



**Amollo v Nyandiga & 3 others (Petition 1 of 2022)  
[2023] KEELC 20757 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20757 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
PETITION 1 OF 2022  
GMA ONGONDO, J  
OCTOBER 18, 2023  
(FORMERLY MIGORI ELC PETITION NO. 8 OF 2019)**

**BETWEEN**

**SILAS ABONG'O AMOLLO ..... PETITIONER**

**AND**

**JANE ATIENO NYANDIGA ..... 1<sup>ST</sup> RESPONDENT**

**ASEGO DIVISION LAND DISPUTE TRIBUNAL ..... 2<sup>ND</sup> RESPONDENT**

**SENIOR RESIDENT MAGISTRATE ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. By a petition dated 21<sup>st</sup> July 2010 and filed on even date, the petitioner who is represented by O. M. Otieno and Company Advocates, is seeking the orders infra;
  - a. Spent
  - b. That the honourable court be pleased to issue conservatory/ preservative orders staying the eviction of the petitioner and his family from the suit land and/or deregistration of the petitioner as the owner of LR Kanyada/Kanyango Kalanya/456 (the suit land herein), or cancellation of the title currently held by the applicant and/or substituting the name of the petitioner with that of the 1<sup>st</sup> respondent herein.
  - c. That the honourable court be pleased to issue a declaration, declaring that the award of the Asego Division Land Dispute Tribunal dated the 22<sup>nd</sup> January 2009, vide Tribunal Case No. 145 of 2008, together with the resultant proceedings of the Senior Resident Magistrate Court vide Homa Bay SRM Misc. Application No. 11 of 2009, in respect of the suit land are illegal,



null and void, in so far as the same contravenes Section 75 of the Constitution of Kenya (repealed) and the same is of no legal consequence.

- d. That an order do issue quashing the Asego Land Dispute Tribunal Decision dated 22<sup>nd</sup> January 2009 and the resultant proceedings of the Senior Resident Magistrate, Homabay vide Homabay SRMC Misc. Application No. 11 of 2009, intended at adopting and executing the said illegal decision of the tribunal.
  - e. Costs of this petition be borne by the respondents.
  - f. Such further and/or other orders be made as the court may deem just and expedient.
2. The petition is anchored on the Supporting affidavit of twenty four (24) paragraphs sworn by Silas Abong'o Amollo, the petitioner herein and the accompanying documents, namely: a copy of the title deed to the suit land, a copy of certificate of confirmation of grant for the estate of Miriam Ogendi (deceased), a copy of letter from the area chief dated 8<sup>th</sup> June 2004, a copy of the proceedings in Asego Land Dispute Tribunal Case No. 32 of 2005, a copy of the proceedings in Homabay Chief Magistrate's Court Misc. Application No. 11 of 2009 and a copy of the order granting leave and stay in Kisii High Court Civil Misc. Case No. 53 of 2009.
  3. In brief, the petitioner's lamentation is that he is the registered owner of the suit land, having carried out succession in the estate of one Miriam Ogendi (deceased). That the 1<sup>st</sup> respondent lacked locus standi to initiate proceedings before Asego Division Land Dispute Tribunal (the 2<sup>nd</sup> respondent herein) as she had not taken out grant of letters of administration in respect to the estate of the deceased. That the decision by the 2<sup>nd</sup> respondent to annul the title deed of the suit land and transfer the same to the 1<sup>st</sup> respondent, which was adopted by the court in Homabay Chief Magistrate's Court Misc. Application No. 11 of 2009, is unlawful and unconstitutional. That the same is a nullity.
  4. PW1, Silas Abong'o Amollo (the petitioner herein), adopted his supporting affidavit sworn on 21<sup>st</sup> July 2010 as well as the documents marked as "SAA1 to 6" (PExhibit 1 to 6 respectively) and a copy of the green card (PExhibit 7) as part of his evidence. He also adopted his statement dated 31<sup>st</sup> May 2022. He testified that the husband of the deceased was his uncle. That he lived with the deceased since 1969. That the deceased had two daughters who are also now deceased. That the family of the deceased was aware of the succession process. That he has established a home on the suit land and lives thereon.
  5. During cross-examination, PW1 stated that his late wife's remains were not interred on the suit land but in a different parcel. That his late father was a cousin to the deceased's late husband. He also stated that he obtained leave of court in Kisii High Court Civil Misc. Case No. 53 of 2009 to file a judicial review application but his advocate failed to do so within the stipulated time.
  6. PW2, Peter Odhiambo Oruna, adopted his statement dated 31<sup>st</sup> May 2022. In cross-examination, PW2 stated that the petitioner's deceased father owned a different parcel of land. That although PW1 alleges to have supported the deceased, there is no record availed in court to prove the same. That the closest people who ought to inherit the deceased are her step-children.
  7. The 1<sup>st</sup> respondent, who was initially represented by M/s Oguttu-Mboya and Company Advocates and currently by Aluoch Odera and Nyauke Advocates, opposed the petition by way of a replying affidavit dated 24<sup>th</sup> September 2010 and duly filed herein on 27<sup>th</sup> September 2010. She deposed, *inter alia*, that the suit land was originally registered in the name of the deceased, who was her step mother. That she has two surviving siblings. That the petitioner, who is not a bona fide- beneficiary of the deceased, secretly and fraudulently obtained a grant of letters of administration to the estate of the deceased. That thereafter, the petitioner transmitted the suit land to himself without notice to the 1<sup>st</sup> respondent



or her surviving siblings. That in any event, the Senior Resident Magistrate's court at Homa Bay lacked jurisdiction to grant the letters of administration to the estate of the deceased to the petitioner, since the value of the suit land exceeded the pecuniary jurisdiction of the said court.

8. DW1, Jane Atieno Nyandiga, the 1<sup>st</sup> respondent herein, relied on her Replying Affidavit sworn on 24<sup>th</sup> September 2010 as well as her statement dated 20<sup>th</sup> September 2022 as part of her evidence-in-chief. She averred that the petitioner, PW1, is not her relative. That they neither belong to the same clan nor lineage. Further, she stated that PW1 did not in any way assist the deceased. That she instituted a suit at the chief magistrate's court, seeking revocation of the grant issued to PW1 in relation to the estate of the deceased.
9. On cross-examination, DW1 asserted that she does not live on the suit land. That she has no intentions of selling the same. That her late mother, one Frinika Akumu, who was a co-wife to the deceased, owned her own parcel of land, which is distinct from the suit land.
10. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file any response to the petition herein.
11. Originally, the matter was filed at Kisii High Court but was transferred to Migori Environment and Land Court on 8<sup>th</sup> May 2019 and subsequently to this court on 31<sup>st</sup> January 2022 for hearing and determination in the spirit of Articles 6 (3), 48 and 159 (2) (b) and (e) of the [Constitution of Kenya, 2010](#).
12. The petitioner's counsel filed submissions dated 24<sup>th</sup> June 2023 on 25<sup>th</sup> July 2023. Briefly, learned counsel submitted that the petitioner is a dependent of the deceased for purposes of succession as stipulated under Section 29 of the [Law of Succession Act](#), Chapter 160 Laws of Kenya. That the petitioner's right to property has been violated by the 2<sup>nd</sup> respondent which purported to originate and entertain a claim by a person bereft of capacity to mount the same, proceeded without jurisdiction to make orders which are null and void and purported to nullify the certificate of confirmation of grant issued to the petitioner. That although the petitioner obtained leave of court in Kisii High Court Miscellaneous Civil Case No. 53 of 2009 to file a judicial review application to review the decision of the Land Dispute Tribunal, his advocate failed to do so within the stipulated time. That declaratory orders are substitute to judicial review remedy. To buttress the submissions, counsel relied on various authoritative pronouncements including the case of [Republic v The Senior Resident Magistrates' Court, Kilgoris ex parte the Clerk, County Council of Trans Mara and another](#) (2012) eKLR.
13. The 1<sup>st</sup> respondent's counsel filed submissions dated 5<sup>th</sup> June 2023 on 6<sup>th</sup> June 2023. Counsel submitted that the petitioner is not entitled to be a beneficiary of the estate of the deceased. Further, that the petitioner has not adduced any evidence in support of the assertion that he supported the deceased. That therefore, the instant petition is not merited and ought to be dismissed with costs.
14. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file any submissions herein.
15. I have carefully studied the entire petition, the 1<sup>st</sup> respondent's replying affidavit and viva voce evidence of PW1, PW2 and DW1, as well as the rival submissions filed herein. In that regard, the following issues fall for determination:
  - a. Whether the petition meets the threshold of a constitutional petition;
  - b. If the answer for (a) above is in the affirmative, whether the petitioner is entitled to the remedies sought in the petition.
  - c. Who should meet the costs of the petition?



16. It is important to note that this court is empowered by Article 162 (2) (b) of the *Constitution of Kenya*, 2010 as well as Section 13 of the *Environment and Land Court Act*, 2015 (2011), to hear and determine constitutional petitions; see also *United States International University v The Attorney General and 2 others* (2012) eKLR.

### **Whether the petition meets the threshold of a constitutional petition**

17. It is a well-developed principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272 where the court stated thus:

“Constitutional violations must be pleaded with a reasonable degree of precision.”

18. In essence, the court stated that the articles of the *Constitution* which entitles rights to the petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.
19. The said principle was later restated by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. The court went ahead to establish the standard of proof in constitutional petitions thus:

“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 1<sup>st</sup> 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.

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 1<sup>st</sup> 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 drafting,” without requiring remedy by the 1<sup>st</sup> respondent ...”

20. This court is cognizant of the provisions of the *Constitution of Kenya*, 2010 with respect to protection of right to property. Article 40 of the said *Constitution* provides:
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
    - (a) of any description; and
    - (b) in any part of Kenya.



- (2) Parliament shall not enact a law that permits the State or any person—
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five;
  - or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
21. In the present petition, the petitioner contends that his right to property has been violated by Asego Division Land Dispute Tribunal, the 2<sup>nd</sup> respondent herein, which tribunal entertained a claim by the 1<sup>st</sup> respondent who was bereft of capacity to mount the same, proceeded without jurisdiction to make orders which are null and void and purported to nullify the certificate of confirmation of grant issued to the petitioner. Clearly, the same does not meet the threshold of a constitutional petition.
22. It is therefore, my considered view that there are no constitutional issues that warrant adjudication by this court.
23. In the instant case, the best remedy available to the petitioner would have been to proceed with the judicial review application since leave to institute the same had already been obtained in Kisii High Court Miscellaneous Civil Case No. 53 of 2009.
24. Indeed, 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 *Abraham Kaisha Kanziku v Governor of Central Bank & others* (2006) eKLR.



25. Similarly, in the case of *Godfrey Paul Okutoyi & others v Habil Olaka & Another* (2018) eKLR, Chacha , J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated:-

“ 65. 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.”

26. Also, 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 (read this court, under Article 162 (2)(b) (*supra*)) 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”.

27. In view in the foregoing and looking at the petitioner’s pleadings, the evidence as well as the submissions of the parties, it is my conserved view that the petition has not met the requirements of a constitutional petition.

#### **Whether the petitioner is entitled to the reliefs sought in the petition;**

28. In the foregone, I am of the considered view that the petition has not met the threshold of a constitutional petition. Therefore, the petitioner is not entitled to the remedies sought in the petition.

#### **Costs of the Petition**

29. The proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides that costs follow the event within the discretion of the court.

30. Wherefore, this petition lacks merit and it is hereby dismissed.

31. By the nature of this petition, each party to bear own costs.

32. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 18<sup>TH</sup> DAY OF OCTOBER, 2023.**

**G M A ONGONDO**

**JUDGE**

**Present**

1. Mr. O. M. Otieno, learned counsel for the petitioner

2. Mr. S. Nyauke, learned counsel for the 1<sup>st</sup> respondent



3. Terrence and Fiona, Court Assistants

