



Kiarie (Suing as the Administrator of the Estate of John K. Christopher Gachina (Deceased)) v District Land Registrar Kiambu; Wanyoike (Interested Party) (Environment & Land Petition 11 of 2022) [2023] KEELC 17545 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17545 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION 11 OF 2022**

JG KEMEL, J

MAY 23, 2023

**IN THE MATTER OF VIOLATION OF RIGHTS UNDER ARTICLES
2(1), (2), 3(1), 20(1), 21, 22, 40(1) AND 47 OF THE CONSTITUTION OF
KENYA, 2010 SECTIONS 79 AND 80 OF THE LAND REGISTRATION ACT**

BETWEEN

CHRISTOPHER KARANJA J. KIARIE PETITIONER

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHN K.
CHRISTOPHER GACHINA (DECEASED)**

AND

THE DISTRICT LAND REGISTRAR KIAMBU RESPONDENT

AND

THOMAS KIBE WANYOIKE INTERESTED PARTY

RULING

(Notice of Motion dated 13/10/2022 and Preliminary Objection dated 4/11/2022)

1. The Petitioner/Applicant filed the instant Notice of Motion dated 13/10/2022 seeking Orders That;
 - a. Spent.
 - b. This Honorable Court be pleased to grant the Petitioner conservatory orders barring the Respondent and Interested Party from alienating, transferring, selling, charging and/or in any other way dealing with title numbers LR Karai/Gikambura/1385 and 1384 pending the hearing and determination of this Application and Petition.



- c. This Honorable Court be pleased to issue conservatory orders barring the Respondent and Interested Party from interfering with the Petitioner's occupation of 2 acres in LR Karai/Gikambura/1385 pending the hearing and determination of the Petition.
 - d. The Honorable Court be pleased to issue stay of all proceedings in MCELC No. 7 of 2020 in Kikuyu Principal Magistrate Court pending the hearing and determination of the Petition.
 - e. This Honorable Court be pleased to give further orders and/or directions as to the hearing hereof and the Notice of Motion filed herein in the light of the unique circumstances of this case.
 - f. The Petitioner/Applicant be at liberty to apply for further orders and/or directions as to the hearing hereof and the Notice of Motion filed herein in light of the unique circumstances of this case.
 - g. The costs of this Application be provided for.
2. The Application is based on the grounds on the face of it inter alia that the Respondent has purported to unlawfully, arbitrarily and irregularly alter the acreage of the Petitioner's property LR Karai/Gikambura/1385 without any authority and without according the Petitioner a fair hearing thus infringing his rights under Article 47 Constitution of Kenya; arbitrarily cancelled the Petitioner's LR Karai/Gikambura/1385 title deed thus violating his rights under Article 40 Constitution of Kenya; irregularly altered Interested Party's property LR Karai/Gikambura/1384 from 0.25 acres to 2 acres and in an attempt to sanctify the Respondent's illegal aforesaid acts, the Interested Party filed Kikuyu PMCC No. 7 of 2020 seeking orders to have the District Land Surveyor survey and demarcate boundaries of the said parcels of land hence the Application.
 3. The Application is supported by a lengthy Affidavit of even date sworn by Christopher Karanja J. Kiarie, the Petitioner in his capacity as the Administrator of the estate of John K. Christopher Gachina (Karanja), his late father. He averred that his father passed away on 26/4/2008 and earlier on in 1970, Karanja had entered into a sale agreement (Cck2) for purchase of parcel LR Karai/Gikambura/1384 which belonged to Charles Gatiti Thomas Wanyoike (Wanyoike). That Karanja fully paid the purchase price to Wanyoike in installments as shown by further agreements annexed as Cck3, 4 & 5 totaling Kshs. 3,600/=.
 4. That upon full payment Karanja and Wanyoike entered into an agreement dated 6/4/1971 - Cck5 recorded in Kikuyu language and accompanied by its English translation. This agreement was witnessed by Geoffrey Kinuthia, now deceased. That thereafter Wanyoike applied for Land Control Board consent vide an Application dated 14/10/71 but there was an apparent error on the face of the record indicating that the consent was for the sale of 25/328 shares translating to 0.25 acres instead of 303/328 shares amounting to 2 acres. That the said was reflected in the letter of consent ultimately issued by Land Consent Board. See annexures Cck6 and Cck7 the Land Consent Board Application and consent respectively.
 5. That the said error would again reflect in the registration of Karanja and Wanyoike as proprietors in common of LR Karai/Gikambura/535 with 303/328 shares and



25/328 respectively. Copies of transfer and green card are annexed as Ckk8 & Ckk9 respectively. That none of the parties noticed the anomaly until 1989 when they sought to partition the land though Karanja had been given his 2 acres while Wanyoike retained 0.25 acres as per the sale agreement. Wanyoike proceeded to apply to the Land Control Board for a transfer in exchange of shares in LR Karai/Gikambura/535 from 303/328 shares to 25/328 shares in favor of Karanja. The Application was approved and the letter of consent – Ckk11 was issued being number LCR No. 227/89. Subsequently an Application for partition was made in light of the exchanged shares and the Respondent issued title deeds to the parties as follows; Karai/Gikambura/1385 measuring 2 acres to Karanja and LR Karai/Gikambura/1384 measuring 0.25 acres to Wanyoike.

6. Later Wanyoike died in 1991 and was buried on his portion of land. The Interested Party vide Nbi Succ. Cause No. 175 of 1992 irregularly obtained orders to inherit the whole of LR Karai/Gikambura/535 despite the fact the said title was non-existent having been closed upon partition in 1989. Ckk17 is a copy of confirmation of Grant issued in the said Succession Cause.
7. That Karanja also died on 24/4/2008 and the Respondent sometimes in 2013 unlawfully and illegally without any notice altered the records and acreage of LR Karai/Gikambura/1385 from 2 acres to 0.25 acres and LR Karai/Gikambura/1384 from 0.25 acres to 2 acres effectively cancelling the title deeds issued in 1989 thus violating the property rights of Karanja's estate. The alterations in the acreage are shown by copies of green card of the said parcels Ckk18 & Ckk19.
8. That the Respondent had earlier on in 2011 gazetted the title deeds of the said parcels as lost vide Gazette Notice No. 5148 of 13/5/2011. The gazette notice led to issuance of a new title deed – Ckk21 on 31/7/2013 to the Interested Party for LR Karai/Gikambura/1384 measuring 2 acres. To sanctify the Respondent's illegal transaction, the Interested Party filed Kikuyu MCELC No. 7 of 2020 *inter alia* seeking an order to have the Kiambu Lands Surveyor survey and demarcate boundaries of the two parcels of land to reflect the altered acreages. The Petitioner terms the actions of the Respondent as unconstitutional and fraudulent amounting to deprivation of his right to own property under Article 40 of the Constitution of Kenya hence the Petition.
9. The Application is opposed by the Interested Party only. The Interested Party, Thomas Kibe Wanyoike similarly swore his detailed Replying Affidavit on 4/11/2022 and outlined the background of the case before the Court. He deponed that on 20/11/2105 he filed an Originating Summons against the Petitioner herein Nbi ELC No. 1199 of 2015 over the subject suit land as shown by pleadings annexed at page 1 -112. The suit was later transferred suo moto to Kiambu Law Courts and later on his Application from Kiambu Law Courts to Kikuyu Law Courts. That the instant Application is an afterthought meant to delay the hearing of the Kikuyu Law Court's case. That the dispute herein touching on the alleged cancellation of titles arising from the said errors are subject of the suit in Kikuyu Court. That the gazetting of titles for cancellation was at the behest of the District Land Registrar after the affected parties refused to surrender their title deeds.
10. That the Petition and Application are sub judice. The Petition does not raise any Constitutional issues and any challenge to the Land Registrar's action ought to have been pursued under Judicial Review. That he's the registered owner of LR Karai/



Gikambura/1384 measuring 2 acres and thus enjoys rights as provided under Section 25 of the [Land Registration Act](#). That the deponent is wrongly sued in his personal capacity to the exclusion of Wanyoike's estate.

11. In a rejoinder, the Petitioner filed a Supplementary Affidavit sworn on 30/1/2023. He averred that the instant suit is different and distinct from Kikuyu PMCC MCELC 7 of 2020 as it raises violation of the Petitioner's Constitutional rights particularly under Article 40 [Constitution](#) of Kenya. That cancellation of the title of parcel 1385 is not an issue in the lower Court suit and reiterated this Court's jurisdiction to hear and determine the Petition. That the Interested Party is properly sued in his personal capacity having been so registered according to parcel 1384's title deed issued on 31/7/2013 as opposed to belonging to the estate of the late Charles Kibe.
12. Contemporaneous to filing the Replying Affidavit, the Interested Party lodged a Notice of Preliminary Objection of even date on grounds inter alia that the Petition is fatally defective and an abuse of Court process; Petition lacks Constitutional legal underpinning; Petition is an attempt to ask this Court to sit on its own appeal and the Petition is sub judice.

The written submissions

13. On 28/2/2023 directions were taken and parties agreed to canvass the Notice of Motion and Preliminary Objection together by way of written submissions.
14. The firm of Kangethe Waitere & Co. Advocates filed submissions dated 7/3/2023 on behalf of the Petitioner.
15. Opposing the Preliminary Objection the Petitioner argued that indeed the Petition raises Constitutional issues for this Court to determine. That the Respondent's move to cancel the two title deeds issued in 1989 amounts to condemning the Petitioner unheard contrary to Articles 47 & 50 of the [Constitution](#) of Kenya. Moreover, the Petitioner's proprietary rights under Article 40 of the [Constitution](#) of Kenya have also been violated.
16. That whilst the subject matters in the instant Petition and Kikuyu case are similar, the pleaded issues are very distinct. The Petition has set out with precision the violated Constitutional rights as stated in the case of [Anarita Karimi Njeru v The Republic](#) [1976-1980] KLR 1272.
17. Supporting the Motion, it was submitted that the Petitioner has satisfied the conditions for grant of conservatory orders as laid down in the case of [Law Society of Kenya v Office of the Attorney General & Another; Judicial Service Commission \(Interested Party\)](#) [2020] eKLR. That this Court has discretionary power to stay proceedings in the Kikuyu case. That the prayers in this Petition should it succeed, would render the Kikuyu suit nugatory.
18. The Interested Party through the firm of Wamae & Allen Advocates filed submissions dated 8/3/2022 (*sic*). Both the Preliminary Objection and Notice of Motion were argued together by drawing three issues for determination to wit; whether the Petition and Application are fatally defective; whether the Petition meets the requisite threshold and whether the Petition is sub judice.
19. The first issue was answered in the affirmative. That the Petitioner has disguised a land dispute into a Constitutional Petition flying in the face of the case of [CNM vs WMG](#) [2018] eKLR that abhorred parties from converting every issue into a Constitutional question. That adequate remedies are provided for in Sections 79 & 80 [Land Registration Act](#) that the Petitioner would have pursued in light of the doctrine of exhaustion.



20. Regarding the Constitutionality threshold of the Petition, the Interested Party was emphatic that the Petition fails the standard set out in the *Anarita Case supra* and as such ought to be dismissed in limine.
21. Last but not least the Interested Party argued that the Petition is sub judice by virtue of the Kikuyu case thus offending Section 6 of the *Civil Procedure Act*. He urged the Court to uphold the Preliminary Objection and dismiss Application and Petition with costs.

Analysis and Determination

22. There are two issues for determination;
 - a. Whether the Preliminary Objection has merit.
 - b. Whether the Notice of Motion has merit.

The Preliminary Objection

23. Appreciating the nature of a Preliminary Objection, that, if successful it can dispose of the entire suit; the Preliminary Objection shall be considered first. If it succeeds there shall be no necessity to determine the Application but in the converse the Application shall be determined.
24. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
25. At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion ...”
26. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.
27. The question underpinning the Preliminary Objection is whether this Court can exercise its Constitutional jurisdiction over the Petitioners claim. That being the case I find that this is a pure point of law. The next question is whether the objection is merited.
28. The Petitioner has argued that his claim raises Constitutional issues that ought to be determined by this Court. The Court was urged to determine whether the cancellation of the Petitioners title of 2 acres issued in 1989 for parcel 1385 without notice to the Petitioner denied the estate of his father the



opportunity to be heard thus condemned unheard in disregard to the provisions of Article 47 and 50 of the *Constitution*.

29. The Petitioner has narrated the history of the claim which stems from an alleged agreement between his father and the uncle of the Interested Party in 1971. That his father acquired 2 acres which title was later altered in 1989 by cancellation without notice leading to his father being issued with a title for 0.25 acres instead of the 2 acres he purchased. He averred that he and his family settled on the 2 acres after the sale and that he constructed a house in 1973 which he resides in todate. Moreover, he asserts that his brothers have constructed on the 2 acres and the family of the Interested Party live on the 0.25 acres todate. He faulted the Interested Party for obtaining a grant of letters of administration upon the death of his father in 2008 over the original parcel of 535 in 1992 when the said parcel was long closed on subdivision of the land into parcel 1384 and 1385. It was his argument that the titles were cancelled without notice and contrary to the provisions of the law(statute). He terms it an irregular act that led to deprivation of 2 acres of their title.
30. The Petitioner sought the following orders in the Petition;
- a. A declaration that the Petitioner's right to property has been violated by the Respondent contrary to Article 40(1) of the *Constitution* of Kenya.
 - b. A declaration that the Respondent's action of altering the acreage of LR Karai/Gikambura/1385 from 2 acres to 0.25 acres and the acreage of LR Karai/Gikambura/1384 from 0.25 acres to 2 acres and effectively cancelling the Petitioner's title to Karai/Gikambura/1385 without notice to the Petitioner and without following the due process set out by law have contravened the Petitioner's right to fair administrative action as enshrined under Article 47 of the *Constitution* of Kenya.
 - c. An order of mandatory injunction directed at the Respondent to reverse the alteration of the acreage in LR Karai/Gikambura/1385 back to 2 acres and LR No. Karai/Gikambura/1384 back to 0.25 acres and reinstation the title deeds of the suit properties issue don October 25, 1989.
 - d. A declaration that the entries numbers 3, 4, 5, 6 and 7 on the register of LR No. Karai/Gikambura/1384 have been made irregularly and the same are null and void.
 - e. An order cancelling the title deed for LR No. Karai/Gikambura/1384 issued to the Interested Party on 3/6/2013 and an order cancelling entries No. 3, 4, 5, 6 and 7 on the registration of LR No. Karai/Gikambura/1384.
 - f. An order of permanent injunction restraining the Respondent and the Interested Party and any other party from interfering with the Petitioner's rights of ownership and possession over the title number Karai/Gikambura/1385 measuring 2 acres.
 - g. An order halting all proceedings in Kikuyu MCELC No. 7 of 2020 (formerly Nairobi ELC No. 1199 of 2015 (OS) and any other proceedings in relation to the suit properties pending the determination of this Petition.
 - h. General damages for breach of the Petitioner's rights of ownership of property under Article 40 of the *Constitution*.
 - i. General damages for contravention of the Petitioner's right to fair administrative action as envisaged under Article 47 of the *Constitution*.
 - j. Costs of the Petition be borne by the Respondent.



- k. Any other relief or order that this Court may deem fit in the special circumstances of this matter.
31. The Interested Party has argued that the issues raised in the Petition are already before a competent Court of law for determination in Kikuyu MCELC No 7 of 2020. That there exists status quo orders in the pending suit; the cancellation arose following the decision of the Land Registrar in which the Petitioner participated and the titles called for cancellation; the Petitioner is guilty of laches for failing to challenge the title for over a decade. Finally, that the Petition does not raise any Constitutional issues given the cause of action is purely a land dispute.
32. I have perused the pleadings in Nrb ELC No 1199 of 2015 – see the Replying Affidavit to the Originating Summons sworn by the Petitioner has regurgitate the contents of the Petition to a large extent in defence of the Originating Summons.
33. It is trite that he who alleges must prove. The threshold for proving breach of Constitutional rights as in the instant case was set out in *Anarita Karimi Njeru vs Republic* (1976-1980) KLR where it was held that;
- “We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.” [Emphasis added]
34. That principle was affirmed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013]eKLR where the Learned Judges emphasized that;
- “(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the Constitutional provisions alleged to have been violated”
35. The Court of Appeal further added;
- “(43) The Petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the Petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the Petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the Petition alleged that the Government of Kenya had overthrown the *Constitution*, again, without any particulars. At paragraph 5 of the amended Petition, it was alleged that the respondents have no respect for the spirit of the *Constitution* and the rule of law, without any particulars.
- “(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the Petition before the High Court



did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the Petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the Petition fell short of the very substantive test to which the High Court made reference to.”

36. In the case of *Re Application by Bahadur* [1986] LRC (Cost.) 297 at 298, the Court held as follows;

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution.”

37. In addition in the case of *Minister of Home Affairs v Bickle & Others* [1985] LRC Cost.755, held as follows;

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The Court will pronounce on the Constitutionality of a statute only when it is necessary for the decision of the case to do so (*Wahid Munwar Khan vs. The State* AIR [1956] Hyd.22). The judge went on to add that: “Courts will not normally consider a Constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

38. I am guided by the case of *Dhow House Limited v Kenya Power and Lighting Company* (Constitutional Petition E058 of 2021) [2022] KEHC 11840 (KLR) where the Court held that

“In summation, the doctrines of ripeness and Constitutional avoidance shun to deal with a Constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a Constitutional issue is not ripe for determination until the determination of the Constitutional issue is the only course that can give the litigant the remedy he seeks. Both Constitutional avoidance and ripeness avert the determination of the Constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause. The exceptions to the Application of the doctrine of Constitutional avoidance are: - (a) where the Constitutional violation is so clear and of direct relevance to the matter; (b) in the absence of an apparent alternative form of ordinary relief, and, (c) where it is found that it would be a waste of effort to seek a non-Constitutional resolution of the dispute.

Closely tied to the doctrine of Constitutional avoidance and ripeness is the question whether this Petition raises a Constitutional question as submitted by the Petitioner. I have severally in my decisions stated that a Constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. When determining whether an argument raises a Constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider Constitutional rights or values. The dispute presented in this case arising from a contested electricity bill can be resolved without resorting to the Constitution. In fact, the definition of a Constitutional question provided in the South African case of *Fredericks & Others v MEC for Education and Training, Eastern*



Cape & Others cited by the Petitioner does not support the Petitioner's argument that before this is Constitutional Petition. Courts abhor the practice of converting every question into a Constitutional question which amounts to trivializing the Constitution".

39. Picking the cue from the decisions of the Court above stated, I find that where the law provides for a mechanism to determine a dispute it is not necessary to resort to the Constitution. The Constitution should be left for Constitutional disputes. Not every case should be constitutionalized even in the face of clear statutory provisions as to how it should be determined.
40. I find the case of the Petitioner is that of title to land. According to the Interested Party it is a question of boundary demarcation but according to the Petitioner the question is whether the Petitioner is entitled to 2 acres or 0.25 acres. In either case the cause of action is a land dispute. The right mechanism to determine this is by Application of the land statutes.
41. This is one such case that, even if there are Constitutional issues raised in the Petition, such issues ought to await the consideration of the matters with respect to ownership before the lower Court.
42. Final orders for disposal
 - a. In the upshot the Preliminary Objection is merited. It is upheld.
 - b. The Application dated the 13/10/2022 and the Petition be and are hereby struck out.
 - c. The costs shall be in favour of the Interested Party.
43. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF MAY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Kangethe for Petitioner

Respondent – Absent

Muhizi for Interested Party

Court Assistants – Kevin & Lilian

