



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**ELC PETITION NO. 15 OF 2019**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA**

***BETWEEN***

**DAVID MUNGIRIA MWONGO.....PETITIONER**

***VERSUS***

**DISTRICT LAND ADJUDICATION OFFICER TIGANIA WEST.....1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR TIGANIA/IGEMBE.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**ROSE MWENDWA MUGAMBI.....4<sup>TH</sup> RESPONDENT**

**ISAIAH IGWATHU.....5<sup>TH</sup> RESPONDENT**

**ELIAS MWENDA M'MINYORI.....6<sup>TH</sup> RESPONDENT**

**STANLEY KAIBUNGA.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**A. Pleadings**

1. Solomon Kigea Mwongo representing the estate of David Mungiria Mwongo herein after the petitioner filed a petition dated 11.6.2019 alleging he was initially recorded as the owner of **Parcel No. 2155 Uringu 1 Adjudication Section** now **Uringu Registration Section** measuring 1.28 acres previously ancestral land belonging to Anampiu Eringo and his brothers also acquired **Parcels No.s 2118, 153, 1535 and 2155**.
2. He averred the 1<sup>st</sup> respondent and without his consent unlawfully reduced his acreage from 1.28 acres to 0.50 acres whereof he filed objection proceedings and upon inquiry 1<sup>st</sup> respondent told him his 0.78 acres had been transferred to another of his parcels at Nchaure.
3. The petitioner averred the proceedings of the adjudication officer were unprocedural, illegal and biased in relation to the Land Adjudication Act and Land Consolidation Act since no committee members were present during the hearing. It was averred the statements by the 4<sup>th</sup> and 5<sup>th</sup> respondents in the purported proceedings confirmed that the parcels of land originated from other areas “flew” and landed” on **Parcel No. Uringu 1/2155**.
4. The principal prayers the petitioner sought were;

a. A declaration that the subsequent subdivisions of L.R No. Uringu 1/2155 be declared illegal ab initio and be cancelled.

b. An order directing the 1<sup>st</sup> respondent to review the proceedings of A/R.

c. An order directing the district surveyor Igembe/Tigania to resurvey L.R No. Uringu1/2155 as recorded initially into 1.28 acres and lastly an order to the 1<sup>st</sup> respondent to interchange the super imposed parcels to their original mother number or portions.

5. In support of the petition the petitioner relied on his witness statement dated 11.6.2019 where he has stated that he was recorded as the owner of the parcel in 1992, the illegal changes happened without his knowledge or consent between 2016/2017 and he only realized in 2017 that his parcel had been subdivided into parcels No's 2312, 2111, 2176 and 2322 and recorded in favour of the 4<sup>th</sup> to 7<sup>th</sup> respondents.

6. He averred that, the registration maps retained at the county level were not in consonance with the ones at Ardhi house Nairobi buttressing his fears that there was collusion and or fraud among the respondents in subdividing his land where he had lived for long.

7. The petitioner also relied on the witness statement of his cousin one Zakaria Mwitii Muriira and a neighbour owning **Parcel No. Uringu 1/154**. His evidence was that if the sub-divisions were to be implemented on the ground, the new parcel of land would overlap his land and cause him to lose two graveyards in his homestead and a miraa plantation. Further it was stated the placement of the disputed parcels came from nowhere and had caused Johnson Mwongo the owner of **Parcel No. 2118** to overlap **Parcel No. 154** and **2155** which would bring a fight, among the neighbours.

8. The petitioner also relied on witness statements dated 13.9.2021 by Geoffrey Mwangela Edward Muthuri Mwongo, Johnson Koome Mwongo and Henry Gichuru Tharamba a surveyor among his nine brothers over parcel no. 2155.

9. Further the petition was supported by a list of documents dated 11.6.2019 from the district land adjudication and settlement officer Tigania east/west district confirming the petitioner as the owner of 0.50 acres and which as at the date was at the A/R stage under **Cap 283 Laws of Kenya**; certificate of official search for **L.R Nyambene/Uringu 1/2312** in favour of 5<sup>th</sup> respondent **L.R Nyambene/Uringu 1/2111** in favour of Jeremiah Mugambi M'Twaruchiu, a valuation report for **L.R No. Nyambene/Uringu 1/2111/2312, 2322 and 2176**, a copy of petition in **Meru H.C Petition no. 37 of 2011** which the petitioner had filed before the title deeds were out, an order withdrawing the petition and lastly a notice dated 18.7.2018 to the 3<sup>rd</sup> respondent.

10. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a replying affidavit sworn on 24.9.2019.

11. The 4<sup>th</sup> - 7<sup>th</sup> respondents opposed the petition through an answer to the petition dated 17.12.2020 accompanied by a list of documents dated 17.11.2021. The 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents averred that the petition did not raise any constitutional issues and it was mischievously filed to defeat the statutory provisions relating to the determination and adjudication of a right to land under The Land Consolidation Act given their parcels of land were registered after due process was followed and that the petitioner had fully participated in the process.

12. It was the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents stand that paragraph 12-13 of the petition disclosed no constitutional issues since it was merely challenging the decision and the award of the 2<sup>nd</sup> respondents which fell under the Land Adjudication Act with a clear procedure on how to challenge such decisions.

13. The 4<sup>th</sup> - 7<sup>th</sup> respondents further pleaded that they were now registered proprietors of their parcels of land **Nyambene/Uringu/2111/2176, 2322 and 2312** respectively and that titles their could only be affected as provided under the Land Registration Act through a civil suit but not by way of a constitution reference.

14. Lastly it was averred by the 4-7 the respondents that the petitioner had filed a previous **Petition No. 37 of 2011** which he had withdrawn after realizing it was doomed to fail hence the instant petition based on the same grounds was an abuse of the court process and amounted to forum shopping contrary to the principle that litigation must come to an end.

15. The 4<sup>th</sup> - 7<sup>th</sup> respondents relied on objection proceedings no. 153, 154 and 155 regarding **2176 Uringu 1 adjudication section** where the objector was the petitioner and Jeremiah Mugambi the respondent, a copy of search for **LR No. Nyambene/Uringu/2111/2322, 2312**, adjudication records for **2153, 2154, 2155, F/No. 3737, F.No/3738**, a sketch map, search certificate for **LR No. Nyambene/Uringu/1478** and photographs.

## **B. Written submissions**

16. With leave of court parties and by consent opted to canvass the petition through written submissions dated 16.12.2021 for the petitioners and 24.1.2022 for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and 19<sup>th</sup> January 2022 for the 4<sup>th</sup> - 7<sup>th</sup> respondents.

17. The petitioner submitted though he filed the A/R objection the same was unprocedurally and illegal determined given the land adjudication officer did not sit with the committee in hearing and determining that the same and the purported claims by the 4<sup>th</sup> and 5<sup>th</sup> respondents that their parcels of land flew and landed on **Parcel No. Uringu 1/2155** was in itself illegal.

18. The petitioner submitted that he had produced before the court enough documentary evidence in his list of documents and witness statements to counter the assertions by the 4<sup>th</sup> - 7<sup>th</sup> respondents.

19. Further the petitioner submitted that the witness statement of Henry Gichunuku Tharamba, a licensed surveyor confirmed the position of the parcels of land on the ground and its implications on the neighboring parcels of land upon implementation.
20. The petitioner urged the court to find the evidence adduced by the 4<sup>th</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> 7<sup>th</sup> respondents and the subsequent holding of the land adjudication officer that changing the boundaries shall tilt the whole block in tremendously since the parcels of land were not from the same block given it was the 4<sup>th</sup> -7<sup>th</sup> respondents who colluded to have their portions introduced near the market due to the land value attached to the vicinity which was achieved through collusion and compromise of the land adjudication officer more so when the demarcation book, copy of the record of existing rights in 1992 read the petitioner's acreage as 1.28 acres but the confirmation letter by the 1<sup>st</sup> respondent in 2007 showed 0.50 acres with a reduction of 0.78 acres hence the blame was on 1<sup>st</sup> -3<sup>rd</sup> respondents.
21. Regarding the replying affidavit sworn by Ali H. Chemasuet dated September 2019 confirming his assertion on the record of existing rights but could not ascertain the transfer to the 1<sup>st</sup> respondent for their offices; confirmed also his late father had objected to the introduction of the parcels. However the deponent could not clarify whether the map and the physical ground was in consonance. In sum the petitioner submitted that the 1<sup>st</sup> respondent had not seriously denied his averments given there was no response to the main petition hence the court should find and hold that the silence by the 1<sup>st</sup> – 3<sup>rd</sup> respondents meant consent and more so the affidavit to the notice of motion by Ali Chemasuet was an admission of facts as brought out in the petition.
22. As regards the response by the 4-7<sup>th</sup> respondents the petitioners submitted that none of them had offered tangible, or legal explanation in the manner in which parcel no. 2155 was reduced by 0.78 acres to benefit them and that the 4<sup>th</sup> -7<sup>th</sup> respondents could not possibly explain the happenings and or acts of the 1-3<sup>rd</sup> respondents since they were the beneficiaries of the illegal actions.
23. As regards the effects of the 1<sup>st</sup> respondent's actions over constitutional rights and freedoms of the petitioner it was submitted his right to own and enjoy property as a citizen was deprived of it unlawfully and therefore unconstitutionally pursuant to **Articles 2 (1), 40** of the constitution in failing to hear and or consult contrary to the rules of natural justice while 0.78 acres was being taken away and or reduced in favor of the 4<sup>th</sup> – 7<sup>th</sup> respondents. He therefore submitted that he was entitled to reliefs in line with **Articles 22, 24, 40 and 47 of the Constitution.**
24. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents based their submissions on the replying affidavit sworn on 24.9.2019 taking the view the record held at the 1<sup>st</sup> respondent's registry indicated parcel no. 2155 was measuring 0.50 acres and belonged to the petitioner and that though initially it was 1.28 acres on 8.12.1992 the land committee transferred 0.78 to **Plot No. 1478 Uringu Adjudication Section** it and demarcated the same prompting the petitioner's to filing objection no's 153, 154 against 155 and the AR register protesting the introduction of **Parcel No.s 2111, 2312 and 2176**. It was submitted the land adjudication officer heard the objections, dismissed the same and that the Uringu 1 adjudication section was now registered.
25. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted their actions were in line with the **Land Consolidation Act Cap 283** laws of Kenya particularly **Sections 9, 10, 21 and 26** and the decision of the land adjudication officer was final; that the petitioner was an active participant and was only trying to frustrate the implementation of the decision in bad faith as an afterthought and he has not demonstrated how the process had violated his rights.
26. Further the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted the petitioner had failed to meet the test in *Anarita Karimi Njeru -vs- Republic (1979) eKLR, Mumo Matemu -vs- Trusted Society of Human Rights Alliance and 5 others (2013) eKLR, Stephen Kirimi M'rinturi -vs- Land Adjudication and Settlements Officer – Igembe District & 3 Others; Peter Kumbu Kimunya & Another (Interested Parties) [2020].*
27. In addition the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that **Uringu 1 adjudication section** was now registered und pursuant to **Section 26** of the **Land Registration Act**, ownership was only challengeable on account of fraud misrepresentation, illegality, unprocedural or corrupt schemes through judicial review and not through a petition hence the petition before this court could not be used as a substitute for other procedures which a party must exhaust first before coming to court. Reliance was placed on *Non-Governmental Organizations Co-Ordination Board -vs- EG & 5 Others [2019] eKLR and Speaker of National Assembly -vs- Karume (2008) IKLR 425 and Geoffrey Muthinja & another -vs- Samuel Muguna Henry and 1756 others (2015) eKLR.*
28. The 1<sup>st</sup> – 3<sup>rd</sup> respondents urged the court was urged to find the petition, not suited for determination and or grounded in any law.
29. The 4<sup>th</sup> -7<sup>th</sup> respondents submitted the petitioner failed to disclose any constitutional issues for this court's determination for the same mischievously sought to defeat statutory provisions under the Land Consolidation Act and since their parcels were now governed under the land registration act the same would only be affected as provided under that law but not by way of a constitutional reference.
30. In their submissions the 4<sup>th</sup> -7<sup>th</sup> respondents stated going by the documentary evidence attached to their answer to petition dated 17.12.2020 and 12.11.2021s they had demonstrated the petitioner had failed to comply with the rules for the filing of a constitutional petition on the rights allegedly denied infringed or violated with some degree of precision as held in *Timothy Njoya -vs- A.G and another (2014) eKLR.*
31. Though the petitioner had invoked **Articles 2 (1), 40 and 41** in his submissions, the 4<sup>th</sup> -7<sup>th</sup> respondents urged the court to find the petitioner had violated **Rule , (2) (c) and (2) of the Mutunga Rules 2013** since submissions could not replace pleadings as held in *Olive Mwhiki Mugenda and another -vs- Okiya Omtata Okoiti and 4 others (2016) eKLR.*
32. Further it was submitted by the 4-7<sup>th</sup> respondents that parties are bound by pleadings and issues flow for pleadings, a party must give particulars of the case and a court should not infer the particulars of the case from documents provided and or submissions but from

pleadings. Reliance was placed on *Mary Anyango Onyango -vs- South Nyanza Sugar Co Ltd [2020] eKLR, IEBC -vs- Stephen Mutinda Mule (2014) eKLR, Peter Gichuki King'ara -vs- IEBC and 2 others (2013) eKLR.*

33. The 4<sup>th</sup> – 7<sup>th</sup> respondents therefore urged the court to disregard the submissions which were introducing issues under **Articles 4 and 47** of the Constitution which had not been pleaded in the petition.

34. In the alternative the 4<sup>th</sup> - 7<sup>th</sup> respondents submitted if assuming the provisions of **Articles 40 and 47 of the Constitution** were referred in the petition, the land adjudication statutes had self-contained mechanisms to address the petitioners' complaints, if any, on illegality and or irregularity in reduction of his acreage and his claim that the committee was not present during the hearing of the objection and that, he was allegedly treated unfairly. The 4<sup>th</sup> – 7<sup>th</sup> respondents however submitted that the petitioner participated in the proceedings filed under **Section 26 (1) Of The Land Consolidation Act** where the decision was final under **Section 26 (2) Land Consolidation Act** and if there were any irregularities, the petitioner's option was to apply for judicial review, and in their view such did not amount to a constitutional issue since the issue could be resolved by interpreting the facts and the relevant statute. Reliance was placed on *R.C.Vs -vs- RR (2021)* and *Turkana County Government & 2 others -vs- AG and others (2016) eKLR*, on the proposition that not every dispute ought to be filed in a constitutional court has held in *Hakizimana Abdoul Abdulkarim -vs- Arrow Motors (EA) Ltd & another (2017) eKLR, Anne Wangui Ngugi & 2,222 others -vs- Edward Odundo C.E.O R.B.A (2015) eKLR, Commissioner Of Lands -vs- Kunste Hotel Limited [1997]eKLR*

35. On the issue of the failure to have the land committee participate in the decision making process the 4<sup>th</sup> – 7<sup>th</sup> respondents submitted assuming that was true, the best forum to address the issue was through judicial review proceeding as held in *Chepkorir Ndege -vs- IEBC & Clerk of The W. Pokot County Assembly [2017] eKLR.*

36. Further the 4<sup>th</sup> – 7<sup>th</sup> respondents submitted since the land adjudication officer decision was final under section 26 of Land Consolidation Act, the petitioner had waited for 4 years before filing the petition. Reliance was placed on *Papinder Kaur Atwal -vs-Manjit Singh Amrit (2014) ECLR.*

37. The 4<sup>th</sup> – 7<sup>th</sup> respondents submitted that the petition was in elegant, obscure, incompetent, mischievous, frivolous, vexatious and in bad faith and brought to defeat the statutory provisions over land adjudication and ought to be dismissed with the contempt it deserved given since under the Land Registration Act a title deed could only be impeached on account of mistake, misrepresentation and illegality under **Section 26** thereof in a civil suit as held in *Anne Wanza and 3 others -vs Kenya Railways Coop and another 2015 eKLR.*

38. On whether the rights to property and fair administrative action had been violated the 4<sup>th</sup> – 7<sup>th</sup> respondents submitted that having established that the petition had raised no constitutional issues, and even if the court were to consider them, still the petitioner had failed to establish and/or prove such violation. It was submitted the witness statements relied upon by the petitioners were not made on oath and or adopted before the court as evidence by consent of parties and in accordance with the Evidence Act. Reliance was placed on *Bedrock Holdings Ltd -vs- Rallytec Motors Ltd (2019) eKLR.*

39. In their view, the 4<sup>th</sup> – 7<sup>th</sup> respondents submitted the evidence produced by the 1<sup>st</sup> respondent was clear that 0.78 acres of land was transferred by the land committee to **Parcel No. 1478 Uringu Adjudication Section** which record was produced in court showing in part (a) that **Parcel No. 2155** was demarcated in favour of deceased David Mungiria Mwongo and was reduced in acreage by 0.78 acres which was transferred to him in **Parcel No. 1478** and increased by 0.78 acre from **Parcel No. 2155**. This was clearly captured in the certificate of official search placed before the court owing it was registered in the name of the deceased petitioner's father hence the issue of not being compensated could not be true.

40. Regarding the denial of the right to fair administration action it was submitted the petitioner had not demonstrated how such rights were denied given that he had filed objection proceedings before 1<sup>st</sup> respondent under the Land Consolidation Act and was heard but instead of challenging the decision as provided under the law, he mischievously filed a constitutional petition instead a judicial review.

41. In sum, the 4<sup>th</sup> -7<sup>th</sup> respondents urged the court to find that the petition raised no constitutional issues for court's determination and/or for reliefs as may be granted under **Articles 22, 23 (3) and 24 of the Constitution.**

42. This court wishes to appreciate the efforts by the advocates on record for the parties since they have taken time to do in-depth research on their rival positions in this petition.

### **C. Issues for Determination**

43. In my view the issues calling for determination are:

- i. If the petition as presented has complied with the law and established a constitutional question for this court to determine.**
- ii. Whether or not the court should only restrict itself to the petition as presented and not the attachments as well as witness statements.**
- iii. What is the threshold of the burden of proof to establish a violation of the bill of rights in a constitutional petition?**
- iv. Whether a constitutional reference is one of the ways and means of challenging the validity or an illegality of a decision arising out of a determination made under the Land Consolidation Act and the resultant registration of title deeds under the Land Registration Act.**

v. Whether the petitioner had pleaded and proved any violation of his right to fair administration and the right to property.

vi. If the petitioner is entitled to any constitutional relief(s) as prayed for in this petition.

44. Constitutional petitions are governed by **Articles 22, 23, 24 and 165 2 (b) of Constitution of Kenya** and the rules made thereunder namely the **Constitution of Kenya (Protection of fundamental rights and freedoms) and Procedure Rule 2013**.

45. The rules require that a petition to include the description of parties, facts of the matter, nature and particulars of rights and or injury or breach complained about, any civil and or criminal matters pending and or determined relating to the subject matter and the reliefs sought.

46. The court under **Rule 10 (3)** and subject to **Rules 9 & 10** is allowed to accept a letter or any other informal documents which discloses the denial, violation, infringement or threat to a right or a fundamental freedom.

47. Under **Rule 11** provides, a petition may be supported by an affidavit and that any party wishing to rely on any document, the same shall be annexed to the supporting affidavit and where there is no supporting affidavit under **Rule 15**, the Attorney General shall within 14 days of service respond by way of a replying affidavit and if any document to be relied upon, it shall be annexed to the replying affidavit while under **Rule 15 (2)** a respondent has to file an appearance of appeal and either a replying affidavit or a statement setting out the grounds relied upon to oppose the petition, and after filing either of the document(s) a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within 14 days. The respondent is allowed to file a cross petition disclosing the matters set out in **Rule 10 (2)**.

48. As regards the hearing of a petition, **Rule 20 (1)** states a petitioner shall unless the court directs otherwise be heard by way of affidavits, written submissions or through oral evidence.

49. **Rule 22 (2)** thereof requires written submissions to contain:

a. **Brief statement of facts with reference to exhibits if any attached to the petition.**

b. **Issues arising for determination**

c. **Concise statement of arguments of each issue incorporating the relevant authorities.**

50. In this matter, the petitioner filed a petition dated 11.6.2019 supported by his statements dated 11.6.2019, a list of five witnesses, a list of documents dated 11.6.2019 and subsequently he filed witness statements of Geoffrey Mungathia Mwangela, Edward Muthomi Mwangi, Johnson Koome Mwangi and Henry Gichuru Tharamba all dated 13.9.2021.

51. The petition was filed together with an application for interim orders dated 10.6.2019 summons to enter appearance dated 26.6.2019 were issued and served against the respondents and an affidavit of service sworn on 4.7.2019 by Joseph Kithinji M'Kiambati was filed in court on 8.7.2019.

52. The 1-3<sup>rd</sup> respondents filed a replying affidavit sworn on 24.9.2019.

53. The 4<sup>th</sup> -7<sup>th</sup> respondents entered appearance on 5.7.2019 and 8.7.2019 and filed replying affidavits by 4<sup>th</sup>, 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> respondents attaching several documents which were later on included as exhibits in their answer to the petition, dated 17.12.2020. Later on, the 4<sup>th</sup> - 7<sup>th</sup> respondents filed a further list of documents dated 12<sup>th</sup> November, 2021.

54. The above are therefore the pleadings forming the bedrock of this petition through which the court shall make a determination upon.

55. A constitutional petition is ordinarily determined by way of the pleadings filed because ideally it should be premised on a constitutional questions seeking constitutional relief. *See Benjamin K. Kipkulei vs County Government of Mombasa & another (2015) eKLR.*

56. The courts have held however that where a petitioner relies on contested facts, it would be prudent to proceed by way of oral evidence so that petitioner can adduce evidence on the contested issues of facts and the testimony can be testified by way of cross-examination. See *Ngige -vs- Cabinet Secretary most of defima (2022) KEHC.*

57. In this petition the facts and the issues before the court have been set out in the respective pleadings alluded above. There was no request made by any party for better particulars and or for objection to reliance on any documents or statements. There was also no specific request made for the petition to be heard orally and or for the cross examination of any witnesses based on the witness statements or the production of documents by a certain witness or party. Parties were given opportunities to file and exchange responses and documents and directed to canvass the petition through written submissions based on what they filed before the court.

58. Therefore, the court shall determine the petition herein based on all the documents alluded above as to their issues raised evidential value to the attached documents and statements to while bearing in mind that **Articles 22 (3) & 4 159** provides justice shall be administered without undue regard to technicalities. What amounts to and how a party filing a constitutional reference has to plead and present has been subject to court determination statutory from *Anarita Karimi Njeru, Mumo Matemu, supra.*

59. In *Gabriel Mutava & 2 others -vs- Managing Director KPA (2016)*, the Court of Appeal held a constitutional litigation was a serious

matter which should not be sacrificed as the alter of all manner of frivolous litigation christened as constitutional petition when it was not and would otherwise be adequately handled in other legally constituted forums.

60. In **Anarita Karimi Njeru (supra)**, the court held a petitioner should set out with a reasonable degree of precision that of which he complains, the constitutional provisions said to have been infringed, violated and or breached, the manner in which they are alleged to be infringed, violated or breached and the specific constitutional reliefs sought.

61. In **Mumo Matemu (supra)**, the court reviewed the petition and the supporting affidavit and came to the conclusion that they did not provide adequate particulars of the claims relating to the alleged violation of the Constitution and the Ethics and Anticorruption Act.

62. In **Anthony Ngure Murugu -vs- Kenya Railways Corporation (2022) eKLR the court cited with approval S. -vs- Boesak (2001) (1) S.A 912 CC** where the court held a constitutional matter may include disputes as whether any law or conduct was inconsistent with the Constitution as well as issues concerning the status, powers and functions of an organ of the state, the interpretation, application and upholding of the Constitution and so too was the question of the interpretation of any legislation or as development of the common law promoting the spirit, purport and objects of the bill of rights.

63. In this petition the complaint by the petitioners was that his **Parcel No.2155 Uringu 1 Adjudication Section and Uringu 1 Registration Section** measuring 1.28 acres as recorded in 1992 was unlawfully and unconstitutionally reduced in acreage to 0.50 acres and the 0.78 acres taken out was subdivided into **Parcels No. 3212, 2322, 2176 and 2111** by the 1<sup>st</sup> – 3<sup>rd</sup> respondents and superimposed to the benefit of the 4-7 respondents by the 1<sup>st</sup> and 3<sup>rd</sup> respondents hence sought for declaratory orders that the 1<sup>st</sup> – 3<sup>rd</sup> respondents actions relating to his land were unconstitutional fraudulent, arbitrary, wrongful, null and void and violated his right to fair hearing and property deprivation.

64. In support of the petition the petitioner attached witness statements confirmation letter dated 10.12.2009, copies of search, valuation report, pleadings in **Meru H.C Petition no. 37 of 2011** filed before the title deeds were issued giving specific details and particulars of the acts complained about and a statutory notice to sue to the Hon. Attorney General dated 18.7.2018.

65. Arising out of the aforesaid pleadings the respondents entered appearance and responded to both the facts, documentary evidence, statutory and constitutional issues raised in the petition.

66. In my view the petition has met the threshold of a constitutional petition going by **Mumo Matemu** holding that the issue(s) must be clear not only in the petition but also the documents, letters and annexures filed in line with **Rule 11 of the Mutunga Rules 2013**. **This answers the 1<sup>st</sup> and 2<sup>nd</sup> issues framed above.**

67. The petitioner averred his land was initially 128 acres but was allegedly reduced to 0.50 acres whereof he lodged AR objection no's 153, 154 and 155 which were allegedly heard and determined by the Land Adjudication officers without the participation of the land committee as provided by the Land Consolidation Act. He maintained the decision which subsequently led to the creation of **Parcels No's 2111, 2312, 2176 and 2322** in favour of the 4<sup>th</sup> - 7<sup>th</sup> respondents was tainted with irregularities, illegalities, procedural unfairness was contrary to statutes and hence failed the constitutional test on fair hearing, fair administrative action and deprived him his right to land ownership as provided under **Article 40 of the Constitution**.

68. The respondents have not denied that there was an A/R objection and a decision thereby leading to the subdivision and issuance of parcel numbers to them arising out of the 0.78 acres which was allegedly removed from the petitioner's **Parcel No. 2155**.

69. The point of departure by both parties whether the failure to adhere to statute and given the concept behind the Land Consolidation Act the petitioner should have filed a constitutional petition or approached the issue through the internal dispute mechanisms set under Cap 283, or gone by way of a judicial review and lastly through an ordinary suit since title deeds issued under the Land Registration Act in which latter case the respondents are of the firm view the petitioner should have filed an ordinary suit to impeach the title deeds.

70. Alongside that argument the respondents have submitted that the petitioner has failed to discharge the burden of proof that the issues complained above injured, violated, infringed and or breached his constitutional rights to fair hearing, fair administrative action and the rights to ownership of land given that whatever acreage he may have lost was compensated to him in **Parcel No. 1478** as per a certificate of search attached to the replying affidavit sworn on 24.9.2019.

71. In answering the issues, In **Christian Juma Wabwire -vs- AG (2019) the court citing with approval Col Peter Ngari Karume and 7 others -vs- AG Petition No. 128 of 2006** the court held a petitioner must avail tangible evidence of violation of their rights and freedoms such as record, witnesses and that a court would not deal with speculations or imaginations and that the evidence must have probative value.

72. The petition on its face is titled in the matter of alleged contravention of fundamental rights under article 40 of the Constitution.

73. Paragraph 6 of the petition stated the record of the demarcation of the parcels read 1.28 acres in 1992 and at paragraph 7 it stated what the fellow brothers to the petitioner got at the time. At paragraphs 8, 9, 10, 11, 12, 13 and 14 of the petition the petitioner made a specific complaint that there was no observance of the rules of natural justice in the process and the decision leading to the reduction of his acreage and in particular at paragraphs 12 and 13, he made a claim that even if he was heard during the A/R objection he had filed, the 1<sup>st</sup> respondent flouted the law governing the process by not involving the committee in the decision making.

74. At paragraph 15, thereof the petitioner sought for this court to review the proceedings and the process and the decision as to its legality and constitutionality and make a finding that it had infringed on his constitutional right to property and grant the constitutional reliefs thereof.

75. The respondents have submitted that the petitioner did not plead any constitutional infringement of his rights and freedoms but instead brought up the alleged issues through written submissions which in their view are against the holding in *Olive Mugenda and IEBC -vs- Stephen Mule (supra)*.

76. In my view the petitioner pleaded the constitution questions and sought answers from this court. The respondents proceeded to respond to the constitutional question(s) and issues in their respective responses.

77. The law governing the A/R objection the subject matter was the Land Consolidation Act as indicated in the confirmation letter dated 10.12.2009 which was written to the petitioner by the 1<sup>st</sup> respondent.

78. In *Peter Kimandiu -vs- land adjudication officer Tigania West District and 4 others (2016) eKLR* the court noted the centrality of the land adjudication committee as the primary decision-making organ under the **Land Consolidation Act** unlike in the **Land Adjudication Act** where the land adjudication officer is the principal organ.

79. In *Benson Njagi -vs- Wilson Miriti Thaara (2021) eKLR* this court held that under **Section 26 of Land Consolidation Act** any person aggrieved by the allocation of land as entered in the adjudication register may within 60 days inform the adjudication officer setting his grounds or objections and the adjudication officer shall consider the matter with the committee and may dismiss the objection if valid and seek the committee to take action under **Section 21 of the Act** and that **Section 26 (3) of that Act** disallowed any appeal to the decision as held in *Joseph Mathita Ikirima exparte Solomon Mworio Samuel (2020) eKLR*.

80. So, to answer the issue raised by the respondent that had allegedly averred and submitted he was heard without the input of the land committee in my view his come to this Land Consolidation Act since under section 26 (3) only allows a challenge before the court unless it was about the monetary compensation which was not the case in this matter.

81. The evidence produced by the petitioner was the proceedings and the decision was heard without the committee input. The petitioner has discharged the burden of proof under **Sections 107 and 109 of the Evidence Act** as to whether or not the law was followed to the letter and spite the hearing and determination of his objection(s). The 1<sup>st</sup> respondent and the other respondents have not denied that there were no committee members in the A/R objection. The proceedings and decision were undertaken contrary to the law. It does not matter if the petitioner participated in the flawed process.

82. The 1<sup>st</sup> respondent had a statutory and constitutional obligation to observe the law and rules of natural justice. Whatever came out of the process was subject to the review of the court. Particularly on whether it met the constitutional test of fair hearing and fair administration action.

83. After the **2010 Constitution** common law remedies of judicial review were fused together under **Articles 22 and 23 of the Constitution**. A party may choose to go for a judicial review and or a constitutional petition. The petitioner opted to file a constitutional reference.

84. There is nothing in the Land Consolidation Act restricting the petitioner's only recourse as to judicial review. In my view therefore once the petitioner raised the issue of non-compliance with the Land Consolidation Act the onus was on the 1-3<sup>rd</sup> respondents to give justification and or offer a reasonable explanation why the law was not followed and if it was justifiable to limit the rights of the petitioner as to fair hearing and fair administrative action leading to the denial of his land rights. The court has the power whether through a petitioner or an ordinary suit under **Section 13 of the Environment and Land Court Act**, to determine the legality of the title deeds held by the 4<sup>th</sup> - 7<sup>th</sup> respondents. The 4<sup>th</sup> - 7<sup>th</sup> respondents had the option to file a cross petition and perhaps plead that they were not privy to the illegalities, improprieties and the irregularities leading to issuance of the parcel numbers and subsequent title deeds.

85. In my view therefore I find the issues no. 1-6 answered in favour of the petitioner and proceed to issue the following reliefs:

**1. A declaration be and is hereby issued that the hearing and the determination of A/R objection no's 153, 154 and 155 regarding parcel no. Uringu 1/2155 were contrary to the Land Consolidation Act and the Fair Administrative Action Act 2015 hence failed to meet the constitutional threshold as to fair hearing and fair administrative action.**

**2. A declaration that owing to subsequent subdivision to parcel no. 2155 Uringu 1 following the decision in A/R objection no. 153, 154 and 155 namely parcel no. 2212, 2322, 2176 and 2111 were mistaken, invalid and illegal in law and are hereby set aside.**

**3. Each party to bear their own costs.**

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF MARCH, 2022**

**In presence of:**

Mwenda for 4<sup>th</sup> – 7<sup>th</sup> respondents

Mutuma for Ondari for petitioner

Kieti for 1<sup>st</sup> – 3<sup>rd</sup> respondents

**HON. C.K. NZILI**

**ELC JUDGE**