



**Kiambi & 4 others v Mukindia (Environment & Land Petition E003 of 2022)
[2023] KEELC 19874 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E003 OF 2022**

CK YANO, J

SEPTEMBER 20, 2023

BETWEEN

**ROBERT KIAMBI 1ST PETITIONER
GLADYS KANYUA 2ND PETITIONER
NANCY KAJUJU 3RD PETITIONER
SUSAN KAGWIRIA 4TH PETITIONER
FAITH KENDI 5TH PETITIONER**

AND

M'MUGAMBI MUKINDIA RESPONDENT

JUDGMENT

1. By a petition dated March 22, 2022, the petitioners are seeking a declaration that the petitioner's fundamental rights and freedoms as guaranteed under article 40 of the Constitution of Kenya were contravened by the respondent and consequently grant an order of inhibition and a permanent injunction restraining the respondent by himself or his agents or assignees from leasing out or interfering with the petitioners use of land Nos. Kibirichia/Ntumburi/3500 and 3498 as well as costs of the petition.
2. The petition was supported by facts set out in the petition and the affidavit of Geoffrey Kinoti Mugambi, the 3rd petitioner sworn on March 22, 2022.
3. The respondent was duly served but never entered appearance nor defended the suit.

The Petitioners Case



4. The petitioners' case in a nutshell is that they are the biological children of the respondent who is the registered owner of the suit properties. The petitioners averred that their fundamental rights and freedom are at risk of being contravened and grossly violated by the respondent who has disregarded the Constitutional Rights of the petitioners and has hatched plans to dispose of the land where the petitioners were born and brought up and which they depend on.
5. The petitioners averred that on diverse dates between October, 2010 and June 2016, the respondent hatched plans to sell the initial land registration No. Kibirichia/Ntumburi/57 before subdivision, but the petitioners upon realizing the respondent's schemes filed ELC Petition No.21 of 2015. That after mediation, the respondent agreed to subdivide the land and transfer portions thereof to the petitioners and as a consequence, the petitioners agreed to withdraw the said suit on July 10, 2019. The petitioners accused the respondent of breaching the mediation agreement by subdividing the land parcel No. Kibirichia/Ntumburi/47 into the suit properties herein and declined to transfer portions into the petitioners names.
6. The petitioners averred that the respondent has been bringing prospective purchasers into the suit parcel of land with the intention of selling the said parcels of land. That the respondent has caused the land registrar Imenti North to issue a notice to the 3rd petitioner herein asking him to show cause why he should not remove a caution placed on land Parcel No. Kibirichia/Ntumburi /3500. The petitioners are apprehensive that if the caution is removed, the said land will be alienated to their detriment and leave them destitute.
7. The petitioners further averred that the respondent, who abandoned them when they were kids after their mother died in 1988 and did not educate them is now desirous of alienating the suit properties. They stated that the initial parcel No. Kibirichia/Ntumburi/57 was registered in the name of the respondent to hold as trustee for the petitioners by their grandfather. The petitioners averred that the respondent is in breach of his duties as a trustee and that his actions are in violation of the petitioners' Constitutional Rights and are illegal.
8. In the affidavit in support of the petition, the petitioners have annexed copies of official searches, copy of consent and pleadings in ELC petition No. 21 of 2016 and minutes as well as a copy of a letter dated February 10, 2021 from the Land Registrar, Meru Central.

The Petitioners' Submissions

9. In their submissions dated April 20, 2023, M/s Kaimenyi Kithinji & Co. Advocates for the petitioners gave a brief of the petitioner's case and submitted that the claim by the petitioners is one of trust. That the property was ancestral land passed on from generation to generation adding that the petitioners do not know any other land except the suit land where they were born and brought up.
10. Counsel for the petitioners further submitted that by virtue of section 30 (g) of the *Registered Land Act* cap 300 (now repealed), the petitioners are protected for having possessory and occupational interests over the suit properties as an overriding interest by the fact that they grew up there until they got married. Counsel for the petitioners relied on the case of *Malcolm Bell v Hon Daniel Toritich Arap Moi & another* Sup Ct Application No 1 of 2013 in which the court held that one needed not to be in actual physical possession and occupation of land to prove the existence of trust.
11. Counsel for the petitioners further submitted on the issue of customary trust and relied on the case of *Obiero v Opiyo & others* 1972) EA 227, and *Esiroyo v Esiroy* (1973) EA 388. The petitioners' counsel also cited section 28 (b) of the *Land Registration Act* and articles 27 and 40 of *Constitution* of Kenya.



12. The petitioners also cited section 68 (1) of the *Land Registration Act* and submitted that the provisions therein give the court discretion to issue orders which are in the nature of an injunction restraining dealings on land pending further orders by the court. That the section is meant to preserve the property from acts that would otherwise render court order incapable of being executed. The petitioners counsel relied on the case of *Mwambeja Ranching company Limited & another v Kenya National Capital Corporation Limited Kenya* & 6 others [2015] EKLK, *Giella vs Cassman Brown and Co Ltd* (1973) EA 358, *Mbutia v Jimba Credit Corporation Ltd* (1988) KLR 1 *Moses C Mubia Njoroge & 2 others v Jane W. Lesaloi & 5 others* High court ELC case no 514 of 2013 and *Mrao Ltd v First American Bank of Kenya and others* (2003) KLR 125 and also cited the *Halsbury's Law of England*, Third Edition, Vol 21 and submitted that they have established a prima facie case against the respondent and are likely to suffer irreparable loss if the respondent alienates the suit properties. It is also the petitioners' submissions that in this case the balance of convenience tilts in their favour and urged the court to allow the petition with costs and interest. The petitioners also relied on the case of *Kanyi Muthiora v Maritha Nyokabi Muthiora* [1984] eKLR, *Mbui Mukangu v Gerald Mutwiri Mbui* Ca No 281 of 2000, *Keiyian Group Ranch v Samwel Oruta & 9 others* [2021] eKLR and *Elly Jepkoech Limo v Susan Wangoi Kibe & another* [2020] EKLK.

Analysis and Determination

13. Having analysed the pleadings and the submissions filed, I find that the following issues are for determination-;
- Whether the petition raises any constitutional issue
 - Whether the petitioners are entitled to the prayers sought.
14. In order to appreciate the issues raised in the petition, one has to go through all the paragraphs therein, the affidavit in support and annexures as well as the submissions filed. What I can deduce from the pleadings is a claim based on customary trust. The petitioners allege that the respondent who is their father and who is the registered owner of the suit properties is trying to alienate the properties which the petitioners claim to be ancestral land. It is the petitioners claim that the respondent is holding the suit properties in their trust. Indeed the petitioners advocate have submitted that the petitioners claim is one of trust.
15. In view of the foregoing, I have no doubt in my mind that the petition is premised on the alleged trust. I do not think that the dispute qualifies to be a constitutional issue. In my view, this is an issue that falls squarely in the realm of private law. There are a host of authorities that elucidate the principles that private law claims should not form the basis of constitutional petitions and should be resolved by using the usual process of litigation. Where there is an alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the Constitutional court. See the case of *Abraham Kaisha Kanziku v Governor of Central Bank & others* (2006) eKLR.
16. In the case of *Godfrey Paul Okutoyi & others v Habil Olaka & another* (2018) eKLR Mwita, J. on the issue of there being an alternative remedy in lieu of Constitutional remedies at paragraph 65 stated:-

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and therefore a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional Petition. A party should only



file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

17. In the case of Bernard Murage v Fine Serve Africa Ltd & others (2015) eKLR the court stated-;

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

18. In the case of Patrick Mbau Karanja v Kenyatta University (2012) eKLR Lenaola J (as he then was) expressed himself as follows in regard to when the constitutional interpretative mandate of the court may be invoked-:

“I should only say this as I conclude, in Francis Waitbaka v Kenyatta University Petition No. 633 of 2011, this court was categorical that it is imperative that the bill of rights and the constitutional interpretative mandate of this court should not be invoked where other remedies lie.

Further the court also cited with approval, the decision in Teitinnang v Ariong (1987) LRC const. 517 where it was held as follows-;

“Dealing now with the question, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the law? The rights and duties of individuals and between individuals, are regulated by private law. The Constitution, on the other hand, is an instrument of Government. It contains rules about the government of the day, to the governed. I am of the opinion that an individual or group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution no action for a declaration that there has been a breach of duty under that provisions can lie or be maintained in the case before me, and I so hold.”

19. Lenaola, J (as he then was) went on to observe as follows after citing the above case-;

“I maintain this position and it is important that simple matters between individuals which are of a purely civil or criminal nature should follow the route of article 165 (3)(1) and be determined as such. To invoke the bill of rights in matters where the state is not a party would certainly dilute the sanctity of the Billy of Rights.”

20. I fully associate myself with the sentiments expressed in the above referenced cases and I agree that matters that do not call for the court’s constitutional interpretative mandate under the bill of Rights provisions of the Constitution should not be disguised as constitutional petitions seeking enforcement of the Bill of Rights. There ought to be a clear delineation of constitutional matters and the ordinary civil suits. In the present matter it is clear that the petitioners are seeking for a share of their father’s parcels of land by virtue of alleged customary trust that has no constitutional underpinning at all. It is a matter that ought to have been filed as an ordinary civil suit.



21. In the same breadth, in case of *Kenya Agricultural and livestock Research Organization (KALRO) vs Edison Sonje Taura & 3 others* [2021] eKLR the court held that-;

“There is no escaping that what the petitioner is seeking has no constitutional underpin at all. This is an apparently simple case of trespass and permanent injunction. It appears to me a clear civil dispute alleging the tort of trespass. It should have been commenced through a plaint and not a constitutional petition. It has been said time without number that the constitutional procedure/process should not be subjected to abuse, where persons file all sorts of mundane civil disputes under the constitutional procedure process.”

22. Similarly, in the case of *Gabriel Muraya & 2 others v Managing Director, Kenya Ports Authority* (2016) eKLR the court of appeal stated as follows-;

“Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

23. It is therefore my findings that the petition has no merit and the same is dismissed. Considering that the respondent did not file any response and taking into account the relationship of the parties who are children and their father, I make no order as to costs.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF SEPTEMBER, 2023

IN THE PRESENCE OF

Court assistant – V. Kiragu/Lenah M

No appearance for petitioners

No appearance for respondents

C.K YANO

JUDGE

JUDGMENT

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