



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. E008 OF 2021

**IN THE MATTER OF ALELGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ARTICLES 22, 23 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 26 (10) OF THE LAND CONSOLIDATION ACT

AND

IN THE MATTER OF SECTIONS 26, 27 AND 28 OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

BETWEEN

PATRICK M'KAILANYA.....PETITIONER

AND

ANNISIETA KAUNGU.....1ST RESPONDENT

WILSON KABERIA.....2ND RESPONDENT

DOMIANO MWENDA.....3RD RESPONDENT

GABRIEL CHOKERA.....4TH RESPONDENT

FESTUS MATHEW.....5TH RESPONDENT

PAUL KIANJI THITWA.....6TH RESPONDENT

ROSE KAGWIRIA.....7TH RESPONDENT

SIMON WAWERU MBUGUA.....8TH RESPONDENT

ISAACK MUCHENURA.....9TH RESPONDENT

PATRICK KUBAI.....	10 TH RESPONDENT
MOSES GICHURU.....	11 TH RESPONDENT
PETER NTONJIRA.....	12 TH RESPONDENT
WILLIAM MURIUNGI.....	13 TH RESPONDENT
DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER	
TIGANIA EAST DISTRICT.....	14 TH RESPONDENT
LAND REGISTRAR TIGANIA EAST/WEST.....	15 TH RESPONDENT
ATTORNEY GENERAL.....	16 TH RESPONDENT

JUDGMENT

A. PLEADINGS

1. Before the court is a petition dated 10.2.2021 in which the petitioner has averred he inherited a portion of land measuring 15.96 acres from his father whose parcel of land was **Parcel No. 817 Antuamburi adjudication section**.
2. He averred he had filed **Objection No. 1929** over the subject land which was successful and the land adjudication officer ruled he be given the entire acres which decision has never been implemented.
3. The petitioner averred that there was no appeal to the Minister filed against the decision. However, he learned that the 1st – 13th respondents had allegedly colluded with the 14th and 15th respondents to cause illegal fraudulent subdivisions and registration of his suit land whereof title deeds were issued to the respondents contrary to the law and the existing land adjudication officer's decision.
4. As a result of the foregoing, the petitioner averred his constitutional rights as to fair administrative action and ownership of land had been breached. He prayed for:- declaratory orders that the respondents had contravened his rights to acquire land; declaration that he was entitled to 15.9 acres as part of **Parcel No. 817/Antuamburi adjudication section**; an order directing the 14th and 15th respondents to implement in full the land adjudication officer's decision arising from objection No. 1929 of 2017; order directing 15th respondent to cancel all titles issued as or result of subdivisions of **L.R No's Meru North/Antuamburi/7684, 817, 7773, 13939, 12345, 6094, 7896, 614, 6662, 8366, 12198, 5863, 6284, 5865, 2951** and any other subdivisions made from original **Parcel No. 817/Antuamburi adjudication section** till a portion of 15.9 acres, the half of the original land be registered in the names of the petitioner; an order directing the 15th respondent and District land surveyor to rectify the cadastral survey map to reflect the decision of the land adjudication officer in **Objection No. 1929 of 2017** and a permanent order of injunction restraining the respondent from interfering with the parcel of as will be registered by the Land Registrar.
5. The petition was supported by an affidavit sworn on 9.2.2021 repeating the contents of the petition save to attach the land adjudication officer's decision marked as **PK "1"**, a green card marked as **PK "2" – PK "11"**, official search certificate marked as **PK "12" and "13"** and a sketch map showing the subdivisions marked as **PK "14"**.
6. Further, the petitioner stated his efforts to seek for the implementation of the land adjudication officer's decision was in vain and could not understand how the respondents were able to get title deed(s) out of the illegal subdivisions despite his efforts to seek audience and intervention from the relevant offices.
7. Lastly, the petitioner expressed his fear that the respondent were intending to make more subdivisions, dispose of the parcel to third parties and had threatened to use violence as well as the police to evict him from his land after successfully removing his surrounding fence.
8. All the respondent were served with the petition and a return of service filed on 10.3.2021 sworn by Geoffrey Mburugu M'Mukiri.
9. The 14th and 15th respondent filed a notice of appointment through D. Mbaikyatta senior litigation counsel while the 2nd – 13th respondents filed a notice of appointment through Ayub K. Anampiu & Co. Advocates dated 12.7.2021 and later a memorandum of appearance dated 13.7.2021.

B. ANSWER TO THE PETITION

10. The 2nd respondent opposed the petition through a replying affidavit sworn on 6.11.2021 averring he had rightfully acquired **L.R No. Antuamburi/12198** as per his green card annexure marked WK "1" and hence the petition was frivolous and an abuse of the court process since he had not breached any of the alleged constitutional rights.
11. The 3rd respondent filed a replying affidavit sworn on 6.11.2021 opposing the petition stating he was registered owner of **L.R. Antuamburi/12345** which he had acquired legally as per his attached green card marked as **DM "1"** and was in total occupation and use of

his parcel of land. He denied any alleged breach of the petitioner's rights to acquiring the land.

12. The 15th respondent opposed the petition through a replying affidavit sworn on 8.11.2021 stating he was the lawfully registered owner of **L.R Antuamburi 13939** which initially belonged to his father and his uncle Robert Chokek. He indicated that the petitioner had allegedly grabbed his father's land and had unsuccessfully filed **Tigania ELC No. 43 of 2012** hence denied the alleged breach of the petitioner's constitutional rights.

C. WRITTEN SUBMISSIONS

13. With leave of court, parties filed written submissions dated 11.10.2021 and 11.7.2022 respectively.

D. ISSUES FOR DETERMINATION

14. The issues for determination are:-

- i. If the petitioner has met the threshold of a constitutional petition.**
- ii. If the petitioner has proved breach of any of his constitutional rights and against the respondents.**
- iii. If the respondents have raised any justification of the alleged breach of the petitioner's rights and freedoms.**
- iv. If the petitioner is entitled to the orders sought.**

15. Under the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, a petitioner must disclose facts relied upon, constitutional rights and freedoms violated, nature of injury caused, capacity to bring the petition, details relating to related civil/criminal matter and the reliefs sought.

16. Paragraphs 1 - 5 of the petition dated 10.2.2021 describes the parties to this petition, whereas paragraphs 7 - 10 gives the factual basis of the petition starting from the acquisition of the land through inheritance, **Objection No. 1929**, attempts to seek the implementation of the objection decision, lack of appeal to the Minister, collusion, illegalities over subdivision(s) and registration in favour of the respondents.

17. At paragraph 11 of the petition, the petitioner avers the action by the respondents amounted to fraud, collusion and or breach of his constitutional rights and freedoms. The particulars of the breach pleaded were failing to implement the land adjudication officer's decision, colluding by causing subdivisions without complying with the objection decision, issuing title deeds without due consideration of the decision, intending to dispose subdivided parcels of land to third parties and interfering with the petitioner's land which acts were termed as illegal and contravening the petitioner's rights under **Article 40 and 47 of the Constitution**.

18. The petitioner proceeded to seek for seven key prayers.

19. The threshold of what amounts to constitutional petition was set out in **Anarita Karimi Njeru -vs- Republic [1979]eKLR and Trusted Alliance Society of Human Rights -vs- Attorney General & 5 Others [2013] eKLR.**

20. In **Meme -vs- Republic [2004] 1 E.A. 124**, the court held a petitioner must set out with reasonable degree of precision the complaint and the manner in which the rights have been infringed with clear focus on fact, law and the Constitution. This was the same position in **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & Others [2013] eKLR and John Mbogua Getao -vs- Simon Parkoyiet Mokare & 4 others [2017] eKLR.**

21. The petitioner is required to demonstrate that an impugned decision or action violates or threatens to violate the bill of rights or the Constitution for that matter. The test is whether the decision, act or omission complained about falls within the ambit of an administrative action in line with **Section 2 of the Fair Administrative Action Act, 2015**.

22. The petitioner had pleaded the facts and acts of omission or commission allegedly committed by 14th – 15th respondents in favour of 1st – 13th respondents who under **Articles 20 and 21** are state organs and are bound to respect, uphold and defend the Constitution and are placed with the burden to respect, observe, protect, promote and fulfill the bill of rights and freedoms in favour of the petitioner's rights as to land ownership and **Fair Administrative Action**. Therefore, I find the petitioner has disclosed a Constitutional question which this court is invited to answer.

23. The question is to whether the petitioner has proved the alleged breach of the two rights particularized in the petition as to fair administrative action in furtherance of his right to own property as governed by **Articles 47 and 40 of the Constitution**.

24. The major complaint by the petitioner is that he filed **Objection No. 1929** over **Parcel No. 817 Antuamburi adjudication section** which the 14th respondent ruled in his favour but failed to implement on time or at all which though not appealed against, the subject land was illegally, fraudulently and unprocedurally subdivided into and registered in favour of the 1st – 13th respondents.

25. In an effort to prove the illegalities, impropriety and unconstitutionality of the acts, decision, the petitioner in the supporting affidavit to the petition attached copies of the land adjudication officer's decision. Whereas the decision has been certified by the land adjudication officer Tigania East, it does not bear the date it was rendered.

26. The petitioner raised a critical question on breach of his right to fair administrative action directed at the 14th respondent. As stated above, the 14th, 15th and 16th respondents were served with the petition but opted to remain silent on both the factual and legal issues raised.

27. The three have both statutory and constitutional duty to uphold, preserve and protect the fundamental rights and freedoms of the petitioner as state organs and or institution. The failure to implement the decision fall squarely on the shoulders of the 14th respondents which under **Section 2 of the Fair Administrative Action Act** is defined to include the refusal to take the decision.

28. Under **Section 3** thereof, an omission has been raised whereas under **Section 4**, the 14th respondent had an obligation to act expeditiously, efficiently and lawfully whereas under **Section 6 (4)** he had to supply the reasons for not acting within 30 days upon request and that if there was a departure to furnish the petitioner with the reasons and justification for departing from the law.

29. Further, under **Section 6 (3) and (4)**, in any proceedings for review of such action or decision where the administrator fails to furnish the applicant with the reason, the court has the mandate to, in absence of proof to the contrary, presume that the decision or action was taken without good reason.

30. In this petition, the information and reasons for non-implementation of the land adjudication officer's decision fell within the mandate of the 14th respondent. Once the petition was filed and served, the burden shifted to the 14th, 15th and 16th respondents to plead and offer reasonable and justifiable reasons and circumstances under which the 14th respondent failed to implement its decision to the detriment of the petitioner subsequent to which the 15th respondent proceeded to issue title deeds in flagrant disregard of the decision.

31. Consequently, the petitioner was entitled to seek for the protection of this court under **Section 7 (2) of Fair Administrative Action Act** on whether the action(s) of the 14th respondent in failing to implement the decision was in bad faith, irrational, an abuse of discretion, unfair, unreasonable and against his legitimate expectation. See *Sidian Bank Ltd -vs- National Land Commission & 2 others; Sigtunes Communications Limited and another (Interested Parties) [2021] eKLR Republic -vs- Non-Governmental Organizations Coordination Board Ex-Parte Evans Kidero Foundation [2017] eKLR*. See also *Gladys Boss Shollei -vs- Judicial Service Commission & another [2018] eKLR*.

32. In the premises, I find the petition with merits. I proceed to issue the following declarations:-

a. A declaration that the petitioner's rights for fair administrative action under Article 47 of the Constitution as read together with the Fair Administrative Action Act 2015 and the right to own land under Article 40 of the Constitution have been violated by the 14th – 16th respondents.

b. A declaration that any subdivisions, registration, and transfers arising out of Parcel No. 817 Antuamburi adjudication section in disregard of the land adjudication officer's decision by 14th – 16th respondents in favour of the 1st – 13th respondents were invalid, irregular, unprocedural and unconstitutional.

c. That a permanent injunction is hereby issued restraining the 1st – 13th respondents, themselves, agents, families, employees or any other person acting at their behest from interfering with petitioner's Parcel No. 817 Antuamburi adjudication section or its subdivisions thereof.

d. There will be no order on costs.

Orders accordingly.

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

In presence of:

Karatu for petitioner – present

Anampiu for 2nd, 3rd and 13 respondents – present

Kieti for 14th, 15th and 16th respondents

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE