



REPUBLIC OF KENYA



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Haji & 28 others v Seif (As Trustee of Seif Bin Salim Trust) & 3 others (Environment & Land Petition 155 of 2015) [2022] KEELC 3980 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3980 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 155 OF 2015

NA MATHEKA, J

JULY 26, 2022

BETWEEN

ABDILLAHI FARAH HAJI 1ST PETITIONER
LAILA ABDILAH OMAR 2ND PETITIONER
JABU ALI SHAMTE 3RD PETITIONER
MUNIRA NAAMAN 4TH PETITIONER
SALIM MAULID 5TH PETITIONER
MOHAMED HUSSEIN BASHIR 6TH PETITIONER
MOHAMED KASSIM ABDULQADIR 7TH PETITIONER
SEIF SOUDI 8TH PETITIONER
SHEIKHA MUUTI 9TH PETITIONER
LALI AHMAD ABDALLA 10TH PETITIONER
ABDUL HABSHI 11TH PETITIONER
HAMZA MUHAMUD 12TH PETITIONER
SWALEH KARAMA 13TH PETITIONER
ALI AHMED SAROOR 14TH PETITIONER
ALI AHMED SAROOR 15TH PETITIONER
JAEQUELINE MAMBEBA 16TH PETITIONER
NYAMBWANA BUNU MAHZI 17TH PETITIONER
HUSSEIN ANWAR OMAR 18TH PETITIONER
ABDI GEDI 19TH PETITIONER



AHMED SHEIKH	20TH PETITIONER
ABDULBASIT SWALEH	21ST PETITIONER
FADHIL AWADH	22ND PETITIONER
SAID ABDALLAH	23RD PETITIONER
MOHAMMAD BABU	24TH PETITIONER
MOHAMED BAUSI	25TH PETITIONER
SWALEH MUHSIN SHIGOGO	26TH PETITIONER
SELEMAN MBARUK	27TH PETITIONER
FAIZ MANSOUR	28TH PETITIONER
JUMA THIAKA KAMONDE	29TH PETITIONER

AND

SAID BIN SEIF (AS TRUSTEE OF SEIF BIN SALIM TRUST). 1ST RESPONDENT	
LAILA MOHAMED SEIF (AS TRUSTEE OF SEIF BIN SALIM TRUST)	2ND RESPONDENT
NATIONAL LAND COMMISSION	3RD RESPONDENT
BEYOND AUCTIONEERS	4TH RESPONDENT

JUDGMENT

1. The Petition states that at all material times, the petitioners are residents of Mwembekuku Estate on the Island of Mombasa and are in occupation and or possession of portions of land on Plot Number Mombasa/block XVII/219 situated at Mwembekuku within the island of Mombasa which is registered in the names of the 1st, 2nd and or 3rd respondents as trustees of Seif Bin Salim Trust. The petitioners inherited the land and or the houses standing on the land from their parents who intern inherited the same from their parents and therefore the Petitioners' families have been in occupation and or possession of the houses standing on the land from the time the coast was under the rule and or administration of the Sultan of Zanzibar to this day. The petitioners aver that the land was originally under the management and or administration of the Sultan of Zanzibar who did so in accordance to the Sheria land tenure
2. The Petitioners therefore held the beneficial interest over the land and the Sultan or his representatives were merely trustees thereof. Sometime in 1890 or thereabouts, the Sultan entered into a treaty with the British Government which was to take over the administration of his territory and or subjects but the land rights of the Sultans' subjects including the Petitioners or their parents and or grandparents were protected. Sometime on December 15, 1930, the colonial British Government wrongly and or illegally and in breach of the 1890 treaty registered the land in the name of Sir Ali Bin Salim who was by then the Liwali of Mombasa even though the equitable ownership or the benefits thereof belonged to the Petitioners, their parents and or grandparents. Subsequently the said Sir Ali Bin Salim consecrated the land into a waqf for the benefit of his family instead of the petitioners, their parents and or grandparents contrary to the intent and purport of the treaty and as a result his family members, particularly the 1st,



2nd and 3rd respondents, have appointed themselves as trustees of the private Wakf of the said Sir Ali Bin Salim instead of the intended public Wakf (whose beneficiaries are the petitioners) after they had registered themselves as absolute proprietors on May 6, 2002.

3. Sometime on or before November 28, 2014 the 1st, 2nd and or 3rd Respondents caused the land to be subdivided into several plots and offered them for sale to the petitioners who had always believed that the land would be subdivided and transferred to those who occupy the same as of right and that the monthly payments they were paying to the 1st, 2nd and or 3rd respondents as ground rent was to meet the administrative expenses required to subdivide the same. The petitioners did not accept the said offer and informed the 1st, 2nd and 3rd Respondents of their right to the land which right the 1st, 2nd and 3rd Respondents did not agree with and as a result they unilaterally and without consent of the petitioners raised the alleged ground rent with effect from January, 2015. When the Petitioners complained to the 1st, 2nd and 3rd Respondents about the said offer, the 1st, 2nd and or 3rd respondents instructed Beyond Auctioneers, the 5th respondent, to levy distress against the Petitioners and on May 26, 2015 the said auctioneers proclaimed the petitioners properties and threatened to remove the proclaimed properties for sale after fourteen (14) days. The constitutional provisions violated and the nature of injury caused or likely to be caused to the Petitioners.
 - i. The petitioners believe, by registering the land in the names of Sir Ali Bin Salim and subsequently to his family, the 4th respondent breached, violated and or contravened the fundamental rights and freedoms of the petitioners particularly:
 - a. Article 40 of the [Constitution of Kenya, 2010](#) in that the 4th respondent has failed to protect the petitioners rights to own land and has allowed the Petitioners to be deprived of the land they lawfully occupy and or possess by the 1st, 2nd and 3rd respondents.
 - b. Article 2 (5) and (6) of the [Constitution of Kenya, 2010](#) as the 4th Respondent disregarded the terms and or conditions of a lawful treaty in allowing the registration of the land in the name of Sir Ali Bin Salim and subsequently to his family members the 1st, 2nd and 3rd respondents.
 - c. Article 43 (1) (b) and (e) and (3) of the [Constitution of Kenya, 2010](#) as the respondents have violated the petitioners rights to accessible and adequate housing and to social security.
 - d. Despite the petitioners complaint to the 4th respondent, the 4th respondent has failed to initiate investigations which is a breach of Article 67 (2) (e) of the [Constitution of Kenya, 2010](#).
 - ii. The effects of the above violations
4. The Petitioners pray for the following orders;
 1. A declaration that Plot Number Mombasa/block XVII/ 219 is a trust land held on trust by the 1st, 2nd and 3rd Respondents for the benefit of the petitioners as beneficiaries thereof and the 1st, 2nd and or 3rd Respondents have no powers or authority to offer to sale the land or portion thereof to the petitioners or to unilaterally and or without the consent of the Petitioners increase the so called ground rent and to instruct auctioneers to levy distress against the Petitioners.



2. An order nullifying the title held by the 1st, 2nd and 3rd respondents in respect of Plot Number Mombasa/block XVII/ 219 and for the same to be subdivided and registered in the names of the petitioners.
 3. A permanent injunction against the 1st, 2nd and or 3rd respondents either by themselves or through their agents, servants, and or employees restraining them from interfering with the Petitioners quiet enjoyment of Plot Number Mombasa/block XVII/ 219 in any manner whatsoever including offering for sale portions thereof, unilateral increasing of the monthly charges allegedly called ground rent and or levying distress thereof.
 4. Costs of this petition.
 5. Any other relief that this honorable court may deem fit and just to grant.
5. The respondents submitted that the fact of ownership has been expressly admitted by the petitioners, which admission effectively extinguishes their allegation that they have acquired interest on land through ancestry. The respondents reiterate that the petitioners are mere licencees and that the said kind of interest is incapable of protection under article 40 of the constitution. That the petitioners opted to file the instant petition as an afterthought after having been served with ground rent increment notices and an option to purchase respective subdivision on first priority.
6. That it is inconceivable that the petitioners would wish to be allowed to occupy and possess the respective subdivisions, without paying the ground rent/county Government land rates. It is only fair and just that the 1st 2nd and 3rd Respondents be allowed deal with their property in any manner as they wish. The 1st 2nd and 3rd Respondents submit that the Petitioners willingly omitted the facts that the Petitioners have defaulted in remitting their lawful ground rent as and when it falls due, which they have been paying in the past and forms the basis of the Licencor-Licensee relationship. The Petitioners have also been economic with the information they wish to divulge to the court; for instance, that the increase of the ground rent was in line and at per with the increased County Government Land Rates which the 1st, 2nd and 3rd Respondents have had to pay as the Petitioners defaulted. The Petitioners have listed articles 19, 20, 21, 23, 25(c), 28, 40 and 43 of the [Constitution](#) but failed to provide any particulars of how those articles of Constitution have been violated, contravened or breached. That without particulars, it is difficult to tell how or which other specific right has been offended. We are unable to see how this Article aids the Petitioners. Article 43 is on Economic and Social Rights. Again without particulars, the exact economic or social right breached is not discernible sufficiently to enable a response. This is especially so as the Article lists such rights as reproductive health care, adequate housing, reasonable sanitation, clean water, social security and education. They submit that the lack of particulars renders the petition incompetent for being nebulous and inchoate. It also renders it unfounded as a constitutional Petition. They referred to the case of [Anarita Karimi Njeru v Republic](#) No 10 (1979) KLR 154 and the further restatement in the case of [Mumo Matemo v Trusted Society of Human Rights Alliance](#) (2014) eKLR where the court stated 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."
7. The Respondents stated that the Petition does not meet the principles to be satisfied for the grant of injunctive orders. The law governing grants of mandatory injunction is contained in the well-known case of *Giella v Cassman Brown Co Ltd* (1973) EA 358 where the principles for grant of injunctions were settled. That the Petitioners have not proved lawful ownership and occupation of



the suit property and have similarly failed to establish violation(s) of their constitutional right(s) by any of the respondents, it should follow that they have failed to prove their petition on a balance of probabilities. The net result is that they are not entitled to any of the reliefs sought in the petition.

8. This court has considered the Petition and submissions therein. As to whether or not there is a competent constitutional petition before the Court, it is necessary to consider whether the petition satisfies the threshold of what constitutes a constitutional petition as per the principle established in the case of *Anarita Karimi Njeru v The Republic* (1979) eKLR which principle was later restated by the Court of Appeal in the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. The principle established in the *Anarita Karimi Njeru* case (supra) was that a Constitutional petition should set out with a degree of precision the Petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. The *Mumo Matemo case* (supra) reaffirmed the principle in the *Anarita Karimi case* when the Court at paragraph 44 of the judgment stated 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 remedy by the 1st respondent"

9. In the same judgment the court on its findings stated as follows:-

It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the constitution of Kenya and the *Ethics and Anti-corruption Commission Act, 2011*, accordingly the petition did not meet the standard enunciated in the *Anarita Karimi Njeru case*."

10. I find that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. It is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints. The Petitioners states that inherited the land and or the houses standing on the land from their parents who intern inherited the same from their parents and therefore the Petitioners' families have been in occupation and or possession of the houses standing on the land from the time the coast was under the rule and or administration of the Sultan of Zanzibar to this day. The instant case appears to me to be an issue of ownership of land and whether or no ground rent has been paid.

11. In the case of *Godfrey Paul Okutoyi & others vs Habil Olaka & Another* (2018) eKLR the court stated that;

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 by procedure. It is not every failure to act in accordance with a statutory provision or where 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 right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

12. In the case of *Bernard Murage vs Fine Serve Africa Ltd & others* (2015) eKLR the court stated that;

Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

13. In the case of *Patrick Mbau Karanja vs Kenyatta University* (2012) eKLR Lenaola, J (as he then was) stated that;

I should only say this as I conclude; in *Francis Waitbaka v Kenyatta University* Petition No 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in *Teitinnang v Ariong* (1987) LRC (const.) 517 where it was held as follows:-

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. The Constitution, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by the Constitution under the fundamental rights provisions are owed by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

14. Lenaola, J also stated in the same case that;

I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.

15. I concur with the above referenced cases that matters that do not meet the threshold of the Court’s Constitutional interpretative mandate under the Bill of Rights provisions of the Constitution should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. There ought to be a clear delineation of Constitutional matters and the ordinary civil suits. There are sufficient statutory legal provisions that govern enforcement of civil land matters and the Petitioners ought to have invoked the jurisdiction of the ordinary Civil Court if at all. In conclusion this Constitutional



Petition is not sustainable and constitutes an abuse of the process of the Court and is accordingly ordered struck out with costs to the Respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

