



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

PETITION NO. 10 OF 2020

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF ARTICLES 22 AND 23 AND 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 26A, 27 AND 28 OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 24, 24 AND 26 OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF SECTION 7 OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF ENVIRONMENT AND LAND ACT 2011

BETWEEN

JAMES MUTHIANE M'MBIRITHU.....PETITIONER

AND

LAND ADJUDICATION AND SETTLEMENT OFFICER IGEMBE

CENTRAL/NORTH SUB-COUNTIES.....1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....2ND RESPONDENT

LAND REGISTRAR MAUA.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

JUDGMENT

A. THE PETITION

1. James Muthiane M'Mbirithu herein after the petitioner through a petition dated 12.8.2020 avers he was plotted **Parcel No. 1037 Amwathi Mutuati IIA adjudication section** measuring 2.54 Ha which he has occupied and developed. In 2017 he found out that the interested party had colluded with the 1st respondent inserted another parcel measuring one acre from another location and imposed it on his land as Parcel No. 1148.
2. The petitioner averred the interested party filed Objection No. 741 which was decided against him but the 1st respondent failed to supply the proceedings and decision on time in order to appeal.
3. Further, as at the time the proceedings and decision was supplied, the time for appeal had expired. Similarly the 1st respondent declined to issue a consent to sue.
4. The petitioner averred his constitutional right under **Articles 35, 40, 47, 48, 50, 60, 68, 64 and 159** had been violated out of the fraud, illegalities and irregularities on the part of the respondents. He sought for: - declaration that the aforesaid proceedings/decision was irregular, fraudulent, arbitrary, wrongful and irrationally unconstitutional; certiorari to quash the proceeding/decision; declaration the land belongs to him; mandamus compelling the chief land registrar to register him as the proprietor and general damages for breach of his constitutional rights and freedoms.
5. The petition was supported by an affidavit sworn on 12.8.2020 and a further affidavit sworn on 16.11.2020 in which the petitioner has repeated the averments in the petition save to attach a copy of record as **JMM "1"**, photographs of developments as **JMM "2"**, copy of the objection as **JMM "3"**, correspondence with the 1st respondent as **anenxture JMM "4"** respectively.
6. As regards the further supporting affidavit, the petitioner deponed the interested party came to the picture at AR stage; the AR objection was heard under the **Land Consolidation Act Cap 283** by the adjudication officer contrary to the law and holding in **Peter Kimandiu –vs- Land Adjudication Officer Tigania West District & 4 Others [2016] eKLR**. The petitioner attached the judgment and an irregular letter calling the interested party for further hearing on 20.2.2020 as **JMM "1" and "2"** respectively.

B. RESPONSE TO PETITION

7. The petition was opposed by the respondents through a replying affidavit by the 1st respondent sworn on 10.11.2021. The basis of the affidavit was that the adjudication process was carried out under the **Land Consolidation Act**; objection No. 741 relating to the subject Parcel No. 1037 was heard and determined on 24.5.2017 whose outcome resulted to the aforesaid parcel number being subdivided to create **Parcel No. 1148** measuring one acre in favour of the interested party; the decision was informed by the findings of various statements given in the course of the proceedings; the decision could not be implemented on the ground out of instigated hostility against the 1st respondents' officers by the petitioner; the decision was also informed by previous committee cases over the suit parcel of land; the petitioner should have exhausted internal remedies under the applicable law; the petitioner's sweeping statements did not demonstrate any violation of rights and freedoms; the alleged collision or fraud was an afterthought since he duly participated in the whole process of adjudication; equity may not come to the aid of the petitioner who was frustrating the decision implementation; the petition was not suited for the determination of issues arising out of the land consolidation process. The respondent attached true copies of the supporting documents marked as **JMM "1"**.

C. WRITTEN SUBMISSIONS

8. With leave of court, parties agreed to dispose the petition through written submission dated 24.11.2021, 11.1.2022 and 29.12.2021 respectively.
9. The petitioner submitted the issues for court's determination are whether the correct legal process was followed; if there was breach of the right to own property and to have any dispute thereof determined lawfully and procedurally and lastly if the petitioner was entitled to the orders sought.
10. As regards the 1st issue, reliance was placed on **Republic –vs- Director of Land Adjudication and Settlement Officer & 9 others Ex-Parte Misheck B Ndubai & 5 others [2018] eKLR; Johnson Mithika M'ikiao –vs- Rose Mukiri Thaitumu & 2 others [2018] eKLR** for the denial of rights on fair hearing.
11. In so far as the breach of constitutional rights and freedom was concerned, the petitioner relied on **Anarita Karimi Njeru –vs- Attorney General [1979] KLR** on the proposition that he had particularized the violation; **Mutsonga –vs- Nyati [1989] KLR 4287** as regards fraud and **Republic –vs- Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others [2015] eKLR** on the proposition that where a party was questioning the legitimacy of the adjudication process there was no need for a consent to sue, **Patrick Musimba –vs- National Land Commission & 4 Others [2015] eKLR and Christopher Nguru Mulwa & 28 Others –vs- The County Government of Kitui & 2 Others [2017] eKLR** on the proposition that matters concerning land and environment rested with an Environment and Land Court for determination if brought by way of a constitutional petition.
12. The respondents submitted that the **Land Consolidation Act** provided for an elaborate dispute resolution mechanism being the land committee, arbitration board, adjudication officer and the A/R committee processes.

13. It was submitted the petitioner was misinforming the court as noted in the ruling dated 17.2.2021 given the dispute arose 44 years ago. Reliance was placed on *Anne Mumbi Hinga –vs- Gaitho Oil Limited [2019] eKLR* on the proposition that equity could not aid one approaching it with unclean hands and contradictory conduct; that there was no demonstration of any alleged violation of rights and freedoms as per *Anarita Karimi Njeru –vs- Republic [1979] eKLR and Mumo Matemu –vs- Trusted Society of Juman Rights Alliance & 5 Others [2013] eKLR*; there was lack of specificity and precision as held in *Stephen Kiri M'rinturi –vs- Land Adjudication and Settlements Officer – Igembe District & 3 Others; Peter Kumbu Kimunya & Another (Interested Parties) [2020]eKLR. Peter Kumbu Kimunya & Another (Interested Parties) [2020]eKLR.*

14. Further, it was submitted the only remedy available to the petitioner was judicial review and not through a petition. Reliance was placed on *Non-Governmental Organizations Coordination Board –vs- EG & 5 Others [2019] eKLR, Speaker of the National Assembly –vs- Karume [2008] 1 KLR 425 and Geoffrey Muthinja & Another –vs- Samuel Muguna Henry & 1756 Others [2015] eKLR.*

15. The interested party submitted there was no evidence tendered on the alleged fraud and or collusion by the petitioner. Reliance was placed on *Jennifer Nyambura Kamau –vs- Humprey Mbaka Nandi [2013] eKLR, Ratilal Gordhanbhai Patel –vs- Lalji Makanji [1957] EA 314, Central Bank of Kenya Ltd –vs- Trust Bank Ltd & 4 Others [2000] eKLR, Rosemary Wanjiku Murithi –vs- George Maina Ndinwa [2014] eKLR.*

16. Regarding the issue of irrationality, it was submitted the test ought to be objective in nature as held in *R. V. Ealing London Borough Council ex parte Times Newspaper Ltd [1986] 85 LGR 316.*

17. Reliance was also placed on **Section 9 (2) of the Fair Administrative Act and Section 9 (3) for the Law Reform Act** on the proposition that the internal mechanism for judicial review had not been exhausted hence it was inappropriate for the petitioner to file a petition.

18. Similarly, the interested party urged the court to be guided by *Kenya National Examination Council –vs- Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, Estate of Sonrisa Ltd & Another –vs- Samuel Kamau Macharia & 2 Others [2020] eKLR, Lepore Ole Maito –vs- Letwat Kortom & 2 Others [2016] eKLR, Municipal Council of Mombasa –vs- republic & Another [2002] eKLR, Evans Chelagat Yatich –vs- Baringo North Sub-County Alcoholic Drinks Committee & Another [2019] eKLR* citing with approval *Moses Kuria Njuguna –vs- County Government of Kiambu [2018] eKLR, Alphonse Mwangemi Munga & 10 Others –vs- Africa Safari Club [2008] eKLR, Tobias Achola Osidi & 13 Others –vs- Cyprianus Otieno Ogalo & 6 Others [2013] eKLR, Republic –vs- Judges & Magistrates Vetting Board Exparte Lady Justice Joyce Khaminwa [2013] eKLR and Daniel Nyongesa & Others –vs- Egerton University College [1989] eKLR* on the proposition that where a decision was final but tainted with illegality, irrationality, with procedural impropriety or was ultra vires, the same would only be impugned by the court through judicial review and not a petition.

19. The court has gone through the pleadings and written submissions. First I wish to commend the advocates for the parties for their diligence and research in this matter.

D. ISSUES FOR DETERMINATION

20. In my view, the issue commending themselves for my determination are:-

- 1. If the petitioner has met the threshold of a constitutional petition.**
- 2. If the petitioner has pleaded and proved any breach of his constitutional rights and freedoms by the respondents.**
- 3. If the petitioner was justified in bringing a petition without exhausting any review or appeal mechanism as provided under the enabling law to the subject matter.**
- 4. If the petitioner is entitled to the prayers sought.**
- 5. What is the order as to costs.**

21. The law governing constitutional petitions in Kenya is **Articles 22 and 23 of the Constitution** whereas the procedure to move the court is governed by **Article 22 (3)** as read together with the **Constitution of Kenya Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013 and Section 13 (3) of the Environment and Land Court 2011.**

22. Rule 10 of the (2013) Rules requires a petition to disclose the parties, facts relied upon, constitutional provision(s) violated to institute the cause; capacity to institute the petition, details of pending suits or claims and the reliefs sought.

23. The petitioner herein invoked **Article 40 of the Constitution** on the basis that following an A/R Objection No. 741 brought by the interested party, the 1st respondent colluded and or through fraud determined it in his absence and proceeded to subdivide his land into **Parcel No. 1148** in favour of the interested party

24. Further, it was averred the 1st respondent denied the petitioner the impugned decision and proceeding so as to lodge an appeal on time or at all.

25. Again, it was averred the decision was tainted with bias, error, unreasonable, was illogical, irrational, arbitrary, unlawful, wrongful and breached the petitioner's constitutional rights and freedoms under **Articles 35, 40, 47, 48, 50, 60, 68, 64 ad 159 of the Constitution**, and that

unless declared unconstitutional and or quashed, he stand to suffer deprivation of his land without a fair hearing and rights to the due process. Therefore, the petitioner invoked the powers of this court as set out under **Articles 22, 23 and 165 of the Constitution.**

26. What amounts to a constitutional petition was determined in *Anarita Karimi Njeru, Mumo Matemu and Johnson Mithika M'Ikiao (supra)*.

27. The main bone of contention by the petitioner was that the 1st respondent entertained the A/R objection without granting him both a fair hearing and fair administrative action hence infringing on his rights as to ownership of land.

28. The attached decision and proceedings appear to indicate that the petitioner was an active participant in the proceedings and was asked questions by committee members.

29. Under **Section 26 (1) of the Land Consolidation Act**, an A/R objection is supposed to be heard and determined by the land adjudication officer together with land committee members.

30. The petitioner claims he was denied a copy of the proceedings and decision on time or at all by the 1st respondent so as to exercise his constitutional rights of appeal.

31. The 1st respondent's affidavit in reply at paragraph 2, 6, 7 and 8 does not specifically explain why he did not supply the decision and the proceedings within a reasonable time and or respond to the letters requesting for a copy of the decision.

32. **Article 47** grants the petitioner a right to administrative action that is expeditious, effective, lawful, reasonable and procedurally fair and written reasons if the administrative action shall adversely affect him. Sections 4 and 6 of the **Fair Administrative Actions Act 2015**, mandates the 1st respondent to undertake its responsibilities while mindful of the constitutional rights and freedoms of parties as set out under **Article 47** including informing parties about their rights on manner, place and period within which to appeal against such a decision.

33. Concerning this petition, **Section 6 of the Fair Administrative Actions Act** is specific that the petitioner had a right to be supplied with the decision and proceeding as may be necessary to facilitate his application for an appeal or review in accordance with **Section 5 of that Act**.

34. The 1st respondent under **Section 6(3)** is statutorily required to do so within 30 days of the request in absence of which in any proceedings for review of such action or decision shall be presumed to have been taken without good reason.

35. In *Shollei –vs- Judicial Service Commission & another (Petition 34 of 2014) [2022] KESC 5 (KLR) (Civ) (17 February 2022) (Judgment)*, the Supreme Court of Kenya took the view that **Article 47 (2)** implied the giving of written decisions and the burden to demonstrate the effect of an administrative action lay with the person to whom the action had been taken against and found the appellant had discharged her burden vide letters from her advocates asking for inter alia reasons for her removal from office. The court found that while the right to fair hearing under **Article 50 (2)** covers quasi-bodies and that the burden to justify limitation of the rights, lay with the person limiting the same.

36. Guided by the above reasoning the respondents have not given any justification why they unduly withheld the decision and proceedings hence denying the petitioner a right to redress under the law. By denying the petitioner his constitutional right under **Article 47** and **Sections 5, 6(3) of Fair Administrative Action Act**, the respondents are estopped from alleging that he did not file the judicial review against the decision within 6 months. The respondents are therefore presumed to have taken that decision without good reason.

37. On that reason alone, my finding is that the petitioner has specified with precision the particulars of the constitutional rights infringed and the nature of injury occasioned to him as held in *Stephen Kirihi M'rinturi –vs- Land Adjudication and Settlements Officer – Igembe District & 3 Others; Peter Kumbu Kimunya & Another (Interested Parties) [2020] eKLR (supra)*.

38. As regards the proceedings and the decision making process, there is no evidence if the committee members ever signed the decision on 21.5.2017. It is also not clear if the parties participated in the scene visit and or gave their views. This would be contrary to **Section 4 (4) of the Fair Administrative Action Act**

39. Further, it is not clear if the land committee members views or comments if any were factored in the final decision. Similarly, the previous decision which the A/R decision(s) was based on were not shared with this court.

40. An issue was raised by the respondents as well as the interested party that there was delay in the filing of the petition and that the petitioner ought to have filed a judicial review as opposed to a petition under **Order 53 of the Civil Procedure Rules** and **Sections 8 and 9 of the Law Reform Act**.

41. Upon the coming in force of **Constitution of Kenya 2010**, the traditional common law remedies of mandamus, certiorari and prohibition were included as some of the constitutional remedies which a court can grant through a constitutional petition.

42. A party is therefore at liberty to go by any of the two choices both under **Order 53** and **Sections 8 and 9 of Land Reform Act** and or lodge a constitutional petition.

43. If a party chooses the former, the need to seek leave and file the proceedings within 6 months of the decision complained about if there is a prayer for certiorari is necessary unlike in the latter since there exists no limitation of time where a party alleges breach of his constitutional

rights and freedoms.

44. In the instant case, the delay as held above was out of inaction by the 1st respondent in not statutorily supplying the decision and proceedings within 30 days as set out under **Section 6 (3) of the Fair Administrative Action Act**.

45. In my view therefore, a delay of less than 3 years cannot be said to be unreasonable especially where it has been sufficiently explained. Similarly, it has been admitted the decision complained about has not been implemented at all hence, I find no prejudice occasioned to the respondents and interested party by the delay in seeking to challenge the decision thereof.

46. As regards fraud, a party relying on fraud must specifically plead to and prove it to the required standards as held in *Jennifer Nyambura Kamau, Ratilal Gordhanbhai Patel, Rosemary Wanjiku Murithi (supra) and Vijay Morjaria –vs- Nansingh Madhusingh Darbar & another [2000] eKLR.*

47. Consequently, I entirely agree with both the respondents and the interested party that the petitioner has made bare allegations of fraud and or collusion with no concrete evidence in support thereof. There was no report made to the investigative agencies including the ombudsman under the **Commission Administrative Justice Act in line with Section 5 (G) of Fair Administrative Action Act**.

48. Consequently, I find the ground untenable and reject it.

49. In view of the foregoing reasons, my conclusion is the petition has merits, the proceedings and the eventual decision made by the 1st respondent is hereby brought before this court and quashed. The A/R objection is remitted for re-consideration by the respondents in line with **Section 11 of Fair Administrative Action Act**.

50. The rest of the prayers to the petition are found unmerited.

51. Each party to bear their own costs given this is a constitutional petition.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 16TH DAY OF MARCH, 2022

In presence of:

Kieti for respondents – present

Orimbo for petitioner- present

Mukanguru for interested party – absent

Court Assistant – Kananu-

HON. C.K. NZILI

ELC JUDGE