



Njerenga (Suing on his Behalf and on Behalf of the Estate of the Late Senior Chief Fausto Njeru Njerenga) v County Government of Embu & 4 others (Constitutional Petition 2 of 2021) [2023] KEELC 22580 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22580 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
CONSTITUTIONAL PETITION 2 OF 2021
A KANIARU, J
DECEMBER 6, 2023**

BETWEEN

FRANCIS IRERI NJERENGA PETITIONER

**SUING ON HIS BEHALF AND ON BEHALF OF THE ESTATE OF THE LATE
SENIOR CHIEF FAUSTO NJERU NJERENGA**

AND

COUNTY GOVERNMENT OF EMBU 1ST RESPONDENT

CATHOLIC DIOCESE OF EMBU 2ND RESPONDENT

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 3RD
RESPONDENT**

NATIONAL LAND COMMISSION 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. This is a composite ruling on two preliminary objections viz: one raised by the 4th respondent vide a notice filed in court on 7/4/2022 and dated 31/3/2023 and another raised by 1st respondent via a notice dated 22/9/2022 and filed on 28/9/2022. Before I go further however, I need to explain that this court only directed filing of submissions for the preliminary objection filed in court on 7/4/2022 and dated 31/3/2023. But some of the counsel on record chose to submit on both and I reckon that it saves judicial time to deliver a ruling on both.
2. The preliminary objection filed on 7/4/2022 and dated 31/3/2022 is two-pronged and is formulated thus:



- a. The Honourable court lacks jurisdiction to hear the following matter by dint of: Article 67 (2) (e) of *the Constitution* of Kenya, 2010, The *National Land Commission Act*, 2012, Section 15, and the *National Land Commission (investigation of Historical Land Injustices) Regulations* 2017 and;
 - b. The suit offends the *National Land Commission Act*, 2012
3. The other objection raised by the 1st Respondent, which was filed on 28/9/2022 and dated 22/9/2023 is as follows:

Take Notice that the Embu County Government the 1st Respondent herein, shall at the earliest opportunity, notice of which is hereby given, raise a preliminary objection on a point of law on the following grounds that the petitioner suit is time barred under the provisions of Section 7 of the *Limitation of Actions act* since the petitioner seeks to claim an interest in Title number Kyeni/Mufu/1521 (the “suit property”) which according to paragraph 9 and 10 of the facts relied upon of (sic) the petition, the petitioner has admitted that the suit property was already allocated to the 1st Respondent which allocation took place during the emergency days and hence it has been more than the prescribed 12 years after the right of action accrued. Further, as plainly evidenced in the petitioners supporting documents, the copy of the register for the suit property (Green card) indicate that the suit property was registered in the name of the 1st Respondents predecessor, the County Council of Embu, on 17th May 1961 which further demonstrates that it has been more than 12 years since the registration of the suit property was done and hence the petitioner’s time to sue lapsed long ago.

4. It is first necessary to give context to the objections. The Petitioner – Francis Ireri Njerenga – filed the petition now before court on 3/9/2021 citing Articles 2 (1), 3(1) 10, 19, 20, 21, 22, 23, 27, 40, 47, 48 and 67 of *the Constitution* of Kenya, 2010, Section 6 of the *National Land Commission Act*, and Section 9 of the *Land Adjudication Act*. These constitutional and statutory provisions provided the anchor validating the petitioners claim.
5. Briefly stated, the petitioner is saying that the land of his late father, the same being Kyeni/Mufu/1521, was illegally taken long ago – in early 1960s to be specific – and he would wish that ownership reverts back to the family of his deceased father or, in the alternative, that the family be compensated. For this reason, he has asked for various declaratory orders and some other remedies.
6. The respondents on the other hand believe that the court has no jurisdiction to grant the prayers sought or even entertain the petition. That is why the two objections under consideration were in fact filed. The objections were canvassed by way of written submissions.
7. The 1st Respondent’s submissions were filed on 22/11/2022. The objection raised by this party was based on Section 7 of *Limitation of Actions Act*, which provides as follows:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.
8. The 1st Respondents argument in the submissions is simple. It is this: By the petitioners own account, the disputed land was registered in the name of 1st Respondent in 1961. The suit land then became reserved for construction of Kyeni Girls Interschool. This petition was filed in the year 2021 which is way outside the 12 years prescribed by law. To drive the point home, the 1st Respondent cited and



- quoted the case of *Dickson Ngige Ngugi Vs Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited) & Another* [2020] eKLR.
9. The 4th Respondent submissions were filed on 6/12/2022. The issue of lack of jurisdiction raised by the 4th respondent is premised on the alleged fact that the petition as filed runs afoul of Article 67 (2) (e) of *the Constitution* of Kenya, 2010, section 15 of the *National Land Commission Act* and the rule and regulations contained in the *National Land Commission (investigation of Historical Land Injustices) Regulations*, 2017. To make the point, the 4th respondent cited and even quoted the cases of *Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Limited*: Civil Appeal No. 50 of 1989 [1989] KLR I, *Antony Miano & others Vs Attorney General & others* [2021] eKLR and *Geoffrey Muthinja Kabiru & 2 others Vs Samuel Munga Henry & 1756 others* [2015] eKLR, among others. It was submitted that the petitioners first port of call should have been the National Land Commission as that commission is the one mandated by law to address the problem he is complaining of. The court was said to be bereft of jurisdiction to handle the problem.
 10. The 3rd and 5th respondents submissions were filed on 22/2/2023. The cumulative thrust and purport discernible in the submissions is in substantial agreement with the submissions of the 4th respondent. Constitutional and statutory provisions – notably Article 67 (2) of *the Constitution*, Section 15 of *National Land Commission Act*, and Regulations 7 (2) and (3) and 29 of the National Land Commission (investigations of Historical Land Injustices) Regulations, 2017 – were referred to and quoted with a further back-up of decided cases such as *Kenya National chamber of Commerce & Industry – KNNC (Murang'a chapter) & 2 others Vs Delmonte Kenya Limited & 3 others: County Government of Kiambu (Interested party) [2020] eKLR*, *Communication Commission of Kenya & 5 others Vs Royal Media Services Limited & 5 others*[2014] eKLR.
 11. The petitioner's riposte came via submissions filed on 11/4/2023. In the submissions, there was express agreement by the petitioner that Article 67 (2) (e) of *the Constitution* of Kenya, 2010, section 15 of the *National Land Commission Act*, 2012 and the *National Land Commission (investigation of Historical Land Injustices) Regulations*, 2017, apply to his problem. But his position is that he tried to raise the issue with the National Land Commission, which apparently did not treat the matter with the seriousness it deserves. This is what impelled him to come to court. The petitioners position is that the petition can be stayed in order to give time to the National Land Commission to play its part regarding the whole issue.
 12. I have considered the two preliminary objections as filed and the rival submissions filed by learned counsel on record. I am in general agreement with the submissions of the respondents. The petition as filed is clearly caught up by provisions of Section 7 of *Limitation of Actions Act*. I perceive this to be a claim envisaged by Section 15 (3) of the *National Land Commission Act*, which refers to claims which are not capable of being addressed through the ordinary court system because they would be debarred under Section 7 of the *Limitation of Actions Act*. It is clear to me that the petitioner is complaining of a land related injustice that took place several decades ago. The court is the wrong forum for such a problem given that jurisdictional concerns based on Section 7 of the *Limitation of Actions Act* are bound to arise. And that is precisely what has happened in this matter.
 13. It is also clear that the resolution envisaged by *the constitution* is forum –specific. And the forum is the National Land Commission, not the ordinary courts of law. The 3rd, 4th and 5th respondents are therefore right to submit that the court is devoid of jurisdiction to handle the matter.
 14. The petitioner has suggested that the court stays the matter pending the handling of the same by the 4th respondent. To me, staying the matter would seem to imply that the court has jurisdiction to handle it but for the fact that another forum, in this instance the 4th respondent, can also handle it. The fact



of the matter is that this court does not have jurisdiction to handle the matter. A clear reading and understanding of Article 67 (3) of *the Constitution*, Section 15 of the *National Land Commission Act*, Regulation 7 (2) and (3) of the National Land Commission (investigations of Historical Land Injustices) Regulations, 2017 and Section 7 of the *Limitation of Actions Act* would show that the court is completely incapacitated in terms of jurisdiction. Usually, when a matter is brought before a forum without jurisdiction such a matter is dismissed, not stayed. (Please see the case of *Abraham Mwangi Wamigwi Vs Simon Mbiriri Wanjiku & another*: [2012] eKLR.

15. As an aside, I think the petitioner also needed to appreciate that he came to court alleging violation of constitutional provisions that were not in existence when his problem arose. Most of the provisions of *the Constitution* of Kenya, 2010, including some cited by him, are forward or future looking. Even assuming that jurisdiction was not an issue, the petition filed would still run into legal headwinds because the petitioner would be hard pressed to demonstrate how provisions of law that came into existence in the year 2010 were violated in 1961. Unless otherwise shown, the legal position is that *the Constitution* does not apply retrospectively. The cases of *Jane Wanjiku Maina & 185 Others V Attorney General & Another*: HCC Petition No. 20 of 2011 [2011] eKLR, *Samuel Kamau Macharia Vs Kenya Commercial Bank*; SC Application No. 2 of 2011 [2012] eKLR and *B.A. & Another Vs Standard Group Limited & Another*: HCC Petition No. 48 of 2011 [2012] eKLR illustrate this position well. There is therefore something fundamentally wrong with the approach taken by the petitioner of filing the matter in court.
16. I therefore uphold the preliminary objections as raised and dismiss the petition herein with costs to the respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6TH DAY OF DECEMBER, 2023.

In the presence of:

Mugambi Justice for Kiongo for 3rd & 5th respondents,

Wamweya for 1st respondent and

Rose Njeru (absent) for petitioner.

Court assistant: Leadys

Interpretation: English/Kiswahili

A.K. KANIARU

JUDGE

06.12.2023

