



REPUBLIC OF KENYA



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Rotich v Odidi, Deputy Commissioner Bomet East & 5 others (Environment & Land Petition 4 of 2019) [2022] KEELC 2946 (KLR) (19 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND PETITION 4 OF 2019**

MC OUNDO, J

MAY 19, 2022

**IN THE MATTER OF ARTCILE 22(1) OF THE CONSTITUTION OF KENYA
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 40 (1), 25 (C), 10 (1) (2) (B)
(C) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE
RULES 2013**

BETWEEN

MERCY C ROTICH PETITIONER

AND

JO ODIDI, DEPUTY COMMISSIONER, BOMET EAST 1ST RESPONDENT

**MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

SARAH CHEMUTAI YABAN 4TH RESPONDENT

ROBERT KIPRONO CHERUIYOT 5TH RESPONDENT

JOHN KIPRONO CHERUIYOT 6TH RESPONDENT



JUDGMENT

1. The Petitioners' Petition dated the 11th June 2019 and filed on an equal date seeks for the following orders;
 - i. A declaration that the annexation by the 1st Respondent of the Petitioners' Land measuring 0.7 of one acre being portion of title No. Kericho/Kongotik/947 and handing over the same to the 4th Respondent was unconstitutional hence null and void.
 - ii. A declaration that the 1st Respondent's directive to the Chief Kemu location, P/No. 1997088918 contained in the 1st Respondent (sic) letter to the said Chief dated 29th May 2019 was in contravention or infringement of the Petitioner's rights to private property hence null and void.
 - iii. An order that the said letter of 29th May 2019 be recalled to this honorable court for purpose of quashing the same.
 - iv. A conservatory order compelling the 4th Respondent to vacate the Petitioner's said property i.e 0.7 of an acre comprised in Kericho/Kongotik/947 and the Respondent to remove her structures and other developments being (sic) standing therein.
 - v. General damages and mense profits to be paid by the 1st, 2nd and 3rd Respondents for annexation of the Petitioner's private property.
 - vi. Cost of the Petition.
2. There was no response to the Petition from the Respondents although the office of the Hon Attorney General had filed their Memorandum of Appearance on behalf of the 1st, 2nd and 3rd Respondents.
3. Alongside the said Petition, the Petitioners filed an application dated 11th June 2019 seeking conservatory orders against the Respondents particularly the 4th Respondent seeking that she be restrained from carrying out any further constructions, cultivating and/or interfering with the Petitioner's occupation and use of the said land and that the 1st, 5th and 6th Respondents be prohibited from assisting, giving protection and security to the 4th Respondent to continue with the occupation and use of the said land. Vide a ruling delivered on the 22nd April 2021, the said application was allowed.
4. Despite there having been several mentions to enable the court issue directions on this matter, there was no participation by the Respondents to the effect that on the 24th November 2021 when the matter came up for mention to take directions on how to dispose the Petition, there was still no appearance by the Respondents wherein the court gave directions that the same would be canvassed by way of written submissions. The Petitioner was granted 21 days to file and serve their written submissions with a corresponding leave of 14 days granted to the Respondents to file and serve their responses and submissions.
5. As I write this judgment, only the Petitioner complied with the directions of the court.

Petitioners' submissions.

6. The Petitioner, through her submissions filed on 14th February 2022 gave a brief history of the matter in question to wit that she had been married to her deceased husband Kiplangat Rotich under the Kipsigis customary law in 2005 where they had established their matrimonial home in her father in



- law's land. That she had continued to reside in their home even upon the demise of her husband on the 14th March 2014. That out of her industrious labour, she had acquired through purchase, three portions of land comprised under title No. Kericho/Kongotik/947 all measuring 0.7 acres.
7. In the month of April 2019 the 4th Respondent surfaced claiming that she was a widow to the Petitioner's deceased husband. She then demanded a share of family's land from the 5th and 6th Respondents herein who were the Petitioner's brothers in law. The 5th and 6th Respondents declined to allocate her family land but instead connived with the 1st Respondent to use and /or abuse his office wherein he unlawfully subdivided the Petitioner's Land measuring 0.7 acres before directing the area Chief of Kembu Location to supervise the construction and completion of the 4th Respondent's house thereon. That the 4th Respondent had then come into occupation of the Petitioner's land depriving her of her hard earned property. The Petitioner contended that the actions by the 1st, 4th, 5th and 6th Respondents had violated her constitutional right to private property.
 8. The Petitioner framed her issues for determination as follows ;
 - i. Whether the Petitioner has established a threshold of violation and/or infringement of her fundamental rights to private property as envisaged in (sic) Constitution?
 - ii. Whether the Petitioner is entitled damages and mesne profits as a result of contravention of her private property (sic) by the Respondents?
 - iii. Who will bear the costs of this Petition?
 9. On the first issue for determination, the Petitioner's submission was that she had demonstrated that she was the proprietor of all that parcel of land measuring 0.7 of one acre comprised under title Kericho/Kongotik/947 as per the annexed agreements. That the said parcels of land were not matrimonial land but that she had acquired the same personally. The Petitioner further submitted that the infringement and/or acquisition of her land by the 4th Respondent, with the help of the 1st, 5th and 6th Respondents had indeed established a violation of her constitutional right to private property. That the 1st Respondent while abusing the power of his office, as an Assistant Commissioner, had aided the 4th, 5th and 6th Respondents to deprive her of her property.
 10. On the second issue for determination as to whether the Petitioner was entitled damages and mesne profits as a result of contravention of her private property (sic) by the Respondents, the Petitioner submitted that she had suffered damages as a result of the illegal operation on her land by the 4th Respondent because at the time of the illegal occupation, she had planted potatoes and other crops thereon which crops had been destroyed by the 4th Respondent when she constructed structures on the suit land. The Petitioner relied on the decided cases in *Straman East Africa Ltd. vs Hussan Guyo Wakalo* [2014] eKLR and *Alex Waigera Mwaura vs Chania Power Company Limited & Another* [2020] eKLR, to seek for damages and mesne profits against the Respondents jointly and severally to a tune of Ksh. 500,000/=
 11. On the last issue for determination the Petitioner submitted that the Respondents should bear the costs of the Petition as costs followed the events.

Determination

12. The Petitioner brings this Petition as a member of the family being the widow to a brother to the 5th and 6th Respondents. It is worth noting that although the Respondents herein were served with the Petitioner's Petition, yet none of them filed their respective and/or joint Defences, Replying Affidavit(s) or at least Grounds of Opposition and therefore the Petitioner's case is uncontroverted and



unchallenged both in terms of facts and the law. I shall therefore proceed to evaluate the same on the said uncontroverted evidence.

13. I have carefully considered the contents of the Petitioner's Petition as well as her Supporting Affidavit. The Petitioner's claim stems from an allegation that she was married to one Kiplangat Rotich who passed away on the 14th March 2014 and who was a brother to the 5th and 6th Respondents. That they had established their matrimonial home in her father in law's land where she continued to reside even upon the demise of her husband. That out of her hard work, she had purchased, three portions of land comprised under title No. Kericho/Kongotik/947 all measuring 0.7 acres. That subsequently the 4th Respondent suddenly appeared and claimed to have been a wife to her husband whereby she had demanded for a share of the family land. that it had been at this point that the 5th and 6th Respondents not wanting to share the family land, connived with the 1st Respondent who used his power as an Assistant Commissioner, to direct the Chief Kambu location to supervise the construction and completion of the 4th Respondent's house on the Petitioner's land. That the 1st Respondent alongside the 5th and 6th Respondent then aided the 4th Respondent to settle on the Petitioner's land thus depriving her of her property, which was an infringement of her fundamental rights to private property.
14. I find that it was for the Petitioner to prove on a balance of probabilities that her fundamental rights as protected by or under the Constitution had been violated by not only identifying the relevant and specific Articles of the Constitution, but availing evidence, through affidavit or otherwise of such violation as per the required standard set out in the case of Anarita Katimi Njeru vs The Republic (196-1980) KLR 1272 where it was held 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”.
15. The Petition referred to infringement of Articles 40 (1), 25 (C), 10 (1) (2) (B) (C) of the Constitution in its title. Having summarized the matter before me as above, I find the issues arising herein for determination as being whether the Petitioner's rights under these Articles had been violated by the Respondents and what remedies if any are available to the Petitioner.
16. I have revisited what the Petitioner seeks from this court as herein above stated and strictly speaking, I find that the prayers sought are prayers whose resolution requires a full trial hearing and the interpretation of a statute rather than through a Constitutional Petition because a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. The particular question to be decided herein so as to put this matter into the ambit of a Petition was whether the state was liable for acts committed by its agents while on duty. In this case, I find the answer in the negative as constitutional rights protect individuals from governmental injury and regulate the discretion of the government to inflict injury. No such evidence had been adduced herein save that the 1st Respondent asked his Chief through a letter dated 29th May 2019 to comply with what had been agreed. This letter, in my view did not convey any proprietary rights to the 4th Respondent.
17. Indeed the Court of Appeal in the case of Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited [2013] eKLR made the following observation:-

“it is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all.....the courts will not



normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to the applicant under some other legislative provision, or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights”..

18. From the facts before me, and the fact that that courts must at all times guard against improper transmission of normal disputes or ordinary issues of litigation being clothed as Constitutional Petitions, I find that this Petition does not rise constitutional issues. The Petitioner ought to have approached the appropriate court by way of an ordinary suit. For the above captioned reasons, this undefended matter is hereby struck out with no orders as to costs. The interim orders are herein vacated.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 19TH DAY OF MAY 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

