Katuga v Cabinet Secretary for Land & 8 others (Environment & Land Petition E015 of 2022) [2023] KEELC 21009 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21009 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION E015 OF 2022

NA MATHEKA, J

OCTOBER 25, 2023

BETWEEN

HILDA WAMBUI KATUGA ..... PETITIONER

AND

CABINET SECRETARY FOR LAND ..... 1ST RESPONDENT

DIRECTOR OF ADJUDICATION & SETTLEMENT ..... 2ND RESPONDENT

THE DIRECTOR OF SURVEY ..... 3RD RESPONDENT

THE COUNTY ADJUDICATION AND SETTLEMENT OFFICER KILIFI COUNTY ..... 4TH RESPONDENT

THE KALOLENI SUB COUNTY COMMISSIONER ..... 5TH RESPONDENT

THE KALOLENI SUB-COUNTY ADJUDICATION AND SETTLEMENT OFFICER ..... 6TH RESPONDENT

OMAR SHARIFF ..... 7TH RESPONDENT

DZOMBO KIRAZI DZOMBO ..... 8TH RESPONDENT

ATTORNEY GENERAL ..... 9TH RESPONDENT

JUDGMENT

1. The Petitioner avers that at all material time to this suit, she was the registered owner of Plot No. Mariakani Kawala "B"/50 and had a title deed which had been issued to her by the Kilifi Land Registry. The Petitioner avers that the said title deed was issued to her in November 2014 and she has all along held the same and she continues holding it as her rightful property by virtue of being the 1st registered owner. The Petitioner avers that she acquired the property from the 8th Respondent before the title deed was issued and for this to happen she filed an objection where her dispute was heard and was

allowed and the Adjudication records were changed in her favour. There was no appeal since the objection was purely procedural to enable her name to replace the 8th Respondent's name by virtue of purchase. The Petitioner avers that pursuant to the decision of the Adjudication Committee she was captured and registered as the owner in the Adjudication register and was subsequently issued with a Title Deed for Plot No. Mariakani/50 which she holds to date.

2. The Petitioner avers that she works in the United Kingdom and resides in that country most of her time but comes back every year and sometime in the year 2018. She visited the country and decided to visit her plot and upon reaching there she found the same fenced off such that she could not gain access. She later discovered that the fence has been put up by the 7th Respondent denying her access completely. The Petitioner avers that it was not until 24th July 2019 when the 7th Respondent served her with his documents when she discovered that there were proceedings purporting to be an appeal to the Minister pursuant to the Provisions under the *Land Adjudication Act* Cap 284 which had taken place on 3.11.2015 touching on Plot No. Mariakani/Kawala without the Petitioner's knowledge and where the 1st Respondent had delegated powers to the 5th Respondent to hear an appeal by the 7th Respondent against the 8th Respondent.

3. The Petitioner avers that the proceedings forming the basis of the appeal to the 1st Respondent touched on Plot No.Mariakani/Kawala "B"/50 which is the Petitioner's plot and which the Petitioner already had a title and she was never informed of any proceedings and yet the 1st, 2nd, 3rd, 4th, 5th and the 6th Respondents were all aware or ought to have been aware of the previous objections proceedings between the Petitioner and the 8th Respondent and which was awarded in the Petitioner's favour and forwarded the results to the 2nd Respondent who closed the register and okeyed a title deed being for plot No. Mariakani/Kawala "B"/50 in Petitioner's favour. The Petitioner avers that the fundamental effect of the decision of the alleged appeal to the Minister by the 7th Respondent was to rectify the area map such that the space showing where plot No. Mariakani/Kawala "B"/50 was situate was removed meaning that the Petitioner remained with a title without a corresponding evidence of the space on the area map.

4. The Petitioner prays for orders against the Respondents jointly and severally for;

    a. A declaration that the decision of the Minister for lands issued on 27/11/2015 were illegal, null and void.

    b. An order for mandamus compelling the 2nd and 3rd Respondents to rectify the Kawala "B" registration section Map and amend it to re-include the Petitioner's Plot No. Mariakani/ Kawala "B"/50 in the Register Section Map for Kawala"B"

    c. An order for Judicial Review to issue quashing the proceedings of 3rd November 2015 and the subsequent decision of the 27th November 2015.

    d. The court to be pleased to award general damages to the Petitioner to be paid by the Respondents jointly and severally.

    e. The Court to award costs of the Petition.

    f. The court to award any other remedy and or orders it considers fit in the circumstances of this case.

5. The 1st, 2nd, 3rd, 5th, 6th and 9th Respondents aver that this petition related to a Judgement in relation to property that falls within Kawala "B". Following that decision made on 30th March 2022, there has been no challenge/Appeal by way of invoking the supervisory jurisdiction of the High Court in

the form of prerogative orders. That any disputes that had arisen were resolved through a four tier hierarchical mechanism starting from Land Committee, appeal to the Arbitration Board, objection to the Adjudication Register and Appeal to the Minister for Lands. That the Petitioner did not exhaust the process provided by Cap 284 of The Laws of Kenya. That this Petition is therefore premature.

6. This court has carefully considered the Petition and the submissions. The principles of drafting a Constitutional Petition were clearly set out in Anarita Karimi Njeru vs The Republic (1979) eKLR, it was stated that;

> " We would, however, again stress that if a person is seeking redress 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 infringed."

7. The Petitioner when coming to court for alleging contravention of constitutional rights, is obligated to cite the provisions of *the constitution* which have allegedly been violated, the manner in which they have been violated and the remedy he seeks for the violations. Then the court will consider the factual evidence presented in support of the said violations to determine whether there has been a violation.

8. The Petitioner averred that the Respondents have used the adjudication process to deprive her of Plot No. Mariakani/Kawala B/50. She claimed the adjudication was unconstitutional, illegal, null and void and prayed for an order of judicial review of mandamus compelling the 2nd and 3rd Respondents to rectify the Kawala B registration section map and further quash the proceedings of 3rd November 2015.

9. The doctrine of exhaustion was comprehensively dealt with in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others vs Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as that;

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR"

10. In the Court of Appeal in *Speaker of National Assembly vs Karume* (1992) KLR 21 in the court stated that;:

> " Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

11. The Petitioner has not exhausted the administrative remedies available under the Cap 284 of the Laws of Kenya. Indeed, she states that she was not a party to the said appeal touching on her property. Be that as it may, the Petitioner filed this Petition where she is seeking redress in the form of judicial review from

this court with reference to *the Constitution*. However, she has failed to set out with a reasonable degree of precision what she complains of, the provisions of *the constitution* she claims to have been infringed and the manner in which she alleges the said provisions of *the constitution* have been infringed. The Petitioner has failed to meet the principles set out in Anarita Karimi Njeru which require the Petitioner to;

a. Specifically set out the provisions in the Bill of Right that have been allegedly violates,

b. Provide the particulars of the alleged violations,

c. Provide particulars in which the Respondents have purportedly infringed the rights.

12. Lenaola J (as he then was) reiterated the principles in Anarita Karimi in *Stephen Nyarangi Onsomu & another vs George Magoha & 7 others* (2014) eKLR, where he stated;

> " In answer to that issue, this Court has in the past expressed its concern about the manner in which parties coming before the Court and alleging a violation of constitutional rights have presented their cases. As a basic minimum, a Petitioner is required to cite the provisions of *the Constitution* which have allegedly been violated, and the manner in which they have been violated, and the remedy which he seeks for that violation - See Annarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272. In demonstrating the manner in which there has been a violation, a Petitioner should present before the Court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation. This basic rule has been affirmed by the Court of Appeal in the Mumo Matemu Case."

13. In this Petition, the Petitioner has referred to Articles 22, 23, 40 and 165 of *the Constitution* but does not say how the objection proceedings relating to Adjudication Section Kawala and Plot No. Mariakani/ Kawala B/50 have threatened the said provisions. In specific, the Petitioner alleged the contravention of Article 40 of *the Constitution* but has failed to evidentially and on a factual basis demonstrate to the court how this right has been violated of infringed by the Respondents. In *Uhuru Muigai Kenyatta vs Nairobi Star Publications Limited* (2013) eKLR it was held;

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

14. There is a clear procedure for seeking redress whenever a person alleges to be prejudiced by a decision of an adjudication process. Where the Petitioner seeks judicial review, the correct procedure is under the Civil Procedure Rules which provides for judicial review and not a constitutional petition. In *Four Farms Limited vs Agricultural Finance Corporation* (2014) eKLR, the court held that;

> " This Court was referred to Decision in Kenya Bus Services Ltd & 2 others –vs- The Attorney General [2005] KLR 787 for the proposition that *the Constitution* is not a general substitute for the normal procedures for invoking judicial control of administrative action. There,

Nyamu J (as he then was) approved the following position taken up in Re Application by Bahadur [1986] LCR (Const)297,

> "The Constitution}} is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under *the Constitution* (see Harrikisson v Attorney General of Trinidad and Tobago [1979] 3 WLR 62 applied.)"

15. The Petitioner seeks to invoke judicial control of the adjudication process which is an administrative action. The correct procedure would be a judicial review under order 53 of the *Civil Procedure Rules* since her claim can be litigated under substantive law. Not all infringements ought to be brought under *the Constitution*, unless and until the Petitioner fulfils the three principles set out in Anarita Karimi Njeru. Further, the Petitioner has not demonstrated to the court that a normal judicial review application would be an inadequate legal remedy. To seek constitutional reliefs in the absence of the above would be in my view a misuse of the court process. This Petition does not present any special feature that would make a constitutional relief more suitable than a civil suit, it is on this premise that I find the Petition dated 23rd April 2022 devoid of merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE