



**Mukururu & another v County Government of Nakuru & 3 others;
Family Bank Ltd (Interested Party) (Environment & Land Petition
10 of 2019) [2022] KEELC 14913 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14913 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 10 OF 2019
FM NJOROGE, J
NOVEMBER 21, 2022**

BETWEEN

CHARLES MUCHERU MUKURURU 1ST PETITIONER

JEREMIAH MUKURURU MUCHERU 2ND PETITIONER

AND

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR NAKURU 2ND RESPONDENT

BAVUNI MUGUATHI WATER PROJECT 3RD RESPONDENT

JOSEPH NDERITU 4TH RESPONDENT

AND

FAMILY BANK LTD INTERESTED PARTY

JUDGMENT

The Petition

1. The petitioners filed an amended petition dated October 31, 2017 seeking the following orders:
 - a. A declaration that the petitioner has been discriminated against by the 1st and 2nd respondent contrary to article 27 of the *Constitution*.
 - b. A declaration that the petitioner's inherent dignity has been violated by the 1st and 2nd respondent contrary to article 28 of the *Constitution*.



- c. A declaration that the petitioner has been subjected to anxiety, pain and suffering, public ridicule, and severe psychological torture by the respondent contrary to article 29(d) of the Constitution.
 - d. A declaration that the petitioner's right to own and quietly enjoy his property has been violated by the 1st and 3rd respondent contrary to article 40 of the Constitution.
 - e. An order of *mandamus* compelling the 3rd and 4th respondent to give vacant possession of property known as Dundori/Muguathi Block 1/1640 Wanyororo 'A' to the petitioner forthwith.
 - f. An order of *mandamus* compelling the 2nd respondent to cancel the subdivision of all of the property known as Dundori/Muguathi Block 1/1640 Wanyororo 'A'.
 - g. An order of prohibition prohibiting the 1st, 3rd and 4th respondents by themselves, their agents, representatives or assignees from entering, remaining on, taking possession of, alienating, evicting the petitioners or their staff or licensees from, or in any other way interfering with the petitioners' quiet possession of all that parcel of land known as Dundori/Muguathi Block 1/1640 Wanyororo 'A'
 - h. Costs
 - i. Interest
 - j. Any other relief that this honorable court may deem fit and just to grant.
2. The genesis of the petition is the alleged encroachment by the respondents on Dundori/Muguathi Block 1/1640 Wanyororo 'A' and the setting up of a water project that, according to the petitioners, infringes on their constitutional rights.
3. The petitioners aver that the 2nd petitioner had acquired all that parcel of land known as Dundori/Muguathi Block 1/1640 Wanyororo 'A', the suit property herein, in 1975 through shares he had acquired in Nakuru Kiamunyeki Ltd and Wanyororo Farmers Company Limited. The petitioners further aver that the 2nd petitioner has been in occupation of the suit property and has from 1988 developed part of the land by building Jemus Academy (now Sunshine Schools); in or about the year 2014, the 3rd and 4th respondents unlawfully and without any notice entered the suit land without notice and initiated a water project on a portion thereof measuring 0.046 ha. The petitioners state that the claim of the 3rd and 4th respondents is that the petitioners' family had entered into an agreement consenting to the construction of the water project on the land and which claim they term as untrue. They aver that the 3rd and 4th respondents have never compensated them for the land and what was paid to them was a partial payment for the sharing of electric power being an amount of Kshs 40,000/=. The petitioners further allege that the 2nd respondent accepted a forged document purportedly consenting to their subdivision of the land. The overtures of the petitioners to the 1st and 3rd respondents intended to resolve the dispute have never yielded fruit and the 3rd respondent has failed to respond thereto. The petitioners state that the 3rd and 4th respondents intend to acquire title for the portion that they have allegedly forcefully taken from the petitioners. They aver that the whole parcel of land remained charged between the year 2006 and the date of the filing of the petition and there was no explanation as to how subdivision was possible during that period without the submission by the 2nd petitioner of the original title deed and discharge of charge. They claim that the said encroachment by the respondents and the construction of the water project at its middle has destroyed their land. The petitioners therefore claim that the respondents have by their action of entry, construction and allowing the public



to access the land violated their rights under article 10, the right not to be discriminated under article 27, the right dignity under article 28, and the right to acquire and own property under article 40 of the Constitution.

4. The amended petition is supported by the 1st petitioner's sworn affidavit dated October 31, 2017. It reiterates the grounds laid out in the petition. The petitioners have exhibited in that affidavit copies of the following documents: copies of receipts and minutes as evidence of the companies' joint resolution to dispose the suit land and payments made for the land, copy of the title deed, copy of the mutation form as evidence of the subdivision of the suit property into two sub-plots number Dundori/Muguathi Block 1/2932 and Dundori/Muguathi Block 1/2933, copy of the Nakuru North Land Control Board consent and a copy of the minutes of a meeting held on July 17, 2014.

The Response

5. The 1st, 2nd, 3rd and 4th respondents did not file their responses to the amended petition despite service. In response, the interested party filed their replying affidavit dated February 1, 2022 sworn by one Wambani Deya the interested party's legal officer. He deposed that on September 30, 2015, Geoffrey Mukururu, Peter M. Mukururu, John M. Mukururo and Joseph K. Mukururo trading as Jemus Academy approached it for a financial facility of Kshs 1,000,000 for finance construction and the 2nd petitioner offered the suit property and another parcel as securities for the loan facility.
6. He deposed that the suit property was charged to them vide a charge dated March 8, 2006 repayable with interest in 9 monthly instalments of Kshs 170,000; that on October 26, 2007 Janus Investments Company Limited and Janus Academy where the 2nd petitioner is a director further approached them for a secured loan of Kshs 1,200,000. He added that the security being the title for the suit property was to be held by them until the facility is paid in full. The interested party deposed that the said credit facility is still outstanding and that from March 9, 2006 the property had been encumbered to it and thus no transaction involving subdivision, transfer of interest and title to the suit land could be registered without its consent. In conclusion, the deponent states that no third party can claim an interest in the suit property without a registered discharge of charge or an express consent from the interested party.
7. The 1st petitioner filed a further affidavit dated May 26, 2022 where he reiterated the contents of his supporting affidavit to the amended petition as well as the interested party's replying affidavit. He further averred that on February 3, 2017 when the County Government opened the borehole to the public, he and the 1st petitioner protested against it which resulted in their assault and arrest by the area chief. He further averred that on the same day the respondents stormed his school and caused damage to the property.

Submissions

The Petitioner's Submissions

8. The petitioners filed their submissions dated August 30, 2022 where they identified four issues for determination. One, whether the 1st and 2nd respondents violated the constitutional rights of the petitioners under article 27 of the Constitution. They rely on several cases including the case of John Kabui Mwai & 3 others v Kenya National Examination Council & others [2011] eKLR and submit that the 1st and 2nd respondents discriminated the 2nd petitioner by treating him differently from others in the society. They further submit that the decision by the 1st and 2nd respondents to forcefully acquire the 1st petitioner's legally acquired property is *prima facie* discriminatory. They relied on article 24 of the Constitution of Kenya 2010 and the case of Lyomoki and others v Attorney General [2005] 2 EA



127. They submit that once it is shown by a petitioner that there is limitation on a fundamental right or freedom, the burden of proving the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom rests on the state or authority limiting the fundamental right or freedom. They further submit that the 1st and 2nd respondent's violated article 27 of the Constitution that protects equality and freedom from discrimination and the right to own property hence their decision cannot be allowed to stand.
9. The second issue is whether the 1st, 2nd, 3rd and 4th respondents violated the 2nd petitioner's constitutional rights under article 40 of the Constitution. The petitioners submit that the 1st, 2nd, 3rd and 4th respondents violated their right to own property by forcefully and illegally acquiring their land and converting it to a public utility without following the due process. They cite the cases of Evelyn College of Design Ltd v Director of Children's Department & another petition No 228 of 2013 and Adan Adirabani Hassan and 2 others v the Registrar of Titles and others petition No 7 of 2012 [2013].
 10. The third issue is whether the prayers sought by the petitioners are tenable under the Constitution and the law. They rely on article 20 of the constitution on the bill of rights that binds all state organs and further obligates the court to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom. They also rely on article 23 of the Constitution which places authority upon the court to uphold and enforce the bill of rights. They submit that having demonstrated that 1st respondent and 2nd respondents violated articles 27 and 40 of the Constitution, the inevitable consequence is that an order of *mandamus* should issue compelling the 1st, 2nd, 3rd and 4th respondents from illegally acquiring the petitioner's property. They cite the case of Al Yusra Restaurant Ltd v Kenya Conference of Catholic Bishops & another [2017] eKLR where the court awarded the petitioner therein Kshs 3,000,000 as compensation for violation of their fundamental rights and freedom under articles 27 and 40 of the Constitution. They add that they have been denied an opportunity to continue developing their property which they depend on for survival. The final issue was on costs where they also urge the court to grant them costs of the suit since they have established that their fundamental rights and freedoms had been violated.

The 1st Respondent's Submissions

11. The 1st respondent filed its submission dated October 12, 2022 where it gave a brief background of the case and identified the main issue for determination as whether the petitioners are entitled to the prayers sought. It submits that the petitioners have not disclosed any reasonable cause of action against the 1st respondent and that the instant suit does not meet the basic threshold/structure of a petition. It further submits that the instant suit relates to a private agreement between the petitioners and the 3rd and 4th respondents to which the 1st respondent was not a party to.
12. The 1st respondent relies on the case of Vivian Mula v Mzoori Limited [2017] eKLR and order 2 rule 15 of the Civil Procedure Rules and submits that the instant suit is vexatious and frivolous and ought to be struck out as it fails to disclose any cause of action against the 1st respondent. It further submitted that the petitioners aver violations of articles 10, 27, 28 and 40 of the Constitution by the respondents but they have not specifically pleaded how the said provisions have been infringed. The 1st respondent relies on the case of Augustino Mbugua v Inspector General of Police & another [2020] eKLR and submits that the petitioners are challenging the validity of the documents which were issued to give consent on the subdivision of the suit land but they have not tendered any evidence to buttress their position.
13. In conclusion, the 1st respondent relies on the case of Godfrey Paul Olutoyi & another v Habil Olaka & another [2018] eKLR and submits that where there are other remedies readily available to a claimant,



the constitutional mandate of the court should not be invoked. It submits that the petitioners' blanket approach to allegedly infringed constitutional rights and/or freedoms does not meet the specificity required under the rule set in the appellate case of *Anarita Karimi v Republic* (1979) eKLR.

Submissions of The Interested Party

14. The interested party also filed its submissions dated September 20, 2022 where it identified one main issue for determination: whether any other interests by any other parties can be registered against the subject title or obtained without the consent of the chargee. It relies on section 87 of the *Land Act* and section 59 of the *Land Registration Act* and submits that there is no evidence that the interested party's written consent had been sought and obtained by the parties involved before the said sale and subdivision was undertaken.
15. The interested party relies on the case of *Innercity Properties Limited v Housing Finance & 3 others* – HCCC No E030 of 2020 and submits that the bank's interest in the charged property overrides any other interest in the property for as long as the property remains charged to it. It further submits that it was not made aware of the intention to subdivide or transfer the interest and title in the land in strict compliance with the provisions in the charge. It adds that it did not give consent for any mutation or sub-division of the suit property at any point.
16. In conclusion, the interested party submitted that the sale and/or sub-division of the suit property without the chargee's consent is an infringement of its right as a chargee and the same cannot be upheld.

Analysis and Determination

17. Upon considering the petition, replying affidavit and the submissions, it is this court's view that the issues for determination are as follows:
 - a. Whether the jurisdiction of the court has been properly invoked;
 - b. Whether this petition meets the threshold of a constitutional petition and
 - c. Whether the petitioners are entitled to the reliefs sought.
18. In dealing with the first issue, it is important to note that the court must guard against improper presentation to it of normal disputes or ordinary issues of litigation under the cloak of constitutional petitions; this court appreciates that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court, but in deciding whether or not to entertain a suit, the court must take into account the existence of such a remedy and its application to the issues at hand.
19. Constitutional petitions are a higher form of litigation; they rank above normal litigation and the invocation of the court's jurisdiction must arise from serious constitutional issues that require the court's intervention at that higher level. It is noteworthy that constitutional petitions are often tried on the basis of affidavit evidence and rarely is any oral evidence called by the parties in such proceedings and there was no order made for a *viva voce* hearing of the present petition. In suits where need for proof of documents in the normal manner arises, a constitutional petition is not the appropriate proceeding for trial of such a dispute. Therefore, the constitutional jurisdiction of a court cannot be said to be properly invoked when there is another statutory or other remedy that can be obtained by a petitioner apart from by way of petition where the petition discloses no constitutional issues.



20. In the case of *Francis Oyagi v Samwel Motari Mangare and 2 others* (2018) eKLR, the court held as follows:

“The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.”

21. In the case of *Bernard Murage Finserve Africa Ltd & others* (2015) eKLR the court stated: -

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

22. Therefore, the vital question that this court must answer is whether its constitutional jurisdiction has been properly invoked. The question addresses and requires the court to examine the facts of the case at hand. I have considered paragraph 43 of the petition. The sum of the petitioners’ claim is encapsulated very succinctly therein. In that paragraph, they state as follows:

“That is (sic) the petitioner’s contention that by encroaching on the land and setting up a water project and letting the members of the public use the parcel of land though (sic) it was a public land(sic) and the consequences arising therefrom:

- a. Are in violation (sic) of the provisions of article 10 of the constitution;
- b. Violates the petitioner’s right not to be discriminated guaranteed in article 27 of the constitution;
- c. violates the petitioner’s right to dignity as enshrined in article 28 of the constitution;
- d. Are in violation of article 40 that provides for the right to acquire property.

23. The petitioners thus claim that the respondents have encroached on their land and destroyed it by building a water project thereon. The petitioners state that the setting up of the water project and allowing members of the public to use the land was a clear violation of their constitutional right to acquire, own and develop property.

24. It is the petitioner’s case that they had acquired the suit property through shares bought from Wanyororo Farmers Company Limited. The petitioners further contend that the 2nd petitioner has been the proprietor of the said land and has been having quiet possession and has since developed a secondary school known as Jemus Secondary School (now Sunshine School.)

25. The respondents on the other hand did not file a response to the amended petition. The interested party filed its replying affidavit where it contends that the suit property had been encumbered with a charge in its favour and therefore no transaction involving sub-division, transfer of interest in the land could be registered without its consent.

26. The respondents did not file a response to the petitioners’ claim while the interested party waded into the fray and contended that the suit property had been encumbered by a charge registered in its favour. The absence of any responses by the respondents may potentially occasion an overly simplistic approach to the present petition with the effect that the respondents may seem liable to be already



summarily condemned by virtue of their own default, but law and practice demands that a petitioner proves his case first even where there is no defence filed (see the old decision of the Court of Appeal in Hon Daniel Toroitich arap Moi v Mwangi Stephen Muriithi NBI CA 240 of 2011 where the Court of Appeal observed that even in an undefended claim the claimant must prove his claim to the standard required by law.)

27. As stated herein before, the petitioners' claim is that there has been encroachment onto their land by the respondents. However, even from a cursory glance at the petition and the interested party's response, the terrain of this dispute appears to be interspersed with dense thickets in the form of unresolved factual disputes, awaiting to be settled before the petitioners can be said to be capable of presenting their claim of violation of constitutional rights to this court. It is only after establishing with clarity the true state of facts being complained of that adjudication may be conducted by this court to determine whether they constitute a breach of the petitioners' constitutional rights. If this court pronounces its decision on the issues of violation of rights, it may proceed on some untrue presumptions of fact and preclude their trial in the appropriate forum
28. The interested party alleges that the priority of its charge was violated by the 1st and 2nd respondents when land subdivision transactions were registered over the suit land without its consent.
29. This court is well aware that the petitioners allege forgery against the 1st and 2nd respondents; of the allegation by the respondents (through the petitioners' own petition) that the hiving off of the suit land and construction were effected after an agreement between the respondents and the petitioners; of the allegation (again through the petition) that some money was paid to the 2nd petitioner, which in the absence of an ordinary hearing, would not be properly classified as compensation for the land or cost-sharing for the electricity supply.
30. How then does the court then proceed to adjudge any party liable for a violation of rights when there is no proof of forgery? While there is an unresolved issue as to whether any agreement was reached between the 2nd petitioner and the respondents? How would the court be able to determine whether the water supply to the school and home of the 2nd respondent was not a quid pro quo, in return for his giving the respondent's rights to the land? Or that the payment of Kshs 40,000/= was not payment for the land?
31. The very fact that a charge existed over the suit property even as all the transactions were carried out renders it possible that some illegalities may have occurred, but that evidence per se is not proof of violation of the petitioner's rights, and may better suit a claim by the interested party and the interested party is not the claimant herein.
32. There is no doubt that petitioners' claim of ownership over the entire suit property before subdivision by the respondents is premised on the certificate of title dated February 6, 1985. The provisions of section 26 of the Land Registration Act protects the sanctity of title and article 40 of the Constitution protects the citizen's right to own property. How the respondents have managed to subdivide the land, if at all it has been done, is a mystery, especially during the pendency of a charge registered over it.
33. Besides overcoming the question of whether a petition has attained the constitutional threshold however, the factual matrix that may lead to a conclusion that constitutional rights to property have been violated must overcome many hurdles, such as proof that the property was legally acquired, or that the claimant's rights have not been extinguished by any contractual relations between him and third parties and that he is still lord over his property.
34. In the current petition one finds it difficult, unless the parties first obtain the decision of the Environment and Land Court in a normal suit regarding the disputed factual issues, to arrive at a



decision that the action of the respondents was not premised on any consensus ad idem or that it was by coercion. This court is not ruling out such lack of consensus or the presence of coercion or other illegality of the respondent's action, but rather stating that that would be a very drastic conclusion that can only come after the judgment in a normal suit has been heard and concluded. It is thus clear to this court that the allegations as raised would only be determined if a normal suit thereon is heard on merit by way of oral evidence and production and proof of documents and not on the basis of affidavit evidence only.

35. In the present petition therefore, I think that the constitutional jurisdiction of this court has not been properly invoked because having regard to the foregoing, this court does not see any ability on the petitioner's part to establish that there was any violation and/or infringement of any constitutional provisions under the bill of rights to justify the petitioners to invoke the constitutional jurisdiction of this court while the issues I have alluded to herein above are still unresolved and while the petitioners had an alternative avenue for redress of their grievances through the Environment and Land Court in an ordinary suit which they have not exhausted.
36. In the light of the finding that the constitutional jurisdiction of this court has not been properly invoked the need to seek to establish whether the petition as pleaded satisfies the requisite constitutional threshold necessary for a constitution petition as expressed in *Anarita Karimi Njeru v Republic* (1979) EKLK, *David Gathu Thuo v Attorney General & another* (2021) EKLK and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLK now fades like the light at sunset and the petitioners must in the gloom of this judgment grope around for their next course of action as will grant them appropriate relief.
37. Consequently, the amended petition dated October 31, 2017 is hereby struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21ST DAY OF NOVEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

