 26 (1) of the Land Registration Act 2012,*** it is provided as follows:

> ***"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –***
>
> ***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***
>
> ***(b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme".***

Therefore, the claim that the Petitioner slept on her rights to the suit land does not aid the 1st Respondent or indeed any of the Respondents in this Petition because as the registered proprietor of the suit land, the law considers her as the absolute owner thereof and her title could only be cancelled as provided for under ***Section 26 (1) of the Land Registration Act***. The 1st Respondent then goes on to depone in paragraphs 8, 9 and 10 of his replying affidavit that although he received Ksh. 20,000 from the Petitioner

as consideration for the suit land, he was duped into signing agreements and did not attend any Land Control Board. Even if that was the position, the only way that the Petitioner's title to the suit land could be challenged was by filing a suit against her where allegations of fraud or misrepresentation would have been pleaded and proved to the required standard. That title could not be cancelled as was done by the order issued in Kerugoya Chief Magistrate's Civil Case No. 233 of 1999 in which the Petitioner was not a party. Her title to the suit land could only be questioned by filing a suit against her and not by merely addressing letters to her. There was therefore a blatant infringement of the Petitioner's rights to property enshrined under ***Article 40 (1) of the Constitution*** which states:

> "***Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –***
>
> ***(a) of any description; and***
>
> ***(b) in any party of Kenya".***

Essentially, her right to a fair hearing enshrined under ***Article 50 of the Constitution*** was infringed because the suit land which was registered in her names was taken away without giving her an opportunity to be heard. The Petitioner has not only asked this Court to quash the orders issued in Kerugoya Chief Magistrate's Court Civil Suit No. 233 of 1999 infringing on her Constitutional rights but further, to order the reinstatement of the register to reflect her as the registered proprietor of the suit land. On the basis of the evidence before me, she is entitled to those reliefs. ***Section 13 (7) of the Environment and Land Court Act*** is wide and does not limit the remedies available to litigants. It states:

> ***"In exercise of its jurisdiction under this act, the Court shall have power to make any order and grant any relief as the Court deems fit and just; including –***
>
> ***(a) interim or permanent preservation orders including injunctions***
>
> ***(b) prerogative orders***
>
> ***(c) award of damages***
>
> ***(d) compensation***
>
> ***(e) specific performance***
>
> ***(f) restriction***
>
> ***(g) declaration or***
>
> ***(h) costs".***

It is also clear that under ***Article 23 (3) of the Constitution***, the remedies that the Court may award for violation of a right are wide. It reads:

> ***"In any proceedings brought under Article 22, a Court may grant appropriate relief including:***
>
> ***(a) –***
>
> ***(b) –***
>
> ***(c) –***
>
> ***(d) –***

(e) –

(f) – ***"*** Emphasis added

The use of the word "***including"*** means that the remedies available to a party that proves violation of a Constitutional right are not limited to those set out in ***Article 23 (3) of the Constitution***. The Court must therefore consider each case on its peculiar circumstances. I am also satisfied that the Petitioner has met the threshold set out in the case of ***ANARITA KARIMI NJERU VS REPUBLIC 1979 K.L.R 1564*** and demonstrated which provisions of Constitution have been violated in relation to her by the Respondents even though she could have done better with her pleadings. It is not in doubt however that the Respondents knew that the case they were to meet involved infringing on the Petitioner's rights to own property and the specific complaint touched on the orders issued in Kerugoya Chief Magistrate's Court Civil Case No. 233 of 1999 reverting the ownership of the suit land to the 1st Respondent without giving her an opportunity to be heard. It was never the Respondents case that they did not understand the case that they were to meet or that they were prejudiced in any manner. In his submissions on behalf of the 4th Respondent, **F.O. MAKORI** the Litigation counsel stated that the copy of the title deed to the suit land (annexture **PKN-1**) ***"is in-complete and hence it is unclear when the alleged proprietary interest in the suit land was registered and the nature of the said proprietary. Therefore we submit that since the authenticity of annexture PKN 1 cannot be verified, the said annexture is unreliable and inadmissible".*** However, the copy of the title deed to the suit land is duly signed by the Land Registrar showing that it was issued on 27th November 2001. ***Under Section 35 (1) of the Land Registration Act***, this Court is entitled to presume, unless the contrary is proved, that it was signed by the Land Registrar and therefore, it is prima facie evidence that the Petitioner who is named therein as the proprietor thereof, is the absolute and indefeasible owner subject only to any encumbrances, easements or other conditions endorsed therein as provided by the provisions of ***Section 26 (1) of the Land Registration Act*** cited above. The onus was on the Respondents to lead evidence to show that the said title deed was not authentic. No such evidence has been placed before this Court to that effect.

On her part, counsel for the 1st and 2nd Respondents **MS THUNGU** submitted that the Petitioner had the suit land transferred to her illegally by some Administrative officers and further, that the orders dated 25th September 2002 and issued on 15th July 2014 were not final in nature and that the suit is still pending in the subordinate Court. In the course of drafting this judgment, I directed the Deputy Registrar of this Court **MS KASAM** to trace Kerugoya Chief Magistrate's Civil Case file No. 233 of 1999 and I was informed that it could not be traced because it was among the files that may have been destroyed when part of this Court was burnt down. If the case is still pending determination at this Court, then nothing would have been easier than for the 1st and 2nd Respondents to inform the Court when it is next due in Court for hearing. The truth is that the said case file is not available as has been explained by the Deputy Registrar of this Court who is the custodian of all the files and is therefore in the best position to know which files are pending hearing. And even if the case file in respect to Kerugoya Chief Magistrate's Court Civil Case No. 233 of 1999 was available, the undisputed fact is that an order was made therein reverting the ownership of the suit land to the 1st Respondent yet the Petitioner who was then the registered proprietor was not a party to the suit. I am satisfied that the Petitioner has proved that she is entitled to the orders sought in this Petition.

Ultimately therefore, there will be judgment for the Petitioner as against the Respondents in the following terms:

1. An order that the Petitioner's rights to own property has been infringed following the order issued by the Chief Magistrate's Civil Court Kerugoya in Civil Case No. 233 of 1999 reverting the ownership of land parcel No. MUTIRA/KAGUYU/3216 to the 1st Respondent without giving her an opportunity to be heard.

2. An order quashing the said orders issued by the Chief Magistrate's Court Kerugoya in Civil Case No. 233 of 1999 dated 25th September 2002 and issued on 15th July 2014.

3. An order that the register be reinstated to reflect the Petitioner as the registered proprietor of

land parcel No. MUTIRA/KAGUYU/3216.

4. The Petitioner is entitled to the costs of this Petition.

B. N. OLAO

JUDGE

28TH JULY, 2017

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

Ms Manyasa for Ms Thungu for 1st and 2nd Respondents present

Mr. Mwai for Applicant absent

Applicant also present

2nd Respondent also present

Right of appeal explained.

B. N. OLAO

JUDGE

28TH JULY, 2017