



**Muthini v Mirumbi & 4 others (Environment & Land Petition
E002 of 2021) [2023] KEELC 16401 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND PETITION E002 OF 2021**

**DO OHUNGO, J
MARCH 20, 2023**

BETWEEN

PETER KIMEU MUTHINI PETITIONER

AND

MIRIAM NYANG'ARA MIRUMBI 1ST RESPONDENT

LAND REGISTRAR KAKAMEGA COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

JUDGMENT

1. By petition dated February 16, 2021, the petitioner averred that sometime in 1968 his deceased father one Muthini Wambua was allocated all that parcel of land known as Kakamega/Sergoit/145 measuring 16.5 Ha (suit property) by the settlement fund trustees and the deceased and his family immediately moved into the suit property, settled therein and commenced agricultural activities of crop planting and livestock rearing and that in 1978, the deceased was approached by one Alfred Momanyi Nyairo, an advocate then based at Eldoret who sought to lease 20 acres of the suit property and he was granted a lease for a term of 10 years at KShs 40,000 and that in 1979 as the deceased was expecting the 20 acres to revert to him and his family, he was forcefully evicted from the suit property by the first respondent who claimed to have purchased the suit property, prompting the deceased to move to a nearby shopping centre until his demise.
2. The petitioner further averred that through the assistance of corrupt settlement officers, the suit property was illegally transferred to the first respondent for a consideration of KShs 90,000 without any agreement with the deceased and that later in 1992, the file in respect of the suit property



disappeared and that one Agnes Muthini, widow to the deceased filed Land Disputes Tribunal Case No LKL6/2005 upon whose conclusion in the year 2006 the tribunal found in favour of the deceased and ordered the Kakamega District Land Registrar to cancel the title deed issued to the first respondent and to register it in the name of the deceased.

3. The petitioner further averred that in the year 2006, vide Kakamega High Court Misc Application No 74 of 2006, the tribunal's determination was quashed and that thereafter the National Land Commission investigated the matter and determined that the deceased's claim was valid and that the deceased had unfairly lost the parcel of land to the first respondent. The petitioner further averred that the respondents infringed on his rights and violated Articles 27,28,29,31, and 40 of the *Constitution of Kenya*.
4. The petitioner therefore prayed for the following orders:
 1. A declaration that the acquisition of all that parcel of land known as Kakamega/Sergoit/145 by the first respondent from the late Muthini Wambua did infringe on the right of the latter to own property as guaranteed under Article 40 of the *Constitution of Kenya*.
 2. A declaration that the action of the second respondent registering the first respondent 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*.
 3. A declaration that the act of the first respondent entering the suit land without any colour of right and with unmeasured force evicted the petitioner and members of his family indeed violated their right to privacy as protected and guaranteed under article 31 of the *Constitution of Kenya*.
 4. A declaration that by the unlawful act of the first respondent of forcefully evicting the petitioner and members of his family from their lawfully acquired farm, that act made them suffer physically, and psychologically and subjected them to mental distress thus contravening article 29 of the *Constitution of Kenya*.
 5. An order compelling and directing the second respondent to cancel the registration of all that parcel of land known as Kakamega/Sergoit/145 in the name of the first respondent and the same be registered in the name of the petitioner.
 6. General damages by the respondents for their actions which infringed and violated the rights of the Petitioner and members of his family and subjecting them to untold suffering since they were evicted in 1989.
 7. Any such other orders as the court may deem proper and expedient in the circumstances to grant.
 8. Costs of this petition be provided for.
 9. Interest on 6 and 7 above.
5. The petition was supported by an affidavit sworn by the petitioner who deposed that his late father was allotted the suit property by the Settlement Fund Trustees in 1968 and subsequent thereto the deceased moved therein with his family and commenced agricultural activities therein. That sometime in 1978,



- one Alfred Momanyi hired 20 acres from the suit property for purposes of growing maize for a period of 10 years which the deceased accepted so as to settle his loan in terms of a charge on the suit property and that when the lease expired the petitioner's family were evicted by the first respondent who alleged to have purchased the suit land and thereafter the petitioner's mother (deceased) commenced proceedings at the Likuyani Land Disputes Tribunal wherein the tribunal delivered its verdict that the entire transaction was tainted with a lot of irregularities and that thereafter the tribunal's verdict was presented to court and the first respondent by way of judicial review obtained orders of certiorari quashing the tribunal's process and finding.
6. The petitioner further deposed that the issues regarding the suit land have never been fully ventilated and be determined on merits before any judge or tribunal and further that when he investigated on how their farm was transferred, the Kakamega District Land Adjudication and Settlement Officer informed him that the suit property's file disappeared without trace in 1992 and further deposed that notwithstanding the fact that the suit land is situate within Kakamega District Adjudication & Settlement Officer's jurisdiction, the first respondent procured the transfer from the Settlement Officer at Kitale. The petitioner further deposed that he petitioned the National Land Commission and the Commission determined that the acquisition of the suit land was unfair as there was no sale and the same should be reverted to the petitioner's family after cancellation of title by the Chief Land Registrar. The petitioner concluded by deposing that the impugned act of the respondents indeed breached his constitutional rights and those of his family members to own and use the suit property.
 7. In response to the petition, the first respondent filed a replying affidavit in which she deposed that the petitioner lacks *locus standi* to institute the petition as he neither has legal authority nor any interest in the suit land because he lacks letters of administration to represent the estate of the deceased whom the first respondent contracted with. She further deposed that the petition purportedly made on behalf of the deceased is time barred as it has lapsed with over twelve years as the cause of action accrued between 1979 and 1996 and further that the petition appears to be a repeat of what transpired in the National Land Commission with similar redresses on disposition of land and as such, the claim as framed in the petition is filed in a court without jurisdiction.
 8. The first respondent further deposed that she bought the suit property from the deceased Muthini Wambua on October 10, 1978 at a consideration of KShs 90,000 and the two attended the land Control board at Lugari and consent was granted and thereafter a transfer effected by the settlement officer. That after following due process, a title deed was issued to the first respondent in 1991. The first respondent went on to depose that she was in the suit property from 1979 until 2005 when the petitioner started claiming the suit property and further that the decision of the Likuyani Land Disputes Tribunal was quashed through judicial review. That the deceased never claimed interest in the suit property having voluntarily sold it to the first respondent and that it is true that the petitioner raised a complaint with the National Land Commission which complaint has however been challenged by the first respondent through Kakamega ELC Petition No. 1 of 2020. The first respondent concluded by deposing that the petition herein is sub judice and that if Kakamega ELC Petition No 1 of 2020 is not heard, then the decisions of the two courts are likely to conflict. The first respondent therefore prayed for the petition to be dismissed with costs.
 9. Although evidence of service was availed, the second to fifth respondents neither filed any response to the petition nor participated in its hearing.
 10. The petition was canvassed through written submissions. The petitioner argued that the purpose of filing the petition was to compel the fourth respondent to execute the decision or recommendations of the fifth respondent in respect of the suit property. In response to the first respondent's claim that he



lacks locus standi, the petitioner submitted that he annexed a copy of grant of letters of administration ad litem.

11. The petitioner further submitted that the first respondent filed Kakamega ELC Petition No 1 of 2021 seeking to have the recommendations of the 5th respondent quashed yet there is no provision for appealing against the decisions or recommendations of the fifth respondent. That the fifth respondent exercises quasi-judicial functions and its decisions can only be challenged through judicial review and that in filing Kakamega ELC Petition No 1 of 2021, the first respondent herein is seeking ways of circumventing the decision of the fifth respondent and that the first respondent ought to have filed judicial review proceedings within six months and as such the challenge put forward by the first respondent in her said petition is futile and time barred.
12. In response, the first respondent argued that the petitioner lodged a complaint with the National Land Commission claiming ownership of the suit property 37 years after the first respondent acquired the suit property and that the National Land Commission without any justification recommended to the Chief Land Registrar the cancellation of the first respondent's title deed and further recommended that the suit property be transferred to the petitioner herein. That the first respondent was never notified of the decision but only learnt of the same when she went to the land registry to obtain a certificate of official search to enable her to secure a bank loan and was shocked to learn that a restriction had been placed on the suit property.
13. In further submitting on whether the matter herein is sub judice, the first respondent submitted that at the time of the filing of this petition, Kakamega ELC Petition No 1 of 2021 was pending determination and that the dispute herein was determined through judicial review in Kakamega Miscellaneous Application No 74 of 2006 which decision the petitioner never appealed against but instead filed a complaint with the National Land Commission. The first respondent went on to submit that the petitioner lacks locus standi to institute this suit as he has no interest in the suit property having not acquired letters of administration to represent the estate of the deceased. In further submitting on whether the decision of the National Land Commission holds water in relation to the suit property, the first respondent argued that the recommendations by the National Land Commission have been challenged through Kakamega ELC Petition No. 1 of 2021 and as such they cannot stand. The first respondent concluded by submitting that the petition is sub judice and further that she is the registered proprietor of the suit property having purchased it from Muthini Wambua (deceased) who never complained or disputed the transfer.
14. 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.
15. Jurisdiction, as has often been stated, is everything. It is the very life and soul of any proceedings. Without it, 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 and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. A constitutional court does not have jurisdiction in the absence of a valid petition before it. To have a valid petition before the court would require that the constitutional jurisdiction of the court be properly invoked.
16. Procedural law regarding constitutional matters is that where ample statutory avenues for resolution of a dispute exist, 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. It abhors the practice of bringing ordinary disputes to the constitutional court. See *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. Thus, an ordinary claim disguised as a constitutional matter and filed in the constitutional court is a claim filed



in the wrong court, in a court without jurisdiction. See *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR. Needless to state, a case filed in a court without jurisdiction is dead on arrival and beyond resuscitation. See *Phoenix of EA Assurance Company Limited v S M Thiga t/a Newspaper Service* [2019] eKLR.

17. The petitioner has stated that the purpose of filing this petition is to compel the fourth respondent to execute the decision or recommendations of the fifth respondent in respect of the suit property. That intention is also discernible from the prayers sought in the petition. There are ample statutory options to achieve the effect that the petitioner desires. Beyond the general allegations in the petition, I see no constitutional question in the petition that would require the attention of the constitutional court.
18. I find that the matter herein was wrongly filed as a constitutional petition and that consequently, this court, sitting as a constitutional court, does not have jurisdiction to determine the matter.
19. In view of the foregoing, I strike out the petition. 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:

No appearance for the petitioner

Mr Matoke holding brief for Mr Nyagaka for the first respondent

No appearance for the second to fifth respondents

Court Assistant: E. Juma

