



**Kaburo v Miriti & 2 others (Constitutional Petition 10 of 2015)
[2022] KEELC 12634 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
CONSTITUTIONAL PETITION 10 OF 2015**

CK NZILI, J

SEPTEMBER 28, 2022

BETWEEN

ELIZABETH KABURO PETITIONER

AND

DOUGLAS MIRITI 1ST RESPONDENT

**LAND ADJUDICATION OFFICER TIGANIA WEST DISTRICT 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

A. Pleadings

1. Through an amended petition dated January 22, 2022 the petitioner an adult male of sound mind and the owner of Parcel No 11351 ankamia adjudication section sued the respondents for breaching of his rights under articles 27, 28, 40, 47 and 50 of the Constitution in hearing and determining an objection filed by the 1st respondent in his absence and proceeded to award the 1st respondent 0.97 acres of the petitioner's land.
2. The petitioner averred the 2nd respondent conspired with the 1st respondent to take away his land; engineered a fake and sham dispute; condemned him unheard; denied him an opportunity to be notified, heard or to be present during the dispute; had a predetermined or preconceived decision and proceeded to affect an illegal decision.
3. The petitioner sought for a declaration that her right to land ownership as guaranteed in the Constitution had been violated, declaration that the suitland Parcel No 11351 belongs to him and the respondents be directed to facilitate and effect the changes in the name of the petitioner.



4. The petition was supported by an affidavit sworn by Elizabeth Kaburo on May 4, 2015 in which she reiterated that she has been in occupation of the suit land.
5. The petition was supported by a further affidavit sworn by Benjamin M'Aburuki M'Twamwari on June 22, 2015 stating that he bought 21-acres of land from one Kanake Mwitari. That on January 4, 1997 the 1st respondent who was among the people ordered to vacate was compensated with Kshs 4,000/= and willingly vacated the land as per receipt marked BRM "1", hence it was irregular for him to now turn back in 2104 to lodge a A/R objection No 1443 over the land he had already been compensated for. It is averred that the suit land was recorded in the name of the petitioner in 1997 who has extensively developed it and was not party to the objection proceedings and since he was unwell at the time.
6. The deponent averred the 1st respondent has purported to fence off his land leading to a criminal case at Tigania Law Courts No 615 of 2015 and an OB No 14/12 (22/4/2015). He therefore denied service of any summons to attend the A/R objection which he termed as a sham, fraudulent but only learned about from one Kimei that he was required at the Ankamia land office and upon arrival that morning he was informed that the case had already been determined and the land given to the 1st respondent.
7. However, his protests were met with fury by the 2nd respondent who threatened to lock him up. Instead, the deponent stated he was included in the proceedings as a party to the objections yet the recorded owner was the petitioner who ended being condemned unheard.
8. Benjamin averred he was threatened and ordered to sign the proceedings. Eventually, a ruling was given on April 16, 2015 and after two days on April 21, 2015, the 2nd respondent purportedly implemented the decision.
9. The deponent averred that the proceedings were a nullity, irregular, unprocedural and against the rules of natural justice. He attached a copy of receipt dated January 4, 1997, deposit receipts dated April 29, 2015 and June 4, 2015 as annexures marked BMM "1".

B. Response by the Respondents

10. By a defence replying affidavit dated May 13, 2015 and a reply to petition dated February 15, 2022, the 1st respondent opposed the petition. He denied that the allegation of the alleged violations of the petitioner's bill of rights. He confirmed filing an A/R objection which was duly heard in the presence of the petitioner as well as his father Benjamin M'Aburuki recording a witness statement. He stated that the 2nd respondent heard and determined the displacement dispute within the confines of the law. He denied any alleged collusion or conspiracy with the 2nd respondent in order to take away the petitioner's land.
11. Further, the 1st respondent averred he legally owned Parcel No 12820 Ankamia Adjudication Section, duly gathered by his late father M'Limbiro M'Aburuki in 1971 while he was a minor as part of Parcel No 267, but which was improperly demarcated after being lifted from its original site.
12. The 1st respondent averred his objection No 1443 was duly filed, lodged, heard and determined by the committee members and the 2nd respondent in the presence of the petitioner who was even given a chance to cross-examine the witnesses.
13. He also averred the outcome was the return of his land to its original site where he has extensively developed by planting 2000 tea bushes, 700 coffee trees and 6 grevillea trees. He averred he erected a fence which the petitioner had maliciously removed as his neighbor owning 0.43 acres. He denied any alleged infringement of the petitioner's rights since she attended the proceedings together with her father, he has been in occupation of Parcel No 12820 and not 11351 hence the petition lacks merits.



14. The 1st respondent to attached a copy of the confirmation letter of ownership, dated September 24, 2015, receipt for the A/R objection dated April 23, 2012, proceeding thereof, a sketch map and A/R objection letter.
15. In response the further affidavit, the 1st respondent swore another affidavit on July 9, 2015, reiterating his late father gathered the land and registered it in 1971 and, that the petitioner only transferred the land to the petitioner after he realized an objection had been filed. The 1st respondent stated that the petitioners father attended the A/R objection hearing and even gave evidence and cross examined witnesses. Further, the 1st respondent averred that the A/R objection has been fully implemented and when the petitioner tried to enter into and damaged the property he was arrested and charged in Tigania CR Case No 673/2015.
16. The petitioner filed a list of witnesses' statements and a list of documents dated July 3, 2018 in support of the petition. Likewise, the 1st respondent filed a witness statement of M'Limboro M'Aburuki and his own witness statement filed on June 21, 2018 and July 13, 2018, respectively and a sketch map.
17. The 2nd & 3rd respondents opposed the petition through a replying affidavit sworn by Ouro Obingo on October 26, 2015.
18. It was averred that the suit land was registered under the name of Benjamin M'Aburuki the petitioner's father during the publication of the section when land owners are allowed to inspect the register whereof the 1st respondent objected to it in line with the law. Mr Obingo averred the recorded owner at the time transferred the land to her daughter, the petitioner herein. That the receipt issued to the objector read the said Benjamin M'Aburuki and the objection was heard, determined and the petitioner was supplied with the proceedings. In his view, the recorded owner, participated in the proceedings and never raised any issue to do with the petitioner. The 2nd & 3rd respondents averred that following the decision, the adjudication record was amended immediately and when the demarcation officer and the committee visited the ground to implement it but the petitioner assembled goons who uprooted the mark and the fence. It was averred the applicant was contradicting herself by saying her father was never involved, yet he was accompanied by the petitioner to the objection proceedings but she was never called as a witness. Instead she involved in sideshows by making noise as the hearing went on. Further it is averred the said M'Aburuki never raised issues of ill-health at the hearing. That the objection was heard at the section office as required by law in open where the applicants further willingly and voluntarily participated and availed his identity card for the record and affixed his thumb print. That the committee representing the area and the chairman of the land committee were present yet the applicant's father never raised any element of compulsion.

C. Pre-trial compliance

19. In compliance with [order 11](#), the 1st respondent filed a paginated bundle of documents dated February 22, 2019. Further after the amended petition was filed and served the 1st respondent filed a reply to the petition and averred that after the A/R objection No 1443 was heard and determined, he was awarded Parcel No 12820 which land was now registered and awaiting the issuance of a title deed. He maintained that he had no interest in Parcel No 11351 which was totally distinct from his land.
20. The 1st respondent averred if the petitioner was dissatisfied with the A/R objection outcome, she should have filed a judicial review case or an appeal to the minister instead of a petition which was an abuse of the court process.



D. Written Submissions

21. With leave of court parties opted to dispose of the petition through written submissions based on the pleadings, documents and witness statements before the court.
22. The petitioner submitted the 1st respondent had initially brought a case over the same A/R objection, lost it vide a judgment dated November 15, 2012 which was never appealed against but instead filed another A/R objection where he was being awarded 0.97 acres of her land without fair hearing. She submitted she was condemned unheard contrary to her constitutional rights as to ownership of land and fair hearing.
23. Further, the petitioner submitted there was collusion between the respondents to take away her land through a sham and fake dispute with a predetermined outcome made in the absence of a land committee and without following up the law.
24. The petitioner submitted that on November 15, 2012 A/R No 1443 was heard over Parcel No 267 measuring 21 acres, Parcels No 267 measuring 21 acres but on April 16, 2015 an A/R objection was done against Parcel No 2911 which resulted to her land being hived off from Parcel No 11250 yet that land was not objected to or disputed by anyone.
25. Reliance was placed on *Keroche Industries Ltd v KRA & 5 others* (2007) 2 KLR 240.
26. The 2nd and 3rd respondents have submitted that the court has no powers to determine ownership of the land and the issues raised contrary to what was raised in the petition which issues are in the objection proceedings.
27. The 2nd & 3rd respondents further submitted an aggrieved party under section 29 of the *Land Adjudication Act* has the right to file a minister's appeal which the petitioner failed to do hence her petition is premature.
28. As to the alleged infringement of rights and freedoms, the 2nd and 3rd respondents have submitted the petitioner has failed to discharge the burden of proof under sections 107-109 of the *Evidence Act* as held in *M'Bita Ntiro v Mbae Mwirichia & another* (2018) eKLR.
29. Further, the 2nd and 3rd respondents have submitted the petition fails to meet the threshold in *Anarita Karimi Njeru v Republic* (1976-1980) KLR 1272 and *Mumo Matemu v Trusted Society of Human Rights & 5 others* (2013) eKLR.

E. Issues for Determination

30. The issues due for courts determination are:
 - i. If the petition has disclosed a constitutional question.
 - ii. If the petitioner should have exhausted the internal mechanism under the relevant statute.
 - iii. If the petitioner has pleaded and proved breach of her right to fair hearing, access to justice and right to land.
 - iv. What is the order as to costs.
31. There is no dispute that this court under article 162 (2) (2) of the *Constitution* and sections 13 (3), (c), 7 (b) & (g) of the *Environment and Land Court Act* 2011 has jurisdiction to enforce constitutional rights. This was the position taken by the Court of Appeal in *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others* (2016) eKLR.



32. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* otherwise known as Mutunga rules require a party seeking constitutional rights enforcement to state the capacity he brings the petition, the specific rights and freedoms infringed or threatened, the nature and manner of the violation, pending suits over the subject matter and the reliefs sought.
33. In *Mumo Matemu* case (supra) the court held that a constitutional violation must be pleaded with a reasonable degree of precision.
34. In this petition, the petitioner describes herself as the owner of Parcel No 11351 Ankamia Adjudication Section whose rights under article 27, 28, 40, 47 & 50 of the *Constitution* were contravened by the 2nd respondent in collusion with the 1st respondent between December 16, 2014 and April 16, 2015 in the hearing and determining of an A/R objection over her property without involving her, subsequent to which a portion of her land measuring 0.97 acre of her property was awarded to the 1st respondent hence disentitling her of her land rights. She terms the said acts as unconstitutional and contrary to an earlier court order.
35. Further the petitioner has averred that the respondents used the same objection no 1443 over Parcel No 267 which was determined on November 15, 2012. However, in April 16, 2015 the objection was over Parcel No 2911 but instead of awarding the land from that number the respondents used a different account namely her Parcel No 11350 which land was not subject to or under dispute by any one least of all the 1st respondent.
36. The 2nd and 3rd respondents filed a replying affidavit by Auro Obingo sworn on October 26, 2015. He confirmed that during the publication of the register, the suit property belonged to the petitioner's father which he transferred to the petitioner while the A/R objection was pending.
37. The petitioner urges the court to find that and declare her rights as violated or threatened under article 40 of the *Constitution*; a permanent injunction; declare the land belongs to her and direct that the land be registered under her name.
38. The petitioner has attached a copy of a letter dated July 12, 2018 from the Land Adjudication Officer Tigania East confirming that she was the recorded owner of Parcel No 1135, measuring 0.53 acres which was awaiting the issuance of title deeds after the finalization of the section.
39. The 1st respondent in a reply to amended petition dated February 15, 2022 admitted on April 16, 2015 he did an A/R Objection No 1443 and was awarded Parcel No 12820 and that title deed are out.
40. Mr Obingo averred the receipt of the objection read the former recorded owner who participated in the objection and never called the transferor as a witness or objected to the jurisdiction of the tribunal.
41. In *Benson Ambuti Adega & 2 others v Kibos Distiller Ltd & 5 others* (2020) eKLR, the Supreme Court of Kenya took the view that where there are multifaceted issues some belonging to other forums, a court should reserve constitutional issues pending the determination of the issues falling under other quasi-judicial bodies.
42. In this petition, the petitioner was not a party to the A/R objection. This fact has been admitted by the respondents that she was the recorded owner of the suit land at the time the A/R objection was heard and determined. It goes without saying that on that score alone, the 2nd respondent ought to have notified her of the A/R objection for she was going to be affected by its outcome one way or the other.
43. Her major complaint herein is that she was condemned unheard and denied her right to property without fair hearing. This in my view is a constitutional question determinable by this court and not the Minister.



44. The petition was also filed timeously as required under the *Fair Administrative Action Act* 2015.
45. Turning to the third issue as indicated above, the petition has disclosed a constitutional question and specified the nature of the constitutional rights and freedoms violated.
46. The respondents have not filed a response to the amended petition but rely on the earlier response filed in 2015 where Mr Aura Obingo has admitted that the A/R objection and proceedings proceeded notwithstanding the change of ownership of the suit property to the name of the petitioner herein.
47. It is the 2nd respondent who had previously approved the transfer while aware there was a pending A/R objection. It was within the knowledge of the 2nd respondent that the proceedings and outcome was likely to adversely affect the recorded owner at the time.
48. Article 47 of the *Constitution* as read together with section 4 (3) & (4) of *Fair Administrative Action Act* requires that such a person to be given prior and adequate notice to make representations; to be given an opportunity to be heard; to cross examine and be accorded adequate materials to be prepared, at the hearing.
49. The affected person is supposed to be accorded an opportunity to attend to the proceedings in person, to be heard, to cross examine and to even request for an adjournment.
50. Looking at the response by both the 1st, 2nd and 3rd respondents as well as the decision itself, it is quite obvious that the respondents knew that the petitioner was going to be adversely affected by the proceedings and the decision. The A/R objection was regarding Parcel No 1911 but ended up affecting Parcel No 11350 which was at the time registered in the name of the petitioner herein. There is no indication if Mr Auro Obingo who heard and determined the A/R objection summoned or notified the petitioner to respond to the objection since she was going to be adversely affected by the outcome. It matters not if she was present accompanying her father and or was involved in side shows.
51. She was a necessary party given that she was now the recorded owner of the suit property.
52. Strangely and even before the aggrieved parties had exercised their rights of appeal, the respondents had proceeded with a lightning speed to implement the decision.
53. Benjamin M'Aburuki M'Twamwari in his affidavit sworn on June 22, 2015 has confirmed that he had ceded ownership of the suit property in 1997 to the petitioner. The 1st respondents' receipt is dated April 23, 2012 and relates to Parcel No 267. The same applies to his objection letters attached thereto.
54. The basis in which an A/R objection would be raised on Parcel No's 267/2911 and end up affecting Parcel No 11351 without calling the owner(s) of the said parcels to participate in the A/R objection would definitely infringe on the constitutional rights of the affected parties. This was a foreseeable eventuality on the part of the 2nd respondent.
55. Therefore, my finding is that the petitioner was condemned unheard and her land taken away without being given an opportunity to defend herself before the hearing and determination of the A/R objection.
56. Therefore, I find the petition proved to the required standard and grant the following orders: -
 - a. A declaration be and is hereby issued that the petitioner's rights under articles 20, 22, 23, 40 and 47 of the *Constitution* were violated by the respondents in the lodging of an A/R objection No 1443 regarding Parcel No 2911, and eventually hearing and determining the same to the extent that it affected Parcel No 11351 without involving the petitioner.



b. Declaration that the creation of Parcel No 12820 by the 2nd respondent in favour of the 1st respondent from the petitioner's Parcel No 11351 to the detriment of the petitioner's right and its implementation on the ground was invalid, null, void and unconstitutional. Any subsequent titles thereof are hereby declared cancelled or invalidated.

c. Costs to the petitioner.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 28TH DAY OF SEPTEMBER, 2022

In presence of:

C/A: Kananu

Mr. Kaume for petitioner

HON. C.K. NZILI

ELC JUDGE

