



Boki & 3 others v Attorney General & 3 others (Environment & Land Petition E002 of 2024) [2025] KEELC 256 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEELC 256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION E002 OF 2024**

EK MAKORI, J

JANUARY 29, 2025

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 19, 20, 21, 23(1), (2), (3)(A), (B),(C),(D), (E), 56, 165(3),(B),(D),(4), OF THE CONSTITUTION OF KENYA, 2010.

- AND - IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 26, 27, 28, 29, 40, 43, 47 OF THE CONSTITUTION OF KENYA, 2010.

BETWEEN

**NYAMAWI KARISA BOKI 1ST PETITIONER
JAPHET HAMISI MLANDA 2ND PETITIONER
KALUME KAZUNGU KADZOYO 3RD PETITIONER
KASICHANA CHENGO MITSANZE 4TH PETITIONER**

AND

**HON ATTORNEY GENERAL 1ST RESPONDENT
COUNTY GOVERNMENT OF KILIFI 2ND RESPONDENT
DIRECTOR, LAND ADJ/SETTLEMENT OFFICER, KILIFI .. 3RD RESPONDENT
COUNTY COMMISSIONER KILIFI 4TH RESPONDENT**

JUDGMENT

1. The Petitioners’ constitutional petition dated 22nd December 2023, supported by the affidavit of one Nyamawi Boki, sworn on 22nd December 2023, seeks the following reliefs:



- a. A declaration that the Respondents' failure to regularize the Petitioners' settlement on the Adu/Kamale Adjudication Section violates the Petitioners' right to own property and live in a dignified and secure environment.
 - b. A declaration that the burning of houses and crops by third parties under the security of the 4th Respondents' officers is illegal, irregular, unprocedural, and contrary to Art. 26, 27(2) (4) & (6) Art. 28 Art 29, Art 39. Art.40, Art. 43, Art.47, and Art 56 of the Constitution of the Republic of Kenya are therefore null and void.
 - c. A declaration that any forceful eviction and/or demolition without a relocation option is illegal, oppressive, and violates the Petitioners' rights.
 - d. A declaration that the Petitioners and other members of the public are entitled to the full enjoyment of the right to economic and social rights that are about to be violated and or already violated.
 - e. A declaration that the Petitioners herein are entitled to complete protection from discrimination and the same right has been violated, and they are entitled to full compensation due to loss suffered during and after the illegal destruction and burning of their homes and crops.
 - f. This Court makes such consequential orders, issues such writs, and gives such directions as it deems appropriate in the circumstances.
 - g. Costs of this Petition
2. The 2nd Respondent has not opposed this petition but belatedly filed grounds in opposition, stating that the petition offends the provisions enunciated in the Land Adjudication Act Cap Laws of Kenya and that the same should be dismissed.
 3. The 1st, 3rd, and 4th Respondents oppose the petition, vide the replying affidavit of the 3rd Respondent's Officer, Martin K. Nyamu, sworn on 27th March 2024.
 4. The petition was canvassed via written submissions.
 5. From the materials and submissions placed before me, the issues I frame for this Court's decision are whether the petition raises constitutional violation issues to meet the threshold of constitutional petitions, whether the 1st, 2nd,3rd, and 4th Respondents have violated any of the Petitioners' constitutional rights calling for redress, whether the Petitioners are entitled to the reliefs sought, and who should bear the costs of the petition.
 6. The Petitioners aver that they were previously residents of the Gongoni Salt Pans area until sometime in 2001 when vide a directive of the National Government and implemented by the then County Council of Malindi, they were directed to move to the interior, specifically Marereni/Msumarini Adjudication Scheme. The Petitioners welcomed this popular resettlement program. They bore a legitimate expectation that the Government would later adjudicate and issue them titles over the area they had been resettled.
 7. However, they contend that their legitimate expectations have exceeded their patience, and in a rather unfortunate turn of events, this has brought them misery and sorrow.
 8. The Petitioners' plea is expressive that from around 2015, the Government, through the 3rd Respondent, made a rather welcome attempt at actualizing their intention to allocate land to the Petitioners' and Gazetted Adu/Kamale Adjudication Section. However, before the interests therein



- could be ascertained, third parties emerged, took possession of the said lands, and have since ever forcefully evicted the Petitioners through the destruction of their farm fields, burning of their houses, assaulting them, and using actual violence to effect their intentions.
9. The Petitioners alleged that all this happened under the watchful eyes of the 4th Respondents' Officers at Magarini Sub-County Criminal Investigation Officers, who, instead of protecting the Petitioners and their properties, sided with the hooligans and resorted to arresting and preferring charges against the Petitioners whenever they made complaints.
 10. The Petitioners have, as a result of the continued inaction, failure, and neglect by the State, been subjected to evictions, assault, and wanton destruction of their properties, compounding to multiple violations of their fundamental rights and freedoms guaranteed under the Bill of rights.
 11. The Petitioners' grievances, as highlighted in the petition, state that they find themselves in this predicament solely because the Respondents have failed to protect them from their circumstances. The Respondents have violated, threatened, and/or breached their rights.
 12. They state that the particular fundamental rights and freedoms specifically violated, threatened, and or breached by the Respondents are the Right to Life as provided for under Article 26, the Right to Equality and Freedom from Discrimination under Article 27, the Right to Human Dignity under Article 28; Freedom and Security of the person under Article 29; and Right to Own Property under Article 40.
 13. Citing the decisions in *Anarita Karimi Njeru v Republic* (1976- 80) 1 KLR 1272 and *Trusted Society of Human Rights Alliance v Attorney General and Others* Petition No.229 of 2012, the Petitioners believe that they have met the threshold in raising a violation of rights under *the Constitution* by concisely outlining the factual background informing the express violation of their rights and freedoms under *the Constitution* under Art. 10 to 23 of *the Constitution*, the same are repeated in the affidavit of Nyamawi Karisa Boki, worthy remedying by this Court.
 14. The Petitioners submit that their claim does not offend the provisions of section 30 of the *Land Adjudication Act*, Cap 284 Laws of Kenya. The petition does not raise a claim over the determination of an interest in land. Instead, the Petitioners' claim seeks to compel the Respondents to respect, uphold, and mitigate any further violation of the Petitioners' rights. The reliefs sought are to effect the Petitioners' legitimate expectation that the State would resettle them.
 15. The 1st, 3rd, and 4th Respondents citing the same decisions as those by the Petitioners - *Anarita Karimi Njeru v Republic* (1976- 80) 1 KLR 1272 and *Trusted Society of Human Rights Alliance v Attorney General and others* Petition No.229 of 2012(supra) are of the view that, apart from citing omnibus provisions of *the Constitution*, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the Court, such failure to draft the petition with precision as to show the specific infringement and the manner, especially that the 3rd and 4th Respondents have played part in it, makes the petition itself moot as against the said Respondents.
 16. Further, the 1st, 3rd, and 4th Respondents are of the view that from the affidavit of Martin K. Nyamu, the sub-county Land Adjudication and Settlement officer, he deposes that the survey and demarcation has already been undertaken but that the process is awaiting the publication of the register as provided for in the *Land Adjudication Act*. He states that the aggrieved parties are advised to wait for the completion of the process as even the officer has not issued consent to file the matter in Court. There is no evidence that the 3rd and 4th Respondents have violated any provision of *the Constitution*.



17. The 1st, 3rd, and 4th Respondents assert that Adjudication is an open and public exercise, and everyone is entitled to participate. In addition, the Petitioners have conspicuously failed to mention the elaborate mechanism under the [Land Adjudication Act](#) regarding lodging disputes before they can be heard in a Court of law. Section 26 of the [Land Adjudication Act](#) provides the relevant provision concerning the Petitioners' case.

18. I will agree with the cited authorities on the framing of constitutional petitions on specificity as espoused in the celebrated case of Anarita Karimi Njeru v Republic (No.1) (1979) 1 KLR 154 as restated in the case of Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012 [2013] eKLR, where Court held as thus:

“However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of [the Constitution](#) and the overriding objective principle under section 1A and 1B of the [Civil Procedure Act](#) (Cap 21) and section 3A and 3B of the [Appellate Jurisdiction Act](#) (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

19. If we prod further, the Anarita Karimi Njeru test states that where a remedy lies elsewhere, one should have exhausted that avenue first before approaching the Constitutional Court. The Petitioners admit that the ascertainment of interests in the Adu/Kamale Adjudication Section is ongoing. The Officer concerned, Martin K. Nyamu, the sub-county Land Adjudication and Settlement Officer, says the process is at the publication of the register level as provided for in the [Land Adjudication Act](#). Once the register is published, objections will follow as provided under section 26 of the Act:

“Objection to adjudication register

1. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
2. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.”

20. I will agree with the 1st, 3rd, and 4th Respondents' submissions that Petitioners prematurely filed the petition before this Court as the Land Adjudication procedure provided under the law - the [Land Adjudication Act](#), is yet to be completed as it is pending the publication of the Adjudication Register. The Petitioners can only raise a contestation within sixty days after the process is complete and the adjudication register is published. Any orders from this Court to affect that process will be without



jurisdiction and tend to slow or negative the process. The Constitutional Court will not be the most efficacious Court to do so.

21. As correctly submitted by the 1st, 3rd, and 4th Respondent, the Court of Appeal in Peter Muturi Njuguna v Kenya Wildlife Service [2017] eKLR stated that:

“.....However, there is a clear intention that the process laid down in the Act be followed. It has been stated time and again that where *the Constitution* or a statute spells out a procedure to be followed, that procedure ought to be adhered to.....”

22. The foregoing goes hand in hand with the bar placed on Courts by Section 30 (1) of the Land Adjudication on the need to get consent from the Adjudication Officer before filing suit:

“Staying of land suits

1. Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

23. In Thomas Kinyori Hussein & 3 others v Mokha Mghanga & 2 others [2018] eKLR as cited by the 1st, 3rd, and 4th Respondents – which I concur with the Court stated as follows:

“The provisions of Section 30 of the *Land Adjudication Act* are couched in mandatory terms. A court cannot entertain a claim on interest in land which is still under adjudication without the consent of the adjudication officer. This is a substantive statutory requirement of the law and not a mere procedural technicality as the applicants have submitted. It was clearly stated in Joshua Werunga –v- Joyce Namunyok & 2 Others (2015) eKLR inter alia.

“In the case of Raila Odinga –v-IEBC & Others (2013)eKLR, the Supreme Court said that Article 159 (2)(d) of *the Constitution* simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigant to comply with procedural imperatives as they seek justice from the court.”

Obtaining consent as required under Section 30 is not a technicality that can be disregarded. It is a fundamental statutory requirement that one must obtain before commencing proceedings in court. In my view, I do not think that Article 159 will come to the aid of the Plaintiffs in this case.”

24. Further, in the case of Benjamin Okwaro Estika v Christopher Anthony Ouko & another [2013] eKLR, the Court of Appeal, commenting on the application of Sections 29 and 30 of the *Land Adjudication Act*, stated:

“That being so, the mandatory requirements of Section 30(a) had to be complied with i.e. consent of the land adjudication officer has to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it.”

25. In my view, the right under Article 40 of *the Constitution* has not yet crystallized to warrant the intervention of this Court, as the adjudication process has yet to be completed. It will then follow that



this Court will act without jurisdiction if it proceeds to invoke Article 23(3) of *the Constitution* and pronounce the declaratory orders against the Respondents since Petitioners have no proprietary or beneficial interest in the property they claim the Respondents have failed to allocate to them. Secondly, the allocation process, in this case, is adjudication, a well-laid-out process provided for under the Adjudication Act. The Act is for the ascertainment and recording of rights and interests in community land, and the process of completion of the register is lengthy to give room to any person or group of persons to lodge any complaints they may have. The process is, however, yet to be concluded. See the decision in *Beekey Supplies Limited & another v Attorney General & another* [2017] eKLR, cited by the 1st, 3rd, and 4th Respondent - which I agree with where the Court held:

“The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.”

26. The upshot is that the petition herein is devoid of merit and that the same is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 29TH DAY OF JANUARY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Munga for the 1st, 3rd and 4th Respondents

Ms. Malombo for the 2nd Respondents

Happy: Court Assistant

In the Absence of:

Mr. Kazungu for the Petitioners.

