



Mwangi & 9 others v Attorney General & 3 others; Joseph Kuria Njuguna & 265 others (Interested Party) (Environment & Land Petition 146 of 2018) [2022] KEELC 84 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEELC 84 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 146 OF 2018**

FM NJOROGE, J

MAY 26, 2022

BETWEEN

IRENE KANYI MWANGI 1ST PETITIONER
MARY NYAMBURA MUGO 2ND PETITIONER
WANGECHI MBURU 3RD PETITIONER
WINNIE MUTHONI 4TH PETITIONER
HELLEN NYAGATI MUREITHI 5TH PETITIONER
ZIPPORAH WARINGA 6TH PETITIONER
HARIET WANJIRU 7TH PETITIONER
LOISE WANJIKU 8TH PETITIONER
MARY WANGARI W/O OWEN NDUNGU 9TH PETITIONER
PENNINAH WANGUI NDUNGU D/O OWEN NDUNGU 10TH PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT
PERMANENT SECRETARY, MINISTRY OF LANDS AND SETTLEMENT 2ND RESPONDENT
PERMANENT SECRETARY, MINISTRY OF SPECIAL PROGRAMMES 3RD RESPONDENT
PHILLIP KAMAU NJOROGE 4TH RESPONDENT

AND

JOSEPH KURIA NJUGUNA & 265 OTHERS INTERESTED PARTY



(FORMERLY PET. NO 26 OF 2011)

JUDGMENT

1. The petitioners commenced this action by way of a Petition dated 16/09/2011 filed on 19/09/2011. They later file an amended petition on 07.02.2020 in which they sought following orders:
 - a. The petitioners fundamental rights and freedoms more so as set out in Article 40(3) (a)(b)(i) & (ii), (4) (right to own property) and Article 10, 22, 27(1), (2), (3), (4) and (5), 28, 35, 40, 43, 45 (right and freedom against discrimination) were violated.
 - b. The government of Kenya and the purported seller be ordered to stop and cease with immediate effect from engaging in any transaction whatsoever regarding the transfer of ownership of the said land.
 - c. The petitioners are the rightful and legal owners of 239.6 acres out of LR No. 6507 Ndonga Farm Subukia.
 - d. The restoration of 239.2 acres to the petitioners.
 - e. A perpetual injunction restraining the respondents by themselves, their agents and/or servants from taking possession and or ownership, subdividing, allocating, dispossessing or in any other manner interfering with the Petitioners' possession, use, occupation, or ownership of Ndonga Farm Subukia No. LR 6507 (Original No. 2676/2)
 - f. An order of eviction do issue against the interested parties.
 - g. The petitioners are entitled to general damages.
 - h. The costs of this petition be awarded to the petitioners.
 - i. Such other orders as this honorable court shall deem just.

The Petition

2. The 1st to 8th petitioners are daughters to the late Benjamin Njoroge Wamanji (deceased) while the 9th petitioner is the daughter-in-law to the deceased as she was the wife to his son Owen Ndungu Njoroge. The 10th Petitioner is the daughter of Owen Ndungu Njoroge. According to the petitioners, after the death of Benjamin Njoroge Wamanji, Succession Cause No. 84 of 1994 was filed and a certificate of confirmation of grant was issued on 2/12/1997. It was averred that the 4th respondent is a brother to the petitioners who was the administrator of the deceased estate and the grant was issued to him. It was averred that among the properties that the deceased left behind was Ndonga Farm Subukia No. LR 6507 and that pursuant to the grant, the 1st to 8th petitioners were supposed to inherit 16.2 acres each.
3. It was also averred that the 9th petitioner's husband, the late Owen Ndungu inherited 220 acres and bequeathed 80 acres to the 9th petitioner and 30 acres to the 10th petitioner. They averred that the total number of acres they were claiming was 239.6 acres which they had taken possession of. That on 8/08/2011, the 2nd petitioner received a letter from Rachier & Amollo Advocates claiming that they had received instructions from the petitioners elder brother and administrator of the deceased estate to sell the said parcel of land and distribute the proceeds to the heirs of the deceased.



4. They further averred that the letter stated that the 2nd petitioner was entitled to Kshs. 1,655,640/=; that the 4th respondent was the vendor in the transaction that is subject to this petition. The petitioners aver that the 4th respondent admits to benefitting from the proceeds despite also claiming to have been defrauded by the other respondents. That the petitioners were never consulted nor their consent sought and so the transaction was fraudulent and illegal as the due procedure of the law was not followed. They averred that they were aware that the government of Kenya was in the process of resettling internally displaced persons on the said parcel of land illegally.
5. It was averred that since the petitioners are all females, the issue of gender discrimination cannot be ruled out contrary to Article 27(1), (2), (3), (4) and 5 of *the Constitution* of Kenya. They also averred that they have been subjected to inhumane and degrading acts by being fraudulently deprived of valuable land and have been denied usage by the respondents.

Response to the Petition

6. In response to the petition, the 1st, 2nd and 3rd respondents filed a replying affidavit sworn on 27/10/2011 and filed on 28/10/2011. It was sworn by Esther Nadupoi Ogega, the Director of Land Adjudication and Settlement in the Ministry of Lands. She deposed that land parcel No. LR 6507/IR 2195 was registered in the name of Benjamin Njoroge Wamanji (Deceased); that the Nakuru High Court Succession Cause No. 84 of 1994 disposed of the estate of the late Benjamin Njoroge Wamanji and the administrator was Philip Kamau Njoroge; that the grant was confirmed on 2/12/1997; that the negotiations for sale begun in the year 2009 through the lawyers for the vendor who were Kahari & Kiai Advocates; that the purchase price was greed at Kshs. 75,000/= per acre for the 655 acres on offer for sale; that the vendors declined to execute the sale agreement and changed their advocates to Rachier & Amollo Advocates; that the matter was then referred to the Interministerial Committee of Permanent Secretaries that recommended a team to be appointed to renegotiate with the land owners who had rejected the government offer; that the team recommended the price of Kshs. 130,000/= per acre for the 750 acres that were on offer; that the draft sale agreement was forwarded to the Attorney General on 28.06.2011 and on 29.06.2011 a response was given that the draft sale agreement was legally in order; that the sale agreement was executed and upon payment of 10% down payment, the vendor surrendered the title deed and the transfer was effected to the Settlement Fund Trustees; that the purchase of the land in question was initiated in 2009 and ended in August 2011 after following all the laid down procurement procedures; that the power of attorney in favour of the administrator of the estate the late Benjamin Njoroge Wamaji was executed by the beneficiaries of the said estate that included the petitioners herein; that the negotiations took a period of two years which was sufficient time for anyone to raise an objection and that the petition is an afterthought that is meant to frustrate the efforts of the government to re-settle the internally displaced persons.
7. The interested parties filed a response to the petition dated 16/03/2017. They denied the contents of the petition and stated that they have been in occupation of the disputed parcel of land from 15/09/2011 to date; that as at 15/09/2011 the suit land was unoccupied and that they have since put up structures and other developments on the land; that the petitioners duly donated their power to the vendor on 10/01/2011 by authorizing him to deal with the suit property; that the Settlement Fund Trustees through the government of Kenya purchased the suit land from Mr Philip Kamau Njoroge; that an agreement for sale to that effect was drawn and signed by both the vendor and purchaser on 03/08/2011 and a transfer form was drawn and signed and that Philip Kamau Njoroge was therefore empowered to deal with the suit property by virtue of a power of attorney dated 10/01/2011 which was registered at the Nairobi Land Titles Registry as P/A 56433. They further aver that on 8/02/2013



- Christopher Kariuki who is the son to the 9th Petitioner entered the suit property with armed youth with the intention of illegally tilling the land and preventing the applicants from farming the said land.
8. The 4th respondent filed a Replying Affidavit sworn on 25/10/2019 and filed in court on the same day. He averred that he was the administrator of the Estate of Benjamin Njoroge (deceased) who was the owner of land parcel No. IR 6507 (original) 2676 (Ndonga Farm) measuring approximately 755 acres. He averred that sometime in 2010, people from the government approached him and asked him whether he was willing to sell that land to the government. He averred further that the government officers were accompanied by a lady by the name Elizabeth Ndumia and after consultation with his sisters and brother, they agreed that he would the land to the government on condition that the land be sold at Kshs. 500,000/= per acre. He also averred that he communicated to the government about the other beneficiaries' conditions on the sale of the land. That he was informed by Elizabeth Ndumia that the government would send valuers on the land for purposes of valuing it to determine the price per acre.
 9. He also averred that no government valuer ever visited the land. That sometime in the year 2010, Elizabeth Ndumia called him and informed him that the original Title Deed to I.R 2195 and the Letters of Administration were needed by the government and so he took the documents to her in Nairobi. That another meeting was held at the Nakuru Provincial Commissioners Office where land officers from the lands department accompanied by the said Elizabeth Ndumia met with him and when he was asked if he was selling the land, he confirmed that he was selling the land and that the family selling price was not less than Kshs. 500,000/= per acre.
 10. He averred that in 2011 he was called by Elizabeth Ndumia who informed him that the government had released money to Rachiel & A. Amollo Advocates. That when he asked how much the government had released he was informed that the government had paid Kshs. 130,000/= per acre making the total payment of Kshs. 98,150,000/=. That when he protested why it was not Kshs. 500,000/= per acre, he was informed that that was the price of the government and once it had released the money, it cannot reverse the transaction. That when he informed the other beneficiaries, they told him that they would not be taking the money as it would be as if the government was taking the land for free.
 11. He also averred that he has never signed an agreement with the government to sell the land and that if there is any agreement then the same was a forgery. He also stated that he did not sign any power of attorney to act on behalf of any person who has beneficial interest in the suit property and that he has never signed any documents on behalf of the petitioners. He also averred that it is Elizabeth Ndumia and the government officers who had appointed the firm of Rachiel & A. Amollo Advocates to act in the transaction. That Elizabeth Ndumia convinced him to take his share of the money and that if there were any grievances, they would be addressed later. That he therefore opened a bank account in August 2011 and he received Kshs. 33,924,000/=. That he also convinced his brother to receive his share of the money and he received Kshs. 20,200,000/= after sending his account details to Elizabeth Ndumia. He stated that after he received the money, he tried to reach Elizabeth Ndumia in order to put forward his grievances but her phone was off. He therefore sought that the government pays the money agreeable by all the beneficiaries for the 755 acres as he had proposed.
 12. The 1st to 3rd respondents filed a further affidavit sworn by Purity Wanjiru Mwangi the assistant Director of Land Adjudication and Settlement in the Ministry of Lands sworn on 23/11/2021 and filed on 24/11/2021 in further response to the amended petition. She averred that it is not true that the government approached Philip Kamau Njoroge to inquire whether he was willing to sell the land and that it was actually Philip Kamau Njoroge who approached the government after an advertisement of expression of interest to sale arable land to the government in 2009; that Philip Kamau Njoroge negotiated the sale of the suit property through his advocates and they finally agreed at the sum of Kshs.



130,000/= for 750 acres for a total sum of Kshs. 97,500,000/=. She averred that the Settlement Fund Trustee's initial offer was for Kshs. 75,500/= which was in the letter dated 22/10/2010 sent to the 4th respondent. She further averred that the 4th respondent and his advocates who were Joseph Marenya and Wairimu Ndumia from the firm of Rachier Omollo were involved in the negotiations and as per the minutes of the Ministerial Tender Committee, one Elizabeth Ndumia mentioned by the 4th respondent did not take part in the negotiations. That after the purchase price was approved by the Ministerial Tender Committee, the 4th respondent's advocate drafted a sale agreement that was executed by the 4th respondent and the Settlement Fund Trustees and witnessed by advocate Jean Ogola. She averred that the property was valued and that upon payment of 10% of the purchase price on 22/07/2011, the vendors advocate released the original title deed and the land was registered in the name of the Settlement Fund Trustee. That on 4/08/2011, the vendor was paid the remaining 90%. She stated that thereafter, the Ministry of Special Programs resettled 267 internally displaced persons on the land in September 2011 where they reside to date. That all through the negotiations, the sale of the suit property and the resettlement of the internally displaced persons the issue of forgery of signatures did not arise. That the government purchased the property in good faith and that the Power of Attorney is not a forgery and if there was any forgery then the 4th respondent would be solely responsible. That the 4th respondent was always represented by counsel and therefore it was impossible for there to be forgery and she therefore sought for the petition to be dismissed with costs to the 1st and 2nd respondents.

13. The court had earlier directed that the petition be heard by way of written submissions but later that order was revoked and specific directions were issued that it be disposed of by way of viva voce evidence.

The Petitioners Evidence

14. Mary Nyambura Mugo testified as PW1. She adopted her affidavit sworn on 10/04/2019 and filed on 11/04/2019 as part of her evidence. She testified that the 1st to 8th petitioners are her sisters while the 9th petitioner is the wife to her late brother Owen Ndung'u Njoroge and the 10th petitioner Owen Ndung'u's daughter. It was her evidence that the suit property belonged to her late father Benjamin Njoroge Wamanji who passed away in the year 1993.
15. She testified that they obtained grant in respect of his estate in Succession Cause No. 84 of 1994 and the certificate of grant issued on 2/12/1997. That pursuant to that grant she as well as the 1st to 8th petitioners were entitled to 16.2 acres. That her brother Owen was entitled to 220 acres and since he had two wives he gave the 9th petitioner 80 acres and the 10th petitioner 30 acres. That the balance of 110 acres was given to the other wife and her children.
16. It was further her evidence that the farm is situated near Maseno shopping center and comprises of 755 acres. That they had a home on the suit property and some of their relatives were buried on the land. She also testified that their home was destroyed and that they are now in court and want each one of them to get their 16.2 acres. She also testified that in 2011, they got a letter from Rachier & Amollo informing them to go and collect Kshs. 1.6 million. She testified that they did not take the money and later they were informed that the government had taken the land.
17. She testified further that they discovered that Philip Kamau Njoroge had sold the land to the government at a cost of 1.6 Million for each of the 16.2 acres. It was her evidence that they had not permitted him to sell their land. That they were chased away from the land and internally displaced people brought by the government in 2011. She stated that they reported the matter to Subukia Police station and told the police that their land had been sold without their consent. That the police did investigations and found out that their signatures on the power of attorney had been forged. She stated



that their plots had been beacons and that they were waiting for title deeds when the land was sold and so they were claiming 239 acres in total.

18. On cross-examination she confirmed that there are eight sisters and three brothers in the family. She confirmed that out of the 750 acres, those who are claiming 239 acres are the ones disputing the transaction. She restated that she became aware of the sale in August 2011 when she received a letter from Rachier Omollo Advocates and found out that the land she owns which is 16.2 acres had been sold to the government at Ksh. 160,000/= per acre. She admitted that if she was selling at Kshs. 160,000/= per acre, it would not translate to Kshs. 1.6 million. She also confirmed that she was cultivating her portion and that she had a worker on the ground. She admitted that they also had squatters on the property and that she later learnt that their brother Philip had gone to the land with the officers.
19. She also admitted that Philip Kamau is her elder brother who was appointed as an administrator of the estate of their late father and that they had appointed him before they commenced the succession proceedings. She also averred that he had no power to sell anybody's portion without consent; that they are in court because they believe that the sale to the government was not right; that they including their father gave powers of attorney to Philip but they did not authorize him to sell. She also stated that she never signed the sale agreement and that neither did they sit to discuss any purchase price for the sale to the government. She was referred to annexure MOW-IV of her affidavit and stated that the annexure is a letter from DCI which carried out investigations and that the letter referred to a forensic document examiners report which she did not annex.
20. On re-examination she stated that the letter from the DCI stated that the document examiner formed the opinion that the signatures in the powers of attorney had been forged. She also reiterated that she and her sisters never signed any sale agreement; that the value of an acre is over Kshs.160,000/= and that they never met any government officials over the sale; that they did not authorize Philip to sell the land and that their other brother Pharis Machunu who was also allocated a portion of the suit property and is not challenging the sale, was likely part of the sale. She also confirmed that the allocation to her has never been altered by the court.

The 4th Respondent's Evidence

21. The 4th respondent stated that he had sworn a replying affidavit on 25/10/2019. The contents of that affidavit are as analysed earlier in this judgment. On cross-examination he confirmed that his father was Benjamin Njoroge who owned the land before it was sold to the government. He also confirmed that he given a grant in respect of his estate on 2/12/1997. That his sisters Zipporah and Elizabeth got an inheritance in the land of 16.5 acres. He averred that his sisters do not use the land and that they rejected the money that was paid for their portions. He stated that he did not allow the government to enter the land before the agreement was entered into.
22. He confirmed that he did not know Mr Ombati the advocate who attested to the power of attorney; that he never went to the offices of Rachiel Advocates or Kiai & Co. Advocates; that his sisters never signed the power of attorney and that Peninah the 10th petitioner is the daughter of his late brother Owen and that he did not secure any grant to Owen's estate before dealing with the government.
23. He stated that the money that was paid to the advocates was little and that his share of the money was paid to his account and he had used it. He also confirmed that his brother Phares Muchuru also received his portion of the money. He admitted that in his affidavit he spoke of Elizabeth Ndumia who had allegedly told him that she was from the Lands office but that he did not get a chance to have a look at her workplace ID. He also admitted that he cannot confirm whether Elizabeth worked



at the Ministry of Lands. She took him to the Provincial Commissioner's office. He confirmed that Elizabeth handled everything as she showed him the documents to sign and that he also did not know who the advocates were. He admitted that he was told that the money was with the advocates who gave him a schedule of payments when he went to their offices. That the money paid to his account was paid in by Elizabeth but he did not have the statements with him to prove that. He stated that he did not sue because they would negotiate as the money the government paid was less than what they had agreed. He also admitted that they agreed as a family to sell the land and that he was the spokesperson in the transactions. He was shown the sale agreement annexed to Purity W. Mwangi's affidavit as PWM-3 and he confirmed that that was his signature on the copy of the agreement. He stated that he did not know the other signatures on the document and also confirmed that he signed many documents. He admitted that his two brothers did not sign and that his sisters had consented to the transaction; that they had agreed that the consideration would be Kshs. 500,000/= and that he went to Rachier & Amollo advocates to complain about the money; he stated that he had never gone to Rachier & Amollo over any agreement. When he was shown the power of attorney he stated that he was not familiar with it but then also admitted that the names of the beneficiaries of his father's estate were listed thereon. He also confirmed that he gave the title deed to Elizabeth and restated that they had agreed to sale the property and only disagreed on the amount to be paid.

24. On re-examination he restated that he did not know anything about the power of attorney and when he was referred to PWM 2 he also stated that he did not know that the minutes existed; that he spoke to the government through Elizabeth and that the land was 755 acres. Submissions
25. The petitioners filed their submissions dated 6/12/2021 on 25/01/2022. They gave a background of the matter and identified the following issues for determination: whether the property herein belonged to the 4th respondent/vendor, whether the 4th respondent had locus standi to transact with the grant and the title deed without court orders and or consent of the beneficiaries, more so 9th and 10th, whether the respondents were innocent purchasers and for value, whether the power of attorney dated 10/01/2011 is valid, whether the sale agreement dated 14/07/2011 was for 755 acres or 650 acres as per the valuation report, whether there was a competent valuation, whether the petition is proven and whether the answers to the petition are plausible and whether the reliefs sought are meet.
26. They submitted that the original owner of the suit property was Benjamin Wamanji Njoroge (deceased) who was the father of the 1st to 8th petitioners, father in law to the 9th petitioner and grandfather to the 10th petitioner. They submitted that he was also the father of the 10th petitioner who was also the administrator of his estate by the grant dated 2/12/1997. That before the estate could be distributed, the 4th respondent entered into an agreement to sell the suit property on the strength of a power of attorney dated 10/01/2011. It was submitted that the inherited parcel of land was a singular unit and until subdivision and distribution, the 4th respondent had no capacity in law to sell it. The petitioners relied on Sections 71(1)(3) and 43 of the Law of Succession Act and the cases of In Re Estate of Thiaka Benjamin (Deceased) [2020] eKLR and In Re Estate of Chirigu Kangerue (Deceased) [2021] eKLR. They submitted further that they were not consulted before the sale was done and that they were not aware of any power of attorney. In conclusion they sought that the petition be allowed as prayed.
27. The 1st, 2nd and 3rd Respondents filed their submissions dated 17/01/2022 on 18/01/2022. They gave a background of the matter and identified the following issues for determination: Whether proper procedure was followed in acquiring 755 acres of LR 6507 (Original No. 2676/2), whether the 1st, 2nd and 3rd respondents engaged in the fraud alleged by the petitioners, whether the Settlement Fund Trustees was a bona fide purchaser for value and whether the petitioners are entitled to the reliefs sought.



28. On whether the proper procedure was followed in acquiring 755 acres of LR 6507 (Original No. 2676/2), it was submitted that the 4th respondent as an administrator of Benjamin Njoroge Wamanji (deceased) who was the owner of the suit property had the proper authority to execute the agreement as he also had a registered specific power of attorney and that they were not aware of any irregularities in the sale.
29. On whether the 1st, 2nd and 3rd respondents engaged in fraud as alleged by the petitioners, it was submitted that if there was any fraud, it was occasioned by the 4th respondent and that further the allegation of fraud has not been proved. They relied on the case of *Ndolo v Ndolo* [2008] 1KLR (G & f) 742 amongst other cases.
30. On whether the Settlement Fund Trustee is a bona fide purchaser for value, the 1st, 2nd and 3rd respondents relied on the case of *Katende v Haridar & Company Limited* [2008] 2 E. A 173 and submitted that the land was purchased without notice of any fraud. On whether the petitioners are entitled to the reliefs sought, it was submitted that they have not violated the petitioners' rights.
31. The interested parties filed their submissions dated 12/01/2022 on 13/01/2022. They gave an introduction of the matter and submitted on whether there exists other sufficient and adequate avenue to resolve the dispute and/or whether the matter is properly before the court as a constitutional petition. They relied on the case of *Raila Amolo Odinga & anor v IEBC & 4 others* Petition No 1 of 2014 and submitted that the standard of proof required in this matter is higher than that of a balance of probabilities. Another issue that they submitted on was as to whether every other dispute involving land should be turned into a constitutional matter where ample avenues are available. They relied on the case of *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR and submitted that there are other avenues the petitioners could have explored before making it a constitutional issue. They also submitted that the petition herein is incompetent for want of precision and on whether the amended petition offends the principles in the *Anarita Karimi* Case. After submitting that the Settlement Funds Trustee was a bona fide purchaser they sought that the petition be dismissed with costs to the interested parties.
32. The 4th Respondent filed his submissions dated 17/01/2022 on 24/01/2022 and gave a background of the matter and submitted that he did not sign the sale agreement and that he did not authorize any advocate to negotiate the sale for him. In conclusion he submitted that sale was irregular and that it should be reversed and commenced afresh while involving all the beneficiaries.

Analysis and Determination

33. After considering the petition, the replying affidavits, the evidence and submissions, it is my view that the issues for determination are whether this petition meets the threshold of a constitutional petition and whether the petitioners are entitled to the reliefs sought.
34. In the present petition, the 1st to 8th petitioners are the daughters of the late Benjamin Njoroge Wamanji who was the registered owner of the suit property. The 9th petitioner is the daughter-in-law of the deceased while the 10th petitioner is the granddaughter of the deceased. After the death of the deceased, the 4th respondent who is also a brother to the petitioners was appointed as the administrator of the estate of his estate. The 4th respondent sold the suit property to Settlement Funds Trustee on the strength of a power of attorney which is now disputed by the petitioners. The petitioners are in effect challenging the sale by stating that they were not consulted. In their amended petition, they stated that by virtue that they are all females, the issue of gender discrimination cannot be ruled out which is contrary to Article 27 of *the Constitution*.



35. On whether this petition meets the constitutional threshold of a constitutional petition, it is observed that the court in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR stated as follows:

“...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 a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they alleged to be infringed.”

36. The Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR reaffirmed the principle articulated in the case of *Anarita Karimi Njeru* (supra) as follows:

“(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. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent.”

37. The court also in the case of *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another* [2018] eKLR stated as follows in instances where there could be an alternative remedy in lieu of constitutional remedies:

“65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.”

38. It is my view that the main issue that the petitioners are raising in the petition is the manner in which the suit property was sold which matter is not for the constitutional court to determine. Further the petition pleads that the provisions of *the constitution* that they allege were breached are Articles 27, (1) (2) (3) (4) and (5) of *the Constitution* of Kenya. As to how their rights therein were violated the petitioners simply state that given the fact that all of them are female, the “issue of gender discrimination can not be ruled out” which in my view is extremely speculative.

39. In this court’s view, the petition as pleaded does not satisfy the threshold necessary for a constitutional petition. The pleadings ought to have adequately set out the particulars of the alleged violations while relating them to the constitutional provisions that are said to be violated. Simply taking the stance that



there could be a probability that since all the petitioners are of the female gender they could have been discriminated by the acts and omissions of the respondents is grossly inadequate pleading.

40. There is also no specific pleading of the provisions under which their claim of inhumane and degrading treatment has been brought, or the manner in which the respondents acted which amounted to such treatment. This is an ordinary land dispute cloaked as a constitutional petition.
41. It is my opinion therefore that this petition falls short of the threshold established in the case of *Anarita Karimi Njeru* (*supra*) and it will not be necessary to consider it on its merits.
42. Consequently, I hereby dismiss the amended petition dated 7/2/2020 with no orders as to costs. I also grant the petitioners leave to institute a civil claim by way of plaint in respect of the subject matter of these proceedings if they deem it fit to do so, and I order that the time within which the petitioners should file that civil claim is hereby extended by 6 (six) months from the date of this judgment failure to which the leave shall automatically lapse.

It is so ordered.

Dated, signed and issued at Nakuru via electronic mail on this 26th day of May, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

