



**Francis (Petitioning as a legal representative of M’Thirinja M’Imathiu Tharane (Deceased))
v Land Adjudication & Settlement Officer – Karama & 2 others; Rithuty (Interested
Party) (Petition 19 of 2021) [2022] KEELC 13729 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13729 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION 19 OF 2021
CK NZILI, J
OCTOBER 19, 2022**

BETWEEN

**MAGDALINE MWOMBURI FRANCIS PETITIONER
PETITIONING AS A LEGAL REPRESENTATIVE OF M’THIRINJA
M’IMATHIU THARANE (DECEASED)**

AND

**LAND ADJUDICATION & SETTLEMENT OFFICER –
KARAMA 1ST RESPONDENT
DIRECTOR LAND ADJUDICATION 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

AND

FERDINAND KAIYERA RITHUTY INTERESTED PARTY

JUDGMENT

A. Pleadings

1. The court by a petition dated June 15, 2021 is asked to declare the decisions made by the respondents in 2017 in objection No’s 5350, 5931 and 5349 and the subsequent transfer and registration of LR No’s 1688, 1638 & 2841 Karama Adjudication Section in favour of interested party, the irregular, fraudulent arbitrary, wrongful, illegal, biased and undertaken in utter disregard and amounting to blatant violation of the petitioners rights as provided under articles 33, 40, 47, 50, 60, 68, 69 & 159 of the Constitution and asked a further prayer that an order of mandamus to issue compelling the 1st respondent to cancel the register of parcel No’s 1685, 1638 & 2841 Karama Adjudication in favour of the interested party and record them in the name of the petitioner.



2. The basis of the petitioner's claim is that she is a sister to M'Ithinja M'Imathiu Tharanje who passed on leaving no heirs and how their late mother had left the aforesaid parcels recorded under his name.
3. It was pleaded that prior to 2017, the 1st respondent colluded with a third party and the 1st interested party to transfer the suit parcels to the 1st interested party who was neither related to the deceased nor was he a next of kin.
4. The petitioner averred that despite filing objection A/R No's 5350, 5931 & 5349 the 1st respondent proceeded to hear and determine the objection on May 19, 2017 without the involvement of the committee members and secondly, by declining to allow the petitioner to present and have her witnesses give testimony hence infringing on the petitioner's rights to own property.
5. The petition was supported by an affidavit sworn by Magdaline Mwomburi Francis in which she attached a copy of the grant register and proceedings marked as annexure MMF "1" – "3" respectively.
6. The petition is opposed by the respondents on the reason that it lacked precision, she failed to exhaust all remedies available prior to filing the petition; she has failed to demonstrate alleged breach of her constitutional rights and freedoms and the respondents acted within the law.
7. The interested party filed a preliminary objection dated November 5, 2021 and a replying affidavit sworn on July 1, 2022.
8. The interested party averred he was a *bonafide* recorded owner of the LR No 2841 Karama adjudication which he bought from the deceased in 1990, took vacant possession and had no interest in land parcel No 1685 & 1638.
9. The interested party averred the A/R objections were heard on merits and in accordance with section 26 of the Land Adjudication Act and all parties were given equal opportunities to present their cases including the petitioner's witnesses No 1 & 2, as per the proceedings attached but after the determination, the petitioner failed to appeal against the decision to the minister in line with section 29 thereof.
10. It was averred that the petitioner instead filed Meru JR No 17 of 2019 which was dismissed on November 3, 2020 for want of prosecution only for the petitioner to await for a whole one year and present this petition.
11. The interested party denied that the suit parcel was held by the deceased brother in trust for the family of the petitioner for lack of documentary evidence.
12. The interested party further averred the petition was lacking in particulars of breach and fraud hence was devoid of evidence and merits.

B. Written Submissions

13. With leave of court parties opted to dispose of the petition by way of written submissions.
14. The petitioner submitted the petition is properly before the court since under articles 162 (2) & 165 of the Constitution the horizons of *locus standi* have been expanded.
15. On specificity, the petitioner submitted the issues before the court are; whether due process was followed by the authorities with regard to adjudication of the suitland by safeguarding the right to ownership of the land and if there was violation of the said rights.



16. The petitioner takes the view that the manner in which the objection proceedings were determined by the respondents could be challenged and quashed through orders of *certiorari* and all what she was challenging was the manner and not merits of the decision,
17. Reliance was placed on Meru ELC JR 70 of 2010 [*Republic v Director of Land Adjudication and Settlement and another, John Mithika M'Tkiao alias Josephat Kabutia v Rose Mukiri Thaitumu*](#) Meru ELC Pet No 22 of 2012.
18. The petitioner submitted that her late brother could not have transferred the parcel of land without informing them about it more so when she was the one staying and cultivating parcel No 2841 before the interested party moved in as per witness number 2 in the objection proceedings.
19. The petitioner submitted that she was not accorded fair hearing during the hearing of the objection proceedings since her evidence was not taken into consideration, documentary evidence was not produced on the manner of ownership by the interested party, there was fraud in hearing the A/R objection and hence deserves the orders sought since the legitimacy of process in hearing the A/R objection was flawed. Reliance was placed on [*Anarita Karimi Njeru v Republic*](#) (1979) KLR, [*Mutsonga v Nyati*](#) (1984) KR 428 [*Republic v Musanka Ole Runkes Tarakwa Lempaso Ole Kuyioni & 2 others*](#) [*Exparte Joseph Lesalol Lokitio & others, Patrick Musimba v NLC & 4 others*](#) (2015) eKLR & [*Christopher Nguru Mulwa & 28 others v County Government of Kitui & 2 others*](#) (2017) eKLR.
20. The respondents submitted that the petitioner failed to exhaust all the available internal mechanisms under sections 10, 13, 26, 29 & 30 of the [*Land Adjudication*](#) cap 284 before filing the petition hence the court lacks jurisdiction to hear and determine the matter.
21. Reliance was placed on [*Speaker of National Assembly v Karume*](#) (1992) KLR 22, [*Mutsanga Tea & Coffee Co Ltd v Shikaru Ltd & another*](#) (2015) eKLR, [*Tobias Achola Osindi & 13 others v Cyprian Orieno Ogalo & 6 others, Julia Kaburia vs Kabeera & 5 others*](#) Nyeri civil appeal No 340 of 2002, [*William Odhiambo Ramogi & 3 others v AG*](#) (2020) eKLR, [*Republic v IEBC Exparte NASA Kenya & 6 others*](#) (2017) eKLR, [*Geoffrey Muthiga Kaburu & others v Samuel Munga Henry & 1756 others*](#) (2015) eKLR.
22. On compliance with the [*Constitution*](#) threshold, the respondents submitted that the petition lacks some level of particularity of the specific right allegedly breached and how it was violated contrary to the principles set out in [*Anarita Karimi Njeru*](#) (supra) [*Mumo Matemu v Trusted Society of Human Rights Alliance*](#) & [*Kiambu County Tenants Welfare Association v AG & another*](#) (2017) eKLR.
23. Regarding ultra vires the respondents submitted the powers to determine any disputes as a result of an adjudication register are covered by section 26 of the [*Land Adjudication Act*](#) and the petitioner has failed to discharge the burden of proof under section 107 of the [*Evidence Act*](#) to bring any evidence to the contrary that the respondents failed to act within the law spell out the particulars of the infringement of her rights, specify which procedure was not followed and how.
24. Reliance was placed on the word by Prof Sir William Wade, [*Administrative Law*](#) and find the respondents acted reasonably in good faith, faithfully and their actions were justified.
25. Lastly the respondents urged court to find there exists no exceptional circumstances for the petitioner to ignore the alternative remedies available under the [*Land Adjudication Act*](#) cap 284 and file this petition.
26. The interested party submitted title deed in the subject adjudication sections are not yet out though the section is completed.



27. The interested party urged the court to find he was an innocent purchaser in 1990 from the deceased, took vacant possession thereafter until the A/R objection was filed in 2017 by the petitioner which was heard and determined lawfully and on merits by the respondents, after according the petitioner all her rights under section 26 of the [Land Adjudication Act](#) and which under sections 30 thereof the petitioner had a right to file a minister's appeal but instead as submitted the petitioner filed Meru JR No 17 of 2019 which was dismissed and has now filed the petition so as to defeat the interested party's defence of limitation of time one year after the dismissal thereof.
28. The Interested party further submitted the petitioner has filed to discharge her burden of proof under sections 107 – 109 of the [Evidence Act](#), by publishing any documents to prove ownership of the suit parcels by her late mother demonstrate the alleged fraud to the regard standard going by the holding in [Virjay Morjaria v Nansigh Madhusingh Darbar & another](#) (2000) eKLR & [Kinyanjui Kamau v George Kamau](#) (2015) eKLR.
29. The interested party submitted the petition is misleading the court since she was accorded a chance to bring two witnesses but after the decision she failed or neglected to file a minister's appeal under section 29 (1) [Land Adjudication Act](#) only to lodge a judicial review which was dismissed.
30. She was therefore on a fishing expedition which was filed after inordinate delay in a clear abuse of the court process.

C. Issues for determination

31. The court has carefully gone through the pleading, documents in support written submissions and the cited authorities and looked at the governing law. The issues calling for determination are:-
 - i. If the petition has met the constitutional threshold and raised a constitutional question.
 - ii. If the petitioner ought to have exhausted the internal alternative dispute mechanism before filing the suit.
 - iii. If the petitioner has proved any of the alleged breach of her constitutional rights and freedoms to entitle her to be granted the order sought.
 - iv. What is the order as to costs.
32. A party approaching the court on a constitutional petition is required to comply with the law governing constitutional petition namely; articles 22, 23, 165 3 (b), 258 (1) & (2) of the [Constitution](#), rules 10, 15, [Constitution of Kenya \(Protection of Rights and Fundamental\) Practice Protection & Procedure Rules, 2013](#) and section 13 of the [Environment and Land Court Act](#).
33. The basic requirements are to state the capacity of the petitioner and the respondent's, give details, particulars and specifications of the rights breached threatened or infringed, particulars of the nature, loss damage and incurred details of pending or concluded civil and criminal proceedings over the subject matter and the reliefs sought.
34. In determining the above requirements, the court in [Anarita Karimi Njaru and Mumo Matemu](#) (supra) stated that a party must specify the rights or freedoms infringed with precision so that the opposite party may know what the complaint or controversy, its nature, extent and particulars so that it can respond to the claim. See [Kiambu County Tenants Welfare](#) (supra).
35. Further the court in [Patrick Mbaabu Karanja v Kenyatta University](#) (2013) eKLR, the court held that not every statutory breach amount to a constitutional petition, otherwise a constitutional court should



not be trivialized by bringing all manner of claims which do not necessarily require a constitutional solution.

36. In *Godfrey Paul Okutoyi & another v Habil Olaka & another* (2018) eKLR, the court held; rights conferred by a statute are not fundamental rights and freedoms and their breach should be addressed through ordinary process.
37. Still looking at whether or not a constitutional threshold has been met and a constitutional question raised, the court in *M'Murunga & 4 others v AG & 2 others* (E & L petition No 10 of 2018) (2022) KEELC 2441 (KLR) July 20, 2022 (Judgment) stated a petitioner who had come to court after losing in a judicial review case before the same court through a constitutional petition had not disclosed the status of the implementation of the decision sought to be challenged and the reasons the petitioner had not appealed against the said decision to the minister.
38. In *Speaker of National Assembly* supra the court held that where there is a clear procedure prescribed for by the *Constitution* and or an Act of parliament that procedure must be strictly followed.
39. In this petition, the petitioner pleaded she was a sister to the late M'Thirinja M'Imathiu Tharane whose mother had given him parcel No's 1685, 1638 and 2841 as the only son to hold in trust for the family which were irregularly, unlawfully and unprocedurally transferred and registered in the name of the interested party by the respondent's and after learning about it, she lodged objection No's 53.50, 5931 and 5349 which the 1st respondent heard and determined them contrary to the law and in breach of her constitutional right as to properly without the involvement of committee member and without fair hearing hence violating her rights as contained in articles 35, 40, 47, 48, 50, 60, 68, 69 & 159 of the *Constitution*, hence prayed for the said action, decisions to be declared invalid that the land belongs to her and an order of mandamus compelling the 1st respondent to cancel the named of the interested party and replace it with her name.
40. The petitioner attached a copy of special grant issued on May 30, 2019 to represent the estate of the late M'Ithirinja M'Imathiu who owns parcel No 1638 & 1685 as per a letter from the 1st respondent attached as MMF "2", annexure marked MMF "3" indicates she was the objector in objection No's 5350, 5931 & 5349 before the 1st respondent in which she said the suit land initially belonged to her late mother Cianjairi.
41. The decision indicates objection No 5350 was dismissed and the land ordered to remain in the name of the deceased while awaiting succession proceedings for the estate of M'Thirinja M'Imathiu while objection No 5394 against parcel No 2841 was dismissed and the land was to remain under the name of the interested party.
42. The petitioner under sections 26, 29 & 30 of the *Land Adjudication Act* if aggrieved by the decision was supposed to lodge an appeal with the minister within 60 days from April 21, 2017.
43. There is no evidence on explanation why the appeal was not filed on time or at all.
44. Similarly, on account of parcel No 1685 & 1638, the Land Adjudication Officer was categorical that the land remained in the name of the deceased while awaiting succession proceedings in the estate of the deceased.
45. The proceedings indicate the petitioner was given an opportunity to present evidence, cross examine witnesses and ventilate her claim under the *Land Adjudication Act*, there is no requirement to hear and determine the A/R objection in the presence of a land committee members, unlike under the *Land Consolidation Act* going by the holding by the court of appeal in *Peter Kimandiu v Land Adjudication Officer Tigania West & 5 others* (2015) eKLR.



46. Similarly, there is no indication why the petitioner did not subject herself to the [Law of Succession Act](#) cap 160 as ordered by the Land Adjudication Officer.
47. In my considered view the 1st respondent heard and determined the A/R objection in line with the [Land Adjudication Act](#). As held in *Tobias Ochola* (supra) the role of the court under the [Land Adjudication Act](#) is minimal, restricted and supervisory in nature. This court lacks jurisdiction to declare interests on land under the said law as is requested to do in this matter.
48. As held in *Speaker for National Assembly & Masanga Coffee & Tea* (supra), where there is an alternative remedial mechanism under statutes, a constitutional court should not step in and should strictly enforce alternative dispute mechanism as required of it under article 159 of the [Constitution](#).
49. The court is mandated under the doctrine of exhaustion as held in *Julia Kaburia v Kabeera* (supra) the [Land Adjudication Act](#) has exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section.
50. The power cannot be exercised by this court through a constitutional petition.
51. Similarly, the power to determine what falls under the estate of the deceased person is governed by the [Law of Succession Act](#).
52. In this petition, the petitioner has not disclosed to the court why this court should usurp the role of a probate court. The petition discloses no constitutional question which is beyond the procedures and processes set out under both [Land Adjudication](#) and the [Law of Succession Act](#).
53. In my considered view, the issues raised in the petition if any are matters which should be handled and determined through the ordinary procedures and processes set out under the relevant statutes.
54. As regard *res judicata* as held in *Maina Kiai & 2 others v IEBC & another* (2016) eKLR there must be key elements on a final determination by a competent court on the same subject matter, same parties and which the subsequent court may determine.
55. All parties have indicated the judicial review matter was dismissed for want of prosecution.
56. A suit dismissed for want of prosecution is not a suit determined on merits to be termed as a final decision. The court never determined to finality the issues of the whether the decision by the 1st respondent was ultra vires and made contrary to the procedures governed by the [Land Adjudication Act](#).
57. The suit was dismissed more or less on technical grounds. It was not a decision based on facts and evidence.
58. In the *Tee Gee Electricals & Plastics Co Ltd v Kenya Industrial Estates* (2005) KLR 97; LLR CAK 6880 the Court of Appeal held; *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits.
59. On whether the petitioner has pleaded with specificity, the particulars of breach of her constitutional rights, it is not enough for a petitioner to cite the constitutional provisions without giving the specific particulars of the breach, the nature of injury or damage and the manner in which the individual actions affected him or her.
60. In this petition the petition has merely cited the articles 35, 40, 47, 48, 50, 60, 68, 64 & 159 of the [Constitution](#) without laying the basis and the manner of the alleged breach.



61. The petitioner has not attached evidence of the initial registration or ownership of the suit parcel of land in favour of her late mother and the manner in which they were transferred or recorded in the name of her deceased brother prior to the A/R objection proceedings.
62. The petitioner has not told the court how her right to access to information, fair administrative action, fair hearing, access to justice and right to land were infringed, threatened or breached by the respondents.
63. It is not enough to throw the article of the Constitution alleged to have been infringed, without accompanying evidence of breach and perhaps action taken by the petitioner demanding for remedial attention prior to the filing of the petition and submission to alternative remedial mechanism under the statute. The petitioner did not seek for leave based on exceptional circumstances why the court should entertain the petition notwithstanding the available alternative disputes mechanisms as provided under sections 10 & 11 of the Fair Administrative Action Act.
64. Further, the petitioner has not explained why the prayer sought are more efficacious as opposed to the aforesaid alternative dispute mechanisms.
65. In absence of evidence to support the alleged breach and fraud as held in *Virjay* (supra) again my finding is that the petition fails on that account.
66. In the premises and due to the foregoing reasons, I find the petition lacking merits. The same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 19TH DAY OF OCTOBER, 2022.

In presence of:

C/A: Kananu

Kieti for 1st – 3rd respondents

Ouma for 1st interested party

HON. C.K. NZILI

ELC JUDGE

