



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
CONSTITUTIONAL PETITION NO. 1 OF 2017

MARGARET WAIRIMU MAGARA.....1ST PETITIONER

FRANCIS MWENJI.....2ND PETITIONER

VERSUS

FAITH WANJIKU GIKUNJU.....RESPONDENT

JUDGMENT

The genesis of this Constitutional Petition are the proceedings in **WANGURU SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 30 of 2005**.

In that case, one **SIMON GIKUNJU KAGO** (as plaintiff) had sued the two Petitioners (as defendants) seeking the main order that he is the legal allottee of the suit premises of 1¾ acres extra field in addition to the rice holding No. 3109 situated at Wamumu Section of Mwea Irrigation Settlement Scheme. When that case came up for hearing on 1st July 2010 before **HON. D.A. OCHARO** – Resident Magistrate – both parties were present and **MR. SONI** advocate holding brief for **MR. OMBACHI** advocate for the plaintiff informed the Court that he was ready to proceed as the hearing date had been taken in Court. However, **MS THUNGU** advocate who was holding brief for **MR. NJAGI** advocate for the Petitioners applied that the matter be stood over generally since **MR. NJAGI** was held up at the **CHIEF MAGISTRATE'S COURT AT EMBU** in Case No. 116 of 2005. That application was opposed by **MR. SONI** who informed the Court that the case had been filed in 2005, that the date had been taken in Court and even his costs had not been paid as directed on 6th May 2010. In a short ruling, the trial magistrate declined to adjourn the matter which then proceeded to hearing and a judgment was delivered on 19th August 2010 in favour of the plaintiff and in the presence of all the parties. No appeal appears to have been filed against that judgment and execution proceeded. From the available record, the matter was lastly in Court on 26th August 2014 when **HON. P.M. KIAMA** Principal Magistrate taxed the plaintiff's bill at Ksh. 60,595.

On 20th January 2017, the Petitioners filed this Constitutional Petition citing *Articles 22 and 40 (1) of the Constitution* and seeking the following remedies:

- 1. A declaration be issued that the Petitioners are the owners of the extra fields attached to their rice holding Nos 4384 and 3173 respectively.**
- 2. A declaration that any judgment entered against the Petitioners without giving the Petitioners a fair hearing is irregular, illegal, null and void ab initio and contravenes Article 40 (I) and (III)**

of the Constitution 2010.

3. An order that the Petitioners own the extra fields attached to their rice holding Nos 4384 and 3173.

4. Any other relief which the Honourable Court may deem fit to grant.

5. The Respondent be ordered to bear the cost of this Petition and the costs in the lower Court.

The Petition is supported by the affidavit of the 1st Petitioner **MARGARET WAIRIMU MAGARA** dated 16th January 2017. It is the Petitioner's case that the 1st Petitioner is the owner of rice holding No. 4384 and the extra field measuring approximately $\frac{3}{4}$ acres while the 2nd Petitioner is the owner of rice holding No. 3173 and the extra field measuring 1 acre within the Mwea Irrigation Scheme. The Petitioners aver that one **SIMON GIKUNJU KAGO** vide **WANGURU SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 30 of 2005** sued the Petitioners over the extra fields attached to their rice holding. That when the hearing came up on 1st July 2010, their advocate **MR. NJAGI** did not turn up but sent **MS THUNGU** to hold his brief as he was held up in Embu Chief Magistrate's Court Civil Case No. 116 of 2005 and asked for an adjournment which was refused. That although they were present, they were not called to ask the plaintiff questions nor give their defence and table documents in support thereof. That they were not present when the judgment was read but they later informed their advocate about what transpired on 1st July 2010 and although he promised to act, he did not do so which forced the Petitioners to instruct another advocate. That the Respondent who substituted the plaintiff in the subordinate Court is now harassing them with execution of Court orders with respect to the rice holding yet the National Irrigation Board by its letter dated 2nd August 2012 confirmed that the extra fields belongs to the 1st Petitioner. That they were denied an opportunity to be heard and have also been deprived of their rights.

In a replying affidavit in opposition to the Petition, the Respondent **FAITH WANJIKU GIKUNJU** re-stated what had transpired in the subordinate Court on 1st July 2010 adding that when the application for adjournment was declined by the trial magistrate, the Petitioners walked away and so the case was heard and a judgment was reserved for 19th August 2010 when it was delivered in their presence. That thereafter, the Petitioners participated in all proceedings and opposed every application for execution and this Petition is meant to pre-empt that process. That the Petitioners Constitutional rights have not been infringed and infact they have been utilizing the Respondent's plot seven years after the judgment in the subordinate Court.

The Petition was canvassed by way of written submissions which have been filed by **MUNENE MURIUKI** advocate for the Petitioners and **G.O. OMBACHI** advocate for the Respondent.

I have considered the Petition, the replying affidavit and the submissions by counsel.

I must commence my determination of this Petition by referring to the case of **ANARITA KARIMI NJERU VS REPUBLIC 1979 K.L.R 154, 1976-80 1 K.L.R 1272** where the Court said:

“If a person is seeking redress from the High Court in 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 have been infringed”.

That decision was of course delivered in 1979 long before the promulgation of the 2010 Constitution. It is however still good law with respect to the need for clarity and precision in matters alleging a breach of Constitutional provisions. The Court of Appeal recently underscored the need for this in **MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & OTHERS C.A CIVIL APPEAL No. 290 of 2012 (2013 e K.L.R)** when it said:

“However, our analysis cannot end at the level of generosity. It was the High Court’s observation that the Petition before it was not the “epitome of precise, comprehensive, or elegant drafting”. Yet the principle in ANARITA KARIMI NJERU (supra) underscores the importance of defining the dispute to be decided by the Court. 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 Appellate 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 issue in controversy. 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”.

Looking at the Petition, it cites **Articles 22 and 40 (1) of the Constitution** but fails to particularize how those provisions were violated. Indeed no reference is made to those Constitutional provisions in the body of the Petition itself which simply refers to the previous proceedings in the subordinate Court with regard to the rice holdings Nos 4384 and 3173 and the extra fields measuring $\frac{3}{4}$ and 1 acre which the Petitioners claim ownership. This Court must remind parties and their legal advisers about the need for precise pleadings as has been emphasized both in the **ANARITA** and **MUMO MATEMU** cases (supra).

Having said so, the Petitioners allege a violation of **Articles 22 and 40 (1) of the Constitution**. **Article 22** provides the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. **Article 40 (1)** on the other hand protects the right by every person either individually or in association with others to acquire and own property. As I have indicated above, the Petition did not conform to the guidelines set out in the cases of **ANARITA** and **MUMO MATEMU** (supra) and so it is not even clear how the above two Constitutional provisions were violated with respect to the Petitioners rights to own property. Nonetheless, my understanding of the Petitioners case is that on 1st July 2010 when the case against them was called in the subordinate Court, they were denied an opportunity to be heard thus violating **Article 50 (1) of the Constitution** which provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body”

Although the Petitioners have not cited **Article 50 (1) of the Constitution**, it is clear in my mind that that is what was contemplated because in paragraph 7 of the supporting affidavit of the 1st Petitioner, it is deponed as follows:

“That we were present on this material day, the plaintiff was called in and he gave his evidence and closed his case, but we were not called in to at least ask questions now that the services of our advocate had been denied and neither were we called to give our defence and table documents we had in support of our defence. Annexed herewith kindly find the proceedings of Civil Case No. 30 of 2005 marked MWM 6”.

In rebuttal to that averment however, the Respondent deponed in paragraphs 7, 8 and 9 of her replying affidavit as follows:

7: “That on 1st July 2010 MS THUNGU Advocate held brief for MR. NJAGI Advocate for the defendants and asked the Court to have the matter stood over generally.

8: That the application was opposed and the Court declined to have the matter adjourned”

9: “That the Advocate holding brief and the defendants decided to walk away and when the matter was reached, it proceeded to hearing when the plaintiff’s case was heard and the Court

reserved its judgment for 19th August 2010”.

The averment in paragraph 9 of the replying affidavit has not been rebutted and this Court can only conclude that when their application for adjournment was declined by the trial Court, the Petitioners and counsel holding brief left the Court. In the circumstances, they cannot be heard to allege that they had no opportunity to “***ask questions or give their defence and table the documents***” to support their case. If they had remained in the Court and not followed counsel outside, they would have had an opportunity to cross-examine the plaintiff and even give their defence notwithstanding the absence of their counsel. However, by walking out of the Court, which has not been rebutted, they left the trial magistrate with no other option other than to hear the plaintiff and deliver a judgment on the evidence that was available. A party who walks out of a Court cannot be heard to claim that his right to be heard has been violated. Whether or not to grant an adjournment was a matter entirely within the discretion of the trial magistrate who was in charge of the proceedings. Given the circumstances of this case and more particularly the un-rebutted averment by the Respondent that the Petitioners walked away when the matter was reached for hearing, any claim that there was a denial of the right to a fair hearing cannot, in my view, be sustained. The opportunity was availed but it was squandered. In the case of **THE UNION INSURANCE COMPANY OF KENYA LTD VS RAMZAN ABDUL DHANJI C.A CIVIL APPLICATION No. 179 of 1996** (un-reported), counsel for the Applicant did not turn up in Court for hearing and his application was dismissed. On appeal, the Court of Appeal addressed itself as follows:

“The law, as we understand it, is not that parties must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and it is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it”

The trial magistrate having declined to further adjourn the case, the Petitioners still had the option to conduct their own defence and not to walk out of the Court and by doing so, they did not utilize that opportunity. Clearly, there was no violation of ***Article 50 of the Constitution***.

Was there any violation of ***Article 40 (1) of the Constitution***? Again the answer is **NO**. The dispute over the rice holding was heard and determined by a Court of competent jurisdiction and it cannot be argued that the Petitioners right to property was arbitrarily taken away.

Finally, it is my view that the Attorney General ought to have been the Respondent in this Petition because the issues raised touch on the conduct of the trial magistrate who conducted the proceedings in the subordinate Court. I am of course alive to the requirement under the Constitution of Kenya ***Practice and Procedure Rules*** that a Petition shall not be defeated by reason of the misjoinder or non-joinder of parties and that the Court may nonetheless deal with the matter. In the circumstances of this Petition however, the Petitioners are themselves guilty of attempting to condemn an important party to those proceedings un-heard. Be that as it may, it is clear from what I have already stated above that this Petition is lacking in any merits.

The up-shot of the above is that this Petition is dismissed with costs to the Respondent.

B.N. OLAO

JUDGE

24TH NOVEMBER, 2017

Judgment dated, delivered and signed in open Court at Kerugoya this 24th day of November 2017

Mr. Ombachi for Respondent present

Ms Kiragu for Mr. Munene for Petitioners present

Right of appeal explained.

B.N. OLAO

JUDGE

24TH NOVEMBER, 2017