



**Imunya v Kibaara & 2 others (Environment and Land Petition  
5 of 2018) [2023] KEELC 21762 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21762 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND PETITION 5 OF 2018**

**CK NZILI, J**

**NOVEMBER 22, 2023**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS  
UNDER ARTICLE 40 AND ENFORCEMENT OF THE SAID RIGHTS UNDER  
ARTICLES 22, 23, 159 AND 165 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**YUDA IMUNYA ALIAS YUDA K. IMUNYA ..... PETITIONER**

**AND**

**ATANASIO KIBAARA ..... 1<sup>ST</sup> RESPONDENT**

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

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Through an amended petition dated 6.7.2022, the petitioner describes himself as the recorded owner of Parcel No. 5392 Karama Adjudication section situated near Karama Market. He averred that he purchased the land on 9.10.1995. He complained that in November 2016, the 1<sup>st</sup> respondent, claiming to be a Karama adjudication section committee member, trespassed onto his land. He averred that he sued the 1<sup>st</sup> respondent in Meru ELC No. 215 of 2016 and obtained interim orders of injunction against him on 19.12.2016, after which the suit was determined in the petitioner's favor on 12.5.2021.
2. The petitioner averred that instead of awaiting the conclusion of the referenced case, the 1<sup>st</sup> respondent colluded with the 2<sup>nd</sup> respondent and fabricated a purported A/R objection proceedings and an award in favor of the 1<sup>st</sup> respondent without his knowledge and backdated or kept them as a secret beyond the mandatory 30 days for appeal and six months for judicial review until 2.5.2018 when a copy was served, thereby denying him an opportunity to be heard.



3. The petitioner averred that the respondent violated his right to be heard, access to justice, equal protection of the law, equality before the law, right to fair administrative action, and right to property protection.
4. Therefore, the petitioner prayed for:
  - a. Declaration that to the extent that the 2<sup>nd</sup> respondent heard and determined A/R objection No. 572 over Parcel No. 5392 in his absence and during the pendency of the Environment and Land Court suit violated his constitutional rights, making the proceedings and decision dated 24.7.2017 void ab initio.
  - b. An order of *certiorari* to bring into this court quash the proceedings and decision dated 24.7.2017.
  - c. An order of *mandamus* commanding the 2<sup>nd</sup> respondent to register him as the owner of the suit land because of the decision ELC case. The petition was supported by affidavits of Yuda Imunya sworn on 16.6.201, 6.7.2022, and 20.9.2022 respectively.
5. Briefly the petitioner averred his land was 0.48 acres, he bought it from Adrian Baiyana Kaumbuthu, took possession of in 1995, erected a euphorbia cum wooden posts, barbed wire fence, planted mature coffee trees and settled his family therein. He attached copies of the plaint, defense and demand letter as Y “1”, “2” & “3”, respectively. Further, the petitioner relied on a paginated bundle of documents dated 16.6.2021 and 6.7.2022, respectively.
6. In answer to the amended petition, the 1<sup>st</sup> respondent filed an affidavit sworn by Atanasio Kibaara on 26.7.2022. He termed the allegations by the petitioner as misleading. He denied the alleged forgery of the summons sent to the petitioner to appear before the land adjudication officer during the A/R proceedings. In his view the signatures, as per the forensic report, belonged to the respective committee members, who were authorized to sign on behalf of the petitioner.
7. Further, the 1<sup>st</sup> respondent averred the signatures belonged to a nephew and uncle of the petitioner who, as per the practice of the adjudication process, were entitled to receive and sign documents on behalf of their clan member. He attached an affidavit sworn by the said nephew as an annexure marked AK “1”. The 1<sup>st</sup> respondent averred that the deponent's identification card numbers were included as clan representatives of the petitioner.
8. The 1<sup>st</sup> respondent averred there was no time he had indicated the signatures belonged to the petitioner who was out to confuse, misdirect, and mislead the court to believe there was a forgery or there was no appeal against the Environment and Land Court case, yet there is a pending Nyeri Court of Appeal, Civil Application No. 39 of 2022. He annexed a copy as an annexure marked AK “2”.
9. The 1<sup>st</sup> respondent averred that no constitutional rights of the petitioner were violated to warrant the petition. He termed it as a fishing expedition trying to salvage his sinking boat after failing to follow the right channel to challenge the decision of the 2<sup>nd</sup> respondent.
10. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the petition through a replying affidavit of Earnest K. Langat sworn on 22.10.2021. He averred that based on the facts of the current record, the petitioner was not the recorded owner of parcel No.5392 but the 1<sup>st</sup> respondent, following an objection filed and determined according to Section 26 (2) & (4) of the *Land Adjudication Act*. The deponent stated that as per information received from the land adjudication officer who heard and visited the parcel in dispute on 12.4.2017, it was the 1<sup>st</sup> respondent utilizing the land; hence, the petitioner's claim of



- utilization and ownership has not been substantiated. The deponed averred after the 1<sup>st</sup> respondent filed an A/R Case No. 572 under Section 21 of the Land Consolidation Act (Cap 283), the petitioner was summoned three times by the Land Adjudication Officer but failed to attend, following which the A/R objection was heard and determined in his absence.
11. On ELC No. 241 of 2016, the 2<sup>nd</sup> respondent averred it was filed after the adjudication section's publication and filing of the A/R objection on 15.7.2015. He attached as EKL copies of the objection proceedings, application for filing objection, a receipt, and summons.
  12. In a further affidavit sworn on 20.9.2022, the petitioner averred that his signature was forged in the summons to attend to the A/R objection. Additionally, he disowned the alleged nephew and uncle because he had not authorized anyone to receive and sign summons on his behalf. Moreover, the petitioner averred he was not aware and had never been served with the application dated 10.6.2022, until after a whole year. Lastly, the petitioner averred that the 1<sup>st</sup> and 2<sup>nd</sup> respondents colluded to violate his rights to be heard and own property by recording non-existent A/R objection proceedings.
  13. By written submissions dated 8.7.2022, the petitioner isolated three issues for determination. On whether his rights were breached under Articles 25 (c), 27 (1) and (2), 40, 47 – 48, and 50 of the Constitution, the petitioner submitted such rights could not be limited, more since it was clear from the forensic examiner's report that the recipients of the discredited the three summons were not his agents and could not represent his interests during the impugned hearing.
  14. The petitioner submitted that since the summons and the appended signatures were not his, he was condemned unheard against the rules of natural justice, and the outcome was not communicated on time or at all until a year later, further compromising his right to appeal or review. Reliance was placed on *Attorney General v. Ryath* (1980) AC 118 Judicial Service Commission v Mbalu Mutava & another (2015) eKLR.
  15. Regarding breach of the right to a fair administrative action, the petitioner submitted Article 47 (1) of the Constitution and Section 4 (1) & (2) of the Fair Administrative Action Act was not complied with. Reliance was placed on Simon Natal Ntoitha v Sub-County Land Adjudication and Settlement Officer Igembe North and 2 others (2022) eKLR.
  16. In breach of the right to protection of property, the petitioner submitted by depriving him of the land in an arbitrary manner that there was a travesty of justice that should not be allowed to stand. Reliance was placed on Simon Natal Ntoitha (*supra*).
  17. On the reliefs sought, the petitioner submitted he deserved the reliefs under Articles 22 & 23 (a) & (f) of the Constitution, more so given the judgment in Meru ELC case No. 245 of 2016 delivered on 12.5.2021. No written submissions were filed or received from the respondents. The issues calling for my determination are:
    - i. Whether the petition discloses a constitution question.
    - ii. If the petitioner pleaded and proved breach of his constitutional rights.
    - iii. Whether the petitioner is entitled to the prayed constitutional reliefs.
    - iv. What is the order the order as to costs?
  18. A constitutional petition must meet the minimum threshold set under Articles 22, 23, 258, and 260 of the Constitution and the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practices & Procedure Rules, (2013) (Mutunga Rules) by setting out the parties' constitutional rights



- or fundamental freedoms infringed, violated or breached particulars of the breach of violations nature of the injuries, loss or damage and the reliefs sought. The petition before the court has complied with the minimum requirements set in *Mumo Matemu v. Trusted Society of Human Rights Alliance and 5 others* (2013) eKLR *Annarita Karimi Njeru v Republic* (1979) eKLR. The respondents responded to the petition without requesting better particulars since it was pleaded with a degree of precision.
19. The next aspect is whether the petition raises constitutional questions or issues. In *Hakiziman Abduol Abdulkarim v Arrow Motors (E.A) Ltd & another* (2017) eKLR, the court observed a constitutional question was an issue whose resolution requires the interpretation of a Constitution rather than a statute. Citing with approval *Fredrick's and others v MEC for Education and Training East Cape and others* 9200 23 L881, the court said constitutional matters include disputes about whether any law or conduct was inconsistent with the *Constitution*.
  20. The petition before the court has raised questions as to the constitutionality of the 2<sup>nd</sup> respondent's actions in hearing and determining an A/R Objection No. 572 brought by the 1<sup>st</sup> respondent against the petitioner and subsequently failing to communicate the decision contrary to the petitioner's rights under Articles 25, 27, 40, 47, 48 & 50 of the *Constitution*.
  21. The issues raised in the petition do not seek answers from the statutes but from the *Constitution*. I find the petition raises constitutional questions requiring the determination of this court. See *John Harun Mwau v. Peter Gastrow and 3 others* (2014) eKLR.
  22. On whether the petitioner has pleaded and proved breach of his rights and fundamental freedoms under Articles 25, 27, 40, 47, 48, and 50 of the *Constitution*, in paragraph 7 of the amended petition, he lists the particulars of the violation. In the supporting affidavit and list of documents, the petitioner attached documentary evidence to support his averments and particulars of violation. Among the exhibits is the forensic report by Chief Inspector Gutu, which confirms that the signatures appearing on the summons did not belong to the petitioner. The said fact was acknowledged by the 1<sup>st</sup> respondent in answer to the petition filed on 26.7.2022 and the affidavit of Atanasio Moli M'Mugambi that he was the one who received the summons on behalf of the petitioner.
  23. The burden of proof in a constitutional petition rests with the petitioner. In *Wamwere and 5 others v. Attorney General* Petition 26, 34 & 35 of 2019 (consolidated) (2023) KESC 3 (KLR) 27<sup>th</sup> January 2023 2023 (judgment), the court said a petitioner bears the burden to prove his claim of the alleged threat or violation to the requisite standard of proof, on a balance of probabilities. In *Kiambu Country Tenant's Welfare Associates v AG and another* (2017) eKLR, the court said that to prove a violation of rights, a party must not only state the constitutional provision(s) but must also show the manner of infringement nature and the extent of infringement and the injury suffered.
  24. In *Samson Gwer & others v. Kenya Medical Research Institute & others* (2020) eKLR, the court said a party making an averment in the validation of a claim is always the one to establish the plain veracity of the claim on a balance of probability through the evidence, for the court to determine that it was more probable than not that the respondent bore responsibility in whole or in part. The court said the standard of proof in constitutional petition assumes a higher level regarding constitutional safeguards. The court cited with approval *Raila Odinga v IEBC* (2013) eKLR that the petitioner should be obliged to discharge the initial burden of proof before the respondent is invited to bear the evidential burden.
  25. In *Daniel T. Arap Moi v Stephen Murithi 7 another* (2014) eKLR, the court said the trial court must examine the evidence to establish if the claim is proved and the standard of proof does not change even if in the absence of a rebuttal by the other side.



26. In this petition, the respondents have admitted there was no personal service of the summons against the petitioner. The petitioner has disowned the so-called clan representatives who took the summons on his behalf. The Land Adjudication Officer who handled the appeal has not sworn any affidavit to dispute the facts. The 2<sup>nd</sup> respondent has not explained if the petitioner was notified of the outcome on time and, if not, why. The contents of paragraphs 8 (1) (ii), (iii), (iv), (v), (vi), (vii) & (viii) of the amended petition were not explicitly denied by the 2<sup>nd</sup> respondent.
27. In *James Muthiane M'Mbirithu v. Land Adjudication Officer Igembe* (2021) eKLR, the court cited with approval *Shollei v Judicial Service Commission* (2022) KESC KLR (17<sup>th</sup> February 2022) Judgment that Article 47(1) & (2) of the *Constitution* implied the giving of written reasons and the burden to demonstrate the effect of an administrative action lay on the person to whom the action had been taken against and that under Article 50 (2), the burden to justify the limitation of the rights lay with the person limiting the same. The court said the failure by the respondent to justify why they unduly withheld the decision and proceedings, hence denying the petitioner a right to redress under the law under Article 47 of the *Constitution* and of the *Constitution* Sections (5) & 6 (3) of the *Fair Administrative Action Act*, presumed the decision had been taken without good reason. In this petition, the respondents have not explained why it took so long to communicate the outcome of the decision to the petitioner. Articles 47 and 50 of the *Constitution* required the 2<sup>nd</sup> respondent to uphold the rights of the parties as regards the right to appeal or review in an expeditious, efficient, lawful, reasonable, and procedurally fair manner. See *Republic v D.C Mwingi & another* (2013) eKLR. By withholding the decision until six months were over, the respondents denied the petitioner a right of appeal or review under the statute.
28. In *Republic v Commissioner of Customs Services exparte Tetra Pak Ltd* (2012) eKLR, the court cited with approval *Republic v Commissioner of Customs exparte Unilever Ltd* (2012) eKLR, that non-communication of the decision during the stipulated time and after six months violated the law and tainted an otherwise lawful decision with illegality and procedural impropriety, therefore inviting the court to intervene through judicial review.
29. In my view, undertaking the A/R objection proceedings exparte, making the decision exparte and not communicating it on time or at all, the 2<sup>nd</sup> respondent fell short of the constitutional parameters against the rules of natural justice, fair hearing, and *Fair Administration Action Act* as held in *Judicial Service Commission v Mbalu Mutava* (*supra*), *AG v Thomas D Ryan Privy* Council Appeal No. 29 of 1997 and in *Simon Ntoitha* (*supra*).
30. The upshot is that I find the proceedings and decision to be one calling for this court to recall and for quashing.
31. The court, therefore, declares that the A/R objection by the 1<sup>st</sup> respondent, which was heard and determined by the 2<sup>nd</sup> respondent in favor of the 1<sup>st</sup> respondent, violated the petitioner's Constitutional rights and freedoms. As held in *Chief Land Registrar & 4 others v. Nathan Tirop Koech & 4 others* (2018) eKLR, inordinate delay, acquiescence, and time limitation should not be used as a bar to alleged constitutional infringements of rights and freedoms.
32. Given its implication on the right to protection of property belonging to the petitioner and subsequent judgment in Meru ELC No. 245 of 2016, I proceed to quash the proceedings, decision and its implementation to the extent that the suit land remains, in the same status as it was before the A/R objection was filed, heard and determined. The prayer for *mandamus* is unmerited since it is not the jurisdiction of this court to undertake the statutory obligation of bodies set under the *Land*



Consolidation Act (Cap 283) and the Land Adjudication Act (Cap 284) as held in Tobias Ochola Osili & 13 others v Cyprianus Otieno Ogola & 6 others (2013) eKLR.

33. The costs of this petition are to be met by the respondents.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**In presence of**

C.A Kananu/Mukami

Mugo for CarlPeters Mbaabu for petitioners

Otieno C for 1<sup>st</sup> respondent

Miss Maina for 2<sup>nd</sup> & 3<sup>rd</sup> respondent

**HON. CK NZILI**

**ELC JUDGE**

