



**Henry v District Adjudication & Settlement Officer Tigania East/West & 5 others; Mborothi & 4 others (Interested Parties) (Environment and Land Constitutional Petition 26 of 2015) [2022] KEELC 13840 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13840 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 26 OF 2015**  
**CK NZILI, J**  
**OCTOBER 26, 2022**

**BETWEEN**

**TABITHA MUGURE HENRY ..... PETITIONER**

**AND**

**DISTRICT ADJUDICATION & SETTLEMENT OFFICER TIGANIA EAST/  
 WEST ..... 1<sup>ST</sup> RESPONDENT**

**SURVEYOR IN CHARGE OF TIGANIA EAST/WEST ADJUDICATION  
 AREAS ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT  
 OFFICER ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF SURVEY ..... 4<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**JUSTUS MWONGO MBOROTHI ..... INTERESTED PARTY**

**SEKUNDU MURIIRA IBAYA ..... INTERESTED PARTY**

**LARENCE KIBURU GITARI ..... INTERESTED PARTY**

**WILLIAM THURANIRA MBOGORI – DECEASED (SUBSTITUTED BY  
 JULIUS MUNGATHIA MBOGORI VIDE THE ORDER GIVEN ON  
 20.5.2019) ..... INTERESTED PARTY**

**FRANCIS MWENDA MBOROTHI - DECEASED (SUBSTITUTED BY  
 JAMBULA KANINKO MWENDA VIDE THE ORDER GIVEN ON  
 20.5.2019) ..... INTERESTED PARTY**



## JUDGMENT

1. By an amended petition dated June 18, 2019, the petitioner describes herself as a resident of Koonga ka–Akwinia village, Uringu Sublocation Meru County and the registered owner of LR Nyambene/ Uringu 1/1998 measuring approximately 9.15 acres on the ground, which was transmitted to her out of Succession Case No 108 of 207 previously belonging to her late husband, Henry Kirema.
2. She averred that she successively won Committee Case No 809/1969, A/R objection no 917, 763 & 609 and an arbitration board case which was never challenged to date,
3. She sued the respondents for the infringement of her constitutional rights as to fair administrative action, fair hearing and right to access to justice by fraudulently colluding to alter, subdivide and reduce her land on the map and created LR No's Nyambene/Uringu/5880, 3648, 3646, 3839 and 3643 in favour of the interested parties without her approval, consent or authorization.
4. She sought for; a declaration that the correct measurement of her land namely LR No Nyambene/ Uringu 1/998 is approximately 9.15 acres; declaration that the alteration of the map by the respondents in favour of the interested parties contravened her rights to fair administration action access to justice and fair hearing; cancellation of the title deed aforesaid and lastly order compelling the 4<sup>th</sup> & 5<sup>th</sup> respondents to rectify the map and register her with the proper title reflecting the current measurements.
5. The petition was supported by an affidavit sworn on October 19, 2015; attaching copies of confirmed grant committee cases, A/R objection and arbitration board case, decision and an order from Tigania Misc Application No 4 of 2009, copy of the map, receipt and a copy of the title deed all marked as annexures TMH 1-5 respectively. The petition was also supported by the petitioner's witnesses' statements dated November 2, 2015, list of documents filed thereto, case summary and issues for determination dated November 3, 2015. For ease of reference the petitioner condensed her documents and filed a paginated bundle on June 18, 2019.
6. The 1<sup>st</sup>-6<sup>th</sup> respondents filed written submissions dated July 8, 2022. Whereas the respondents admit that the suit land was initially recorded in the name of Thaimuta Amoru Mborochi and was currently in the name of the petitioner, they averred that the land was adjudicated under Cap 283, the [\*Land Consolidation Act\*](#).
7. That due to Objection No 414 William Thuraira Mbogori (3<sup>rd</sup> interested party) by Parcel LR No 3643 of 3.75 acres came out due to repossession; Parcel No 3646 for Francis Mwenda Mboroki , (the 4<sup>th</sup> Interested party) 1.50 acres came about due to a subdivision through Objection No 763; Parcel No 3648 for Julius Mwongo Mboroki (1<sup>st</sup> interested party), 1.5 acres came about by subdivisions due to Objection No 9020, Parcel No 5880 for Lawrence Kiburu Gitari, 3<sup>rd</sup> Interested party came about from parcel no 3648 and out of Parcel No 3648 Sekundu Murira Ibaya (2<sup>nd</sup> interested party) received 0.70 acres.
8. That after the subdivisions, it left Parcel No 998 measuring 2.40 acres in the register of existing rights. The interested parties averred that all their objections were filed while the deceased was alive and that during the hearings, it was the petitioner who represented her late husband.
9. The respondents submitted that the issues for determination are; whether the petition meets the constitutional threshold; if the presumption of regularity is applicable in these cases; if the doctrine



- of constitutional avoidance applies and lastly, if the petitioner has proved to the required standard the allegation of fraud.
10. On the 1<sup>st</sup> issue, the respondents took the view that the amended petition is fatal and lacks mandatory specificity as held in [\*Anarita Karimi Njeru vs Republic \(1979\) eKLR\*](#) and [\*Gray Jepkemoi Kiplagat vs Zakayo Chepkoga Cheruiyot \(2021\) eKLR\*](#), [\*Mumo Matemu vs Trusted Society of Human Rights Alliances and 5 others \(2013\) eKLR\*](#).
  11. The respondents submitted that other than citing several provisions of the [\*Constitution\*](#), the petition as amended lacks constitutional underpinnings for it fails to demonstrate with clarity, the particulars of the alleged infringement as it relates to the respondents alleged denial, violations, infringement or threats. Reliance was placed on [\*Bernard Ouma Omondi & another vs Attorney General & another \(2021\) eKLR\*](#) on the proposition that there has to be some particulars of the alleged infringements to enable the respondents to be able to respond and answer to the allegations to complaints.
  12. The respondents further submitted that the petitioner has made general allegations without clarity for them to respond or answer to the complaint.
  13. On presumption of regularity, the respondents, submitted under this doctrine, the court presumes the official duties have been properly discharged and all procedures duly followed until the challenger presents clear evidence to the contrary.
  14. Reliance was placed on [\*Chief Land Registrar & 4 others vs Nathan Tirop Koech & 4 others \(2018\) eKLR\*](#) where it was stated that there is a presumption that all acts done by a public official have lawfully been done and that all procedures have duly been followed. That this is also rebuttable presumption as held in [\*Teresia Kamene Kingoo vs Harun Edward Mwangi \(2019\) eKLR\*](#) and is aptly captured omnia praesumuntur esse acta 'all things are presumed to have been done rightly'.
  15. Further, the respondents submitted that the petitioner seeks the courts accord in the belief that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents colluded with the interested parties to clandestinely and unlawfully alter the map barring the suitland, illegally subdivided the said land in the map record only and failed to do so on the ground, created Parcels LR No's 5880, 3648, 3646, 3849 & 3643 in favour of the aforementioned interested parties.
  16. The respondents invoking the doctrine of regularity submitted the respondents as government officials acting in their respective mandates did so lawfully and procedurally in any action involving the suitland. Therefore, the burden to rebut the presumption of regularity was upon the petitioner with cogent, clear and uncontroverted evidence which in this petition is lacking.
  17. As to the doctrine of constitutional avoidance or exhaustion, the respondents submitted that the petitioner was trying to constitutionalize a matter that was fully addressed by a Statute. Therefore, since the constitutional jurisdiction of the court is specific it should not be open to general claims. Reliance is placed on [\*Southlake Panorama Ltd vs Ketraco Ltd and 3 others \(2021\) eKLR\*](#), [\*CCK vs Roral Media service Ltd & 5 others citing with approval S vs Mbungu \(1995\) SA 865 \(CC\)\*](#).
  18. The respondents urged the court to find that the dispute herein was more of a civil nature capable of being resolved by other means other than through a constitutional petition and by coming to this court the petitioner was abusing the court process after failing to follow the laid down procedures as set out under the [\*Land Consolidation Act\*](#) in addressing or ventilating her grievances, if any by filing a committee case under Sections 9 & 11, or an objection under Sections 17, 18, 19 & 26 (1) of the [\*Land Consolidation Act\*](#).



19. The respondents submitted that without exhausting those avenues it was not open for the petitioner to seek redress outside the set framework.
20. Reliance was placed on *Abdullahi Mangi Mobammad vs Lazarus Beja & 5 others (2021)eKLR*, where the court held that the improper practice of making all private disputes as to ownership of property as application for the enforcement of the constitutional right to property should be discouraged.
21. Further, reliance was placed on *Kenya Bus Services Ltd & 2 others vs AG (2005) eKLR 787* citing with approval Trinidad and Tobago case of *Re-application by Bahadur (1986) LRC (Const) 297* at page 298 on the proposition that the *Constitution* is not a general substitute for the normal procedure for invoking the judicial control of administrative action.
22. Similarly, the respondents urged the court to be guided by *Nartosa & others vs Minister of Education for Western Cape & others* quoted with approval *Mombasa Pet Case No 18 of 2013* on the proposition that a Constitution should only be invoked if an Act of Parliament is deficient in remedies it provides.
23. In this petition, the respondents submitted that the petitioner has given no evidence of any attempts she made to have the matter resolved through the mechanisms provided under the *Land Consolidation Act*. The court is therefore urged to find the petition as nothing more than a claim relating to land administration and management merely clothed and framed in the Bill of Rights language, yet there is a remedy prescribed by the statute and find the court as devoid of jurisdiction.
24. On whether the petition has been proved to the required standard the allegation of fraud, the respondents submitted that there is no basis of this in the petitioner's evidence.
25. Reliance was placed on *Urmila w/o Mabendra, Shah vs Barclays Bank International Ltd and another (1979) eKLR*, *Virjay Morjaria vs Nansigh Madhusing Darbar & another (2000) eKLR*, *Central Bank of Kenya Ltd vs Trust Bank Ltd & 4 others (1996) eKLR*.
26. The interested parties have opposed the petition through replying affidavits sworn on June 26, 2019 by Jambula Kaninko Mwenda the 5<sup>th</sup> interested party, Julius Mungathia the 4<sup>th</sup> interested party and witness statements dated July 30, 2019, paginated bundle dated February 20, 2020 and written submissions dated July 2, 2022.
27. The 4<sup>th</sup> interested party stated he was the legal representative of the estate of William Thurania Mbogori. That LR No Nyambene/Uringu/1/3643 which was adjudicated to the deceased during the adjudication period, confirmed as so after the committee and the arbitration decision as per annexures JMM '1' & '2'.
28. That at A/R dispute the petitioner and her brother in law conceded the interest of the deceased as per annexure marked JMM '3' following which a decision was made by the land adjudication officer on October 11, 2006 confirming that the petitioner had no case. However, the petitioner trespassed into the land after it was adjudicated in favour of the deceased hence the reason the deceased filed the Tigania SRMCC No 7 of 2010 for eviction as per annexure JMM '4'.
29. The 5<sup>th</sup> interested party defence was that as the legal representative of Francis Mwenda M'Mborothi, the petitioner's husband had been appointed by the 1<sup>st</sup> interested party and her husband to lead them in the dispute and later on share the land but after the cases were concluded, he failed to keep the promise hence the objections leading to the decision on October 11, 2006 which was never appealed against thus the petition lacks merits.
30. With leave of court parties agreed to dispose off the petition by way of written submissions based on the pleadings, list of witness statements and documents in the court file.



31. The petitioner submitted that she has lived on and exclusively utilized, the suit land measuring 9.15 acres on the ground since 1972 with developments thereon and or subdivisions up to September 21, 2015, when she found out the irregularities and or illegality's contrary to her constitutional rights as pleaded, which the 1<sup>st</sup> – 3<sup>rd</sup> interested parties have not opposed and that the affidavits by the 4<sup>th</sup> & 5<sup>th</sup> interested parties are not sworn on their behalf.
32. On the constitutional threshold guided by Anarita Karimi (supra), *Simon Natal Ntoitha vs Sub-County Land Adjudication and Settlement Officer Igembe North and others (2022) eKLR*, it was submitted that at paragraphs 12 (a), 17 (a), (b) and (c), (d) & (e) and 185 of the amended petition, she pleaded with precision and certainty Articles 40 (1) and (2), 47, 48 & 50 of the *Constitution* hence her petition meets the constitutional test.
33. Regarding merits of the petition, the petitioner submitted that at paragraphs 12 (a), (14), 14(a), (b), 15, 16, 17 (a) – (e) and 18, she has demonstrated how the 1<sup>st</sup> – 3<sup>rd</sup> respondents colluded with the interested parties to illegally and clandestinely alter the map, subdivide her land and create the disputed parcels of land which have never been implemented on the ground since she has been in occupation.
34. It was further submitted that the respondents like the 1<sup>st</sup> -3<sup>rd</sup> interested parties have not controverted the facts and issues raised in the petition and the 4<sup>th</sup> and 5<sup>th</sup> respondents replying affidavits statements and documents, have not denied or controverted her averments.
35. Regarding paragraph 11 of the 4<sup>th</sup> interested party's replying affidavit attaching A/R proceedings and the list of documents thereto, the petitioner submitted that she never participated in the alleged proceedings, the same was done secretly, without her knowledge and was in collusion with the 1<sup>st</sup>-3<sup>rd</sup> interested parties so as to deprive her of her constitutional rights.
36. Further, the petitioner submitted that the replying affidavits and witnesses' statements by the respondents and interested parties do not indicate if the petitioner was informed or involved and that in any event the said proceedings did not refer to the interested parties or award them any land; that the land committee members were lacking, there was no stamp in the name of the land adjudication officer and certification as true copies of the original.
37. Additionally, the petitioner submitted that all the other A/R objection proceedings attached by the 4<sup>th</sup> & 5<sup>th</sup> interested parties to their affidavits were fake, choreographed and have different hand writings including Njuri Ncheke proceedings of 1491-2001 and an agreement on October 9, 1998 contrary to Sections 76(1) of the *Evidence Act*.
38. The petitioner also submitted that the aforesaid proceedings violated her rights to fair administrative action as held in Simon Natal Ntoitha case (supra), access to justice, to land and fair hearing.
39. The interested parties have further submitted that they equally had a right to the suit property since it was from their late father Geoffrey M'Thaimuta M'Aburia which the petitioner's late husband could not deny them their inheritance shares or benefits.
40. The 4<sup>th</sup> & 5<sup>th</sup> interested parties submitted the standard of proof on account of fraud has not been met by the petitioner under Sections 107, 108 & 109 of the *Evidence Act* as held in *Mellen Mbera vs Theuri Wambugu (2020) eKLR*, Virjay Morjaria (surpa).
41. On the constitutional test, the 4<sup>th</sup> & 5<sup>th</sup> interested parties submitted the petition was a disguised plaint as held in *Nathan Naitore M'Iburi and another vs AG & 2 others; Sebastian Kuaria (IP) (2020) eKLR*, in which also the petitioner has failed to tender evidence to demonstrate the alleged breach of her constitutional rights.



42. The 4<sup>th</sup> and 5<sup>th</sup> interested parties submitted the petitioner was trying to circumvent the ordinary process of filing a suit based on fraud which the court should not allow and must therefore dismiss the petition.
43. The issues for the court's determination are:
- i. Whether the amended petition has met the requirements and raises any constitutional questions.
  - ii. If the petitioner has exhausted the internal disputes mechanisms under the Statute.
  - iii. If there are exceptional circumstances to warrant this court to admit the petition notwithstanding non-exhaustion of no (2) above.
  - iv. If the petitioner has proved the alleged breach of her constitutional rights.
44. A party filing a constitutional petitioner is required to disclose the capacity, the specific constitutional rights and freedoms infringed, manner of breach by the respondents, nature of reliefs sought and if there are pending or previous suits over the subject matter between the parties.
45. While expounding on this principle, the court in *Mumo Matem (supra)*, *Bernard Omondi & another (supra) & Simon Natal Ntoitha (supra)* held that a party must raise specific constitutional questions with facts, details of the alleged breach over and above citing the constitutional provisions so that the respondents can respond or answer to the specific allegations or complaints. See [\*Silas Make Otuke vs AG and 3 others \(2014\) eKLR\*](#).
46. Applying the foregoing case law, the petitioner has described herself as the registered owner of LR No Nyambene/Uringu/1/1998 said to have been fraudulently, illegally and unlawfully reduced, subdivided and registered in favour of the interested parties by the respondents without regard to her constitutional rights as to property, access to justice, fair hearing and fair administrative action.
47. In my view, other than citing the specific constitutional provisions infringed, the petitioner has pleaded the particulars of the breach, fraud, the nature of injuries and the reliefs to an extent that both the respondents and the interested parties have filed answers thereto without seeking for further and better particulars.
48. Therefore, the petition has met the structural and procedural framework as required under the [\*Constitution\*](#) of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules (2013) and the requirements under the case law afore cited.
49. As to whether the petition raises a constitutional question, the petitioner has averred that on September 21, 2015 she went to purchase a survey map from the 4<sup>th</sup> respondent and discovered that there were alterations on her land and creation of new parcels of land in favor of the interested parties. Her major complaint are these activities were done secretly and clandestinely by the respondents in collusion with the interested parties so as to disentitle her of the suit land and, without due process and in breach of her constitutional rights as to fair hearing, fair administrative action and access to justice.
50. In their response, the respondents have averred and submitted that the process of the subdivisions and creation of new parcel numbers was lawful, regular, procedural and was as a result of A/R objection proceedings which the petitioner was privy to or aware of and that if she was aggrieved by the aforesaid decision, she did not follow the procedure and exhaust the provisions of Sections 17, 18, 19 & 26 (a) of the [\*Land Consolidation Act\*](#) (cap 283). Therefore, the respondents urged the court to invoke and apply the doctrines of presumption of regularity, constitutional avoidance, find the dispute not



a constitutional question but one governed and available for settlement in the normal manner and exercise the doctrine of judicial restraint.

51. On the side of the interested parties, they have averred that the petitioner failed to make material disclosure that they jointly had inheritance rights over the suit land coming from the same ancestry; that the petitioner's deceased husband was handling the disputes on behalf of the interested parties and after the decisions were successful, he declined to share out the land with them hence the objections leading to the subdivisions which the petitioner fully participated in, but failed to challenge the outcome if at all she was aggrieved, on time or at all in line with the [\*Land Consolidation Act\*](#).
52. In a rejoinder, the petitioner submitted that she has lived on the suitland since 1972; she won the Committee Case No 8099/69 and A/R Objection No's 917/793 and 609 which were never impugned to date and that the alleged objection proceedings alienating portions of her land as per annexure '3' by the 4<sup>th</sup> & 5<sup>th</sup> interested parties referred to different objections or land sections, were suspect, do not refer to the interested parties, award no land, lack land adjudication officer and committee members names who heard and determined them, bear no stamps or names of the land adjudication officer and were not certified.
53. Further, the petitioner submitted that the aforesaid objection proceedings did not indicate if she or her late husband ever participated in them and contained different hand writings. Therefore, the petitioner urged the court to find that the process infringed on her constitutional rights.
54. A constitutional question has been termed as the one whose answers flow from either the interpretation of the [\*Constitution\*](#), relate to the enforcement of constitutional rights and freedoms, its roles, powers, directions and decisions of state organs as they exercise power and or whose reliefs must flow from the [\*Constitution\*](#) and not on a Statute. See [\*Gabriel Mutava & 2 others vs Managing Director Kenya Ports Authority & another \(2016\) eKLR\*](#).
55. In Abdullah Mangi (supra) & the court held that a constitutional court should not be dogged with applications for enforcement of purported rights which require prior determination and that it was an improper practice to make all private disputes as to ownerships of property under the guise of breach of a constitutional right to property.
56. In [\*Murage vs Fine Serve Africa Ltd & 3 others \(2013\) eKLR\*](#), the Supreme Court of Kenya held that not each and every violation of the law must be raised as a constitutional issue, while in [\*Speakers of National Assembly vs James Njenga Karume \(1992\) eKLR\*](#), the court said Alternative Dispute mechanisms have to be exhausted first.
57. In this petition, the petitioner pleaded that she discovered the alleged breach of her constitutional rights on September 21, 2015 when she acquired the survey map.
58. That is far from the truth. In JMM '4' & JMM '5' there is attached a defence filed by the defendant dated February 12, 2010 in Tigania SRMC No 7 of 2010 in response to the plaint dated June 20, 2010 by the 4<sup>th</sup> interested party stating that he was the owner of Parcel No 3643 Uringu 1 Adjudication Section demarcated and bordering Parcel LR No 998 owned by the petitioner, whose boundaries the petitioner was alleged to have ignored. He sought for the replacement and the fixing of boundary beacons, eviction of the petitioner from his land and for a permanent injunction. The petitioner in her defense at paragraph 5 thereto referred to Objection No 917 and alleged that she was not a party to it. She pleaded fraud and referred to a pending Meru HCCA No 103 of 2008.



59. In this petition, the petitioner has attached a ruling in Meru HCCA No 103 of 2009 between herself and the 4<sup>th</sup> interested party where she sought for stay of execution which was granted on September 24, 2009 pending the hearing of an appeal.
60. In my view therefore, the petitioner as at 2010 knew that there was an Objection No 917 and an adjudication of some of her land in favor of the 4<sup>th</sup> interested party. A confirmation of ownership letters and a consent to sue were also served to the petitioner alongside the plaint and the Misc Civil Application No 4 of 2009.
61. The respondents have submitted that the petitioner participated in the A/R objections but failed to appeal or object as provided under the relevant Statute.
62. The objection proceedings attached as JMM '3' bear the names identification number and the thumb print of the petitioner including the death certificate number of her deceased husband.
63. The proceedings indicate she testified and at the end of their testimony, her thumb print is affixed and the identification number after which she was cross-examined.
64. The proceedings and the decision thereto capture her evidence. The said A/R Objection No's 917, 763, 414 and 609 were allowed on October 11, 2006, in the presence of the petitioner.
65. Given the above findings of fact that the petitioner as at 2006 knew of the objections and participated in them and that subsequently in 2009 & 2010, she knew of the claims over adjudication of portions of her land by the respondents in favour of the interested parties, can there be a constitutional question raised in her petition herein based on alleged discovery in 2015, yet the records and previous statements by the petitioner as at 2009 and 2010 show otherwise?.
66. In *National Assembly of Kenya vs Kina & another (Court of Appeal, 166 of 2019) (2022) KECA (548) KLR (June 10, 2022) (judgment)* the Court of Appeal held: 'a party must demonstrate either actual infringement of a right or threat of infringement of a right'.
67. As relates to constitutional avoidance and exhaustion of other legal reliefs, the court held that there must be an existing constitutional question raised by a petitioner and if he or she has not exhausted alternative remedies, a party must show such would entail delay, uncertainty in providing a remedy, or was not available or was ineffective or the doctrine of exhaustion does not apply or that the constitutional legitimacy of that Statute was under challenge.
68. In this petition, the petitioner had the right to proceed as per the *Land Consolidation Act* after the decision was made on October 11, 2006. She has not given an explanation why she did not appeal against the decision if at all she was aggrieved. The application for eviction was made in 2009 and subsequently a suit was filed in 2010 for eviction. The petitioner filed an appeal and stay of execution in the High Court at Meru in 2008.
69. In the said defence, the petitioner only pleaded fraud against the 4<sup>th</sup> interested party but never sought to join the respondents in that suit.
70. It thereafter took the petitioner 6 years to file this petition. She has deliberately failed to disclose to this court the pending Tigania SRMCC No 7 of 2010 and in particular her defence dated February 12, 2010 when she pleaded fraud against the 4<sup>th</sup> interested party, which are completely at variance with the particulars of fraud under paragraph 17 of the amended petition.



71. This position is also fortified by the letter dated July 14, 2008 from the 3<sup>rd</sup> respondent to the 1<sup>st</sup> respondent and which is copied to the petitioner. It confirmed the filing and the determination of Objections No's 609, 963, 917 & 414.
72. In my considered view therefore, given the prior knowledge of the facts in this matter, there was obviously in existence at the time, a non-constitutional way of seeking for redress which the petitioner ought to have exploited but did not and has not explained the reason why.
73. Further, the petitioner was expected to be vigilant and should have complied with the provisions of Sections 9 (4) of the Fair Administrative Actions Act and sought to be exempted from the obligations to exhaust the provisions of the Land Consolidation Act by describing any exceptional circumstances and the interest of justice so as to be allowed to present the petition. See Speakers of National Assembly vs James Njenga Karume (1992) eKLR and *NM vs WMG (2018) eKLR*, *CCK vs Royal Media Services (supra)*, *Abdullahi Mangi Mohammed (supra)* Kenya Bus Service Ltd (supra).
74. As to whether the petitioner has pleaded and proved breach of her alleged constitutional rights as to access to justice, fair hearing, fair administrative action and fraud, the respondents and the interested parties have supplied documents in opposition to the petition. The interested parties filed replying affidavits, witness statements and a list of documents.
75. The petitioner did not seek leave to put in any additional documents and or to challenge the authenticity of the said documents especially the fact that the petitioner fully participated in the objection proceedings hence is estopped from denying the obvious.
76. The court was invited by the petitioner to find the documents and proceedings as suspect, tailor made and as a collusion or fraud orchestrated by the respondents and the interested parties to deny her the right to property.
77. It is trite law fraud must be pleaded and proved to a standard above the normal one but below proof beyond reasonable doubt. In *Vijay Morjaria (supra)* and *Arithi Developer's vs West End Butchery Ltd (2015) eKLR* the court held fraud cannot be inferred from the facts but must be proved with tangible and cogent evidence.
78. The petitioner has not specified and proved when the alleged fraud occurred, who did it and or demonstrated the same by way of expert or police investigative report that the JKM '3' & '4' which is the same as annexure 'TM '2' was forged or fraudulently made, obtained and conducted.
79. The petitioner did not share with the court any complaints she ever made soon after discovering the alleged fraud in September 2015 to the respondents and any follow up measures in line with Articles 35 & 47 of the Constitution. The alleged altered map was neither certified nor disclosed as to who the author or maker was. Strangely, the alleged map has a caveat on its face that it is not an authority on boundaries.
80. The respondents have urged this court to apply the doctrine of presumption of regularity and find the petitioner has not rebutted that presumption that the objections proceedings were lawful, regular, official business and undertaken by them in the discharge of their official duties guided by the case law of *Teresia Kamene Kingoo (supra)*.
81. In *Chief Land Registrar and 4 others vs Nathan Tirop Koech & 4 others (2018) eKLR*, it was stated that there is a presumption that all acts done by government officers on official capacity and all procedures have been dully followed.



82. Applying these principles, the starting point would be the objections proceedings. There is no dispute the petitioner participated and presented her evidence. The respondents had the mandate to hear and determine the objections under the relevant Act and implement the decision thereto.
83. The petitioner was expected to produce cogent, clear and uncontroverted evidence to rebut that presumption. In *JSC vs Gladys Shollei & another (2014) eKLR*, the court addressed the implications of fair hearing and right to be supplied with reasons for any decision in line with the parameters of Article 47 of the *Constitution*.
84. In this petition, the petitioner is complaining about a process which she participated in but alleges she was not notified and or given an opportunity to participate in and whose decision infringed on her right to property.
85. Looking at the documents and the evidence availed by the respondents and the interested parties, the petitioner has not rebutted the presumption of legality and regularity of the objection proceedings and the subsequent actions leading to the issuance of title deeds.
86. Strangely the petitioner was a beneficiary of that process and obtained a title deed.
87. Before the title deeds are issued, a certificate of finality is given by the 3<sup>rd</sup> respondent and parties are required to observe and view the adjudication register so as to confirm that all their details, acreage and description of their properties are in line with the adjudication record of existing rights.
88. The petitioner has not explained why she did not establish the missing acreage if at all she attended the publicized notice before the titling was done.
89. In view of the foregoing findings, the court therefore finds the petitioner has failed to discharge the burden of proof under Sections 107, 109 & 112 of the *Evidence Act* over the alleged breach of her constitutional rights.
90. The petition therefore lacks merits and is dismissed with no order as to costs.

Orders accordingly

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022**

**In presence of:**

**C/A: Kananu**

**Kieti for 1<sup>st</sup> – 6<sup>th</sup> respondents**

**Wambua for interested parties**

**HON. C.K. NZILI**

**ELC JUDGE**

