



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**ENVIRONMENT AND LAND COURT**

**PETITION NO.5 OF 2015**

**IN THE MATTER OF ARTICLE 19, 20(3), 22(1),(2)(B), 23(1) & (3), 24,25,27 (1) &(2),28,29(D),**

**31(B),35(1), 40,42 AND CHAPTER FOUR AND ARTICLE 157 OF THE CONSTITUTION**

**OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION AND OR ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20((3), 22(1) ,(2)(b), 23(1)  
&(3), 24,25,27(1)&(2),28.**

**29(d),31(b),35(1),40,42 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND**

**PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL.)  
HIGH COURT**

**PRACTICE PROCEDURE RULES, 2006**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO.5 OF 2012**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT'S ACT NO.12 OF 2012**

**BETWEEN**

**EUNICE DOLLY SANDE.....PETITIONER**

**AND**

**THE SIAYA COUNTY GOVERNMENT.....1ST RESPONDENT**

PETER LOLWE OMBEEL.....2ND RESPONDENT

ALLOYS OBUNDE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

### RULING

1. **Siaya County Government** who are the 1<sup>st</sup> Defendant in this proceedings gave notice dated 10<sup>th</sup> march 2015 to raise a preliminary objection on points of law that **Eunice Dolly Sande**, the Petitioner lacks the locus Standi to bring this petition as she has not taken out letters of administration. When counsel appeared before the court on 10th March 2015, they agreed that the Preliminary objection be disposed off through written submissions.
2. The Petitioner's counsel filed their submission dated 6<sup>th</sup> May 2015 while the 1<sup>st</sup> Defendant counsel filed theirs dated, 8<sup>th</sup> July 2015.
3. The 1<sup>st</sup> Defendant's submissions are that petitioner has not moved to court as a representative of an interest group under article 258 of the Constitution but as an individual pursuing her own interest as a daughter of a deceased person who was the registered proprietor of land parcel **South Gem/Kaudha/301** and therefore section 2 of the Law Reform Act applies. That as the Petitioner has not obtained a grant, (under the Law of Succession Act chapter 160 of Laws of Kenya), to sue on behalf of the estate of her deceased father, then she is without capacity to file the petition and the petition should be dismissed with costs.
4. The petitioner's counsel's submission is that the provision of Section 2(3) of the Law Reform Act that disqualifies any person who has not taken out letters of administration from instituting ordinary suit for the estate, that provision do not apply when it comes to filing of Constitutional petitions as they do not belong to the class of ordinary suits. He further submitted that Constitutional Petitions are proceedings in sui generis in that they are special proceedings that are neither Civil nor Criminal in nature and cannot be subservient to the Law Reform Act for the reliefs sought in the petition are for protection against the breach of fundamental rights as provided for under the Constitution 2010. The counsel further submitted that article 22(1), (2) and 258 of the Constitution allows every person to institute court proceedings by way of Constitutional petitions to protect their rights own property and fundamental freedoms in the Bill of Rights and that the Petitioner has lodged the petition on her own behalf and also in the representative capacity to protect the interest of her family members from being forcefully dispossessed of land parcel **South Gem/Kaudha/301** by the Respondents. That the petitioner has demonstrated that their fundamental proprietary rights to own the said land are being breached by the Respondents who have taken steps to dispose them. That the petition therefore is hinged on the violation of the fundamental rights protected by the provisions of the Constitution and not the Law of Succession Act. The Petitioner's counsel then submitted that as article 2(4) of the Constitution provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, then Section 2(3) of the Law Reform Act is ultra vires the provisions of articles 22(1), (2) and 258(1) of the constitution 2010 to the extent that it bars the filing of Constitutional petitions where no letters of administration has been obtained. The counsel referred the court to the following decided cases in support of his submission that the petitioner, as a daughter, to the deceased has locus standi to file the petition even without a grant.

(a) Samuel Angasa Onuko – V – Speaker County Assembly Kisii County & 4 others {2014} eKLR.

(b) Marbury – V – Madison 5 U.S. 137(1803)

(c) Israel Kabwa – V- Martin Banoba Musiga Civil Appeal No.52 of 1995 {1996}  
UGSC

(d) Solo David & Another – V – Pagali Abda & Another HCT – 04-CV – CA -0027

5. The main issues for determination are as follows:

- (a) Whether the petitioner has filed the petition for her own behalf or representative capacity or both
- (b) Whether the petitioner has capacity to file this petition in the absence of letters of administration.
- (c) Whether the petition should be struck out.
- (d) Who pays the costs of the preliminary objection.

6. The court has perused the petition dated 2<sup>nd</sup> January 2015 and the following are the prayers sought marked (i) to (x):

" (I) A declaration do issue that the Petitioner and all the dependants of the late James Wilson Sande are the lawful beneficiaries of the property known as L.R. South Gem/Kaudha/301

(ii) A declaration do issue that the decision by the 1st to 3rd Respondents to enter into and construct a building on the property known as L.R.No

South Gem/Kaudha/301 earmarked to be part of the ECD classrooms in a school to be named Kaudha Chapel Primary School is null and void.

(iii) A declaration do issue that the construction by the 1st to 3rd Respondents of the building earmarked to be part of ECD classrooms in a school to be named Kaudha Chapel Primary School on the property known as L.R. South Gem/ Kaudha/301 is illegal and amounts to a trespass.

(iv) A declaration do issue that to the extent that the 1st to 3rd Respondents with impunity commenced construction by of the building earmarked to be part of the ECD classrooms in a school to be named Kaudha /chapel Primary School without acquiring the property known as L.R.No. South Gem/Kaundha/301 it amounts to a fraud to the community and mismanagement of public resources.

(v) A declaration do issue that the construction by the 1st to 3rd Respondents of the building earmarked to be part of the ECD classrooms in a school to be named Kaudha Chapel Primary School on the property known as L.R No. South Gem/Kaudha/301 amounts to a contravention of the petitioner's and by extension all her family members' fundamental rights as guaranteed under Article 20(3), 22(1) & (3), 24, 25, 27 (3) and (4), 28, 29 (d) and (f), 31, 40, 42 and 47 of the Constitution of Kenya, 2010 and a nullity in law.

(vi) This Honourable court be pleased to order the Respondents to pay the Petitioner general damages for the trespass unlawful entry into and occupation of and construction of the building earmarked to be part of the ECD classrooms in a school to be named Kaudha Chapel Primary School on the property known as L.R. No. South Gem/Kaudha/301.

(vii) This Honourable court be pleased to order the Respondents to remove the building earmarked to be part of the ECD classrooms in a school to be named Kaudha Chapel Primary School from the property known as L.R. No. South Gem/Kaudha/301.

(viii) Alternatively the Respondents to jointly compensate the Petitioner and her family of the current

value of the suit parcel of land known as L.R. NO.South Gem/Kaudha/301 whereat they have constructed the building earmarked to be part of ECD classrooms in a school to be named Kaudha Chapel Primary School.

(ix) Costs of this petition.

(x) Any other order that this Honourable court may deem just and fair to grant."

The court has also considered the submissions by counsel and come to the following finding:

(a) That the Petitioner filed the petition on behalf of herself and the other beneficiaries of the estate of her deceased father, namely **James Wilson Sande** to whom the land parcel South Gem/Kandha/301 had been bequeathed by his late father Jokobo Oti in whose name the property is still registered. From the pleadings filed herein no grant of administration has been obtained in respect of the estate of Jakob Oti to date.

(b) That it is the discovery in 2014 of some construction on a portion of the said property that led the petitioner to file this petition as it was being done without the petitioner's family's consent. The provision of section 45 of the Law of Succession Act chapter 160 of Laws of Kenya outlaws taking of possession, disposing of, or otherwise intermeddling with any free property of a deceased person except as far as expressly authorised by the Act, or by any other written law, or by a grant of representation issued under the Act. The Law of Succession Act, chapter 160 of Laws of Kenya has a commencement date of 1<sup>st</sup> July 1981. The introduction describes it as "An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and the purposes connected therewith, and incidental thereto". Both counsel agree in their submissions that for one to sue or be sued in respect of the estate of a deceased person, it is a prerequisite to be clothed with capacity through a grant of letters of administration issued under the Law of Succession Act. The petitioner herein do not have a grant issued Under the said Act in respect of her deceased grandfather named Jacob Oti, who is reportedly the registered proprietor of the land in question. This is the reason the counsel for 1<sup>st</sup> Defendant issued notice to raise the Preliminary objection and has submitted that the Petitioner therefore has no capacity to file the petition and the same should be struck out.

(c) That in defence of the petitioner's right to file the petition, the petitioner counsel has submitted that no grant is required to be obtained by the petitioner before filing the Constitutional petition and any law that is interpreted to require such a grant as a prerequisite is invalid to that extent in view of article 2(4) of the Constitution. While it is true the constitution 2010 has made it easy for persons to move to the seats of justice especially in protection of the bill of rights, and litigation by public spirited persons on public interest matters, the prayers in the petition filed herein could easily have been pursued upon the Petitioner or any other person agreed upon by the family moving to the Succession Court and obtaining a grant of letters of administration in accordance of the Law of Succession Act, Chapter 160 of Laws of Kenya. The superior courts have in several decisions, including the following ones held that where infringement can be redressed within a legislative framework, the course to follow is to take out proceedings under the framework and not under the Constitution unless that framework does not provide efficacious and satisfactory answer to the litigants grievance.

(a) Busia Petition No.1 of 2014 Joseph Owino Mudiesia & another – V – NEMA & 2 Others

(b) Busia Petition No.8 of 2014 Joseph Ojwang Ovude – V – NEMA & 8 Others

(c) Nairobi Misc. Civil Application No.155 of 2012, Republic - V - National

Environmental Tribunal & 2 others Ex parte Abdulhafidu Sheikh Ahmed Zubeidi

[2013} eKLR, and

(d) Busia H.C. MISC. Application No.84 of 2015, Republic – V – National Environmental Tribunal & 2 Others Exparte Busia sugar Industry Ltd & another.

This court is of the considered view that the petitioner and her family's interests would be better addressed through the legislative framework provided by the Law of Succession Act Chapter 160 of the Laws of Kenya than through the Constitution petition filed herein.

7. That for reasons set out above the court finds merit in the Preliminary objection raised by the counsel for the 1<sup>st</sup> Defendant and the same is upheld. The petition filed herein is dismissed for being an abuse of the courts process with each party bearing their own costs.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**5/11/2015**

Dated and delivered this 5<sup>th</sup> day of November 2015

In presence of

Petitioner N/A

Respondent s N/A

Counsel Mr Indimuli for Petitioner/Respondent

Mr Rakwa for Madialo for Defendant/Applicant

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**5/11/2015**

5/11/2015

S.M. Kibunja j.

Oyugi Court clerk

Parties absent

Mr Indimuli for the Petitioner /Respondent

Mr Rakewa for Madialo for 1<sup>st</sup> Defendant/Applicant

Court: ruling delivered and dated in open court in presence of Mr Mr Indimuli for the Petitioner /Respondent and Mr Rakewa for Madialo for 1<sup>st</sup> Defendant/Applicant.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**5/11/2015**

Mr Indimuli: I pray for leave to appeal.

Court: Leave to appeal granted.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**5/11/2015**