



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC PETITION NO. 4 OF 2019

WANJALA WEKESA WESELA & OTHERS.....PETITIONERS

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

TANNA & SONS.....4TH RESPONDENT

JUDGMENT

1. The petition dated 2nd April, 2018 which was filed on 2/4/2019 the petitioners herein seek the following orders against the respondents:-

(a) A declaration the petitioners fundamental rights to property and a right to fair administrative action has been violated, transgressed by the respondents by virtue of arrest of the petitioners, their servants, employees, agents and interference of development and enjoyment of the suit land.

(b) A declaration that the respondents have illegally and unlawfully invaded the petitioners land who are legally in occupation thereof and that PLOT NO. 364 is separate and distinct from PLOT NO. KITALE MUNICIPALITY BLOCK 4/439 - 442.

(c) The 2nd respondent be mandated to process and issue a certificate of title in favour of the petitioners.

(d) An award to damages for breach of fundamental rights to human dignity, right own property and a right to fair administrative action.

(e) A permanent injunction to bar the respondents by themselves, agents, employees, servants, subordinate officers, or any other person from respondents from interfering with possession, occupation and development of the suit property.

(f) Any other relief the court may deem fit to grant.

(g) The costs of the petition.

The Petitioners' Case

2. According to the petition the petitioners operate various businesses on Plot Nos. **Kitale Municipality block 4/429 to 442 Kamukunji Market** within Kitale town and have been in occupation of various portions thereof since 1994 to date by virtue of letters of allotment issue in favour of **Wanjala Wekesa, Robert Makona, Isaiah Wanyonyi, Abud Mukwana** on 5/11/1996 by Commissioner of Lands.

3. It is alleged that the 5 named allottees hold the same in trust for and on behalf of all members of the Kamukunji Market. The petitioners aver that the County Government of Trans-Nzoia recognizes the market and issues receipts and business permits to the members who carry out business thereof.

4. Further the plots were surveyed and demarcated and beacons by the Director of Surveys on **26/9/1995** and the necessary approvals granted before occupation by the petitioners.
5. After commencing their occupation of the premises, the petitioners carried out their various businesses thereon peacefully and continuously and to the exclusion of all other persons and with licence from the County Government of Trans-Nzoia. However on **17/7/2017** the said market was razed down by unknown assailants and the petitioners' stock in trade was completely destroyed. A fund raising meeting was subsequently convened by politicians and money was raised for market reconstruction and thereafter the petitioners engaged a reputable contractor to carry out construction of a modern market to be known as Muliro Business Centre.
6. On **10/12/2018** County Government suddenly invaded the market and gave verbal notice requiring the petitioners to vacate and in default have their business premises demolished, as a result of which action they filed **Kitale CMCC Land Case No. 75 of 2018** seeking injunctive orders and orders of declaration against the said County Government.
7. Interim orders were granted in that case on **13/12/2018** and in the course of proceedings the 4th respondent in this petition sought to be enjoined in that lower court case as a defendant.
8. Thereafter the 4th defendant, having been so enjoined, obtained an order of injunction on **21/2/2019** against the petitioners restraining them from utilizing or accessing their business premises. The order required the police to enforce compliance and it is alleged that police officers from Kitale Police Station visited the market and harassed customers and forced closure of the petitioners' business besides requiring them to move out of the premises.
9. At the petitioners instance in the lower court case the lower court suspended the order in favour of the 4th respondent but that notwithstanding, the police continued harassing the petitioners and arrested and incarcerated one of them before releasing him on cash bail. The same alleged harassment took place on 20/3/2019 whereupon one petitioner was injured.
10. The petitioners aver that they have been caused to live in fear and have been reduced into a status of unwanted persons in the area yet the orders of injunction in favour of the 4th petitioner are still suspended to date.
11. They further posit that the police, being public officers, have a duty to uphold and protect the constitution and fundamental rights of the petitioners and the respondents generally have a duty to act fairly and lawfully and not be partisan in discharging their duties.
12. It is their case that while they are still Kenyan citizens they are treated as vagabonds in their own County and they are not allowed to conduct their business in a free business environment.
13. It is averred that the 4th respondent's claim is in respect of plot No. **Kitale Municipality Block 4/364** which is different from the suit land and that the petitioners possess a map that shows that **Kitale Municipality Block 4/364** does not exist on the ground.
14. The petitioners aver that as a result of 1st respondent action they have been subjected to substantial loss of business in which they hold the respondents reliable. Numerous provisions of the constitution have been cited as having been breached by the respondents hence the prayers sought in the petition.
15. The petition is supported by the sworn affidavit of **Wanjala Wekesa Wesela** one of the petitioners herein which reiterates substantially the same facts set out in the petition.

The 1st, 2nd and 3rd Respondents' Grounds of Opposition

16. On **10/5/2019** the 1st, 2nd and 3rd respondents filed 10 grounds of opposition as their response to the petition. Those grounds challenge the petition principally on the basis that it is defective as the impugned actions were premised on a valid order in **Kitale CMCC Land Case No. 75 of 2018**; that the petition does not meet the threshold set out in **Anarita Karimi Njeru -vs- Republic [1976-1980] KLR 1272**; that there is no evidence presented by the petitioners to demonstrate which of his fundamental and freedom were violated; that the petition is calculated at circumventing proceedings in another court which is seized of similar issues and raises no arguable matters and is an attempt to clog the judicial process with matters revolving around the same issues; that this court is *functus officio* as the order in dispute has already been declared as not challenged by another court and there is a standing judgment that has determined the ownership of the land in question.

The 4th Respondents' Response

17. The 4th respondent filed an "answer to the petition" and a replying affidavit both dated 2/4/2019 which will be hereby referred to simply as "*the response*".

18. The summary of the 4th respondent's response is that it has not violated the petitioners' property rights in any manner; that it owns **Kitale Municipality Block 4/364** having been issued with a certificate of lease on 5/5/1999 which land is clearly surveyed, beacons and fenced and that it pays rates and rents therefor to the relevant authorities; that in **Kitale ELC No. 64 of 2011** this court found that the 4th respondent owns the suit land and that **Kitale Municipality Block 4/439 - 442** were irregularly and unlawfully resurveyed from **Kitale Municipality Block 4/364** and thereby cancelled the titles to **Kitale Municipality Block 4/439-442** which are now by virtue of that order non-existent, and that therefore this court may not issue any orders in respect thereof; that the decision in **Kitale ELC No. 64 of 2011** has never been appealed or set aside; that a similar case **Kitale CMCC Land Case No. 75 of 2018** was filed by the petitioners and raises similar issues; that in the lower court case the petitioners herein claim only two plots **Kitale Municipality Block 4/439** and **440** but have included **Kitale Municipality Block 4/441** and **442** in the current petition; that their allotment letters produced in the lower court case in respect of **Kitale**

Municipality Block 4/439 and 440 and those produced in this petition differ and the petitioners have not supported their ownership claim with any valid documents; that this petition is calculated to circumvent a ruling of the court in **Kitale CMCC Land No. 75 of 2018** yet the matters herein can be conveniently finalised in the lower court case; that the orders of injunction restraining the petitioners from interfering or dealing with **Kitale Municipality Block 4/364** on **21/2/2019** and **7/3/2019** are still in force to date and that those orders issued on 5/3/2019 state that “*construction should stop forthwith until the finalization of this suit and therefore the leave for further development of the suit land by the petitioners should be declined*”; that though the petitioner alleged the suit property was issued to Muliro Market Kamukunji in 1992, that self-help group was not in existence in 1992 and that in any event the allegation contrasts with the allotment letter issued on 5/11/1996 to some individual persons which letter forms the basis for this this petition; that in any event no compliance with any of the terms contained in either of those allotment letters has been demonstrated; that following encroachment and trespass into and attempts to construct structures on **Kitale Municipality Block 4/364** the 4th respondent lodged a counterclaim in the lower court which has jurisdiction to hear and determine the dispute and therefore this petition is an abuse of the process and brings a multiplicity of suits; that the petitioners being trespassers could not have suffered any loss or damage; that there is no collusion between the respondents to violate the petitioners’ rights and in any event such rights can only be deemed to be violated only if **Kitale CMCC Land Case No. 75 of 2018** had been finally determined and that granting this petition would nullify decision of a competent court **Kitale ELC No. 64 of 2011**.

19. The petitioners’ written submissions were filed on **10/6/2019**. The 4th respondent filed his submissions on **20/5/2019** while the 1st, 2nd and 3rd respondents filed theirs on **11/7/2019**. I have considered those submissions which mostly dwell on the facts outlined in the petition, the response and the grounds.

DETERMINATION

Issues for Determination

20. The issues that arise in this petition are as follows:

- (a) Whether the petition meets the threshold set out in Anarita Karimi Njeru case.**
- (b) Whether the petitioners have demonstrated violation of their constitutional rights.**
- (c) Whether the petition is an abuse of the process of the court in view of pending proceedings in Kitale CMCC Land Case No. 75 of 2018.**
- (d) What orders should issue?**

(a) Whether the petition meets the threshold set out in Anarita Karimi Njeru’s Case

21. The court in celebrated case of **Anarita Karimi Njeru -vs- Republic 1976-1980 KLR 1272** held that when a petitioner approaches the court for redress of a violation of a constitutional right he must with precision state the right, the provision of constitution under which that right is provided and the manner in which he alleges that the right has been violated. The observations of courts regarding this issue over time were qualified by the decision of the Court of Appeal in the case **Mumo Matemu -vs- Trusted Society for Human Rights Alliance & 5 Others [2013] eKLR** where the court observed that what is needed is not a formulaic approach to the drafting of the pleadings but that the claim of violation must be discernible from whatever pleadings have been placed before the court. The court observed as follows:

“(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. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”

22. With this decision in mind this court has set out to access the extent to which the petitioners have managed to present their case with clarity.

23. The petition dated 2/4/2018 has set the target of proving violation of numerous articles of constitution as is evidenced by its heading. It sets out these as Articles to, **10, 19, 20, 21, 27, 28, 31, 40, 47, 62, 64, 68, 159, 165(3), 238, 245, 258** and **259** of the Constitution.

24. Stating the provisions of the Constitution intended to be proved to have been violated is just part of the task a petitioner faces. Establishing that the right claimed to be violated or threatened exists and the alleged violation is the next step and it starts with identifying individual articles and linking them with the evidence of actions or inaction on the part of the respondents which led to the alleged violation of the right.

25. In the instant petition it has been alleged that despite the existence of a court order in **Kitale CMCC Land Case No. 75 of 2018** the respondents colluded on various dates to commit acts that were in violation of the petitioners rights and occasioned them loss and damage.

26. The facts of alleged acts of the respondents are clearly set out in the body of the petition in a narrative form without any linkage to specific provisions of the constitution.

27. Further down in the same petition under the heading “*breach of the constitution*” the petitioners have set out under numerous subheadings various provisions of the constitution alleged to have been contravened. Alongside those provisions the petitioners have proceeded to merely outline what each provision states.

28. Paragraph 51 of the petition states that as follows:

“Flowing from this article the government has a duty to ensure that the rights and fundamental freedom (sic) of the petitioner (sic) are protected and implemented. The government has an obligation to respect and protect the dignity of the petitioner (sic) and not to interfere with her (sic) privacy except in accordance with the law. The government has to ensure the petitioner (sic) has equal and not partial protection and benefit of the law. The government and its servants have a duty of making expeditious, efficient, lawful, reasonable and procedurally fair administrative action that does not infringe on the rights and fundamental freedom of the petitioner herein.”

29. Thereafter the petitioners proceed to set out the remedies they seek from this court. Can the petition therefore be said to be so fatally defective that it ought to be struck out? I have already indicated the proper manner of pleading is to state the right the provision of constitution alleged to have been violated and specifically link it to the action or inaction on the part of each respondent which violate the petitioners’ rights as provided for under that provision. I do not find that to be the case in the instant petition.

30. Where more than one respondent have been enjoined in a petition generalities such as those exhibited in the instant petition must be avoided in favour of specific pleading that links each respondent to a certain action or omission that contributed to the allegation of violation if the court is to properly assess whether any right has been violated by any of them. Pleadings such as the instant petition render arduous the court’s task of assessing whether any violation of rights occurred. The Court of Appeal in the **Mumo Matemu case (supra)** observed that:

“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. 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.”

(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. 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

31. In the case of **Humprey Mutegi Burini & 9 Others v Chief of the Kenya Defence Forces & another [2017] eKLR** the court (Matiwo 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.”

32. 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.

(b) Whether the petitioners have demonstrated violation of their constitutional rights

33. Arising from what I have observed while addressing issue No. (a) above it is quite clear by now the petitioners have not established and could not hope to establish, in the light of the manner of pleading presented before court, any fact of violation of their rights.

(c) Whether the petition is an abuse of the process of the court in view of pending proceedings in Kitale CMCC Land Case No. 75 of 2018 and Kitale ELC No. 64 of 2011.

345. It is an undenied fact that two cases preceded this petition: **Kitale CMCC Land Case No. 75 of 2018** between the petitioners as plaintiffs and the County Government of Trans-Nzoia and the 4th respondent as defendants and **Kitale ELC No. 64 of 2011** between Boaz Kipchumba Kaino as plaintiff and the 4th respondent as he defendant.

35. **Kitale ELC No. 64 of 2011** has already been determined judgment having been delivered on 30/5/2017. Notably the petitioners were not parties and it cannot be gain said that the respondents in this petition do not insist that they were.

36. **Kitale ELC No. 64 of 2011** was a case involving the 4th respondent and a person who alleged to have been issued letters of allotment in respect of **Kitale Municipality Block 4/439 - 442** on 1/6/1995.

37. Later on the certificate of leases were issued to him in respect of those suit plots whereupon he sold plot No. 439 and charged plot No. 440 and 442.

38. The 4th respondent herein being the defendant in that case testified that it had purchased plot No. Kitale Municipality Block 4/364 from its original owner, one Ben Mogaka.

39. The issue of re-survey of **Kitale Municipality Block 4/364** in the year 2000 while the original survey had not been cancelled was raised by the plaintiff in that case.

40. This court found for the 4th defendant and that the land was not available for allocation to the plaintiff in that case.

41. It cannot be understood why the petitioners herein who were admittedly in occupation of the suit land by 2011 when **Kitale ELC No. 64 of 2011** was commenced were not enjoined in that case. Granted that they were not parties in that case this court must deal with the pending case in the lower court.

42. In that case as documents filed in court show, they seek a declaration that the 4th respondent herein has no right to evict the petitioners from plots Nos. **Kitale Municipality Block 4/440 and 439**.

43. The issue of re-survey of the land to come up with those plots is one that the court in **Kitale ELC No. 64 of 2011** dealt with in its final judgment. This court will avoid any direct comment on that issue that may prejudice the trial of the case before the lower court that is, **Kitale CMCC Land Case No. 75 of 2018**.

44. What remains to be said is that the issue of ownership of Plots Nos. **Kitale Municipality Block 4/439-442** is still pending for hearing in that case and cannot be made the subject of this petition.

45. This petition is purely in regard to whether the constitutional rights of the petitioners have been violated by the respondents and the first and second issues discussed above have determined that.

46. Consequently, without any prior determination of ownership of Plots Nos. **Kitale Municipality Block 4/439-442** in favour of the petitioners by a court of competent jurisdiction, the prayers in this petition for a declaration that the petitioners' constitutional rights with respect to the suit land or use thereof have been contravened are incompetent and cannot be granted.

47. The applicants have claimed that they were in possession of the suit lands for a long time as businessmen licenced by the then local authority. Violation of rights that relates to ownership of the suit land is separate from violation of other rights that have been provided for in the Constitution. As along as the petitioners can establish the violation of those rights in the proper manner and in the proper forum, they are entitled to institute constitutional proceedings in that forum. In saying this this court is alive that there are other rights that may be proved to have been violated even in the absence of proof of ownership of the land in question. In brief I state here that in proving some violations of rights properly provided for under the Constitution the petitioners may not require proof of ownership of the land. For example, the right to life, human dignity, assembly, and association are all standalone rights. However remotely connected with the issue of land which they may not own at the moment the petitioners would be entitled to approach the court under **Article 22 (1) of the Constitution of Kenya 2010**. I have noted that they were not involved in the litigation in **Kitale ELC No. 64 of 2011** which determined the issue of ownership as between the 4th respondent and one Boaz Kaino. Their attempts to assert their rights cannot be outrightly dismissed as entirely hopeless at the present stage.

48. I therefore decline to uphold the respondents' submission that the lodging of this petition is an abuse of the process of the court.

CONCLUSION

(b) What orders should issue?

49. Consequently I find that the petitioners have failed to establish any violation by the respondents of any of their rights under the constitution and therefore the petition dated **12/4/2018** has no merit. The same is hereby dismissed. Each party shall bear their own costs.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGI

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Onyancha for 4th Respondent

Ms. Arunga holding brief for Omboto for Petitioners

Mr. Kuria for 1st, 2nd and 3rd Respondents

COURT

Judgment read in open court.

MWANGI NJOROGI

JUDGE

30/9/2019