



**Chelimo v Chebii & 3 others (Environment and Land Constitutional Petition  
9 of 2022) [2023] KEELC 16426 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16426 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 9 OF 2022**

**L WAITHAKA, J  
MARCH 17, 2023**

**BETWEEN**

**DAVID KIPTALA CHELIMO ..... PETITIONER**

**AND**

**ANTHONY KIMUTAI CHEBII ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS HOUSING AND URBAN  
DEVELOPMENT' ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR LAND ADJUDICATION AND SETTLEMENT' .... 3<sup>RD</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. David Kiptala Chelimo, the petitioner herein, filed the petition dated 7<sup>th</sup> December 2021 on 10<sup>th</sup> December 2021 inter alia seeking an order of Certiorari to bring to this court for purpose of being quashed the decision of the 2<sup>nd</sup> respondent made on 8<sup>th</sup> May 2019 in Appeal to the Minister Case No.162 of 2009.
2. From the pleadings filed in this suit comprised in the petition, the affidavit sworn in support thereof and the affidavits sworn in response to the petition, it is common ground that the subject matter of the petition to wit the parcel of land known as plot No.78 situated in Kapkoiwo Adjudication Section (hereinafter referred to as the suit land) was subject of the process of adjudication of interests to land provided for under the *Land Adjudication Act*, Cap 284 Laws of Kenya (LAA).



3. The process of adjudication of rights to the suit land culminated in an appeal to the Minister to wit Appeal No.162 of 2009. The appeal to the Minister was between the appellant and the 1<sup>st</sup> respondent. The appeal was determined in favour of the 1<sup>st</sup> respondent.
4. Aggrieved by the outcome of the appeal, the petitioner filed the instant suit/petition claiming that the Minister failed to consider his evidence and the evidence of his witnesses; that the Minister failed to appreciate that the issue of acquisition of the suit land was neither proved nor supported by any evidence on the part of the 1<sup>st</sup> respondent; that the decision of the Minister was unfair, unjustifiable; irrational, inconclusive and inconsistent and that the entire appeal process was a sham, unprocedural and defective in that the appeal was filed outside the time provided for filing an appeal to the Minister hence time barred.
5. The petition is opposed through the replying affidavit of John Ongalo Laku, the Principal Land Adjudication & Settlement Officer Baringo, sworn on 24<sup>th</sup> June, 2022. Through the affidavit the deponent has demonstrated that the suit land, was subject of the process of ascertaining interests in land provided for under [Land Adjudication Act](#) *LAA* and contended that the instant suit impugns not only the mandate of the respondents to conduct and finalize adjudication process but also seeks to overturn the said process in contravention of the provisions of *LAA*; that there is no evidence to demonstrate that the 2<sup>nd</sup> to 4<sup>th</sup> respondents violated the rules of natural justice or were biased against the petitioner or had a predetermined decision against the petitioner. That there is no evidence that the petitioner's right to a fair administrative action and/or of violation of the petitioner's constitutional rights under Article 40 and 60 of the [Constitution](#).
6. The respondents contend that the petitioner is circumventing the procedures in LAA; that the petition does not meet the threshold set out in [Anarita Karimi Njeru v. Republic](#) (1979) 1 KLR 54 and [Mumo Matemu v. Trusted Society of Human Rights Alliance & Others](#) (2013) eKLR and that the petition does not raise any valid constitutional grounds.
7. The suit was disposed of by way of written submissions.

## Submissions

### The Petitioner's Submissions

8. In his submissions filed on 27<sup>th</sup> September, 2022 the petitioner has given an overview of his case and the responses by the respondents.
9. Concerning the replying affidavit filed by the 1<sup>st</sup> respondent, the petitioner points out that the stamp impression affixed on the affidavit shows that the advocate who attested the swearing of the affidavit is based in Eldoret.
10. Based on the provisions of Section 5 of the [Oaths and Statutory Declarations Act](#), Cap 15 Laws of Kenya and the decisions in the case of [Mary Gathoni & another v Fridah Ariri Otolo & Another](#) (2020)eKLR and the case of [Regina Munyiva Ndunge v Kenya Commercial Bank](#) (2005)eKLR where affidavits that were not sworn in strict compliance with Section 5 of the [Oaths and Statutory Declarations Act](#) were struck out; it submitted that the replying affidavit sworn by the 1<sup>st</sup> respondent is bad in law. The petitioner wonders how the affidavit bears a stamp impression bearing the name of an advocate based in Eldoret yet there are many Commissioners for Oaths based in Kabarnet where the oath is indicated to have been taken. He urges the court to strike the affidavit out for violating the said provision of the law.



11. Section 5 of the *Oaths and Statutory Declarations Act*, aforementioned provides as follows:-
 

“Every Commissioner of Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.
12. On the legal propriety of the appeal the 1<sup>st</sup> respondent preferred to the Minister, reference is made to Section 29(1) of *LAA* which provides that a person who is aggrieved by the determination of an objection under Section 26 of the *Act* may, within sixty days after the date of the determination, appeal against the determination to the Minister and submitted that the requirement of filing an appeal to the Minister within sixty days is statutory and couched in mandatory terms hence must be complied with.
13. Asserting that the appeal to the Minister that forms the subject matter of this suit was filed outside the time provided for under the *LAA* (a fact said to be admitted by the 2<sup>nd</sup> to 4<sup>th</sup> respondents in their replying affidavit, paragraph 11 thereof), the petitioner submits that the appeal was a nullity. Based on the decision in the case of *Macfoy v United Africa Co. Ltd* (1961) All E.R 1169 where Lord Denning stated:-
 

“If an act is void, then it is a nullity in law. It is not only bad, but incurably bad.....”

it is submitted that the appeal to the Minister was a nullity hence incapable of affecting the petitioner’s interest and rights in the suit land.
14. On whether the petitioner’s constitutional rights were violated, it is reiterated that the proceedings of the appeal to the Minister were unlawful and unprocedurally unfair and submitted that the petitioner’s rights under Articles 27, 40 and 47 of the *Constitution* were violated as a result of the impugned process.
15. As to whether the petitioner has made up a case for being granted the orders sought, reference is made to Articles 22 and 23 of the *Constitution* of Kenya 2010 and the case of *Samuel Ngigi Wabogo & 4 others v. Attorney General & 2 Others Samuel Chege (Interested Party)* (2019) eKLR and submitted that the petitioner has made up a case for being granted the orders sought.

### **The 1<sup>st</sup> Respondent’s Submissions**

16. In his submissions filed on 10<sup>th</sup> October 2022, the 1st respondent has framed four issues for the court’s determination namely, whether the petition meets the constitutional threshold; whether the petition is fatally defective; whether the 1<sup>st</sup> respondent’s replying affidavit is fatally defective and who should bear the costs of the suit.
17. On whether the petition meets the constitutional threshold, reference is made to the Constitutional test of pleading violation of constitutional rights espoused in the case of *Anarita Karimi Njeru v. Republic* (1979) 1 KLR 54 and the case of *Mumo Matemu v Trusted Society of Human Rights Alliance*, Civil Appeal No.290 of 2012 (2013) eKLR and submitted that the instant petition does not meet that threshold. It is contended that the instant petition does not state in clarity the rights alleged to have been infringed; that little or no particulars at all of the alleged infringements have been given of the manner in which the rights were infringed during the adjudication process.
18. It is further submitted that the petition is fatally defective as it seeks to challenge the decision of the Minister through the back door which decision is by dint of the provisions of Section 29(1) of *LAA* final. Based on the decisions in the cases of *Benard Muage v. Fine Serve Africa Ltd & 3 others* (2015) eKLR; *Kenya Bus Services Ltd v. Attorney General* (2005) 1 KLR 287; *Tobias Ochola Osidi & 13 Others v Cyprian Otieno Ogalo & 6 others* (2013) eKLR; *Lepore Ole Maito v Letwat Kortom & 2 others* (2016)



eKLR and *John Masiantet Saeni v. Daniel Aramat Lolungiro & 3 Others* (2017)eKLR it submitted that the petition is fatally defective as it seeks to challenge the decision of the Minister through the back door.

19. On the competency or otherwise of the 1<sup>st</sup> respondent's replying affidavit, reference is made to the overriding objective of the court under Section 1A and 1B of the *Civil Procedure Act*; Article 159(2) (d) of the *Constitution* of Kenya, 2010 and the decision in the case of *Saggu v. Roadmaster Cycle Ltd* (2002) 1 EA 258 and submitted that the defect in the affidavit is curable under Article 159(2)(d) of the *Constitution*.
20. On who should bear the costs of the suit, it is submitted that costs follow the event and the court is urged to dismiss the petition with costs to the respondents.

### **The 2<sup>nd</sup> to 4<sup>th</sup> Respondents' Submissions**

21. In their submissions filed on 26<sup>th</sup> October 2022, the 2<sup>nd</sup> to the 4<sup>th</sup> respondents have given an overview of cases of the parties to the petition and framed the following as the issues for the court's determination:- Whether the court has jurisdiction to entertain the suit and whether the petitioner has made up a case for being granted the orders sought.
22. On whether the court has jurisdiction to entertain the suit, reference is made to Section 29(1) of LAA which provides that the decision of the Minister on appeal to the Minister under Section 26 of *LAA* shall be final and based on the decision in the cases of *National Assembly v Karume Njenga* (1992) eKLR; *Mwangi Njagu v Meshack Mbogo Wambugu & Another* HCC No. 234 of 1991 (unreported); *Lepore Ole Maito v Letwat Kortom & 2 others* (2016)eKLR, it is submitted that the instant petition is misconceived as it is an attempt to reverse what had been properly and validly done pursuant to the provisions of LAA.
23. Terming the petition an abuse of the court process, the 2<sup>nd</sup> to 4<sup>th</sup> Respondents have submitted that the *Constitution* of Kenya cannot be invoked to resurrect matters that had been duly resolved through due process of the law.
24. On whether the petitioner has made up a case for being granted the reliefs sought, it is submitted that the petitioner has failed to demonstrate that he had any recognizable interest over the suit land; that the evidence on record demonstrates that the 2<sup>nd</sup> respondent procedurally allocated the suit land to the 1<sup>st</sup> respondent and that there is no evidence that the allocation of the suit property to the 1<sup>st</sup> respondent was tainted with fraud or illegality. Further, that the petition discloses no constitutional question(s) and that the petitioner has not demonstrated in which way his constitutional rights were violated by the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents.
25. It is reiterated that the petition is devoid of precision and submitted that it is not easy to determine the real issues in contention. In that regard, the petitioner is said to have failed to provide adequate particulars of the alleged violation of his constitutional rights and the manner of violation.
26. In view of the foregoing, it is submitted that the petition does not meet the threshold of pleading violation of constitutional rights set in *Anarita Karimi Njeru v Republic* (1976-1980) KLR 1272 and *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, Civil Appeal No. 290 of 2012 (2012)eKLR.



## Analysis and determination

27. From the pleadings, affidavit evidence and the submissions filed in this matter it is common ground that the suit land was subject of the process of ascertaining interests to land provided for under the [Land Adjudication Act](#), LAA.
28. The process of adjudication of the interests to the suit land culminated in appeal to the Minister to wit Appeal No.162 of 2009.
29. That being the case, an issue of law arises as to whether in view of Section 29 of [LAA](#) that provides that an Appeal to the Minister shall be final, this court has jurisdiction to entertain this suit, despite it having been packaged as a constitutional petition.
30. In answering that question, I am guided by the decision of the Court of Appeal in the case of [Timotheo Makenge v. Manunga Ngochi](#) (1978) KLR 53 at page 63, where it was held
- “The Act ([Land Adjudication Act](#)) prescribes within itself a specific and complete code for the treatment of the land adjudication cases through set stages, with the Minister empowered to determine appeals to him “and make such orders as he may think just”; his orders being final...”
31. I will also rely on the persuasive decision in the case of Robert Kulinga Nyamu v Mutunga & Another (2022) eKLR where it was held:-
- “...In view of the Provisions of Section 29(1)(b) of the [Land Adjudication Act](#) which provides that the decision of the Minister shall be final, the plaintiff cannot appeal against the said decision in the manner that he has done. I say so because the mechanism to resolve disputes within an adjudication area have been set out in the Act. Consequently, the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review proceedings.”
32. Whilst the instant suit is packaged as a constitutional petition, it is clear from the pleadings and the affidavit evidence adduced in support thereof that the petitioner is appealing or challenging the decision of the Minister. As was observed in the case Robert Kulinga Nyamu supra, if the appellant wished to challenge the legality of the process of arriving at the final decision, he should have come under judicial review. That position was underscored in the case of [Lepore Ole Maito v Letwat Kortom & 2 Others](#) (2016) eKLR where it was held:-
- “...Once an appeal is made to the Minister and determined under the provisions of Section 29 of the [Act](#), such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the Minister’s decision can only challenge such determination by way of judicial review and not otherwise if he considers the Minister acted wrongly or exceeded his jurisdiction.”
33. Whilst the petitioner has raised arguable and justiciable issues arising from the appeal to the Minister, this court would only be properly seized of the issues in a judicial review proceeding but not a constitutional petition. There is nothing constitutional in a claim that is said to have been time barred. The issue of time bar is an issue to be determined within the confines of the applicable statute as the [Constitution](#) does not provide for timelines for presentation of an Appeal to the Minister. There is also



no new cause of action and in my considered view, the filing of this petition is meant to run away from the structures set out in the law.

34. The upshot of the foregoing is that the instant suit is bad in law and lacks in merits for offending the provisions of Section 29 of the Land Adjudication Act, which provides that the decision of the Minister on an Appeal to the Minister under Section 26 of the Act shall be final. I dismiss it with costs to the respondents.

35. Orders accordingly.

**READ, DELIVERED AND SIGNED AT ITEN THIS 17<sup>TH</sup> MARCH, 2023**

**L. N. WAITHAKA**

**JUDGE**

Judgment read virtually in the presence of:-

M/S Towet for the Petitioner

M/S Cheruiyot for the 2<sup>nd</sup> – 4<sup>th</sup> respondents

N/A for 1<sup>st</sup> respondent

Christine Towett – Court Assistant

