



**Gatheru v Laikipia County Government (Environment and Land Constitutional
Petition 7 of 2015) [2022] KEELC 12649 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 12649 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 7 OF 2015**

JO OLOLA, J

MAY 19, 2022

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS PURSUANT TO ARTICLE 40(1)(2)(3) AND 47(1) OF THE
CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND
ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2012**

BETWEEN

STEPHEN GATHERU PETITIONER

AND

COUNTY GOVERNMENT OF LAIKIPIA RESPONDENT

JUDGMENT

Introduction.

1. The petitioner herein, filed this petition seeking judgment against the respondent for:-
 - (i) A declaration that he is the lawful, legal and sole owner of the parcel of land known as Plot No TOL 8 Old Market in Laikipia County (Suit land).
 - (ii) An order of permanent injunction to restrain the respondent by itself, its agents, employees, successors in title or anyone acting on its behalf from demolishing the developments, buildings, houses, structures on the suit land or depriving him ownership and enjoyment of the suit land;
 - (iii) A declaration that his constitutional right to protection of the right to own property has been violated;
 - (iv) A declaration that his right to a fair administrative action has been violated and
 - (v) Such other orders that the court may deem just and expedient in the circumstances to grant in order to serve the ends of justice.



2. As can be discerned from the averments on the face of the petition and the affidavit sworn in support of the petition, the petitioner who has described himself as the registered owner of the suit land and claims that he has been in use and occupation of the suit land since 1997, complains that the respondent has encroached into the suit land and hived off almost half of the suit land under the guise of expansion of Nanyuki open air market.
3. The petitioner further complains that the respondent intends to unlawfully demolish the developments he has effected in the suit land; that the area Member of County Assembly (MCA) has incited traders in the open air market to harm him and that attempts to resolve the dispute have not borne any fruits.
4. It is the petitioner's case that his fundamental right to own property and protection of that right is threatened with violation; that his right to a fair, lawful, reasonable and procedurally fair administrative action has been denied and that he is apprehensive that the suit land will be unlawfully taken away from him by the respondent.
5. In support of the averments contained in the petition and the affidavit, the petitioner has annexed the following documents to the affidavit:-
 - (i) Letter from the town clerk, Municipal Council of Nanyuki, to the petitioner, Stephen Gatheru Ref NMC/CON/P/8 dated January 19, 2002 in which the clerk confirms to the petitioner that he had been allocated plot No 8 and advised him to confine his construction within the plot boundary;
 - (ii) Letter from clerk, Nanyuki Municipal Council to the Petitioner, Stephen Gatheru dated March 12, 1997 informing the petitioner that the council was in the process of converting the T O Ls (Temporary Occupation Licences) to long term leases and requesting him to produce his ownership documents and ensure he had paid council dues in order to be considered for conversion of his T O L to a long term lease.
 - (iii) Copy of the proposed open air market stalls lay out plan revised in May 2005;
 - (iv) Approved development plan for proposed typical plan for open air market stalls;
 - (v) Property rates payment requests;
 - (vi) Receipts Nos H75092 and 131197 for Kshs 200 and 2000/- respectively.
6. The petition is opposed through the replying affidavit of Ekwam Nabos, the respondent's Chief Officer, Trade Tourism Enterprises and Cooperative Development, on the following grounds:-
 - (i) The petitioner's ownership of the suit land is being addressed (investigated to ascertain its authenticity) by the respondent;
 - (ii) That the petitioner is misusing the law to further his selfish interests;
 - (iii) The respondent has not breached any law as alleged and has endeavoured to ensure that the law is strictly adhered to;
 - (iv) That the County Assembly (CA) of Laikipia through the Transport and Public Works Committee deliberated the issue and made recommendation on the suit land;
 - (v) That the subject matter of this suit is still under deliberation and investigation by the County Assembly of Laikipia;



- (vi) That this suit to the extent that it seeks to curtail and/or stop the County Assembly from carrying out its mandate of advancing its constituent's interests is misplaced;
 - (vii) That the investigation by the County Assembly resulted in demarcation of Nanyuki Open Air Market as per the Nanyuki Part Development Plan; and
 - (viii) That the petitioner's apprehension is unfounded because the exercise he is referring to has not made any determination on the revocation or otherwise of the suit land.
7. Pursuant to directions given on July 31, 2018 the petition was disposed of by way of written submissions.

Submissions

The Petitioner's Submissions.

8. In the submissions filed on behalf of the petitioner three issues namely, whether the suit land is private or public land; whether the petitioner's fundamental rights and freedoms under article 22, 40 and 47 of the Constitution have been violated by the respondent and who should bear the costs of the suit are raised.
9. On whether the suit land is private or public land, it is submitted that the petitioner's ownership of the suit land is not denied but stated that the respondent contends that the suit land was illegally allocated to the petitioner and that the circumstances surrounding the allocation of the suit land are under investigation by the CA of Laikipia. Arguing that the CA does not have jurisdiction to investigate alleged illegal allocation of public land, the petitioner submits that the adjudication of the dispute concerning the suit property by the CA of Laikipia is *Ultra vires*. On the issue of ownership of the suit property, it is submitted that the petitioner has produced overwhelming evidence showing that he is the owner of the suit land.
10. Terming the respondent's claim that the suit land was illegally allocated to the petitioner an attempt to grab private land in the guise of advancing public interest, the petitioner maintains that he has made a case for being granted the orders sought.
11. The petitioner relied on the case of James Shikwati Shikuku v County Government of Kakamega & 3 Others ; Isaac Shivachi Mutoka & 2 Others (Interested Parties) eKLR where the court quoted the decision in the case of Arnacherry Limited v Attorney General (2014)eKLR thus:-

“This is indeed a sad and distressing petition. It is not expected that the state, in this age and time and with a robust constitution such as ours, can actively participate in acts of impunity such as the forcible take over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing”.

The Respondent's Submissions.

12. In the submissions filed on behalf of the respondent, it is submitted that this court has jurisdiction to determine the dispute herein; that the petitioner has not proved that he is the registered owner of the suit land and that the petitioner's case does not meet the threshold of a constitutional petition.
13. It is further submitted that there are established mechanisms for addressing the alleged threat to bodily harm of the petitioner; that MCAs are not agents, representatives of the respondents for the respondent to be called upon to answer for their alleged breaches of the law and that no evidence has



been adduced by the petitioner capable of showing that the respondent has taken any adverse action(s) against him.

14. Terming the petition lacking in substratum, devoid of any cause of action within the realm of constitutional law, lacking in evidence, vexatious and frivolous; the respondent urges the court to dismiss it with costs.

Analysis and Determination.

15. From the pleadings filed in this case, the affidavit evidence and the submissions by the parties, I find the following to be the issues for the court's determination,
 - (i) Whether this case is suited as a constitutional petition?
 - (ii) Whether the petitioner has made up a case for being granted the orders sought or any of them?
 - (iii) What is the order as to costs.
16. On whether this case is suited as a constitutional petition, on behalf of the respondent, it is submitted that a constitutional petition ought to demonstrate that there is a likelihood that a fundamental freedom provided for under the Constitution is being denied, violated or infringed or threatened or likely to be affected by conduct of the respondent or its agents and based on the circumstances of this case submitted that the petition herein is lacking in substratum, devoid of any cause of action within the realm of constitutional law, lacking in evidence, vexatious and frivolous in the least.
17. The petitioner is said to have failed to adduce any evidence in support of his case. The evidence adduced is said to be irrelevant to the subject matter before the court. It is contended that the petitioner seeks to abet illegal allocation of public land.
18. On his part, the petitioner maintains that he has through evidence proved that he is the registered owner of the suit property and that the respondent has threatened to interfere with his ownership rights of the suit land by hiving off parts thereof for extension of Nanyuki Open Air Market.
19. The ingredients of a constitutional petition were formulated in the case of Anarita Karimi Njeru v Republic (1979) eKLR where it was partly stated as follows: -

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

Similarly, in the case of Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR the court stated that: -

- (42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure



Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. 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. What Jessel, M R said in 1876 in the case of *Thorpe v Holdsworth* (1876) 3 Ch D 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

- (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. 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.”
23. It should be noted the case of *Anarita Karimi Njeru* (supra) has been relied upon from time and time again to demonstrate the threshold of a successful constitutional petition. It should be appreciated the



requirements for a successful constitutional petition are simple and are thus: - the petitioner should set out the constitutional provisions, which he believes have been violated or threatened, and the manner in which the respondent(s) have violated those provisions. It is not enough for the petitioner to just list the constitutional provisions without demonstrating how they were infringed upon... In that regard see the case of *Sella Rose Anyango v Attorney General & 2 others* [2021] eKLR.

20. In the case of *Serab Mweru Mubu v Commissioner of Lands & 2 others* [2014] eKLR the court stated:-

“In order to protect the right to property, a party must establish a proprietary right or interest in land as the Constitution does not itself create these rights or interests.

The petitioners have not precisely set out their rights to the land that they currently have...”

21. In the case of *Ledidi Ole Tauta & others v Attorney General Others* (2015) eKLR it was stated: -

“Applying the test established in the case of *Anarita Karimi Njeru v Attorney General* (supra) as amplified in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & Others* (Supra) to the facts of this case it is our view that the petition lacks any specificity such that it is merely of a general nature in that it fails to identify with precision the particular property to which the petitioners lay claim. Save for stating that they are entitled to 577 hectares of the suit land, the petitioners have not specified which portion of the 3077.0 hectares gazetted as Ngong Hills Forest they lay claim to. We are satisfied that the petition suffers serious lack of precision and that it is practically not possible for the respondents to know what the specific claim by the petitioners is such that even if the petitioners claim was to be upheld it would invite a further exercise of determining what the claim relates to.”

22. In applying the principles set in the above cited cases to the circumstances of this case, where the petitioner has merely adduced evidence showing that he has some proprietary interest in the suit land, by virtue of being the one in occupation of the suit land and also by virtue of having effected developments in the suit land on account of license or permission granted by the respondent but failed to provide any evidence capable of assisting the court determine the nature of interest he has in the suit land, I agree with the respondent that the petitioner’s case is not suited as a constitutional petition. Besides, failing to prove the nature of interest he has in the suit land, the petitioner has also failed to prove to the required standard any violation or threat to violation of his constitutional rights by the respondent or the respondent’s officers. It was not enough to merely allege that the respondent has taken or threatened to take half of the land occupied by the petitioner and has threatened to demolish the structures thereof. The petitioner needed to, by way of evidence, prove the alleged violations or threatened violation of his right to property by the respondent and/or its agents.

23. Concerning the activities of the CA complained of, I am not convinced that the same amount to either violation of the petitioner’s right to property or threat to his right to property as no evidence has been given of any decision or action of the CA that is likely to lead to breach of the petitioner’s right to property or fair administrative action.

24. As to whether the petitioner’s right to a fair administrative action has been breached or is threatened with violation, no evidence was adduced capable of making this court determine that the petitioner’s



rights have been violated or are threatened with violation as no decision of the respondent or its agent was presented before the court to enable it make that determination. In my view, it would be speculative to determine that the petitioner's rights to property are threatened with violation on account of the admitted discussion of the subject matter of this suit by the CA or the alleged threats by the area MCA when no evidence has been adduced capable of proving the threats. In any event, no reason or explanation has been given for failure to make the area MCA a party to the petition to answer to the accusations levelled on him as the accusations appear personal as opposed to official actions of the MCA on behalf of the respondent.

25. For avoidance of doubt, this court has not determined that the petitioner has no proprietary interest in the suit land; the determination is that, owing to want of evidence concerning the nature of the petitioner's proprietary interest, the court is unable to grant the orders sought seeking a declaration that the petitioner is the lawful, legal and sole owner of the parcel of land known as Plot No TOL 8 Old Market in Laikipia County.
26. The upshot of the foregoing is that the petition is found to be lacking in merits and it is dismissed with costs to the respondent.
27. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 10TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF MAY, 2022.

J. O OLOLA

JUDGE

