



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

PETITION CASE NO.34 OF 2014

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 34,40 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

**JOSEPH OKEYO OLIK
....PETITIONER**

AND

**THE HON ATTORNEY GENERAL.....1ST
RESPONDENT**

**STEPHEN ODERA NASHON.....2ND
RESPONDENT**

**GEORGE ODUOR ODERA.....3RD
RESPONDENT**

**J.R..R AGANYO T/A AGANYO & ASSOCIATES.....4TH
RESPONDENT**

**CLARANCE JUMBA T/A JUMBA & COMPANY ADVOCATES.....5TH
RESPONDENT**

**NYAWIRI OSERO CARILUS & COMPANY ADVOCATES.....6TH
RESPONDENT**

RULING

1. **J.R.R. Aganyo T/A J.R.R. Aganyo and Associates**, the 4th Respondent, seeks vide notice of motion dated 27th January 2016 to be struck out of the petition and costs be borne by the Petitioner, **Joseph Okeyo Olik**. The application is based on three grounds being that;

a) That the petition does not disclose any cause of action against the 4th Respondent.

b) That if the cause of action did exist, the same has been terminated after the 4th Respondent refunded the Kshs.16,000/= to the Petitioner.

c) That the continued inclusion of the 4th Respondent in the petition is mischievous, misconceived, frivolous and bad in law.

The application is supported by the 4th Respondent's affidavit sworn on the 20th January 2016 in which he among others deposed as follows;

i) That the Petitioner retained him on 11th February 2014 to offer him surveying service in regard to the land he intended to purchase from the 2nd Respondent and paid him Sh.16,000/=.

ii) That his terms of reference was to map and survey the land the Petitioner intended to purchase and did not extend to any warranty on the ownership and transfer of the land which remained the responsibility of the Petitioner.

iii) That he has since refunded the Petitioner the Kshs.16,000/= and the petition against him does not disclose any cause of action. That the petition is misconceived, malicious and an abuse of the court process.

2. The application is opposed by the Petitioner through his replying affidavit sworn on the 22nd April 2016 in which he deposes to the following among others;

a) That the 4th Respondent had been called by the chief named Barack Obondo to a meeting where it was agreed he will undertake the process of transferring the land from 3rd Respondent to 2nd Respondent and then to the Petitioner.

b) That the Petitioner was to meet the attendant costs and paid the 4th Respondent Ksh.16,000/=, 30,000/= and 800/= making a total of Ksh.46,800/= for the exercise.

c) That the 4th Respondent has only refunded Ksh,16,000 out of the total amount of kshs46,800/= and hence he has a cause of action against him.

3. The application came up for hearing on the 19th September 2016 with Mr. Rogo and Okiro for the 4th Respondent and Petitioner respectively making rival oral submissions:

4. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties, the oral rival submissions and concluded as follows;

a) That the petition dated 5th December 2014 and specifically the prayer sought against the 4th Respondent at paragraph 13.03 and the Petitioner counsel's submissions in court on 19th September 2016 leads the court to a finding that the Petitioner only enjoined the 4th Respondent in the petition to get refund of the Ksh.30,800/= that remained outstanding after the payment of Ksh.16,000/=.

b) That a claim of refund of money from an individual person does not require a constitutional petition to pursue it as there are specific statutory and legislative frame work guiding on the process of pursuing claims of refund of money.

c) That flowing from (a) and (b) above, the court associates itself with the finding in **Robina C. Kikungu & 4 others –V- Redeemed Gospel Church, Inc. & 13 others & 7 others** [2015] eKLR where Emukule J, found that where there is no allegation of denial, violation or infringement or threat of any rights of a petitioner guaranteed under the Bill of rights, then such a dispute cannot be resolved by way of a constitutional petition.

d) That in view of the foregoing this court is empowered under **Rule 5 (d)** of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 to either of its own motion or on application of any party, to order the striking out of any party for

misjoinder in order to facilitate the just expeditious, proportionate and affordable resolution of the petition.

5. That having come to the above determinations, the court finds that the notice of motion dated 27th January 2016 has merit and is hereby allowed with costs. That the 4th Respondent is hereby struck out as a party in this petition.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 7TH DAY OF DECEMBER 2016

In presence of;

Petitioner Absent

Respondents Absent

Counsel Mr Orengo for Rogo for 4th Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

7/12/2016

S.M. Kibunja Judge

Parties absent

Mr Orengo for Rogo for 4th Respondent

Court: Ruling dated and delivered in open court in presence of Mr. Orengo for Rogo for 4th Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

7/12/2016