



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 24 OF 2021

IN THE MATTER OF: ENFORCEMENT OF THE

CONSTITUTIONAL AND BILL OF RIGHTS UNDER ARTICLES

2,3, 10, 22, 23, 27 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012 AND LAND REGISTRATION ACT NO. 3 OF 2012

BETWEEN

1. EDARUS SALIM HUSEIN

2. SOFIYA SALIM HUSSEIN

3. ZENA SALIM HUSSEIN

4. SALMA SALIM HUSSEIN

5. NOOR AHMED SALIM

6. AISHA OMAR MOHAMED

7. GHALIB AHMED ALWIY.....PETITIONERS

VERSUS

1. SHARIFFIA BINTI SALIM

2. SHEKHA HAMED ABDALLA

3. REGISTRAR OF LANDS, LAMU

4. THE ATTORNEY GENERAL.....RESPONDENTS

RULING

This ruling is in respect of a Notice of Motion dated 29th October 2021 by the 2nd Respondent on the ground that the Petition dated 13th October 2021 does not raise constitutional issues.

The Petitioners had filed a Petition dated 13th October 2021 seeking the following orders:

- a) A permanent injunction restraining the 1st and 2nd Respondents by themselves, their agents, servants, staff, employees, representatives or anyone acting under their instruction from entering into or in any way interfering with the Petitioners' lawful use of land from demolishing and destroying permanent or temporary homesteads, cutting down trees and plantations, burning and/or setting on fire houses and plantations and from obstructing the Petitioners from enjoyment of all those properties known as LAMU ISLAND/BLOCK 11/116.*
- b) A declaration that the Petitioners have acquired the ownership of the Property LAMU/ISLAND/BLOCK11/116 by virtue of Adverse possession.*
- c) A declaration that the transfers effected and registered in favour of the 1st and 2nd Respondents as joint owners on the 16th March, 2017 and subsequent transfer effected and registered in favour of the 2nd Respondent as the sole-proprietor also on the 16th March, 2017 is illegal, fraudulent null and void.*
- d) An order directing the Registrar of Lands, Lamu County to recall the Title Deed for LAMU ISLAND /BLOCK11/116 for purposes of having it cancelled and re-issued in the names of the Petitioners and the rectification of the Register in respect of the above stated parcel of land.*
- e) An order compelling and directing the 1st and 2nd Respondents to compensate the Petitioners for the damages and loss occasioned to the demolition of homesteads, destruction of plantations and crops and other properties.*
- f) Costs of this suit.*

Counsel agreed to canvas the application vide written submission which were duly filed.

The court will therefore deal with the 2nd Respondent's application dated 29th October 2021 on the suitability of the Petition as filed.

2ND RESPONDENTS SUBMISSIONS.

Counsel relied on the following grounds in support of the application.

- a) The substantive prayer being sought in the petition dated 13th October, 2021 is a declaration that the Petitioners have acquired the ownership of the property known as Lamu Island/ Block11/ 116 by virtue of adverse possession.*
- b) In law one cannot bring a claim of adverse possession in a constitutional Petition. The Petition is therefore incompetent.*
- c) Further, it is clear from the Petition that the Petitioners have no claim to the suit property and the Petitioners cannot therefore claim to have their rights violated.*
- d) It is only after the vesting order has been granted under Order 37 Rule 7 (1) of the Civil Procedure Rules, 2010 to an applicant can claim to have rights violated under Article 40 of the Constitution of Kenya, 2010.*

Mr. Mwanzia submitted that the Petition is not maintainable in law on the ground that a claim of adverse possession cannot be brought under a Constitutional Petition. That the substantive prayer sought in the Petition is for a declaration that the Petitioners have acquired the ownership of the property known as **Lamu Island/Block II/116** by virtue of adverse possession having been in peaceful and uninterrupted occupation for more than seventy (70) years.

Counsel submitted that it is clear from the Petition that the Petitioners have no claim to the suit property and the Petitioners cannot therefore claim to have their rights violated as it is only after a vesting order has been granted under Order 37 Rule 7(1) of the Civil Procedure Rules, 2010 to an Applicant, that an Applicant can claim to have its rights violated under Article 40 of the Constitution of Kenya, 2010.

Mr. Mwanzia relied on the cases of *Trans Nzoia Chingano Grain Farmers Co-operative Society v Hon. Attorney General & 4 Others (2013) eKLR* and *Parkie Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others (2015) eKLR* where the court held a party cannot bring a claim of adverse possession in a Constitutional Petition as the Civil Procedure Rules clearly provide the manner in which such a claim can be brought to court.

Counsel submitted that the Applicant is therefore not entitled to orders of injunction as the Petition is not maintainable in law. Further that the Petition is an abuse of the court process as the Petitioner had already filed Malindi Environment and Land Court *ELC Case No. 78 of 2021; Edrus Salim Hussein & 6 others v Sharrifa Binti Salim & 2 others*.

PETITIONERS' SUBMISSIONS

Counsel for the Petitioners admitted that the main prayer by the Petitioners is for adverse possession but submitted that there is no bar in law to file a claim vide a petition. Counsel cited Articles 22, 23 and 165 of the Constitution which gives every person a right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

Counsel further submitted that the declaration sought can only be determined through full hearing and tendering of evidence in court by the Petitioners. On the question of a vesting order under Order 37 Rule 7 (1) of the Civil Procedure Rules, Counsel submitted that Sections 37 and 38 of the Limitation of Actions Act stipulates that if the land is registered under one of the Registrations Acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Counsel urged the court to dismiss the Preliminary Objection.

ANALYSIS AND DETERMINATION.

There are two applications in this matter, one by the 2nd Respondent which is a Preliminary Objection on the suitability of the claim vide a Petition and one by the Petitioners for injunction.

I will therefore deal with the 2nd Respondent's application first of which if allowed then will have an effect of terminating the Petition at this juncture.

It is admitted by the Petitioners that their substantive prayer that they are seeking for is for a declaration that they have acquired the suit property by way of adverse possession. The Constitution provides that every person a right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. There are also procedures put in place on the constitutional threshold to be met in Constitutional Petitions. They must raise constitutional issues and violation of rights under the Bill of Rights with specific articles being quoted. Not all cases or claims can pass as Constitutional Petitions.

In the case of *John Harun Mwau vs. Peter Gastrow & 3 Others [2014] eKLR* the court held that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

Similarly, in the case of *Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR, Lenaola, J* (as he then was) held that:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

As I have stated above the substantive claim in this matter is for a declaration that the Petitioners have acquired the suit parcel of land by way of adverse possession. There is an elaborate procedure for filing a claim for adverse possession in the Civil Procedure Rules which the Petitioners are aware of and should invoke instead of filing a Constitutional Petition.

In the case of *Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others [2015] eKLR (supra)* the court held that: -

“I think this is a good point to also address the argument that this Petition is incompetent for seeking to pursue a claim for adverse possession as a Constitutional Petition. I agree with this argument. Claims for adverse possession are adequately addressed by the Limitation of Actions Act, CAP 22, Laws of Kenya, and the Civil Procedure Rules, specifically Order 37 thereof. Claims of adverse possession are private law claims which need to be addressed through the private law legal channels provided. I do not see how the petitioners can assert a claim for adverse possession, a purely private law claim, through a constitutional petition. Indeed, I doubt if there is a constitutional violation which one will point at, when pursuing a suit for adverse possession. It follows that even if I am wrong on the point that the issue of adverse possession on behalf of the same parties herein has previously been litigated, the aspect of this Petition, that relates to pursuance of a right over land by dint of adverse possession is incompetent, for there are laid down procedures on how to pursue an adverse possession suit, which ought to be followed.”

The above case summarizes the holding that a party cannot claim adverse possession through a petition. *Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd (2013) eKLR (supra)* where it was held that a private individual cannot maintain an action for declaration against another private individual for alleged breach of the fundamental rights provisions of the Constitution.

Further in the case of *Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011* the court held that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes.

I find that the 2nd Respondent's application has merit and the resultant order is that the Petition is hereby struck out with costs to the 2nd Respondent. The Petition having been struck out the court will therefore deal with the application for injunction.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.