



**Gitonga & 2 others v County Government of Mombasa & another;
Mangale & 2 others (Interested Parties) (Environment & Land Petition
41 of 2021) [2022] KEELC 13711 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13711 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 41 OF 2021**

NA MATHEKA, J

OCTOBER 26, 2022

BETWEEN

LUCY KARWITHA GITONGA 1ST PETITIONER

SALIM ABDALLA MOHAMED 2ND PETITIONER

GODINHO MWAKISHA 3RD PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

MOHAMED AHMED 2ND RESPONDENT

AND

NDEGWA CHIMERA MANGALE INTERESTED PARTY

JUMA KUMBU MUTA INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

JUDGMENT

1. The petitioners stated that the 1st and 3rd petitioners entered into a sale agreement with the 1st interested party while the 2nd petitioner purchased the suit property from the 2nd interested party and the 4th petitioner purchased the property from the 4th interested party. That the 1st petitioner purchased from the 1st interested party surveyed plot measuring 40ft length by 35ft width at 300,000 Kshs (three hundred thousand Kenyan shillings) which she had developed she intended to develop a three story building at the time of the demolitions. That the 2nd petitioner purchased plot No 350 Barawa from the 2nd interested party at a I value of Kshs 230,000(two hundred and thirty thousand Kenyan shillings). That the 3rd petitioner purchased a 29ft length by 40ft width from the 1st interested party at a value



of Kshs 130,000 and further purchased a 40ft length by 54ft width at a value of Kshs 160,000 (one hundred and sixty thousand Kenyan shillings), and constructed a two bed roomed house which was still under construction. That the 4th petitioner purchased a 40ft length by 50 feet width from the 4th interested party at a value of Kshs 250,000 (two hundred and fifty thousand Kenyan shillings) and constructed a 3 bed roomed house which was complete.

2. That the said petitioners developed the said properties by constructing permanent structures on them. That the petitioners houses were marked for demolitions which prompted the petitioners to seek the chief's assistance, the petitioners were later directed the Kiambeni DO who stated he was going to investigate the matter. That on the July 19, 2021 the 2nd respondent accompanied by police officers and hooligans violently raided and attacked the petitioners while sleeping in their said properties. That the 1st respondent alleged that the petitioners' properties were on a road reserve that the respondent physically attacked anybody who tried to question their action. That the petitioners properties were vandalized and looted while the respondent carried out the demolitions. That they demolished selected houses despite them claiming that the houses were built on road reserve, which was a hoodwink act or a corrupt scheme to give 2nd respondent vacant possession, in an orthodox means. That a survey report dated December 6, 2021, by Pimatech Land Surveyors and Consultant shows that the boundaries of plot numbers MN/ 1 1/10475, 10476, 10447 and 10481 were determined by normal survey practice and that the measurements were derived from the survey plan FR NO 347/50 duly approved and authenticated by director of survey. That the survey pointed out marks of the demolished developments in the forms marks were within plots number MN/ 1 1/10475, 10476, 10477 and 10481. That surveyed plots namely MN/ 1 1/10475, 10476 and A041. Have a common newly constructed boundary wall. That as per the survey report the first petitioners house is marked as HI, and 2nd petitioners house marked as 1-12, were the only houses which section a small section of the houses were on the road reserve. That the 3rd and 4th petitioners whose houses are marked as 1-13 and 1-14 respectively, were not in a road reserve. However, the 1st respondent still proceeded and demolished the petitioner's houses without following the due processes on the law of eviction.
3. The petitioners seek for the following prayers;
 - a. A Declaration that by virtue of article 29(c) of the Constitution of Kenya, the petitioners are entitled not to be subjected to any form of violence of the nature meted out by the respondents its servants and agents on the July 19, 2021
 - b. A declaration that by virtue of article 27(l) of the Constitution of Kenya, the petitioners are entitled to equal protection and equal benefit of the law from the caprice and whims of the respondents, its servants and agents as occasioned upon the respondent on July 19, 2021
 - c. A declaration that by virtue of article 40 of the Constitution of Kenya, the petitioners are protected against being arbitrarily deprived of their property as were arbitrarily deprived of by the respondent its servants, agents and employees on July 19, 2021.
 - d. A declaration that pursuant to article 47 of the Constitution of Kenya, the petitioners are afforded fair administrative action by the respondent, its agents servants and employee that is unlawful, reasonable and procedurally fair and have been given written reasons prior to the respondent embarking on the actions meted on the petitioners on July 19, 2021
 - e. A declaration that the petitioners are bonfide legal owners of surveyed properties, herein measuring 40ft length by 35ft width 29ft length by 40ft width and plot no 350 and unsurveyed plot measuring 40 length by 50 width respectively purchased from 1st and 2nd interested parties situated at Barawa, Kisauni sub county, within Mombasa County.



- f. An injunction directed upon respondents, their servants, agents and employees restraining them from in anyway purporting to take administrative action of any nature against the petitioners without giving the petitioners written reasons for undertaking the same.
 - g. A mandatory injunction against the 2nd respondent, his agents restraining them from further constructing and or dealing with the petitioners unsurvey suit properties described in measured 40ft length by 35ft width, 29ft length by 40ft width and Plot no 350 respectively, situated at Barawa.
 - h. An order compelling the respondents to restore the petitioners back to their properties and cost of restoration be borne by the respondents.
 - i. Exemplary damages
 - j. Cost of the petition.
4. This court has considered the petition and submissions therein. Salim Abdalla Mohamed the 2nd petitioner has deponed the petition's supporting affidavit dated January 26, 2022, that he and the three petitioners on diverse dates, purchased four different plots of land from the interested parties. That on September 1, 2019, Lucy Kawritha Gitonga the 1st petitioner purchased unsurveyed plot measuring 40ft by 35ft, described as 'a portion of land situated at Barawa' from Ndegwa Chimera Mangale for Kshs 300,000/=. On January 5, 2015, Salim Abdalla Mohamed the 2nd petitioner purchased a plot measuring 40ft by 55ft, described as plot No 350 Barawa from Juma Kumbu Muta for Kshs 230,000/= . On December 6, 2017, Godinho Mbogholi Mwakisha, the 3rd petitioner purchased plot measuring 29ft by 40ft, within Barakwa from Ndegwa Chimera Mangale for Kshs 130,000/= and on August 17, 2016 Mohamed Ali Mohamed, the 4th petitioner purchased a plot measuring 40ft by 50ft within Barawa from Bora Chirima Njei for Kshs 250,000/=.
 5. The petitioners claim that they have developed the said plots by constructing permanent structures on them, which have since been demolished by 2nd respondent on the allegations by the 1st respondent that the said plots were on a road reserve. The acts of demolishing the structures on the said plots have been termed by the petitioners as violation of their rights under articles 29 (a)(c), 27, 40, 43 and 47. They claim that the 1st respondent acted ultra vires to the powers granted to them under section 38 of the *Physical Planning Act* as no enforcement notice was issued before the evictions. Further the petitioners claim that the 1st respondent acted in an unfair, oppressive and a violation of the petitioners' constitutional rights.
 6. There is a survey report on record dated December 6, 2021 prepared by Pimatech Land Surveyors and Consultants, in respect of plot No MN/11/10475, 10476, 10477, 10481 which are said to be derived from Survey Plan FR No 347/50. The report alluded that the four different plots bought by the petitioners had the above mentioned plot numbers (plot No MN/11/10475, 10476, 10477, 10481). The report does not provide court with the survey report as prepared by the director of survey to ascertain indeed the existence of the said plot numbers. Further the court cannot rely on the said plot numbers as they have not been authenticated by title documents that specify their tenure.
 7. Further the petitioners have attached valuation reports for the four different plot, please note that all the reports were prepared by Elite Africa Valuers Limited on December 30, 2021. The first valuation report is for 1st petitioner, there is no specific plot number indicated for the suit property neither has the land tenure been ascertained. The second valuation report for the 2nd petitioner has also neither indicated the plot number nor the land tenure, so has the 3rd and 4th valuation report for the 3rd and 4th petitioners respectively. From the analysis of the facts and evidence before court, the petitioners are



claiming legal and equitable interest over the suit properties and seeking redress in form of permanent and mandatory injunctions as well as exemplary damages for the evictions. In my view, the petition ought to have been filed as an ordinary suit, heard and determined in an ordinary way where parties are allowed to not only exchange pleadings but granted an opportunity to cross examine witnesses. I find that from the facts, the petitioners are laying claim to unsurveyed plots with no title documents, it is only prudent to call oral evidence that would be tested within the parameters of cross examination as opposed to mere statements deposed in an affidavits.

8. Further, a look at the 2nd respondent's replying affidavit deposed by Mohamed Abukar Ahmed, he denies residing or owning any property in Barawa area. The deponent maintains that he is not privy to any agreement of sale neither is he aware of any structures that were demolished. He has distanced himself from the alleged demolitions of the structures on the unsurveyed plots of land as claimed by the petitioners. The court cannot make a determination on ownership of land based on deponents made on affidavits, there must be a trial where witnesses are examined on the evidence they rely upon to establish their case on a balance of probabilities. Indeed, the County Government of Mombasa the 2nd respondent maintain that they did not authorize eviction of the petitioners from the suit property as alleged, neither did it participate in the events leading to destruction of the petitioners property as the suit property is private.
9. In *Peter Ndegwa Gathirwa & another vs County Government of Nyeri (2019) eKLR* the court held that article 23 of the Constitution did not create constitutional petitions as alternative means of institution of suits from the forms of which have been specifically prescribed. The court found that where petitioners misuse the Constitution as a general substitute for the normal procedures for invoking judicial control of administrative action, such acts amount to abusing the court process. In that case the court held that;

' The point is this; not every grievance calls for invocation of the Constitution for a remedy. It must be appreciated that the assertion of constitutional rights through a petition is always a solemn process that is employed in those rare cases where it is obvious that the petitioner's constitutional rights have been violated, are being violated and are likely to be violated and the remedy sought cannot be granted through any means other than a constitutional petition. Put another way, a constitutional petition should not be relegated to such level as being an alternative form through which parties seek remedies for grievances that would have properly been determined through other forms of suits.

While a constitutional petition may appear to be the most expedient and convenient way to approach court, it should not be employed to avoid the necessary but what may appear as 'inconvenient' legal and procedural prerequisites that the claimants have to comply with if they pursue their claims through, for instance, statements of claims, complaints, originations summons or through judicial review. To lodge a constitutional petition when one's claim can be competently determined through any of these other forms of suit is, in my humble view, not only demeaning to the sanctity of a constitutional petition but it is also an abuse of the process of the court.'

10. I find that a petition ought not to substitute an ordinary suit, and in this case the petitioners have attempted to do so. They ought to have lodged an ordinary suit and sought the appropriate reliefs. Having said the above, I find the petitioners' petition amended on January 26, 2022 devoid of merit and I strike it out with costs to the respondents.

It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF OCTOBER 2022.

NA MATHEKA

JUDGE

TABLE

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