



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CONSTITUTIONAL PETITION NO. 2 OF 2015

**IN THE MATTER OF AN APPLICATION UNDER CHAPTER 4 ARTICLE 22 (1) 23 (1) 3 (F)
AND SCHEDULE 6 PART 5 CLAUSE 19 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF WANG'URU ARBITRATION CASE NO. 5 OF 2007

BETWEEN

JACKSON MWANGI GATHUNA

Suing as the Administrator of the Estate of the late

SHEM GATHUNA THIONGO..... 1ST APPLICANT

JACKSON MWANGI GATHUNA.....2ND APPLICANT

JIMMY HUMPREY GATHUNA.....3RD APPLICANT

AND

PELISCA WAMBUI GATHUNA.....1ST RESPONDENT

JOHN KIMANI GATHUNA.....2ND RESPONDENT

AGNES MUGURU GATHUNA.....3RD RESPONDENT

**(THE CONSTITUTION OF KENYA SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT
PRACTICE AND PROCEDURE RULES 2006)**

JUDGMENT

The petitioners herein filed this Constitutional Petition seeking the following orders:-

- 1. That their fundamental rights to own property has been infringed by the respondents in ordering that rice holding No. 2032 be sub-divided into three (3) portions so that SHEM GATHUNA THIONGO gets one acre, AGNES RUGURU GATHUNA one and a half acre and PELISCA WAMBUI GATHUNA gets one and a half acre without involving the owners and when one of the parties was deceased.***

2. *The award of the MWEA LAND DISPUTES TRIBUNAL was adopted when the defendant was dead.*
3. *This Court in exercise of its supervisory powers be pleased to call for WANGURU ARBITRATION CAUSE NO. 5 of 2007 and quash orders infringing on the applicants Constitutional rights.*
4. *The Court be pleased to order the reinstatement of the 2nd and 3rd applicants as owners of rice holding No. 2032 as it was on 20th September 2011.*
5. *Costs of this application be provided for.*

From the supporting affidavit of **JACKSON MWANGI GATHUNA** the 1st applicant herein and who is suing as the administrator of the Estate of the late **SHEM GATHUNA THIONGO** (deceased), he is the legal tenant and licensee of the rice holding No. 2032 A since 18th February 2011 and he has learnt that the respondents filed a case at the **MWEA LAND DISPUTES TRIBUNAL** (the Tribunal) against his late father **SHEM GATHUNA THIONGO** when he was not the legal tenant of the said rice holding. The Tribunal proceeded to make an award which was adopted by the Court sub-dividing the said rice holding as follows:-

1st Petitioner – 1 acre

1st Respondent – 1 ½ acre

3rd Respondent – 1 ½ acre

That the petitioner was not a party to the Tribunal's proceedings and his Constitutional rights were cancelled without giving him a hearing and even by the time the award was being made by the Tribunal and adopted by the Court, the deceased had already died. Annexed to the petition are the tenant cards for the rice holding No. 2032 A measuring 2 acres in the names of the 1st petitioner, the decree issued in the Senior Resident Magistrate's Court Case No. 5 of 2007, a letter dated 14th June 2012 from the National Irrigation Board addressed to the Principal Magistrate at Wanguru Court and the response thereto, the death certificate of the deceased and a limited Grant ad Litem granted to the 1st petitioner in respect to the Estate of the deceased – annexures **JMG 1 to JMG 5**.

In opposing the petition, the 3rd respondent **AGNES MUGURU GATHUNA** filed a replying affidavit in which she deponed, inter alia, that she is the legal wife of the deceased having married him in 1962 and that he died on 28th February 2011. She confirmed that the decree issued by the Wanguru Senior Resident Magistrate's Court on 20th September 2011 was after her late husband's death but she had not participated in the Tribunal's proceedings. That the rice holding No. 2032 originally belonged to her late husband who surrendered it to her before she in –turn surrendered it to her sons **JIMMY HUMPHREY GATHUNA** (the 3rd applicant) and **JACKSON GATHUNA** (the 1st applicant). That the said 1st and 3rd applicants were not summoned to the Tribunal and she was therefore surprised that their land was taken from behind their backs and given to her and her late husband (posthumously) and a stranger **PELISCA WAMBUI**.

Submissions have been filed by the parties' advocates with Ms Thungu advocate appearing for the petitioners and Mr. Andande advocate for the respondents.

Having considered this petition carefully together with the submissions by counsel, it is doubtful if indeed there is a proper petition before me. It is trite law that a party approaching the Court with a petition alleging a violation or threatened violation of a Constitutional right must demonstrate with a reasonable degree of precision the rights alleged to have been violated or threatened with violation and the manner of the violation – ***ANARITA KARIMI NJERU VS REPUBLIC NO. 1 1979 K.L.R 154***. **BLACK'S LAW DICTIONARY** defines a *Petitioner* as a *party who presents a petition to a Court or other official seeking a relief*. In the **OXFORD ENGLISH DICTIONARY**, a *Petition* is defined as *a formal written request typically signed by many people appealing to authority over a cause*.

Therefore, a Constitutional Petition such as this one now before me must surely allege a violation of a

Constitutional right and seek redress from the person or authority in violation of that right. The person or authority alleged to be in violation of the petitioner's rights must therefore be a party in the petition. From the petitioner's pleading herein, it is clear that the **MWEA IRRIGATION SCHEME** and the **SENIOR RESIDENT MAGISTRATE'S COURT WANGURU** should have been the respondents in this petition. It is that Court which made the orders in Arbitration Case No. 5 of 2007 and it is the Manager of the **MWEA IRRIGATION SCHEME** who cancelled the petitioner's tenant card to rice holding number 2032 A following the decision of the **MWEA LAND DISPUTES TRIBUNAL**. There can be no proper Constitutional Petition before this Court without enjoining the Attorney General and the **MANAGER MWEA IRRIGATION SCHEME** which, under *Section 3 (1) of the Irrigation Act* is a body corporate having perpetual succession and a common seal with power to sue and be sued. The respondent herein did not do anything in relation to the rice holding No. 2032 A and therefore, it cannot be alleged that they have violated his rights. If anything, the 3rd respondent's replying affidavit is wholly in support of this petition. It was clearly a mis-adventure on the part of the petitioner in failing to cite the Attorney General or the National Irrigation Board because the remedies being sought touched on the conduct of those offices. It is obvious therefore that though framed as a Constitutional Petition, this suit is really an appeal against the decision of the National Irrigation Board through its Scheme Manager Mwea and the Senior Principal Magistrate's Court Wanguru with respect to the rice holding No. 2032 A. That explains why this petition has not cited the particular Constitutional provisions alleged to have been violated by the respondents herein. The petitioners must have realized that none of the respondents cited in the petition have violated any of their rights.

In the circumstances therefore, the Constitutional Petition filed herein on 30th April 2015 must be dismissed with no order as to costs.

B.N. OLAO

JUDGE

3RD JUNE, 2016

Judgment dated, delivered and signed in open Court this 3rd day of June 2016.

Mr. Rurige for Ms Thungu for Petitioner present

Ms Nafula for Mr. Andande for Respondent present.

B.N. OLAO

JUDGE

3RD JUNE, 2016