



Mathiu (Suing on His Behalf and on Behalf of 30 Plot Owners at Juja Farm Land Project By Kenya Bankers Sacco Society) v Kenya Bankers Sacco Society Limited & another (Environment & Land Petition E003 of 2021) [2022] KEELC 3270 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION E003 OF 2021**

JG KEMEL, J

MAY 26, 2022

IN THE MATTER OF THE ALLEDGED VIOLATION AND INFRIDGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 2, 3, 10, 35, 40, 42, 43, 46, 47, 50, 73, 75, & 232 OF THE CONSTITUTION OF KENYA. AND THE PUBLIC OFFICER ETHICS ACT (NO 40 OF 2003), THE COMPANIES ACT (CAP 486)

BETWEEN

JAMES KUBAI MATHIU (SUING ON HIS BEHALF AND ON BEHALF OF 30 PLOT OWNERS AT JUJA FARM LAND PROJECT BY KENYA BANKERS SACCO SOCIETY) PETITIONER

AND

KENYA BANKERS SACCO SOCIETY LIMITED 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The petitioners are described as purchasers of various plots from the 1st respondent. James Kubai Mathiu, the petitioners has filed the petition on his behalf and on behalf of the 30 plot owners of Juja Farm Land Project.
2. The 1st respondent is a registered Cooperative Society under the *Societies Act*.
3. The 2nd respondent, the Hon Attorney General, is the Principal Legal Advisor to the Government of Kenya sued pursuant to the provisions of the article 156 of *the Constitution* of Kenya.

The Petitioners case

4. The petitioners case is anchored in interalia articles 2, 10, 35, 40, 43, 73, 75 and 232 of *the Constitution* of Kenya.



5. According to the Petitioners, the basis of their grievance is contractual. It arises from various purchases of plots from the 1st Respondent. At all material times the Petitioners were either members of the 1st Respondent Sacco or purchasers from the original members. That they were invited by the 1st Respondent to purchase parcels of land measuring one acre. That later in 2020 the Petitioners, discovered that, the 1st Respondent, had without their knowledge and consent, unlawfully reduced the acreage of their acquisitions/holdings. For example, the Petitioners averred that on 27/6/2014 he was issued with a certificate of lease in respect to plot No 10823/262 IR 134035 measuring 0.1597 ha.
6. The Petitioners accused the 1st Respondent of inordinate delay in processing their titles within reasonable time thus occasioning them lost opportunities in utilizing their parcels despite having paid the purchase price and submitting the relevant changes in time. They charged that the 1st Respondents were obligated to ensure that they received titles with correct acreage.
7. That the reduction of their acreage without compensation was in contravention of article 40 of *the constitution* which protects the right to property in land. That they were deprived of their land without justifiable cause thus leading to arbitrary deprivation which is disavowed in *the constitution*. That the 1st Respondent failed to involve them in the decision to reduce their acreage nor availed any information to them with respect to the aforesaid action contrary to the provisions of article 10 and 35 of *the Constitution*; That their economic and social rights to health food water and social security and education has been violated contrary to the guarantees found in article 43 of *the constitution*.
8. The petition was supported by the verifying affidavit of James Kubai Mathiu sworn on the 13/1/2021 who deponed that he has the authority of the co Petitioners to file the petition on his behalf and that of the 29 co-petitioners. He rehashed the contents of the petition and added that the 2nd Respondent was obligated to ensure that the District Land Registrar of the Ministry of Lands & Physical Planning in Kiambu performed their responsibilities.
9. In a further affidavit sworn on the 17/2/2022 by Henry Karauka Advocate on behalf of the Petitioners, the deponent averred that the 1st and 2nd Respondents being under a legal duty to verify the correct and accurate acreage of the Petitioners lands failed refused and or neglected to allow land surveyors to carry out the said verifications. That the continued occupation and alienation of part of the Petitioners lands is tantamount to continued trespass that cannot be statured barred.
10. In their rather brief submissions, the Petitioners contended that their averments in the petition have not been controverted and that the Respondents have conceded that the acreage of their parcels was not verified and also admitted the inordinate delay in processing the titles and that interalia the Respondents have failed to demonstrate that the Petitioners got titles with the correct acreage.
11. As to whether the Petitioners petition is merited, they relied on the case of Supreme Court of Kenya in Attorney General Vs Zinj Limited (2021) where the judges upheld the provisions of Art 40 of *the constitution* and ordered compensation and damages in respect of the acquired property. They also relied on the case of Dr *Ben Mutungi Mathiora Vs Marion Muthamia Kiara* (2017) where the Court of Appeal held that section 23 (1) of the then *Registration of Titles Act* gives an absolute and indefeasible title to the owner of the property. That section 4(2) of the *Limitations Act* does not apply on continuing trespass within the meaning of the *Trespass Act*.
12. As to whether the Petitioners are entitled to the reliefs sought, the Petitioners were persuaded that the court has jurisdiction under *the constitution* and the provisions of the *Environment and Land Court Act* to grant the reliefs sought. They exulted the Court to so grant.



13. Whilst citing the various provisions of *the constitution* already alluded the Petitioners urged the Court to hold that the said provisions had been violated and proceed to allow the petition.
14. The Petitioners prayed that;
 - a. A declaration that the 1st Respondent has a legal obligation to safeguard the Petitioners' land and ensure its alienation and/or use is according their trust and in furtherance of common good by the Petitioners.
 - b. A declaration that the wrongful deduction of acreage, alienation, transfer and/or encumbrance of the suit premises by the Respondents violated the constitutional rights of the Petitioners to property (sic).
 - c. A mandatory order directing the 2nd Respondent to discharge its statutory duty and forthwith ensure that the Petitioners are issued with title documents in respect of their correct land premises by the District Land Registrar, Kiambu upon survey of the said premises by the County Surveyor, Kiambu.
 - d. An order for general damages and compensation for the losses suffered by the Petitioners due to the unconstitutional acts of the 1st Respondent be paid based on the acreage reduced and the prevailing market value of the Petitioners' property.
 - e. Any further remedy that this Honorable Court may deem fit to grant hereof.
 - f. Costs of the petition.

The 1st Respondents case

15. In opposing the petition, 1st Respondent denied the Petitioners claims and contend that the sale and subdivision was conducted lawfully. That the allegation of reduced acreage is not supported in evidence and further contended that the issues dealing with land transfers subdivisions land sizes are the forte of the Ministry of Lands and not the SACCO. That any delay in processing of the titles was occasioned by the processes in the Ministry of lands and not of their making. That in any event the Petitioners took immediate possession of the parcels on signing of the agreements with majority of them developing the said properties and the claim of loss of economic utility of the land cannot arise as the Petitioners are already in possession of the same. Finally, that it lacks the capacity to ensure the acreage on the ground tallies with that in the title since the same can only be done by a qualified surveyor whom they engaged for the purpose.
16. With respect to the allegations of constitutional violations, the 1st Respondent denied the said allegations and sought to put the Petitioners to strict proof of the same. Inter alia that the claims in the face of the petition does not disclose any constitutional violations to warrant the issuance of the reliefs sought. That the issue of ascertainment of land acreage is an administrative function of the Ministry of lands and Physical Planning.
17. The 1st Respondent's Chief Executive Officer Elijah Odede also filed a Replying Affidavit sworn on 17/9/2021. He conceded that the 1st Respondent invited the Petitioners to purchase various plots in Juja through the balloting system which was conducted publicly and witnessed by a presiding officer who filled the particulars of every successful allottee on the ballot. That thereafter the 1st Respondent and the Petitioners entered into specific agreements for the sale of specific plots and acreages. That the Petitioners were requested variously to confirm the land reference numbers deed plan numbers and respective names in the documents they were holding for purposes of title processing. That



- the Petitioners confirmed the said particulars and no objections were raised. That thereafter the 1st Respondent submitted the transfers for assessment of stamp duty by the chief valuer. The titles having been processed the Petitioners were informed around the 25/6/2012 through letters sent to them asking them to clear outstanding balances to facilitate the release of the titles to them. Finally, that the titles were processed legally and the delay was occasioned by the ministry of Lands and not on its side.
18. It was submitted on behalf of the 1st Respondent that it invited the Petitioners to purchase various plots in Juja through balloting on various dates after which they entered into specific agreements for sale for the plots with specific acreages. That on confirmation of each plot owner's details including payment of all outstanding payments the titles were issued to the Petitioners. It is the 1st Respondents case that the claim of reduction in acreage is unfounded and that the delay in processing the titles was occasioned by the ministry of lands and therefore it cannot be blamed for it.
 19. With respect to the various provisions of *the constitution* relied by the Petitioners in their claim, the 1st Respondent relied on the case of Anarita Karimi Njeru vs Republic and urged the Court to find that the constitutional threshold that constitutional violations must be pleaded with reasonable degree of precision.
 20. It was further submitted that the said principle was reaffirmed in the case of *Mumo Matemu vs The Trusted Society of Human rights alliance & 5 others* (2013)eKLR where the Court stated as follows;
‘.. the principle in Anarita karimi njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.’
 21. That the petition fell short in disclosing with reasonable degree of precision the actions of the Petitioners complained about in relation with the constitutional provisions cited. That they have failed to demonstrate how their individual rights were violated.
 22. Further it was submitted on behalf of the 1st Respondent that to the contrary the Petitioners were involved and participated in the process of title processing and indeed confirmed their particulars including the acreage and payment balances before they were issued with titles. That no objection was raised by any of the Petitioners.
 23. Similarly, it was submitted that consequently the Petitioners are not deserving of any of the reliefs sought in the petition on account of their failure to prove any violation of their constitutional rights.

The 2nd Respondent's case

24. In opposing the petition, the 2nd Respondent herein, the Hon Attorney General, relied on the following grounds of opposition;
 - a. That the petition as drawn does not meet the threshold of constitutional litigation as it does not disclose any public law issues. It falls squarely in the realm of private law.
 - b. That the petition does not disclose any constitutional violation by the 2nd Respondent or the government officers upon the Petitioners.
 - c. That the petition does not disclose any reasonable cause of action against the 2nd Respondent and is liable for striking out.
 - d. That the petition is misconceived incompetent and bad in law and an open abuse of the process of the Court process.
 - e. That the petition and the Petitioners supporting affidavit make baseless and unsubstantiated claims against the 2nd Respondent.



25. Despite directions having been taken, the 2nd Respondent failed to file any written submissions to the petition.

Analysis and determination.

26. Having read and considered the Petition, the rival affidavit evidence and the written submissions the issues that commend themselves for determination in my considered view are;
- a. Whether the petition meets the constitutional threshold
 - b. If yes, whether the Petitioners have proven the alleged violations against the Respondents.
 - c. What orders should the Court grant
 - d. Who meets the costs of the petition?
27. The gist of the instant Petition is that the Petitioners purchased various plots of land from the 1st Respondent and/or from persons who had earlier purchased the subject lands from the 1st Respondent. That they received their titles in or about June 2014 but upon visiting the subject lands in November 2020, they discovered that the acreage was less what they had agreed to purchase. They accused the 1st Respondent of unlawfully and unjustifiably reducing the impugned acreage.
28. The 1st Respondent vehemently denies the accusations levelled against it. It maintained that the sale of the various plots was legally done in accordance with the governing laws and the Petitioners were well informed of the processes. That they acknowledged their plots as shown in the land reference numbers, deed plans by submitting their personal documents for purposes of registration. That the issue of acreage is a qualified surveyor's expertise who was engaged and in any event the acreage is always given as an approximate.
29. The Petitioners have not claimed that they did not receive the plots of land they bought from the 1st Respondent. I have carefully examined and analyzed the affidavit evidence annexed by the Petitioners in support of the petition. An example is the ballot for Agnes Nyawira Miano which shows that the land purchased is LR No. 10823/193 measuring 0.5 of an acre. Contrary to the averments of the Petitioners that they executed sale agreements and land transfers, I find that none were annexed to enable the Court to form an opinion on the same. Not even the title for this property was produced to demonstrate that the acreage in the agreement of sale, the ballot and the title are at variance. Some of the ballot papers for example in the name of James K. Mathiu are blank with respect to the acreage. However the sale agreement, transfer of land and copy of the title was not annexed to show the acreage of the land. Their case is that the sizes of the plots are not what they signed for. In the case of Anne Nduku Muthusi vide a land transfer dated the 24/5/2008 the size of the land is not indicated on the face of the agreement save that reference is made to deed plan No 242821 annexed to the copy of the title. The acreage disclosed in the deed plan is 0.157 ha or 0.4 acres.
30. The totality of my analysis is that the Petitioners failed to tender evidence of the actual acreage of the impugned plots vis-à-vis the 'reduced' acreage by the 1st Respondent.
31. With respect to the objection raised and as rightly submitted by the 1st Respondent the legal threshold for constitutional petitions was set out in out in the Anarita Karimi Njeru case supra where the Court held that;

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of



which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

32. That principle was affirmed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the Learned Judges emphasized that;

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated....”

33. The Court of Appeal further added;

“(43) The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st Respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the Respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to.”

34. Applying the above tests, it is not in doubt that the Petitioners save for citing the aforementioned constitutional provisions in para. 4 above, have not succinctly demonstrated how those rights were violated/infringed and by whom.

35. Recently the Learned Judge Korir in the case of *George Ragui Karanja (Suing as Director of Interactive Advertising Limited) v Central Bank of Kenya; Equity Bank Kenya Limited (Interested Party)* [2021] eKLR emphasized that;

“In a constitutional petition, the Petitioners is required to plead with clarity the rights alleged to have been violated by the Respondent, the constitutional provisions infringed by the impugned action, the nature of the injury sustained and the relief sought. This will not only give the sued party an opportunity to directly respond to the issues raised but will also help the Court to understand and properly adjudicate the dispute between the parties.”



36. In the persuasive decision in the case of *Evans Ladtema Muswahili v Vihiga County Public Service Board & 2 Others; Marley Ezekiel Ayiego (Interested Party)* [2021] eKLR while dismissing a petition for want of precision of the alleged infringement of facts the Court held;

“The foundation of the Petitioners’ case ought to be the facts upon which the petition is founded. A cause without a factual foundation or basis has no legs to stand on. A spectacular legal or constitutional basis cannot save it, for the constitutional or legal basis is, itself, supposed to be founded on a factual background. Lack of a factual basis embarrasses the Respondents, in terms of what they are expected to respond to; and to the Court in terms of understanding the actual or real issues in dispute. Parties should always be alive to the fact that they may, both sides, be privy to all the facts in the matter at hand, but the Court is never privy to the same. It should not be expected that the Court would somehow get to discover or unearth those facts. Kenya is not a civil law jurisdiction. It is not for the Court to dig out the facts. It is up to the parties to them bring out, so as to assist the Court do justice based on those facts. Where facts are not fully disclosed there is a gap, a deficiency, and it would be pretentious to assume that the Court would do justice when it only has half of the facts.”

37. Before I pen off I wish to distinguish this case with the Supreme Court of Kenya decision in the case of *Attorney General Vs Zinj Limited* (2021). The distinction is on the basis that the Respondent in the SCOCK case had a title to the suit land. In this case the Petitioners case is that they purchased land and later realized that the acreage was not correct. It must be noted that it is not clear what acreage the Petitioners are claiming. In para 4 of the said petition the Petitioners aver that they were given the opportunity to buy ‘one acre of half acre.’ The same averment is repeated in para 9 of the supporting affidavit of the 1st Petitioner. It is not clear whether the acreage was one acre or half acre or one and half acres. Parties are bound by their pleadings.

38. Having said so, to my mind, this is a case clothe in constitutional apparel when it is simply a civil suit grounded on contract for the sale of land. In other words it is a case grounded on breach of contract, pure and simple. Needless to state, the Petitioners have not demonstrated how their rights and fundamental freedoms have been violated, the manner of the infringement and by whom. Their case is that they were invited to purchase land, they balloted in 2000, confirmed their particulars, were issued with titles in 2008 and alas! in the month of November 2020 they discovered that the acreage of land they purchased is incorrect. Such a case is best brought as an ordinary Civil suit so that parties may present evidence in support of the facts which can be tested by way of cross examination to proof their claims.

39. It is the finding of the court that this petition fails for failure to meet the legal threshold for a constitutional petition.

40. In the upshot the petition fails. It is struck out.

41. The costs shall be payable by the Petitioners.

42. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 26TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;



Kurauka for the Petitioners

Kimathi holding brief for Ndungu for the 1st Respondent

2nd Respondent – Absent

Court Assistant - Phyllis

