



**Thauruiya v Kailemia & 7 others (Petition E007 of 2022)
[2023] KEELC 22389 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION E007 OF 2022**

CK NZILI, J

DECEMBER 13, 2023

**IN THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA
IN THE MATTER OF THE ENVIRONMENT AND LAND ACT 2012**

BETWEEN

NAHASHON THAURUIYA PETITIONER

AND

STANLEY KARUGU KAILEMIA 1ST RESPONDENT

GIDEON KIBURI KAILEMIA 2ND RESPONDENT

ELIUD MUKIA KAILEMIA 3RD RESPONDENT

CHARLES LIMIRI KAILEMIA 4TH RESPONDENT

BERNARD THIAINE 5TH RESPONDENT

ABRAHAM MENGA ITHEWA 6TH RESPONDENT

**LAND ADJUDICATION & SETTLEMENT OFFICER KIGUCHWA
ADJUDICATION SECTION 7TH RESPONDENT**

THE HON. ATTORNEY GENERAL 8TH RESPONDENT

JUDGMENT

1. The petitioner has brought this petition as the registered owner of L.R No. Tigania East/ Kiguchwa/1186. It was averred that the suit land's acreage on the ground was 3.5 acres, as opposed to the contents of the title deed reflecting half an acre. The petitioner's complaint against the respondents is that they illegally and unconstitutionally colluded and took a substantial part of his land without his



consent or authority. As a result of the respondents' illegal acts, the petitioner averred that his rights to ownership of property were infringed, violated, or breached. He sought for:

- a. The declaration that the respondents have breached the right to his property by giving off part of it and granting it among the 1st – 5th respondents.
 - b. General damages.
 - c. The 1st – 6th respondents filed a reply to the petition dated 14.12.2022.
 - d. They averred L.R No. Tigania/East/Kiguchwa/1186 was ancestral land whose dispute with the petitioner was still alive and kicking since 1997.
2. Further, it was averred they had no *locus standi* in these proceedings since it was their mother, Mrs. Severina Nculubi, who has been a party in Maua SPMCC No. 85 of 1998, Meru HCCA No. 104 of 1999 and Nyeri Civil Appeal No. 221 of 2010.
 3. Therefore, the 1st – 6th respondents averred the petition was *res-judicata* as all the issues raised herein have been decided in Maua Courts, Meru High Court and the Court of Appeal, hence this court lacks jurisdiction to hear and determine the petition. In support of the answer, the 1st – 6th respondents attached a list of witnesses and witness statements and documents among them the judgments in the alluded previous suits.
 4. The 7th – 8th defendants did not attend court or file any response to the petition despite service with notices on 21.8.2023 and 15.9.2023.
 5. With leave of court parties were directed to canvass the petition by way of written submissions to be filed by 12.11.2023. The 1st -6th respondent relied on written submissions dated 6.11.2023 and isolated four issues for determination.
 6. On whether the petitioner has proved a breach of his right to property it was submitted they have not contravened any of the petitioner's rights as alleged or at all. Further, it was averred the petitioners has not particularized the alleged complaints and manner of the alleged infringements to proper ground his petition.
 7. The 1st – 6th respondent submitted the land dispute has been on since 1997, when their mother sued the petitioner and two others in Maua SPM CC No. 85 of 1997, claiming to be the rightful owner of the land then under adjudication and for the nullification of Parcels No's 162 and 1186, which prayers were granted. Aggrieved by the decision, it is submitted the petitioner and owners appealed in Meru HCCA No. 104 of 1999, which court upheld the lower court decision.
 8. Similarly, the 1st – 6th respondents submitted the petitioner and others filed an unsuccessful appeal at the court of appeal which upheld the decision of the two courts above. The 1st – 6th respondents also submitted the effect of the previous litigation was that the nullification of Parcels No's 162 and 1186. Therefore, it was submitted the alleged title deed held by the petitioner is not valid in law, it was issued in 2018 after the alluded decisions hence flies against the law for it was acquired illegally, irregularly and in total disregard of the court's decision.
 9. On locus standi the 1st - 6th respondent submitted they cannot be sued over the suit land which property belongs to their mother who is still alive and not a party to this suit. Further, it was submitted no evidence has been adduced to show they are the registered owners of the alleged hived land. Reliance was placed on Black's Law Dictionary 9th Edition, page 1026 and *Alfred Njau and others v City Council of Nairobi* (1982) KAR 229.



10. On jurisdiction the 1st – 6th respondents submitted the court has no jurisdiction to hear determine and grant the reliefs sought since the issue of ownership has been heard and determined by competent courts up to a superior court, as this court. Reliance was placed on *Republic v Karisa Chengo* (2017) eKLR.
11. It was further submitted the petitioner having exercised his rights of appeal, he cannot file another suit before this court couched as a constitutional petition to enforce his right to property under Article 40 of *the Constitution* contrary to the principle of finality in litigation and end to litigation which is contrary to the hierarchy of courts.
12. The 1st – 6th respondents urged the court to find the petitioner has not proved any breach of Article 40 of *the Constitution* and to dismiss the petition with costs.
13. Having carefully looked at the pleadings and the rival submissions, the issues for determination are:
 - i. If the petition meets the constitutional threshold and discloses a constitutional question.
 - ii. If the petition is *res-judicata*.
 - iii. If the petition has pleaded and proved a breach of his constitutional rights to property.
 - iv. If the petitioners is entitled to the reliefs sought.
 - v. What is the order as to costs?
14. A constitutional petition has to meet the procedural and substantive laws governing constitutional petitions namely articles 22, 23, 165 2 (b), 258 & 260 of *the Constitution*, the *Constitution of Kenya (Fundamental Rights and Freedoms) Practice and Procedure Rules*, 2013 Mutunga Rules, Section 13 of the *Environment and Land Court Act* and the *Environment and Land Court Practice and Procedure Rules* 2014. The Mutunga Rules, Rule 10 provides a petition must define the name and the address of the petitioner, capacity in which he brings the petition, particulars and manner of breach, specific provision of the rights or freedoms injury or damage caused any pending or previous proceedings over the matter and the reliefs sought.
15. The petition may be accompanied by affidavits and documents in support. While propounding the above procedural and substantive law, courts have come up with principles and practice rules on constitutional petitions.
16. In *Anarita Karimi Njeruu v Republic* (1979) KLR 154 and *Mumo Matemu v Trusted Society of Human Rights* (2014) eKLR the court held a petition must be pleaded with a degree of precision and specificity as to the manner, particulars and ways in which the particular breach, threat or infringement of constitutional rights or freedoms has occurred, times ways and means of the breach, threats infringement loss and damage. In *Mumo Matemu (supra)*, the court said pleadings assist to give a fair notice to the other party.
17. On evidence, further in *Christian Juma Wabwire v Attorney General* (2019) eKLR and *Peter Ngari Kagume and others v A.G.* Constitutional Petition No. 128 of 2006, it was held a petitioner has to avail tangible evidence of the violation of the rights and freedoms other than mere allegations since a court should not deal with speculations or imaginations.
18. I think the petitioner has substantially pleaded the particulars of the parties, the nature of his complaint, the particular right infringed, particularly of loss or damage and the reliefs sought. The petition is also supported by witness statements and a list of documents dated 27.7.2022.



19. The respondents were able to answer to the petition and none sought for better and further particulars. As to whether the petition raises a constitutional question or issue the courts have held a constitutional question as one whose answers arise from *the Constitution* and not a statute. See [Jeniffer Shamalla v Law Society of Kenya & 5 others](#) (2017) eKLR, [Peter Okutoyi v Habil Olaka & another](#) (2018) eKLR, [Renita Choda v Kirit Kapur Rajput](#) NRB Petition No. E014 of 2020.
20. Constitutional issue or question includes those dispute as to whether any law or conduct is inconsistent with the constitutional issues concerning the status, powers and functions of organs of state, interpretation, applicant and upholding of *the constitution*.
21. In [Minister of Safety and Security v Hurters](#) (2007) 28 ILJ 133 (CC) the court said when determining an argument raises constitutional issues the court is not strictly speaking concerned with whether the argument will be successful but whether it forces the court to consider constitutional rights and values.
22. In [Turkana County Government & 20 others v Attorney General & others](#) (2016) eKLR the court said statutory violations could not give rise to constitutional violations.
23. In this petition, the petitioner has raised a single question as to whether the reduction of the acreage in his title deed on paper than is on the ground by the respondents amounted to a breach of his right to property as provided by Article 40 of *the Constitution*. In my view, the answer to the question requires this court to find if there was any justification by the 7th – 9th respondents to reduce the acreage.
24. Coming to the issue of *res-judicata* the doctrine is anchored in Section 7 of the [Civil Procedure Act](#).
25. The 1st – 6th respondents have pleaded that the subject matter was determined from 1997, by competent courts up to the Court of Appeal to finality and the petition herein is a disguised appeal before this court.
26. One of the requirements in a constitutional petition is to disclose previous proceedings over the subject matter.
27. The petition is silent on this issue. Even after the 1st – 6th respondents pleaded the doctrine of *res judicata* and provided the judgments, no response to admit or deny was received from the petitioner.
28. In [John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure and others](#) (2021) eKLR, the court affirmed the case of [Kenya Commercial Bank Ltd v Muiri Coffee Estate Ltd & another](#) (2016) eKLR, that the principle of *res-judicata* as a matter of public policy prevents multiplicity of suits which clog courts, occasion unnecessary costs to parties and seeks to ensure litigation comes to an end and the verdict translates into fruit for one party and a liability for another party. The court said the doctrine applies with equal measures to constitutional litigation. The court set out the parameters to apply as:
 - i. There is a former judgment or order which was final.
 - ii. The judgment or order was on merit.
 - iii. It was rendered by a court competent over the subject matter and the parties.
 - iv. The parties in the two suits are identical and so is the subject matter and the cause of action.
29. As to exceptions, the court said there must be potential for substantial injustice if a court does not hear the constitutional matter or issue on merits and or whether special circumstances were warranting the court to make an exception.



30. In *Communication Commission of Kenya v Royal Media Services* (2014) eKLR, this court said Res judicata prevents causes of action or issues from being relitigated once they have been determined on merits.
31. Further, the court said the plea succeeds when it is established that the issue before a court is essentially the same as another one already satisfactorily decided before a competent court.
32. The court also said a party is estopped from using an institutional detour to attack the validity of an order by seeking a different forum rather than through the designated appellate or judicial review route.
33. In *Okiya Omtatah Okoiti and another v Attorney General and others* (2014) eKLR, the court said res judicata in constitutional matters should be invoked in the clearest of cases where a party is re-litigating the same matter before the constitutional court to determine an issue over the same parties and the same subject matter.
34. Applying the matrix set by the caselaw herein, the judgment at the Court of Appeal in C.A No. 221 of 2020 was between the petitioners and Severina Nculubi, regarding Parcel No. 960 Kiguchwa Adjudication Section and for nullification of its resultant subdivisions P. No. 162 and 1186.
35. At the lower court it had been alleged the two parcels were fraudulently acquired through conspiracy with land adjudication officers. The trial court by judgment dated 28.7.1999 agreed with Severina Nchulubi on appeal Mary Kasango J affirmed the judgment by a judgment dated 2.7.2010. Aggrieved by the judgment the petitioner appealed to the Court of Appeal. By a judgment dated 26.10.2013 the court of appeal confirmed the lower court verdict there is no indication if the petitioner appealed to the Supreme Court. His argument before this court is his title deed is 0.22 ha as per title deed issued on 13.12.2018. The same was issued and collected on 13.12.2018. This was almost five years after he had lost his appeal at the Court of Appeal.
36. The issue of ownership had been determined by a competent court on finality. The subject matter is the same. Parties are almost the same or litigation is on the same umbrella. Upon losing the appeal the petitioner does not say or plead on what basis he is entitled to move land in his title deed. If that argument were to be followed it would mean the petitioner is questioning the title deed which ideally aligns with the outcome of the appeal in 2013. There must be a finality to litigation. It prevents a party from being vexed or handled and hounded with the same issues that have already been litigated to finality.
37. In *IEBC v Maina Kiai* (2017) eKLR, the court said the doctrine of res judicata and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora to obtain at last, outcomes favorable to them and in the process to render judicial process a nuisance and bring disrepute or calumny.
38. In *William Koross v Hezekiah Kiptoo Komen & others* (2015) eKLR, the court said *res-judicata* is meant to provide rest and closure for endless litigation so that a successful litigant can reap the fruits of his success and the unsuccessful one to learn to let go.
39. I think the petitioner is trying to have a second bite at the cherry. The 1st – 6th respondents have not been known to be beneficiaries or registered owners of the suit land. By adding new faces and wearing a different hat, the petitioner cannot escape the doctrine of *res-judicata*. I find the issues subject matter and parties as the same where the petitioner is trying to reopen the dispute alleging a new cause of action. Accordingly, I find the petition res judicata.
40. On pleading and proving a breach of his constitutional rights to land, it is not enough to allege breach without tangible and cogent evidence of breach as held in *Gitobu Imanyara v Republic* (2016) eKLR.



41. In *Otolo Margaret Kanaini & others v Attorney General and others* (2022) eKLR the court cited *Alfred Njau and others v City Council of Nairobi* (1983) eKLR, that *locus standi* means right to appear in court. The nexus between the 1st – 8th respondent and the suit property has not been established. What they did to reduce the acreage was not pleaded or proved. The 1st – 6th respondents must be told and evidence availed or their role in land adjudication, registration and issuance of title deed.
42. No evidence was brought to show that the petitioner complained his acreage with the 1st – 8th respondents. The title deeds are issued by the land registrar, who has not been sued in this petition.
43. The burden of proof was on the petitioner to prove his allegations to the required standard. Violation of rights to property. See *Koigi Wamwere v Attorney General* (2012) eKLR.
44. In *Trust Bank Ltd v Paramount Universal Bank Ltd & 20 others* Milimani HCC No. 1243 of 2001, the court said where a party fails to call evidence in support of its case the pleadings therein remain mere statements of facts since he fails to substantiate them. See also *Christopher Maina Kimaru v Josephine Wairimu Ngari & another* (2016) eKLR and *Daniel Toroitich Moi v Mwangi Stephen Murithi & another* (2014) eKLR.
45. My finding is the petitioner has failed to substantiate his averments against the respondents and if then the evidence falls short of the required standards the petition is and must be dismissed. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13TH DAY OF DECEMBER 2023

In presence of

C.A Kananu/Mukami

Nahashon Tharuiya in person

Mbumbuya for 1st – 6th respondents

Miss Maina for the 7th – 8th respondents

HON. CK NZILI

JUDGE

