



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**CONSTITUTIONAL PETITION NO. 4 OF 2014**

**JOSEPHINE WAIRIMU GITHINJI.....PETITIONER**

**VERSUS**

**LUCY WANJIRU MURIMI.....1<sup>ST</sup> RESPONDENT**

**HARRIS KARURI GITHINJI.....2<sup>ND</sup> RESPONDENT**

**MARK ELIUD MURIMI.....3<sup>RD</sup> RESPONDENT**

**KERUGOYA LANDS REGISTRAR.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**JOSEPHINE WAIRIMU GITHINJI** the Petitioner herein filed this Constitutional Petition on 9<sup>th</sup> July 2014 seeking the following orders:

- a. A declaration that the Petitioner's fundamental right to have her dignity respected and protected has been infringed, violated and threatened by the acts of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally.***
- b. A declaration that the Petitioner was the only legal wife of CYRUS GITHINJI KARURI (deceased).***
- c. A declaration that the purported marriage between CYRUS GITHINJI KARURI (deceased) and the 1<sup>st</sup> Respondent is null and void.***
- d. An order of injunction against execution of the judgment and decree in BARICHO SRMC No. 10 of 2011 LUCY MURIMI VS MICHAEL OTIENO until final determination of this Petition.***
- e. An order of stay of proceedings in KERUGOYA ELC No. 93 of 2012 LUCY WANJIRU MURIMI & 2 OTHERS VS JOSEPHINE WAIRIMU GITHINJI until final determination of this Petition.***
- f. A declaration that the sub-division and subsequent transfer of title No. KIINE/SAGANA/1831 was illegal thus a nullity ab initio.***
- g. A declaration that the re-issuance of certificate of lease of title No. KIINE/SAGANA/388/299***

*was fraudulent and illegal thus a nullity.*

**h. An order that the 4<sup>th</sup> Respondent do reinstate title No. KIINE/SAGANA/388/299 in the name of CYRUS GITHINJI KARURI (deceased).**

**i. An order that the 4<sup>th</sup> Respondent do cancel from Kerugoya Lands Registry records certificate of title Nos KIINE/SAGANA/388/299 and KIINE/SAGANA/2318/2320/2321/2322/2323/2324/2325 and 2326 and restore certificate of title No. KIINE/SAGANA/1831.**

**j. Costs of the Petition plus interest at Court rates.**

**k. Such other order(s) as this Honourable Court shall deem just and fit to grant.**

The background to this Petition is that the Petitioner and **CYRUS GITHINJI KARURI** (deceased) were married on 28<sup>th</sup> December 1968 in a Civil Marriage at Embu and were blessed with five (5) children. Since the celebration of that marriage, they resided in their matrimonial property being title No. KIINE/SAGANA/1831 registered in the deceased's names although the deceased also had another property namely KIINE/SAGANA/229. Before his death in 2003, the deceased had also cohabited with the 1<sup>st</sup> Respondent who bore the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Following the death of the deceased, the Petitioner instituted at the **KERUGOYA PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No. 65 of 2003** to which the 1<sup>st</sup> Respondent objected and land parcels No. KIINE/SAGANA/2321, 2322, 2323 and 388/299 were removed from the said proceedings on the ground that the property was jointly registered in the names of the deceased and the 1<sup>st</sup> Respondent as trustees of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That the succession matter is yet to be concluded to-date. The said land parcels were sub-divisions of KIINE/SAGANA/1831 and that they were done without due process of the law in that:

- a. No Land Control Board consent was obtained to sub-divide
- b. No Land Control Board consent was obtained to transfer
- c. No transfer was signed by the deceased in his life time
- d. No stamp duty was paid on the transfer as provided by the law.

To-date, the records for title No. KIINE/SAGANA/1831 has never been closed at the Kerugoya Lands office and the property is still in the names of the deceased. That the 1<sup>st</sup> Respondent filed **BARICHO SENIOR RESIDENT MAGISTRATE CIVIL CASE No. 10 of 2011 LUCY WANJIRU MURIMI VS MICHAEL OTIENO** seeking eviction orders and mesne profits claiming unlawful occupation of one residential house in land parcel No. KIINE/SAGANA/388/299 which the 1<sup>st</sup> Respondent claimed was hers by producing a certificate of lease issued by the Kirinyaga Land Registrar on 12<sup>th</sup> June 2009 in the names of the deceased. The suit has been determined and the defendant evicted from the house. On 8<sup>th</sup> June 2012, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed **EMBU HIGH COURT CIVIL CASE No. 93 of 2012** against the Petitioner seeking orders that they are the owners of land parcel No. KIINE/SAGANA/2321. That suit is yet to be determined to-date.

Arising from the above chronology of events, the Petitioner filed this Petition as her fundamental rights and freedom to own property have been infringed by the Respondents and she is about to be evicted from her matrimonial property by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are soliciting for buyer for land parcels No. KIINE/SAGANA/2321, 2322 and 2323 being purported sub-divisions of land parcel No. KIINE/SAGANA/1831 registered in the names of the deceased. The Petitioner cited the following Constitutional and legal provisions in support of her Petition:

**Articles 2 (1) and (4), 20 (1) (2) (3) and (4), 21 (1) and (13), 22 (1), 23 (1) and (3), 28, 40, 45 (1) of the Constitution.**

**Sections 6 (1) (a) (b) and 8 (1) of the Land Control Act.**

**Sections 7 (2), 18 (1), 19, 25 (2) and 89 of the repealed Registered Land Act.**

**Sections 10 (1), 19, 52 (1) and 71 of the Stamp Duty Act.**

**Sections 35 (1) and 45 (1) of the Law of Succession Act and finally, Section 9 (a) of the Marriage Act.**

Annexed to the petition is a supporting affidavit and other documents.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the Petition and filed a replying affidavit sworn by 1<sup>st</sup> Respondent. The 4<sup>th</sup> Respondent did not file any response.

In that replying affidavit dated 10<sup>th</sup> November 2014 and also sworn on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the 1<sup>st</sup> Respondent averred, inter alia, that this Petition does not disclose any Constitutional issue and has been irregularly filed as a substitute to appeal in legal suits which she lost apart from **KERUGOYA ELC No. 93 of 2012** which is pending (I have since established that it is infact **KERUGOYA ELC CASE No. 120 of 2012**) and **BARICHO SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 10 OF 2011** where the decree has already been issued and executed.

The 1<sup>st</sup> Respondent deponed that she was married to the deceased under Kikuyu Customary Law on 17<sup>th</sup> September 1988 and they bore the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents while the Petitioner was his first wife though they separated in 1987 and she went to live in Nairobi. That following the demise of the deceased on 31<sup>st</sup> January 2003, the Petitioner invaded her matrimonial home with her grown up children and threw out the 1<sup>st</sup> Respondent and her children.

That on 8<sup>th</sup> October 1993, the deceased had lawfully transferred land parcel No. KIINE/SAGANA/2321 to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, on 13<sup>th</sup> September 1995, the deceased transferred land parcel No. KIINE/SAGANA/2322 to the 2<sup>nd</sup> Respondent but held it in trust for him. On the same day, the deceased transferred the following parcels of land:

- KIINE/SAGANA/2323 to the 3<sup>rd</sup> Respondent but held it in trust for him
- KIINE/SAGANA/2324 to the 3<sup>rd</sup> Respondent but held it in trust for him
- KIINE/SAGANA/2325 to the 1<sup>st</sup> Respondent to hold in trust for the 2<sup>nd</sup> Respondent.

On 25<sup>th</sup> February 1996, the deceased transferred land parcel No. KIINE/SAGANA/388/299 to himself and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

That in 2003, the Petitioner secretly filed **KERUGOYA PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No. 65 of 2003** and included the above properties as part of the deceased's Estate when they actually belonged to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Petitioner also unilaterally obtained an order on 30<sup>th</sup> September 2003 ordering all the tenants on parcel No. KIINE/SAGANA/388/299 who were the 1<sup>st</sup> Respondent's tenants to pay rent to her. The 1<sup>st</sup> Respondent therefore filed an application seeking the removal of the aforementioned properties and account No. 41199 from the Succession Cause and was granted the orders. The Petitioner then filed an appeal being **NYERI HIGH COURT CIVIL APPEAL No. 25 of 2004** which was dismissed with costs on 30<sup>th</sup> July 2004. After some ten (10) years, she moved to the Court of Appeal and filed **COURT OF APPEAL CIVIL APPLICATION No. 16 of 2013** seeking leave to appeal against the orders of the High Court. That application was dismissed with costs on 10<sup>th</sup> October 2013. Therefore the issues relating to

ownership of land parcels No. KIINE/SAGANA/2321, 2322, 2323, 2324, 2325 and KIINE/SAGANA/388/299 have been determined by competent Courts including the Court of Appeal in favour of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

That on 8<sup>th</sup> June 2012, the Respondents filed at **EMBU HIGH COURT CIVIL CASE No. 93 OF 2012** (now **KERUGOYA ELC CASE No. 120 of 2012** seeking the eviction of the Petitioner from land parcel No. KIINE/SAGANA/2321 in which no defence was filed and interlocutory judgment was entered. The said case is still pending yet the Petitioner herein is seeking that this Court determines issues that are also pending in **KERUGOYA ELC CASE No. 120 of 2013**. That the Petitioner is seeking declarations against the sub-division and transfer of land parcel No. KIINE/SAGANA/1831 by the deceased and that land parcel No. KIINE/SAGANA/388/299 to revert to the names of the deceased yet those prayers cannot be made against a deceased person and also, the Petitioner has filed this Petition in her personal capacity and not as a legal representative of the deceased. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents therefore asked that this Petition be dismissed with costs.

By a further affidavit dated 24<sup>th</sup> December 2014, the Petitioner averred that she never divorced the deceased and the law did not allow him to contract another marriage having been married to her under Civil Law. That her Petition disputes the process by which the property was sub-divided and transferred in a controlled area without consent. That the succession proceedings were published in the Kenya Gazette and were therefore not done secretly. That this Petition should therefore be allowed because the Respondents fraudulently sub-divided and transferred the land parcels subject of this Petition.

The Petition was canvassed orally on 24<sup>th</sup> November 2015 with the Petitioner and the 1<sup>st</sup> Respondent being the only witnesses. They both adopted as evidence, their respective affidavits and annexures and were duly cross-examined.

Submissions were thereafter filed both by **MR. KIONI** instructed by **SICHANGI and PARTNERS ADVOCATES** for the Petitioner and **MR. MAGEE** instructed by **MAGEE WA MAGEE ADVOCATES** for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

I have considered the Petition, the rival affidavits, the annexures thereto and the submissions by counsel.

The starting point should be whether this Constitutional Petition, as pleaded, meets the threshold required by clearly identifying the provisions that have been infringed and in what manner. I am satisfied that the standard set out in the case of **ANARITA KARIMI NJERU VS REPUBLIC (1976-80) K.L.R 1272 154** and augmented by the Court of Appeal in the recent case of **MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE C.A CIVIL APPEAL No. 290 of 2012 (2013 e K.L.R)** with regard to setting out with particularity the specific Constitutional right and how it has been violated has been met by the Petitioner.

Going now to the merits of the Petition, I have set out above the particular provisions on which this Petition is premised. **Article 22 of the Constitution** allows every person 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.

Having said so, has the Petitioner established any infringement of her Constitutional rights to warrant the intervention of this Court as sought? That is what I shall now examine.

In my view, what the Petitioner seeks in this Petition is to appeal from orders of previous Courts though disguised as a Constitutional Petition. I do not see how any of her Constitutional rights were violated with regard to the land parcels referred to in this Petition nor how the claim that she was the only legal wife of the deceased or that the marriage between the deceased and the 1<sup>st</sup> Respondent can now be Constitutional issues. Her relationship with the deceased is only being fronted in this Petition to try and scuttle the orders made in **KERUGOYA PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No. 65 of 2013** which were up-held in **NYERI HIGH COURT CIVIL APPEAL No. 25 of**

2004 after which an appeal to the **COURT OF APPEAL NYERI** was dismissed in its **CIVIL APPEAL No. 16 of 2013** whereby all the issues relating to the deceased's Estate and in particular the aforementioned parcels of land were fully determined in proceedings to which she was a party.

With regard to an order of injunction against the execution of the judgment and decree in **BARICHO SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 10 of 2011**, that judgment has already been executed and the defendant evicted from the land parcel No. KIINE/SAGANA/2321. In any event, the Petitioner was not a party to that suit or the owner of the property.

The Petitioner also sought an order of stay of the proceedings in **KERUGOYA ELC CASE No. 120 OF 2012 LUCY WANJIRU MURIMI & OTHERS VS JOSEPHINE WAIRIMU GITHINJI**. The record in that case shows that stay orders were granted on 16<sup>th</sup> July 2015 pending the out-come of this Petition.

It is clear to me that this Constitutional Petition is premised on quick sand. As the owner of the land parcels in dispute, the deceased could lawfully dispose of them during his life time as he did. The only party who can properly allege a violation of any Constitutional or legal right with regard to the same is one who can claim any interest in the said parcels of land. And in my view, the succession proceedings in which the Petitioner was a party and which culminated in an unsuccessful appeal to the Court of Appeal finally settled the issue of ownership of the said land parcels in favour of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. To grant the orders sought in this Petition would amount to reversing orders both of a Court of equal jurisdiction and one of Superior jurisdiction. This Court cannot do that.

In the circumstances, this Petition is devoid of any merit and, I dare say, is an abuse of the process of this Court.

It is accordingly dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**B.N. OLAO**

**JUDGE**

**10<sup>TH</sup> NOVEMBER, 2017**

Judgment dated, delivered and signed in open Court this 10<sup>th</sup> day of November 2017 at Kerugoya

Mr. Wachiara for Mr. Magee for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents present

Mr. Kioni for Petitioner absent

Petitioner present

1<sup>st</sup> Respondent present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**10<sup>TH</sup> NOVEMBER, 2017**

COURT: Further order

In view of the fact that I have made determinations in this Petition, it is my view that KERUGOYA ELC

NO. 120 of 2013 be heard by another Court as it involves the same subject matter.

**B.N. OLAO**

**JUDGE**

**10<sup>TH</sup> NOVEMBER, 2017**