



Kaburia (Suing as administrator of the Estate of Anampiu Ngiti alias Jonathan M'Anampiu (Deceased) v M'Nkanata Kiogora (Sued as the administrator of the Estate of Jeremiah M'Rukaria M'Imanyara (Deceased) & 2 others (Petition 18 of 2017) [2022] KEELC 2576 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2576 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION 18 OF 2017**

CK NZILI, J

MAY 18, 2022

BETWEEN

**JASPER KABURIA (SUING AS ADMINISTRATOR OF THE
ESTATE OF ANAMPIU NGITI ALIAS JONATHAN M'ANAMPIU
(DECEASED) PETITIONER**

AND

**MBURUGU M'NKANATA KIOGORA (SUED AS THE ADMINISTRATOR
OF THE ESTATE OF JEREMIAH M'RUKARIA M'IMANYARA
(DECEASED) 1ST RESPONDENT
LAND REGISTRAR MERU 2ND RESPONDENT
ATTORNEY GENERAL OF KENYA 3RD RESPONDENT**

RULING

A. Preliminary Objection

1. On November 13, 2019, the court allowed the application dated May 28, 2019 in which the petitioner sought to cause the legal representatives of the 1st respondent made party to this petition.

B. Written Submissions

2. Parties were also deserted to comply with Order 11 and file their paginated bundles. On 18/1/2022 and put in written submissions on the issue of jurisdiction.
3. The respondents by written submissions dated 9/2/2022, 10/2/2022 and 7/3/2022 respectively raised preliminary points that the issues raised by the petitioner fall under the civil suit regime and not a constitutional petition by dint of Article 162 (2) and 165 of *the Constitution*. The 1st respondent relied



on *Safe Park Ltd vs Henry Wambeya & 2 others* (2019) eKLR. *N.K Brothers vs David Muai* (2021) eKLR on the proposition that the matter should have gone before the ELC as a civil matter.

4. The 2nd respondent took the view that the petition dated October 10, 2017 had not demonstrated breach of any constitutional rights and freedoms which the petitioner as holder of limited grant of letters of administration ad litem had suffered given more so when the 2nd respondent as a private citizen holds no public office clothed with quasi – judicial powers, capable of infringing the rights and freedom of the petitioner. Reliance was placed on *Chelimo A Marsiu & 7 others Vs OCS Kirindine G.S.U camp and 7 others* (2011) eKLR on the proposition that a constitutional court was not a general substitute for the normal procedure for invoking judicial control by administrative action.
5. The 2nd respondent urged the court to find the petitioner should have gone by private law and not the constitutional petition route.
6. The 3rd and 4th respondents took the view that the petitioner had merely cited the allegation of fraud and collusion and matters of infringement of their rights without demonstrating the exact manner in which the alleged misconduct and violation of rights was carried out. Reliance was placed on *Mumo Matemtu Vs Trusted Society of Human Rights Alliance and 5 others* (2013) eKLR.
7. Further, the 3rd and 4th respondents therefore urged the court to find that the petition contained vague allegations, made obscure imputations and hence denies the respondents fair hearing for lack of clarity and details.
8. The respondents urged the court to follow the principle of constitution avoidance especially where a matter may be decided otherwise and in the instant case the issue was a tort hence a civil matter, where there exists other sufficient and adequate avenues to resolve it instead of trivializing the constitutional court. Reliance was placed on *Daniel N. Mugendi vs Kenyatta University and 3 others* (2015) eKLR, *Gabriel Mutava & 2 others vs MD K.P.A and another* (2016) eKLR.
9. The 3rd and 4th respondents submitting under the doctrine of approbation and reprobation that no party could accept and reject the same instrument and therefore obtain some advantage to which he could only be entitled, on the footing that it was valid and then turn around and say it was void for the purposes of securing some other advantage.
10. It was submitted that the petitioners had convoluted the issue of violation of human rights with fraud which was a civil matter hence misleading the court.
11. Further the 3rd and 4th respondents relying on the doctrine of election as discussed by Lord Blackburn in *Benjamin Scarf Vs Alfred Jarnine* (1882 – 82) A.C 345 *Republic vs Institute of Public Secretaries of Kenya exparte Mundia Njeru Geteria* (2010) eKLR held where a man having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which conferred him a benefit and or that if a party chooses one of the remedies and communicates it to the other side to believe that he had made a choice, he has completed his election, an equivocal act (see *Banque D Moscou Vs Kindeslaey* 2 ALLER 649
12. In this instance, the 4th respondent submitted that by blowing hot and cold at the same time, the petitioner was infringing on the rights to fair hearing of the 1st and 2nd respondents.
13. The petitioner has opposed the preliminary objection through written submissions dated 4/2/2022. It was submitted the petition was premised on the contravention of the constitutional rights by the 3rd respondent who as a public officer, abused his office so stooping low to collude with the 1st and 2nd respondents and assist the 1st and 2nd respondents to fraudulently forge documents under his custody



and alter shares of ownership of LR No. Nkuene/Uruku/87 and eventually partition such shares in an arbitrary manner, hence depriving the petitioner and other beneficiaries part of their father's land.

14. The petitioner therefore prayed the court finds it has jurisdiction to grant the reliefs sought in the petition.

C. Issues for Determination

15. The issues for my determination are;
 - i. If the respondent have raised a pure point of law.
 - ii. If the petition has met the constitutional threshold.
 - iii. If the court has jurisdiction to entertain the petition.
16. A preliminary point of law has been described as a pure point of law which is taken based on the basis that what has been pleaded is admitted by the other side.
17. In *IEBC vs Jane Cheperenge & 2 others* (2015) eKLR Supreme court of Kenya endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd vs West End* and *Hassan Ali Jobo & another vs Suleiman Said Shabbal & 2 others* (2014)eKLR, *Aviation and Allied Workers Union Kenya vs Kenya Airways Ltd and 3 others* (2015) eKLR on the proposition that a court has to be satisfied that there are no contested facts as prima facie presented in the pleadings on record.
18. The court stated a preliminary point should be founded upon a settled and crisp point of law to the extent that its application to undisputed facts leads to but one conclusion that the facts are incompatible with that point of law. The court held a preliminary objection serves two purposes of merit as a shield to the originator of the objection against profligate deployed of time and other resources and secondly, sparing judicial time for only the deserving cases of dispute settlement.
19. In this petition what the respondents have raised touches on whether the court has jurisdiction to entertain an otherwise civil matter touted as a constitutional petition which should otherwise be resolved in an ordinary way.
20. It has been said that jurisdiction is everything. It is either the court has it or it does not have it for it is either donated by *the Constitution* and or as statutes.
21. In *Tom Kusienya & 11 others vs Kenya Railway Corporation* (2013) eKLR the court held that not every breach of rights becomes actionable under the bill of rights as a constitutional question, especially where other avenues exist for obtaining a remedy.

D. Pleadings

22. In this petition, the court as indicated above allowed the application dated June 28, 2019 on 13.11.2019. To-date, no amended petition has been filed to reflect who the petitioners are. The petition was brought under Article 27, 40, 47, 50, 258, 239 and 262 of *the Constitution*, in which the late Jonathan Anampiu alias Anampiu Ngiti as owner of L.R No. Nkuene/Uruku 87 registered as joint common owners with Ikiugu Murithi gave him a power of attorney to charge the suit property for a loan with Barclays Bank and which property was discharged. Another loan was taken out with the Kenya Commercial Bank Ltd which upon default in loan, some 4/9 of the suit property were allegedly disposed of.
23. It was averred that on January 23, 2001 the respondents fraudulently, illegally and in collusion altered and registered the shares in LR No. Nkuene Uruku/87 in favour of the 1st respondent 25/90, Jeremiah



- M'rukaria M'Imanyara 25/90 and Jonathan Anampiu 40/90 hence depriving the petitioner 10/90 shares measuring one acre.
24. It was averred that the 3rd respondent colluded with the 1st and 2nd respondents and falsified land records to deprive the estate of Jonathan Anampiu the right share and in furtherance of the fraud and illegalities, it was averred that in 2017 the 3rd respondent without informing the beneficiaries of the petitioner's estate partitioned the suit land into L.R No's 1725, 1726, 1727, without lifting a restriction dated February 20, 2022 and alleged back dated the partitions to 13/3/2003.
 25. The petitioner prayed for the cancellation of the partitions and reinstated of the suit land to the original parcel number; an order for the Meru District Surveyor to partition the original parcel and register it the name of Jonathan Anampiu and 1st, 2nd and 3rd respondents and for the District Criminal Investigation Officer North Imenti to investigate the persons who allegedly falsely and illegally altered the shares, to the suit property.
 26. The petition was opposed by replying affidavits sworn by Mburugu M'Nkanata Kioga, the 1st respondent on 26/11/2017, Salome Karoki the 1st – 2nd respondents sworn on 16/2/2018 and the 3rd and 4th respondent submissions dated 4/2/2022.
 27. The *Constitution of Kenya (Protection of Rights & Fundamental Freedom Practice and Procedure Rules* 2013, require key ingredients of a constitutional petition inter alia the capacity the party comes to court facts relied upon, the constitutional provisions violated, the nature of injury caused, details of the suits, be they criminal or civil between the parties, pending or otherwise and the reliefs sought.
 28. In *Mumo Matemtu (supra)* the court held a party should set out with a reasonable degree of precision that of which he complains the provisions said to have been infringed and the manner in which they are alleged to have been infringed.
 29. The 3rd respondent has averred the petition lacks clarity, lacks specific claim to respond to, lacks details, is a civil in nature, and has been filed to trivialize the role of a constitutional court since there are other avenues to redress such grievances as held in *Daniel N. Mugendi (supra)* and *Gabriel Mutua & 2 other (supra)*.
 30. Further, the 3rd & 4th respondents took the view that this court should avoid such a dispute since there are other avenues to address such grievances if any. Secondly, the 3rd & 4th respondents submitted the petitioner is guilty of the doctrine of approbation and reprobation and hence estopped from changing goal posts as held in *Republic vs Institute of Certified Public Secretaries of Kenya exaparte Mundia Njeru Gateria* (2010) eKLR.

E. Determination

31. There is no dispute that the petition as presented has not given specific constitutional rights and freedoms of the petitioner violated by the respondents including the days, time, particulars, nature of the injuries and or damages occasioned and the specific constitutional reliefs sought.
32. Whereas the petition sets out the details of fraud collusion and illegalities allegedly occasioned to his land, pleadings the nexus between the alleged statutory violation of the law relating to land and the constitutional provisions regarding the petitioner's rights.
33. The petitioner's sworn affidavit of 10/10/2017 attached a copy of records for LR No. Nkuene/Uruku 86 as annexures JK "2") which has entries running between 7/12/1965 to 26/3/2003 when the suit property was closed for partition leading to L.R Parcel No. 1725 – 1727.



34. Annexure marked JK “4” was a ruling by the court in Meru CC No. 336/88 showing that there was a valid court order effecting some transfers of 4 acres from the suit land involving the petitioners.
35. Therefore the petitioners cannot possibly renege on such transfer to the suit land as sanctioned by the court. The petitioner is therefore estopped in law from denying such obvious legal process. He cannot therefore approbate and reprobate at the same time and turn around to deny such legal processes which involved the 1st and 2nd respondents herein as invalid and or inconsequential.
36. As regards the prayers sought in the petition, the duty and powers of a constitutional court is to uphold and enforce the bill of rights by hearing and determining applications for redress of a denial, violation, infringement, threat to a right or a fundamental rights Article 23 of *the Constitution*.
37. Under Article 23 (3), any proceedings brought under Article 22 require the constitutional court to grant reliefs such as declaration of rights, injunction, conservatory orders, declaration of invalidity of any law, compensation and an order of judicial review.
38. In this petition, the petitioner is based on fraud, illegalities, collusion and alteration to the register for L.N No. Nkuene/Uruku/87 allegedly orchestrated by the respondents.
39. The reliefs sought are for this court to order the cancellation, partition and reinstatement to the original title no. Order the Meru District surveyor to partition LR Nkuene/Uruku/87 and an order that the District Criminal Investigation Officer North Imenti to investigate who in the Meru Land Registry falsely and illegally altered the shares of the registered proprietors and falsely and illegally back dated the registers to 26/3/2003 and take the necessary action against the said culprits.
40. Looking at the petition in totality, it is quite clear the petitioner has not made any complaints, protests, objections and or sought for any specific intervention under the *Fair Administration Action Act*, the *Land Registration Act* and the *Land Act* before the relevant quasi-judicial bodies, including the Land Fraud Unit, DCI for investigations to be commenced if at all, he suspects any fraudulent dealings of the suit property by the respondents.
41. In *CCK & 5 others vs Royal Mabati Services Ltd and 5 others* (2014) eKLR the court held that a party invoking Article 22 of *the Constitution* has to show the rights said to be infringed as well as the basis of his or her grievance.
42. The court in *Anarita Karimi Njeru vs Republic* (1979) eKLR there must be a link between the aggrieved party, the provisions of Constitution alleged to have been contravened and the reliefs sought which principle was said to be a foundation of conviction and good faith in engaging the constitutional process of dispute settlement. The petitioner has the responsibility to produce evidence to meet the constitutional threshold in this petition.
43. In other words, if the petitioner make specific allegations on fraud, illegality and collusion against the respondent in the body of the petition and at the same time prays for an order for the constitutional court to issue against the DCIO Meru to go out the investigate the complaint and find who the culprits are, it is quite obvious the facts relied upon by the petitioner in this petition are yet to be established and or verified by the investigative agencies. A party coming through a constitutional petition must have credible, reliable and probable evidence in support of the same and must plead with specificity, the facts and the nature of breaches loss, injuries and damages thereof.
44. If the petitioner is not sure of the culprits at this stage who altered falsified and or effected the changes to the register relating to the suit land it means this claim is farfetched, moot, premature and misguided as against the respondents.



45. Further, it means the facts, issues and dispute is yet to ripen and/or crystalize for lack of evidence. A civil suit perhaps would therefore have been a proper forum for the dispute if any instead of crafting a constitutional petition. (See *Faraj & 3 others vs Police and 2 others* Constitutional Petition 165 of 2000) (2022) KCHC 287 (KLR) 274 – 2022 Judgment.
46. With respect, I do not see any constitutional question disclosed in this petition for the dispute if any has not ripened, and secondly the petitioner is yet to lodge any complaint with the good offices of the respondents including the ombudsman and the Land Fraud Unit. Based on the doctrines of exhaustion, constitutional avoidance, justiciability and the fact that the reliefs sought in the petition do not necessarily depend on a constitutional court. I decline to entertain the petition as being a non-starter. The same is dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 18TH DAY OF MAY, 2022

In presence of:

Kaunyangi for Kaumbi for 2nd respondent

Mburugu for petitioner

Kieti for 3rd and 4th respondent

HON. C.K. NZILI

ELC JUDGE

