



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Chief Land Registrar & another (Petition E006 of 2021)
[2022] KEELC 3578 (KLR) (15 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3578 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION E006 OF 2021
MAO ODENY, J
AUGUST 15, 2022
IN THE MATTER OF: ARTICLE 21, 22 (1), 23 OF THE
CONSTITUTION OF KENYA
IN THE MATTER OF: ALLEGED CONTRAVENTION OF
RIGHTS OR FUNDAMENTAL FREEDOMS
UNDER ARTICLE 3, 20, 23, 27(2) (3), 40 AND
47 OF THE CONSTITUTION OF KENYA
IN THE MATTER OF: THE TITLE AND ALLOCATION OF TITLE
NUMBER TEZO/ROKA SETTLEMENT
SCHEME/73 ALLOCATED TO OMAR ALI
IN THE MATTER OF: APPLICATION FOR THE ORDER OF
MANDAMUS SEEKING THE RELEASE OF TITLE
BY LANDS REGISTRAR KILIFI
IN THE MATTER OF: SECTION 30 OF LAND REGISTRATION
ACT (NO. 3 OF 2012) LAWS OF KENYA

BETWEEN

OMAR ALI PETITIONER

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

LAND REGISTRAR-KILIFI 2ND RESPONDENT



JUDGMENT

1. By a Petition dated May 3, 2021 the petitioner herein sought for the following reliefs against the respondents;-
 1. A declaration that the respondents have infringed his fundamental rights and freedoms and specifically article 40 of the Constitution of Kenya 2010
 2. An order for issuance of original title deed and a copy of the green card for Tezo/Roka settlement Scheme/73
 3. Any other relief the honourable court may deem expedient and fit in the circumstances
 4. Costs of the petition
2. Parties took directions and agreed that the Petition would be heard by way of filing written submission as opposed to *viva voce* evidence which were duly filed.

Brief facts of the petitioner's case

3. The Petition is premised facts on the grounds on the face of the Petition together with the supporting affidavit of Omar Ali the petitioner herein who deponed that he is the registered owner of all that parcel of land known as Tezo/roka Settlement Scheme/73 measuring approximately 12.4 acres within Kilifi County.
4. That on May 28, 2018 the petitioner completed the process of discharge of charge and transfer of suit property from the settlement scheme and was eventually registered and title deed issued in his name on November 4, 2019, however that the respondents have refused to issue the petitioner with the original title deed for the suit property in their custody save to photocopies thereon in total contravention of the petitioners' fundamental rights as enshrined under article 27 (2) (3), 35(b) and 40 of the Constitution of Kenya, 2010.

Petitioner's Submissions

5. Counsel identified two issues for determination as whether the petitioner has proved ownership and whether he is entitled to costs.

On the first issue counsel submitted that the petitioner has proved ownership by producing a copy of a title deed, relevant documents for payment, and discharge of charge from the Settlement Fund Trustee but the respondents have refused to issue the original title deed to the petitioner without justification.
6. Counsel relied on section 24, 25 and 26 of the Land Registration Act, Act no 3 of 2012, on indefeasibility of titles and the case of Kabogo Tharau v Joash Omwenga & another [2017] eKLR and urged the court to allow the petition as prayed.

Respondent's submissions

7. Counsel identified four issues for determination as follows: -
 - a. Whether the petition is proper.
 - b. Whether the petition filed is premature.



- c. Whether the petitioner’s right to property has been infringed.
 - d. Whether the petitioner should be awarded costs of the petition.
8. Counsel submitted that the petitioner’s case challenging the decision of the respondents for allegedly refusing to issue him with his title deed would have been best dealt with in a judicial review application rather than a Petition and relied on the case of *Prisca Fikirini Mwenzani V Land Registrar Kilifi & Another* [2020]eKLR where the court held that the complaint by the petitioners belongs to the realm of public administrative law and that the same can only be addressed if there is evidence of refusal to take action on the part of the defendants, by way of judicial review.
 9. On the issue whether this Petition is premature, counsel submitted that the petitioner has not requested for the original of his title deeds before approaching this court and further that the petitioner has not exhibited any evidence of making any request to the respondents for issuance of the original title deed.

Counsel therefore submitted that the petitioner has not proved that his right to property has been infringed hence the Petition should be dismissed with each party bearing their own costs.

Analysis and determination

10. The issue for determination is whether the Petition as filed in proper before the court.
11. The petitioner sought for a declaration that the respondents have infringed on his fundamental rights and freedoms specifically article 40 of the *Constitution* of Kenya 2010 and further sought for an order for the issuance of original title deed and copy of the green card for Tezo/roka Settlement Scheme.

In the case of *CNM vs WMG* [2018] eKLR, the court weighed in on the constitutional question as follows;-

A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

“When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values.”

12. The petitioner claims that his fundamental rights have been violated and cites articles 3, 20,23,27 (2) (3), 40 and 47 of the *Constitution*. The petitioner has not demonstrated how the respondents have infringed on his constitutional right. Not all infractions amount to constitutional violations which must be resolved through constitutional Petitions.

The orders the petitioner is seeking for can be obtained in a normal suit where the court can compel the respondent to the respondent to issue the petitioner with an original title deed upon proof of his case.

In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the court held as follows: -

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.”

“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)).

13. The documents displayed by the petitioner in support of his case are pure contractual documents between the petitioner and Settlement Fund Trustees. The petitioner has shown how he was allocated the land by SFT, the payment receipts, the discharge of charge and a title deed upon transfer. There was no harm filing a suit to compel the respondent to issue him with the original title deed having gotten the photocopy.

I have considered the Petition, the submissions by counsel and the relevant judicial authorities and find that this Petition is not proper before the court and is therefore struck out with each party bearing its own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF AUGUST, 2022.

M A ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

