



**Mwangi v Kawendo Investments Limited & 4 others (Environment & Land
Petition E002 of 2023) [2023] KEELC 21993 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 21993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND PETITION E002 OF 2023**

CG MBOGO, J

DECEMBER 5, 2023

**IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA
2010 AND IN THE MATTER OF CONTRAVENTION OF ARTICLES 40 & 47
OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF
THE FAIR ADMINISTRATIVE ACTION ACT NUMBER 4 OF 2015 AND
IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012, LAWS OF
KENYA AND IN THE MATTER OF ARTICLE 63 OF THE CONSTITUTION OF
KENYA 2010**

BETWEEN

STEPHEN KAMAU MWANGI PETITIONER

AND

KAWENDO INVESTMENTS LIMITED 1ST RESPONDENT

**LEPARAKUO SIAMETO (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF SIEMETO OLE SEMPERE) 2ND RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

DISTRICT LAND REGISTRAR NAROK 4TH RESPONDENT

DISTRICT SURVEYOR NAROK 5TH RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion Application dated 27th January, 2023 filed by the petitioner/applicant and expressed to be brought under Article 40 of *the Constitution* of Kenya, 2010 and Rules 13 & 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013) seeking the following orders: -



1. Spent.
 2. spent.
 3. That pending hearing and determination of this petition, this honourable court be pleased to issue an order of temporary injunction restraining the 2nd respondent, her agents, servants and/or employees or whomsoever acts on his instructions from selling, auctioning, wasting, charging, mortgaging or in any way disposing all parcel of land known as title number CisMara/Olopito/2099.
 4. That pending hearing and determination of this petition, this honourable court be pleased to issue an order of temporary injunction restraining the 4th respondent from registering any further dealing in respect of title number CisMara/Olopito/2099 or in the alternative a temporary order do issue compelling the 4th respondent to register a caveat against all parcel of land known as title number CisMara/Olopito/2099.
 5. That this honourable court be pleased to issue such further order(s) as may deem just.
 6. That the costs of this application be awarded to the petitioner.
2. The application was supported by the affidavit of the petitioner/applicant sworn on 24th January, 2023. In his affidavit, the petitioner/applicant deposed that sometime in the year 2002, he entered into an agreement for sale with the 1st respondent where it was agreed that the purchase price of the suit land would be Kshs.25,000/- in which he proceeded to make periodic payments which he cleared on 19th April, 2002.
 3. That upon payment of the final instalment of Kshs. 10, 000/-, he was issued with a receipt and, thereafter, he was issued with a plot number after mutations were registered by the 5th respondent. The petitioner/applicant deposed that after a long wait, he discovered upon conducting an official search that a certificate of title of the suit land had been issued fraudulently to Siemeto Ole Siempere whose estate is being administered by the 2nd respondent on 17th November, 2006.
 4. The petitioner /applicant further deposed that the 1st and 2nd respondents colluded to commit fraud in connivance with the 5th respondent and that despite the 4th respondent issuing a certificate of title to the suit land and registering it as CisMara/Olopito/2099, a keen reading of the map of Olopito Adjudication Section shows that the suit land was allocated plot no. Olopito 2087. That this confirms the extent of concealment of the fraud perpetuated to arbitrary deprive him out of entitlement of the suit land and there is likelihood of a bloody confrontation ensuing if the current state of affairs is not properly adjudicated upon.
 5. On 24th May, 2023, the 1st and 2nd respondents filed their grounds of opposition dated 10th May, 2023 in opposition to the petition on the following grounds: -
 1. That the petitioner's petition before this honourable court is a mere academic exercise and a waste of judicial time and resources as it does not meet the threshold of a constitutional petition as was established in *Anarita Karimi versus Republic (No.1) 1979* KLR 154 and in the matter of *Mumo Matemu versus Trusted Society of Human Rights Alliance [2014]* eKLR.
 2. That there are substantive laws that have been enacted under *the Constitution*, where the petitioner's claim should have been file and arbitrated upon effectively.
 3. That the petitioner's claim is time barred under the relevant laws and the petitioner's recourse should not be under a constitutional petition.



4. That the petitioner has not demonstrated that his rights under *the Constitution* (if any) have been violated.
5. That the 1st respondent prays that the petition be dismissed with costs.
6. On 21st August, 2023, the 3rd, 4th and 5th respondents filed their grounds of opposition dated 15th August, 2023 seeking that the petition be dismissed on the following grounds: -
 1. That the instant petition does not raise any constitutional issue since the issues raised are civil in nature.
 2. That the petitioner ought to have filed a claim in which witnesses would be called.
 3. That the petitioner is guilty of inordinate delay in bringing the petition to challenge alleged actions which took place in 2006.
 4. That the instant petition is a judicial review coached in a constitutional petition.
7. The application was canvassed by way of written submissions. On 28th September, 2023, the petitioner/applicant filed his written submissions dated 25th September, 2023 where he raised two issues for determination as listed below: -
 1. Whether the applicant has satisfied the legal threshold to be granted the temporary orders of injunction.
 2. Whether the respondents' grounds of opposition are merited.
8. On the first issue, the petitioner/applicant submitted that he has demonstrated that he lawfully purchased the suit property by attaching the receipts being proof of payment and that the 1st and 2nd respondents perpetuated fraudulent activities where the 2nd respondent acquired a certificate of title in respect of the suit land. Further, he submitted that he commenced developments immediately he took possession and thus he stands to suffer enormous financial loss that cannot be compensated by way of damages.
9. The petitioner/applicant further deposed that this court ought to take strict considerations as to the actual harm being occasioned upon him by the 2nd and 4th respondents vis a vis the harm occasioned on him owing to denial of his proprietary rights. The petitioner/applicant relied on the cases of *Virginia Edith Wambui versus Joash Ochieng Ougo, Civil Appeal No. 3 of 1987 [1987]* eKLR, *Joseph SiroMosiomo versus Housing Finance Company of Kenya [2008]* eKLR, *Kennedy Otieno Odiyo & 12 Others versus Kenya Electricity Generating Company Limited [2010]* eKLR and *Mrao versus First American Bank of Kenya Limited & 2 Others [2003]* eKLR.
10. On the second issue, the petitioner/applicant submitted that a constructive trust was created between him and the 1st respondent and as such, the 1st respondent should be estopped from perpetuating any fraudulent claims that may give rise to the suit property being owned by the 2nd respondent. Further, he submitted that he had a legitimate expectation that the 5th respondent being a government official, he reasonably expected that any changes affecting his ownership of the suit land ought to have explained the same. The petitioner/applicant relied on the cases of *Charles Kanyagia versus Alfred Musavi & Another [2020]* eKLR and *Jammohammed (Suing as the executrix of the estate of Daniel Toroitich arap Moi) & 2 Others versus Chelugui & Another (Suing as the administrators of the estate of the Late Noah Kipngeny Chelugui) & 6 Others (Civil Appeal 159 & 254 of 2019 (Consolidated) [2022] KECA 720 (KLR) (22 July 2022)* (Judgment).



11. The petitioner/applicant further submitted that the arguments advanced by the respondents that the petitioner/applicant herein should have filed a land claim instead of a petition are not sustainable since they can't prevent the petitioner/applicant from seeking for enforcement of his right. He relied on the case of *Chief Land Registrar & 4 Others versus Nathan Tirop Koech & 4 Others [2018]* eKLR. While relying on the case of *Faustina Njeru Njoka versus Kimunye Tea Factory Limited [2022]* eKLR, the petitioner/applicant submitted that the grounds of opposition as filed do not substantively respond to the application and it should be allowed as prayed.
12. On the 11th October, 2023 the 1st and 2nd respondents filed their written submissions dated 6th October, 2023. The 1st and 2nd respondents submitted that at the time of the sale of the plots, there were no specific plot numbers because subdivision had not been done. Further, that the petitioner/applicant was allocated plot no. CisMara/Olopito/2100 and he was issued with a title deed. Further, that the 1st respondent parcel nos. CisMara/ Olopito/2087 and 2089 were issued to the 2nd respondent and he obtained the title deeds in the year 2003. Further, they submitted that all these parcels are distinct on the ground and on the map.
13. The 1st and 2nd respondents submitted that the petitioner/applicant has come to court with unclean hands as he has brought this claim 17 years later after the title deed was issued to the rightful owner and has been indolent all along. While relying on the case of *Reuben Mwongera M'itelekwa M'Mucheke Naituri alias M'itelekwa Mucheke versus Paul Kigea Nabea & 2 Others [2019]* eKLR, the 1st and 2nd respondents submitted that this being a land contract, there is an elaborate procedure through which the petitioner/applicant should have sought redress and hence the recourse does not lay in filing a constitutional petition.
14. I have considered the application, grounds of opposition and the written submissions filed by the petitioner/applicant and the 1st and 2nd respondents. In my view, the issues for determination at this stage are as follows: -
 1. Whether the petition raises constitutional issues that ought to be determined by this court.
 2. Whether the petitioner is entitled to the orders of injunction.
 3. Who is to bear costs.
15. The petitioner/applicant herein is seeking injunction orders against the respondents with respect to property known as CisMara/Olopito/ 2099 which he claims was registered in the name of the 2nd respondent. The petitioner/applicant claims to have owned this parcel of land after purchasing it from the 1st respondent which owned the whole parcel of land known as CisMara/ Olopito/ 1601 before its subdivision.
16. The law that governs applications for injunction is premised under Order 40 Rule 1 of the *Civil Procedure Rules* which provides as follows: -
 - “ 1. Where in any suit it is proved by affidavit or otherwise-
 - a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the



execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

17. A perusal of the application shows that the claim is one of ownership and interest in land through purchase. The said parcel of land was a subdivision of a mother title owned by the 1st respondent. The petitioner/applicant contended fraudulent actions by the 1st and 2nd respondent in the issuance of the certificate of title to the 2nd respondent. The question then is does the said application meet the threshold of a constitutional petition?
18. In *Edward Karanja Chogo & 2 Others versus County Government of Kakamega [2018]* eKLR the court observed that;

“A constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the petitioner ought to revert to a civil claim...”
19. I am alive to the fact that it is within the litigant’s rights to choose which method would be more efficacious to determine his case but with that in mind, I am of the view that such options ought to be arrived at with clear precision. In this case, how is the petitioner’s/applicant’s claim a constitutional matter? In *Gabriel Mutava & 2 Others versus Managing Director, Kenya Ports Authority [2016]* eKLR the Court of Appeal stated as follows: -

“Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”
20. A reading of the application and the petition shows that the petitioner/applicant is challenging the manner in which the 2nd respondent acquired ownership of the land which questions can best be determined in an ordinary claim which would also afford parties the chance to present their evidence and give their testimonies.
21. My analysis and conclusion is that the matter before this court is one of an ordinary claim that can be heard through filing of a plaint and it does not raise any constitutional issue.
22. For this reason, the Notice of Motion Application and petition both dated 27th January, 2023 are hereby struck out with costs to the respondents’. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 5TH DAY OF DECEMBER, 2023.

HON. MBOGO C.G.

JUDGE

