



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC SUIT NO. 1330 OF 2013

PETER MUNGAI NGENGI.....PLAINTIFF

-VERSUS-

MAMA NGINA KENYATTA.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. Two notices of Preliminary Objection are the subject of my determination and disposal herein. The first was filed by the 1st Respondent on 8th October, 2014 when also the 2nd Respondent, who was originally the 3rd Respondent, filed his Notice of Preliminary Objection. Both notices are to the effect that the petition herein as well as the petitioner's claim is statute barred.
2. By way of a brief background, the facts and the litigation history of this petition may be stated as follows.
3. The Petitioner commenced the petition herein on 4th October, 2012. Three Respondents were then named and impleaded. The 2nd Respondent was then Hon. Uhuru Muigai Kenyatta who is currently the President of the Republic of Kenya. He is also the son of the 1st Respondent. The 1st and 2nd Respondents were then sued as the administrators and personal representatives of the estate of Jomo Kenyatta (deceased), who until his death in August, 1978 was the First President of the Republic of Kenya. Hon. Uhuru Kenyatta was sworn in as the 4th President of the Republic of Kenya on 9th April, 2013. Pursuant to the provisions of Article 143 of the Constitution wise and prudent counsel prevailed and the parties on 16th August, 2013 consensually withdrew the petition against Hon. Uhuru Kenyatta.
4. The Petitioner in his petition claimed that his real property was alienated and merged into a parcel of land known as Ngenda/Kimunyu/982 to establish a home for the late Hon. Jomo Kenyatta. To the Petitioner his parcel of land was compulsorily acquired without following the constitutional process then obtaining under Section 75(1) of the Constitution. The Petitioner averred further that title to his parcel of land was discreetly revoked and the parcel transferred to the late Hon. Jomo Kenyatta. The transfer, the Petitioner adds, was effected through falsified documents and without the Petitioner's consent. the Petitioner concluded by stating that his right to own property was violated by the late Hon. Jomo Kenyatta who wielded enormous powers by virtue of his position as the President of the Republic of

Kenya. The Petitioner then asked not only for damages (general and exemplary) but also for an order that 3 ½ acres be exercised from the property known as title No. Ngenda/Kimunyu/982 and be transferred to the Petitioner.

5. In his lengthy affidavit sworn on 27th September, 2012 in support of the Petition, the Petitioner has graphically described the above facts and wraps it up with a deposition as follows:

“That I am old now and about to join my fathers over yonder. I find it expedient to let my children know the truth before my actual grave for my days are numbered”.

6. A Replying Affidavit was sworn and filed by then 2nd Respondent on behalf of the 1st Respondent on 3rd November, 2012. The 1st Respondent denied knowledge of the Petitioner. The 1st Respondent also deposed that the suit property had always belonged to the late Jomo Kenyatta, in whose favour a title was issued on 19th March, 1963. A copy of the Certificate of freehold title issued under the National Lands Registration Ordinance 1959 was exhibited. The 1st Respondent further stated that the acreage of the suit property has never decreased and neither had it increased since the day of registration. The acreage has consistently been 12.54 acres. The 1st Respondent also denied that the Petitioner has ever resided on the suit property. The 1st Respondent further stated that the Petitioner had not availed any documents to support the Petitioner’s ownership to a portion of the suit property. The 1st Respondent concluded by stating that the Petitioner’s claim was time barred due to inordinate delay on the part of the Petitioner in filing the claim.

7. As I understood the Respondents on their objection *in limine*, the Petitioner’s claim and remedies lay elsewhere. Indeed as was submitted by Mr. Kabaiku, for the 1st Respondent, *“the reliefs [sought by the Petitioner] have nothing to do with the Constitution. This is a normal suit and should have been brought normally”*. Such too was the effect and force of the 2nd Respondent’s submissionS through Mr. Kamau. Both Respondents were simply stating that the Petition is a suit in disguise.

8. Evidently, the statute of limitations being the Limitation of Actions Act (Cap 22) would apply only if the matter or cause to be adjudicated and determined did not fall to be labeled as a constitutional matter. Section 7 of the Limitation of actions act (Cap 22) bars claims relating to recovery of land after the expiry of twelve (12) years from the date the cause of action accrued. There is no equivalent or parallel provision for causes originating from constitutional matters. The trend has however been not to time bar a party if the matter touches on the party’s constitutional rights.

9. Consequently, in determining the *in limine* objection, I need to determine whether there is a constitutional matter or whether this petition ought to rank and should have been brought as an ordinary suit for ordinary remedies available under common law.

10. The objection *in limine* was prosecuted by way of oral submissions. Briefly, Mr. Kabaiku for the 1st Respondent submitted that the issues raised by the Petitioner were matters which should have been brought forth through an ordinary suit. Counsel submitted that the Petitioner had claimed that he Petitioner had been evicted from the suit land in 1968. According to Counsel the Petitioner should have laid claim to his property within twelve (12) years from the date of his eviction. This could have been done as late as the year 1980, otherwise pursuant to the provisions of Section 7 of the Limitation of Actions Act, the Petitioners’ claim to the land was time barred. Counsel relied on the cases of **Judy Watiri –v- Chief Land Registrar & 7 others [2014] eKLR** as well as **Esther Gachambi Mwangi –v- Samuel Mwangi Mbiri [2013] eKLR** to support his legal propositions.

11. The 2nd Respondent also in support of the objection *in limine* contended that the Petitioner was hiding behind a constitutional petition to resurrect a claim that was already time and statute barred. The 2nd Respondent added that the Petitioner had not explained why no action was taken by the Petitioner for the more than 30 years, since the demise of Jomo Kenyatta. The 2nd Respondent relied on the case of **Peter Ngari Kagume & 7 others –v- Attorney General [2009] eKLR** for the Proposition that even if there

was a genuine constitutional matter, the delay by the Petitioner in seeking redress was still inordinate and inexplicable and Petition should be declined *in limine*.

12. Mr. Wandaka held the position that the Petition involved a constitutional matter as the Petitioner had been wrongfully and fraudulently divested of his land. Mr. Wandaka explained the delay by stating that the wrongdoer was then the President of the Republic and that subsequently the son too was not only to become a minister but ultimately became the President himself. Relying on the two cases of **Dommic Arony Amollo –v- Attorney General High Court Misc. Case No. 494 of 2003** and **Rutongot Farm Ltd –v- Attorney General & 3 others [2014] eKLR**, Mr. Wandaka submitted that limitation laws do not apply to causes founded upon and under the Constitution. The Petitioner then asked the court not to invoke technicalities to lock out the Petitioner. Finally, Mr. Wandaka submitted that even if the court was to find that the Limitation of Actions Act was applicable, attempts by the 1st Respondent to settle the matter and dispute with the Petitioner by purchasing building stones for the Petitioner meant that time had ceased at one point to run.

13. It is evident from the parties submissions that the survival of the Petition hinges on the issue as to whether the Petition raises a constitutional matter and genuinely so. I am consequently to proceed on that basis and examine whether there has been demonstrated a genuine constitutional matter.

14. The transformative nature of the Constitution did not come as a surprise to many Kenyans. The Constitutional making process which had begun in the 1990's culminated in a purposive and transformative document whose main purpose was to transform the country and facilitate its rebirth in all spheres. This is captured in the principles and values which are outlined in Article 10 of the Constitution and also in almost every first Article of each chapter of the Constitution, running from the Preamble through to Chapter 14 of the Constitution.

15. With the purpose of renewal in the fore, constitutional litigation was bound to rise. Hard empirical evidence need not be availed before one concludes that there has indeed been a steep rise in constitutional litigation. Purposefully too and with the provisions of Article 259(1) (a) & (b) in mind the courts appear consistent that in constitutional litigation the concept of limitation of action has no place especially where a party claims that his rights have been violated: see for example the cases of **Rutongot Farm Ltd –v- Attorney General & 3 others [2014] eKLR**, **Gitau Njau & 9 others –v- Attorney General CP No. 340 of 2012 [2013] eKLR** and **Wachira Weheire –v- Attorney General [2010] eKLR**. I, of course, have no doubt that in matters constitution an aggrieved party should always have some zeal and motivation in enforcing his or her rights if the same have been violated: see **Attorney General of Uganda & Another –v- Omar Awadh & 6 others [EACJ] No. 2 of 2012**.

16. With such increased litigation space in the constitutional arena, the courts have also seen a plethora of ordinary litigation suits where the reliefs and remedies which would lie in ordinary common law remedies are being filed as constitutional matters. In this regard, courts have been vigilant to literally act as a colander and filter out those cases which do not truly fall into the realm of constitutional litigation but are simply so disguised and camouflaged. Thus in the case of **Hon. Uhuru Kenyatta –v- The Star Ltd [2013] eKLR** it was correctly pointed out by the court that not all disputes should attract a constitutional adjudication. Likewise civil matters which have been filed or ought to be filed in the ordinary civil or commercial courts ought not be adjudicated upon as issues of enforcement of fundamental rights and freedoms: see **Booth Irrigation –v- Mombasa Water Products (booth Irrigation No. 1) Nairobi Misc. 1052 of 2004** and also **Edwin Thuo –v- Attorney General & another Nairobi Petition No. 212 of 2011** (unreported). Where therefore exists an appropriate forum to address a party's grievance, the party should be appropriately directed.

17. The result too of the foregoing is that parties coming to court on the basis of the Constitution and alleged violations of their fundamental rights must be able to succinctly lay out their case to enable the court sitting *qua* a constitutional court to assess whether the matter is genuinely a constitutional one: see **Anarita Karimi Njeru –v- The Republic [1980]KLR 1272** and **Trusted Society of Human Rights Alliance –v- Attorney General & 2 others [2012] eKLR**. With detailed and complete pleadings it is the court' duty to determine whether there is a constitutional matter: see the South African case of **NM &**

others –v- Smith & others [2000] 5 S. A 250.

18. I ascribe to the foregoing views and will only add that the court must be vigilant and not entertain every single Petition, notwithstanding the rather liberal and wide wording of Article 23 of the Constitution, when it is evidently apparent that the Petitioner's claim has recourse in ordinary common law remedies rather than constitutional remedies. Busy bodies should be shut out whilst parties with genuine constitutional grievances and concerns welcomed: see **Attorney General of Gambia –v- Njie [1961] AC 617.**

19. The matter in which the Petitioner herein seeks declaratory and substantive reliefs is not an abstract, academic or hypothetical one but one in which the Petitioner genuinely believes that he has real and substantial rights at stake. There is quite clearly a material dispute as to whether the 1st Respondent divested the Petitioner of his rights to a property. For purposes of the objection though, would the dispute herein rank as a “constitutional matter”?

20. What constitutes a constitutional matter is truly for the court to ascertain after pegging the various provisions of the Constitution to the facts as pleaded. The Constitution itself does not define what would constitute a constitutional matter and in view of the context in which various courts use the phrase and interchange the same with other like phrases to wit “constitutional issue” and “constitutional question”, I would hesitate to give a complete definition of the phrase. Suffice though to point out that a constitutional matter would include all the matters listed as falling within the court's jurisdiction under Article 165(3) (b) to (e) (inclusive) of the Constitution. The list though is not to be deemed comprehensive and conclusive lest the transformative function of the constitution is missed and impaired. Suffice to note too that the court should not assume that a matter is constitutional simply because provisions of the Constitution are referred to and or constitutional remedies are prayed for. It is for the petitioner to demonstrate a bona fide and genuine constitutional matter through clear and concise pleadings.

21. With regard to the instant petition and with the foregoing in mind, the petitioner claims that his property was compulsorily acquired after being ejected in 1968. Counsel for the Petitioner further submitted that the acquisition was not done in a procedural manner and that the Petitioner was not compensated. It is to be noted that the Petitioner has not submitted any evidence to show proprietorship of the suit property which was allegedly compulsorily acquired. The petitioner also claims that he was disposed in 1968. Of course, the Respondents deny all these allegations. The 1st Respondent also has tendered evidence to demonstrate that the suit property was owned by the late Jomo Kenyatta as proprietor as early as March, 1963.

22. I hold the view that this is yet another of the many cases where parties advance the theories of constitutional issues or matters even where none exists. The undisputed evidence by the 1st Respondent confirms that the suit property has at all material times been registered in favour of the late Jomo Kenyatta. The registration took place even before the late Jomo Kenyatta became the President of the Republic of Kenya in 1964.

23. The Petitioner's case as pleaded that there was compulsory acquisition also does not hold much. There is no pointer that the property was ever acquired by the Government yet it is such acquisition which hallmarks the process of compulsory acquisition.

24. It is also to be noted that the petitioner himself admits that it is the late Jomo Kenyatta who divested the Petitioner of his land: see paragraph 11 of the Supporting Affidavit. It is stated that it was the late Jomo Kenyatta who prompted the process of fraudulent acquisition of title. Truly if that was the case then the petition has nothing to do with the Constitution. It was then a case of fraudulent acquisition of an individual's private property by another private individual. To state that in such circumstances the constitutional rights have been infringed would amount to visiting the Constitution to purely private civil disputes over land. In such a case the petitioner's remedy lay in an ordinary case for recovery of land and rectification of title which was registered in 1963. The Petitioner then could have sued the late Jomo Kenyatta in 1963 but not between 1964 until even his demise in 1978. After 1978 the Petitioner could have brought an ordinary suit for recovery of land against the 1st Respondent but did not. Time then flew

