



Kaliuntu (As legal representative of Benasio Mungania Mwirichia) v Dlaso Tigania East and West Sub Counties & 3 others; Ngeera & 12 others (Interested Parties) (Environment & Land Petition 17 of 2019) [2022] KEELC 2443 (KLR) (20 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION 17 OF 2019**

**CK NZILI, J
JULY 20, 2022**

BETWEEN

**JACINTA KALIUNTU PETITIONER
AS LEGAL REPRESENTATIVE OF BENASIO MUNGANIA MWIRICHIA**

AND

**DLASO TIGANIA EAST AND WEST SUB COUNTIES 1ST RESPONDENT
DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 2ND
RESPONDENT**

**CHIEF LAND REGISTRAR 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

AND

**JOSEPH KIAMBI NGEERA INTERESTED PARTY
SOLOMON LIRIA INTERESTED PARTY
WINFRED KAGANI INTERESTED PARTY
DAVID MUGAMBI MAILUTHA INTERESTED PARTY
M'NTUANKIO MIKURU INTERESTED PARTY
PETER KINYUA INTERESTED PARTY
Geffrey KARUTI INTERESTED PARTY
HENRY KIREMA NGURARU INTERESTED PARTY
LAWI KINYUA PETER INTERESTED PARTY
JUMA MURIKINYI M'IBERE INTERESTED PARTY**



M'ITUMBIRU IKWINGA INTERESTED PARTY
MICHUBU MICHAEL INTERESTED PARTY
STEPHEN GATUA INTERESTED PARTY

JUDGMENT

A. The Pleadings

1. By a petition dated 20.6.2019 the petitioner describing herself as a legal representative and wife of Benasio Mungania Mwirichia alias Mungania Mwirichia a resident of Antuamburi Tigania East claims her late husband owned LR Tigania/Antuamburi/810 which is occupied by his wives and sons, since 1973 and where the deceased is interred. She sued the respondents for illegally and unprocedurally hearing objections no's 710, 3266, 3226 and 41 regarding the subject land in total disregard of the "estates" right to fair administrative action and ownership of land and subsequently proceeded to subdivide and record in favor of the interested parties as subdivision Parcels No's 810, 11722, 12077, 13530, 13531, 12602, 12603, 12605, 12606, 12607 and 12608.
2. The petitioner averred the interested parties have never lived or worked on any part of the said suit land and or ever called a land surveyor to be shown the alleged subdivisions yet they possess title deeds and have threatened her and her family members to evict them from the subject land.
3. The petitioner averred the said subdivisions and registration of new parcels of land was done through collusion and fraud by the respondents and the interested parties after the demise of her husband secretly and in total violation of the estate's constitutional rights and freedoms set out under Article 40, 47, 48 & 50 of the *Constitution*.
4. The petitioner prayed for declaration; that the decision of the 1st respondent in the aforesaid objections were unconstitutional, null and void; an order quashing the decisions thereof and for the cancellation of all the titles of LR No. Tigania/Antuamburi/810, 1172, 12077, 13530, 13531, 12602, 12603, 12604, 12605, 12607, 12608 and have the same consolidated as one parcel of land in the name of the deceased.
5. The petition is supported by an affidavit sworn by Jacinta Kaliuntu on the even date attaching a copy of grant as annexure JK "1", committee decision in No.592/68, 186/77 & 185/77 in favour of the deceased as annexure JK "2" & JK "3", chiefs letter as annexure JK "4", copies of proceedings in the objections as annexure JK "5" & "6" and letters from the 1st respondents to come and affix the boundaries as annexure JK "7" and "8" respectively.
6. The summary of the supporting affidavit over and above the contents of the petition was that the deceased had two wives living on the subject land, that in 2012 they went to Mikinduri after the adjudication registrar was declared complete only to find that they had no land; upon search the adjudication officer informed them about the objections done while, the deceased had passed on but the family were not made a party to the objections; efforts to file a suit at Tigania Law courts were unsuccessful for the court lacked jurisdiction; threats have been made to come and effect what is on the paper on the ground; efforts to have a panel of elders intervene have been made but in vain as the respondents and interested parties have ganged up to evict them, and the only recourse was the court.
7. The petition was served and a return of service filed on 15.7.2019 by John K. M'Ikiara. The 1st respondent through a replying affidavit sworn on 3.10.2019 by Elias M. Kamaru has opposed the



petition. Regarding the contents of paragraph 5 of the petition, the 1st respondent states he could not deny or confirm on the land case and ownership of Parcel No. 810 for the adjudication section record were currently at Nairobi hence he had no documents to peruse and rely upon since the matter was at registration stage whose mandate fell with the 3rd respondent.

8. As regards the issue that the land adjudication committee had confirmed the ownership and drew the map the 1st respondent denied the same given the role of the land committee was not on land confirmation and drawing of maps or sketches since those roles belonged to land technical committees. On the aspect of who was on the land and the alleged threat to visit the suit land to effect the subdivisions, the 1st respondent stated he could not deny or confirm the same since the respondents had not visited the disputed land. On the issue of the alleged hearing of the objections in total disregard of the petitioner's constitutional rights, the deponent denied the same given the [Land Consolidation Act](#) Cap 284 under Section 26 required the Land Adjudication Officer to hear and determine the filed objections. The 1st respondent took the view that according to the filed proceedings, the petitioner was represented by his son and all the processes were followed from the filing, summoning, hearing and implementing of the decision made.
9. On the follow up letters by the petitioner the 1st respondent stated the alleged letters were written to unnamed authorities and that the petitioner had failed to disclose previous suit in Tigania PMCC No. 25 of 2018 which was dismissed her failure to file a judicial review to challenge the Land Adjudication Officer decision making process otherwise the Njuri Ncheke's decision was untenable in law, was not binding on them and could not override the land adjudication officer's decision.
10. On the consent to sue the 1st respondent admitted issuing such a consent to the petitioner to institute judicial review proceedings, which was done in good faith. Nevertheless, the petitioner had failed to disclose there was a case heard and determined in CC No. 25 of 2014 and ELC No. 253 of 2013.
11. Regarding the subdivisions and resultant parcels of land, the 1st respondent averred since there was a process to subdivide and transfer of the land, the land adjudication officer heard and determined the objections as per Section 26 of the [Land Consolidation Act](#) hence the subdivisions and generation of new number, was as a result of land adjudication officer decision which was not arbitrary since had the mandate and jurisdiction to do so.
12. The 4th interested party entered appearance on 15.7.2019 while the 7,8 & 10 interested parties filed a defence dated 10.8.2019 and a replying affidavit by Geoffrey Karuti sworn on 30.8.2019 on behalf of himself and 8 & 10 interested parties. The gist of their opposition was that the deceased never owned Parcel No. 810 or succeeded in the alleged land committee cases up to taking a Nthenge oath as alleged or that the land was ever fully occupied by the petitioner since 1973. The interested party specifically denied the alleged mock trial or fraud collusion or any alleged violation of the petitioner's rights & freedoms. In particular the 7th interested party attached a copy of title deed for LR. Tigania/Antuamburi/12603 & 12605 which they had obtained after the adjudication process as annexures GK 1, 2 & 3 respectively. Further the 7th interested party averred that after the issuance of title deeds, the petitioner filed ELC No. 25 of 2018 at Tigania law courts suing the same parties over the same subject matter which was dismissed and therefore the current petition was a clear abuse of the court process. He attached the ruling and the plaint as annexures G.K "4" & "5" respectively.
13. Additionally, the 7th interested party deponed he and some other interested parties were in actual occupation of their respective parcels of land and district surveyor had visited the land and put the boundary beacons. Lastly the 7th interested party stated the parcels were acquired lawfully after following the right processes and procedures hence there was no alleged fraud or breach of the petitioner's rights.



14. Parties herein also relied on their paginated bundle of documents filed on 22.1.2020, by 5, 7, 8, 10 & 12th interested parties paginated documents filed in 24.2.20201 respectively.

B. Written Submissions

15. With leave of court parties consented to canvass the petition by way of written submissions. The petitioner submitted she has met the threshold of Annarita Karimi Njeru by specifying the rights violated and the issues calling for determination as: whether due process was followed in adjudicating her rights to land or property and if her right to the property was violated by the unlawful subdivisions of LR No. Tigania/Antuamburi/810 and lastly if she was entitled to the orders sought.
16. As regards due process, the petitioner submitted due process was not followed hence the court has powers to scrutinize the same as held in Meru ELC JR No. 7 of 2010 *Republic Vs Director of Land Adjudication & Settlement Officer and another* and [*Johnson Mithika M'Ikiao alias Josephat Kabuthia vs Rose Mukiri Thaitumu*](#) Meru ELC Petition No. 22 of 2012.
17. The petitioner takes the view she was not made a party to the objection or notified about it given her husband was already dead. On the 2nd issue over the right to ownership of property the petitioner submits her husband passed on 2009 and the hearings of the objections without her knowledge as the legal representative.
18. Further the petitioner submits the process of adjudication & objection was fraught with fraud hence breaching her constitutional rights and the resultant title deeds to the interested parties were fraudulently obtained. Reliance is placed on [*Mutsonga vs Nyati*](#) (1989) KLR 428. On whether she is entitled to the orders sought, the petitioner submits the land adjudication committee confirmed ownership, the family of the deceased have lived therein since 1973 to date, extensive developments have been made therein, the legitimacy of the process is under question given the objections were heard after the death of her husband without her involvement. Reliance is placed on [*Republic vs Musanka Ole Runkes Tarakwa, Lempaso Ole Kuyioni & 2 others exparte Joseph Lesalol Lekitio & 2 others*](#).
19. The petitioner submits public organs & officer ought to embrace the national values and principles in making any decisions under the law including but not limited to her right over her property. Reliance is placed on [*Patrick Musimba vs NLC & 4 others*](#) (2015) eKLR and [*Christopher, Nguru Mulwa & 28 others vs the County Govt of Kitui & 2 others*](#) (2017) eKLR.
20. The respondents submitted the petition invokes Articles 22, 23, 40, 47, 48 & 50, 165 of the [*Constitution*](#) whereas Tigania PMCC No. 25 of 2018 has been in existence as set out in paragraph 7 of the replying affidavit which is contrary to Rule 10 of the rules.
21. The respondents take the view that the issues for determination are:
- i. Whether the petition discloses a constitutional cause of action against the respondents and if in the affirmation;
 - ii. Whether the petition has merits.
22. On the 1st issue the respondents submitted Rule 10 of the Mutunga Rules require a petition to disclose the facts, the provisions violated, the nature of injury caused, details regarding any previous cases and the reliefs sought. The respondents rely on [*Annarita Karimi Njeru vs Republic*](#) (1997) KLR 154 and [*Mumo Matemvu vs Trusted Society of Human Rights Alliance*](#) (2014) eKLR.



23. The respondents submit the petitioner has no protectable interest under Article 40 of the Constitution as the objections were carried out under Section 26 of the Land Consolidation Act, before the register was declared final and registration effected hence Article 40 is inapplicable.
24. The respondents submitted it was unnecessary for the petitioner to invoke the Constitution and based on the doctrine of constitutional avoidance, where there exists another remedy in law, one should not unnecessarily invoke the Constitution. To this end the respondents submit as regards the impugned objection proceeding the only recourse by the petitioner was to invoke Sections 8 & 9 of the Law Reform Act and since she knew her claim was late in time, she resorted to the petition to avoid the strict provisions of the applicable law and therefore no explanation has been tendered for the late filing.
25. Regarding fraud, the respondents submit the replying affidavit was explicit the law was duly followed, the petitioner's representative attended and no contrary evidence has been tendered hence the petitioner has failed to discharge the burden of proof over the alleged fraud as held in Virjay Morjaria vs Nasingh Madhusingh Darbar & another (2000) eKLR.
26. The 3rd interested party submits the petition is an afterthought as the allegations therein are traceable to civil case no. 253 of 2013 and orders issued on 5.6.2013 which were never compiled with. Therefore the petition is resjudicata given ELC No. 46 of 2014 was dismissed which was between the same parties and on same subject matter.
27. Further the 3rd interested party is submitted there have been several matters filed in Tigania law courts hence this petition was an abuse of the court process.
28. The 5th, 7th, 8th, 10th and 11th interested parties submit the only option available to the petitioners after the A/R objection was determined was a judicial review or appeal to the Minister since there was no violation of the alleged rights as they followed due process and a decision was made which has not been challenged at all.
29. The interested 5th, 7th, 8th, 10th and 11th parties submit the petitioner has a pending case in Tigania Law Courts which he has abandoned and instead filed this petition which is a fishing expedition more so since they possess title deeds.

Issues for Determination

30. Having gone through the petition, supporting affidavits and written statements, responses thereto and replying affidavits, annexures thereto and written submissions, the issues for determination are:-
 - i. Whether the petition discloses a constitutional question.
 - ii. If the petition is resjudicata and res-subjudice
 - iii. If the petition has been filed after inordinate delay.
 - iv. If the petitioner has proved any alleged breach of her constitutional rights and freedoms.
 - v. What is the order as to costs.
31. The respondents and interested parties have raised issues that the petition does not meet the threshold or the conditions set out under the Constitutional Rule 2013 for lack of disclosing a constitutional question; or specification and of particulars for being brought late and lastly for being both res judicata and res-subjudice.
32. The petitioner has instituted the petition under Articles 22, 23 & 165 of the Constitution which empowers any person to institute a claim over violation or threatened violation of his rights and



- freedoms as set out in the bill of rights. The petitioner alleges the respondents and the interested parties violated her rights and those of the deceased estate as protected under Articles 40, 47, 48, 50 and 165 of the Constitution.
33. Whereas the court has jurisdiction to hear and determine constitutional questions on matters concerning Land and Environment, the Court before embarking on such determination must answer the questions as whether or not the matter before it raises any constitutional questions.
 34. In Gabriel Mutava & 2 others vs MD KPA 2016 (eKLR) the Court of Appeal held constitutional litigation was a serious matter that should not be sacrificed on the alter of all manner of frivolous litigation christened constitutional when they are not and could otherwise be handled adequately in other legally constituted forums. The court held a constitutional litigation was not a panacea for all manner of litigation.
 35. In Anarita Karimi (*supra*) the court held a petitioner must set out with a reasonable degree of precision that of which he complains, the provisions violated and the manner in which they are alleged to have been violated.
 36. In Mumo Matemu (*supra*) the Court of Appeal held the threshold is to be met by providing sufficient particulars to which the respondents could reply to plead with precision relating to the alleged violations and the manner of violation.
 37. In CCK vs Royal Media Services Ltd (*supra*) the Supreme Court of Kenya held the principle of constitutional avoidance precludes the court from determining ordinary civil issues disguised as constitutional questions. Further the court held the principle means that a court will not determine constitutional issue where a matter may properly be decided on another basis.
 38. A constitutional question entails disputes as to whether the law is inconsistent with the Constitution, status, powers and functions of an organ of state interpretation application and upholding of a Constitution, and allocation of various powers to various organs by the alleged constitution. In this petition, the petitioner has singled out two alleged constitutional violation namely hearing and determination of objection proceeding while her husband was deceased without involving her as a legal representative contrary to fair hearing and fair administrative action and as a consequence of which she was denied of her right to property.
 39. In response to the petition both the respondents and the interested parties have pleaded that due process was followed in the hearing, determination and implementation of the objection proceedings hence there was no violation of her alleged rights as to fair hearing, administrative action and the right to own property.
 40. It is trite law that the petitioner is entitled to fair hearing and fair administrative action in the manner the respondents hear and determine disputes regarding adjudication on interests over land as set out under both the Land Adjudication Act and Land Consolidation Act. As to whether the respondents in hearing and determining the objections by the interested parties, there was full or substantial compliance with both the statutory and constitutional procedures as to fair hearing and fair administrative action. In my considered view these are constitutional questions falling under the determination of this court.
 41. The petitioner has pleaded as to the two questions and the respondents and interested parties were able to ably respond to it. My finding therefore is the petition discloses as constitutional questions and that the petitioner met the threshold under Rule 10 of the 2013 rules as well as the principles set out in Mumo Matemu & Anarita Karimi Njeru (*supra*).



42. The respondents and the interested parties contend the petition as instituted is fatal as it offends section 7 & 8 of the Civil Procedure Act given there were two lower court matters over the subject matter between the parties and one of which is still pending.
43. In support of this contention the 7th interested party has attached annexure marked GK “4” and GK “5” being the ruling and the plaint in ELC No. 25 of 2018 before PMCC court Tigania. Unfortunately, none of the parties has bought a final decree from the court which would make this court find the issues raised herein to have been determined to finality by a court of competent jurisdiction. The draft plaint is also not court stamped and or filed before a known court in Kenya. It does not also contain a case number. The respondents at paragraphs 6 & 7 of the replying affidavits sworn by Elias Karani aver that two suits were heard and determined in 2013 and 2014 respectively.
44. None of the judgments were attached as annexures to the said replying affidavit. My finding therefore is that the said objection and or defence has not been substantiated at all hence lacks merits more so bearing in mind that at paragraph 15 of the petition, the petitioner has pleaded the lower court made a finding it had no jurisdiction to deal with the matter.
45. Turning to the issue as to whether the petition is filed after an unexplained inordinate delay and or is being used to circumvent is disguised as a constitutional petition so as to avoid the statutory six months period under Section 7 & 8 of the Law Reform Act as read together with Order 53 Rule 2 of Civil Procedure Rules, the issue as to whether there are time limits in petition courts have held that even though there are no time limits for the filing of proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant the reliefs, must consider whether there has been inordinate delay and whether justice will still be served by permitting a respondent to be vexed by an otherwise stale claim. See Joan Akinyi Kubasellah & 2 others vs A.G (2014) eKLR.
46. In Joseph Migere Ouro vs AG (2015) eKLR the court held there must be consideration on whether the delay in filing the petition was unreasonable and or prejudicial to the respondents’ defence.
47. In the present petition, the petitioner has admitted she became aware of the objection proceedings in 2012. The title deeds attached by interested parties were issued in 2017. The deceased passed on in 2009 while the limited grant was sought and obtained on 31.6.2013. The explanation given by the petitioner is that she filed an ELC matter at Meru but was later on transferred to Tigania Law Court which court eventually held it lacked jurisdiction.
48. In my considered view the explanation for the delay is reasonable. Similarly, the delay cannot be termed as inordinate under the circumstances.
49. Coming to the issue as to whether the petitioner has proved the breach of her constitutional rights as to fair hearing, fair administrative action and the right to ownership of land, the burden of proof is always on the party who alleges as per Sections 107-112 of the Evidence Act.
50. Other than the proceedings from the land adjudication committee, the petitioner has not attached any record of existing rights or interests showing that her deceased husband was initially recorded as the owner of parcel no. 810. The annexures to her supporting affidavit and paginated bundle of documents are also not duly certified and or authenticated by the office of the 1st & 2nd respondents. My findings therefore are that the said annexures hold no evidential strength given the respondents have said they cannot deny or confirm their authenticity since the original records were forwarded to the titling centre Nairobi. It therefore has been easier for the petitioner to make a follow up and obtain verified or certified adjudication records from the Director of land adjudication so as to buttress her averments. In absence of evidence my finding is that the petitioner has failed to prove such violation to the required standard.



51. As concerns the issue as to whether the respondents and the interested parties purported to fraudulently file, hear and determine objection proceedings without involving the petitioner, the burden was on the petitioner to prove all the allegations on fraud, illegalities and statutory, non-compliance as held in *Vijay Morjaria* (2000) eKLR *supra* and Arithi Developers.
52. The petitioner has brought no evidence if she ever made a report to the police on the 2nd respondent and investigations commenced against the respondents, their agents or employees who allegedly orchestrated, perpetuated and or implemented the said scheme.
53. The respondents and interested parties on the other hand have said that the deceased estate was ably represented by the son who even participated in the proceedings hence due process was followed. Similarly, the respondents have made specific averments that the petitioner was advised and issued with a consent to lodge an application for Judicial Review on time which was done in good faith. The petitioner did not counter those specific averments and or disapprove them through evidence.
54. The petitioner based her claim on both the fair hearing and fair administrative action during the adjudication process. The respondents have averred that they gave the petitioner an opportunity to pursue her claim by way of judicial review within time and in line with Article 47 of the *Constitution* to an extent of issuing her with a consent to sue. She did not pursue her access to justice thereafter as she was directed and before the land adjudication process became final and titles came out. The petitioner slept on her rights to fair hearing and access to justice out of no fault or impediments from the respondents.
55. Instead of pursuing her appeal or review rights, the petitioner went to the wrong forum and or delayed the precipitate action until the subdivisions were registered and titles came out. She cannot therefore possibly complain over denial of her right to fair hearing and fair administrative action leading to loss of her land rights without bringing tangible and concrete evidence on how the specific officers of the respondents allegedly denied her alleged constitutional rights and freedoms.
56. The petitioner has brought no such evidence before this court against the respondents that they colluded and fraudulently heard and determined the objections. See *Esther Kiutha M'Mbui vs Stephen Muriuki Arachia & 2 others* (2022) eKLR. As regards whether the petitioner was denied an opportunity as a legal representative to participate in the objections, the limited grant attached to her petition was issued in 2013 while the objections were heard in 2009.
57. There is no requirement under the land adjudication process for a legal representative for a deceased person to be present since the issues revolve around interests on land which have not crystallized into estates falling under the *Law of Succession Act*.
58. Therefore, if a son of the deceased was present and which fact the petitioner has not denied, the requirements of the law were duly met and hence the interests of the estate of the deceased were duly met by the respondents. See *Republic vs District Commissioner Machakos Ex parte Kakui Mutiso* (2015) eKLR and *Republic vs AG & Ex parte Eric Ndungu Ithuku* (2019) eKLR.
59. In the premises I find the petitioner has failed to prove that her constitutional rights were breached by the respondent and the interested parties. The petition is 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:

Wambua for petitioner



Ayub for 7th, 8th, 10th and 11th interested parties

Kieti for respondent

HON. C.K. NZILI

ELC JUDGE

