



Rhigo (On his own behalf and on behalf of the Uta Clan/Ali Rhigo Family) v Hiriba & 6 others (1st - 4th Respondents on their own behalf and on behalf of the larger Duko Family) (Constitutional Petition E31 of 2021) [2023] KEELC 16665 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16665 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CONSTITUTIONAL PETITION E31 OF 2021
MAO ODENY, J
MARCH 27, 2023
IN THE MATTER OF: ARTICLE 22 (C), 23, 24, 40 & 63 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ARTICLE 67 (F) OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: PROTECTION OF RIGHT TO OWN LAND BY THE
UTA CLAN BEING THE ANCESTRAL LAND IN HOLA
TANA RIVER COUNTY (MEASURING
APPROXIMATELY 62 ACRES)

BETWEEN
SAID BWANAIDI RHIGHO (ON HIS OWN BEHALF AND ON BEHALF OF
THE UTA CLAN/ALI RHIGHO FAMILY) PETITIONER

AND
BUYA HIRIBA 1ST RESPONDENT
JOHN DUKO RHIGHO 2ND RESPONDENT
PHILLIP RHIGHO JILLO 3RD RESPONDENT
JACKSON KIGO 4TH RESPONDENT
NATIONAL LAND COMMISSION 5TH RESPONDENT
INSPECTOR GENERAL, NATIONAL POLICE SERVICE 6TH RESPONDENT
THE HON ATTORNEY GENERAL 7TH RESPONDENT



**1ST - 4TH RESPONDENTS ON THEIR OWN BEHALF AND ON BEHALF OF
THE LARGER DUKO FAMILY**

JUDGMENT

1. By a Petition dated November 22, 2021 the Petitioner filed this petition seeking the following reliefs;
 - a. A declaration that the petitioner and the Ali Righo family are the owners of their ancestral land situate along Tana River in Tana River County now disputed between the Ali Righo and the Duko families measuring approximately 62 acres and the respondents be barred from making any further or other claim over the land.
 - b. An order directed to the 5th respondent; the National Land Commission to initiate the demarcation and registration process of the land to safeguard the rights of the petitioners to own their ancestral land.
 - c. An order barring the 6th defendant and his junior officer from interfering with the quiet possession, occupation utilization of the disputed land between the Ali Righo family and the respondents and the Duko family in Tana River Hola along Tana River or aiding the respondents to harass and intimidate the petitioners from the quiet possession, occupation utilization of the disputed land.
 - d. The Petitioner is entitled to cost of this Petition.
2. It is the Petitioner's case that Ali Righo family and the Petitioner occupy land measuring approximately 62 acres along Tana River in Tana River County which is their ancestral land. That the Ali Righo family are heirs in the lineage of Bahiyesa Dhadho and are now the 5th or 6th generation in a span of about 200 years and the family through the generations have always lived, cultivated and conserved and held the land for their generations without any interruption, disruption or interference.
3. It is further the Petitioner's case that the Respondents started laying claim over the land sometimes in the year 2009 and since the land is/was unregistered land governed by the Pokomo customs with the custodian of the Pokomo community land being the Gasa (Council of elders). That the then head of the Ali Righo family reported the matter to the elders court by the name Zubaki Location Gasa Court whereby the elders court held hearings and a verdict was pronounced in favour of the Ali Righo family.
4. The Petitioner also stated that the said determination was not challenged in court by the Duko family and everything remained calm until the year 2019 when the 1-4 Respondents and their family members started harassing the Petitioner and family members blocking them from accessing their farms in the area which harassment has caused immeasurable losses.
5. The 1-5th Respondents did not file any responses but the 6th and 7th Respondents filed grounds of opposition dated September 23, 2022 as follows:
 - a. The petition is fatally defective for having not been supported by a supporting affidavit.
 - b. That the documents from page 7 to 62 of the petition are not marked and/or commissioned hence lack evidential value.



- c. That the petitioner is not the registered owner of the suit land
 - d. That this court cannot issue orders in favour of non parties.
 - e. That order 3 if issued will act as a blanket moratorium against any criminal investigation and arrest of the petitioner by the 6th Respondent.
6. The Petition was canvassed by way of written submissions whereby counsel for the Petitioner reiterated the contents averred in the Petition and I therefore need not reproduce.
 7. Counsel for the 6th and 7th Respondents submitted that the Petition dated November 22, 2021 is fatally defective as it is unsupported by an affidavit and that the verifying affidavit, and some attachments are neither marked nor commissioned.
 8. Mr Ojwang submitted that defect cannot be termed as procedural technicality and cited the case of *Benson Kamanda & 4 Others v Bisembe Farmers Cooperative Society Ltd* [2016] eKLR and submitted that unmarked and commissioned documents offend the provisions of Rule 9 of the *Oaths and Statutory Declarations Act* which requires that all exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with the serial letters of identification.
 9. Counsel therefor urged the court to strike out the unmarked and uncommissioned annexures as they have no evidential value.
 10. Counsel further submitted that the Petitioner cannot act for other parties who are not participating in this case as there is no authority to act given to him hence he cannot purport to act for the whole family and/or clan.
 11. Mr. Ojwang submitted that the Petitioner has not proved that they own the community land as was held in the case of *Robert Bonaya & another v Samuel Hamena Mtetemo* [2021] eKLR

Analysis And Determination

12. The issue for determination is whether the Petition is properly before the court.
13. I will start with the issue whether the Petitioner has authority to file this Petition on behalf of unknown persons or clan members. I have checked the Petition and I see no authority filed with the names of the people that the Petitioner purports to represent.
14. Looking at the verifying affidavit which is the sole affidavit in support of the correctness of the contents of the Petition, the Petitioner states that he is the Petitioner and well versed with the facts and issues pertaining to the Petition hence competent to swear this affidavit.
15. Further there are documents which were filed which have not been annexed to an affidavit, marked as exhibits or commissioned by a Commissioner for Oaths. The documents have just been thrown into the Petition without a background and explanation how they fit in the Petition.
16. A Petition can either be heard *vide viva voce* evidence or by way of written submissions. If it is to be heard by way of written submissions, the documents must be filed in a way that they have evidential value and meet the legal requirements of documents under oath just like through *viva voce* evidence. In this case as earlier stated the documents are neither marked nor commissioned by a Commissioner for Oaths.



17. In the case of *Francis A Mbelanga vs Cecilia W Waema* (2017) eKLR, the court held that;
- “It is trite in law that an Affidavit and the annexures attached on it constitute evidence. Indeed, where a person seeks to prove a fact by way of Affidavit, he is obligated to exhibit any document on his Affidavit.
- However, before such a document can be received in evidence by the court, the law requires that such a document must be sealed by the Commissioner for Oaths.
- The law that requires the sealing and marking of annexures with serial letters is in mandatory terms, and must be complied with.
- Although the Plaintiff’s advocate submitted that the failure to seal and mark the annexures is a defect in form that should be ignored by the court, the law has declared in mandatory terms that annexures must be sealed and number. That is the only way they can be allowed on record.
- It is therefore not true, as submitted by the Plaintiff’s counsel, that the failure to seal and number the annexures is a procedural technicality that can be saved by the provisions of Article 159(2)(d) of the *Constitution* and Section 1A and 1B of the *Civil Procedure Act*.”
18. A case is in the pleadings and if they are not drafted properly, a party’s case may be struck out for missing out the key ingredients in a case. The ingredients missed out may not be cured by Article 159 on focusing on technicalities as it goes to the core of the suit to guide the court what relief the claimant is seeking for. Courts cannot guess what a claimant wants and can only get it from the pleadings.
19. In the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 6others* [2013] eKLR where Kiage JA stated:
- “...I am not in the least persuaded that Article 159 of the *Constitution* and the oxygen principles which both commend courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines...”
20. Further in the case of *Benson Kamanda & 4 others v Bisembe Farmers Co-operative Society Ltd* the court observed as follows:
- “In the instant case, as I have observed in this judgment the petition was filed without the supporting affidavit and the documents attached to the petition were contrary to the provisions of the Rule 14 of Gicheru Rules it therefore follows that in terms of Rule 14 of the Gicheru Rules the petition contains allegations without the affidavit evidence intended to accompany the petition to support the allegations in the petition and this makes the petition incompetent.
- In the case of *Patrick Ochiemo Obachi & 6 others v Kenya Anti-Corruption Commission* [2010] eKLR, the court observed as follows on failure to file a supporting affidavit:
- “That is a fatal technicality as it determines the substance, namely the completeness of the petition. It follows that in terms of rule 14 that petition contains allegations without the affidavit evidence intended to accompany the petition to support allegations in the petition and that makes the petition incompetent.”



The verifying affidavit annexed to the petition does not meet the mandatory requirements of the Gicheru Rules and the documents filed with the petition are strictly speaking not annexures to any affidavit as the same have not been commissioned by the commissioner of oaths as exhibits to any affidavit. Consequently, I dismiss the Notice of Motion dated September 13, 2016. The applicants shall bear the costs of the motion.”

21. I have considered the Petition, the submissions by counsel and come to the conclusion that this Petition is fatally defective and is therefore struck out and hence the court will not delve into the merits of the case.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF MARCH, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

