



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

CONSTITUTIONAL PETITION NO. E02 OF 2021

**IN THE MATTER OF PROTECTION OF THE RIGHTS TO
PROFFER UNDER ARTICLE 40 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE RIGHT TO FAIR ADMINISTRATIVE
ACTION UNDER ARTICLE 47 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE AUTHORITY OF COURTS TO UPHOLD AND
ENFORCE THE BILL OF RIGHTS UNDER ARTICLE 23 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE GRAND LOCATION (DEMARICATION) OF LAND
PARCEL NO. 2168 WITHIN AMWATHI/MUTUATI 11A, ADJUDICATION SECTION
SIMON NATAL NTOITHA.....PETITIONER**

VERSUS

**SUB-COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER,
IGEMBE (NORTH).....1ST RESPONDENT**

**THE DEMARICATION OFFICER, AMWATHI/MUTUATI 11A
ADJUDICATION SECTION.....2ND RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

A. Pleadings

1. The petition before the court is dated 10.22.2020 in which the petitioner averred he gathered 5.04 acres of land and was demarcated at four ground location and issued Parcel No's 2168, 4245, 4246, and 4258 Amwathi/Mutuati II measuring 2 acres, 0.54 acres, 0.30 acres and 2.20 acres respectively with parcel no's 2168 & 4246 opposite each other separated by a public access road.
2. The petitioner averreds the following the tarmac road network, growth and the expansion of Mutuati market, the 1st and 2nd respondents

purported to alter the ground location of Parcel No. 2168 which he had acquired and worked on since childhood and published an AR register showing the petitioner's current ground location as being Parcel No. 4566.

3. The appellant averred he lodged an objection no. 1 over the unlawful displacement and presented a tracing map sheet no. 15/3 certified on 4.4.1998 at the time he was applying for electricity supply to his land which objection was ruled in his favour.

4. The petitioner averred legitimate expectation that the aforesaid decision shall be implemented and his parcel no. 2168 reinstated to the ground he had been occupying and developing since 1970. Following an application dated 13.2.2020 to subdivide the land into 11 parcels, the petitioner was told his land was still in the pre-objection position per the adjudication register which land was eight kilometres away from his ground location.

5. The petitioner averred his rights to the property were being trampled upon by the 1st and 2nd respondents without any claim by third party, without regard to the Constitution and the Land Adjudication Act, as regard rights to Fair Administration Action and the right to property.

6. The petitioner sought; a declaration that the actual current ground position of his Parcel No. 2168 measuring 2.00 acres as is currently actually and actively occupied by him within Amwathi/Mutuati IIA adjudication section remained where it currently was per tracing map sheet no. 15/3 certified on 4.4.1998 notwithstanding any change in the map sheet numbering and secondly the adjudication map or registry index map if already registered to be rectified to show the ground location of Parcel No. 2168 within Amwathi/Mutuati/IIA adjudication section as currently occupied by him and as defined above.

7. The petition was supported by an affidavit sworn on 11.11.2020 by the petitioner repeating the facts in the petition. He has annexed a copy of the gathering book, copy of an official tracing map dated 4.4.1998, copy of the objection proceedings and the decision, copy of his application for subdivision marked as SNN 1-4 respectively.

8. The petition was opposed by the 1st-3rd respondents through a replying affidavit sworn by John Mbai on 22.2.2022 in which he stated that according to the records of existing rights Parcel No. 2168 measuring 2.00 acres belonged to the petitioner having been demarcated in map no. 15/3 before it was relocated and demarcated in map sheet no. 10/16 with an alleged intention of creating a space for the construction of public institutions as per annexed map sheets JM 1A & JM 1B namely Mutuati Secondary school, police station, social hall and law courts. He therefore denied that any of the constitutional rights of the petitioner had been infringed since the land adjudication officer was merely implementing the Land Committee's decision to allocate land to public institutions.

9. Further the 1st-3rd respondents averred that owners of land were allowed to file land claims if aggrieved in this case the petitioner's objection had been allowed.

10. The 1st – 3rd respondents averred that the land the petitioner was relocated to, was still intact and was still using his other land as at the filing of the petition. Additionally the 1st-3rd respondents averred that the major problem was that the petitioner was not consulted by those who made the decision to relocate him and his land from where it was developed to another place which was unmerited.

11. Lastly the 1st-3rd respondents averred the petition lacked evidential basis since the affidavit in support was very thin on facts and that the issues raised were not constitutional in nature since they relate to the adjudication process governed by the Land Adjudication Act.

B. Written Submissions

12. Following directions, parties opted to dispose the petition through written submissions. The petitioner has submitted that the authority to re-locate and re-demarcate his land was not sought and obtained from him and that his occupation and possessory rights were taken into account, in the process of making the decision.

13. Further the petitioner submitted that whereas the 1st-3rd respondents acknowledged that his objection was heard and determined it has not been stated why there has been lack of implementation of the decision which by itself can only be impunity.

14. The petitioner submitted that the replying affidavit by the respondent was contradictory and that under Article 40 (3) of the Constitution he could not be deprived of his property unless the deprivation resulted from an acquisition in line with Chapter 5 for public purpose and in accordance with the Constitution or any other Act of Parliament.

15. In his view the petitioner submitted the respondents had not indicated if the alleged relocation was under the above exceptions of the constitution only to say it was done without consulting him which is contrary to Article 47 of the Constitution.

16. The petitioner submitted that given by his initial lawful demarcation, the objection proceedings and decision, looked at together with his development and occupation, his rights have been violated. Further, the petitioner submitted there was need for corrections as pleaded since title deeds were now out for the section so that the, title deeds and registry index map could tally and reflect the reality on the ground.

C. Issues for determination

17. The issues commending themselves for determination:

(i) If the petition has met the constitutional threshold.

(ii) *If the petitioner's constitutional rights on fair administration action and rights to property were violated by the respondents.*

(iii) *If the 1st-3rd respondents were justified in failing to implement and effect the proceedings and decision over Parcel No. 2168 dated 25.10.2016.*

(iv) *If the petition is entitled to any constitutional reliefs as prayed.*

18. The Constitution of Kenya (Protection of Rights and Fundamental Freedom) (Practice and Procedure Rules) 2013 require a petitioner to state the facts relied upon, constitutional rights and freedoms infringed, violated or threatened, nature of injuries or damage suffered, the capacity in which the petition is brought, civil or criminal proceedings related to the matter, and the reliefs sought.

19. The manner to plead and prove a constitutional petition has been determined by our courts.

20. In ***Kenya Human Rights Commission & another vs Non-Governmental Organization Coordination Board and another (2018) eKLR*** the court held that an administrative action that flow from statutes must meet the constitutional test of legality, reasonableness and procedural fairness, that those taking administrative action were bound by the Constitutional decree failure of which it renders their actions unconstitutional null and void.

21. In ***JSC vs Mbalu Mutava & another (2015)*** the Court of Appeal held under Article 47 (1) of the Constitution natural justice comprises of acting fairly as well as in a procedurally fair manner.

22. In ***(CORD) Coalition for Reforms and Democracy & 2 others vs republic of Kenya & others (2015) eKLR*** the court held a party alleging violation of a right which has been impaired, infringed or limited, has to demonstrate so and once demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation.

23. In this matter the petitioner alleged his land was re-located and re-demarcated from map sheet no. 15/3 on a site he had occupied and developed for many years to map sheet no. 10/16 which was eight kilometres away. He averred he lodged an A/R objection which was determined on 25/10/2016 but when he sought to subdivide his Parcel No. 2168 on 13.2.2020, he was told by the respondents that his land was still at pre-objection position as per the adjudication register contrary to his legitimate expectation that the objection outcome had been implemented. He averred his right to fair administration action and the right not to be deprived of property under article 47 and 40 of the Constitution had been infringed, violated or breached.

24. In the response by the 1st respondent at paragraphs 4, 5 and 6 of the replying affidavit was admitted that the record of existing rights indicated the petitioner as the owner of the land in issue before it was relocated and redemarcated in map sheet no. 10/16 so as to create a space for the construction of public institution, most of which were yet to be constructed in the reserve area namely a secondary school, police station, social hall and a law court. It was averred by the respondent that none of the constitutional rights of the petitioner had been violated breached, threatened or infringed since the decision to allocate public land was done by committee members and the 1st respondent's work was merely to implement the land committee decision. The 1st respondent admitted the petitioner filed an A/R objection which was allowed and that the area where the petitioners land was before the relocation was still intact and that he was still using it.

25. Further the 1st respondent averred that the major problem was that the petitioner was not consulted by those who made the decision to relocate his land from where it was developed to another place which was unmerited.

26. Looking at the pleadings by the petitioner, it is apparent that he has raised a specific constitutional/legal question with facts, details, alleged breach, nature of injuries and sought specific reliefs which the respondents have replied to and averred there was justification to relocate and re-adjudicate his land.

27. In my view, the petition herein has met the constitutional threshold as held by the Court of Appeal in ***Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others (2013) eKLR***.

28. The respondents knew the real cause of action which was coming for trial. The respondents were able to respond to the petition and plead a justification to their action.

29. The petitioner has raised two key claims on fair administration action under Article 47 and deprivation of property under Article 40 (3) of the Constitution.

30. I reject the argument and take view that it cannot therefore be true that the issues relate solely on the Land Adjudication Act and are not constitutional in nature, since the land adjudicatory bodies act within the constitutional frame work.

31. The next issue is on whether the petitioner's right to land and fair administrative action have been violated by the respondents.

32. As indicated above, the 1st – 3rd respondents have admitted the fact that Parcel No. 2168 as appearing on the ground was initially demarcated in favour of the petitioner on the demarcation map sheet no. 15/3 measuring 2. acres but was later on relocated and re-demarcated in sheet no. 15/16 to create a space for public utilities namely a secondary school, police station, social hall and a law court.

33. The petitioner averred that the respondents had issued him with a tracing map sheet on 4.4.1998 at the time he was seeking for an electricity supply and that there was no objection then regarding his ownership.

34. Further, the petitioner averred when he learned of the alleged relocation of his land he lodged an A/R objection which was successful but the decision was never implemented by the respondents' and his legitimate expectation that the A/R decision would be implemented have been in vain, and caused him loss, injury and damage.

35. Article 40 of the Constitution provides every person subject to Article 65 of the Constitution has the right to acquire and own land which under sub-article 1 (a) should not be arbitrarily deprived of by the state unless the deprivation results from an acquisition of land, or is for a public purpose or in public interest and is carried out under the Constitution or Act of Parliament that requires prompt payment in full or just compensation and allows such a person recourse to a court of law.

36. Article 47 of the Constitution on the other hand states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further sub article (2) thereof provides that if a right has been or is likely to be adversely affected by an administrative action the person has a right to be given written reasons for the action.

37. In this matter the respondents have admitted that there was no consultation with the petitioner when the decision was made to take away his land and move him away from his developed land. The date the decision, the persons who made it, the reasons and justification thereof has not been submitted to this court as well as the petitioner.

38. The respondents have not denied that there was a demarcation officer by the name Valentine Kimanathi who in 1998 issued a certified sketch map tracing the petitioner's Parcel No. 2168 to sheet map 15/3.

39. Further, even when the petitioner lodged objection no. 1 and the same was determined he was not supplied with the decision depriving him his land in the first instance.

40. What the respondents brought to this court purported to be map sheets were not authenticated, signed, stamped, dated and or certified. They were not also accompanied by any minutes and or registry index maps. The alleged beneficiaries to the petitioners land have also not filed any responses and or produced accompanying official documents from the 1st and 2nd respondents confirming if indeed they sought for and were formally allocated the petitioner's land as public institutions.

41. The 1st respondent on one hand averred that the alleged public institutions have commenced developments while at the same time stated that the petitioner's land which he had developed and continues to occupy was still intact. This makes the explanation by the respondents not doubtful but also unbelievable. The respondents have withheld vital information before this court.

42. In ***Attorney General vs Zinj Ltd (Petition No. 1 of 2020 (2021) KESC 23 KLR (Civ) (3 December 2021) (judgment)*** the Supreme Court of Kenya in interpreting Article 40 (1) & (3) held any compulsory acquisition process had to be commenced with a requisite notice to the registered owners, the public purpose for the acquisition had to be clearly stated and most importantly the resultant acquisition has to be attended with prompt payment in full or just compensation.

43. In ***Zinj Ltd case (supra)***, there was nothing on record to show that any of the mandatory processes under the Constitution had been followed before a portion of the suit land was acquired. The court found the issuance of the title deeds to third parties was unlawful, unprocedural and an egregious violation of the respondents' right to property under Article 40 (3) (a) & (b) of the Constitution.

44. Applying the above principles in this matter, it is not in contention that the petitioner was recorded as the owner of Parcel No. 2168 at the demarcation stage in sheet no. 15/3 measuring 2 acres but the land was re-located to sheet no. 10/16. The land the petitioner continues to occupy was allegedly re-taken and re-adjudicated to public institutions supposedly belonging to the state without notice, just compensation, fair administrative action and in a manner suggesting and/or tantamount to compulsory acquisition.

45. There can be no justification for such utter disregard of the petitioner's constitutional rights as to fair hearing, natural justice and compensation. The petitioner ought to have been notified, summoned and or involved in the deliberations and his views sought on whether he opted for a compensation in monetary terms or by exchange with another portion of land. The decision on what was good for him could not have been made in his absence and or be imposed on him. The petitioner ought to have been notified of the decision leading to his land being taken away and re-adjudicated in favour of any state or public institution formally and his rights to contest the decision in line with the Fair Administrative Action Act.

46. The respondents have not brought before this court the aforesaid proceedings and or decision to take away the petitioner's land. They did not supply the same to the petitioner. In absence of such a decision and reasons for the same there is a presumption under Section 6 of the Fair Administrative Action Act that there were no good reasons available by the respondents to deny him his constitutional rights and freedom as pleaded herein.

47. To further compound, the whole situation the petitioner lodged an A/R objection which the alleged beneficiaries or public institutions did not oppose. A decision was rendered in his favour. To date the said decision has not been implemented despite the petitioner's legitimate expectation that the decision was legal and took effect the moment it was rendered. The respondents have admitted such a decision exists. However they have failed to implement it or give reasons thereof for the non-implementation.

48. In ***Gladys Boss Shollei vs Judicial Service Commission the Supreme Court of Kenya*** held that it was enough for a party to show that a demand letter seeking for reasons for non-implementation or supply of a decision under Article 47 of the Constitution in discharging the burden of proof.

49. In this petition, the respondents have not told this court or the petitioners why they have not implemented their own decision yet the petitioner has a right to an administrative action which is efficient, expeditious and procedurally fair.

50. The respondents were under both a constitutional and a statutory duty to implement a lawful decision made by a lawful officer in execution of a statutory power.

51. Section 6 (4) of the Fair Administrative Action Act requires that the 1st-3rd respondents lawfully execute their mandate and should not unfairly and without lawful excuse delay or fail to act as expected of them under the law and frustrate a party who legitimately expects such decision(s) to be implemented.

52. Flowing from the pleadings herein, it is apparent the 1st – 3rd respondents have grossly abused their discretion, caused manifest injustice to the petitioner and exhibited palpable excess of authority as held in *Kenya Vision 2030 Delivery Board vs Commission on Administrative Justice and 2 others (2021) eKLR* which calls for the court to grant orders for the full implementation of the decision.

53. In *Communication Commission of Kenya & others vs Royal Media Services & 5 others (2014) eKLR* the Supreme Court of Kenya held a legitimate expectation would arise when a body by representation or past practice has aroused an expectation that is within its powers to fulfil.

54. In this matter, an A/R objection decisions under Section 26 of the Land Adjudication Act are done for a purpose. Kenyans expect such decisions worthy something and shall be acted upon. The 1st respondent made a decision in favour of the petitioner after he complained that he had been condemned unheard after his land was taken away for an alleged public purpose.

55. The petitioner expected that the decision would be implemented within a reasonable time so that his land rights could be protected. Unfortunately four years down the line the petitioner was rudely told by the 1st and 2nd respondents that the A/R register was still reading as per pre A/R objection stage. This was contrary to the Land Adjudication Act and the Fair Administration Action Act.

56. In the premises the answer to issues no. 3 & 4 above is that the petitioner has proved violation of his rights and freedoms and is therefore entitled to constitutional reliefs under Article 23 3 (a) (e) & (f) of the Constitution, I therefore proceed to grant the following prayers and reliefs:

(1) A declaration that the proceedings and decision to relocate Parcel No. 2168 of Amwathi/Mutuati II A Adjudication section Igembe North Initially demarcated in favour of the petitioner in map sheet no. 15/3 and re-locate and demarcate it in map sheet no. 1016 and subdivide the petitioner's initial land into parcel no. 9616, 11431, 2163, 2720, 5568 in favour of proposed for Mutuati law courts, social hall, police station, secondary school and open market was unlawful, unprocedural, null and void and unconstitutional.

(2) That an order of mandamus be and is hereby issued compelling the respondents to implement the A/R decision delivered on 25.10.2016 with respect to parcel no. 2168 Amwathi/Mutuati/II A.

(3) Declaration that any registration of sub division regarding Parcel No. 2168 Amwathi/Mutuati II A and subsequent titles that may have been issued contrary to the decision in A/R objection delivered on 25.10.2016, namely Parcels No's 9616, 1143, 2703, 2720 and 5568 are hereby declared invalid, irregular, unlawful and stand cancelled.

(4) An order of mandamus be and is hereby issued directed at the chief land registrar alongside the district land registrar in charge of Igembe North to recall any title deeds for cancellation and or invalidation and to rectify and or amend the Registry Index Map regarding Parcel No. 2168 or its subdivision which was irregularly allowed to subsist despite the non-implementation of the A/R decision made on 25.10.2016 in favour of the petitioner herein.

(5) Costs to the petitioner.

Orders accordingly

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF APRIL, 2022

In presence of:

Muriera holding brief for Mwarania for petitioner

Miss Kendi for respondents

HON. C.K. NZILI

ELC JUDGE