



**Mirumbi v National Land Commission of Kenya & 2 others (Environment & Land
Petition 1 of 2020) [2023] KEELC 16238 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND PETITION 1 OF 2020**

DO OHUNGO, J

MARCH 20, 2023

BETWEEN

MIRIAM NYANGARA MIRUMBI PETITIONER

AND

THE NATIONAL LAND COMMISSION OF KENYA 1ST RESPONDENT

PETER MUTHINI WAMBUA 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

JUDGMENT

1. By petition dated August 4, 2020, the petitioner averred that she is the registered owner of all that parcel of land known as Kakamega/Sergoit/145 (suit property) having purchased it from one Muthini Wambua (deceased) in 1978 and had been enjoying quiet possession of the land from 1979 until 2005 when one Agnes Muna Muthini alleging to be the deceased's wife started claiming the suit property. That Agnes Muna Muthini presented her claim before the Lugari District Land Disputes and the tribunal cancelled the sale transaction prompting the petitioner to seek judicial review through Kakamega HC Miscellaneous Application No 74 of 2006 wherein the tribunal's decision was quashed.
2. The petitioner further averred that in or about 2016, the second respondent lodged a complaint with the first respondent claiming ownership of the suit property and the first respondent made a determination recommending that the third respondent cancels the petitioner's title deed and further directed that the suit property be transferred to the second respondent. The petitioner further averred that she only learnt of the decision in July 2020 when she visited the registry to obtain a certificate of official search to enable her to secure a bank loan only to discover that a restriction had been placed on the suit property by the first respondent pursuant to the recommendation. She further stated that the recommendation and directions by the first respondent are in breach of her rights under articles 40, 47 and 50 of the *Constitution*.



3. The petitioner therefore prayed for the following orders:
- a. A declaration that the petitioner's rights under article 40, 47 and 50 of the *Constitution of Kenya, 2020*, have been infringed or violated.
 - b. A declaration that the first respondent's recommendation that the petitioners title deed be cancelled, the land be transferred to the second respondent and be registered in the name of the second respondent is illegal, null and void.
 - c. A declaration that the first respondent's decision to cancel the title Kakamega/Sergoit/145 registered in the petitioner's name was and/or is unprocedural and a violation of the petitioner's Constitutional right to own property enshrined in the *Constitution of Kenya, 2010*.
 - d. A declaration that the recommendation to cancel the title by the first respondent was ultra vires and in breach of the rule of natural justice, administrative fairness, national values and principles of good governance.
 - e. An order of certiorari do issue to remove in to this Honourable Court for the purposes of quashing the proceedings and the determination/recommendation/decision/order dated 7th February, 2019 of the first respondent in respect of Complaint No NLC/HLI/164/2017 with respect to Land parcel No Kakamega/Sergoit P/No 145 and the resultant subdivisions thereof to wit; Kakamega/Sergoit/2912, Kakamega/Sergoit/2913, Kakamega/Sergoit/2914, Kakamega/Sergoit/2915, Kakamega/Sergoit/2916, Kakamega/Sergoit/2917, Kakamega/Sergoit/2918, Kakamega/Sergoit/2919, Kakamega/Sergoit/2920, Kakamega/Sergoit/2921, Kakamega/Sergoit/2922, Kakamega/Sergoit/2923.
 - f. An order of certiorari do issue to remove in to this honourable court for the purposes of quashing item Serial No 4 in Kenya Gazette Notice No 1995 published in Kenya Gazette volume CXXCI-No 27 on March 1, 2019 in its entirety in so far as it purports to publish the determination and /or recommendations of the first respondent dated February 7, 2019.
 - g. An order of prohibition do issue against the third respondent, his agents/servants and or any person acting on his behalf from acting upon, implementing and or enforcing the determination dated February 7, 2019 and gazetted vide Kenya Gazette volume CXXCI-No 27 Gazette Notice No 1995 in any manner whatsoever and be restrained from interfering with the petitioner's ownership/proprietorship of Land Parcel No Kakamega/Sergoit No 145 and the resultant subdivisions thereof to wit; Kakamega/Sergoit/2912, Kakamega/Sergoit/2913, Kakamega/Sergoit/2914, Kakamega/Sergoit/2915, Kakamega/Sergoit/2916, Kakamega/Sergoit/2917, Kakamega/Sergoit/2918, Kakamega/Sergoit/2919, Kakamega/Sergoit/2920, Kakamega/Sergoit/2921, Kakamega/Sergoit/2922, Kakamega/Sergoit/2923.
 - h. An order of permanent injunction to restrain the third respondent from cancelling and transferring and registering the petitioner's title to parcel No Kakamega/Sergoit No 145 and the resultant subdivisions thereof to wit; Kakamega/Sergoit/2912, Kakamega/Sergoit/2913, Kakamega/Sergoit/2914,



Kakamega/Sergoit/2915, Kakamega/Sergoit/2916, Kakamega/Sergoit/2917, Kakamega/Sergoit/2918, Kakamega/Sergoit/2919, Kakamega/Sergoit/2920, Kakamega/Sergoit/2921, Kakamega/Sergoit/2922, Kakamega/Sergoit/2923 in the name of the 2nd respondent.

- i. An order of cancellation of any title that might have been issued pursuant to the said recommendation and or decision in respect of the petitioner's parcel of land known as parcel No Kakamega/Sergoit No 145 and the resultant subdivisions thereof to wit; Kakamega/Sergoit/2912, Kakamega/Sergoit/2913, Kakamega/Sergoit/2914, Kakamega/Sergoit/2915, Kakamega/Sergoit/2916, Kakamega/Sergoit/2917, Kakamega/Sergoit/2918, Kakamega/Sergoit/2919, Kakamega/Sergoit/2920, Kakamega/Sergoit/2921, Kakamega/Sergoit/2922, Kakamega/Sergoit/2923 to the 2nd respondent and the rectification of the register to reflect the name of the petitioner as the owner.
 - j. A declaration that the petitioner is the registered owner of land parcel No Kakamega/Sergoit No 145 and the resultant subdivisions thereof to wit; Kakamega/Sergoit/2912, Kakamega/Sergoit/2913, Kakamega/Sergoit/2914, Kakamega/Sergoit/2915, Kakamega/Sergoit/2916, Kakamega/Sergoit/2917, Kakamega/Sergoit/2918, Kakamega/Sergoit/2919, Kakamega/Sergoit/2920, Kakamega/Sergoit/2921, Kakamega/Sergoit/2922, Kakamega/Sergoit/2923
 - k. Costs of and incidental to this petition.
 - l. Any other relief that this court may deem fit and just to grant.
4. The petition is supported by an affidavit sworn by the petitioner who deposed that she is the registered owner of the suit property having purchased it from one Muthini Wambua (deceased) in 1978 and that she has been enjoying quiet possession of the land since 1979 till 2005 when one Agnes Muna Muthini alleging to be the deceased's wife started claiming the suit property. That Agnes Muna Muthini presented a claim before the Lugari District Land Disputes Tribunal and the tribunal cancelled the sale transaction prompting the petitioner to seek judicial review through Kakamega High Court Miscellaneous Application No 74 of 2006 wherein the tribunal's decision was quashed. That in the year 2016, the second respondent lodged a complaint with the first respondent claiming ownership of the suit property and that no notice of the complaint was ever issued to the petitioner. That the petitioner only learnt of the ongoing proceedings when the firm of Nyairo and Company Advocates sought her input in responding to a letter issued to them seeking information on the role they played regarding the transfer of the suit property.
5. The petitioner went on to depose that nevertheless, she attended hearing on July 11, 2018 and that her request to be fully heard was never met and that without notice, the first respondent made a determination on the matter on February 7, 2019 wherein it recommended to the Chief Land Registrar to cancel her title and to transfer the suit property to the second respondent. That the first respondent published its determination through Kenya Gazette Notice No 1995 in the Kenya Gazette Vol. CXXI-No 27 on March 1, 2019. The petitioner added that she only learnt of the determination in July 2020 when she went to the registry to obtain a certificate of official search to enable her secure a bank loan only to discover that a restriction had been placed on the suit property by the first respondent. She concluded by deposing that the first respondent's determination and recommendations are in breach to her constitutional rights under articles 40, 47 and 50 of the *Constitution of Kenya, 2010*.



6. Although evidence of service was availed, the first and third respondents neither responded to the petition nor filed submissions.
7. In his response to the petition, the second respondent filed an answer to the petition, a cross petition and a replying affidavit. In the cross petition dated February 14, 2022, the second respondent sought judgment as follows:
 - a. A declaration that the acquisition of all that parcel of land known as Kakamega/Sergoit/145 by [Miriam Nyangara Mirumbi] from the late Muthini Wambua did infringe in the right of the latter to own property as guaranteed under Article 40 of the Constitution of Kenya.
 - b. A declaration that the action of [the Chief Land Registrar] registering [Miriam Nyangara Mirumbi] as proprietor of all that parcel of land known as Kakamega/Sergoit/145 infringed and further deprived the latter the right to own and possess property as guaranteed under article 40 of the [Constitution of Kenya](#).
 - c. A declaration that the act of [Miriam Nyangara Mirumbi] entering the suit land without any color of right and with unmeasured force evicted [the second respondent] and members of his family indeed violated their right to privacy as protected and guaranteed under article 31 of the [Constitution of Kenya](#).
 - d. A declaration that by the unlawful act of [Miriam Nyangara Mirumbi] of forcefully evicting [the second respondent] and members of his family from their lawfully acquired farm, that act made them suffer physical, psychologically and subjected to mental distress thus contravening article 29 of the [Constitution of Kenya](#).
 - e. An orders compelling and directing [the Chief Land Registrar] to cancel the registration of all that parcel of land known as Kakamega/Sergoit/145 in the name of [Miriam Nyangara Mirumbi] and the same be registered in the name of [the second respondent].
 - f. General damages by the respondents [in the cross petition] for their actions which infringed and violated the rights of the [the second respondent] and members of his family and subjecting them to untold suffering since they were unlawfully deprived and evicted in 1989.
 - g. Any such other orders as the court may deem proper and expedient in the circumstances of grant.
 - h. Costs of [the cross petition] be provided for.
 - i. Interest
8. It is important to note that the second respondent herein separately filed Kakamega ELC Petition No E002 of 2021, wherein, through petition dated February 16, 2021, he seeks the same orders as sought in the cross petition herein. Thus, the cross petition is subsumed into Kakamega ELC Petition No E002 of 2021 and will be determined in the said matter.
9. In the replying affidavit, the second respondent deposed that he is the administrator of the estate of his late father Muthini Wambua (deceased) who died on July 7, 1996 and that the deceased was allotted



the suit property by the Settlement Fund Trustees in 1968. That the deceased immediately moved into the suit property with his family and started growing maize and rearing livestock on it. That sometime in 1978, the deceased was approached by Alfred Momanyi Nyairo, an advocate then based at Eldoret, with a view to leasing 20 acres of the suit property for a period of 10 years for growing maize. That Alfred Momanyi executed a lease with the deceased on August 13, 1978 which lease was to terminate in 1989 and that when the lease expired, the deceased's family was brutally evicted from the suit property by the petitioner herein who alleged to have purchased the suit property.

10. The second respondent further deposed that the actions of the petitioner and officials of Settlement Fund Trustees were illegal because the charge in favour of the Settlement Fund Trustees was to be discharged within a period of 28 years from 1968 which term had not yet expired. He added that he subsequently lodged a complaint with the National Land Commission and that in its determination the commission recommended that the petitioner's title be cancelled and that the suit property be registered in the name of the deceased. He further deposed that the petitioner fully participated in the proceedings, testified under oath, and was represented by two advocates.
11. The petition was canvassed through written submissions. The petitioner argued that she was not accorded a fair hearing and that the first respondent breached the rules of natural justice. She further contended that the dispute over ownership of the suit property was concluded in Kakamega High Court Miscellaneous Application No 74 of 2006 and that the first respondent has no jurisdiction to oust the court's determination in the said matter. The petitioner therefore urged the court to allow the petition.
12. The second respondent argued that the petitioner has not approached the court properly and that the reliefs of certiorari and prohibition which she seeks can only be obtained by following the procedure laid down under order 53 of the *Civil Procedure Rules*. He further argued that the petitioner appeared before the first respondent and was represented by counsel. The second respondent concluded by arguing that that the petitioner ought to have filed an application for judicial review.
13. I have considered the petition, the affidavits, and the submissions of parties. The issues that arise for determination are whether the court has jurisdiction and whether the reliefs sought should issue.
14. The petitioner's case is built around articles 40, 47 and 50 of the *Constitution*. The gist of her case is that she was never accorded a fair hearing and that her right to property was breached.
15. I will deal first with the petitioner's claim that her right to property was breached, since it has jurisdictional connotations.
16. It is settled that jurisdiction is key in any proceedings. It is everything, the be-all and end-all, without which the proceedings come to a certain end and the court cannot make any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. As the Supreme Court stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

....

17. The Court of Appeal also addressed the issue in *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR where it stated:

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the



court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer jurisdiction to itself. ...

18. There is no doubt that besides having jurisdiction in matters to do with the environment and the use and occupation of and title to, land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the *Constitution*, this court, sitting as a constitutional court, also has jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of fundamental rights related to environment and land. See *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR.
19. The law relating to constitutional matters is that where there exist ample statutory avenues for resolution of a dispute, the statutory options for redress must be followed and the constitutional court will decline to entertain the dispute. This is what is called the principle of constitutional avoidance. See *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.
20. The Court of Appeal discussed the principle of constitutional avoidance in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR as follows:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

(17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ...
21. The dispute between the parties herein is essentially one of ownership of the suit property. There are ample statutory avenues for resolving such a dispute *inter alia* under the *Land Act, 2012* and the *Land Registration Act*. I further note that the petitioner's case is that the parcel of land known as Kakamega/Sergoit/145 (the suit property) was subdivided into Kakamega/Sergoit/2912, Kakamega/Sergoit/2913, Kakamega/Sergoit/2914, Kakamega/Sergoit/2915, Kakamega/Sergoit/2916, Kakamega/Sergoit/2917, Kakamega/Sergoit/2918, Kakamega/Sergoit/2919, Kakamega/Sergoit/292, Kakamega/Sergoit/2921, Kakamega/Sergoit/2922, Kakamega/Sergoit/292. The court would need to verify whether in fact the suit property was subdivided as alleged. The register of the suit property has not been availed to vouch for the alleged subdivisions. From the copies of certificates of search exhibited by the petitioner, it seems that the registered owners of some of the subdivisions are not parties to this matter. All those issues can only be resolved in an ordinary suit brought *inter alia* under the *Land Act, 2012* and the *Land Registration Act*. This court, sitting as a constitutional court, has no jurisdiction in the matter concerning dispute over ownership of the suit property and its subdivisions.
22. The petitioner also raised allegations of breach of her right to a fair hearing. I note that she deposed in her supporting affidavit that she attended hearing before the first respondent on July 11, 2018. Indeed, a reading of the first respondent's proceedings, which the petitioner herself availed, shows that she was present before the first respondent on July 11, 2018 and testified on oath.
23. Whether the petitioner was accorded a fair hearing and the consequences thereof on the first respondent's determination are all matters that can be adequately dealt with through judicial review



under order 53 of the Civil Procedure Rules. Indeed, the petitioner has not shown that there is any inadequacy in the procedures under order 53 of the Civil Procedure Rules or indeed other statutory provisions. Whereas pursuant to article 23 (3), the constitutional court may grant appropriate relief including an order of judicial review, relief is a secondary issue which only comes into consideration once the jurisdictional challenge is surmounted. If an order of judicial review can be obtained through a statutory path, the constitutional route is unavailable. That, plainly, is the essence of the principle of constitutional avoidance.

24. In view of the foregoing, I find that this court, sitting as a constitutional court, lacks jurisdiction to hear and determine the matter. I strike out the petition. Considering that the parties are also litigating in Kakamega ELC Petition No E002 of 2021, I make no order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF MARCH 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Matoke holding brief for Mr Nyagaka for the petitioner

No appearance for the first respondent

No appearance for the second respondent

No appearance for the third respondent

Court Assistant: E. Juma

