



**Wachira v Washington Nderitu Komu t/a Nderitu Komu
& Co. Advocates & 2 others (Environment & Land Petition
852 of 2016) [2022] KEELC 2526 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 852 OF 2016**

SO OKONG'O, J

JULY 14, 2022

**IN THE MATTER OF ARTICLES 2, 3, 10, 22, 53, 60, 159 AND 258 OF THE
CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF THE ALLEGED
CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER
ARTICLES 27, 28, 31, 39, 40, 43, 48 AND 50 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

EDWARD THIONG'O WACHIRA PETITIONER

AND

**WASHINGTON NDERITU KOMU T/A NDERITU KOMU & CO.
ADVOCATES 1ST RESPONDENT**

**CHIEF MAGISTRATE'S COURT MILIMANI COMMERCIAL
COURT 2ND RESPONDENT**

DUNCAN KIRERI WACHIRA 3RD RESPONDENT

JUDGMENT

1. By a petition dated 20th July 2016, the Petitioner sought the following reliefs;
 - i. A declaration that the orders made on 2nd October 2015 in Nairobi Milimani CMCC No. 170/2015, Duncan Kireri Wachira v Edward Thiong'o Wachira breached the Petitioner's rights and fundamental freedoms under the provisions of Articles 27, 28, 31, 39, 40, 43, 48 and 50 of the *Constitution*, hence void for all intents and purposes.
 - ii. Judicial Review by way of an order of certiorari be issued to remove into the Court and quash the orders made on 2nd October 2015 in Nairobi Milimani CMCC No. 170/2015, Duncan Kireri Wachira v Edward Thiong'o Wachira.



- iii. A declaration that the initiation, maintenance and prosecution of Nairobi Milimani CMCC No. 170/2015, Duncan Kireri Wachira v Edward Thiong’o Wachira in the manner intended contravenes the Petitioner’s constitutional right to fair hearing, is an abuse of the court process, malicious and oppressive.
- iv. An order be issued prohibiting continuance of Nairobi Milimani CMCC No. 170/2015, Duncan Kireri Wachira v Edward Thiong’o Wachira in the manner intended.
- v. An order be and is hereby issued directing the 1st and 2nd Respondents to pay the Petitioner a sum of Kshs. 320,000/-.
- vi. An order be and is hereby issued directing the 1st and 2nd Respondents to reimburse the Petitioner for the aggregate future rent payment incurred as a result of unlawful eviction from L.R No. 330/694, Nairobi (hereinafter referred to as “the suit property”).
- vii. A declaration that the Petitioner’s overriding interests in the suit property are restored forthwith.
- viii. A mandatory injunction be issued against the Respondents jointly and severally requiring them, by themselves, their servants, employees and agents or any other person in actual possession of the suit property and/or claiming possession of the suit property through or under the Respondents to hand over vacant possession of the suit property to the Petitioner in a clean state and in default eviction orders to be issued.
- ix. An order be and is hereby issued directing the Respondents to pay restitution to the Petitioner for income derived from dealings associated with the suit property.
- x. The 1st and 2nd Respondents do bear the costs of the petition and of Nairobi Milimani CMCC No. 170/2015, Duncan Kireri Wachira v Edward Thiong’o Wachira.

The Petitioner’s case:

2. In his petition and the supporting affidavit, the Petitioner stated his case as follows:
3. The Petitioner resided in the suit property from 1993 to 2015. The suit property was worth Kshs. 200,000,000/-. On 19th January 2015, the 1st Respondent purportedly commenced legal proceedings on behalf of the 3rd Respondent against the Petitioner in Nairobi Milimani CMCC No. 170/2015, Duncan Kireri Wachira v Edward Thiong’o Wachira (hereinafter referred to as “the lower court suit”). The proceedings before the lower court were irregular for among other things being conducted in a court that lacked pecuniary jurisdiction. In addition to the plaint, the 1st Respondent filed an application in the lower court seeking the eviction of the Petitioner from the suit property. The Petitioner entered appearance in the suit and filed a defence. The Petitioner also filed notice of preliminary objection and a replying affidavit in response to the application by the 1st defendant.
4. The Petitioner has contended that the application seeking his eviction from the suit property was heard by way of written submissions and a ruling was delivered thereon on 2nd October 2015. The Petitioner has contended that the said ruling contravened his fundamental rights under the Bill of Rights and other provisions of law in that the 2nd Respondent; purported to gather evidence on behalf of the 3rd Respondent; dismissed the Petitioner’s preliminary objection; failed to follow the precedents in various cases; shifted the burden of proof from the 3rd Respondent to the Petitioner; violated the rules of natural justice by stating that the Petitioner had no right in the suit property; directed that the



Petitioner hands over vacant possession of the suit property and failed to use the court's jurisdiction to strike out the application which was an abuse of the court process.

5. The Petitioner has contended that he filed an application for review of the said order of 2nd October 2015 and one, Sylvia Muthoni applied to be joined in the lower court suit as an interested party. The Petitioner has averred that on 27th October 2015, the 2nd Respondent gave directions on the two applications that once again contravened the Petitioner's fundamental rights in the Bill of Rights and other laws in that the 2nd Respondent refused to hear the parties appearing before it and to grant a stay of execution of the impugned order.
6. The Petitioner has averred that on 30th October 2015, the Petitioner filed Nairobi Milimani, ELC Misc. Civil App. No. 283 of 2015, Edward Thiong'o Wachira v Duncan Kireri Wachira which was pending determination. The Petitioner has averred that on 4th November 2015, one P. Mwangi Muya took possession of the suit property after the eviction of the Petitioner therefrom pursuant to the said order by the 2nd Respondent. The Petitioner has averred that he has incurred rent expenses totalling Kshs. 320,000/- as at July 2016 following his eviction from the suit property.
7. In his supplementary affidavit sworn on 20th March 2018, the Petitioner has averred that the 3rd Respondent was of unsound mind. In his further supplementary affidavit sworn on 26th August 2020, the Petitioner has averred that Nairobi Milimani CMCC No. 170/2015, Duncan Kireri Wachira v Edward Thiong'o Wachira (the lower court suit) and Nairobi Milimani, ELC Misc. Civil App. No. 283 of 2015, Edward Thiong'o Wachira v Duncan Kireri Wachira had abated. The Petitioner has stated further that he was evicted from the suit property on or about 4th November 2015. The Petitioner has stated that he has a legitimate interest in the suit property since he had contributed towards the purchase of the same.

The 1st Respondent's case:

8. The 1st Respondent filed a replying affidavit sworn on 27th February 2018 on opposition to the petition. The 1st Respondent stated as follows: In November 2014, he received instructions from the 3rd Respondent to file a suit against the Petitioner in the lower court seeking his eviction from the suit property. He prepared the pleadings and filed the suit as well as an application. The Petitioner entered appearance and filed his pleadings. The application was heard on merit and a ruling in favour of the 3rd Respondent delivered.
9. The 1st Respondent has contended that if the Petitioner was aggrieved by the decision of the lower court, he should have challenged it through an appeal. The 1st Respondent has averred that the Petitioner was granted an opportunity to be heard and that there was no infringement of his rights in the conduct of the lower court proceedings. The 1st Respondent has contended that the 3rd Respondent was of sound mind.
10. In conclusion, the 1st Respondent has stated that he was not a party to the lower court suit and that he was conducting the suit as a professional on behalf of the 3rd Respondent. The 1st Respondent has contended that the claim for Kshs. 320,000/- against him was untenable as it could only be raised in the lower court proceedings.

The 2nd Respondent's Case:

11. The 2nd Respondent has opposed the petition through grounds of opposition dated 6th December 2016. The 2nd Respondent has contended that the Petitioner is engaged in forum shopping which is against the law. The 2nd Respondent has contended that the petition discloses no cause of action against



the 2nd Respondent and that it is an abuse of the court process and sub-judice in view of the existence of the lower court suit and Nairobi ELC Misc. Civil App. No. 283 of 2015, Edward Thiongo Wachira v Duncan Kireri Wachira.

The submissions:

12. The Petitioner filed his submissions on 30th August 2020 in which he has listed fifteen issues for determination. On the first issue the Petitioner has relied on *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR and submitted that the petition was filed in the right court. On the second issue, the Petitioner has cited *Joseph Njuguna & 28 others v George Gitau t/a Emmaus School & another* [2015] eKLR and submitted that the petition was not sub-judice as it involved different causes of action from those in the lower court and Nairobi Milimani, ELC Misc. Civil App. No. 283 of 2015, Edward Thiongo Wachira v Duncan Kireri Wachira . On the third issue, the Petitioner has submitted that the 2nd Respondent exhibited bias towards him by gathering evidence for the 3rd Respondent. On the fourth issue, the Petitioner has submitted that the 2nd Respondent contravened the Petitioner's right to access justice by failing to hear his application promptly. On the fifth issue, the Petitioner has submitted that the 2nd Respondent infringed on his right to a fair hearing by hearing a dispute where the value of the subject matter was Kshs. 200,000,000/- and by failing to conduct an inquiry into the 3rd Respondent's mental status. In support of this submission, the Petitioner has relied on *MMM v AMK* [2016] eKLR. On the sixth issue, the Petitioner has submitted that the 3rd Respondent did not have the necessary mental capacity to instruct the 1st Respondent to institute the lower court suit. The Petitioner has submitted that in a ruling dated 22nd December 2017, the High Court had found that the 3rd Respondent was unable to manage his affairs.
13. On the seventh issue, the Petitioner has submitted that the 1st Respondent contravened his right to human dignity by filing a case in a court that lacked jurisdiction and whose decision led to his eviction from the suit property. On the eighth issue, the Petitioner has submitted that the 1st Respondent violated his right to privacy by instituting a suit that revealed private affairs of the Petitioner's family. On the ninth issue, the Petitioner has submitted that the 1st Respondent contravened his freedom of residence by acting without lawful instructions from the 3rd Respondent. On the tenth issue, the Petitioner has submitted that the 1st Respondent violated his right to property as he had ownership rights to the suit property. On the eleventh issue, the Petitioner has submitted that his eviction from the suit property denied him a right to adequate housing.
14. On the twelfth issue, the Petitioner has relied on *Commission on Administrative Justice v Insurance Regulatory Authority & another* [2017] eKLR, and submitted that this court has power to grant prayers i, ii, iii and iv of the petition. On the thirteenth issue, the Petitioner has submitted that the 3rd Respondent was the owner of the suit property. The Petitioner has submitted that the court should order that the suit property be returned to the Petitioner. In support of this submission, the Petitioner has relied on *Anthony Otiende Otiende v Public Service Commission & 2 others* [2016] eKLR and *Nancy Wangui Wakaba & 3 others v Peter Nderi Wakaba* [2013] eKLR. On the fourteenth issue, the petitioner has submitted that the 1st Respondent should pay the costs of the petition and of the lower court suit as he acted prematurely and unreasonably in instituting the latter suit. On the fifteenth issue, the Petitioner submitted that he was entitled to damages for unlawful eviction from the suit property assessed at Kshs. 340,000/- per month from November 2015.
15. The 1st Respondent filed his submissions on 20th November 2020. The 1st Respondent has also framed a number of issues for determination. On the issue as to whether the Petitioner's constitutional rights were violated, the 1st Respondent has submitted that the Petitioner was a defendant in the lower court



where he entered appearance, filed his pleadings, had an opportunity to be heard and was heard. Relying on *Anarita Karimi Njeru v Republic* [1979] eKLR, the 1st Respondent has submitted that the Petitioner has not proved to the required standard how the lower court decisions complained of had violated his rights. On whether the petition was an abuse of the court process, the Petitioner has submitted that the petition is an abuse of the court process for the following reasons, first; because the Petitioner had a right to file an appeal against the lower court decisions complained of but did not do so. Secondly, the claim for rent expense by the Petitioner cannot be raised in the petition before the court as it was not raised in the lower court and thirdly, the Petitioner has not established proprietary interest in the suit property.

Determination:

16. I have considered the petition together with the affidavits filed in support thereof. I have also considered the replying affidavit and grounds of opposition filed by the 1st Respondent and the 2nd Respondent respectively in opposition to the petition. Finally, I have considered the submissions by the parties. I am of the view that the petition before me has no merit. The Petitioner’s complaint in the petition before the court concerns two orders that were made by the lower court, the first order was made on 2nd October 2015. This order required the Petitioner to hand over possession of the suit property to the 3rd Respondent forthwith in default of which he was to be forcefully evicted from the property. The second order is said to have been made on 27th October 2015. In the order, the lower court is said to have given directions in which the lower court declined to hear the Petitioner’s application seeking a review of the earlier order made on 2nd October 2015 and to grant an order staying the execution of the said order. I have not seen on record a copy of the said order made on 27th October 2015. The Petitioner has claimed that the said orders violated his constitutional rights and various provisions of the law.
17. In *Uburu Muigai Kenyatta v Nairobi Star Publications Ltd.* [2013] e KLR the court stated as follows:

“...I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy ... My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”
18. This position was further emphasized in *Leonida Aloo Odhiambo v Attorney General & another* [2020] eKLR where the court stated as follows:

“Further, it is an established practice that where a matter can be disposed of without recourse to *the Constitution, the Constitution* should not be invoked at all. The court will pronounce on the constitutionality of an action only when it is necessary for the decision of the case to do so and that if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”
19. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court stated that:

(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.”

- (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).
- (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.”
20. The principle running through all the cited cases is that the court will not determine a dispute brought to court as constitutional issue where the same can be determined through other processes provided for in law. It is not disputed that the Petitioner entered appearance in the lower court and filed a defence to the claim that was brought against him by the 3rd Respondent. The Petitioner also filed a replying affidavit and a notice of preliminary objection to the 3rd respondent’s application that was seeking a mandatory injunction to compel him to vacate and handover possession of the suit property pending the hearing and determination of the suit. Both parties were heard on the application and the lower court delivered its ruling on 2nd October 2015 allowing the same. The lower court order was on the following terms:
- “I now order and direct that pending the hearing and determination of this suit or further orders of this court a mandatory injunction be and is hereby issued against the defendant requiring him to hand over vacant possession of the suit property forthwith, and in default, eviction orders be and are hereby issued to forcefully remove the defendant from the suit property and the costs thereof shall be borne by the defendant.”
21. The Petitioner has contended that he made an application for the review of the said order but his application was not heard. The petitioner has contended that instead of hearing his review application, the lower court gave directions on 27th October 2015 declining to hear the application and to grant an order staying execution of the orders that were sought to be reviewed. As I mentioned earlier, I have not seen the proceedings of the lower court of 27th October 2015. The orders made on that day appear not to have been extracted. I am unable to ascertain the reasons that were given by the lower court for not hearing the Petitioner’s review application. Whatever the case, the petitioner had a right to appeal against the said decisions of the lower court if he was aggrieved by the same. The Petitioner has not demonstrated that he made any attempt to appeal against the said decisions. Since the right of appeal was available to the Petitioner, I find that the doctrine of constitutional avoidance applies in this case. I am of the view that if petitions of this nature are allowed, it will open flood gates for petitions against decisions made by the lower court. Nothing will stop anyone who is aggrieved by a ruling or a judgment of the lower court from challenging the same through a constitutional petition instead of following the appeal process.
22. On the merit of the petition, I find that the petitioner has not met the threshold for proving constitutional right violation. In *Anarita Karimi Njeru v Republic* (supra) it was stated that:

“We would, however, again stress 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.”

23. In *Mumo Matemtu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the court stated as follows:

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

24. The Petitioner has set out an omnibus of constitutional provisions that he claims were violated. However, he has not demonstrated with precision how the same happened. It is not enough to say that a right has been violated. The Petitioner was under a duty to show the direct correlation between the proceedings in the lower court and the various violations he alleges. He failed to do so. The 1st Respondent is an advocate of the High Court. He was acting for the 3rd Respondent in the lower court. The Petitioner has not explained in what respect the 1st Respondent violated his constitutional rights. If the Petitioner believed that the 1st Respondent was acting without instructions, that is an issue the petitioner should have raised in the lower court for determination by that court. The 2nd Respondent is the lower court. Again, the Petitioner has not persuaded me that in delivering a decision that the Petitioner believed was wrong, the 2nd Respondent violated any of the Petitioner’s constitutional rights.
25. The 3rd Respondent was the plaintiff in the lower court. The Petitioner had claimed in the lower court that he was of unsound mind a claim that he denied. I wonder why the Petitioner joined him in this petition if he was of unsound mind. The Petitioner has not convinced me that by filing a suit in the lower court, obtaining favourable orders and executing the same, the 3rd Respondent violated the Petitioner’s constitutional right. In any event, it is common ground that the 3rd Respondent died on 22nd October 2019 and was not substituted in this petition. Consequently, the petition herein abated as against the 3rd Respondent and as such no orders can issue against him in the petition. The lower court suit has also abated since the 3rd Respondent who was the plaintiff in the suit died and there is no evidence that he was substituted. The fact that the lower court suit abated was confirmed by the Petitioner in his further supplementary affidavit sworn on 26th August 2020.
26. What I have stated is enough to dispose of this petition. I wish to add however that even if I had found merit in the petition, I would not have granted the reliefs sought. The orders complained of by the Petitioner were made by the lower court at the instance of and in favour of the 3rd Respondent. As I have mentioned above, this petition has abated as against the 3rd Respondent. In the absence of the 3rd Respondent, the reliefs sought cannot be granted. I am of the view that failure on the part of the Petitioner to substitute the 3rd Respondent was fatal to his petition.



Conclusion:

27. In view of the foregoing, I find no merit in the petition dated 20th July 2016. The petition is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

The Petitioner in person

Ms. Wangari h/b for Mr. Mahinda for the 1st and 3rd Respondents

Ms. Njuguna h/b for Ms. Nyawira for the 2nd Respondent

Ms. C. Nyokabi - Court Assistant

