



**Mungiria & 5 others v Mutuma & 3 others (Petition E007 of 2023)  
[2023] KEELC 20895 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20895 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
PETITION E007 OF 2023**

**CK NZILI, J**

**OCTOBER 18, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLES 22, 23, 47, 50, 62  
AND 156 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE LAND ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE FAIR ADMINISTRATIVE ACTION ACT 2015**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**THOMAS MUNGIRIA ..... 1<sup>ST</sup> PETITIONER**

**JOSHUA MWANGI KAMAU (SUING AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF KAMAU GITHONGI - DECEASED) ..... 2<sup>ND</sup> PETITIONER**

**JOANNA IMPWI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE  
OF JOHN THIKANYI - DECEASED) ..... 3<sup>RD</sup> PETITIONER**

**KIRAGU KAMWIRU ..... 4<sup>TH</sup> PETITIONER**

**SAMUEL LIBURU ..... 5<sup>TH</sup> PETITIONER**



**BERNARD MEME MUTHOMI ..... 6<sup>TH</sup> PETITIONER**

**AND**

**JOHN MUTUMA ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND ADJUDICATION OFFICER ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR – TIGANIA EAST/WEST ..... 3<sup>RD</sup> RESPONDENT**

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

## **JUDGMENT**

1. Before the court is a petition dated 16.5.2023, in which the petitioner describes themselves as registered owners of Parcel No's 1507, 626, 1662, 1452, 2167, and 1787, which are subdivisions of Parcel No. 1197 Antuamburi Adjudication Section. The petitioners averred that the original parcel of land was initially registered in the name of their Akinna clan leader, the late Mbirithu M'Muriunga alias Peter Mbirithu M'Muriunga, following a protracted land dispute between 1965 and 1975. The petitioners averred that they bought their parcels of land from the initial owner, which has been in their occupation.
2. It was averred that in total disregard of the petitioners' constitutional rights, the 1<sup>st</sup> – 3<sup>rd</sup> respondents colluded and fraudulently excised two acres each from their parcels of land and registered them as Tigania/Antuamburi/9802, 9798, 9803, 9841, 9801 and 9805, in favor of the 1<sup>st</sup> respondent.
3. As a result of the alleged illegal, fraudulent, and irregular subdivisions, the petitioners averred that their constitutional rights as set out under Articles 40, 47, 50, and 62 of *the Constitution* were and continue to be violated.
4. The petitioners, therefore, prayed for declaratory orders of;- violation of their constitutional rights, that they are the rightful and beneficial owners of the parcels of land, an order reverting the two acres excised from each of their parcels of land by amending their titles to reflect the changes, and a permanent injunction restraining the respondent from interfering with their ownership, user, occupation, enjoyment and or development on the suit parcels of land.
5. The petition was accompanied by a supporting affidavit sworn by Joshua Mwangi Kamau, the 2<sup>nd</sup> petitioner, on behalf of the other petitioners. Briefly, the 2<sup>nd</sup> petitioner averred that there was a counterclaim pending in Meru ELC No.12 of 2010, which was likely to prejudice this petition and in which suit they were plaintiffs until their names were dismissed from the suit for lack of letters of grant ad litem on 8.2.2023. The 2<sup>nd</sup> petitioner admitted that the two cases addressed similar questions of law and facts, hence the need for consolidation. The 2<sup>nd</sup> petitioner reiterated the history of the dispute since 1965 between Paul M'Iliame and Peter Mbirithu M'Muriunga, where the latter was successful and became the recorded owner of Parcel No. 1197.
6. The 2<sup>nd</sup> petitioner averred that while aware of outcomes in Objection Case No. 99 of 1965, 827 of 1975 and 833 Case No. 274 of 1975, the 1<sup>st</sup> respondent misrepresented the truth or concealed material facts to the 2<sup>nd</sup> respondent who acted to their detriment and excised two acres each from their parcel of land and transferred the same to the 1<sup>st</sup> respondent, hence depriving them of their land rights. The 2<sup>nd</sup> petitioner annexed copies of grant ad litem, a title deed, objection proceedings dated 13.10.1975 and 2.3.1979, a letter to the Assistant Land Adjudication Officer on Objection No 1105 & 1110, 11242,



- and 1109, application for transfer and the approval from the Assistant Land Adjudication Officer, alienation of transfer of land to Kamau Kithongo and Mwangi Marathi by Peter Mbirithu, letter to the Chief Mikinduri Location dated 14.7.1990 and ruling in Meru ELC No. 12 of 2010, all marked as annexures JMK 1-11 respectively.
7. The petition was duly served upon the respondents on 27<sup>th</sup> and 29<sup>th</sup> May 2023. A return of service sworn by Zakayo Mutua Mutea on 30.5.2023 was also filed.
  8. In a ruling dated 17.5.2023, the court declined to consolidate this petition with the Meru ELC No. 12 of 2010 and or stay its proceedings. Therefore, following directions issued on 24.7.2023, the respondents were directed to file and serve any responses within 14 days from that date. Additionally, parties were required to dispose of the petition through written submissions to be filed by 30.8.2023.
  9. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents opposed the petition through a replying affidavit by Edwin Mutevu Nzangi, a Land Registrar Tigania sworn on 9.8.2023 on the basis that;- the parties herein and the issues are the same as in the pending Meru ELC No. 12 of 2010 making the petition defective in both form and substance and lastly, as an appeal against the decision made on 8.2.2023 disguised as a constitutional petition.
  10. The 2<sup>nd</sup> – 4<sup>th</sup> respondents averred that the petitioner had not met the threshold of a constitutional petition as set in *Mumo Matemu vs Trusted Society of Human Rights & 5 others* (2013) eKLR for there is no demonstration of a prima facie case arguable on breach of constitutional provisions or for that matter, for not raising any constitutional issues for determination before the court.
  11. In written submissions dated 9.8.2023, the 2<sup>nd</sup> – 4<sup>th</sup> respondents isolated two issues for determination. Whether the petition offends the principle of *sub-judice* as per Section 6 of the *Civil Procedure Act*, the 2<sup>nd</sup> – 4<sup>th</sup> respondents relied on *Kenya National Commission of Human Rights vs AG & another* (2020) eKLR. They stated that the subject property Parcel No. 1197 Antuamburi Adjudication Section was the same property in the ELC case, and both suits seek the determination of ownership; both claims pending before the same court parties are the same except the 3<sup>rd</sup> respondent.
  12. Reliance was placed on *Republic vs Paul Kibara Kariuki & others* (2020) eKLR, on the proposition that the mere addition of a party or parties does not alter the pith and substance of the suit and that the framing of the matter as a constitutional petition does not make it raise constitutional issues since the substance of the lawsuit remains the same and therefore there was no justification of filing a subsequent suit; otherwise, it was aimed at pre-empting the earlier suit.
  13. On whether the petition has met the constitutional threshold, the 2<sup>nd</sup> – 4<sup>th</sup> respondents submitted that the same falls short of the ingredients set in *Mumo Matemu* (*supra*) for the degree of precision of the complaint, provisions infringed and how they have been violated was lacking, which particulars cannot be cured by merely citing the consistent provision. Relying on *Republic vs Paul Kibara Kariuki* (*supra*), the 2<sup>nd</sup> – 4<sup>th</sup> respondent submitted that no constitution issues or values were discernable in the entire petition since the issues of ownership of property calls for interpretation of a statute, namely the *Land adjudication Act* (Cap 284) and not *the Constitution*.
  14. Additionally, the 2<sup>nd</sup> – 4<sup>th</sup> respondents submitted that where there was an alternative remedy instead of a constitutional relief, a constitutional mandate of this court should not be invoked as held in *Patrick Mbau Karanja vs Kenyatta University* (2012) eKLR and *Godfrey Paul Okutoyi 7 others vs Habil Olaka & another* (2018) eKLR.



15. Further, the 2<sup>nd</sup> – 4<sup>th</sup> respondents submitted the petition did not call for the constitutional interpretative mandate under the Bill of Rights, for sufficient statutory legal provisions exist under the [Land Adjudication Act](#).
16. The procedural and substantive law governing a constitutional petition is set out under Articles 30, 31, 32, 23, 159, 165 3 (b), 258 of [the Constitution](#), Section 13 (3) [Environment and Land Court Act](#) and the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) \(Practice & Procedure Rules \(2013\)\)](#) from now on the Rules. Rule 10 requires that a petition discloses the name and address, facts relied upon constitutional provisions violated, the nature of injury caused, the capacity of institutions of the petition details regarding past or present civil or criminal proceedings over the subject matter, and the reliefs sought. Under Rule 15, the Hon. Attorney General or any state organ shall, within 14 days upon service with the petition, have to file a response through a replying affidavit and annex any document relied upon. Any respondent other than the Attorney General or state organ has to file a memorandum of appearance, a replying affidavit, or a statement setting out the grounds relied upon to oppose the petition. A respondent may also file a cross-petition.
17. In the absence of responses, Rule 16 allows the court to hear and determine the petition. Rule 20 allows the court to hear and determine the petition through affidavit evidence, written submissions, or oral evidence.
18. Having set the procedural legal framework, the next issue is whether the petition before the court meets the procedural and substantive requirements and if it discloses a constitutional question. In the case of [Wekesa vs. Kenya Power & Lighting Company Constitutional Petition 12 of 2021 \(2023\) KEHC 2899 \(KLR\) 27<sup>th</sup> March 2023 \(Judgment\)](#), the court cited with approval [CNM vs WMC \(2015\) eKLR](#) that a constitutional question revolves around the constitutionality of any provisions of the law and the interpretation or application of any legislation. See [Bia Tosha Distribution Ltd vs Kenya Breweries Ltd & others Petition 15 of 2020 \(2022\) KESC 14 \(KLR\) Constitutional & Judicial Services \(17<sup>th</sup> February \(2023\) \(Judgment\)](#).
19. In the case of [Kwari vs Bee Hive Media Ltd vs Capwel Industries Ltd \(IP\) Constitutional Petition E321 of 2021 \(2023\) KEHC 2684 \(KLR\)](#), 31<sup>st</sup> March 2023 (Judgment) citing with approval [Communication Commission of Kenya & others vs Royal Media Services Ltd & others \(2014\) eKLR](#) that a petitioner has to show the rights said to have been infringed and basis of the grievance as a foundation of conviction and good faith in engaging the constitutional process of dispute settlement. The court also said that the conduct of a constitutional petition was guided by Sections 2, 107 and 109 of the [Evidence Act](#). Further, the court cited with approval [Fredricks & others vs MEC for Education and Training Eastern Cape and others \(2002\) 23 ILJ 81 \(CC\)](#), that a constitutional matter must be gleaned from the reading of [the Constitution](#) itself and include disputes or issues concerning the status, powers, and functions of an organ of the state, its interpretation, applications and upholding of [the constitution](#) as well as the interpretation of any legislation. The court observed that in the United States of America, Constitutional issues refer to any political, legal, or social issues that somehow confront the protections laid out in the United States of America Constitution. Therefore, the court said that a constitutional issue must demonstrate the link between the aggrieved party, [the constitution](#)'s provisions alleged to have been contravened or threatened, and the manifestation of contravention or infringement.
20. The court cited with approval Langa J in [Minister of Safety vs Luiters \(2007\) 28 ILJ 133 \(CC\)](#), that whether an argument raises a constitutional issue, the court was not strictly concerned with whether the argument will be successful but whether the argument forces the court to consider the constitutional rights and values. Additionally, the court cited with approval [Turkana County](#)



- Government & 20 others vs AG & others* (2016) eKLR, that claims of statutory violation could not almost or give rise to a constitutional violation.
21. Again, a constitutional petition must establish that only a constitutional court can handle the matter. In *William Odhaimbo Ramogi & 3 others vs. AG & others* (2020) eKLR, the court observed that exhaustion when a doctrine served the purpose of ensuring that there was a postponement of judicial consideration of the matter to ensure that a party was first of all diligent in the protection of his interest within the mechanism in place for resolution of disputes outside the courts in line with Article 159 of *the Constitution*. See *Mumo Matemu* (*supra*), *Kenya National Commission for Human Rights* (*supra*) and *Republic vs Paul Kibara* (*supra*).
  22. Applying the foregoing principles and caselaw, does the petition before the court surmount the above threshold? The petitioners described themselves as bonafide land purchasers from the initially recorded owner. They did not state when they bought the parcels of land. In paragraphs 10 – 15, the nexus between them and the initial owner is unclear. In paragraph 16, the reference is to the 4<sup>th</sup> respondent. In paragraphs 17 – 33, the dates, venues, persons, organs, and particulars of the alleged violations, nature of injuries, and actions taken or complaints made to the various organs of the 2<sup>nd</sup> – 4<sup>th</sup> respondents are missing.
  23. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are creatures of statutory laws. No particulars have been pleaded on when and how the respondents colluded to excise the alleged two acres of land from each parcel belonging to the petitioners. See *Mumo Matemu* (*supra*). No corresponding evidence is attached to the effect that indeed, the respondents breached the operating statutory rights of the petitioners. Annexures marked JKM “5 – 10” are not certified by the issuing offices, nor do they pass the test of secondary evidence as provided under the *Evidence Act*.
  24. No single complaint letter has been exhibited to show that the petitioners established the alleged interference with the acreage of their parcels of land, given that the annexures marked JKM 1 – 4, were all issued by the 3<sup>rd</sup> respondent on 6.6.2017. Between 2017 and the filing of the petition, there is no indication if and why the petitioners failed to invoke the internal dispute resolution mechanism under the relevant laws before filing a constitutional petition. Additionally, before the parcels of land became titled, there must have been the publication of the final register, in which case the petitioners had a chance to ascertain the acreage and details of their parcels of land before a certificate of finality was issued under Section 27 of the *Land Adjudication Act*. No evidence has been tendered to show that the petitioners had raised any claims or complaints with the Director of Land Adjudication or the Chief Land Registrar alleging that what was ascertained in the published register before titling was different from what was eventually included in the issued title deeds. The petitioners alleged that two acres of land were deducted from the parcels, which ended up being included in land parcels belonging to the 1<sup>st</sup> respondent. No evidence from official land record searches or land survey reports from the ground has been tendered before this court. The petitioners alleged fraud, illegality, and irregularities in subdivisions of their parcels of land. Fraud must be specifically pleaded and proved. It was not enough to allege fraud, illegality, or irregularities without particulars for the same. No forensic investigative report from the Criminal Investigation Department Land Fraud Unit was availed to substantiate the alleged fraud, illegality, or irregularity. See *Virjay Morjaria vs Nansingh Madhusingh Darbar & another* (2000) eKLR.
  25. The legal burden in a constitutional petition vests with the petitioners. In *Wamwere & 5 others vs AG Petition 26, 34 & 35 of 2019 (Constitution) (2022) KESC 3 (KLR) 27<sup>th</sup> January 2023 (Judgment)*, the Supreme Court of Kenya said that even in a situation where a respondent has not filed or tendered evidence to counter the petitioner’s case, the petitioner bore the burden of establishing his claim on



- a balance of probabilities. The court said that the standard would be met based on evidence to the satisfaction of the court, that it was more probable that the allegations in issue occurred.
26. In this petition, the allegations by the petitioners are grave in nature, for they border on criminality on the part of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents. It was not enough to make wild allegations without an iota of evidence to that effect. A party coming to a constitutional court must be ready to substantiate every allegation of violation or threat to his constitutional rights and freedoms. See [Paul Nga'nga Nyaga & others vs. AG & others](#) (2012) eKLR.
27. The 2<sup>nd</sup> – 4<sup>th</sup> respondents have averred that the petition is camouflaged as a constitutional petition, yet the subject matter and parties are the same as in the Meru ELC No. 12 of 2010, hence offending the principle of *sub-judice* and further that it was an appeal to the ruling made on 8.2.2023, disguised as a constitutional petition. The petitioners have not denied those facts. The court is bound by the holding of the Supreme Court of Kenya in [Kenya National Commission on Human Rights vs AG](#) (*supra*) that parties should avoid abusing the court process by filing the same suit likely to cause conflicting decisions on the same subject matter. The issues and parties before this court and the pending ELC suit are the same. As held in [Republic vs Paul Kariuki](#) (*supra*), a mere addition of the 3<sup>rd</sup> respondent herein does not change the subject matter. The citing of the constitutional provisions does not make the suit sound like a constitutional petition or raise constitutional issues. The petitioners alleged a breach of statutory rights under the [Land Adjudication Act](#). There is no evidence that the petitioners invoked the provisions of the [Land Adjudication Act](#) as the first port of call before invoking the constitutional provisions. Courts have held that not every statutory violation amounts to a constitutional violation. See [Paul Mbau Karanja](#) (*supra*) and [Godfrey Paul Okutoyi](#) (*supra*).
28. The petitioners failed to appeal against the ruling delivered on 18.2.2023 if they were aggrieved, as pleaded in paragraphs 19 and 20 of the petitions herein. It is not the business of a constitutional court to ascertain interests or rights on land ownership and who the beneficiaries are. A court sitting as a constitutional court has a limited mandate to enforce crystallized rights only and not to undertake investigative duties. In the absence of an appeal, the court cannot be asked to sit on appeal of its own decision in the name of a constitutional court.
29. Given the foregoing, I find the petition offensive of the doctrine of *res sub-judice*, an abuse of the court process raising no constitutional questions, guilty on non-exhaustion of alternative remedies, and lacking merits. The same is dismissed with costs to the respondents.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18<sup>TH</sup> DAY OF OCTOBER 2023**

**HON. CK NZILI**

**ELC JUDGE**

In presence of

C.A Kananu

Miss Maina for 2nd & 3rd defendants

