



Isangaiwishi Group Branch v County Government of Taita Taveta & 15 others (Environment & Land Petition 14 of 2021) [2023] KEELC 18342 (KLR) (19 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 14 OF 2021**

NA MATHEKA, J

JUNE 19, 2023

BETWEEN

ISANGAIWISHI GROUP BRANCH PLAINTIFF

AND

COUNTY GOVERNMENT OF TAITA TAVETA & 15 OTHERS .. RESPONDENT

JUDGMENT

1. This is the Petition of Isangaiwishi Group Ranch Limited which states that there exists Plot Title Bura/Isangaiwish1/19 measuring approximately 5560.5 hectares and Plot Title Bura/Isangaiwish1/20 measuring approximately 404.7 hectares both situate in Taita Taveta County in the name of the Petitioner absolutely and which are collectively known as Isangaiwishi Group Ranch. The Petitioner was registered on 13th October, 1983 and as at 30th August 2010 had a membership of 1940 members as set out in schedule 'A' set out in the affidavit in support of the Petition. The Petitioner states that since its inception, it has operated as a member based group ranch with a constitution and bylaws. In this regard, to be a member of the Petitioner one has to meet the following mandatory conditions that a person has inherited an interest from a person who was recorded on that Register; or the Group Representatives all agree; and The Group Representatives' decision is confirmed at an Annual General meeting of the group or a court so orders.
2. For the foregoing reasons, the membership of the Petitioner has always been defined and has never been a general community ranch. In the year 2000 some individuals challenged the ownership of the suit property in Court by filing and prosecuting HCC Misc Civil Application Number 225 of 2000 Mombasa Edward Lenjo Musamuli & 5 Others v Commissioner of Lands and Isangaiwishi Group Ranch Limited. The Petitioner successfully defended the case and the same was dismissed with costs on 28/3/2008. On 28th August 2010, Kenya promulgated a new constitution which is now in force and is being implemented the (*Constitution* of Kenya) under Article 63 of the *Constitution*. Further under The *Community Land Act* (TCLA) Section 7 provides for procedure for registration of communities.



- Further under Section 8 (1) (c) of the [Land Registration Act](#) No. 3 of 2012, there is a provision for a register of members and in 8(1) (e) the identity of those members registered and the representatives and names and identities of the members of the group.
3. The Petitioners state that they are yet to be registered as a group ranch under the [Community Land Act](#). For this reason, Section 47 (2) provides that "the respective group representatives shall cease to hold office upon registration as a group under the [Community Land Act](#)." The Petitioner states that it is the legitimate and lawful absolute owner of the suit property and the membership of the community contemplated under Article 63(2) of the [constitution](#) and section 47 (1) of the [TCLA](#) are the members set out in schedule A. Under sections 10 and 11 of the [TCLA](#), the 8th Respondent is mandated to register the Petitioner under the [TCLA](#) but that has not yet happened. For that reason the current representatives of the Petitioner continue to hold office. that on 8th February 2021, your Petitioner applied for registration but the process is not complete with a meeting set on 5th March, 2021.
 4. That for ranches which had a legal status as at 28th August 2010, the framers of the [Constitution](#) did not contemplate creation of a new community but a transition of the community created under Cap 287 (repealed) to the group registered under Section 8 of the [Land Registration Act](#). Equally, in enacting the [TCLA](#), parliament did not contemplate dissolution of the existing group ranches under Cap 287 (now repealed) and creation of a new register of community members ignoring the status quo of membership existing prior to 28th August 2010. That until the new group is registered under the [TCLA](#), the entity existing under Cap 287 (repealed) continues to manage the affairs of the Petitioner. For that reason, there is no vacuum in the leadership and management of the affairs of the Petitioner.
 5. That on 13th January, 2014, the Petitioner was approached by the leadership of the 9th Respondent (a public entity) for the Petitioner to consider donating a portion of the suit property measuring approximately 1000 acres. According to the 9th Respondent, if donated, the 1000 acres would be used for expansion of the public facilities of the University including a School of Health Sciences, a School of Agriculture, Earth Science and Environmental Studies among others and which in turn was to benefit the wider public of the 1st Respondent and beyond. The Petitioner deliberated on this proposal and on 4th July, 2014 in an Annual General Meeting passed a resolution where we accepted to and donated 1000 acres. On 30th January, 2021 the 1st Respondent wrote to the 9th Respondent expressing an opinion about the suit property, Article 63 of the [Constitution](#) and Section 47 of the [TCLA](#) (1st Respondent's Opinion). As a result of this 1st Respondent's opinion, the Petitioner is apprehensive that the Land Control Board Consent will not be issued. The 1st Respondent's opinion seriously compromises the rights of the Petitioner as guaranteed under Article 40 of the [Constitution](#) by implying that a new entity with new members and a new management is in the process of being created. On 24th February 2021 the 2nd Respondent issued a press statement accusing the officials of the Petitioner of serious offences and urging the invaders to stay put. The 1st Respondent's Opinion renders the suit property an open-no-man's land and a free for all to occupy. This has broadened the invasion and spread of the 10th - 16th Respondents. Currently there are a few squatters on the suit property who entered recently mostly at the invitation of the 2nd Respondent.
 6. In an effort to have the illegal occupants evicted from the suit property issued a Statutory Notice under Section 152E of the [Land Laws \(Amendment\) Act](#) 2016 and had the said Notice served through advertisement in both the Daily Nation and Taifa Leo on 25th June 2020. In these Statutory Notices, the Deputy County Commissioner, the 6th Respondent is statutorily bound to evict all the illegal occupants after the expiry of the Statutory Notices. The said Deputy County Commissioner was served with the Statutory Notice on 1st July, 2020. The Statutory Notices expired on 31st October, 2020. The Petitioner has engaged the 5th and 6th Respondents to evict the 10th -16th Respondents but the said



Respondents have refused to comply with the law by evicting the illegal occupants. The role placed on the 3rd, 4th, 5th and 6th Respondents under Section 152E of the [Land Laws \(Amendment\) Act 2016](#) is administrative. That the Petitioner is entitled to fair administrative action under Article 47 of the [constitution](#) which is fair, just, expeditious and procedurally fair.

7. The Petitioner states that its constitutional rights have been breached and in particular Article 40 of the [Constitution](#). That the 10th-16th Respondents have threatened and continue to threaten the rights of the Petitioner and occupy the suit property contrary to this article. Article 47 of the [Constitution](#) that the 4th -6th Respondents have failed to evict the squatters herein the 10 - 16th Respondents in compliance with the sections 152 (E) of the Land Laws (amendment) Act 2016. Article 63 of the [Constitution](#) that the threat by the 1st Respondent through the letter dated 30/1/2021 is a threat to the existence of the community of the Petitioner by bringing other members arbitrarily. This is oppressive and unconstitutional.
8. The Petitioner states that the principles set out in the [Amarita Karimi Nieru v Republic](#) (1976) 801 eKLR 1283 The Petitioner now prays for the following remedies against the Respondents jointly and severally;
 - a. A Declaration that the membership of the Petitioner set out in Schedule A of this Petition shall constitute the only membership of the Isangaiwishi Group to be constituted under section 47 of the *TLCA* by the 8th Respondent to own, manage and control the plot title Number Bura/Isangaiwish1/19 & 20.
 - b. A Declaration that pending the registration of the new entity under Section 47 of the *TLCA* and Section 8 of the *Land Act*, the current officials of the Petitioner have the authority to manage, control and protect the assets of the Petitioner including plot title number Bura/Isangaiwishi/19 & 20 and the interests thereof.
 - c. A declaration that the decision to donate 1000 acres of the plot Title number Bura/Isanigawish1/19 & 20 by the Petitioner done on 4th July, 2014 was lawful.
 - d. A Mandatory order do issue compelling the Land Control Board, Taita Taveta to issue the Petitioner with a consent to transfer the 1000 acres to the 9th Respondent.
 - e. A declaration that the actions of the 2nd Respondent in inviting outsiders into the suit property amounts to an express breach of chapter 6 of the *Constitution*.
 - f. A Mandatory conservatory order in the form of orders of Mandamus do issue compelling the 1st, 4th, 5th and 6th Respondents to evict all squatters currently occupying portion of plot title numbers Bura/Isangaiwish1/19 & 20 forthwith.
 - g. An order of injunction do issue restraining the 10th - 16th Respondents by themselves, servants and or agents or any other non-member of the Petitioner from interfering through entry, use or occupation of any part of the suit property.
 - h. A declaration that the act of forceful takeover of the Petitioners' Land breaches the right to own property as guaranteed in Article 40 of the *Constitution*.
 - i. Any other relief this Honourable Court would be pleased to issue.
 - j. Costs of the Petition.
9. In response the 4th, 5th, 6th, 7th and 8th Respondents filed grounds of opposition dated 28th November, 2022. The grounds of opposition were as that the Petition does not meet the test set out in [Anarita](#)



Karimi Njeru v Republic (1976-1980) the extent that the Petition fails to disclose names of the alleged the alleged squatters and or invaders. That the Petitioner failed to obtain a formal authorization from court to evict the alleged squatters and or invaders in compliance with section 1520 (b) of the Land Amendment Act 2016. That the Petitioners failed the present a formal authorization for eviction from court. That Petitioner is guilty of material non-disclosure in failing to disclose the names of the persons against whom orders of eviction are sought.

10. At the time the Petitioner filed this case he had commenced the process of registration under the Community Land Act (See paragraph 23 of the Petition). The Petitioner state that they applied for registration under the Community Land Act on 8th February, 2021.
11. On January, 2023 the Petitioner filed a further affidavit dated 19th January, 2023. In the affidavit, he states that the Petitioner was registered under The Community Land Act on 17th June, 2021 and after registration a certificate of registration was issued. Upon registration of the land as community land, the Petitioner's right to set aside land for public purpose retained. Section 22 provides for ways in which Community Land may be converted to public land and 26(1) of The Community Land Act provides that a community may set aside land for public purposes. There is therefore no bar to the setting aside of part of the community land for public purpose under section 26 of The Community Land Act. The Petitioner is free to set aside land for a public university. The apprehension by the Petitioner that the Land Control Board Consent will not grant/issue consent is just that, apprehension. No evidence has been availed to show that an application for consent was made to the Land Control Board, Taita Taveta. The Land Control Board is also not a party to these proceedings. They submit that it is premature to grant a mandamus order to compel the Land Control Board, Taita Taveta to issue the Petitioner with a consent to transfer the 1000 acres to the 9th Respondent before the Land Control Board receives an application. On eviction they submit that Section 152 E of the Land Act, 2012 provides for eviction in Kenya. Section 152E of the Amended Land Act provides that:

If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve a notice, of not less than three months before the date of the intended eviction.

(2) The notice under subsection (1) shall- a) Be in writing and in a national and official language.”

12. The Respondents submit that while the Petitioner is entitled to protection of its right to property no proof was availed to prove he had complied with the provision of Section 152E(d) and the 4th, 5th and 6th Respondents cannot be faulted for failure to evict 'the squatters. Similarly, there is need for the Petitioner to point out the persons to be evicted. This is necessary because he alleges more people (apart from the 10th -16th Respondents) trespassed onto the land at the invitation of the 2nd Respondent.
13. This Court has considered the Petition and the submissions therein. The Respondents have raised a preliminary issue on the threshold required in Constitutional Petitions. It is now a well-developed principle that in Constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272 where the court stated that;

“Constitutional violations must be pleaded with a reasonable degree of precision.

14. The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise



manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.

15. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR provided the standard of proof in Constitutional Petitions. The Court of Appeal judges stated that;

“...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. What Jessel, M R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

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.

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. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the Petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st Respondent...”

16. Lenaola J. while referring to the *Anarita Karimi* and *Mumo Matemu* Cases in *Dr. Rev. Timothy Njoya v The Hon. Attorney General and Kenya Review Authority* HC Constitutional and Human Rights Division Petition No 479 of 2013 stated that;

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the *Constitution* has been violated by whom and even state the Article of the *Constitution* that has been violated and the manner in which it has been violated.”

17. Looking at the Petitioner’s pleadings, the evidence as well as the submissions of the parties, it is my considered view that the Petitioner has not met the requirements of a Constitution Petition. Although



the Petitioner has pleaded provisions of the Constitution, they have not demonstrated to the required standard how their individual rights and fundamental freedoms were violated, infringed or threatened by the Respondents. They have not adduced any evidence to demonstrate the alleged violations. The Community Land Act provides the procedure for Registrations of communities and that a community may set aside land for public purposes. It is clear that at the time the Petitioner filed this case he had commenced the process of registration under the Community Land Act (See paragraph 23 of the Petition). The Petitioner states that they applied for registration under the community Land Act on 8th February, 2021. If the remedy sought can be granted under other legislative provisions, the court ought to decline to determine it. In the case of Uburu Muigai Kenyatta v Nairobi Star Publications Limited (2013) eKLR, the court held that;

“I need say no more. Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in stated in *AG v S.K. Dutambala* Cr Appeal No 37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions. The complaint in this case is not so serious as to attract Constitutional sanction.”

18. In the case of Humprey Mutegi Burini & 9 Others v Chief of the Kenya Defence Forces & another (2017) eKLR the court (Mativo J) observed as follows:

In my view, the above are generalized allegations. There are ten Petitioners in this Petition. It would have been prudent for the Petition to contain particulars of the alleged violations subjected upon each Petitioner, the loss or damage if any suffered and specify the injuries suffered whether physical or physiological. The Petition ought to contain details of the alleged place of arrest for each Petitioner, detention, conditions at the place of detention and a chronology of the torture inflicted and if possible the culprits. That way, the Respondents would have been confronted with a specific claim to respond to. To, me, this Petition lacks clarity and with tremendous respect discloses extremely poor pleadings and does not conform to the rule 10 (2) cited above. It is difficult for the court to determine the nature and extent of torture meted on each Petitioner and arrive at a fair and reasonable compensation in absence of such clarity and specificity.”

19. Drawing from the decisions cited above, I would agree with the Respondents that the kind of specificity required of a Petitioner by the holding in *Anarita Karimi Njeru* has not been met by the Petitioners in the instant Petition and that therefore this Petition is defective.
20. Even assuming that this Petition was competent, I find it would be premature and would not pass the test of the burden of proof. What is the identity of these “other” squatters, when did they invade and how many are there. Being apprehensive of the 1st Respondent’s opinion is not enough. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case Leonard Otieno v Airtel Kenya Limited (2018) where Mativo J. held that;

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *constitution* an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues.



Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

21. From the foregoing I reach a conclusion that this Petition has not been pleaded with a reasonable degree of precision and that the alleged violations have not been proved. I find that the Petitioner has not met the threshold of a Constitutional Petition. It is trite law that costs follow the event. The Petitioner having presented a Petition that offends the set down Constitutional principles, ought to meet the costs of the said Petition. I find that this Petition lacks merit and it is hereby dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH JUNE 2023.

N.A. MATHEKA

JUDGE

