

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO.45 OF 2011

**IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLE 22 (4) OF THE CONSTITUTION OF KENYA**

=AND=

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF
RIGHTS**

**AND CONSTITUTION UNDER ARTICLE 22 (4) 24,27,35,40,46,47,50 AND 10 OF
THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: MSA HCC NO.652[0.S] OF 1988 AND MSA HCC NO 41 OF
2009**

=BETWEEN=

FOUR FAMRS LIMITEDPETITIONER

=VERSUS=

AGRICULTURAL FINANCE CORPORATIONRESPONDENT =AND=

(1) THE REGISTRAR OF TITLES (2) MILFAN DEVELOPERS LIMITED

**(3) PATBON INVESTMENTS COMPANY LIMITED (4) ALICE GITHERE (5)
MARY WACEKE MUGAI (6) LAURIAN MKALA (7) JANE GITHERE (8) JOHN
NGARA MUGO (9) REGINA WAIRIMU THAARA (10) REV. TEE ORUYA NALO
(11) KENNEDY MWANGI (12) JANE NJOKI GITAU (13) ANN W. WARUNGE (14)
FENOSA HOLDINGS LIMITED (15) GATANNA ENTERPRISES LIMITED (16)
JUSTUS MULWA NDUYA (17) ANDREW MUGAMBI (18) NDATA NI
ENTERPRISES LIMITEDINTERESTED**

PARTIES

J U D G M E N T

1. This judgment is in answer to the Petitioners prayers for the following Declaration and/or orders:-

“a) A declaration that the Respondent’s failure to supply to the Petitioner a rational detailed computed statement of account in respect of Account Number 330435 is an infringement of the Petitioner’s right of access to information enshrined under Article 35 of the Constitution.

b) A declaration that the Respondent’s deliberate failure and refusal to supply to the Petitioner a rational detailed computed statement of account in respect of Account Number 330435 is an infringement of the Petitioner’s right and entitlement to a fair administrative action as enshrined in Article 47 of the Constitution of Kenya.

c) A declaration that the Respondent’s actions of deliberate failure to supply account information in respect of Loan Account Number 330435 has deprived the Petitioner with material/evidence necessary to facilitate a fair trial contemplated by Article 50 of the Constitution in respect of HCCC No.41 of 2009.

d) A mandatory injunction compelling and directing the Respondent to, within thirty (30) days, comply with Article 35 of the Constitution by supplying to the Petitioner and lodge in Court in HCCC No.41 of 2009 at rational full detailed computed statement of account held in respect of the Petitioner’s Loan Account No.330435 on the basis of day to day, month, month to month from the effective date when the loan was advanced in 1984 to date.

e) An order directing the Respondent in compliance with Article 35(2) of the Constitution to delete, exclude and effect correction of the untrue and misleading interest amounts and other penalties accrued effective August,1988.

f)(i) A deletion of accrued/accumulated interest on Kenya Shillings Eighteen Million Forty Five Thousand Seventeen Million Three Hundred Thousand equivalent of the sale proceeds pursuant to court orders in HCCC 652/88 (OS) effective end of April 1991 January 1990 by reason of the Respondent’s lack of co-operation to comply with court orders and rejecting payments and/or refusal to bank cheques issued by purchasers towards liquidating the loan and further refusing to facilitate transfers to purchasers timeously.

(ii) A declaration that accumulated/arrears of interest in excess of double the principal loan advanced is not payable and that interest due in respect of a debt/loan ceases to run when it reaches the amount of the unpaid capital sum.

(iii) A declaration that the Respondent has been in breach/violation as against the Petitioner of the Constitutional principles of equal protection

and equal benefit of law, economic interest[consumer rights], rule of law, fairness, equity and social justice.

(iv) A declaration as null and void the purported loans of kshs.4,500,000/=,Kshs.3,500,000/= and kshs.500,000/= and that auctioning of the Petitioner's property on account of the said loans amounts to violation of law, and infringement of private property rights and hence unconstitutional.

(v) An order nullifying and/or quashing all entries of transfer and titles issued therefrom in breach of Courts Order registered on 9th December, 2009 as Entry No.42 in the land registry photostat copy/records for Plot LR.No.544(ORIGINAL 482/3) Section III Mainland North, for being unconstitutional;

g) A declaration as a violation of the Constitution and an infringement of the Petitioner's property rights protected under Article 40 of the Constitution and as a nullity the purported sales of sub-divisions from LR.NO.544 (ORIGINAL 482/3) Section III Mainland North on account of purported loans other than the admitted lawfully advanced loan of kshs.5,000,000/= which together with interest thereon is fully settled.

h) An order of mandatory injunction directing the Respondents to release the mother title for Plot No.LR No.544 (original 482) Section III Mainland North and the deed plans for the sub divisions not sold by 31st December, 2008 therefrom for the remainder of the land.

i) An order for compensation.

j) Costs of the proceedings.

k) Such other orders of reliefs as this Honorable Court shall deem just."

Those prayers culminate from the averments of law and fact contained in the Petitioners Further Re-Amended Petition dated 31st January 2012 and filed on 1st February 2012.

The Pleadings

2. It is stated by the Petitioner that upon its request, the Respondent advanced to it a loan in the sum of ksh.5,000,000/=. The loan was subject to the Respondents letter of offer of 18th June 1984. As security therefor the Petitioner charged LR No.544 Section III maintained North measuring fifty four Decimal one (54.11) Hectares or thereabouts (hereinafter **The Security**) in favour of the Respondent.

3. It was averred that requests by the Petitioner for additional facilities totaling ksh.8,500,000/= were never considered nor honoured by the Respondents Board of Directors and that no further funds were ever released or disbursed to the Petitioner. The Petitioner

grieves that notwithstanding these, the Respondent erroneously and unlawfully endorsed the requested but not advanced loans in the encumbrance section of the security.

4. In respect to the advanced loan the Further Re-Amended Petition tells of default on the part of the Petitioner. Reasons given were the poor health of its Directors and unfavourable climatic change which adversely affected the Petitioners operations.

5. The default degenerated to litigations being HCCC 652 of 1988 and more recently HCC No.41 of 2009 **Four Farms Limited –vs- Agricultural Finance Corporation**(hereinafter **The Civil Suit**). After some negotiations a compromise was reached in HCCC 652 of 1988 on the manner in which the debt would be settled. The mainstay of the compromise being that the security would be subdivided and the some resultant subplots sold towards offsetting the due amount. The Petition avers that the subsequent sells yielded a sum in excess of sh.17,000,000/=.

6. A grievance by the Petitioner is that the Respondent has failed, neglected or refused to render a detailed Statement of Account in respect to the loan account notwithstanding requests made by the Petitioner. Further that the Respondent has failed to maintain proper accounts as obliged by law. In addition it is averred by the Petitioner that the Respondent has induced accrual of exorbitant interest by refusing to accept payments tendered by the Petitioner towards liquidating the loan and this obstructive conduct has unfairly enriched the Respondent.

7. It is contended by the Petitioner that the Respondents conduct has hindered it from effectively exercising and enforcing its right to property and amounts to an infringement of the fundamental rights as enshrined in Articles 35 and 47 of The Constitution 2010 and that it breaches the values and principles set out in Article 10. And in particular, the infringement has prejudiced and hindered the Petitioner from exercising its right to fair trial in The Civil Suit.

8. On another front the Re-Amended Petition attacks the Respondents stance that the principal loan is in excess of ksh.5,000,000/= and requests that all documents in respect to the loan including the notification of charge indicating or reflecting any amount in excess of ksh.5,000,000/= be declared erroneous, invalid and a nullity.

9. The Petitioner also maintains that the Respondents attempts to sell or selling or keeping the Petitioner away from its private land without giving a rational, full, detailed and proper account has deprived the Petitioner, its Directors and Shareholders their right to enjoy and earn an income. The Petitioner sees this as lowering its inherent dignity and that of its shareholder and Directors.

10. The Petitioner further contends that the Respondents have failed to comply with a valid agreement and Court order and resorted to a different mode of recovering the outstanding loan and this amounts to a violation of the Right to Protection of Law, Social Justice and Economic and Consumer Rights.

11. The Petition also attacks the transfers of subtitles resulting from the subdivision of The Security to Milfan Developers (the 2nd Interested Party) and subsequent transfers thereof to the 3rd – 18th Interested Parties. The Petitioner avers that the transfers were effected inspite of Constitutional Petition 45 of 2011 | Kenya Law Reports 2015

a valid Court order in the Civil Suit and the conduct of the Respondent and the Interested Parties affronts the Petitioners right to private property.

12. The evidence in support of the Petition was contained in the affidavits of Hussein R. Noormohamed (hereinafter Noormohamed) of 29th July 2011, 5th August 2011 and 25th October 2011. He is the Managing Director of The Petitioner Company.

The Response by The Respondent and Interested Parties

13. The Gicheru Rules, just as the Current Rules, required a Respondent opposing a Petition to do so by way of a Replying Affidavit. In opposition to the Petition, the Respondent filed three Replying Affidavits. Two by one Rose Ochanda sworn on 27th August 2011 and 1st November 2011 and another by Amos Wachanga of 22nd August 2011. The former was the Corporation Secretary of the Respondent while the latter was the Accountant.

14. Without going into the details of the evidence, the Respondent defence is that it advanced to the Petitioner a sum of ksh.13,300,000/=, a sum that the Petitioner has all along admitted in writing. That the said loan was duly secured by the security and charges registered thereover in favour of Respondent.

15. That following default in repayment, there were long and winding negotiations on how the loan would be repaid. An agreement was reached which included subdividing the security and disposal of resultant sub plots. Subsequently some plots were sold and the proceeds applied to the repayment of the loan. But as default persisted, the Respondent exercised its statutory power of sale and disposed of a portion of the remaining security on 26th June 2009. The Respondent maintains that the sale was lawful and that there was no existing Court order barring it from exercising its statutory power of sale.

16. In respect to the Statement of Accounts, the Respondent blamed the Petitioner for failing to make requisite payments for processing the Accounts notwithstanding that it had been asked to do so. That aside, the Respondent attached to the Affidavit of Mr Amos Wachanga, a statement which it stated was a detailed statement of account.

17. Two important issues emerge from the rival affidavits of the Petitioner and the Respondent. That there is a pending civil litigation between the two being HCCC No.41 of 2009. By a ruling dated 6th November 2009 Ojwang J (as he then was) restrained the Respondent from,

“selling, auctioning, repossessing, foreclosing, alienating of in any way whatsoever interfering with the parcel of land known as L.R. No.544 [originating 482/3] Section III mainland North, until the final hearing and determination of the main cause.”

18. It is stated for the Petitioner that the order was duly registered in the title to the security on 6th November 2009. But that inspite of it transfers to third parties were duly registered on dates after the entry of the Court order. On its part the Respondent was certain that no Court order existed when it made the sale to one Milfan Developers Ltd. The Respondent sought to point out that the sale was made on 26th June 2009 some months before the Judge issued the restraining order. Milfan Developers Ltd subsequently made sales and effected transfers to other 3rd parties.

19. But something curious, the Petitioner displayed two copies of title, both in respect to the security and both emanating from the hand of The Registrar of Titles Mombasa. One copy had the entry showing the registration of the Court order and another without. For this reason the Land Registrar was enjoined herein as an Interested Party in the hope that he would proffer an explanation on this apparent anomaly.

20. The Registrar of Titles was represented by The Attorney General and chose to react to the Petition by filing grounds of opposition in which he raised the following grounds:-

1. **“That the petition is frivolous, vexatious and an abuse of the process of the court.**
2. **That the Registrar of Titles decision was proper and in order.**
3. **That no constitutional rights have been demonstrated to be breached.**
4. **The Registrar of Titles acted in accordance with the Law and the orders made were not unconstitutional.”**

21. As to Milfan Developers Ltd and the current Registered properties who bought from it, there participation in these proceedings was necessary as the Petitioners prayer for nullification of all the entries of transfers and titles issued after 9th December 2009 would necessarily mean a revocation of their titles. That would prejudice them.

22. On 2nd March 2012, Milfan Developers Ltd filed the following 4 grounds of opposition:-

1. **“THAT the matters raised in the petition are purely a Commercial dispute without any constitutional issues.**
2. **THAT the matters raised in the petition are already being litigated upon inter alia in HCCC NO.41 of 2009 (Mombasa), HC. Misc. Application Numbers 94, 95, 106 and 863 of 2011 (Mombasa).**
3. **THAT the petition is therefore frivolous, vexatious an abuse of court process.**

4. THAT the petition lacks merit.”

23. The other 16 Interested parties purchased various plots from Milfan Developers Ltd and are the current registered owners of their respective land parcels. In various affidavits, they raised similar opposition to the Petition. Basically, it was their averment that they purchased their land from Milfan for value without notice of any defect. Also, that as the registered owners of their respective land parcels, they hold absolute and indefeasible title thereto by dint of section 23 of The Registration of Titles Act (now repealed) and that their titles cannot be subject to challenge except on grounds of fraud and misrepresentation to which they are proved to be party.

Direction of the Court as to hearing

24. Following a complaint raised by The Petitioner about the legality of the transfers effected after the registration of the Court order in the Register of the security, the Land Registrar sought, by administrative fiat, to revoke all those transfers. Not surprising his action was resisted by the 2nd – 18th Interested Parties who filed separate judicial review Applications (being Mbsa JR No.91,95,106 and 863 of 2011) challenging the Registrars decision. Before the hearing of this Petition, the Petitioner urged Court to consolidate this Petition with the Judicial Review Applications on the grounds that the matters are related and involve similar issues. The Petitioner also made the point that to avoid the possibility of contradictory decisions the causes should be heard and determined by the same Judge.

25. Upon considering the Petitioners pleas, Muriithi J. gave the following directions on 26th January 2012:-

a. “The Petition No.45/2011 and the Judicial Review Application Nos.94,95,106 and 863 of 2011 shall be heard by the same court.

b. The Judicial Review Application Nos.94,95,106 and 863 shall be consolidated and heard together as the same questions of fact and law relating to the cancellation by the Registrar of Titles of the titles to the suit parcels of land on the 1st July 2011 will be determined.

c. The Petition No.45 of 2011 shall be heard separately as it involves several independent issues of violation of the Petitioner’s constitutional rights by the Respondent as set out in the prayers of Re-Amended Petition.

d. In view of prayer (g) of the Re-Amended Petition for declaration of invalidity of all transactions on the parcels of land after January 2009 and its direct bearing upon the

Judicial Review proceedings, the Petition will be heard first in time to the consolidated Judicial Review Applications Nos.94,95,106 and 863 of 2011 and rulings for both the petition and the consolidated Judicial Review applications will be considered and delivered together.

e. The exparte Applicants and 1st Interested Party in the Judicial Review proceedings may be joined and heard, if they so wish, on the Petition No.45/2011 as interested parties especially with regard to prayer (g) of the Petition, pursuant to Order 1 rule 10(20) of the Civil Procedure Rules, 2010.

f. The parties to the Petition and the Judicial Review Applications will list the Petition and the consolidated Judicial Review applications for hearing on three consecutive dates mutually convenient to the court and the parties.”

A Preliminary Matter

26. At the hearing of the matter, lengthy arguments were made by Counsel on the substantive matters raised in the Petition. Yet a matter that kept rearing its head right from the time the Respondent and Interested Parties entered these proceedings is whether this Petition was an abuse of Court process in view of the pendency of HCC No.41 of 2009. The Respondent had on 11th November 2011 given notice of its intention to raise a Preliminary Objection on the grounds inter alia, that:-

“the Petition is ill founded and unwarranted in law more so considering that there is a suit Mombasa No.41 of 2009 in which the orders could have been raised.”

The 1st Interested Party was more subtle and in his grounds of opposition simply stated that the Petition is an abuse of the process of the Court. The 2nd Interested Party was emphatic. It was its position that the matters raised in the Petition were already the subject of the civil litigation. As to the other Interested Parties, the very issue formed a plank of its arguments at hearing.

27. This Court, upon consideration, has decided that it will deal with this issue as a prefatory matter. If this Court were to find that the Petition is an abuse of Court process then it would have to dismiss it without considering its substance and merit.

28. As I commence on this path, let me disabuse a suggestion made by the Petitioner that the question posed as to whether the Petition is an abuse of Court process because of the existence of the civil suit is no longer a live matter. The Petitioner’s suggestion is premised, firstly, on the directions given by Muriithi J and alluded to earlier in this decision (see paragraph 25 above) The argument being that all causes arising from this dispute including the Civil Suit were to be heard and determined together. That, however, would be a

misleading argument because Directions given by the Judge were only in respect to the hearing and determination of the Judicial Review Applications and this Petition. The Civil suit was not the subject of those directions.

29. The other argument made by the Petitioner was that by failing to raise the objection at the beginning of the hearing, the Respondent and Interested Parties had abandoned the question and surrendered themselves to the process. Simply put, the only opportunity that the objection could be made was a preliminary point. But I am afraid I do not share that view. The question raised is whether or not the entire Petition is an abuse of Court process. It is an argument that the Petition is brought in breach of a fundamental principle of the law. Whilst it may have been more convenient to deal with it at the early stage of these proceedings, it is a question that pervades the entire stretch of these proceedings .From beginning to the end. The Court has a duty to protect and strengthen the pillars upon which Justice is dispensed. The Courts must be vigilant at all times and must act even if the issue is brought to its attention or argued at the tail end of proceedings. It can never be too early or too late for the Court to protect the Court process from being abused.

30. So what is the substance of the Civil suit? Therein the Petitioner has sued the Respondent for the following orders:-

a. **“A declaration that the Defendant has fully recovered the sums due on account of loan advanced to the Plaintiff and lacks the right to sell, Auction, repossess or alienate the Plaintiff’s properties being land Parcel No.544 Section III M.N Mombasa on account of loans advanced in the year 1985.**

b. **An Order for Discharge of the Plaintiffs Title to Land parcel No.5444/Section III/M.N. Mombasa and release of the Title documents thereof and/or all subdivision titles remaining unsold.**

c. **Costs of this suit and interest.”**

31. In the Amended plaint dated 16th March 2009, the Petitioner explains that through the sale of the Petitioners assets and portions of the suitland the Respondent has fully recovered the sums due to it. The Petitioner complains that despite demands the Respondent has refused to avail accounts to the Petitioner and seeks a provision of the accounts.

32. In answer to the Petitioners claim, the Respondent avers that the Petitioner is in default of monies advanced to it and the Respondents right to realize the security has crystallized. The Respondent saw the Civil Suit as a belated attempt by the Petitioner to frustrate it from exercising its statutory power of sale.

33. The Civil suit is yet to be heard and determined. However in a ruling delivered on 6th November 2009 the Court issued the following Inter- locutory order:-

“Consequently, I allow the plaintiff’s application with costs, and order that the defendant by itself, its servants, agents or otherwise, shall be restrained from selling, auctioning, repossessing, foreclosing, alienating or in any way whatsoever interfering with the parcel of land known as L.R. No.544 [Org.482/3] Section III Mainland North, until the final hearing and determination of the main cause.”

One of the claims in the Petition is that in disregard of the Court order, the Respondent working with the 1st Interested party had transfers of portions of the suitland effected in favour of the third parties. First, to the 2nd Interested Party and subsequently to the 3rd to 18th Interested Parties.

34. The thrust of the Petitioners response to the question of abuse is that there was violation of a Court order which affronts the rule of law and the principle of Constitutionalism. In addition it led to a breach of the Petitioners fundamental right. The Court was asked to lean towards the policy of giving effect and promoting the Bill of Rights as commanded by Article 20 of the Constitution 2010. This Court was also asked to give due regard to the provisions of Articles 22 (3) (b) (d) and 159 (2) (d) of The Constitution 2010 which minimizes formalities and technicalities and directs Courts not to give undue regard to technicalities.

35. In support of the argument that it is this cause and not the Civil Suit that is the appropriate forum for resolving the Constitutional issues raised, Mr Mogaka Counsel for the Petitioner referred this Court to the decision in C.A 84 of 2004 **Damian Belfonte vs The Attorney General of Trinidad and Tobago**. Relevant to Counsels arguments is this passage from that decision,

“(19) The opinion in Jaroo has recently been considered and clarified by the Board in AG v Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship’s words:

“where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court’s process. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power. (emphasis added).

Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is a available only under the constitution. It would not be fair, convenient or conducive to the proper

administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights.”

I heard Counsel argue that a flagrant breach of a Court order was a special feature that made these proceedings the more suitable forum.

36. The Respondents and Interested Parties were of a different view. Mr. Rashid for the Respondent saw the dispute being purely commercial and it is for that reason the Petitioner had filed The Civil Suit. Counsel posed the question, when did the matter stop being commercial? It was argued that the question of contempt should have been raised for determination in The Civil Suit. The Respondent saw a danger of two Courts of concurrent jurisdiction issuing conflicting rulings on the same issue. It was its view that the Petitioner should have first withdrawn the civil suit before presenting this Petition.

37. This Court was referred to Decision in **Kenya Bus Services Ltd & 2 others –vs- The Attorney General [2005] KLR 787** for the proposition that the Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. There, Nyamu J (as he then was) approved the following position taken up in Re Application by **Bahadur [1986] LCR (Const)297**,

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution (see *Harrikisson v Attorney General of Trinidad and Tobago [1979] 3 WLR 62 applied.*)”

38. Adding his voice of support to the Respondents arguments Mr. Sittonik for the 3rd, 4th, 5th, 6th and 8 Interested Parties submitted that the Petitioner had not alleged that the Civil Procedure Act, The RTA or any other applicable law are unconstitutional or that the reliefs available under those Statutes or Laws are insufficient.

39. On this issue Mr. Kibaara acting for 9th – 17th Interested Parties pointed out that the Petitioner had enjoined all the Interested Parties to the Civil suit only to abandon them there and drag them into a Constitutional Court.

THE COURTS DETERMINATION

40. Article 22(1) of The Constitution 2010 provides:-

“22.(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

That right of access to Court should not be impeded or stifled in a manner that it frustrates the enforcement of fundamental rights. An argument by the Respondents and the Interested Parties, however, is that the Petitioner has sought to abuse this access because the existing commercial claim provides an effective platform for vindicating its grievance. Whilst the Respondents and the Interested parties stress the argument that **“where infringement of can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution”**, I am persuaded that the proposition made in Damian Belfonte (supra) ensures fullest access to a Constitutional Court.

41. The portion of the Decision earlier quoted herein makes the proposition with clarity. It bears repeating;

“(19) The opinion in Jaroo has recently been considered and clarified by the Board in AG v Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship’s words:

“where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court’s process. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power. (emphasis added).

Another example of a special feature would be a case where several rights re infringed, some of which are common law rights and some for which protection is a available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights.”

42. I entirely agree with this position. Confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigants grievance. When the remedy is inadequate

then the litigant should be afforded access to the Constitutional Court that is guaranteed by the Constitution itself. I do not hold this view alone. Majanja J, in discussing the extent of the application of The Bill of Rights to Private Relationships made the following observations in **Nrb Petition No.461 of 2012 Isaac Ngugi –vs- Nairobi Hospital & Another**

“For instance, the Court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the Constitutional guarantee even though there exists private law regulating a matter within the scope of the Application of the Constitutional right or fundamental freedoms. In such cases, the Court may proceed to apply the provisions of the Constitution directly.” (my emphasis)

43. In this contest there already exists a civil suit filed by the Petitioner. The task of this Court is to examine whether that civil claim as is presented or could be presented affords to Petitioner adequate redress to all the grievances it has raised in this Petition.

44. A substantial complaint by the Petitioner is that the Respondent has unreasonably, deliberately withheld, neglected or refused to supply or render a true statement of the loan Account. This is in paragraphs 11,12,13,14 and 15 of The Further Re-Amended Petition. For instance, paragraphs 15 reads:-

“The Petitioner is entitled to access the information contained in the detailed computed Statement of Account held/maintained by the Respondent in respect of loan Account Number 330435 and hence a deliberate failure to supply same by the Respondent to the Petitioner amounts to an infringement of the fundamental rights enshrined in Articles 35 and 47 of the Constitution of Kenya.”

That issue of accounts is also taken up in the Commercial claim. This is what paragraph 11 of the Amended plaint states:

“The Defendant despite demands has refused to avail accounts to the Plaintiff indicating sums received and balance due or overpayments made and the Plaintiff claims for provision of the said accounts.”

45. In fact, Ojwang J (as he then was) recognized that the rendering of true and accurate accounts was central to the Petitioners claim in the Commercial claim. The Judge expressed himself:-

“Since some considerable action has already been taken by the Defendant in realizing the terms of the agreement of November 1987, it ceases to be equitable for the Defendant to return to the terms of the original charge-agreement before giving a full account of the monies realized from the agreement of 9th November 1987. Only with such account faithfully given, can it become an issue whether or not to return to the terms of the original charge-agreement.”

The Petitioner has now attempted to give that grievance a Constitutional complexion by arguing that its, rights to fair Administration Action (Article 47) and access to information (Article 35) have been infringed.

Further that it compromises its ability to enforce its right to property and to a fair trial.

46) I do not think that it assists the Petitioners case to elevate the controversy around the accounts to Constitutional questions because the complaints it has raised in respect to the accounts is a central issue before the Commercial Court. If the Respondent were to be compelled to render a true and Just account then that will be an effective relief. The Constitutional grievances that the Petition has build around the issue of accounts would fall by the wayside. And if the Petitioner needs, as it says, to use the accounts to prosecute his claim, the Civil Procedure Act affords a robust procedure for bespeaking those accounts. For instance, the Petitioner can move the Court at Pre-Trial for orders of discovery, production, inspection or interrogatories or of furnishing of any particulars (see Order 11 Rule 3 of The Civil Procedure Act).

46. The allegation of breach of the Court order is raised in paragraphs 27,28 and 29 of the Further Re-Amended Petition. The Petitioner avers as follows:-

“27. The Petitioner states that the registration of transfers of Sub-divisions after 9th December, 2009 from LR.NO 544(ORIGINAL 482/3) Section III Mainland North to Messrs. Milfan Developers Limited Titles issued thereto and subsequent transfers and titles therefrom including those of the interested parties are void and a nullity for having been originated from transactions in breach of Chapters 302, 323, Transfer of Property Act laws of Kenya and valid court orders in a pending suit HCCC No.41 of 2009.

28. The Petitioner states that the Registrar of Titles breached legal duty and the law in effecting transfers and issuing titles in respect of Sub-divisions from LR.NO 5449 ORIGINAL 482/3) Section III Mainland North effective 9th December, 2009 when valid Court Orders in HCCC No.41 of 2009 had been lodged and registered against the Registry title/records for the property.

29. The Petitioner avers that from the totality of the foregoing, disposal of the land an account of the purported loans of kshs.4,500,000/=, kshs.3,500,000/= and kshs.500,000/= amounted to breach of law, violation of the right to private property and hence unconstitutional.”

47. This Court was beseeched to find that the flagrant breach of a Court order was a special feature which made a Constitutional relief the more appropriate remedy. If there was indeed a breach of a Court order then two issues may arise. One would be the need to punish the contemnor Second, the Court must decide the suitable relief that the aggrieved party would be deserving .

48. On the issue of punishing a contemnor of a Court injunction both Common Law and Statute (Civil Procedure Rules) prescribe the procedure and punishment. Years past, Common Law contemplated that there would be delinquent persons who breach Court orders. For that reason it developed procedure and rules to deal with such persons. At home, The Judicature Act which commenced on 1st August 1967 gave a statutory framework for dealing with contempt of Court. More recently, and in respect to disobedience of an order of injunction, Order 40 Rule 3 of the Civil Procedure Code prescribes the punishment. All that the Petitioner would need to do is to commence contempt proceedings in the Civil Suit.

49. As to what should be done with transfers that were subsequent to the Court order, the Petitioner would have to expand its claim to include this post-suit grievance. This is easily achievable by seeking leave to amend its plaint. Indeed, the Petitioner does seem to appreciate that the scope of its Commercial claim is now enlarged because the Petitioner sought and obtained an order to enjoin into the Civil suit all the beneficiaries of the transfers effected after the Court order. The purpose of enjoinder could only have been to allow for a determination of the propriety of the transfers. If the Court were to find them unlawful, an ancillary issue is the relief to be granted to the Petitioner. This Court was not told by the Petitioner why and how a remedy in the Civil Suit would be less effective than a Constitutional relief. And no reasons come to mind!

50. I turn to another issue raised in this Petition. This Court was asked to find that the interest claimed by the Respondent is unlawful and contrary to the *in duplum* rule. If this were true then the Respondent would have acted counter the loan agreement and Statute. Why anyone would want to raise a Constitutional question in such a matter is perplexing. The Commercial dispute is, in part, about whether any money is still due to the Respondent from the Petitioner. The contest as to whether or not the interest sought is lawful falls squarely within the issues for determination in the Civil suit. That is the right forum for the determination of that dispute.

51. This Court reaches the decision that this Petition does not reveal any special or unique feature that would make a Constitutional relief more efficacious or suitable than the redress now or can be sought in Civil suit No.41 of 2009 .It is not for this Court to speculate on the reasons that motivated the Petitioner to abandon those proceedings which, it freely commenced, and embark on this path. This Court thinks and finds that this Constitutional Petition is an abuse of process. And although this Court will be at the forefront in protecting

a Petitioners access to the seat of Justice, it cannot allow a Petition which violates a fundamental principle of law to stand. On this alone, I would, as I now do, dismiss the entire Petition with costs.

F. TUIYOTT

J U D G E

COUNTERSIGNED, DATED AND DELIVERED THIS 28TH DAY OF MAY, 2014.

IN THE PRESENCE OF:

J U D G E



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