



Mwaganda v National Land Commission & 2 others; Amin & 2 others (Interested Parties) (The administrator of the Estate of Mohamed Al 'Min and Teba Binti Mohamed) (Environment & Land Petition 10 of 2018) [2023] KEELC 20957 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20957 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 10 OF 2018
NA MATHEKA, J
OCTOBER 25, 2023

BETWEEN

GILBERT MWAGANDA PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

REGISTRAR OF TITLES 3RD RESPONDENT

AND

AMANI MOHAMED AL 'AMIN INTERESTED PARTY

MOHAMED MOHAMED ALMIN INTERESTED PARTY

UMI MOHAMED AL AMIN INTERESTED PARTY

**THE ADMINISTRATOR OF THE ESTATE OF MOHAMED AL 'MIN AND
TEBA BINTI MOHAMED**

JUDGMENT

1. The Petitioner avers that the parcel of land now known as Plot No. NN/111/553 Kanamai original No. 284/MN/III registered under the name of Teba Binti Mohammed was originally owned by his grandfathers Mzee Mwaganda, Mzee Bendera, Mzee Masha, Mzee Fondo, Mzee Kambi before independence. This parcel of land is their ancestral land and his grandfathers were buried there and their graves are still there. There are also their cash crops on the land which is being used by the Interested Party. That his grand fathers, Mzee Mwaganda, Mzee Bendera, Mzee Masha, Mzee Fondo, Mzee Kambi owned and lived in the parcel of land known as Plot No. NN/111/553 KANAMAI - Original No. 284/MN/111 in 1908 before Kenya's independence. They lived on the said parcel



- of land between 1908 and up to 1958 when one Mohamed Mohamed Alamin assisted by the colonial administration invaded the land, demolished all houses and forcefully evicted their forefathers. His forefathers Chidianga Becheupe, Kulumba Becheupe, Kanungu Becheupe were arrested. That their houses were set ablaze and were demolished and they were forcefully evicted by the Colonial Administration officers and one Mohamed Mohamed Alamin.
2. That the office of the Land Registrar (previously Commissioner of Lands) which is a department in the Ministry of Lands acted illegally by issuing documents of title to the Interested Parties' parents at their father's expense. That the Attorney General in his capacity as the Chief Legal Advisor to the government under Article 156 of the *Constitution* and in the *Government proceedings Act* failed to so advise or erroneously advised the Office of the Land Registrar (previously Commissioner of Lands). That the Land Registrar (previously Commissioner of Lands) is the department in the Ministry of Lands with the legal capacity to remedy the grievances that he is and the Attorney General as the Chief Legal Advisor to the Government has the responsibility to legally advise the said department.
 3. The Petitioner thereof prays;
 - a. That the decision by the Ministry of Lands to register and issue title to the Interested Party as the right owner of the parcel of land known as xN111/553 KANAMAI - original No. 284/5/MN/111 be declared null and void as it violated the Petitioners' fundamental rights to ownership of the said parcel of land.
 - b. That the Interested Party be ordered to vacate the said parcel of land and give the Petitioner vacant possession of the same.
 - c. That the Petitioner be declared the rightful owner of the said parcel of land and the Respondent be ordered to issue a title deed in favour of the Petitioner.
 - d. That the Title Deed in the name of the Interested Parties be cancelled.
 4. The 1st Respondent the National Land Commission, never filed any documents nor did they participate despite service of summons having been effected on them. The Attorney General (2nd Respondent) and the Registrar of Titles (3rd Respondent) filed a replying affidavit to the Petition sworn by the Land Registrar J.G . Wanjohi on 29th July 2020 and filed the same day. They never filed any witness statements nor did they avail any witness in court. The Interested Party filed witness statement by one Mohamed Mohamed Al-Amin on 18th February 2020 list of documents dated 18/2/2020 on the same day. Another witness statement by Abdulrahman Mohamed Al-Amin was filed 10th May 2021. They also filed a supplementary list of documents dated 24th August 2020 on 25th August 2020.
 5. This Court has considered the Petition and submissions therein. The Petitioner lists the following Articles of the *Constitution* having been contravened, Article 40 on the right of every person to acquire and own property, Article 43 on social economic rights, Article 48 on the right to access to justice for all persons and Article 67 on the establishment of the National Land Commission. The principles of drafting a Constitutional Petition were clearly set out in *Anarita Karimi Njeru v The Republic* (1979) eKLR, it was stated;

“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.”



6. The Petitioner when coming to court for alleged 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. In the instant Petition, the Petitioner has presented an omnibus Petition, he has cited Articles 40, 43, 48 and 67 of the Constitution but has failed to say how the dispute of ownership of land with the Interested Parties has contravened the said provisions. The Petitioner has failed to provide evidence and a factual basis to show how these rights have been violated or contravened.
7. The Petitioner's claim is that of cancellation of title documents, eviction and vacant possession which in my view is a claim under substantive law, and the proper course is to bring the claim under the law and not the Constitution . It is the view of this court that the Petitioner's claim cannot be elevated to constitutional questions as he seeks the court to believe. The Civil Procedure Act and the Land Registration Act afford a robust procedure and remedy which is an efficacious and satisfactory response to the Petitioner's grievances.
8. In Bethwell Allan Omondi Okai v Telkom (K) Ltd (Founder) & 9 others (2013) eKLR Lenaola J (as he then was) said;

“While I am alive to this Court's unlimited jurisdiction under Article 165 (3) (a) of the Constitution , I do not think as can be seen elsewhere above that the Petitioner has raised any constitutional matters to warrant the intervention of the Court under Article 165 (3) (a). In any event, this Court in International Center for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012 held that the unlimited original jurisdiction of this Court could not be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances such as the one raised by the Petitioners. The Court of Appeal has also upheld this reasoning in Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425, where it held that:-

“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

9. The instant case does not raise any constitutional issue, I find that the Petitioner is seeking declaratory reliefs i.e. cancellation of title and eviction orders which could have easily been sought out in a civil court. Litigants ought to restrain themselves from substituting ordinary civil disputes with constitutional Petitions seeking redress for violation of fundamental rights when in fact the claim is an ordinary civil dispute for ownership of land. The court is at the forefront of protecting a Petitioner's right to access justice through Article 22 (1) of the Constitution , which grants every person the right to institute court proceedings claiming that a right of fundamental freedoms enshrined in the Bill of Rights has been denied, violated, infringed or threatened; this right should not be abused. The court will not allow a Petition which violates fundamental principles of law to stand and looking at the Petition again, there is nothing left for me to determine. The entire Petition dated 9th May 2019 is dismissed and let each party bear its own costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE

