



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
OF KENYA AT KITALE
ELC PETITION NO.1 OF 2016

SUSAN CHEPKURGAT ROBINSON.....1ST PETITIONER

CHEPOWANGO CHEPTOO ROBINSON....2ND PETITIONER

VERSUS

ROTINO MOIBEN.....1ST RESPONDENT

LAND REGISTRAR, WEST POKOT.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

1. The petitioners sued for the following orders against the defendants:-

- 1) **Cancellation of Land title to West Pokot/Siyoi A/4408, 4409 and 4410;**
- 2) **Registration of the suit properties in the names of the petitioners;**
- 3) **Eviction of the 1st respondent, his agents, servants, attorneys and any other persons who act for him;**
- 4) **Costs of this petition.**

2. It is the petitioner's case that their constitutional rights have been violated; that what happened to them in respect of the suit land is a matter of clear historical injustice; that they have been discriminated against; that they have been treated inhumanely contrary to **Article 28** of the Constitution, and that their rights under **Article 40(2)** and **(b)** have been violated as well as under **Article 47(1)** hence this petition.

The Petitioners' Case

3. The petitioners' version of events pertinent to this petition is that in the year **1964**, the late Malcolm Sewell Robinson (who was the 1st Petitioner's father as well as the 2nd Petitioner's customary law husband) bought land within Siyoi A/197 from a person known only as Arap Tenai to settle his family on. The deceased put up a semi-permanent structure on the land and settled his family thereon, and the family grew pyrethrum, coffee and practiced dairy farming on the land.

4. The deceased was a school principal. He worked in places far from the farm. He would send money to his family. On one occasion, he failed to do so and the 2nd petitioner borrowed **Ksh.7000** from the 1st Respondent to cater for the family's pressing needs. She awaited her husband to come back and repay the money to the 1st Respondent.

5. It is claimed that three days after lending the Ksh.7000 to the 2nd petitioner, the 1st respondent allegedly evicted the 2nd petitioner's children from the farm in the 2nd petitioner's absence. The 1st respondent thereafter took vacant possession of the land. When the 2nd petitioner's husband returned the 1st Respondent barred him from accessing the land. The 2nd petitioner's husband then, out of frustration, took two of his daughters to Gilgil Secondary School where he continued to stay with them.

6. It is alleged that the 2nd respondent attempted to get back the land in vain as the 1st respondent was a feared man in the community. The

2nd petitioner's husband was said to have been threatened by the first respondent and the 2nd respondent resorted to heavy drinking after losing the family land.

7. It is alleged that the 1st respondent's actions of obtaining the suit land by force amounts to a historical injustice which can be addressed by this court through the new Constitution. The registration of the title deed resulting from the subdivision of the suit land is challenged as unlawful.

The 1st Respondent Case

8. The 1st respondent filed an Affidavit in reply to the petition. It is dated 26/1/2016. In that affidavit, states that it is the 2nd petitioner who approached him with an offer to sell the land to him in **1966**, which he took up and paid the agreed consideration of **Ksh.7000**; That the land had no title at the time of purchase, the husband to the 2nd petitioner did not pursue the land issue since he was aware of the sale; that the 1st Respondent has lived on the suit land for **50 years** and there has been delay in bringing this petition; that this is a matter relating to contract and no constitutional issues arise; that the land parcel No. **West Pokot/Siyoi/A/197** was the subject of a first registration under **Section 143** of the now repealed **Registered Land Act** and cannot be impeached and that it being a claim for the recovery of land though disguised as a petition it is clearly time barred by the provisions of **Section 7** of the Limitation of Actions Act; that the 1st Respondent cannot trace the agreement for sale made in **1966** and almost all of his witnesses to the transaction are dead and so he would suffer prejudice if the court entertains this petition; that the 1st Respondent never dealt with the 2nd Respondent's husband since he was not the owner of the suit property; that the 1st Respondent has never wielded so much power as to instill fear in the petitioners to the extent of not seeking legal redress within the statutory time period; that the 1st Respondent believes that the petition is grossly misconceived, mischievous, an abuse of the court process, and devoid of merit and that therefore the same should be struck out or dismissed with costs.

The 2nd and 3rd Respondents Case

9. The 2nd and 3rd Respondents rely on an Affidavit sworn on the **31st March 2016** by one **A. Kavehi**, the Land Registrar, West Pokot. He avers that the information available in the Land Registry does not show that the petitioners ever had any interest in **LR West Pokot/Siyoi A/197** since no documents show that the Land ever belonged to Malcom Sewell Robinson, the 2nd Petitioner's husband. A. Kavehi states that the land was adjudicated in favour of the 1st Respondent in **1975** and that no objection or appeal was raised to such adjudication by the petitioners or by any other person. The land was thereafter registered in the name of the 1st Respondent in the year **1979**. The land has since been subdivided into 3 parcels following issuance of Land Control Board Consent for the exercise.

The Petitioners' rejoinder

10. The petitioners' rejoinder to the averments by the 1st Respondent continued in a further affidavit sworn by the 1st Petitioner on **30/8/20016**. In that Affidavit she states that, based on legal advice she has received if there was a contract for sale of the land, the same would have required consent of the Land Control Board, and that in any event, no contract has been annexed to the Replying Affidavit. According to the 1st Petitioner, nothing can stop a court from cancelling a title document when such registration which it arises from is unconstitutional.

11. Further, they aver, limitation of time does not apply to violation of a Constitutional right. The trustee's possession is the beneficiaries' possession hence time does not run against a beneficiary. The deponent further states that the 2nd Respondent has denied ever selling the land to the 1st Respondent and puts the 2nd Respondent to strict proof.

Issues for Determination

12. I have considered this petition at length. I must deal with two main questions or issues that arise in the pleadings, that is, whether a private citizen can commence or sustain proceedings to enforce fundamental freedoms and rights as against another private citizen and whether there is evidence of violation of constitutional rights.

Whether a private citizen can commence or sustain proceedings to enforce fundamental freedoms and rights as against another private citizen.

The Replying Affidavit of the 1st Respondent raises this issue at its **paragraph 12** where he states as follows:

"12 That I have been advised by my Advocates on record which advice verily believe to be true that this is purely an issue of contract and which doesn't raise even a single issue of the interpretation of the constitution or any other issue in the Public Law domain."

13. Even though in the eyes of the 1st respondent the issue is purely a matter of contract between the parties, allegations of violation of constitutional rights have been raised and the court needs to inquire into whether there was any such violation. As long as it is a pleading that is provided for by law, the pleading by which the proceedings were instituted must be taken as it is and not as what the respondent would have preferred it to be. It is the issues therein that have to be tried.

14. In the current petition, it is alleged, though denied that the 1st Respondent acquired the 2nd Petitioner's land using brute force and that he has remained on the said land to date. It is not alleged by the petitioners that the 1st Respondent was a state officer or a public officer.

15. Allegations of violation of constitutional rights are usually leveled at the state or state bodies where they have acted or omitted to act in a certain manner hence leading to the alleged violation.

16. However individuals and non-state bodies may at times be deemed capable of violating a person's constitutional rights. There are previous decisions of this court which have focused and ruled on this issue.

In **Petition No.70 Of 2012** between **Mike Rubia Samuel and Njunu Mugwe (suing personally and on behalf of Orange Democratic Party-Murang'a County Branch)** and **Dr. Moses Wangi Peter Munga, Jimnah Mbaru (sued personally and on behalf of Murang'a County Initiative)** Lenaola J (as he then was) stated as follows:

“In that regard, I maintain that the Constitution is not a substitute for all redress of all injuries especially where the Petitioner has another remedy in law. If that be the case, he must pursue that remedy instead of making constitutional issues of what really is a pure matter of private law and where private law has an adequate remedy. As to the issue whether a private citizen can allege a violation of fundamental freedoms as against another private citizen, I reiterate the findings in the Jemima Wambui Ikere Case (supra) where the Court stated as follows;

“I am clear in my mind that the Constitution in Articles 2 and 20 and the definition of the term “person” under Article 260 envisaged both vertical and horizontal application of the Bill of Rights; vertical application between the citizen and the State and horizontal application between one citizen and another citizen. Article 2 of the Constitution provides that ‘this Constitution is the supreme law of the land and binds all persons and all state organs at both levels of government’. Similarly, Article 20 provides that; ‘The Bill of Rights applies to all and binds all state organs and all persons’. Article 260 has defined a person as ‘including a company, association or other body of persons whether incorporated or unincorporated’. My reading of the above provisions of the Constitution reveals that no person is above the Constitution and every person is bound by the provisions of the Constitution including the Bill of Rights. It therefore means that the Petitioners are entitled under Article 22 of the Constitution to institute a claim alleging a violation of the Constitution whether those violations are by a private citizen or the State.”

I do not see any reason and the Respondents have given me none as to why I should depart from the above reasoning. It is also clear to my mind that there is nothing in the Constitution that draws the distinction between vertical and horizontal application of the Bill of Rights. The Bill of Rights applies to all persons and binds everybody. My sister and brother, Mumbi J. and Majanja J. have respectively and equally held that the Bill of Rights applies both horizontally and vertically. (See Law Society of Kenya v Betty Sungura Nyabuto & 2 Others (2012) e KLR, B.A & Another v The Standard Group Ltd (2012) e KLR) and I agree with their reasoning.”

17. I do find that the claim for redress for violation of constitutional rights against the 1st respondent in the form of a petition is properly before this court.

Whether The Petitioners Have Proved Any Violation Of Constitutional Rights.

18. It is pleaded is that the 1st Respondent had immense influence at the time of the acquisition of the land. Therefore, it is said, even the area Chief did not assist the 2nd Petitioner when she cried to him for assistance as he was a close relative of the 1st Respondent. Is this pleadingsufficient to prove the allegations of violation of rights of the petitioners by the 1st respondent?

19. Mere influence wielded by citizen, however, need not be assumed to automatically translate into propensity to violate other citizen's rights. Facts need be presented to court on how such influence may have been used to tread on the rights of a claimant. Even if the petitioners have claimed that the 1st respondent was a close relative of the then Chief, they have not demonstrated to this court by way of evidence that that was true.

20. This court cannot grant any remedies in constitutional petitions where there are no violations of right demonstrated by petitioners especially when it is evident that other lesser causes of actions, if commenced in the right manner could be entertained by the court. Constitutional petitions are proceedings in respect of serious breaches that transcend the statute law realm and they must be treated with seriousness. The Hon Justice Linnet Ndolo stated as follows in the case of **Industrial Court of Kenya at Nairobi Petition No 19 of 2014 - John Miriti Mbarire versus the Attorney General:**

“In the case of Kemraj Harrikissoon Vs the Attorney General of Trinidad and Tobago [1979] UKPC 3 the Court held that the value of the right for redress for breach of fundamental rights and freedoms is diminished when it is misused as a general substitute for the normal procedures for invoking judicial control of administrative action. I am persuaded that this is the correct interpretation of our jurisprudence even against the backdrop of the current Constitution which elevates labour rights to the Bill of Rights. I do not think that this elevation jettisons the applicable substantive and procedural law on employment and labour relations.”

21. So, regarding the claims against all the Respondents the court finds that these are capable of being raised in an ordinary suit commenced by way of plaint for resolution by the Environment and Land court just like other land disputes which allege trespass or unlawful registration of Land. It is at those proceedings where the evidence, whether by way of documents or oral testimony will be tried and tested by way of the normal methods of proof employed in cases which do not involve claims of violations of constitutional rights.

22. It may appear that under **Article 23(3)** a court may grant any appropriate relief under (a) to (f). The power of the court is not limited therefore when it comes to remedies for constitutional rights violation. That may be so but it must be stressed here that for the court to exercise that jurisdiction evidence of violation of such rights must be presented.

23. Turning specifically to the allegations of violation of right by the 2nd and 3rd respondents, the same requirement of proof stands. In my view, a citizen's mind should remain open as he or she seeks a solution from a public officer, where it is alleged that the public officer has refused to act or is compromised, there is automatic leeway to escalate the problem to that public officer's superiors for a solution. In many instances this is the most available form of evidence to support claims of violation of right at the lower echelons of the service. No evidence of such escalation was presented. Evidence of official governmental actions or inaction that could warrant a petition for remedies for breach of rights of the petitioners herein is simply lacking.

24. In addition, an unfortunate part in the petitioner's narrative is that Land Adjudication officers who were involved in a very important stage in the 1st respondent's march toward acquisition of title to the suit land were not enjoined and no pleading against them was made. It is therefore not clear, in these proceedings whether there are any events that took place during the adjudication stage which would have ameliorated the petitioner's claim. The Land Registrar West Pokot was enjoined but the only allegations made regarding violation of rights are not proved against him.

25. The petitioners have also not attributed their allegations of violation of rights contained at paragraph 30-33 of the petition to any particular person in government or office. The prayers do not indicate who they are seeking orders against and it can only be presumed that the orders are sought as against all the respondent's equally. In this court's opinion, this goes contrary to the norms of pleading in a petition for redress for violation of rights. In the case of **Mumo Matemu Vs Trusted Society For Human Rights Alliance**, the Court of appeal stated as follows:

“Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639* holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing”.

26. In the light of the above, I find that the petitioners' pleading is insufficient to support a claim of violation of rights against the Respondents.

27. For these reasons I find that the petition herein has no merit. The petition is therefore dismissed. As there are evident bonds of kinship between the parties, I hereby order that each party will bear their own costs.

Dated, signed and delivered at Kitale on this 24th day of August, 2017.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Mr. Ngumbi for 2nd & 3rd Respondents

Ms. Sitati for 1st Respondent

Ms. Oketch holding brief for Khaosa for Plaintiff

Judgment read in open court.

MWANGI NJOROGE

JUDGE

24/8/2017