



**M'Murunga & 4 others v Attorney General & 2 others (Environment & Land
Petition 10 of 2018) [2022] KEELC 2441 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION 10 OF 2018**

CK NZILI, J

JULY 20, 2022

**N THE MATTER OF ARTICLES 10, 22, 23, 40, 60, 63, 69, 155, 232, 233, 234, 236 AND 258 OF
THE CONSTITUTION OF KENYA AND CHAPTER 6 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ANCESTRAL LAND

BETWEEN

**M'RIRIA M'MURUNGA 1ST PETITIONER
APHAZARD NGAKU 2ND PETITIONER
PHINEAS MURUIKI KIRIGIA 3RD PETITIONER
WILSON KITHINJI 4TH PETITIONER
AARON M'ABURI 5TH PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
DISTRICT LAND REGISTRAR, MERU 2ND RESPONDENT
LAND ADJUDICATION OFFICER IMENTI SOUTH DISTRICT 3RD
RESPONDENT**

JUDGMENT

1. Before the court is the petition dated August 20, 2018 in which the petitioners describing themselves as male citizens residing in Igoji aver they represent the property right holders of Abothuguchi Kamanga clan of Meru County.



2. It is averred in 1957, various clans among them the petitioners clan acquired land, parceled it out and identified their boundaries as ancestral land measuring approximately 200 acres which, following some hunger strike in 1964, was encroached upon by some other clans.
3. The petitioners averred that in 1990's the land adjudication process commenced in the area and in 2000, various land cases and objections were filed regarding the suit land in which their share was allegedly given to Bweguna and Abonthia clan out of collusion with the chairman of Mweru III adjudication section, whose clan was Abwejuna clan and which allegedly destroyed trees worthy Kshs.16 million. The petitioners aver the area chief and the forest officers witnessed the destruction whereof they notified the area District commissioner Imenti South District of an appeal against the A/R judgment.
4. The petitioners aver the 3rd respondent by a decision dated May 6, 2011 contrary to Article 63 (4) of *the Constitution* infringed on their rights under Article 40 as read together with Article 10 of *the Constitution* as regards Parcel No's 290, 331, 333, 334, 336, 339, 340, 342 and 343 and instead allegedly recorded the suit land in the name of non-clan member(s).
5. As a consequence, the petitioners averred they stand to suffer irreparable loss and inconvenience if their constitutional and legal obligations are denied.
6. The petitioners prayed for declaration that land premises known as Gaitune in Mweru III adjudication section is community land belonging to Abothuguchi Kamanga clan; injunction preventing the implementation of the decision made on May 6, 2011 by the 3rd respondent; mandatory an injunction compelling the respondents to issue title deeds in respect of the said land in Gaitune to their members based on the proposed mode of sharing dated August 25, 2018; an order compelling the distribution of the said land to Abothuguci Kamanga family at Gaitune in the names of clan representatives as per the names and identification numbers set under prayer (d).
7. The petition was supported by a sworn affidavit of M'Riria M'Muranga on 20.8.2018 repeating the contents of the petition save to attaching annexures marked MM "1" comprising of the judgment in ELC JR Misc application No. 47 of 2011, the proposed sharing agreement letter dated June 28, 2012, map of the area, land board proceedings dated 16.6.2004; ministry request for arbitration dated November 13, 2008, further proceedings of the land board dated November 30, 1999, committee judgment dated October 23, 2005, further proceedings dated January 18, 2000; committee findings of October 23, 2000; committee award dated April 1, 2005 and a ministry letter to the petitioners dated November 24, 2008.
8. The petition was opposed the respondents through grounds of opposition dated April 12, 2021 on the basis that; the petition was against public interest. Article 1 of *the Constitution* donates the power to public institution(s); there has been non-material disclosure of facts some were interested parties in Meru JR No. 47 of 2011 have been not been made parties to the petition which offends the principles of fair play; the petition is a collateral attack of the Land Adjudication officer made on May 6, 2011 which still stands; the effect is to seek to unravel settled issues of titling and instigate administrative chaos in an exercise that resulted to issuance of titles; the orders are not efficacious; the petition is moot and an academic exercise; the petition seeks to derogate from the principle of sanctity to title by circumventing Section 26 of the *Land Registration Act*; the dispute is against public policy and is coming 10 years thus rendering the dispute time barred; the court should exercise constitutional avoidance for the petitioners seeks to derogate from the internal mechanism under Cap 284; Article 63 of *the Constitution* has not been operationalized; the petition creates a legal conundrum by usurping the role of the County Government under Article 63 (3) of *the constitution* the *Community Land Act*



does not derogate the [Land Adjudication Act](#) and lastly the petition offends the principle of inter-generational equity as set out under Section 18(a) (10) of the ELC Act 2011.

B. Disposal by way of Written Submissions

9. Parties by consent agreed to canvass the petition through written submissions which were to be filed by February 6, 2022 and later extended to March 29, 2022.
10. The respondent's submission dated February 7, 2022 maintain that Article 1(3) of [the Constitution](#) donates powers to public institution(s) to conduct various duties stipulated by law and that under the [Land Adjudication Act](#) specific officers are granted powers to handle land adjudication cases.
11. It is submitted under Section 29 of the [Land Adjudication Act](#) the petitioners were entitled to file an appeal to the Minister if dissatisfied by the decision made on May 6, 2011 within 60 days. Therefore, the failure to exhaust the said mechanisms renders the petition unwarranted, is an afterthought, an abuse of the court process, the petition is inordinately filed late it is frivolous, vexatious and by dint of the doctrine of constitutional avoidance the dispute could have been handled otherwise without invoking [the Constitution](#). Reliance was placed on *Daniel N. Mugendi v KU & 3 others* [2015] eKLR, *Kuria Greens Ltd v Registrar of Titles and another* [2011] eKLR.
12. The respondents submit in the absence of evidence on fraud, misrepresentation on the part of the 3rd respondent, the court lacks no powers to cancel a title to land.
13. As regards Article 63 the respondents submit the [Community Land Act](#) has not been operationalized and the Act did not detract from the [Land Adjudication Act](#).
14. The respondents submit the petitioners were cat fishing for information more so as regards paragraph 18 & 19 of the petition where they seem to be confusing and conflating issues.
15. Additionally, the respondents submit the petitioners have failed to disclosure material facts regarding some interested parties who have not been enjoined in this petition, whereas they were parties in the Judicial Review matter hence were mischievous since the issues raised have been determined hence the petition was like flogging a dead horse. Reliance was placed on *County Government of Meru and another v DLASO Tigania East & 18 others* [2018] eKLR on intergenerational and intragenerational equity.
16. Therefore, the respondents urge the court to find the petition defective, mischievous frivolous and lacking merits.

C. Issues for Determination

17. Having gone through the petition, annexures, grounds of opposition and written submissions, the issues for determination are:
 - i. If the petition meets [the constitution](#) threshold.
 - ii. If the petition is res judicata
 - iii. If the petitioners have exhausted other available avenues.
 - iv. If the petitioners have proved any breach of their constitutional rights and freedoms.
 - v. What is the order as to costs?
18. A party alleging breach of the bill of rights under legal notice no. 117/2013, the (Constitution of Kenya Protection of Rights And Fundamental Freedoms) Practice and Procedure Rules 2013 may acting in



his own interest, or on behalf of another person or as a member or interest of a group or class of persons, or in public interest or in association acting in the interest of one or more members, bring a petition disclosing his name and address; facts relied upon, the provisions violated, nature of injury caused or likely to be caused, details regarding any civil or criminal cases involved and related to the matter in issue and the reliefs sought.

19. Rule 11 (1) thereof provides a petition may be accompanied by an affidavit and annexed documents to be relied upon.
20. In reply to a petition Rule 15 (1) thereof requires on the part of the Attorney General and any other respondent to file a memorandum of appearance and either a replying affidavit or statement setting out the grounds to be relied upon to oppose the petition.
21. Rule 20 thereof allows the court to direct the manner of hearing including by way of affidavits, written submissions or through oral evidence.
22. Under Rules 21 and 22 thereof, the court may direct written submissions to be filed within 14 days or such other time as well as the framing of the issues for determination. The written submissions must contain a brief statement of the facts with reference to exhibits, issues arising for determination, concise statement of arguments for each issue and authorities relied upon.
23. Addressing the above provisions, the court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR reaffirmed the principle in *Anarita Karimi Njeru (supra)* that a petition must have sufficient particulars to which the respondents could reply to.
24. In *Patrick Mbaabu Karanja vs Kenyatta University* [2012] eKLR the court held the constitutional court's mandate should not be invoked where there are other remedies especially on simple matters between individuals which are purely civil or criminal which can follow the ordinary route.
25. In *Godfrey Paul Otutoyi & another v Habil Olaka & another* [2018] eKLR, the court held rights conferred by a statute are not fundamental rights under the bill of rights and therefore their breach, being a breach of an ordinary statute should be addressed through a court of law in the manner the statute stipulates and or the rules of procedure provide.
26. In *David Gathu Thuo v AG & another* [2021] eKLR the court stated that the rights alleged to have been violated must be precisely enumerated and the claim as pleaded must demonstrate such violation with precise particulars of violation, manner of commission and the extent of violation by way of disclosed evidence in the pleadings.
27. In *Nyatete Nyakundi Justin and 17 others vs Pyrethrum Processing Co. of Kenya Ltd* [2022] eKLR the court held it is never enough to merely enumerate various constitutional provisions alleged to have been violated in the heading of the petition and leave it at that.
28. In this petition the petitioners after setting the historical facts, in paragraph 21 of the petitioner aver that the 3rd respondent made a decision on 6th May 2011 denying them community land contrary to Articles 63 (4) of *the Constitution* hence infringing on their rights under Articles 40 and 63 of *the Constitution*.
29. It is averred at paragraphs 24 & 25 of the petitioner by that singular decision of the 3rd respondent the petitioners and the public stand to suffer irreparable loss and inconvenience unless the respondents are ordered to perform their constitutional and legal obligations.
30. In the prayers sought the court is therefore asked to declare the suit land namely Gaitune Mweru III adjudication section community land; issue injunction stopping the implementation of the 3rd



respondent's decision and for a mandatory injunction for the issuance of title deed(s) to the petitioners and subsequent distribution to its members.

31. The petitioners support their claim with a judgment in Meru ELC No. 47 of 2011 relating to land parcels no's 290, 330, 331, 332, 334, 335, 336, 338, 339 and 340 The said Judicial Review case was between the 1st petitioner herein as the exparte applicant, the 1st and 3rd respondents and some interested parties who are not party to this petition.
32. In the said judicial review case the prayers were sought for the quashing of the 3rd respondent's decision made on May 6, 2011 over objection no's 102, 103, 104, 105, 106, 109, 110, 111, 112 and 113 against land Parcel No. Mweru III adjudication section no's. 290, 330, 331, 332, 333, 335, 336, 338, 339 and 390.
33. In the judgment rendered on 15.11.2017, the court determined four key issues namely; the applicable law; whether the decision was made alongside the land committee; if rules of natural justice were addressed and lastly on whether the decision was biased or unreasonable. The court reached a verdict that the notice of motion was unmeritorious.
34. In this petition the claims revolves around the decision by the 3rd respondent on May 6, 2011 alleged to infringe on the petitioner's rights under Articles 63(4) & Article 40 of *the Constitution*. Further at paragraph 23 of the petition, the petitioners accuse the respondents for failing to comply with Article 10 of *the Constitution* by not acting or making their decisions on the suit premises in a transparent, accountable and equitable manner.
35. In the judicial review proceedings the subject matter was the subdivisions forming part of the exparte applicant's large ancestral land owned by his clan Abothuguchi/Kamanga alleged to have been determined by a land arbitration board and awarded to the petitioners vide a decision made on April 1, 2005
36. In this petition, the petitioners describe themselves as representing the property rights of their clan. At paragraph 17 of the petition, the holding or ruling of the land arbitration board in 1999, 2000 and 2004 is admitted.
37. The respondents have opposed the petition on non-disclosure of material facts, invoke the principle of constitutional avoidance, claim the petition is contrary to public policy, is moot or academic to create a legal conundrum by usurping the role of the County Government and other state organs bestowed with duties under the *Land Adjudication Act* under its internal mechanisms on dispute settlement.
38. The decision in the judicial review matter was delivered on November 15, 2017. This petition was filed on October 18, 2018. The effect of the judgment in the judicial review case was that the stay of the implementation of the 3rd respondent's decision made on May 6, 2011 was lifted and or vacated.
39. The petition having been filed almost a year after the judgment was rendered does not disclose whether the petitioners appealed against the said judgment and more importantly the status of the implementation of the decision made on May 6, 2011 which they now complain about albeit this time round through a constitutional petition.
40. Following the 2010 *Constitution* one of the reliefs, a constitutional court is mandated to issue is judicial review orders.
41. Looking at this petition and the above quoted decision, several similarities arise as to the parties, subject matter and issues at hand.



42. In *John Florence Maritime Services Ltd & another v Cabinet Secretary Transport and infrastructure* (petition 17 of 2015) (2021) KESC 39 (KLR) Col (6 August 2021) Judgment, the Supreme Court of Kenya settled the question as to whether res-judicata rules applies to constitutional litigation.
43. The court affirmed the doctrine of res judicata applies, but must only be sparingly invoked in the clearest of the cases since rights keep on evolving, mutating and assuming multifaceted dimensions. The court held that the doctrine of res judicata was not a technicality since it goes to the root of the jurisdiction of the court to entertain a dispute.
44. Having analyzed the judgment and the petition my finding is that the issue in dispute is the same or substantially the same as the previous case, parties are the same or claiming or litigating under the same title and the earlier claim was decided on merits.
45. The petitioner seems to be trying to have a second bite of the cherry this time round bringing a constitutional petition which also not met the threshold as set out in *Mumo Matemu* decision.
46. The specific injuries and the previous proceedings were not pleaded in the body of the petition. There has been deliberate non-material disclosure. The specific complaints made against the respondents as concerns the petitioners, Constitutional rights and freedoms have not been particularized. The petitioners have not also exhausted the internal dispute mechanism especially the judgment in the judicial review before resorting to the constitutional courts by way of an appeal. The holding of the court in the judicial review case over the merits of the 3rd respondent's decision made on May 6, 2011 has not been appealed against. Such a decision cannot therefore be challenged through a constitutional petition given that this court has no mandate to sit on an appeal of its own judgment, rendered in a judicial review application.
47. Further, there are no special circumstances demonstrated by the petitioners why the court should not apply the doctrine of res-judicata and or for this court to arrive at a different conclusion sitting as a constitutional court given its expanded mandate.
48. I therefore find the petitioners have been unable to plead and prove the breach of their constitutional rights as to Land Article 40 & 63 of *the Constitution*. The petition is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 20TH DAY OF JULY, 2022

In presence of:

Kurauka for petitioners

Kieti for respondent

HON. C.K. NZILI

ELC JUDGE

