



REPUBLIC OF KENYA



KENYA LAW
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Arita & another v Ocheng) & 8 others; Nyauma & another (Interested Parties) (Environment & Land Petition E001 of 2024) [2024] KEELC 5503 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5503 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND PETITION E001 OF 2024
JM KAMAU, J
JULY 24, 2024
162(2) & (3) AND 165(6)& (7) OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF: ENVIRONMENT AND LAND COURT ACT, NO.09 OF 2011
AND
IN THE MATTER OF: SECTION 5(1) (A) OF THE TRESPASS ACT CAP. 294
LAWS OF KENYA
AND
IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012 LAWS OF KENYA
AND
IN THE MATTER OF: THE MAGISTRATES COURT ACT, CAP.10 LAWS OF
KENYA
AND
IN THE MATTER OF: SECTION 3 OF THE LAW
OF CONTRACT ACT, CAP.23 LAWS OF KENYA
AND
IN THE MATTER OF: THE DOCTRINE OF CONSTRUCTIVE TRUST
AND
IN THE MATTER OF: STAY OF PROCEEDINGS IN NYAMIRA CMCC NO. 38
OF 2022, ANDREW NYAUNDI NDUBI & 2 OTHERS VS. EUNICE
KEMUNTO ARITA & THE HON. ATTORNEY GENERAL, CIVIL
APPEAL NO. ELCA NO.004 OF 2024 & E68 OF 2020 AND E002 OF 2020
BETWEEN



EUNICE KEMUNTO ARITA 1ST PETITIONER
EVANS MORARA NYANGONGO 2ND PETITIONER

AND

JANE BOCHABERI (BEING SUED AS THE REPRESENTATIVE OF THE
ESTATE OF THE LATE HEZRON NDUBI OCHENGE) 1ST RESPONDENT
ANDREW NYAUNDI NDUBI 2ND RESPONDENT
STEPHEN KINANGA NDUBI 3RD RESPONDENT
TIMOTHY ARONI NDUBI 4TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT
THE OFFICE OF DPP - NYAMIRA 6TH RESPONDENT
THE DISTRICT LAND REGISTRAR – NYAMIRA COUNTY 7TH
RESPONDENT
INSPECTOR GENERAL OF POLICE 8TH RESPONDENT
G.N. SAGWA & COMPANY ADVOCATES 9TH RESPONDENT

AND

AGNES N. NYAUMA INTERESTED PARTY
SAMUEL MOMANYI OGECHI INTERESTED PARTY

JUDGMENT

1. The 2 Petitioners herein, Alice Kemunto Arita and her husband Evans Morara Nyamongo have sought a number of reliefs as follows:-
 1. A Declaration that the rights of the Petitioner to privacy under Article 31, to own property under Article 40, to a fair administrative process under Article 47 and a fair hearing under Article 50 of *the constitution* have been violated by the Respondents.
 2. It be declared that by reason of the deceit, concealment and fraud committed by the 1st, 2nd, 3rd and 4th Respondents in proceedings before the Chief Magistrates Court in CMCC No. E2 of 2020, Stephen Kinanga Ndubi Versus Eunice Kemunto Arita & 2 others Nyamira CMCC Cause No 48 of 2019 in the matter of Hezron Ochenge Ndubi- Deceased and Nyamira CMCC No 38 of 2022, Andrew Nyaundi Ndubi & 2 others Versus Eunice Kenunto Arita and the Hon. Attorney General the Court in exercising its Judicial authority was obstructed from promoting and / or protecting the purpose and principles of *the constitution*.
The powers of the Court under Articles 159 (I)(e) were constrained.
 3. It be declared that by reason of the deceit, concealment and fraud committed by the 1st, 2nd, 3rd and 4th Respondents in proceedings before the Chief Magistrates Court in CMCC No. E2 of 2020, Stephen Kinanga Ndubi Versus Eunice Kemunto Arita & 2 others Nyamira CMCC Cause No 48 of 2019 in the matter of Hezron Ochenge Ndubi- Deceased and Nyamira CMCC No 38 of 2022, Andrew Nyaundi Ndubi & 2 others Versus Eunice Kemunto Arita



and the Hon. Attorney General the Court in exercising its Judicial authority the Petitioners' right to fair trial or hearing was contravened or violated.

4. A Declaration that the 1st and 3rd Respondents' grants having been obtained by fraud and material concealment – on these Respondents part, the same are null and void. Consequently, these Respondents the requisite locus standi and capacity to challenge the 1st Petitioner's title L.R. No. North Mugirango/ Boisanga/4600.
 5. An order to bring to this Court and quash the proceedings in Chief Magistrates Court in CMCC No. E2 of 2020, Stephen Kinanga Ndubi Versus Eunice Kemunto Arita & 2 others Nyamira CMCC Cause No 48 of 2019 in the matter of Hezron Ochenge Ndubi- Deceased and Nyamira CMCC No 38 of 2022, Andrew Nyaudi Ndubi & 2 others Versus Eunice Kemunto Arita and the Hon. Attorney General the Court the same having been brought by people who lacked standing and were riddled with fraud on the trial courts.
 6. A Declaration that the petitioner is the registered, rightful and absolute owner, in law of all parcels of land known as L.R. No. North Mugirango/ Boisanga/ 4600.
 7. An order of permanent injunction prohibiting the 1st, 2nd, 3rd and 4th Respondents from entering, remaining, beaconing, trespassing or in any way interfering with the boundaries and title of the 1st Petitioner who is the Registered proprietor of L.R. No. North Mugirango/ Boisanga/4600.
 8. In the alternative, a Declaration be made that there exists a constructive trust in favour of the 1st Petitioner on account of the land Sale agreement dated 3rd December, 2023 , 10th June 2006 and 24th August 2008 between the 1st, 2nd, 3rd and 4th Respondents herein and the late Hezron Ochenge Ndubi, on the one hand and the 1st interested party herein on the other where the Respondents were parties and they received the purchase price and were the suit land was sold and transferred to the 1st Petitioner.
 9. Further by Order of this Court the Deputy Registrar signs sub-division and transfer documents to register and issue a title deed to the 1st Petitioner excised 1 and 1/8 Ace from the larger L.R. No. North Mugirango/Boisanga/2516 on constructive trust.
 10. That by order of this Court the Deputy Registrar of the Court refers the 9th Respondents C.N. Sagwa to the Advocates Commission for professional misconduct and the law Society of Kenya and be held jointly liable for the costs of the petition.
 11. General damages for violation of petitioner's fundamental rights.
 12. An award of aggravated and exemplary damages to be borne by the 1st, 2nd, 3rd and 4th Respondents jointly and severally.
 13. An order that the costs of this petition be provided for.
2. The grounds upon which the 2 seek the aforesaid orders are that; -
1. The petitioners were wrongly and unfairly condemned and ordered to pay general damages in compensation for malicious prosecution against the 2nd, 3rd and 4th Respondents in Nyamira Criminal case No. 519 of 2020 Republic Versus Andrew Nyakundi & 2 others. The compensation case was Nyamira No. 38 of 2020, Andrew Nyakundi Ndubi & 2 others Versus Eunice Kemunto Arita and the Hon. Attorney General which judgement was appealed



to the High Court – Nyamira ELC which was later withdrawn and the lower court being unsuccessfully moved to review its judgment.

2. In Nyamira Chief Magistrate’s Court No. 48 of 2019 parallel letters of administration in respect to the estate of Hezron Ndubi Ochenga were issued to the 1st and 3rd Respondents contrary to law.
3. The 9th Respondent was all along aware of the facts in the foregoing paragraph and did in fact participate in the illegalities.
4. The Chief Magistrate’s Court Nyamira Chief Magistrate Court Case No. E2 of 2020 lacked jurisdiction to entertain the case since the subject matter is very high in its monetary jurisdiction, the value of the property being Ksh. 30,000,000/-
5. There was an issue of constructive Trust in Chief Magistrate’s Court Case No. E2 of 2020.
6. The right to fair administrative action under articles 47, 48 and 50 has been circumvented against the Petitioner.
7. The Petitioners’ rights to be heard under Articles 40 of the constitution of Kenya, 2020 have been violated.
8. Rights to privacy under Articles 31 violated contemporaries with the Petition a Motion was filed under certificate of urgency dated 25/5/2024 seeking the following orders: -
 1. That the Application be certified urgent, service hereof be dispensed with and this application be heard ex-parte in the first instance;
 2. That the court be pleased to issue interim orders of stay of execution of the judgments and consequential decrees for CC no 38 of 20122 and E002 of 2020 pending hearing and determination of this matter.
 3. That after inter partes hearing of this application the court confirms that orders of stay of execution of the judgments and consequential decrees for CC No. 38 of 2022 and E))2 of 2020 pending hearing and determination of this petition.
 4. That the court be pleased to issue an order restraining the 1st Respondent or any other party herein from trespassing into the petitioners’ parcels of land LR. North Mugirango/Boisanga/4600 until this petition is heard and determined.
 5. That costs of this Application be provided for.
 6. That the court be pleased to issue any other appropriate orders relevant to this matter.
3. The 9th Respondent then raised a Preliminary Objection dated 6/6/2024 where among other things she argued that all the issues in this Petition have been canvassed in the lower Court and in some of them Appeal preferred and in others, Applications for Review heard and determined and can therefore not be introduced in this court under a different jurisdiction of Constitutional Petition.
4. The 1st Petitioner responded by claiming that she is seeking the supervisory powers of this court since she has “been mistreated by the lower court.”
5. On his part, the 2nd Petitioner argued that the Preliminary Objection is not properly before the court as there is no Response to the Petition which must be filed and the



6. Preliminary Objection pleaded thereon before the Objection is raised. He also claimed that the matters in the Petition are disputed and the reliefs sought are unique.
7. What is before me is a classic case of the doctrine of constitutional avoidance under which many litigants are now avoiding the conventional way of seeking redress before courts of law. Courts will invariably avoid ruling on constitutional questions if they can resolve a case on other grounds, including statutory.
8. I do agree with the 9th Respondent that all the above issues have been canvassed in the lower court and the only recourse the Petitioners had was to either appeal or apply for review and which was done in some of the cases. Should the Petitioners have felt that they were treated in an unconstitutional way they should not have waited until the cases were over or until their appeals or Reviews were dismissed. They ought to have raised the issues in the courts hearing the matters or moved the relevant Superior Courts in their supervisory jurisdiction or otherwise. As much as this court would want to sympathize with the Petitioners for what they perceive was unfairness to them, its hands are tied. There must be an end to litigation and before then the due process of the law must be followed. In fact, in some of the issues raised in the Petition even in an ideal situation, jurisdiction lies elsewhere.
9. In the premises, this Petition is disallowed and dismissed with no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 24TH DAY OF JULY, 2024.

MUGO KAMAU

JUDGE

In the presence of: -

Court Assistant - Brenda

Petitioner- in person

Respondent's Counsel - N/A

