



Thuo v County Government of Kirinyaga & another (Environment and Land Constitutional Petition 5 of 2019) [2022] KEELC 2187 (KLR) (18 March 2022) (Judgment)

Neutral citation: [2022] KEELC 2187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 5 OF 2019**

EC CHERONO, J

MARCH 18, 2022

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 162 (2) (B), 2, 10, 19,
20 (1), (2), (3), (4), 21, 22 AND 23 OF THE CONSTITUTION OF KENYA (2010)**

BETWEEN

EPHANTUS MWANIKI THUO PETITIONER

AND

COUNTY GOVERNMENT OF KIRINYAGA 1ST RESPONDENT

GILBERT KINOTI RICHARD 2ND RESPONDENT

JUDGMENT

1. On 15th November 2019, the Petitioner filed a Petition dated 14th November, 2019 whereby he seeks the following orders: -
 - a. A declaration that the act of the 1st Respondent County Government of Kirinyaga through its Dispute Resolution Committee of resolving the dispute over ownership of whole plot No. 115 Kibothere situated in Kutus Town, Kirinyaga County in favour of the 2nd Respondent herein Gilbert Kinoti Richard on 8th October, 2019 is unconstitutional, illegal, unlawful, invalid, null and *void ab initio* and contrary to National values and Principles of Governance as well as fair administrative action.
 - b. An order of *certiorari* removing into this Honourable Court and quashing the entire proceedings of the County Government of Kirinyaga through its Dispute Resolution Committee that were held on 10th April, 2019 and the resolution thereof issued on 8th October, 2019.
 - c. An order of *mandamus* compelling the 1st Respondent and/or its subordinate officers and/or any other person acting under or through them to issue the Petitioner with the allotment



letter of whole plot No. 115 Kibothere situated in Kutus Town, Kirinyaga County as per the approval that was effected on 29th July, 2017 and 4th June, 2017 vide Min: L/H/UD/16/2017.

- d. A declaration that the Petitioner's Right to a fair Administrative Action, protection of right to property, right to equality from discrimination, right to access of justice and right to a fair hearing enshrined and contemplated in Article 47, 40, 27, 28, 48 and 50 (1) of *the Constitution* of Kenya 2010 have been violated and/or infringed upon by the 1st Respondent County Government of Kirinyaga through its dispute resolution committee.
 - e. A declaration that as result of breach of the Petitioner's rights he has suffered loss and damages.
 - f. An order for compensation for the apparent breach or violation of petitioner's rights.
 - g. An injunction restraining the 2nd Respondent either by himself, his servants, agents, relatives and/or anybody else claiming through him from entering, trespassing, constructing and/or interfering in any way with plot no. 115 Kibothere situated in Kutus.
 - h. Any other order as the Honourable Court shall deem just and fit.
 - i. Costs of the suit and interest thereof.
2. The Petition is premised upon facts enumerated in the Petition and grounds particulars of which are set out on the face of the Petition. It is further supported by the affidavit sworn by the Applicant and the annexures thereto.
 3. The petition is opposed by the 1st Respondent vide a Replying Affidavit sworn on 12th April, 2021 and filed on 14th April, 2021. The 2nd respondent also opposed the said application by way of a replying affidavit sworn on 2nd March, 2020 and a Notice of Preliminary Objection dated 12th April, 2021 and filed on 16th April, 2021
 4. When the petition came up for hearing on 6th October, 2021, the parties agreed through their advocates on record to canvass it by way of written submissions. The petitioner filed His submissions on 22nd November, 2021 and the 1st Respondent in January, 2022. The 2nd Respondent did not file any submissions.

Petitioner's Case and Submissions:

5. The petitioner's case is that he is the legal and bonafide owner of plot No. 115 Kibothere upon purchasing it from Purity Wanjiru Wangeci on 18th March, 2017 who was in actual occupation of the plot uninterrupted since the year 1981.
6. He stated that the transfer was effected and approved by the Land Housing and urban Development Committee of the 1st Respondent herein vide the meeting held on 29th June, 2017 and 4th July, 2017.
7. He stated that later, the 2nd Respondent had lodged a complaint claiming temporary occupation license and argued that he owned the whole plot whereby the Dispute Resolution Committee without observing fairness, rules of natural justice and relevant facts resolved that the ownership of the plot belongs to the 2nd respondent herein.
8. He stated that the said resolution was biased and unjust as it took into account extrinsic facts that were not among the main issue for determination in that they brought the issue of a succession cause which had not been put forward to the committee during hearing of the dispute and failed to consider that he occupied the plot after the transfer was effected and has sunk a water well.



9. He stated that the dispute resolution committee ignored the surveyor's report which indicated that the said purity sold the plot to him and had been in occupation since 1981.
10. He stated that the dispute resolution committee in attempt to defeat justice erred in law and fact by failing to consider that the 2nd respondent never filed any evidence of actual possession to controvert his proof including payment of land rates and the 2nd respondent only had temporary occupation license.
11. He stated that it is only fair and just to stop the consequences of the illegal resolution not only for the protection of his fundamental rights but also as a matter of public policy and interest.
12. He stated that it is only fair just and equitable that he be granted the orders sought.
13. In his written submissions, the petitioner reiterated the facts displayed in his petition.
14. He submitted that from annexure WS-1 in the 1st Respondent's affidavit, it did not indicate the plot number upon which the temporary occupation licence was issued and approvals made, thus the same were void abinitio as they were made for plot that was not identified and not verified on the ground.
15. To support his submissions, he relied on the case of Pauline [*Kanyiba Njogu vs Wanjao Mwarano & 3 others*](#) [2017] eKLR

1st Respondent's Case and Submissions:

16. The respondent's employee stated that a temporary occupation was initially awarded to John Mwangi Kabebi who transferred it to Leonard Washington Muthoni and the transfer approved in a council's meeting held on 26th July, 2015.
17. He stated that in 2006, the said Leonard Washington Muthoni intended to transfer the Temporary Occupation License to the 2nd respondent herein and made an application for transfer, whereby he was granted a clearance certificate.
18. He stated that the transfer was deferred on grounds that the Kerugoya-Kutus Municipal Council Surveyor was supposed to make a site visit and on 29th June, 2017 & 4th July, 2017 the application for transfer was approved, from Purity Wanjiru Wangechi to Ephantus Mwaniki Thuo.
19. He stated that a dispute arose between the 2nd Respondent and the Petitioner, which was resolved by the Dispute Resolution Committee of the County Government of Kirinyaga in favour of the 2nd Respondent herein as the Petitioner had no ownership documents.
20. He submitted that the Petitioner did not exhaust all the internal mechanisms for dispute resolution before filing the petition as provided under the [*Fair Administrative Actions Act*](#), 2015. He relied on the case of [*Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & Another*](#) [2012]eKLR.
21. He submitted that it was not in dispute that written reasons for the administrative action that was taken against the petitioner was provided for and that the 1st Respondent acted within its powers and arrived at a decision that was fair in its honest view.

2nd Respondent's Case

22. The 2nd Respondent raised the following grounds: -
 - a. That the petition is premature for failure to follow the alternative effective dispute resolution mechanism provided under [*Physical and Land Use Act*](#) to wit, it offends Section 32, 40, 78, 80, 84 of the [*Physical Land Use Act*](#).



- b. That the petition has not made any application to be exempted from complying with the doctrine of exhaustion of internal mechanisms. The Petitioner has offended Section 6, 7, 8 & 9 of the *Fair Administration Actions Act*.
 - c. That the petition does not meet the requisite Constitutional threshold as on issues raised do not involve interpretation or enforcement of any Constitutional provision thus offending the doctrine of constitutional avoidance.
 - d. That the petition is an abuse of court process lacks non-justiciable as same is that only a land ownership dispute being clothed as a constitutional issue whereas not.
23. The respondent stated that he purchased the suit land from Leonard Washington Waweru in the year 2006.
 24. He stated that the plot was a temporary occupation license and had done a search to confirm ownership of the plot, whereupon he was showed the plot and found that it was not developed at all.
 25. He stated that he took possession of the plot in 2006 and began to cultivate and that to date the plot has no structures at all.
 26. He stated that he came to learn in the year 2017 that his plot had been sold to the petitioner by one Purity Wanjiru Wangeci.
 27. He stated that vide minutes of the meeting held on 18th October, 2006 the plot was transferred to him and the surveyor was supposed to make a site visit, and upon visiting he verified that the plot was not developed.
 28. He stated that upon discovering that his plot had been sold he paid a dispute fee of Kshs. 5,000 and he, the petitioner, Purity Wanjiru Wangeci and others were summoned and the said Purity did not have any documents to show that the plot belonged to the mother.
 29. He stated that before the said committee, he produced all his supporting documents and that none of the petitioner's rights were infringed upon since the person who transferred the plot did not have good title and thus his remedy lies with the vendor.
 30. He prayed that the petition be dismissed with costs.

ANALYSIS

31. I have considered the Petition, the affidavit in support, 1st Respondent's replying affidavit, the Notice of Preliminary Objection, the parties' rival submissions as well as the relevant law.
32. The issues for determination are;-
 - a. Whether the petitioner has exhausted all dispute mechanisms available.
 - b. Whether the petitioner has proved the petition, warranting an award of the orders sought.
 - c. Who should bear the costs.

Whether the Petitioner has Exhausted all Dispute Mechanisms Available

33. The Respondents have claimed that the Petitioner had not exhausted the required dispute resolution mechanisms.



34. Where a party is dissatisfied with an administrative decision, the procedure to challenge the same is provided under Section 9 of the *Fair Administration Actions Act* which provides that: -
- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
 - (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”
35. In case of *Geoffrey Mutbinja & another Vs Samuel Muguna Henry & 1756 others* [2015] eKLR whereby the Court of Appeal held as follows; -
- “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”
36. From the foregoing it is evident that a party can only move to court upon exhausting all the internal dispute resolution mechanisms available.
37. The *Physical and Land Use Planning Act*, 2019 establishes the County Physical and Land Use Planning Liaison Committee whose functions are outline under Section 78 of *the Act* as follows: -
- (a) Hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
 - (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
 - (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
 - (d) hear appeals with respect to enforcement notices.
38. Further Section 80 of the said *Act* provides as follows: -
- (1) A person who appeals to County Physical and Land Use Planning Liaison Committee shall do so in writing in the prescribed form.
 - (2) A County Physical and Land Use Planning Liaison Committee shall hear and determine an appeal within thirty days of the appeal being filed and shall inform the appellant of the decision within fourteen days of making the determination.
 - (3) The chairperson of a County Physical and Land Use Planning Liaison Committee shall cause the determination of the committee to be filed in the Environment and Land Court and the court shall record the determination of the committee as a judgment of the court Procedure of the County Physical and Land Use Planning Liaison Committees. Appeal to a County Physical



and Land Use Planning Liaison Committee 653 2019 Physical and Land Use Planning and published in the Gazette or in at least one newspaper of National circulation.

39. From the materials placed before this Honourable Court, it is clear that what the Petitioner is challenging is the decision that was made by the County Government of Kirinyaga through its Dispute Resolution Committee.
40. This is clear evidence that the petitioner has not complied with Section 80 of the *Physical and Land Use Planning Act*, 2019 as there is nothing to show that the petitioner appealed the decision before the County Physical and Land Use Planning Liaison Committee.
41. From the fore going, it is my view that this petition is untenable and must fail as the same was filed prematurely.

CONCLUSION

42. In conclusion, this petition is hereby dismissed with costs to the Respondents. It is so ordered

JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 18TH DAY OF MARCH, 2022.

HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

Mr. Mugo holding brief for Maina Kagio for 1st Respondent

Ms Ndungu holding brief for Mwaura for Petitioner

2nd Respondent/Advocate – absent

Kabuta – Court clerk.

