



**Kithure v Kithara & 6 others (Environment & Land Petition
12 of 2020) [2022] KEELC 13656 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13656 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION 12 OF 2020
CK NZILI, J
OCTOBER 19, 2022**

BETWEEN

JOSEPH KITHURE PETITIONER

AND

EDWARD KITHARA 1ST RESPONDENT

PURITY MWONTUNE 2ND RESPONDENT

JOHN KOBIA 3RD RESPONDENT

BERNARD KIRIINYA NTOGAI 4TH RESPONDENT

LAND ADJUDICATION AND SETTLEMENT OFFICER 5TH RESPONDENT

LAND REGISTRAR, TIGANIA 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

JUDGMENT

A. Pleadings

1. The petition before the court is the one dated September 15, 2020 in which the petitioner averred he is the original, actual, registered owner and occupant of LR No Tigania/Antuamburi/5449 measuring approximately 5.90 acres which he has subdivided into LR No's 5449, 13533 – 36.
2. He averred that during the adjudication process, he established a portion of the suitland measuring approximately 0.20 acres was curved out by the 1st – 4th respondents fraudulently and in collusion with the officers of the 5th respondent they made illegal changes to the survey maps to include parcels No 8145, 4357, 4162 and 4367, without a minister's appeal or order of this court and without his knowledge, approval or consent which amounts to breach of his constitutional right to ownership of property.



3. Further petitioner averred he lodged a complaint *vide* objections No's 1033, 1924, 1925 and 2254 whereof the district Land Adjudication and Settlement Officer rendered his decision in 2010 to the extent that parcel No5449 be measured on the ground to establish if it was 2.90 acres or else parcel No's 8145 and 4357 to revert to the initial parcel of land, which decision has never been implemented.
4. The petition therefore sought the court to:
 - a. Declare the respondents' actions as amounting to violation of his constitutional rights.
 - b. Cancellation of titles regarding Tigania/Antuamburi/8145, 4357, 4162 & 4347 and the same to revert to the petitioner.
 - c. Permanent injunction against the respondents from entering or interfering with his quiet possession and
 - d. An order for the rectification of the survey map to reflect the decision of the land adjudication officer.
5. The petition is supported by an affidavit sworn by Joseph Kithure repeating the averments in the petition save to add that the 1st respondent sold LR No Tigania/Antuamburi/4357 to the 2nd respondent while the 3rd respondent sold the LR Tigania Antuamburi/4351 to the 4th respondent.
6. Further, the petitioner averred that the 4th respondent was in the process of fencing off the suit land which is prejudicial to him as well as colluding with the office of the district land surveyor with an intention of taking away his land despite having subdivided the parcels in favour of his children.
7. Additionally, the petitioner averred that there were no records in the land registry showing that LR No's 4162 & 4367, but the 3rd respondent insists that the said parcel exists and belongs to him and has made further subdivisions so as to dispose the same to third parties.
8. The petitioner also attached both a copy of the objection proceedings and a decision by the land adjudication officer dated June 11, 2010 as annexure marked JK "1"; copy of a sketch map showing the subdivision as annexure JK "2" green cards for LR No Titania/Antuamburi/4357 and 8145 as annexures JK "3" and "4", letter from the county survey office for LR No's 4162 & 4367 as annexure marked JK "5" and county surveyor's letter dated September 3, 2020 requesting for a site visit to the suit parcels of land.
9. The respondents have opposed the petition by an affidavit in reply dated June 11, 2021 sworn for and on behalf of the 1-4th respondents by the 1st respondent.
10. He stated that in 1992 he bought 0.15 acres from one Joaochim, took vacant possession where after he bought an additional 0.05 acre from Silas Kiruki out of the same block as the 1st plot in folio No 1700 and since the land was governed by the [Land Consolidation Act](#), he was displaced by a public land and his two parcels were consolidated to make 0.20 acres and allocated parcel No 4357 where he lives bordering the petitioner's parcel No 5823.
11. The 1st respondent averred that he subdivided his parcel No 4351 into parcel No 8145 which he sold to Africa Evangelical Presbyterian church and parcel No 4351 was sold to Gervasio M'Ikamati hence relinquishing his interest.
12. The 1st respondent averred the said church exchanged their parcel No 8145 with the 3rd respondent's parcel No 4367 which the 3rd respondent sold to the 4th respondent.



13. The 1st respondent averred that nobody objected to his subdivisions or the transfer to the third parties including the petitioner who knew about it between 2002 and 2017, as he was serving then as the area land adjudication committee member.
14. The 1st respondent averred at the time the title deeds came out the title deeds read his name but the said Gervasio M'Imuti had already sold the portion to the 2nd respondent and hence effected the transfer directly to her. He annexed a copy of the title deed and a search certificate as annexure marked EK "1" & "2" respectively.
15. In addition the 1st respondent averred there has been a boundary dispute which the land surveyor has been attempting to come and establish yet the petitioner has been evasive more so after he lodged a suit in Tigania Law Courts. The 1st respondent attached a letter by the land surveyor dated September 23, 2020 and a response thereto by the petitioner as annexure marked EK 3 (a) & (b).
16. Further, the 1st respondent states that parcels No's 4357 & 8145 have title deeds and were occupied by the 2nd – 4th respondents, which boarder parcel No 4367 and 5823 the 3rd respondent and the petitioner's parcel No's 5449, 13530 & 13533 as per the area map annexed as EK "4", which clearly showed that the petitioner had a big chunk of land namely parcel No 5623 and his intention was to import 0.20 acre and displace parcel No's 4357 and 8145 which parcels he had never owned or occupied as alleged or at all.
17. Similarly, 1st respondent averred the suit was misplaced and lacked merits since the petitioner never objected at the committee, arbitration or appealed to the minister before the suit parcels were registered and title deeds issued.
18. The 5th – 7th respondents opposed the petition through the ground of opposition dated July 4, 2021; that the petition lacks specificity and precision; the petitioner failed to raise an objection to the A/R as per section 26 of the Land Consolidation Act and follow the due process under the Act; cap 284 relied upon by the petitioner was not applicable; the petition was incompetent, misconceived, misplaced an abuse of the court process and that the petitioner was indolent.

B. Written Submissions

19. With leave of court parties opted to dispose off the petition by way of written submissions whose deadline for filing was February 6, 2022.
20. The 1st-4th respondents submitted that the court on January 19, 2021 stayed the petitions for a period of 6 months so that parties could appeal before the land registrar and the land surveyor within 3 months for the determination of the boundaries and the two to file a report before court for further orders.
21. The 1st – 4th respondents submitted the petitioner never made a follow up, just as he has done previously, after the county surveyor issued summons to visit the *locus in quo*.
22. The 1st – 4th respondents submitted the petitioner also filed and abandoned a suit before Tigania Law Courts and the delay herein is characteristic of him since he does not wish the truth to be known which is essentially a boundary dispute.
23. Reliance was placed on Mrao Ltd v First Ameircan Bank Ltd & 2 others (2003) ekLR, Kenleb Con Ltd v New Gatitu Service Station Ltd & another civil appeal No 3112 of 1990, Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) ekLR, Kenya Breweries Ltd & antoher v Washington O Kenya (2002) eKLR and Ashok Kumar, Bajpai v Dr (Smt) Ranjama Baijai (AIR) 204 ALL 107 2004 (1) ACW 88.



24. The 5th & 6th respondents submitted that the issue for determination was whether the respondents and the petitioner followed due process in the conduct of the adjudication process and whether the land registrar issued title deeds in line with the procedure set out in the law. The process of adjudication culminates with the publication of the final adjudication register for land under the [Land Adjudication Act](#). The 5th, 6th & 7th respondents submitted that it was not in dispute that the register for the area was published and lodged which under section 26 (5) of the Act which includes the form and the demarcation collectively known as the Adjudication Register which includes the map of the area and names of person entitled to be issued with title deed in the adjudication section.
25. Since it was published and lodged, it was submitted that there is no doubt that the petitioner failed to inspect the final register or lodge a complaint about it hence at this stage he cannot raise such issues that he failed to address as per the law.
26. Concerning the [Land Consolidation Act](#) cap 283, the 5th – 7th respondents submitted that section 27 requires after the expiry of 60 days from the date a certificate under section 25 thereof is issued, an adjudication register shall be final and whose implication is that if there are no complaints or objections made to the final register, the 5th respondent was duty bound to prepare and forward the register for issuance of titles.
27. It was submitted that the purpose of the said section was to acknowledge that errors may exist in the register and the persons to be entitled to such land in the adjudication section are duty bound to be vigilant and point out such errors for rectification at that stage and point in time. And that an adjudication officer bound by the strict laid down procedure does not have powers to alter the final register to accommodate the interest of persons who refuse to present their objections within the statutory timelines.
28. The 5th – 7th respondents further submitted that it was during that period when a land adjudication officer may order for compensation as per section 26 (2) of the [Land Consolidation Act](#) and also when an aggrieved party may move to the resident magistrate to object it the amount of compensation.
29. Further, it was submitted that the law only granted an adjudication officer power to correct clerical errors or errors of like nature in the Adjudication Register per section 28 of the [Land Consolidation Act](#) and that there was no provision in the Act that grants the land registrar power to issue title deed for land that were subject to [Land Consolidation Act](#) in a manner contrary to the Act since the final register that was forwarded to him is the only basis upon which he should issue titles and cannot on his own motion start to reopen and examine matters that took place before the completion of the register.
30. Additionally, the 5th – 7th respondents submitted that given the foregoing, the 5th respondent discharged its mandate forwarded the final register and gave parties an opportunity for objection and could not be said to have violated the petitioners rights to own land, nor did the 6th respondent violate any right since it was only required to issue title deed as per the final register and not to question or challenge or serve as an adjudication officer who has the powers to reopen the adjudication process.
31. Finally, the 5th – 7th respondents submitted that the petitioners sat on his rights, violated his own right and hence could not blame the respondents.

C. Issues for Determination

32. The issues for the court's determination are: -
 - i. If the petition has met a constitutional threshold and or raises a constitutional question.



- ii. If the petitioner exhausted the internal mechanisms set under the [Land Consolidation Act](#).
 - iii. If the petition has pleaded loss, injury and damage of his constitutional rights by the respondents.
 - iv. What is the order as to costs?
33. The law governing constitutional petition is articles 22, 23, 165 3(b), 258, of the [Constitution](#), the [Constitution of Kenya \(Protection of Rights & Fundamental Freedoms\) Practice and Procedures Rules 2013](#) and section 13 of the [Environment and Land Court Act](#).
 34. Rules 10 & 15 thereof require a party filing a petition to give details of the capacity he approaches the court, specific details on the rights infringed, manner and nature of injury and damage thereof, pending or existing suit over the subject matter and the relief s sought.
 35. While expounding the rules, the court in [Annarita Karimi Njeru v Republic](#) (1979) 1KLR 54 and [Mumo Matemu v Trusted Society of Human Rights Alliance](#) (2013) eKLR, [Meme v Republic](#) (2004) I EA 124 said that a party must plead with precision and specificity the alleged breach so that the opposite party may know the exact complaint, controversy and the circumstances of the alleged infringement.
 36. In [Kiambu County Tenant Welfare Association v AG & another](#) (2017) eKLR the court observed that a party must not only state the provisions infringed but also the manner, nature and extent of the infringement, and the extent of the injury suffered.
 37. In [Patrick M'Kailanya v Anncieta Kanungu & 15 others](#) (2022) eKLR the court said that a petitioner is required to demonstrate an impugned decision or action violates or threatens to violate the bill of rights and the test was whether the act or omission complained about falls within the ambit of the article 47 of the [Constitution](#). The court went on to observe that under articles 20 & 21 of the [Constitution](#), state organs were bound to respect, uphold and defend the [Constitution](#) and were placed with the burden to respect, observe, promote and fulfil the bill of rights and freedoms in favour of citizens.
 38. In [Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot](#) (2021) eKLR the court observed with approval [Anarita Karimi](#) (supra) & [Mumo Matemu](#) (supra) that a party should provide sufficient particulars to which the respondents could reply to while in [Bernard Ouma Omondi & another v AG & another](#) (2021) eKLR, the court stated a constitutional petition to be sustainable must at the minimum satisfy a basic threshold so that the respondent can respond to and or answer to the allegations or complaints.
 39. A constitutional petition must disclose a constitutional complaint. In [Carton Manufacturers Ltd v Prudential printers Ltd](#) (2013) eKLR the court while citing with approval [Drummond Jackson v British Medical Association](#) (1970) eKLR 688 observed that a cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.
 40. In this petition, the petitioner has to disclose a constitutional question or controversy. A constitutional question has been defined as one whose answer comes from the [Constitution](#) and not a statute. This may include a constitutional interpretation, role of a state organ, conflict between state organs, its powers, functions and the mandate in relation to the [Constitution](#) and breach of the bill of rights by a state organ.
 41. In [CNM v WMA](#) (2018) eKLR the court observed that when determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful but whether the argument forces the court to consider constitutional rights or value. The court cited



with approval *Fredrick's & others v MEC for Education & Training Eastern Cape and others* (2001) ZACC 6 where Justice O Regan citing SOS Boesak observed:

“..... What is a constitutional matter and be gleaned from a reading of the constitution itself and includes disputes as to whether any law or conduct is inconsistent with the Constitution as well as issues concerning the status, powers and functions of an organ of state..... the interpretation, application and upholding of the constitution.

Courts have held not every statutory breach should amount to a constitutional issue or question”.

42. In *Gabriel Mutasa & 2 others v M.D KPA & another* (2016) eKLR, the court said a constitutional litigation was not open for every claim which may properly be dealt with under the alternative existing, mechanism for redress in civil or criminal law.
43. In *CNM* (supra) the court held that the principle of constitutional avoidance holds that where it is possible to decide a case without reaching a constitutional issue, that should be done.
44. Applying the foregoing principles, in this petition the petitioner's complaint is that parcel No 5449 was originally 2.90 acres but was allegedly, unprocedurally and irregularly curved out 0.20 acres by the 5th respondent and subdivided into parcels No's 5449, 13533, 13534, 13535 and 13536 in favour of the 1st-4th respondents who have been issued with title deeds by the 6th respondents.
45. Further the petitioner pleaded that upon learning of the alleged acts, he filed objection No's 1023, 1924, 1925 & 2254, where the District Land & Settlement Officer who rendered a decision in 2010 to the effect that parcel No 5449 be measured on the ground and if its acreage was not equal to 2.90 acres, then parcel No's 8145 & 4357 should be taken back to where they had come from which decision he averred has not been implemented to date.
46. The petitioner urged this court to find there was infringement of his constitutional rights to land and declare the actions by the respondent to have violated his rights, cancel the title deeds for LR No's Titania/Antuamburi/8145, 4357, 4162 and 4367 so as to revert to him, order for the rectification of the survey maps to reflect the decision of the land adjudication officer and issue a permanent injunction against the respondents.
47. In response to the petition, the 1st-7th respondents have raised the following key issues: -
 - i. The governing law to the suit parcel was the *Land Consolidation Act* and not the *Land Adjudication Act*.
 - ii. There was consolidation of parcels leading to parcel No 4357 measuring 0.20 bordering the petitioner's No 5823.
 - iii. Parcel No 4357 was split into two parcel No 4353 & 8145.
 - iv. There were no objections raised to the consolidation, subdivision and transfers.
 - v. The petitioner has a pending suit in Tigania Law Courts over the subject matter.
 - vi. The dispute is all about boundary disputes which the petition has been evading
 - vii. No A/R objection was filed on time or at all.
 - viii. Title deeds are out and each of the parcels of land are clearly indicated in the survey map.



- ix. Due process was followed as set out in sections 25, 26, 27, 28 of the [Land Consolidation Act](#) (cap 283) and the land adjudication officer lacked powers to alter the final register and so is the land registrar who upon receipt of the final register as to issue title deed and could not question an adjudication officer or reopen the adjudication process.
- x. The petitioner sat on his rights when the final register was published and lodged for inspection under sections 26 of [Land Adjudication Act](#) and 27 of the [Land Consolidation Act](#).
48. The petitioner's complaint was that there was a decision rendered on June 11, 2010 out of his objections No's 2013, 1924, 1925 and 2254 which was never implemented by the 5th respondent.
49. It was the petitioner's claim that the failure to implement the aforesaid decision on time or at all infringed on his right to fair administrative action and to own property as enshrined in articles 47 & 40 of the [Constitution](#).
50. The 1st – 4th respondents have pleaded at paragraph 18 of the replying affidavit sworn on their behalf by Edward Kitharia, the 1st respondent, that they were never served and were not aware of the purported A/R objection until this petition was filed and believed it was a forgery.
51. Rule 15 of the [Constitution of Kenya Protection of Rights and Fundamental Freedoms, Procedure Rules 2013](#) require that the Hon Attorney General or any other state organ shall within 14 days upon service respond to a petition by way of a replying affidavit and annex any documents to rely upon in the replying affidavit. Any other respondent other than a state organ is required under sub rule 2 (a) to file a replying affidavit or a statement setting out the grounds relied upon including the filing of a cross-petition.
52. Rule 16 (1) thereof allows the court the power to hear and determine the petition notwithstanding the responses under rule 15 (1).
53. Looking at the pleadings by the petitioner and the decision attached as annexure JK "1" made by the 5th respondent on June 11, 2010 vis a vis the response by the 1st - 4th respondents and bearing in mind the requirements under articles 20 & 21 of the [Constitution](#), for the 5th, 6th & 7th respondents to uphold, protect, preserve and observe the bill of rights, the petition herein has disclosed a constitutional question on whether or not the failure by the 5th respondent to implement its own decision dated June 11, 2010 resulted to the infringement of the petitioners right to fair administrative action and ownership of land after the 6th respondent proceeded to register and issue the 1-4th respondents with title deeds notwithstanding the said decision and its impact to the acreage and the legality of the said documents.
54. The next issue is whether the petitioner has exhausted the internal mechanisms under the [Land Consolidation Act](#).
55. The 5th – 7th respondents have submitted that the petitioner ought to have lodged a complaint or objection under sections 25, 26, 27 & 28 of the [Land Consolidation Act](#) before the register became final and was transmitted to the 6th respondent to issue title deeds.
56. The 5th – 7th respondents have further submitted that the petitioner slept on his rights when he failed to do so especially after the adjudication register was published for inspection at which point in time any errors, or irregularities would have been detected in the register.
57. The 5th – 7th respondents submitted that the petitioner was expected to be vigilant and point out such errors for rectification at that stage and point in time which would have occurred under the limited powers given to the adjudication officer under section 28 of the [Land Consolidation Act](#).



58. As indicated above, the 5th – 7th respondents are duty bound under the procedure to file a replying affidavit and attach any documents to rely upon in the hearing of a petition.
59. In this petition, the 5th – 7th respondents failed to file a response or make a statement setting out the grounds upon which they shall oppose the petition.
60. The court granted the said 5th – 7th respondents time to make a response and file any documents which would have assisted the court to make a fair determination of the petition.
61. It is trite law that submissions however persuasive and forceful cannot amount to pleadings and evidence. See *Daniel Toroitich Arap Moi v Stephen Mwangi Marathi* (2014) eKLR.
62. In this petition, annexure marked JKI was made by the 5th respondent. The facts as set out by the petitioner in the body of the petition and repeated in the supporting affidavit sworn on September 15, 2020 by Joseph Kithure remain unchallenged, uncontroverted and unshaken by the 5th respondent.
63. It is the 5th respondent who made the decision on June 11, 2010 and cannot run away from it. The petitioner had a legitimate expectation that the decision would be implemented and effected prior to the register being declared final. See *Communication commission of Kenya & 5 others v Royal Media Services Ltd & 7 others* (2014) eKLR.
64. The 5th – 7th respondents have not denied the existence of that decision. They have not said how, when and where it was implemented and if not so its significance thereof.
65. In *Chief Land Registrar and 4 others v Nathan Tirop Koech & 4 others* (2018) eKLR it was stated that there is a presumption of that all acts done by a public officer have lawfully been done and that all procedures have been duly followed.
66. Assuming this was a lawful decision by the 5th respondent, it was expected that it meant something under the *Land Consolidation Act*.
67. The petitioner pleaded and submitted the singular act of on not implementing its own decision, the 5th respondent infringed on his right to fair administrative action under article 47 of the *Constitution* which grants him the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
68. Under sub rule (2) thereof, the petitioner is also entitled to written reasons for the action.
69. Under rule 4, 6 & 7 of the *Fair Administrative Action Act* 2015, the failure to furnish adequate reasons or justify an action in a court proceeding on an administrative action raises a presumption of the action having been taken without good reasons. See *Gladys Shollei v JSC* (2013) eKLR.
70. The petitioner has the burden of proof to discharge under sections 107-109 of the *Evidence Act* that his rights to fair administration action and ownership of land were infringed.
71. It was admitted by the 1st – 4th respondents that the petitioner owns parcel No 5833 which borders parcel No's 4357, 8145 & 4367 belonging to the 2nd – 4th respondents.
72. It was also admitted that the petitioner was a member of the land adjudication committee of the area between 2002-2017.
73. The title deeds issued to the 1st-4th respondents all bear the date of issuance as June 6, 2017. A copy of register attached as JK "3" for LR No's 4351 & 8148 indicates it was opened on May 24, 2017. This was long after the decision made on June 11, 2010 by the 5th respondent.



74. The 5th respondent had more than enough time to implement the decision prior to the register being declared final and transmitted to the 6th respondent for the issuance of the title deeds.
75. The petitioner had by then submitted to the internal dispute mechanism as set out under section 26 of the [Land Consolidation Act](#) and a decision made by the 5th respondent. What remained was the duty of the 5th respondent to implement the decision on time in line with the legitimate expectation set out under section 7 (2) (m) of the [Fair Administrative Action Act](#) 2015.
76. The petitioner has pleaded that a decision was made by the 5th respondent which it failed to implement on time or at all and which resulted to the issuance of title deeds in favour of the 1st -4th respondents notwithstanding that there was a need to ensure his acreage of LR No 5449 remained 2.90 acres on the ground.
77. The 3rd respondent was listed as a party to the objection's proceedings alongside Gervasio M'Imuti who the 1st respondent has admitted he exchanged his parcel No 4357, sold to him by the 1st respondent with parcel No 8145 with the 3rd respondent's P No 4367.
78. The 3rd respondent and Gervasio M'Imuti have not denied those facts that a decision was made regarding parcel No's 8145, 4357, 5449 & 5450 on June 11, 2010 by the 5th respondent.
79. Additionally, given the doctrine of regularity and the law that the onus was on the 1st-4th respondents to rebut the presumption and tender evidence why they think the A/R objections attached by the petitioner were forgeries and did not emanate from the 5th respondent. Strangely they have admitted that they own and possess title deeds for parcel No's 8145, 4357, 4367.
80. At paragraph 19 of the replying affidavit the 1-4th respondents admitted that parcel No's 4357 and 8145 are occupied by the 2nd-4th respondents and that they boarder the petitioner's parcel No's 5449, 13530 and 13533 and the 3rd respondents parcel No's 4367 & 5823.
81. At paragraph 20 of the replying affidavit, the 1st-4th respondents state that the bone of contention in this petition was that the petitioner wanted to import 0.20 acres and displace LR No Tigania/Antuamburi 4357 & 8145 which did not materialize hence this petition.
82. The 1st respondent at paragraph 10 of the replying affidavit admitted that he depleted his account after selling parcels No's 4357 and 8145 in 1992. He could not therefore possibly deny or represent or advance the interests of his co respondents said to be a beneficiary of illegalities
83. The next issue is whether out of the omissions or actions by the 5th respondent, the petitioner has suffered loss, injury and damage out of breach of his right to property and fair administrative action.
84. The petitioner has pleaded at paragraph 31 of the petition that despite the decision made on June 11, 2010, the 1st-6th respondents hived out four portions from his land and issued title deeds for LR No's 8145, 4357, 4162 and 4367 which land has been and or is what he and his family depend on.
85. Unfortunately, none of the parties herein has attached a registry index map duly certified by the survey department of Kenya to confirm the allegations
86. The petitioner has also pleaded collusion and fraud on the part of the respondents. It is trite law that fraud must be pleaded and proved on a balance of probability higher than the ordinary scale but not to the standard of proof beyond reasonable doubt. See [Arihi Highway Developers v West End Butchery & others](#) (2015) eKLR.



87. In this petition, the petitioner has failed to prove any fraud on the part of the respondents. There is no investigative report or complaint, report and or outcome made to the police, CID and the Commission on Administrative Justice by the petitioner and its outcome to back the allegations of collusion, fraud or illegality.
88. Similarly, the petitioner has not brought any evidence that the 1st – 4th respondents were privy and party to the fraud, collusion and illegalities perpetuated by the 5th respondent and or that they in any way participated in ensuring that the decision thereof was not implemented.
89. As regards the 3rd respondent and the owner of LR No 4357, though they appear to have been party to the objection, they do not appear to have taken part in the proceedings.
90. Similarly, the petitioner has not tendered any evidence that they were aware of the outcome of the A/R objection.
91. Additionally, the onus was on the petitioner to show how the decision was relayed by the 1-4th respondents and subsequently the date, time and manner in which he demanded for action from the 5th respondents before the title deeds were issued to the 1st-4th respondents by the 6th respondent.
92. The petitioner has also not proved that the 6th – 7th respondents were aware of the pending implementation of the A/R decision made on June 11, 2020 and ignored the same.
93. The court was been asked to cancel, reverse and order that titles to LR No 4357, 4162 and 4367 revert to the petitioner and the survey maps be rectified to reflect the decision made on June 11, 2010.
94. The decision made on June 11, 2010 was to the effect that the parcel No's 5449 & 5450 be measured on the ground and if they do not make a total of 2.90 acres and 0.20 acres respectively, then parcel No 8145 and 4357 totaling 0.20 acres to move back to where they came from and parcel No 5450 be measured including the neighbouring parcels and adjustments to be made to ensure there was enough acreage.
95. The petitioner has not supplied any adjudication records as at June 11, 2010 to the court to indicate that what was eventually supplied to the 6th respondent for titling was not reflective of the decision made on June 11, 2010.
96. Similarly, the 5th respondent has not denied that the decision herein was not implemented.
97. Additionally, this court lacks the survey maps, land surveyor and land registrar's report as to the extent of the acreage of the petitioner vis a vis that of 1st-4th respondents on the ground and what is contained in the official, registry index survey maps.
98. The petitioner's A/R objections were determined in 2010. The 1st respondent has not attached an authority to plead, swear and act on behalf of the 2nd – 4th respondents. If he no longer owns land in the sad area and lacks interest thereof it was incredible that he would purport to speak for and on behalf of the 2nd – 4th respondents without authority and on matters he was not privy to, which allegedly occurred or happened long after he had sold the two parcels of land.
99. Coming to the issue of extent of the loss and the effect on the ground, this court made an order for the 6th respondent and the county land surveyor to visit the locus in quo as per the orders given on January 19, 2022. There is no indication if petitioner extracted and served the said orders upon the relevant officers and thereafter prepared and filed the report.
100. The petitioner has not brought before this court any expert report on the extent of damage or loss to his land after the issuance of title deeds to the 2nd – 4th respondents by the 6th respondent.



101. In *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Ag and 2 others* (civil appeal 243 of 2017) (2021) KECA 324 (KLR) (17th December, 2021) {Judgment}, the court observed that the Constitution under article 22 does not define the nature of compensation but depends on the facts and circumstances of each case since it is a distinct remedy and additional to remedies in private law for damages. The court said the common law damages include general, special, nominal and punitive damages. Further the court said comparative jurisprudence limits the award of general damages in constitutional cases only to proven damages and not presumed damages.
102. Citing the US Supreme Court in *Carey v Piphus* 435 US 247 (1978), the court said while presumed compensatory damages may not be awarded in a constitutional petition, nominal and proven compensatory damages were appropriate for redress of such a grievance and that presumed compensatory damages were general damages that are recoverable without prove of actual loss. The court cited with approval Lord Nicholls in *Siechand, Ramanoop v the AG of T & T*, PC Appeal No 13 of 2014 where it was said monetary award for constitutional violations was not confined to an award of compensatory damage in traditional sense and a constitutional court was concerned to uphold or vindicate the constitutional right infringed, an award of compensation will go some distance toward vindicating the infringed right and should reflect the sense of public importance of constitutional rights and the gravity of the breach and deter further breaches.
103. The court went on to state nominal damages are awarded for purposes of declaring and vindicating legal and constitutional rights and do not require proof of harm whereas punitive damages are award upon proof of highly culpable state of mind as they serve penal and deterrent functions in cases of gross constitutional violations as well as vindicatory functions.
104. Coming to the present petition, the petitioner did not specifically plead the nature and extend of the loss suffered.
105. The 1st – 4th respondents have admitted that they possess title deeds to the land and are in occupation of their parcels of land.
106. Annexure marked JK “5” to the petitioner’s supporting affidavit was a letter written by the 6th respondent where he confirmed it had no record for LR No’s 4162 and 4367 whereas annexure JK “6” was a letter from the county surveyor dated September 3, 2020 seeking to re-establish the boundaries for parcel LR No’s 4357 & 8145.
107. As indicated above the court made an order on January 19, 2022, stayed the proceedings for six months so that the parties could submit to the internal mechanisms before the Land Registrar and the Land Surveyor under both the Land Registration Act and the Survey Act for recourse.
108. None of the parties heeded to this order and brought reports for or against the petition.
109. In absence of the expert reports, the court finds the petitioner has failed to substantiate the nexus of breach of the twin constitutional rights to fair administrative action, right to ownership of land and factually prove the said allegation both on paper and on the ground. Therefore, 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

Karatu for petitioner



Kieti for 5th – 7th respondents

Atheru for 1-3rd respondent's

HON. C.K. NZILI

ELC JUDGE

