



Kilibai (Suing as Legal Representative of Kilibai Dio Kilibai) v Wanyonyi & 5 others; Diwani & 2 others (Interested Parties) (Environment & Land Case E002 of 2023) [2025] KEELC 3442 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3442 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E002 OF 2023
FM NJOROGE, J
APRIL 29, 2025**

BETWEEN

MOHAMED DIO KILIBAI PLAINTIFF

SUING AS LEGAL REPRESENTATIVE OF KILIBAI DIO KILIBAI

AND

GRACE NANDAKHO WANYONYI & 5 OTHERS & 5 OTHERS .. DEFENDANT

AND

FREDERICK KAZUNGU DIWANI & 2 OTHERS & 2 OTHERS & 2 OTHERS INTERESTED PARTY

JUDGMENT

1. The petitioner in the present suit is Mohamed Dio Kilibai. He brings this Petition on behalf of the estate of Kiribaye Dio Kiribai having obtained a grant of letters of administration in Malindi Miscellaneous Cause Number 85 Of 2022 in the matter of Kilibai Dio Kilibai. He seeks the following orders:
 - a. A declaration that the transfer of LR number LR number Chembe/Kibabamshe/320 from the petitioner to the 1st respondent was illegal and invalid in law;
 - b. A declaration that all ensuing transfers of the suit property from the 1st respondent to the latest transfer to the 2nd respondent were void and illegal;
 - c. An order directing for the cancellation of the title deed currently held by the second respondent for LR number Chembe/Kibabamshe/320;



- d. An order directing the 4th respondent to rectify the registration of the suit property and register the title for the suit property in favor of the petitioner;
 - e. General damages for fraud committed by the 1st respondent and its ensuing effects;
 - f. Cost of this petition;
 - g. Any other orders that the court may deem fit.
2. The petition is premised on the following grounds: the deceased was issued with a title deed for the suit land on 2nd September 1980 after a land adjudication process was carried out on 30th May 1977. Sometimes thereafter and through a law firm by the name Ochieng and Opiyo Advocates which was acting for her, the 1st respondent purported to purchase the suit property from the deceased. Transfer was effected to the 1st respondent's name. She subsequently demanded the original title from the deceased who declined to release it or any copy thereof.
 3. The petitioner alleges that the firm of Ochieng and Opiyo Advocates has never been registered by the Law Society of Kenya. It is also alleged that the transfer to the 1st respondent has never been reflected in the land register the Kilifi Land Registry. It is further alleged that there was no sale agreement between the deceased and the 1st respondent or any proof of payment for the suit land by the 1st respondent.
 4. The petitioner also avers that the suit land being agricultural land, a Land Control Board consent was required for the purported transaction, but in order to circumvent that requirement the 1st respondent obtained the letter dated 31st October 1985 from the Municipal Council Malindi addressed to the Land Registrar Kilifi, in which the Council stated that the suit property is within the gazetted boundaries of the Municipal Council of Malindi and the same is not bound by the Land Control Act. Despite that letter by the Council, the subsequent transfers to the 1st, 2nd and 3rd interested parties were effected after Land Control Board consents were successfully applied for and secured from the Board.
 5. It is alleged that the 1st respondent, after registering herself as the proprietor of the suit land, registered a legal charge over the property in favour of Standard Bank of Kenya Limited PLC on 1st November 1985; ironically, the petitioner claims that there is no record of registration of the said legal charge in the Land Register, or any record of the discharge of charge prior to the transfer of the suit property in the many subsequent transfers that followed with the 2nd and 3rd Interested Parties.
 6. The matter was reported to the National Land Commission. The first determination was rendered by the Kenya Gazette Notice of 17th July 2017 in which the Commission did not clear the property and ordered that the parties to the dispute should appear before it with documents.
 7. After two more sittings of the National Land Commission during which there was no appearance by the 2nd respondent or any other person, another sitting was held on 17th January 2022 at which also there was no appearance by the second respondent or any other claimant to the land. The petitioner avers that there was no determination of the dispute by the National Land Commission and therefore he sought the services of the Directorate of Criminal Investigation. He also initiated these proceedings. The petition is supported by the sworn affidavit of the petitioner also bearing the same date as a petition.
 8. Leave was sought to serve the 1st to 3rd interested parties and the 1st and 2nd respondents by way of a press advertisement and such leave was granted on 30th May 2024.
 9. The 5th respondent entered appearance on 17th of October 2023 but filed no response to the petition. None of the Respondents or the Interested Parties filed any response to the petition and the court



ordered that the petition be disposed of by way of written submissions, which the petitioner alone filed and which this court has considered in preparing this judgment.

Analysis And Determination.

10. The fact that the petitioner seeks an order that the title to the suit property be registered in his favour is sufficient to elicit the conclusion of this court that what has arisen between the petitioner and the respondents and the interested parties is an ownership dispute. The petitioner claims that the purported transfer to the 1st respondent was fraudulent hence it taints the transfers to the 2nd defendants and to the Interested Parties with illegality.
11. This court is of the view that the issues arising for determination in the present petition are as follows:
 - a. Whether the jurisdiction of this court has been properly invoked;
 - b. Whether the transfer of LR number Chembe/Kibabamshe/320 from the petitioner to the 1st respondent ought to be declared illegal and invalid in law by reason of fraud;
 - c. Whether an order ought to issue directing for the cancellation of the title deed currently held by the 2nd respondent for LR number Chembe/Kibabamshe/320;
 - d. Whether an order ought to issue from this court directing the 4th respondent to rectify the registration of the suit property and register the title for the suit property in favor of the petitioner;
 - e. Whether the petitioner deserves to be awarded general damages for fraud committed by the 1st respondent;
 - f. Who ought to bear the costs of the present petition.

The issues are discussed as herein below.

a. Whether the jurisdiction of this court has been properly invoked

12. On numerous occasions this court has been faced by a situation such as in the present petition. Persons claiming title to land have instead of filing an ordinary suit for the determination of ownership of land have repeatedly laid the dispute before the court by way of a constitutional petition. Courts of law have often also reiterated that their jurisdiction to determine land ownership disputes ought to be invoked by way of ordinary suits and not constitutional petitions. In *James Mwamuye Munga vs Tinga Kalu Tinga & 3 Others –Malindi ELC Petition No. E003 OF 2021* the court stated as follows:

“As seen from the earlier paragraphs of this judgment the cause of action in the present claim lies in fraud: the petitioner claims that he and his family are the rightful owners of the suit land and that the land was fraudulently registered in the names of the 1st and 2nd respondents. The mere word “fraud” evinces an intention to deceive. The traditional manner of pleading concerning fraud is through a plaint in which specific particulars of fraud are set out and viva voce evidence is later called which lays all the evidence of all the sides to the case to test by way of cross-examination and examination of the documents produced. It is usually in that kind of scenario where the court would be truly able to establish from the total sum of oral and documentary evidence given as to whether there was intention to deceive on the part of the party suspected of fraud.”



13. In *Petro Oil Kenya Limited v Kenya Urban Roads Authority* [2018] eKLR the court stated as follows:

“A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case. Whether or not the suit property was hived from a road truncation is not an issue which I can determine on the affidavit evidence before me. If it is true that the suit property was hived from a road truncation, the title held by the Petitioner would not be valid since the property was not available for allocation to Wangs from whom the Petitioner purchased the suit property. Article 40 (6) of *the Constitution* provides that the protection accorded to property does not extend to the property which has been acquired unlawfully. Whether or not the Petitioner acquired the suit property lawfully is an issue that can only be determined in a civil suit and not in a Constitutional Petition. The courts have said over and again that the mere fact that constitutional rights are alleged to have been violated or are threatened does not make the dispute a constitutional one calling for the filing of a petition under Article 22 of *the Constitution*. The court can still uphold constitutional rights in a normal civil suit...

In the case before me, I am of the view that due to the nature of the dispute which turned on whether the Petitioner holds a valid title, the ideal forum should have been a civil suit. In a civil suit, the court would have been better placed to determine all the issues raised by the parties. The court would also have been in a position to grant all the reliefs sought in the petition herein if merited. It is my finding therefore that although the Petitioner had a right to invoke the jurisdiction of the court under Article 22(1) of *the Constitution*, that jurisdiction was not ideal for the determination of the issues at hand. As aptly put by the Respondent in its replying affidavit, this court in exercise of that jurisdiction is not possessed of the necessary tools to determine the validity or otherwise of the Petitioner’s title to the suit property.”

14. In *James Mwamuye Munga vs Tinga Kalu Tinga & 3 Others –Malindi ELC Petition No. E003 OF 2021* the court proceeded to find that the petition was properly before it by stating as follows:

“Bearing in mind that the petitioner has invoked Article 47 and that the Fair Administration Action Act (FAA) enacted thereunder provides for the lodging of a review, it may appear that he has blundered in filing a petition and not a judicial review application as provided for in Part III of the FAA. However, Article 47 is in the same Constitution that provides for protection of fundamental rights and freedoms of the individual, as well as grants the court mandate to issue remedies of, inter alia, declaration of rights, such as those sought by the petitioner herein. Further, Article 159 (2) (d) provides that justice shall be administered without undue regard to technicalities. It is not strange then that today a finding of fraud can be made in a constitutional petition if the issue finds its place therein by virtue of being one of the claims of violation of constitutional rights made against a respondent, and the remedies sought are among those in *the constitution*. It is with the foregoing observations in mind that this court holds that the petition is properly before it for determination.”

15. In the present case however the petitioner has not brought his petition under Article 47 of *the Constitution* and indeed, contrary to the rules of pleadings in constitutional petition has failed to specify the constitutional clauses under which he comes, the right claimed to have been violated and the manner in which the right has been violated.

16. In view of the foregoing, this court concludes that the petition on its face does not evince any violations of constitutional rights of the petitioner, thus the court’s jurisdiction has not been properly invoked,



and that the present dispute ought to have been lodged as an ordinary civil suit for determination of ownership.

17. Further, in *Anarita Karimi Njeru v Republic* [1979] eKLR the Court of Appeal stated as follows:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

18. I think the Court of Appeal in *Anarita* (supra) not only had it in mind that the constitutional jurisdiction is a higher jurisdiction and should not be invoked willy nilly by litigants unless they had serious claims of violation of rights which could only be addressed in a constitutional petition, but also that it was incumbent on the petitioner to make set out his claim in crystal clear terms, adducing facts and referencing them to constitutional clauses in a manner that leaves no doubt that there is truly an issue fit for expenditure of valuable judicial time and other resources on even in cases where the jurisdiction of the court had properly been invoked. Failing to specify the constitutional clauses under which he comes, the right claimed to have been violated and the manner in which the right has been violated considerably undermines the competence of the present petition. Even if the court were to have proceeded with the determination of the petition on its merits, such a serious handicap would militate against any determination in favour of the petitioner in the end.

19. The upshot of the foregoing is that the petition dated 26/7/2023 is hereby dismissed with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 29TH DAY OF APRIL, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

