



Kariuki (Suing as the Administratrix of the Estate of Jeremiah M'rukaria M'imanyara -Deceased) v Attorney General & 3 others (Environment & Land Petition E009 of 2023) [2023] KEELC 21143 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E009 OF 2023
CK NZILI, J
OCTOBER 25, 2023**

BETWEEN

SALOME KARIUKI (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF JEREMIAH M'RUKARIA M'IMANYARA -DECEASED) PETITIONER

AND

**THE ATTORNEY GENERAL 1ST RESPONDENT
LAND REGISTRAR – MERU CENTRAL 2ND RESPONDENT
JULIUS MUTHURI MARETE 3RD RESPONDENT
JUDITH KAROKI M'MARETE 4TH RESPONDENT**

JUDGMENT

1. Before the court is a petition dated 6.3.2023, where the petitioner describes herself as the administratrix of the estate of the late M'Rukaria M'Imanyara (deceased). She avers that she is the registered owner of L.R. No. Abothuguchi/Kithirune/2906, measuring approximately two acres and a resultant subdivision of L.R. No. Abothuguchi/Kithirune 127, (hereinafter the suit land).
2. The petitioner has sued the 3rd and 4th respondents, described as the administrators of the estate of Marete Kiunga alias Marete S/o Kiunga (deceased), claiming that in 2008, the deceased Jeremiah innocently entered into a sale agreement with the 3rd respondent, who possessed a grant for purchase at a valuable consideration a portion of the suit land which was subdivided, transferred and registered under his name by a title deed dated 10.1.2008 while the remainder of the original land was left in the name of the 3rd respondent. The petitioner averred that the deceased took vacant possession, planted tea plants, erected a farmhouse, and continued to develop the land up to date.



3. The petitioner averred that the grant used by the seller in 2008 was later cancelled or revoked by the court. An order was made for the land to revert to the deceased's estate for proper distribution to the rightful beneficiaries, who, despite knowledge of his earlier regularly issued title deed, the 3rd and 4th respondents failed to involve him in the said proceedings, leading to a judgment on 12.2.2019 which cancelled his title deed without a fair hearing.
4. The petitioner averred that in June 2022, he was shocked to find land surveyors on his land implementing the said judgment, yet the judgment above never mentioned her parcel of land as due for cancellation. Therefore, the 2nd respondent misinterpreted the said judgment and registered the land in the names of the 3rd and 4th respondents.
5. The petitioner averred that she sought an interpretation of the said judgment by an application dated 19.9.2022, but the court, in its ruling dated 15.12.2022, ordered that his parcel of land was subject to the cancellation, and therefore the 2nd respondent acted lawfully.
6. The petitioners averred that the judgment's net effect and the ruling above was to deprive her of property without a fair hearing. She averred that the administrative action adversely affected his property right; she stands to suffer irreparably, her title deed stands canceled, the judgment and the ruling were illegal and unconstitutional and she was an innocent purchaser for value and had acquired the land properly and legally.
7. The petitioner based her claim on Articles 10, 19, 20, 22 (1), 23(1), 40, 47(2), 50 of [the Constitution](#) and prayed for;
 - a. A declaration that the cancellation of L.R. No. Abothuguchi/Kithirune/2906 was illegal, unconstitutional, and grossly violated his visits to a fair hearing and right to property.
 - b. Declaration that L.R. No. Abothuguchi/Kithirune/2906 formed part of the estate of Jeremiah M'Rukaria M'Imanyara, (deceased), and was not available for redistribution by the beneficiaries of Marete s/o Kiunga (deceased).
 - c. An order directing the 2nd respondent to rectify/amend the register regarding L.R. No. Abothuguchi/Kithirune/2906 by deleting the entry made on 12.5.2021 and reinstating the particulars/ownership as was before the referenced dates.
 - d. Permanent injunction restraining the 3rd and 4th respondents from entering, trespassing, or interfering with the petitioner's quiet use, occupation, and utilization of L.R. No. Abothuguchi/Kithirune/2906.
8. In support of the petition the petitioner relied on her affidavit sworn on 6.3.2023 attaching a copy of the certificate of confirmed grant dated 26.11.2013 as annexure marked SK "1" copy of title deed dated 10.1.2008 as an annexure marked SK "2" judgment delivered on 12.2.2019 as annexure marked SK "3", a copy of search certificate after cancellation as annexure marked SK "4", a copy of an application dated 19.9.2022 as annexure marked SK "5" submissions thereto as annexure marked SK "6" and the ruling dated 15.12.2022 as annexure marked SK "7".
9. The 1st and 2nd respondents opposed the petition through the affidavit of Mary Alice Njeri, the Land Registrar Meru central, sworn on 18.7.2023. After setting out the historical background of the parcels of land in issue, the 1st & 2nd respondents averred that after the cancellation was ordered by the court, it became necessary for all the subdivisions done on L.R. No. Abothuguchi/Kithirune/177 to revert



- to the deceased's name for the court order to be implemented successfully, for redistribution purposes. The 1st and 2nd respondents termed the cancellation as lawful; there was no demonstration that they did not act independently or were capricious, acted in bad faith, or abused the process in a manner as to trigger this court's intervention.
10. The 1st and 2nd respondents averred that the petitioner had failed to establish a prima facie case within the meaning of the rule in *Mumo Matemu vs Trusted Society of Human Right Alliance and 5 others* (2013) eKLR, to enable her to apply for the reliefs sought in her petition, for there was no breach of any of her fundamental rights and freedoms or any provisions of the law. Lastly, the 1st and 2nd respondents termed the assertions by the petitioner as inaccurate, for there were no discernible constitutional issues in the petition to warrant its admission and adjudication.
 11. The 4th respondent opposed the petition through a replying affidavit sworn by Judith Karoki M'Marete on 2.8.2023, terming it as devoid of merits. That the petitioner had already exhausted the previous litigation, whose ruling and judgments could not be reviewed through a constitutional petition; there was no appeal preferred against the said previous determinations; the estate has been distributed; the petition was res judicata; there was non-disclosure of material facts that the subject matter was subject to H.C. Succession Cause No. 3 of 1978, which was not appealed; the petition lacks arguable issues, is misplaced, unnecessary, superfluous and unmeritorious.
 12. The 4th respondent attached a copy of the ruling dated 5.12.2022 and the application dated 19.9.2022, reply to the application as annexures marked JKM "1, 2 & 3," respectively.
 13. Even though the 3rd respondent entered appearance on 31.5.2023 through a notice of appointment through Kuria Karatu and Co. Advocates dated 30.5.2023, no response was filed to the petition despite the extension of time to do so.
 14. With leave of court and the concurrence of parties, the petition was canvassed through written submissions. By written submissions dated 30.8.2023, the petitioner isolated six issues for the court's determination. On whether the petition has met the constitutional threshold, the petitioner submitted that under Articles 22, 23, and 165 3 (b) of *the Constitution* as read with Section 13 (3) of the *Environment and Land Court Act* and Rule 10 of *the Constitution* of Kenya (Protection of Rights & Freedoms) Practice and Procedure Rules 2013 (Mutunga Rules 2013), she has satisfied the procedural requirements as to facts, rights violated, manner of violation, pending and previous suits and the reliefs sought going by the holding in *Anarita Karimi Njeru v Attorney General* [1979]eKLR.
 15. The petitioner submitted that she was entitled to the right to land under Article 40 of *the Constitution* and should not have been deprived of that right without due process of the law and that under Article 47 (2) thereof, she was entitled to be given a written reason as the person who was likely to be affected by the administrative action.
 16. On whether her claim was res judicata as pleaded by the 1st & 2nd respondents, the petitioner submitted that a probate court had no powers to determine issues relating to non-survivors or beneficiaries to the estate of the deceased as held in *Re-estate of Alice Mumba Mutha* [2017] eKLR and *Gikonyo v Cypriano* [2022] eKLR. Therefore, the petitioner submitted that in *John Florence Maritime Services Ltd & Another vs. Cabinet Secretary for Transport and Infrastructure and 3 others* [2021] eKLR, the Supreme Court of Kenya held that a constitutional court should look beyond the process over and above the merits of a matter or decision, re-affirm the use of structural interdicts supervisory orders and that res-judicata should only apply to the rarest and the clearest of cases in a constitutional petition, where there is a potential for substantial injustice if the court did not hear a constitutional matter or issue on its merit and where a litigant had demonstrated exceptional circumstances warranting the court to make an exception.



17. In this case, the petitioner submitted that there exists a clear delineation of the role of the probate court vis-a-vis the Environment and Land Court and that the interpretation of the probate court did not sufficiently satisfy the critical elements of res judicata in the infringed on his statutory rights on whether the cancellation of his title deed was determined.
18. The petitioner submitted that under Section 80 of the [Land Registration Act](#) it was in mandatory terms that the land register shall not be rectified to affect the title of appropriate in possession unless he had been notified or had knowledge of the omission and that under Section 87 thereof, the 2nd respondent had to exercise and safeguard her rights including the right to be heard before her title deed could be cancelled.
19. Relying on Sceneries Ltd vs. National Land Commission (2017) eKLR, the petitioner submitted that she was neither afforded a hearing by the probate court nor by the 2nd respondent, which, therefore, infringed her right to property, which, unfortunately, the 3rd and 4th respondents have not responded to meaning that they were out to steal a match and deprive her of her land, especially for failing to notify the probate court.
20. On the strength of the facts, evidence, statutes, Constitution and precedents cited above, the petitioner urged the court to find the petition merited and grant her the reliefs sought.
21. By written submissions dated 16.8.2023, the 1st and 2nd respondents isolated two issues for the court's determination. On whether the suit offended the principle of res judicata, the 1st and 2nd respondents submitted that the previous suits, ruling and judgment had dealt on the matter directly between the party's finality and through a competent court as set out under Section 7 of the [Civil Procedure Act](#) and in the case of IEBC v Maina Kiai and five others [2017] eKLR.
22. The 1st and 2nd respondents further submitted that the parties had been substantially heard and the mere addition of the 1st respondent did not change the substance of the suit for the parties were litigating over the suit land, the jurisdiction of the probate court had not been challenged and that the High Court under Article 165 3 (a) of [the Constitution](#) had unlimited jurisdiction.
23. Relying on Kennedy Mokuia Ongiri v Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR the 1st & 2nd respondents submitted that judicial determination must be final, binding, conclusive and that unless such a decision was set aside or quashed, it must be accepted as uncontrovertibly correct and that to revisit would substantially undermine the court especially where a dissatisfied party goes back to the same court, if there was a change of a judicial officer in a court station.
24. The 1st and 2nd respondents submitted that lodging the same suit in the guise of a constitutional petition before this court, which has the same status as the High Court, was like seeking an appeal against the decision by Hon. Gikonyo J. The 1st and 2nd respondents urged the court to dismiss the petition in the public interest. Reliance was placed on Chacha Mwita J in C.K Bett Traders Ltd & others v Kennedy Mwangi & another [2021] eKLR.
25. On whether the petition meets the constitutional threshold, the 1st and 2nd respondents submitted that the petition falls short of the minimum set in Mumo Matemu (supra) since there was no degree of precision of the petitioner's complaint, provisions infringed, manner of infringement and adequate particulars of the violation, other than merely citing the articles of [the Constitution](#) violated so that no constitution issues were discernible in the petition as held in Republic v Paul Kihara Kariuki Attorney General & 2 others Exparte Law Society of Kenya [2020] eKLR.
26. The 1st and 2nd respondents submitted that the petition was about the ownership of the suit property and the cancellation, which calls for the interpretation of the [Land Registration Act](#) and the [Land Act](#)



and not *the Constitution* herein, which were conclusively determined; she should not have invoked this court's mandate since there was an alternative remedy instead of constitutional remedies. Reliance was placed on Patrick Mbau Karanja v Kenyatta University [2012] eKLR and Godfrey Paul Okutoyi and others v Habil Olaka and another [2018] eKLR.

27. The court has carefully reviewed the pleadings, written submissions, and the law. The issues calling for the court's determination are:-
- i. If the petition meets the constitutional test.
 - ii. If the petitioner is res judicata.
 - iii. If the petition is guilty of the non-exhaustion doctrine.
 - iv. If the petitioner was entitled to be heard before the court, the 1st respondent could cancel her title deed.
 - v. If the petitioner has proved a breach of her right to a fair hearing, fair administrative action, and right to property.
 - vi. If the petitioner is entitled to the reliefs sought.
 - vii. What is the order as to costs?
28. A party seeking constitutional reliefs based on an infringement of constitutional rights and freedoms is required to comply with the procedural law set under Articles 20, 21, 22, 23, 258 (1), (2), and 260 of *the Constitution* as read together with Rule 10 of the Mutunga Rules, by setting out the description of parties, facts relied upon, rights or freedoms infringed, violated or threatened with violation, pending or concluded proceedings on the matter and the reliefs sought.
29. In *Law Society of Kenya vs Communications Authority of Kenya & others* (Petition 8 of 2020) [2023] KESC 27 (KLR) Civ (21 April 2023) (Judgment), the court observed that the definition of a person did not open a doorway for any passerby who was disgruntled with a decision delivered. The court cited with approval *Mumo Matemu* (supra) and *Kingori v Chege and others* [2002] 2 KLR 243, that a proper party was one with a direct and substantive interest in the issues arising in the litigation which interest was recognizable in the court as a right capable of being enforced. The court said that Article 22 of *the Constitution* was the pathway for parties to claim the denial, violation, or infringement of a right or fundamental freedom at the High Court, which has the jurisdiction to determine questions of denial, violation, or infringement of a right or fundamental freedom. The Supreme Court of Kenya declined to entertain such a constitutional petition.
30. As to what amounts to constitution questions or issues, in *NGOs coordination Board vs Attorney General & 4 others; Katibu Institute* (Petition 16 of 2019 [2023] KESC 17 KLR 24 February 2023 (Judgment), the court observed that when there was an alternative remedy, it was only in exceptional circumstances that a party would move to court. The court said that the right to just administrative action was a constitutional imperative or what may be called the constitutionalization of an administrative justice based on the standard of reasonableness, expedition, efficiency, lawfulness, and procedural fairness, which were the correct measures of judicial scrutiny of administrative decisions.
31. On the doctrine of exhaustion, the court cited with approval *Anthony Miano & others v Attorney General* [2021] eKLR, that courts must undertake an extensive analysis of facts, interests, involvement and public interest ability of the statutory forum and determine whether an exception applies. The court found the petition concerned the interpretation and application of *the Constitution*, and the



- Minister could not handle the issues therein as they touched on the constitutionality of the decision taken by the Director and the Board.
32. In this petition, the petitioner has pleaded that she was not a party to the application that revoked the grant and subsequently the mother title and hence was condemned by the court in revoking the title and subsequently the 1st and 2nd respondents when they cancelled the title deed, under the court decree without according her an opportunity to be heard as enshrined in Articles 40 & 47 of *the Constitution*. Further, the petitioner pleaded that when she applied for the interpretation of the judgment, the High Court confirmed the judgment, depriving her of an asset legally acquired for valuable consideration without giving her a fair hearing.
 33. The respondents aver that the petition does not disclose a prima facie case, arguable on breach of constitutional provisions; it is res-judicata, it is not pleaded with precision, and there was an alternative remedy under the land statutes.
 34. In Republic v Paul Kihara Kariuki AG (supra), the court held that a constitutional question was one whose resolution required the interpretation of *the Constitution*, rather than that of a statute. In Godfrey Paul Okutoyi and others vs. Habil Olaka and another (supra), the court observed that a party should only file a constitutional petition to redress a constitutional breach or denial of his fundamental rights and freedoms.
 35. Looking at the petition before the court, I think it meets the threshold. The petitioner has stated that her title deed was cancelled following a suit where she was not a party, yet the 3rd and 4th respondents knew she was holding a title issued by the 2nd respondent that the 2nd respondent recalled and canceled her title deed without giving her a fair hearing; that the action by the courts and the 1st & 2nd respondents infringed on her rights to fair administrative action and the right not to be deprived of her right to property without compliance with Article 40 (6) of *the Constitution*.
 36. In my view, the petitioner gave the details on the chronology of events between the issuance with title in 2008, litigation leading to the cancellation on 12.2.2019 without her participation, and the application she had made to review the judgment on 15.12.2022.
 37. To my mind, none of the respondents sought for better particulars from the petitioner. All the respondents, save for the 3rd respondent, filed responses to the petition. My finding is that the petition, as pleaded, discloses constitutional issues as to whether a party who has obtained a title deed should be condemned unheard if the title comes into question in subsequent proceedings to its issuance and whether the land registrar should accord such a party a fair administrative action before the title deed is cancelled or recalled.
 38. On the exhaustion of alternative remedies, the petitioner says that she was not a party to the proceedings and judgment dated 12.2.2019; it was the 4th respondent who had brought the application dated 15.9.2015, as one of the objectors seeking to overturn the certificate of confirmation of grant dated 11.4.1978, which had given the 3rd respondent the mandate to administer the deceased's Parcel No. LR Abothuguchi/Kithirune 177, which led to subdivision LR 11/Kithirune/2907. The objectors had claimed that the 3rd respondent had left them out, yet they were daughters of the deceased and had never consented to the 3rd respondent to confirm the grant and disentitle them of their inheritance. In paragraphs 13 and 27 of the judgment, the 3rd respondent disclosed the disposal of L.R. No.2907 to the petitioner. The court directed for the cancellation of the titles and for the land to revert to the deceased's estate, to be divided equally to the estate's beneficiaries in line with Section 38 of the *Law of Succession Act*, among them the 3rd respondent. From the judgment, the probate court did not



- determine the rights of the third parties, who had been sold and transferred 5.31 acres of the estate by the 3rd respondent.
39. Instead of suing the 3rd respondent and the estate for any recovery of her money, the petitioner filed an application dated 19.9.2022. She sought to be joined as a party and the 2nd respondent as parties post-judgment and urged the court to interpret its judgment on whether L.R. No. 2907 was included for cancellation. Further, she sought an order for the 2nd respondent to rectify or amend its records by deleting the entry made on 12.5.2021 and reinstate her particulars as the owner. She based her claim on inadvertence or excusable error on the part of the court.
40. The court, in a considered ruling dated 15.12.2022, held that the reversal of the land to the names of the deceased could not happen without touching on its resultant subdivisions. The court found that the 2nd respondent had lawfully cancelled titles to L.R. No. Abothuguchi/Kithirune/2906 and 2907 reverting them to L.R. No. Abothuguchi/Kithirune/177 in the deceased's name for distribution purposes.
41. The court did not determine whether or not the petitioner's rights to ownership of land and fair administrative action had been infringed. In *IEBC vs. Maina Kiai* (supra), the court held the five elements to be satisfied for the bar of res-judicata to be effectively raised and upheld as:
- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. It was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit.
42. In the judgment delivered on 12.9.2019, the petitioner herein and the 1st and 2nd respondents were not parties. The rights or consequences of those third parties to the deceased's estate were not raised, litigated, and pronounced to finality. The judgment and the ruling did not pronounce on whether the petitioner was an innocent purchaser for value without notice. In *Kennedy Mokuia Ongiri vs John Nyasenda Mosioma and another* (supra), the court observed that a judicial determination must be final, binding, conclusive and unless set aside or quashed, it should not be revisited before the same court.
43. Having looked at the two previous decisions, I have not come across any final decision on the issues raised by the petitioner herein regarding her right to fair administrative action and protection from deprivation of land ownership without a fair hearing. Therefore, I find the objection based on res-judicata lacking merits.
44. Coming to the exhaustion of alternative remedies under the statutes on land and that there exists an alternative remedy to the rights of the petitioner, Section 80 of the [Land Registration Act](#) provides that the register shall not be rectified to affect the title of a proprietor unless the proprietor knew of the omission, fraud or mistake in consequence of which the certificate is sought, or caused such omission fraud or mistake or substantially contributed to it by any act, neglect or default. Section 81 thereof grants a right to indemnify any person suffering damage because of any rectification of the register or any error unless he has caused or substantially contributed to the damage by fraud or negligence. Sections 82 – 84 provides the mode of proving and establishing the indemnity amount, the procedure for and the recovery of the indemnity.



45. Section 86 refers to the review of the decision by the registrar and the review of any duty under the Act by the court. Regarding an opportunity to be heard, Section 87 thereof provides that one is deemed to have been given such an opportunity if he attends in person or by an advocate or he states that he does not wish to be heard or if served with a notice in writing specifying why he does not wish to attend. Section 53 of the Act protects the person acquiring land in good faith and without knowledge of the owner.
46. Articles 40 (2) (a), (3) & (6) of *the Constitution* provide that parliament shall not enact a law permitting the state or any person to deprive another of property unless unlawfully acquired arbitrarily. Article 47 (2) provides where a party was likely to be adversely affected by an administrative action to be accorded written reasons for the action.
47. The petitioner argues that she only knew of the cancellation in June 2022, when she found land surveyors on her land implementing the judgment. There is no averment by any of the respondents that the petitioner before this date had been summoned, notified, and or invited to show cause why her title deed should not be cancelled or rectified. There are no averments from the respondents that the petitioner was notified of the proceedings before the court as a person directly to be adversely affected by the cancellation of the title. The respondents had made no specific complaint that the petitioner had acquired her title illegally or with notice to the rights of the 3rd and 4th respondents.
48. In *Sceneries Ltd v National Land Commission* (supra), the court observed that natural justice was not dependent on statutory provisions and that the principle must be applied irrespective of whether there was a statutory provision or not for there to be fair play in action by giving a person to be affected by a decision a reasonable opportunity to present his case in some fashion in a fair, impartial and open process.
49. The petitioner has submitted that the probate court and the land registrar did not accord her a fair hearing, and therefore, the deprivation of property without the due process of the law amounted to a breach of her fundamental rights and freedoms.
50. The respondents have not specified the alternative remedy that the petitioner should have exhausted before moving to a constitutional court, its efficacy and capacity to determine the constitutionality of the respondent's action have not been stated. The two issues were not determined as alluded to above in the probate court.
51. An appeal to the Court of Appeal would not have helped since the issues were not determined, and this court has jurisdiction to hear and determine the rights of third parties on land rights raised before a [probate court. I find the objection unmeritorious.
52. On whether the petitioner was condemned unheard by the probate court, the petitioner went to the said court seeking a review of the judgment. She did not seek for the judgment to be set aside while applying to be joined as a party. She did not file a suit against the 2nd and 3rd respondents seeking for indemnity or determination that she was an innocent purchaser for value without notice.
53. The *Fair Administrative Action Act* does not grant this court powers to review judgments by superior courts. The power affects and applies only to quasi-judicial and inferior tribunals and not a High Court. This court lacks jurisdiction to review decisions made by a court of concurrent jurisdiction. It is the petitioner who approached that court for interpretation of its judgment. She did not ask for more and cannot fault the court, for a court can only determine issues brought before it and not engage in moot, academic, or fishing expeditions to establish what was best for a party in the circumstances.



54. If the 2nd respondent failed to summon, notify, and engage the petitioner before canceling the title and initiating the entries, a right to a fair hearing must be observed under the statutory law and *the Constitution*. There is no evidence that the 2nd respondent complied with the law and summoned the petitioner. It does not matter that the 2nd respondent was complying with a court order. The 2nd respondent was obliged to establish the whereabouts of the proprietor, summon her, and demand the surrender of her title deed for cancellation. The replying affidavit by the land registrar is silent on compliance with the law and, for that matter, whether the administrative action it took was expeditious, efficient, lawful, reasonable, and procedurally fair.
55. Without any justification, the court finds that the entries were made without the petitioner's notice or opportunity to be heard and with written reasons for that decision. See Gladys Boss Shollei vs Judicial Service Commission & another (Petition 34 of 2014) 2022 KESC 5 (KLR) 17th February 2022 (Judgment).
56. The petitioner averred that she was not notified of the impending cancellation of her title deed or notified about its cancellation and the reasons. She said this amounted to a breach of her constitutional rights to land and fair administrative action. In Harrison Kiambuthi Wanjiru & another v District Land Registrar Nairobi & others (2022), eKLR at issue was whether the cancellation of the title violated Section 79 of the *Land Registration Act*, was wrongful, unlawful, unconstitutional, and or fraudulent. The court held that the applicant should have received a 90-day notice through formal documentation.
57. In the case of John Mwangi Nyoike vs District Land Registrar & 4 others (2022) eKLR, the court observed that parties were bound by their pleadings and must not depart from such pleadings, which act as beacons guiding the court to determine the issues.
58. In this petition, the respondents have deliberately failed to confirm whether or not the petitioner ought to have been involved before a decision to recall, revoke, or cancel her title deed was made. Further, the respondents have not responded as to whether the petitioner suffered any loss or damage for the failure to be notified or accorded an opportunity to be heard before the title deed was cancelled.
59. In Lawrence Murithi Mbabu vs District Land Registrar Nyeri & another John Githu Kinyua (I.P.) [2019] eKLR, the court cited with approval Kuria Greens Ltd v Registrar of Titles & another [2011] eKLR and Isaac Gathungu Wanjohi & another v Attorney General & others [2012] eKLR, on the constitutionality of revocation of title. Further, the court cited with approval Chemei Investments Ltd vs. the A.G. and others (NRB) Petition No. 94 of 2005 that even where the title was illegally acquired under Article 40 (6) of *the Constitution*, the legally established process of revocation and not by whim had to be followed. The court found the process of cancellation without notification offensive to Articles 47 (1), (2) and 50 (1) of *the Constitution*.
60. In Joseph Mudamba Ojwang v John Opondo Onyango & 4 others [2022] eKLR, the court cited with approval Mahaja v Khatwalo & another [1983] eKLR that person directly affected by the proceedings should have been joined as a party. Furthermore, the court cited with approval Mwinyi Hamisi v Attorney General & another [1997] eKLR that for a claim of adverse possession to succeed, title holders of the land in issue had to be parties to the suit.
61. A party must rely on tangible and credible evidence to succeed in a constitutional petition. It is not enough to plead without proof of the allegation. In this petition, the petitioner provided documentary evidence showing that she was not involved in the judgment, following an application for revocation of the initial grant by the 3rd and 4th respondents. The petitioner stated on oath that the 2nd respondent failed to notify her before the revocation occurred and alternatively, communicate that it was implementing a court decree with implications over her title deed.



62. Responding to the petition, the 1st and 2nd respondents did not deny that the petitioner was not a party to the revocation or its implications. Similarly, other than stating that the judgment and the ruling the 1st and 2nd respondents were implementing were regular and legal, the 1st & 2nd respondents did not contest that the petitioner was condemned unheard.
63. In *Joseph Musikali Mutemi v National Land Commission & 7 others* [2021] 2KLR, the court observed that the burden was on the 1st respondent to prove issuance of a notice, its date, adequacy, sufficiency, and service thereof, before the review of the grants was undertaken and more importantly table such notices as evidence before the court. The court cited with approval *Attorney General vs Ryath* [1980] AC 748 that a decision affecting the legal rights of an individual offensive of the rules of natural justice was outside the jurisdiction of the decision-making authority. The court further cited with approval *Halsbury's Laws of England* 4th Edition on page 76, paragraph 64, that all parties in court must observe rules of natural justice, unless expressly or by necessary implication excluded. On the reliefs sought, the court cited with approval *Republic v National Land Commission ex parte Ephraim Muriuki Wilson & others* [2018] eKLR, that the court should not be used to resolve a land dispute disguised as a judicial review application. The court held the decision was unconstitutional but declined to find the petitioner as the lawful land owner without any evidence being tendered viva voce. See *Meshack Moturi Siro suing through Janet Siro Holder of Power of Attorney No. 2954 v National Land Commission & 7 others* [2021] eKLR.
64. Other than seeking this court to declare that the respondents' acts violate her constitutional rights to land, fair hearing, and administrative actions, the petitioner seeks to be declared the owner of the parcel of the land, rectification of the register to reflect her name and a permanent injunction against the 3rd and 4th respondents.
65. Unfortunately, no evidence was given as to why the petitioner never appealed against the ruling made on 22.12.2022. This court cannot sit on appeal of a decision by court of concurrent jurisdiction under the guise of a constitutional petition. In the absence of an appeal, the findings that the decision by the 2nd respondent was lawful and valid on 12.5.2021 remain lawful to the extent that the 2nd respondent was implementing a decree of a competent court.
66. However, the implementation as indicated elsewhere in this judgment did not absolve the 1st and 2nd respondents from upholding the constitutional rights and freedoms of the petitioner as enshrined under *the Constitution*.
67. Further, the decision did not stop the petitioner from filing incidental proceedings to safeguard her rights as an innocent purchaser for value without notice and claim indemnity against the 1st, 2nd and 3rd respondents.
68. In constitutional petition she did not plead any such claims and or lead evidence to that effect. The other reliefs sought, if granted, would also be contrary to a decree issued by a court of competent jurisdiction that has not been appealed against or set aside by a higher court because the petitioner was condemned unheard.
69. The upshot is that the petition succeeds in establishing that the cancellation of L.R. No. Abothuguchi/Kithirune/2906 was undertaken by the 2nd respondent contrary to Articles 40, 47, and 50 of *the Constitution*. The petitioner is at liberty to pursue any damages against the respondents as provided by the statute, which is not a constitutional issue going by the doctrine of exhaustion of alternative remedies. This being a constitutional petition, each party will bear its costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU



ON THIS 25TH DAY OF OCTOBER 2023

In presence of

C.A Kananu

Kaumbi for petitioner

Miss Maina for Mbaikyatta for 1st & 2nd respondent

HON. CK NZILI

ELC JUDGE

