



Tanui & 8 others v Borop Multipurpose Co-op Society Ltd & 2 others (Environment & Land Petition 22 of 2019) [2022] KEELC 2885 (KLR) (18 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 22 OF 2019**

**FM NJOROGE, J
MAY 18, 2022**

BETWEEN

**JOSHUA K. TANUI 1ST PETITIONER
JOHN SIGILAI 2ND PETITIONER
DAVID K. LANGAT 3RD PETITIONER
PAUL K. KORGOREN 4TH PETITIONER
DAVID KIPRONO NGENO 5TH PETITIONER
SAMSON K. KILEL 6TH PETITIONER
SILVANUS MOSOTA 7TH PETITIONER
JOSEPH CHERES 8TH PETITIONER
KAREN C. NGENY 9TH PETITIONER**

AND

**BOROP MULTIPURPOSE CO-OP SOCIETY LTD 1ST RESPONDENT
NAKURU DISTRICT LAND REGISTRAR 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

JUDGMENT

1. By a Petition dated 25/10/2019 filed on 28/10/2019 the Petitioners sought the following orders:
 - a. A declaration that the decision made by the respondents to cancel their deeds by advertising a notice of annulling and/or cancellation without giving them any notice and without according them a hearing when they are the registered proprietors of the properties is unconstitutional



and therefore unlawful on account of violation of Articles 10, 28, 29, 40, 47, 50, 232 and 236 of *the Constitution* of Kenya 2010 hence null and void ab initio.

- b. A declaration that the actions of the respondents have been inhuman and degrading against the Petitioners;
 - c. An order of certiorari be issued to bring into this Honourable Court for purposes of being quashed the decision made by the respondents vide the advertisement contained in the Kenya Gazette Notice number 7452 of 9/8/2019 giving 30 days' notice of cancellation of titles Numbers Mau Summit/Sachangwani Block 10/1-200 for being in contravention of Articles 10, 28, 29, 40, 47, 50 of *the Constitution* of Kenya 2010.
 - d. An order of permanent injunction restraining the 2nd Respondent by himself, agents, servants and hirelings from interfering with, invading, cancelling titles or in any way dealing with Petitioners' land parcels contained in Mau Summit/Sachangwani Block 10/1-200 with the fixtures and developments thereon;
 - e. A declaration that the 2nd and 3rd respondents have abdicated their constitutional and legal roles and are therefore escapists;
 - f. An order of compensation and general damages to issue for violation of the petitioners constitutional rights.
 - g. Any other relief the court may deem fit to grant in redress to the clear violation of the Petitioners right to property, fair hearing and fair administrative actions;
 - h. Costs of the Petition.
2. Two affidavits of the 1st Petitioner dated 25/10/2019 and 22/11/2019 were sworn in support of the Petition. The 1st respondent filed a replying affidavit and grounds of opposition both dated 12/11/2019, a further affidavit dated 23/12/2019 and an answer to the Petition dated 27/1/2021.
 3. The 2nd and 3rd respondents filed a response to the petition dated 23/2/2022.
 4. The court ordered that the matter be disposed off by way of written submissions. The Petitioners filed theirs on 20/1/2022, the 1st respondent on 31/1/2022 and the 2nd & 3rd Respondents on 23/2/2022.
 5. The claim by the Petitioners is as follows: the Petitioners are bona fide members of the 1st respondent who owned LR NO. 9045/10 also known as Mau Summit/Sachangwani Block 10 (Borop) [herein after referred to as the suit land] which it held in trust for its members; in the year 2000 or thereabouts the society resolved to subdivide the suit land in accordance with the shares held by members. The Petitioners and other members were with the approval of the 1st Respondent's officials and the 2nd Respondent allocated their shares in 2002 or thereabouts after the subdivision process and after balloting. They took possession, developed the land and have been in quiet occupation since. They were later issued with title deeds to their respective portions by the 2nd respondent between the year 2006 and 2010. They aver that they have never been subjected to any court proceedings or any quasi-judicial proceedings with respect to the issuance of those titles or their legality thereof or occupation of the land. In the year 2010 leadership squabbles by some of the 1st respondent's officials led to a request to the Cooperative Societies Tribunal through Tribunal Case Number 6 of 2010 in a dispute between it and its officials and sought orders restraining those officials from dealing with society affairs or holding themselves out as officials of the society, to return all the documents belonging to the 1st respondent and an order annulling and cancelling all documents authenticated by the said officials using the 1st respondent's seal among all others. The Tribunal granted an order restraining the said



officials from dealing in way with the 1st respondent's documents. The Petitioners never participated in those proceedings and were not made parties. Thereafter and before the Tribunal award was adopted by any court of law the 2nd respondent vide Gazette Notice 7452 of 9/8/2019 caused to be published a notice of an intended cancellation of the issued title deeds. The Petitioners aver that they have never been required to explain their position with regard to the title deeds and that the decision to cancel them shall adversely affect them. Their attempts to have the 2nd Respondent grant them audience have yielded no fruit. In the meantime, the 1st Respondent has on several occasions threatened to demolish the Petitioners houses on the suit land. The 2nd Respondent is intent on cancelling the title deeds and the Chief Land Registrar in a letter dated 4/10/2019 has indicated to the 1st Respondent that the area list shall be forwarded to the Department of Surveys for the purpose of cancellation of title. The 1st Respondent on its part has purportedly claimed that the Petitioners' titles have already reverted back to it and have demanded, while issuing threats, that the Petitioners do desist from dealing with the property in any manner. It is urged that to the extent that the respondents gave no notice of cancellation of the Petitioners' title deeds they have threatened to deprive the Petitioners of their constitutional right to own property in contravention of Article 40(2)(a) of *the Constitution*; that by limiting the Petitioner's right to use, occupy, possess or deal with the suit land the respondents have contravened Article 40 (2) (b); by threatening to cancel title deeds and to dispossess the Petitioners of their properties the respondents have subjected the Petitioners to psychological and emotional torture contrary to Article 29 (d) of *the Constitution*; by threatening to dispossess the petitioners of their property where they live and earn their livelihoods the respondents would deprive the Petitioners of their inherent dignity in contravention of Article 28 by rendering them homeless or squatters; by making an administrative decision to cancel their title deeds without giving the petitioners a hearing and without involving them beforehand the respondents have violated the petitioners right to fair administrative action guaranteed under Article 47 of *the Constitution*, and the right to fair hearing under Article 50 in that no due process was followed before arriving at the decision; that disregarding Petitioners proof of ownership through title deeds issued by the government is contrary to Section 24 and 25 of the *Land Registration Act* 2012.

6. The 1st Respondent's response to the Petition as per the Replying Affidavits is that a consent judgment was recorded in Nairobi Cooperative Tribunal Case No. 36 of 2002 John K. Rotich and 4 others vs. Joel K. Yegon and 7 others on 24/4/2002 in the following terms:
 - a. Elections of the 1st respondent be held on 8/4/2002 at the society farm.
 - b. The Provincial Cooperative Officer Rift Valley be the returning officer
 - c. The returning officer to file the returns of the election by 14/6/2002; that titles issues not to be released to members and those not processed not to be processed until the new management gives directions
7. By the same consent the agenda of the meeting of 19/6/2002 would be elections and the cooperative officer would issue the notices. The said consent was adopted by court and has never been reviewed or appealed.
8. The 1st respondent avers that the titles the petitioners exhibit are not legitimate and are not entitled to any protection by law as they were issued by the previous management of the 1st respondent and after the Cooperative Tribunal order set out herein above had injuncted their issuance; they therefore have no basis in law. A special general meeting of the 1st respondent was held on 18/1/2003 which resolved that the farm be resurveyed by a different surveyor, the roads and feeder roads be taken into consideration, and the roads which initially existed be put into use. The 1st respondent avers that the cancellation of the titles vide Gazette Notice 7453 of 9/8/2019 was to effect the orders of the



Cooperative Tribunal of which all members were aware. That if the Petitioners are members of the 1st respondent, who was engaged in the Tribunal proceedings, they cannot deny participation in the proceedings or resolutions of the 1st Respondent. The 1st Respondent avers that after the expiry of the Gazette Notice, if no objection had been received, then the Land Registrar would issue new titles; that the titles are therefore already cancelled as an intervention by the government in implementation of the cooperative Tribunal decision and the Petitioners should have appealed or sought a review of in a court of competent jurisdiction and not file new litigation. It was stated that the 1st respondent is a society governed by by-laws and resolutions made by members through its representatives which are binding.

9. The 1st respondent denied that it acted in order to deprive the rightful owners of interest over the land parcels but to pave way for new subdivisions with each member proving his purchase of land shares by way of receipts and share certificates and that none of the members who had been allocated the land in a transparent manner would be deprived from enjoyment of their property; that a meeting held on 29/1/2003 resolved that no titles be issued since a prior order existed nullifying the issuing of title deeds. It is claimed that the Petition seeks to sanitize the illegalities earlier committed by the issuance of the petitioners' titles between the years 2006 and 2010 after the court had issued its orders which have never been vacated. The 1st respondent gave an example of the 1st Petitioner, Joshua K Tanui who acquired a title pursuant to receipt number 221 which is said to belong to a member who had reported it lost and who has not acquired any land since. The said Joshua had failed to provide any sale agreement to show how he acquired land and so his acquisition is fraudulent. Other petitioners are also said to lack receipts or to attach membership receipts without any evidence of payment for the land. That Section 76 of the Cooperative Society Act 1997 mandates the Cooperative Tribunal to decide all disputes emanating from a Cooperative Society. That Rule 50 of the multipurpose by-laws authorizes disputes arising out of the by-laws or the society business which cannot be settled by the committee of general meeting to be referred to the Cooperative Tribunal under the Cooperative Societies Act and appeals therefrom to be filed in the High Court whose decision is final. It is stated that the petitioners provided scanty evidence of their membership and acquisition of the land. In effect the 1st respondent's response to the petition is that any claims to own any portion of the suit land must be backed up by way of appropriate documents recognized by the 1st respondent, and that the 1st respondent is only interested in transparency, accountability, fairness and justice in the manner in which land is acquired and by so doing ensure that members acquire what is rightfully theirs. It avers that protection of property under Article 40 of *the Constitution* can only extend to legally acquired property and the petitioners illegally acquired titles cannot be protected by this court. Further, it is averred that the cancellation having arisen from a court process, then there can be no violation of constitutional rights. The fact that the land was originally owned by the 1st respondent and was not privately owned by the petitioners, and that the 1st respondent is governed by certain bylaws and regulations is also said to dispense with the right to a fair hearing. To the 1st respondent, the petition does not satisfy the threshold set out in the Anarita Karimi Case and is a civil dispute disguised as a constitutional petition with an intention to avoid the full application of the Limitation of Actions Act Cap 22 as the issues raised arose between 2002 and 2003.
10. According to the 2nd and 3rd Respondents in their response to the petition, they are strangers to the allegations under paragraphs 1, 5, 6, 7, 8, 9 and 10 of the petition. They aver that they published the notice of intention to cancel the petitioners titles after an application was lodged for the same together with a court order by the 1st Respondent. They further averred that the said notice of intention to cancel the titles was not a final decision as it was inviting any objections thereto. They concluded by stating that they have abdicated their duties and the petitioners in this suit are not entitled to the orders being sought.



Submissions

11. The petitioners filed their submissions dated 4/01/2022 on 18/01/2022. They submitted as follows: on whether the Land Registrar has powers to cancel Land titles, it was submitted that he does not have power to revoke and/or cancel title to land as only the Environment and Land Court can give orders to the Land Registrar to effect cancellation. They relied on the case of *Republic V Registrar of Titles Mombasa & 4 others Ex-parte A.K Abdulgani Limited* [2018] eKLR among other cases.
12. The second issue they submitted on was whether the Co-operative Societies has powers to order for cancellation of land titles and if yes, whether in its decision of 30/3/2015 it ordered for cancellation of titles to land parcels Mau Summit/Sachangwan Block 10/1-200. They reiterated that only the Environment and Land Court and not the Cooperatives Tribunal has powers to revoke, annul or cancel titles. They relied on the case of *Republic vs Gatbaite Farmers' Cooperative Society Limited & Another Ex-Parte Richard Ng'ang'a Kamiro* [2013] eKLR.
13. On whether the petitioners are the registered proprietors of their respective parcels of land, they relied on Sections 25 and 26 of the *Land Registration Act* 2012 and Article 40 of *the Constitution* and submitted that they are the registered owners of the various land parcels as evidenced by the annexed copies of title.
14. On whether the petitioners were accorded fair administrative action, it was submitted that their right to fair administrative action was violated contrary to Article 47 of *the Constitution* as they were not given a chance to state their case before the 2nd Respondent who purported to issue a Gazette Notice expressing her intention to cancel their titles. They relied on section 4(1), (2) and (3) of the *Fair Administrative Action Act*. They concluded their submissions by seeking that the orders sought in the petition be granted.
15. The 1st Respondent filed its submissions dated 28/01/2022 on 31/01/2022. They submitted that the titles have already been cancelled and therefore do not exist and that the titles exhibited are not legitimate and are irregular in that the petitioners are not the legitimate, lawful, rightful legal owners of all those land properties known as Mau Summit/Sachangwan Block 1/13, 18, 83, 84, 94, 107, 129, 160 and 199. They also submitted that the petitioners are not entitled to any protection of the law as the above titles were issued by the previous management of the co-operative society. They further submitted that the issuance of the titles was done in accordance with the orders of the court.
16. They submitted that the entire petition is a civil dispute disguised as a constitutional petition and the filing was misdirected and intended to avoid the full application of the Limitation of Actions Act Cap 22 Laws of Kenya as the issues raised in the petition arose in the years 2002, 2003 and 2006. They relied on the case of *Kenya Bus Services Limited & 2 Others vs Attorney General* [2005] eKLR and the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* among other cases. They concluded their submissions by seeking that the petition be dismissed with costs as the same is without merit.
17. The 2nd and 3rd respondents filed their submissions dated 31/01/2021 on 23/02/2022 They submitted on whether the instant petition is competent, whether the rights of the petitioners have been violated by the 2nd and 3rd Respondents and whether they are entitled to the orders sought. On whether the petition is competent, it was submitted that the petitioners are castigating the 2nd Respondent for implementing the orders of the Tribunal in Tribunal case No. 6 of 2010 which case the petitioners admit were not party to. They submitted that the proper remedy would have been to institute Judicial Review proceedings to quash the decision of the Tribunal on the grounds of lack of a fair hearing a violation of the rules of justice. They relied on the case of *Anarita Karimi Njeru vs The Republic*



(1976-1980) KLR 1272 and submitted that the present petition does not meet the threshold as set out in that case. They also relied on the case of *Benard Murage vs. Fine Serve Africa Limited & 3 Others* [2015] eKLR among other cases.

18. On whether the rights of the petitioners have been violated by the 2nd respondent, it was submitted that the petitioners in proving particulars of violations have quoted Articles of *the Constitution* to act as blanket provisions which do not reveal with precision the actual violation. They also submitted that the 2nd Respondent issued the notice of intended cancellation effecting the orders of the Co-operative Tribunal in Tribunal case No. 06 of 2010 dated 22/11/2018. Further that the 2nd Respondent published in the Kenya Gazette Notice No. 7453 on 9/08/2019 a 30 days' notice for cancellation of title deeds according to the orders of the said Tribunal. In conclusion they submitted that the petitioners have not proved their case to the required standards and the Petition should therefore be dismissed.

Analysis and Determination.

19. After considering the petition, responses to the petition and the submissions the issues that arise for determination are as follows:
- a. Whether the instant petition meets the threshold required of a constitutional petition.
 - b. Whether the petitioners' rights were violated.
 - c. Whether the reliefs sought are available.

The issues are discussed as hereinbelow.

Whether the instant petition meets the threshold required of a constitutional petition.

20. The Supreme Court in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR stated as follows:

“(256) The appellants in this case are seeking to invoke the

“principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

....

- (258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”



21. In *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR the Court of Appeal stated as follows:

“(49) We are also of the view that it has now become a settled principle that judicial review remedies are not available in matters where facts are disputed. See the case of *Funzi Island Development Ltd & 2 Others vs County Council of Kwale & 2 Others* [2014] eKLR succinctly stated that-

“It is true that generally speaking, judicial review procedure is not well suited for resolving disputes on material fact.”

Karanja, JA in the aforementioned case also expressed that-

“It is common ground that the subject matter herein is property worth a substantial amount of money. There were also serious and weighty arguments, for instance, whether the property in question was Trust Land or not; whether it was forest land or not; whether it formed part of Funzi Island or it formed part of the foreshore which could not be set aside for allocation..

In my view, a matter such as this ought to have been fully heard as a civil claim where all the parties would have had an opportunity to bring all their legal ammunition in support of their claim. That way, issues of fraud as envisaged under the Registration of Titles Act (RTA), and other disputed facts would have been fully canvassed and conclusive determinations made on the same.”

22. Constitutional petitions substantially resemble judicial review proceedings in that oral evidence is not usually required and, as in the present petition, they are normally disposed of by way of affidavit evidence. They are usually premised on certain verified facts which are not in dispute. In the present case, there is a dispute as to whether some of the members of the 1st respondent are entitled to land within the 1st respondent’s farm at Sachangawani.
23. The instant petition seeks declarations, an order of certiorari and an order of permanent injunction. It also seeks compensation. The subject matter of the petition is land that was acquired by the 1st respondent society and which is meant to be subdivided in a fair and just manner to all those of its members entitled to it.
24. It is not disputed that the cancellation of title has been prompted by perceptions that some individuals may have obtained titles to land wherein they did not deserve such titles. The issuance of title to the members was not complete by the time litigation commenced in the Cooperatives Tribunal many years ago in 2002. By then, some titles had been issued while others were still pending.
25. The action of some members of going to the Tribunal led to a consent order halting the production of more titles and withholding of the already issued titles. None of the members owned any land in absolute within the 1st respondent’s farm before that case was filed. Indeed, absolute title to land within the farm would accrue to the members only upon a fair distribution of the land after subdivision. Acquisition of land by members was also subject to their proof of membership and proof of purchase of land from the 1st respondent among other things.
26. While there can be no final confirmation in this petition that any of the members acquired land by fraud, it would be in the public interest that the distribution of the Society’s land be conducted as transparently as possible. Apparently, the 1st respondent’s desire for just allocation of land to members



and weeding out of persons not entitled to land in the 1st respondent's farm was the genesis of the Gazette Notice issued by the 2nd respondent giving notice of cancellation of titles.

27. It is difficult to conclude that before the final distribution of land and dissolution of the Society was achieved any member could claim absolute title to their portions that could entitle them to claims of violation of constitutional rights.
28. As pointed out by the 1st Respondent, in order for the court to determine this matter, the petitioners have to provide evidence that would include proof of membership of the society, proof of ownership of the suit properties, evidence of how they acquired the suit properties, production of payment receipts and survey plans.
29. In order to verify the genuineness of all documents produced by members in support of their claims to land, a proper hearing in which such documents would be produced and be subjected to proof by way of application of the rules of evidence would be necessary and that is not within the purview of a constitutional petition. It is this court's view that there exists ample avenues for the determination of the petitioners' grievances. It matters not that the petitioners' have exhibited a letter of authority signed by some other members, it is clear from the admission of the 1st respondent that not all members would suffer from the clean-up process intended by the 1st respondent. I cannot therefore conclude that the petitioners have demonstrated a prima facie case that their rights to own or use property under Article 40 of *the Constitution* would be under any threat in the circumstances outlined above. I cannot also by the greatest stretch of imagination come to the conclusion that a prima facie case showing that the petitioners have been subjected to psychological and emotional torture under Article 29(d) of *the Constitution* or their right to inherent dignity under Article 28 have been violated or threatened with violation.
30. The petitioners case essentially challenges the decision by the 2nd Respondent vide the gazette notice No. 7452 of 9/08/2019 which sought to cancel title deeds for land parcels No's Mau Summit/Sachangwani Block 10/1-200 pursuant to an award of the Cooperatives Tribunal Case No. 6 of 2010. Regarding the 2nd and 3rd respondents' inclusion in this petition, it is clear to see that no cleanup and fresh distribution can be done while the titles already issued have are still in place. In this court's view, the 2nd respondent was not independently exercising his powers at his absolute discretion but in conjunction with the 1st respondent whose responsibility is to determine how the land was to be distributed. He has no knowledge of how the land ought to be shared and indeed it is not within his duties to determine that; independent of any information given by the 1st respondent, his cancellation of the titles would have been suspect and liable to a serious challenge. By virtue of those observations, there is no probability that the acts of the 2nd and 3rd respondents can be deemed to be violations of constitutional rights of the petitioners.
31. In view of the foregoing, it is this court's view that the instant petition does not meet the threshold required of a constitutional petition and that being the case, I do not need to address the other issue that had been framed for determination. For that reason, the petition dated 25/10/2019 is hereby struck out with no orders as to costs.

It is so ordered.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 18TH DAY OF MAY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

