



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 10 OF 2017

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS PURSUANT TO ARTICLES 2, 10, 19,

20, 22, 23, 40(1), (2), (3), 47 AND 48 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 4 AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT

OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

ESTHER KIUTHA M'MBUI.....PETITIONER

VERSUS

STEPHEN MURIUKI ARACHI.....1ST RESPONDENT

CHARLES MUTWIRI RINGAUGU.....2ND RESPONDENT

MINISTRY OF LANDS.....3RD RESPONDENT

JUDGMENT

A. PLEADINGS

1. The petitioner filed a petition dated 21.7.2017 as the allottee of **L.R No. Kiirua/Maitai – Naari/182** in 1971 which she alleged she had fenced and built a semi-permanent house. However, sometime in June 1985 while processing her title, she discovered that the 1st respondent had without her knowledge, fraudulently got registered as the sole proprietors. She reported to the elders who ruled in her favour.
2. She pleaded her constitutional rights, natural values and principles had been violated in particular **Articles 10, 22, 40 and 47 of the Constitution** hence caused her injury, loss and damage.

3. She pleaded she had instituted **Meru High Court ELC No. 101 of 1986, Esther Kiutha M'Mbui –vs- Stephen Muriuki Arachi** but the file disappeared or got misplaced before it was concluded but eventually the 1st respondent filed against her **Meru CMCC 331 of 2015** which proceeded ex parte.
4. She therefore sought court to declare her rights as to fair administrative action and to own property to have been violated and that the decision by the 3rd respondent to register the land in the name of the 2nd respondent to be removed into this court and be quashed.
5. The petition was supported by her affidavit sworn on 21.7.2017 attaching photographs of the developments, panel of elders minutes and proceedings, copy of pleadings in **Meru HCC 101 of 1986** for rectification of the register, copy of an official search and copies of proceedings and decree for the removal of the caution she had placed on the title marked as **EMK 1 – 5** respectively.
6. The petitioner also filed her list of witnesses and witness statements dated 17.7.2018.
7. The 1st and 2nd respondents made replies sworn on 5.4.2018 and 14.3.2018 respectively.
8. The 1st respondent averred he became registered as the owner of the suit land on 22.1.1974 and eventually sold and or transferred the land to the 2nd defendant on 9.4.2016. He states the suit parcel title was closed for subdivision to create two parcels **L.N No. 1379** in favour of the 2nd respondent and **L.N No. 1380** in favour of Duncan Gachunguru hence the land claimed by the petitioner no longer existed with effect from 23.3.2017.
9. The 1st respondent maintained the petitioner had never owned the land as alleged or at all and that the 2nd respondent and Dauncan Gachunguru M'Mutuota were purchasers for value and that if at all the petitioner ever owned the land by the time she allegedly lodged the suit, the same was being brought after 15 years were over and subsequently from 1986 to the filing of the suit 30 years later, thus the claim was time barred.
10. As regards **Meru HCC No. 101 of 1986**, the 1st respondent averred it was not true the file got misplaced and or lost. On the contrary, the suit was dismissed and that concerning **Meru CMCC No. 331 of 2015**, there was proper service, but even afterwards, she did not exercise any right of appeal and challenge the decision then and cannot possibly do so through this petition which is not the proper procedure, is misguided, incompetent, bad in law, misconceived and a legal misadventure.
11. Additionally, the 1st respondent maintained the petitioner had never been in actual possession, occupation or in use of the parcel as alleged or at all.
12. Further, it is averred the 3rd respondent was an unknown party since there are only three respondents.
13. The 1st respondent relied on a copy of an official search, a sale agreement and copies of title deeds as annexures **SMA 1 -4** respectively.
14. The 2nd respondent averred that he was a lawful purchaser of the **L.N. No. Kiirua/Maitai-Naari-182** from the 1st respondent and got registered on 12.5.2016 following which closure of title on 23.3.2017 there was in existence no such parcel as alleged by the petitioner, and which parcel of land had been in the name of the 1st respondent since 22.1.1974 which was fifty years before he transferred it to him, hence it could not be true that the petitioner was a first allottee: and that his rights were protected under the **Constitution 2010** and the **Land Laws of 2012** given the same was first registered under the retired **Cap 300**.
15. That unlike the 1st respondent, 2nd respondent averred he had valid title documents and that the petitioner's claim was time barred, unsustainable and lacking factual and legal basis given the orders sought were in the nature of certiorari which could only be granted through a judicial review procedure and not through a petition.
16. The 2nd respondent denied that the petitioner had ever been in occupation of the suit land as alleged or at all.
17. Similarly, echoing the sentiments of the 1st respondent, the 2nd respondent averred the 3rd respondent did not exist in law and hence was non-suited and that the allegations on paragraph 6 (a) and 6 (c) of the petition referred to a ghost party.
18. He relied on a copy of the sale agreement dated 9.4.2016, 5.6.2017, search certificate for **L.N. Kiirua/Maitai-Naari/1379 and 1380** and copy of green card for **L.N. 182 as annexures No. EKM 1 – 4 B** respectively.
19. From the court record, there is no indication that the 3rd respondent was ever served with the petition and return of service filed to that effect. However, the record for 9.7.2018 indicates Mr. Kieti appeared for pretrial directions and was given time to respond.
20. Similarly, the record shows the 1st respondent allegedly passed on and leave was granted to substitute him. Nothing was done by the petitioner in that regard despite the leave.
21. Further, on 27.9.2021, Mr. Kieti appeared for the 3rd respondent. He eventually sought leave on 2.11.2021 to make a response and put in written submissions. The deadline was on 30.1.2022 for both written submissions and responses. None of the parties complied particularly the 3rd respondent by filing a response to the petition.

B. ISSUES FOR DETERMINATION

22. The issues commending themselves for determination are:-

- a) **If the petition has met the constitutional threshold.**
- b) **If the respondents have breached the petitioner's rights and freedoms**
- c) **If the 1st respondent and 3rd respondents are properly sued in this petition.**
- d) **What is the order as to costs.**

23. The petition is premised on **Articles 2, 10, 19, 20, 22, 23, 40 (1) (2) & (3), 47 (1) and 48 of the Constitution , the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the constitution) Practice and Procedure Rules (2013)** as read together **with Sections 4 and 12 of the Fair Administrative Action Act 2015.**

24. The rules require a petitioner to disclose her address, facts relied upon, provisions violated, injury caused or likely to be caused, interest in the petition, details of past or present cases involving the petitioner and related to the issue in the petition and the reliefs sought.

25. **Rule 5 of the Mutunga Rules 2013** provides a petition shall not be defeated for misjoinder or non-joinder of parties and in every proceeding the court may proceed to deal with the matter in dispute and where there is mistake made in good faith, the court if necessary may order for the substitution or addition of a necessary party for the adjudication of the matter in issue.

26. As regards the courts power, **Article 22 of the Constitution** grants a party powers to institute a petition to enforce the bill of rights which have been denied, violated, infringed or threatened and specifically **Article 22 (3) (b)** thereof states formalities shall be kept to the minimum and the court shall not unreasonably restrict a party through procedural technicalities.

27. The authority to uphold and enforce the bill of right under **Article 23** was expanded by **Constitution 2010** to the extent that under **Article 22** proceedings the court may grant inter alia declaratory order, injunction, conservatory orders, declaration of invalidity of any law/order compensation and grants orders of judicial review.

28. The petitioner averred she was allocated **P.N L.R Kiirua/Maitai-Naari/182** in 1971 by the then committee in charge of the allocation, took vacant possession but unfortunately, in 1986 she discovered it had been illegally, fraudulently and without notice been re-allocated and registered in favour of the 1st respondent in 1974 who eventually sold and transferred the land to the 2nd respondent.

29. She averred the re-allocation transfer and registration violated her constitutional rights and freedoms but despite intervention in both in proceedings in the **Meru High Court HCCC No. 101 of 1986** and **Meru CMCC No. 331 of 2015**, she was not heard and or was condemned unheard. She sought for declaration that her rights as to fair administrative action and ownership were violated by the 3rd respondent's decision to register the land in the name of the 1st respondent who eventually transferred the same to the 2nd respondent which decision, she sought for removal to this court for quashing.

30. Further, she also sought for the decision in Chief Magistrate's Court Meru removing her caution over the suit land be removed to this court to be quashed.

31. The 1st and 2nd respondents' defence was that the petition was time barred; the procedure used to seek for both Constitutional reliefs and judicial review orders was bad in law; the previous High Court matter was dismissed and the petitioner was deliberately misleading the court; there was proper notice and service before the Chief Magistrate; the suit was heard and determined; no appeal or review was ever preferred against the previous suits by the petitioner; the registration and eventual transfer in favour of the 1st and 2nd respondents was lawful, procedural and could not be impeached in law and that the petitioner had no protectable or disclosable legal rights under the statute and by extension constitutional rights worthy capable of enforcement given there has been no material to base her alleged ownership claims.

C. CONSTITUTIONAL THRESHOLD

32. As a starting point, what should be a constitutional petition has been litigated over the years in a litany of cases starting with **Anarita Karimi Njeru –vs- The Republic. (1976-80) 1 KLR and Trusted Society of Human Rights Alliance –vs- Mumo Matemu & 5 others [2015] eKLR.**

33. The courts have held a constitutional petition must be pleaded with precision and that not every alleged legal claim should be brought before a constitutional court.

34. In the instant case, the petitioner in my view has substantially complied with **Rule 10 of the Mutunga Rules**. Consequently, in answer to issue No. 1, the petition before the court has met the minimum constitutional threshold.

35. Turning to the 2nd issue is whether the petitioner has pleaded and proved any alleged breach of the constitutional rights and freedoms by the respondents. The claim is that the 3rd respondent illegally, unlawfully and or fraudulently allocated/registered the 1st respondent land belonging to the petitioner without her consent, notice and or approval subsequent to which the 1st respondent transferred the land to the 2nd respondent hence denying the petitioner her rights to fair administrative action and ownership of land.

36. The petitioner bears the burden of proving the land was initially hers and that the respondents breached the Constitution by allocating or transferring the land.
37. On the other hand, the 1st and 2nd respondent's averred the registration occurred in 1971 and 2016 respectively hence the petition was time barred and brought too late in the day.
38. Courts have held that even though there is no limitation period for the filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant the reliefs must consider whether there has been inordinate delay in lodging the claim and whether justice will be served by permitting a respondent to be vexed by an otherwise state claim. **See Joan Akinyi Kabaselleh & 2 others – vs- Attorney General [2014] eKLR.**
39. In **Braham Kaisha Kanzika –vs- Governor Central Bank Of Kenya & 2 Others [2006] eKLR** the court held even though there was no specific period of limitation, it was proper for the court to consider the period of delay since the accrual of the claim and the reason for the delay must be satisfactorily explained. The court found a delay of 17 years was inordinate and not explained at all.
40. The court in **Joseph Migere Onoo –vs- Attorney General [2015] eKLR** held there must be consideration on whether the delay in filing a petition was unreasonable and prejudicial to the respondents defence.
41. In the present suit, the registration in favour of the 1st respondent occurred in 1971 going by the green card attached as 1st respondent's green card, whereas 2nd respondent got registered in 2017.
42. The petitioner has attached nothing to show she was ever allocated the land initially in 1971. The minutes and proceedings by a panel of elders holds no evidential strength given it cannot confer a better title as against a title deed which prima facie is to be taken as proof of bona fide holder of it under **Sections 24, 25 and 26 of Land Registration Act** except on account of mistake, fraud or illegality. The fraud, mistake or illegality must be specifically pleaded and proved as held in **Vijay Morjaria –vs- Nansingh Madhusingh Darbar & another [2000]eKLR.**
43. In the instant case, the petitioner did not plead or prove any particulars of fraud, illegality and mistake against each of the respondents. The petitioner brought no proof if she ever made a report to the police and an investigation commenced against the respondents, their agents or employees.
44. The petitioner alleged she discovered the fraud in 1986 and lodged a case at the High Court. The petitioner did not bring anything in support of her allegations that the file got lost or was misplaced. There was no evidence she ever applied for a skeleton file to be opened so as to proceed with the matter. There was also no evidence that she endeavored by whatever means to have the matter revived as soon as possible instead of lodging a constitutional petition.
45. Again, there was no evidence that the petitioner ever sued the Chief Land Registrar and or lodged a complaint under the **Fair Administrative Action Act** for investigations to be conducted.
46. In my considered view, petitioner had a duty to explain to this court why she did not lodge any complaint against the land registrar who allegedly caused the caution to be removed.
47. Similarly, if the petitioner complaint was the lower court irregularly removed the caution, there was nothing stopping her from mounting a judicial review proceedings and or applying for the review of the orders and seeking for the cross-examination of the process server alleged to have served her with the suit papers in the lower court.
48. In my considered view, a delay of over 50 years against the 1st and 3rd respondents and 30 years as against the 2nd respondent was inordinately long, unreasonable and the explanation given for the same was not only unconvincing but shows that the petitioner has been indolent and or inactive in agitating for her constitutional rights and freedoms.
49. Whereas the petitioner had pleaded breach of constitutional rights as to ownership and fair hearing, there were statutory remedies for the same. In my view, the petitioner had a duty to file an ordinary suit to seek for the cancellation of the title deed. **See CNM –vs- WMG [2018] eKLR.**
50. In **Uhuru Muigai Kenyatta –vs- Nairobi Star Publication Ltd [2013] eKLR**, **Lenaola J** as he then was now Supreme Court of Kenya Justice observed that whereas there was remedy in civil law, a party should pursue that remedy since not every ill in society should attract a constitutional sanction.
51. In this petition, the petitioner did not demonstrate how her constitutional rights were denied, violated or were threatened with denial or violation. Courts have held private claims should not form the basis of constitutional petition and should be resolved by using the usual process of civil litigation. **See Benjoh Amalgamated Ltd & Another –vs- Kenya Commercial Bank Ltd [2007] eKLR and Dennis Wanyonyi Simiyu & 2 Others –vs- Caroline Nafula Omondi & Another [2020] eKLR.**
52. In **Wareham T/A A.F. Wareham & 2 Others –vs- Kenya Post Office Savings Bank Ltd [2004] eKLR**, the court held the burden of proof was on the plaintiff and the degree was on a balance of probabilities and that the evidence was evidence of existence or non-existence of the facts in issue or facts relevant to the facts in issue.
53. The court held that it was only evidence of facts pleaded which was to be admitted and if the evidence did not support the facts pleaded,

the party with the burden of proof should fail.

54. The petitioner has alleged fraud, illegality and transfer of her land to the 1st and 2nd respondents. She has also pleaded the above amounted to breach of her constitutional rights. There was however no material placed before the court to discharge that burden especially against the respondents.

55. Whereas the 3rd respondent has been enjoined, there was no prejudice occasioned since under **Rule 5 (b) of Mutunga Rules**, petition should not be defeated by reason of the misjoinder or non-joinder of parties. It is common knowledge the Cabinet Secretary Ministry of Land was the one responsible for matters relating to land under whose docket the Land Registrars operate in line with **Section 14 of the Land Registration Act 2012**.

56. As indicated above, the principal state counsel made an appearance in these proceedings and was granted leave to respond and file written submissions on behalf of the 3rd respondent. Unfortunately, the 3rd respondent never responded to the petition in spite of the clear pleadings and allegations levelled against it.

57. The above notwithstanding, the petitioner had a duty and an obligation to prove breach on the part of the 3rd respondent since there exists a presumption that all acts done by a public official is lawfully done and that all procedures have been duly followed. The onus was on the petitioner to prove otherwise.

58. A bare allegation that a lawful procedure was not followed did not suffice as prove of the allegation. The petitioner did not produce any documents that the registration in 1971 and 2016 was irregular, unlawful and or unconstitutional.

59. In ***Chief Land Registrar & 4 Others –vs- Nathan Tirop Koech & 4 Others [2018] eKLR***, the court held a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence.

60. In this petition, the onus was on the petitioner to satisfy the court on the evidence produced by her that she was entitled to the declaration that there was violation of her right of ownership of land and fair administrative action by the respondents and that the decision to register the 1st and 2nd respondents in 1971 and 2016 respectively should be quashed and that the decision by the lower court to remove the caution in 2015 was invalid.

61. There are procedures relating to land registration, land sale agreements, land control board consents and land transfers governed by the **Land Act, Land Registration Act, Land Control Board Act and Law of Contract Act**.

62. The petitioner did not demonstrate how any of the above statutes were violated by the respondents in the process of registering and transferring the suit land to the 1st and 2nd respondents.

63. Under **Section 97 (1) and 100 of the Evidence Act**, it is provided no oral evidence should be admissible to contradict or vary the contents of documentary evidence. The petitioner did not call to question any of the documents used in registering and transferring the land in favour of the 1st and 2nd respondents by the officers of the 3rd respondent.

64. It was not enough to throw before the court the allegations without prove of the facts. The legal and evidentiary burden rested on the shoulders of the petitioner so as to establish that the suit property was irregularly, unlawfully and unprocedurally registered and transferred to the 1st and 2nd respondents with the active participation of the 3rd respondent so as to deny her constitutional rights as to ownership of land and fair administrative action.

65. An issue was raised by the 1st and 2nd respondents that the petitioner should not have combined a constitutional petition with a prayer for judicial review. The argument is invalid given the coming into force **Constitution Kenya 2010** combined the common law principles or prayers of judicial review as part of constitutional reliefs which courts in Kenya can grant.

66. A party is therefore at liberty to choose to move the court under either **Order 53 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act** or file a constitutional petition under Article 23 of the Constitution as well as under **Section 4 and 15 of the Fair Administrative Action Act**.

67. Similarly, under the Constitution, the courts are no longer forbidden unlike before from delving into both procedural and substantive merit issues under **Order 53**. The barriers or ridges between judicial review proceedings and ordinary actions were collapsed by the **Constitution 2010** hence opening avenues to access justice.

68. There is no longer need to file separate processes as submitted by the respondents. Similarly, ordinarily, courts have held res judicata does not apply in constitutional petitions unless the court is asked to re-litigate an issue determined to finality by a constitutional court as held by the Supreme Court in ***Communication Commission of Kenya –vs- Royal Media Services Ltd [2014] eKLR and Child Welfare Society of Kenya –vs- Republic & 2 others Ex-parte Child in Family Focus Kenya [2017] eKLR Suchan Investment Ltd -vs- Ministry of National Heritage & Culture & 3 Others [2016] eKLR, Felix Kiprono Matagei –vs- Attorney General; Law Society of Kenya (Amicus Curiae) [2021] eKLR***.

69. Given the foregoing, it is my conclusion the petition herein fails and is dismissed.

70. Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23RD DAY OF
FEBRUARY, 2022**

In presence of:

Kaimenyi for petitioner – present

Kieti for 3rd respondent – present

1st and 2nd respondents – absent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE