



Kotikash (suing as the next friend of Sironka Kotikash) v Kuyo & 5 others (Environment & Land Petition 21 of 2017) [2022] KEELC 13487 (KLR) (17 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND PETITION 21 OF 2017
CG MBOGO, J
OCTOBER 17, 2022**

BETWEEN

JEREMIAH LASITI KOTIKASH (SUING AS THE NEXT FRIEND OF SIRONKA KOTIKASH) PETITIONER

AND

**PARKURITO KUYO 1ST RESPONDENT
CABINET SECRETARY, LAND & HOUSING 2ND RESPONDENT
CHIEF LAND REGISTRAR 3RD RESPONDENT
DISTRICT LAND REGISTRAR 4TH RESPONDENT
DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .. 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT**

JUDGMENT

1. The petitioner filed a petition dated November 5, 2013 seeking the following orders: -
 - a. It be declared that the finding that the title to the petitioners' property comprised in parcel no Cis-Mara/Olposimoru/246 by the district commissioner, Narok North acting on the authority of the 2nd respondent violated the petitioner's constitutional rights to protection of private property under article 40 of the Constitution of Kenya.
 - b. It be declared that the revocation of the petitioner's title to property comprised in title no Cis/Mara/Olposimoru/246 by the 4th respondent acting on the instructions of the respondent violated the petitioner's right to a fair hearing before the petitioner is deprived of his private property in contravention of article 40 of the Constitution of Kenya.



- c. It be declared that the revocation of the petitioner's title to that piece of land known as Cis/Mara/Olposimoru/246 was and is without any legal basis.
 - d. A permanent order of injunction be granted to restrain the 1st respondent by himself, his servants and or agents from violating the petitioner's constitutional rights guaranteed under the the Constitution of Kenya by depriving him of his property comprised in that piece of land known as Cis/Mara/Olposimoru/246 and entering and trespassing thereon without the petitioner's consent.
 - e. A mandatory injunction compelling the 3rd respondent to cancel the purported revocation of the petitioner's title to that piece of land known as Cis/Mara/Olposimoru/246 and its registration in the names of the petitioner herein.
 - f. That the respondents do pay the costs of this suit.
2. In the petition, the petitioner contended contravention and violation of his constitutional rights under Article 40 and 50 (1) of the Constitution over and in relation to property known as Cis/Mara/Olposimoru/132 that the 4th respondent acting on the advise of the 3rd respondent has purported to revoke the petitioner's title to the said property thus depriving the petitioner of the same and denying and depriving him of the right to a fair hearing before arbitrarily revoking the said title.
 3. The petition is supported by the affidavit of the petitioner sworn on even date. The petitioner deposed that he is one of the sons of Sironka Ole Kotikash and that his father and the 1st respondent were members of Olposimoru adjudication section in which his late father was allocated parcel number Cis/Mara/Olposimoru/132 and the 1st respondent was allocated parcel number Cis/Mara/Olposimoru/246. The petitioner further deposed that the 1st respondent objected to the said allocation before the district objection board and the arbitration board and which both objections were dismissed with costs and it was upheld that land parcel number Cis/Mara/Olposimoru/132 remained the property of the petitioner's father. Further, that when the 1st respondent appealed to the Land Dispute Tribunal, Olorurto Division and the Rift Valley Provincial Land Disputes Appeals Tribunal, it was upheld that parcel number Cis/Mara/Olposimoru/132 belonged to the petitioner.
 4. The petitioner further deposed that the 1st respondent filed a fresh suit in the Chief Magistrates' Court at Nakuru which adopted the decision of the Rift Valley Provincial Land Disputes Appeals Tribunal as judgment of the court. Further, that pursuant to the unmerited decision of the Minister, the 1st respondent went ahead and fraudulently obtained a title deed claiming to have been awarded the same by the District Commissioner, Narok North. The petitioner deposed that the district commissioner, Narok North acted beyond his jurisdiction in entertaining a claim which involved parcel number Cis/Mara/Olposimoru/132 by having it registered in the names of the 1st respondent disregarding the decisions of all other authorities that had dealt with the matter. Further, that the district commissioner disregarded a court order issued on June 14, 2002 by awarding the land in issue to the 1st respondent which is contempt of court and invalidating and disregarding the decision of the Rift Valley Disputes Appeals Tribunal which is a higher authority in relation to determination of the issues.
 5. The petition is opposed by the replying affidavit of Patrick M Munyalo-the 5th respondent sworn on Febraury 13, 2019. The 5th respondent deposed that the Land District Tribunals do not have the legal capacity or jurisdiction over land falling within adjudication areas and the decision of the Rift Valley Provincial Land Disputes Appeals Tribunal has no effect even though it declared the petitioner as the registered owner of Cis/Mara/Olposimoru/132. The 5th respondent further deposed that pursuant to section 29 (4) of the Land Adjudication Act, the district commissioner had the authority to hear



- and determine matters arising from the adjudication committee and the arbitration board which the petitioner attended and called evidence. Further, that the 2nd to 5th respondents have acted in good faith within their prescribed powers and as such shall not be liable to any action, suit or proceedings under the Land Adjudication Act. Further, that article 40 (3) of the Constitution does not extend to any property that has been found to have been unlawfully acquired.
6. The 1st respondent filed an amended replying affidavit sworn on April 27, 2021. The 1st respondent deposed that the petition is an abuse of the court process, devoid of merit, incompetent and misconceived for the reasons that he is the registered owner of Cis-Mara/Olposimoru/132 having been issued with a title deed and further, the petitioner herein is a total stranger to this case as the dispute has been between him and one Sironka Kotikash. In addition, the 1st respondent deposed that there is no authority that has been filed appointing the petitioner to pursue his interest and act as his next of friend.
 7. The 1st respondent further deposed that it was his right to appeal and that the minister by virtue of section 29 of the Land Adjudication Act is authorized to determine appeals and order titles to be issued in the name of successful parties in the appeal and in this case, Sironka Kotikash who was the respondent in the matter before the appeals committee should have filed an appeal within the acceptable time frame and not more than a year from the date of judgment. The 1st respondent further deposed that he filed the case at the magistrates' court to reinstate the restriction registered on Cis-Mara/Olposimoru/132 which was removed fraudulently. Further that the Kotikash family has never proved why they should share his land and further subdivide it while there was a pending case and a restriction as well whereas they own land parcel number Cis-Mara/Olposimoru/608. Further, that the minister's decision dated June 15, 2012 was obtained legally and the district commissioner, Narok North had authority to hear and determine disputes as per legal notice number 7 of 25/0 4/1978. In conclusion, the 1st respondent deposed that the petition does not meet the test of a constitutional petition as laid down in the case of Anarita Karimi Njeru versus Republic [1979] eKLR and that not each and every violation of the law must be raised before the high court as a constitutional issue as there are alternative remedies which the petitioner ought to pursue first.
 8. The petitioner filed written submissions dated June 24, 2022. The petitioner raise three issues for determination as follows: -
 - a. Whether the decision of the minister in Case no 132 Olposimoru Adjudication Section is sustainable.
 - b. Whether the petition is entitled to the orders sought in this petition.
 - c. Whether the petitioner has demonstrated any constitutional violation or threats of their rights to property.
 - d. Whether this honourable court has jurisdiction to hear and determine this matter.
 9. On the first issue, the petitioner submitted that at the centre of this petition is a decision of the District Land Adjudication Officer delivered on March 5, 1999 where the 1st respondent being aggrieved, filed an appeal to the Minister on July 19, 1999 which was heard on March 14, 2012 and typed and certified proceedings issued on June 15, 2012. The petitioner relied on the case of Chembe Katana Changi versus Minister of Lands and Settlement & 4 Others [2015] eKLR and Grace Adhiambo Ogaga versus William Ochieng Ogaga & 3 Others [2018] eKLR.
 10. On the second issue, the petitioner submitted that he is entitled to institute these proceedings as is provided under article 22 of the Constitution and that invocation of the court's jurisdiction to question



the procedural property of substantive merit of the adjudication process is proper in that they ignored the laid out procedure that is provided under the *Land Adjudication Act*.

11. On whether this honourable court has jurisdiction to hear and determine this matter, the petitioner submitted that this court has jurisdiction under section 13 of the *Environment and Land Court Act* and therefore can grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms. The petitioner relied on the case of *Gabriel Mutava & 2 Others versus Managing Director Kenya Ports Authority & Another* [2016] eKLR.
12. The 1st respondent filed written submissions dated July 18, 2022. The 1st respondent raised 3 issues for determination as follows: -
 - a. Whether the petitioner has locus standi to lodge the petition herein.
 - b. Whether the petitioner is entitled to the reliefs sought.
 - c. Who bears the cost of this petition.
13. On the first issue, the 1st respondent submitted that the capacity of a party to sue cannot be gainsaid and that upon perusal of the pleadings in this petition, there is no authority to demonstrate that Sironka Kotikash appointed the petitioner to pursue his interest. The 1st respondent relied on the case of *Mike Makarena versus District Land Adjudication and Settlement Officer East District & 3 Others* [2022] eKLR. The 1st respondent further submitted that given that the petitioner has not explained his relationship with Sironka Kotikash and also shown that he is incapacitated, helpless, disabled, it then only appears that the petitioner is pursuing a curious path which reveals that the petition is frivolous, vexatious and an abuse of the court process.
14. On whether the petitioner is entitled to the reliefs sought, the 1st respondent submitted that the accepted threshold to sustain a constitutional petition was set out in Anarita Karimi Njeru versus The Republic (1976-1980) KLR 1272 and restated in *Mumo Matemba versus Trusted Society of Human Rights Alliance* [2014] eKLR which essentially provided that the petitioner, in a constitutional petition is required to plead his case with reasonable precision and evidence allegedly breached, threatened or infringed as per section 107 of the *Evidence Act*. The 1st respondent submitted that the petitioner has not proved his entitlement over the said property and that he has come to court with unclean hands having fraudulently subdivided the original parcel number 132 as such, the petitioner is guilty of failing to disclose all material facts. In conclusion, the 1st respondent submitted that a successful litigant is inter alia awarded costs so as to recoup the costs he has undergone in the course of litigation and as such he is entitled to the same.
15. I have analysed and considered the petition, the replies thereof and the written submissions filed by the petitioner and the 1st respondent and the issues for determination is whether the petition has merit and whether the petitioner is entitled to the reliefs sought.
16. The bill of rights under article 22(1) of the *Constitution* clearly provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.
17. The ingredients of a constitutional petition was clearly formulated in the case of Anarita Karimi Njeru vs Republic (1979) eKLR where it was partly stated as follows: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision



that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

18. Similarly, in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the court stated that: -

“(42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

(43) The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the *Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the *Constitution* and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the Petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was



not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st Respondent.”

19. It should be noted that the case of Anarita Karimi Njeru (*supra*) has been relied upon from time and time again to demonstrate the threshold of a successful constitutional petition. It should be appreciated that the requirements for a successful constitutional petition are simple and are thus: - the petitioner should set out the constitutional provisions, which he believes have been violated or threatened, and the manner in which the respondent(s) have violated those provisions. It is not enough for the petitioner to just list the constitutional provisions without demonstrating how they were infringed upon.
20. I have taken time to read through the petition dated November 5, 2013 and in particular, part B which read ‘Constitutional rights of the Petitioner’ and part C which reads ‘Contravention of the Petitioner’s Constitutional Rights by the 1st, 2nd, 3rd, 4th and 5th respondents’. Upon consideration of the same, it is clear to me that the petitioner has laid out the actions by the respondents which he believes were wrong and unconstitutional as well as the provisions of the Constitution which the petitioner believes were violated. However, the petitioner has not clearly provided “who” “what” and “why” to this court and as such I find that the Petition as drawn and filed does not meet the threshold for a constitutional petition as clearly enumerated in the Anarita Karimi Njeru case (*supra*)
21. More importantly, is that a party is bound by its pleadings. The foundation of the petitioner’s case ought to be the facts upon which the petition is founded. A cause without a factual foundation or basis has no legs to stand on. Lack of a factual basis embarrasses the respondents, in terms of what they are expected to respond to; and to the court in terms of understanding the actual or real issues in dispute. Parties should always be alive to the fact that they may, both sides, be privy to all the facts in the matter at hand, but the court is never privy to the same. It should not be expected that the court would somehow get to discover or unearth those facts as is the case here. It is not for the court to dig out the facts. It is up to the parties to them bring out, so as to assist the court do justice based on those facts. Where facts are not fully disclosed there is a gap, a deficiency, and it would be pretentious to assume that the court would do justice when it only has half of the facts. In this case, the petitioner has not disclosed the nature of relationship existing between him and Sironka Kotikash. Also, the petition refers to a parcel of land known as Cis/Mara/ Olposimoru/132, the orders or reliefs sought relate to a parcel of land known as Cis/Mara/Olposimoru/246. There is no documentary evidence whatsoever to show existence of the latter parcel of land. It is disturbing that even with such glaring anomalies, the petitioner did not seek to amend the petition to correct the errors, and/ or providing evidence proving existence of the same. In addition, the petitioner did not file an authority to plead on behalf of Sironka Kotikash. I am most certain that the petition was not made in good faith at all.
22. A further look at the pleadings indicate that the petitioner (sic) was aggrieved with the decision of the Minister dated August 21, 2012. This court has often stated its position on the suitable approach parties ought to take when displeased with the decision of the minister exercising jurisdiction under the Land Adjudication Act. The petitioner in this case ought to have explored judicial review as an avenue in which his claims whether legitimate or not would be entertained.
23. Arising from the above, it is my finding that the petitioner has not has not met the threshold of a constitutional petition. Secondly, the petitioner has no *locus standi* to bring forth this petition and third there is no proof of existence of land known as Cis/ Mara/ Olposimoru/ 246. The petition dated November 5, 2013 is hereby struck out with costs to the 1st respondent. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 17TH DAY OF OCTOBER, 2022.



HON MBOGO C G

JUDGE

17/10/2022

In the presence of:

CA:Chuma

