



**Itiri v M'limbere & 4 others (Environment & Land Petition E010 of 2021)  
[2023] KEELC 19845 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19845 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND PETITION E010 OF 2021  
CK YANO, J  
SEPTEMBER 20, 2023  
IN THE MATTER OF ARTICLE 22 (1) & (4), 23 (1) & (3)  
AND ARTICLE 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OR INFRINGEMENT OF THE  
RIGHT TO GUARANTEED UNDER ARTICLE 40 OF THE CONSTITUTION**

**BETWEEN**

**FRANCIS MUCHIRI ITIRI ..... PETITIONER**

**AND**

**M'MARANYA M'LIMBERE ..... 1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RETISTRAR OF LANDS MERU ..... 3<sup>RD</sup> RESPONDENT**

**DLASO (DISTRICT LAND ADJUDICATION OFFICER, TIGANIA WEST SUB  
COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF SURVEYORS ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a petition dated 1<sup>st</sup> March 2021, the petitioner is seeking for the following orders against the respondents jointly and severally:
  - a) An order of declaration that the alterations/or changes done on the Land No. LR No. Akithi III 353 lying map 108/4/6/2 and map in 2017 were illegal and fraudulent and the subsequent titles from the altered 2017 were fraudulently obtained.



- b) An order of cancellation of the altered land title LR No. Akithi III/353 lying map 108/4/6/2 A and map 108/4/6/2 post 217 and cancellation and or revocation of the title deed issued by the respondents from the post 2017 map.
- c) An order of permanent injunction directed to the 1<sup>st</sup> respondents retraining by himself, employees servants and or agents and or anybody claiming 108/4/6/2 LR Akithi/III/353 lying map 108/4/6/2 by virtue of or under his authority from trespassing into, encroaching onto, selling, transferring, excavating on, building and/or erecting structures or building upon or otherwise interfering and/or erecting structures or building upon or otherwise interfering and/or dealing with the suit property and/or continuing to do, perform or to carry out any of the acts complained of.
- d) A declaration that the said land premises known as land reference Parcel No. Akithi III/353 lying map 108/4/6/2 in Meru County belongs to the petitioner's fathers since for over 59 years and that is where he lives and he is entitled to it under law.
- e) A mandatory order be and is hereby issued to compel the respondents to release to court and the petitioner any available records information, including the maps before illegal alterations were made in 2017 and copies of the relevant documents relating to land reference parcel No. LR NO. Akithi III/353.
- f) That an order of certiorari quashing the decision of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents decision to alter the LR NO. Akithi III/353 Lying Map 108/4/6/2 and the map in 2017.
- g) That an order of mandamus do issue to the respondents compelling them to cancel the altered map of 108/4/6/2 which was altered in 2017 and revoking all the titles obtained through post 2017 map and register back the original map taking back the petitioners land LR No. Akithi/III/353 lying map 108/4/6/2 to its original position.
- h) That an order of prohibition directed against the respondents prohibiting them through their servants and or agents from further interference and or dealing with the suit land parcel being AkithiI/III/353 lying map 108/4/6/2.
- i) That the costs be provided for
- j) General damages
- k) Any other or further remedy that the Honourable court shall deem fit to grant pertaining to the suit premises.
- l) An order that the respondents do pay the costs of this petition.

### **The Petitioner's Case.**

2. The petitioner averred that at all material times the petitioner's father, one M'itiri M'ekandi (deceased) was and/or has always been the owner of the land Parcel Known as Akithi III/353 lying map 108/4/6/2 (hereinafter called the suit property). That sometime on the 6<sup>th</sup> November, 2017, the petitioner was charged in court with forcible detainer contrary to section 91 of the Penal Code Vide Tigania CR case No. 1773/2017. That the petitioner was therefore arrested and detained in connection with the abovementioned criminal case. That it was during the petitioner's detention that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent colluded and fraudulently effected illegal changes and or alterations in the land map No. 10/4/6/2 concerning the suit parcels of land and brought the 1<sup>st</sup> respondent into the suit land hence evicting the petitioner illegally.



3. The petitioner averred that on 9<sup>th</sup> March 2018, the Tigania court in Cr. Case No. 1773 of 2017 found the 1<sup>st</sup> respondent to be on the wrong.
4. The petitioner further stated that he has failed to get justice from the respondents to reinstate the suit land to its original location and for the 1<sup>st</sup> respondent to be taken to his original position. The petitioner averred that he has suffered much damage and loss and therefore seeking an order from the court for a declaration that the said transfer and or changes effected by the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> respondents were illegal and that the suit property belongs to the petitioner's father.
5. The petitioner has enumerated particulars of the alleged violation by the respondents as harassing and threatening the portioner on his parcel of land, accusing the petitioner and having him charged in court over his own legal parcel of land, harvesting the petitioner's produce on the land, threatening to evict the petitioner from his legal parcel of land where he has lived and has developed greatly and even where his late father was born and lived on since 1929, forging the details and/or documents of the suit parcels of land and colluding to fraudulently alter the map in 2017 from 1988 and even 2011 map, causing false, illegal and/or fraudulent alterations in the land register and map, colluding to illegally effect the changes on the title of the suit parcel of land, causing transfer and or changes in the suit land and lying map without exercising due diligence and colluding to fraudulently alter the map.
6. At the hearing the petitioner testified as P.W 1 and adopted his statement dated 30<sup>th</sup> November, 2020 and produced the documents filed on 21<sup>st</sup> April 2022 as P exhibit 1 – 12 respectively. He was also cross-examined. He stated that he has sued the 1<sup>st</sup> respondent because he curved a portion of his land which he was ploughing and which belonged to his father.
7. The petitioner further stated that the parcel is 353 and the map do not indicate the names of his father. He further stated that he had a certificate of confirmation dated 15<sup>th</sup> August 2017 marked P Exh 1. P.W 1 testified that they were given a title deed for that land but the same did not come as per the confirmation of land.
8. The Petitioner testified that his father was now deceased and that when he was alive, he demarcated the suit portion of the land from Dlaso. P.w 1 stated that he did not have a copy of the proceedings. He stated that there was an alteration of the map done in 2018 and that the 1<sup>st</sup> respondent came and overlapped his father's 0.40 acres.
9. The petitioner further testified that he has constructed his house in plot No. 4136 which is part of his father's plot NO. 353. The portioner stated that plot No. 353 was subdivided and it resulted in parcel Nos 4136 and others that do not border the land of the 1<sup>st</sup> respondent. The petitioner stated that the 1<sup>st</sup> respondent was not his neighbor.
10. The petitioner testified that he knew the 1<sup>st</sup> respondent plot No. 734 and stated that he wanted him to vacate from plot 353 to 734. The petitioner pointed out that he had a complaint dated 13<sup>th</sup> August 2019 but which he had not produced. He stated that he was claiming 0.40 acres which the 1<sup>st</sup> respondent has been using since the year 2021.

### **The 1<sup>st</sup> Respondent's Case**

11. In response to the petition, the 1<sup>st</sup> respondent filed a replying affidavit sworn on 15<sup>th</sup> December, 2021 and filed in court on 13<sup>th</sup> January, 2022 wherein he averred that he is the registered owner of land parcel No. Akithi/III/734 having gathered the same several decades ago. He annexed a copy of the title deed and letter of confirmation of ownership. The 1<sup>st</sup> respondent further stated that he is not in occupation or in any way interested in the petitioner's parcel of land No. Akithi/III/353 which is distinct but



borders land parcel no. Akithi/III/734. That the petitioner's land is a subdivision from the land of the petitioner's deceased father, one M'tiri M'ekandi.

12. The 1<sup>st</sup> respondent denied the particulars of fraud levelled against him and further denied having been convicted of the offence of forcible detainer in criminal case no. 1773 of 2017 as alleged by the petitioner who never exhibited a copy of the alleged judgment. That on the contrary, the petitioner is the one who was charged with malicious destruction and upon his request to settle the matter out of court, the matter was resolved amicably.
13. At the hearing, the 1<sup>st</sup> respondent testified as D.w 1 and adopted his witness statement dated 10<sup>th</sup> November, 2022 as his evidence in chief. The said statement basically reiterated the contents in his replying affidavit.
14. D.W 1 testified that his parcel No. 734 borders parcels Nos. 4140, 4135, 4141, 4136, 4138, 4137 and 4139 which were originally parcel No. 353. He produced the title for his parcel No. Tigania West Akithi III/73, a certificate of search and letter dated 30<sup>th</sup> July 2017 as well as a sketch map as D exhibits 1 – 4 respectively. He testified that his parcel of land No. 734 is separated by a road with parcel No. 353 and that when a surveyor came to identify the boundary of the two parcels, the petitioner took off. D.W 1 stated that he never had any dispute with the petitioner's father. He was cross-examined and re-examined.

#### 2<sup>nd</sup> – 5<sup>th</sup> Respondents Case

15. Samuel Njau, the 4<sup>th</sup> respondent, filed a replying affidavit sworn on 14<sup>th</sup> November, 2022 wherein he stated inter alia that the certificate of finality for Akithi Adjudication Section was issued in February 2017 which forwarded Akithi III maps and adjudication records to the chief land registrar for registration. Relying on advice, the 4<sup>th</sup> respondent contended that this petition is misconceived and a non-starter as section 26 of the [Land Consolidation Act](#) makes provision for objection to the Adjudication Register which the petitioner failed to utilize to his prejudice. That since the suit parcel has been registered, the 4<sup>th</sup> respondent has no jurisdiction over it.
16. It is further stated that the petition herein raises no constitutional issues, but civil issues that should be determined in the ordinary suits. That in any event, the land registrar is seized of jurisdiction in the issue herein in the first instance by virtue of sections 18 and 78 of the [Land Registration Act](#) No. 3 of 2012. Further, that the petition lacks particularity on the nature and extent of the violations by the respondents save for broad and sweeping assertions.
17. The 4<sup>th</sup> respondent averred that according to RER parcel No. 353 initially was of size 1.28 acres and later the family of Francis Muchiri Itiri applied for subdivision which was granted and the said parcel was subdivided into eight portions to wit 352 – 0.20 (mother number), 4134 – 0.12, 4135 – 0.12, 4135 – 0.12, 4136 – 0.17, 4137 – 0.14, 4138 – 0.12, 4139 – 0.12, 4140 – 0.12 and 4141 – 0.12 all totaling 1.28 acres. That parcel No. 353 bordered parcel No. 734 during demarcation and allocation and all can be accommodated on the same ground. That upon referring to the RER and other records, the two parcels have never had any A/R objections against the register or each other. The 4<sup>th</sup> respondent confirmed that when they went to the ground to re-measure the parcels, to conform with the acreage as per RER the petitioner refused and walked away.
18. the 2<sup>nd</sup> – 5<sup>th</sup> respondents did not call any witness. After the close of the petitioner's case and the respondent's case, the petitioner and the 1<sup>st</sup> respondent filed written submissions.



## Petitioner's Submissions

19. The petitioner submitted on three issues, the first being whether the alterations or changes done on the parcel No. L.R Akithi III/353 lying on map 108/4/6/2 and the map in 2017 were illegal and fraudulent together with and the subsequent titles, whether the plaintiff is the rightful owner of L.R NO. Timau Settlement Scheme/1655(sic) and who pays for costs.
20. The petitioner cited Section 19 and 22 of the *Registered Land Act* (repealed) and submitted that the same was not followed. He relied on the case of *Stephen Onyango Oloo v Nelson Makokha Kaburu & 4 others* Civil Appeal No. 83 of 2014 and ELC petition No. 6 of 2013 *Party of Independent Candidate of Kenya & another Vs Mutula Kilonzo & 2 others* (2013) ECLR.

## 1<sup>st</sup> Respondent's Submissions.

21. The 1<sup>st</sup> respondent raised 4 issues, that is whether or not the petition meets the threshold of a constitutional petition, whether the 1<sup>st</sup> respondent is the owner of land parcel number Tigania West Akithi III/734 while the petitioner is the owner of land Parcel Number Tigania West/ Akithi III/353, whether the petitioner is entitled to the prayers sought and fourthly who bears the costs of the petition.
22. The 1<sup>st</sup> respondent submitted that the nature of a claim before the court is one of encroachment or a boundary issue and that no single constitutional provision relied on in both the petition and the petitioner's submissions has been disclosed. It is the 1<sup>st</sup> respondent's submissions that the petitioner's claim is an ordinary claim that would have been litigated in the normal court and not as a constitutional question.
23. The 1<sup>st</sup> respondent submitted that the instant petition does not meet the constitutional threshold as required under the Anarita Karimi Njeru's case.
24. In regard to the second issue, the 1<sup>st</sup> respondent cited Section 26 of the *Land Registration Act* 2012 and submitted that courts have on several occasions stated that title deed is a prima facie evidence of ownership of land.
25. On the issue of whether the petitioner is entitled to the prayers sought, the 1<sup>st</sup> respondent relied on the case of *Kenya National Examination Council Versus Republic Ex-parte Geofrey Gathenji Njoroge & 9 others* (1997) ECLR and the case of *Sophia Nyakerario Maina and Sebastian Adala (suing on their own behalf and in the interest of 440 other applicants being inhabitants of properties known as land reference number 209/1216) V Kenya Airports Authority & 3 others* and submitted that the orders sought are directed to the 2<sup>nd</sup> to 5<sup>th</sup> respondents of whom the 1<sup>st</sup> respondent has no control over.

## Analysis and Determination.

26. Upon consideration of the pleadings herein, the rival submissions and various authorities relied on by the parties, the following issues arise for consideration-;
  - a. Whether the petition meets the threshold of a constitutional petition.
  - b. Whether the main issue in the petition is a boundary issue.
  - c. Whether the petitioner is entitled to the reliefs sought.



### Whether the petition meets the threshold of a constitutional petition

27. On the issue as to whether the petition as drawn and filed meets the threshold of a constitutional petition, it is trite that where it comes to matters concerning the violation of human rights it is well expounded and found in the case of *Anarita Karimi Njeru Vs Republic* (1979) eKLR where the court stated that

“... If a person is seeking orders 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 a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be ingraind.”

28. Similarly, in *Kiambu County Tenants Welfare Association Vs Attorney General & another* [2017]eKLR it was held-;

“Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must not only state the provisions of the *Constitution* allegedly infringed in relation to them but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any) ... In my view the petitioner has failed to discharge the burden of proof to the required standard. To my mind the burden of establishing all the allegations rests on the petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not)

29. From the facts of this case and parties’ pleadings, it is not in dispute that the petition herein surrounds issues of ownership of two land parcels, Tigania West/ Akithi III/734 and land parcel number Tigania West/ Akithi III/353. Parcel No. Akithi/353 belonged to the petitioner’s deceased father before a sub division was done and the land was bequeathed to his children.

30. A perusal of the petition as drawn and filed, it is clear that it has not set out with a reason able degree of precision that of which the petitioner complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed. A party seeking constitutional reliefs is under an obligation to prove violated of his rights under various provisions of the Bill of rights. It has time and again been clearly stated a party must not only state the provisions of the *Constitution* allegedly infringed in relation to the rights violation but has also to state the manner of infringement and the nature and extent of the infringement and nature and extent of injury suffered (if any). Considering the petition herein, in my view, I find the petitioner has failed to discharge the burden of proof as set out in the *Anarita Karimi Njeru Vs Republic* case (*supra*).

31. I find that what is before this court is not a constitutional petition but boundary dispute disguised as constitutional petition. I therefore find that the petition herein has not met the threshold of a constitutional petition.

### Whether the main issue in the petition is a boundary dispute

32. On scrutiny of the pleadings and evidence it is clear that the dispute herein is centered on a boundary issue. It is only after this dispute is resolved that a determination on whether the petitioner is entitled to the reliefs sought can be made.



33. Section 18 (2) of the *Land Registration Act* provides that the determination of the boundaries of a parcel is initially the preserve of the land registrar and states;

“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

34. Section 18 (3) and 19 then follows with further provisions as to how the Land Registrar may go about making the determination, including receiving evidence as to the parcel’s boundaries and situation as may be necessary.

35. Mutunga J in *Ali Farah V Moses Ole Nasisit & 9 others* [2016] eKLR held that the courts are not a suitable venue to begin resolving such disputes that are of a technical nature and stated as follows;

“Section 18 and 19 of the *Land Registration Act* 2012 gives power to the land Registrar to have the boundary of any parcel of land established and fixed in the event of any dispute and in carrying out such exercise the land registrar is at liberty to receive such evidence as to the situation of the land parcel boundaries as may be necessary. Hence the Act recognizes that it is the land registrar acting in concert with the surveyor who would be best suited to resolve any issues relating to boundary disputes and not the courts. The land registrar has custody of all the necessary records and the surveyor in case of need renders the necessary technical support.”

36. The respondents averred that when they wanted to re-measure the suit parcel to confirm their acreages and possibly establish the boundaries, the petitioner ran away. The petitioner did dispute this. It therefore follows that the court lacks jurisdiction to hear the petition as it was brought prematurely before ascertaining the boundary in the manner contemplated by the *Land Registration Act* and in any case, the same has not met the constitutional threshold required.

37. I find that this suit as filed does not meet the Constitutional threshold to warrant the grant of the orders sought. Consequently, the petition is dismissed with cost to the respondents.

38. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MERU THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**C.K YANO**

**JUDGE**

In the presence of

Kaba holding brief for Maranya for 1<sup>st</sup> respondent

Petitioner present in person

No appearance for 2<sup>nd</sup> – 5<sup>th</sup> respondent

