



REPUBLIC OF KENYA



Miheso v Kibetu & 9 others (Environment and Land Constitutional Petition E007 of 2021) [2022] KEELC 14829 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E007 OF 2021
FM NJOROGE, J
NOVEMBER 17, 2022**

BETWEEN

GEORGE ABWAYO MIHESO PETITIONER

AND

BENSON MBENI KIBETU 1ST RESPONDENT

ELIZABETH KALIUNTU ANGAINI 2ND RESPONDENT

JAMES KARIMI 3RD RESPONDENT

ARTEX REALTORS LTD 4TH RESPONDENT

KEDONG RANCH, NAIROBI 5TH RESPONDENT

LAND REGISTRAR, NAIVASHA 6TH RESPONDENT

LAND SURVEYOR, NAIVASHA 7TH RESPONDENT

INSPECTOR GENERAL OF POLICE 8TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 9TH RESPONDENT

ATTORNEY GENERAL 10TH RESPONDENT

JUDGMENT

1. The Petitioner filed a petition dated March 26, 2021 seeking the following orders:
 - a) A declaration that the respondents have violated Articles 2, 3, 10, 19(1) & (2), 20(1) & (2), 22(1), 23, 25(c), 27, 40, 47 and 50 of the [Constitution](#)
 - b) A declaration that the petitioner is the rightful and legal owner of parcel of land Naivasha (maraigushu Block 10/8 (kedong) measuring 78.98Ha.



- c) A permanent injunction against 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents in dealing, alienating and interfering with parcel of land Naivasha (maraigushu Block 10/8 (kedong) measuring 78.98Ha. in any way whatsoever to the detriment of the petitioner.
 - d) Compensation from 1st, 2nd, 3rd and 4th respondents for illegally, unprocedurally, fraudulently, deceptively forcing valuation and under valuing the petitioner's property, the suit property herein.
 - e) A declaration that the officers of the 8th and 9th respondents discriminated against the petitioner and therefore offended the Constitution according to Articles 27 and 47 of the Constitution of Kenya 2010.
 - f) An order of full compensation for general and aggravated damages.
 - g) Costs of this petition.
 - h) And any other or further relief as this honourable court may deem fit to grant.
2. In the petition, the petitioner avers that he is a resident of Naivasha engaged in large scale animal production, having invested on parcel No Naivasha Maraigushu Block 10/ Kedong measuring 78.98 Hectares; that he has been breeding poultry for over 25 years, with 17 years having been spent on the suit property since 2004 where he keeps 150,000 broilers and layer parents stock imported from other countries; the petitioner produces 6,000,000 chicks per year which are distributed to small, medium and large scale farmers in East Africa and beyond. The farm also produces 4,000,000 eggs for consumption, keeps 500 sheep for breeding stock and also beef cows; it trades under the name Kenbrid Farms. The petitioner has been expanding by buying additional land and by 2003 the petitioner had bought 21 acres in the Mirera area and developed the same for his project and thus increasing its value. Consequently, these additional investments attracted settlements around the farm which is scientifically not good for breeding exercises and the petitioner had to seek another remote site as recommended by experts. The petitioner learned by word of mouth of the presence of land for sale in Kedong Ranch and he paid a visit to the ranch. The land had been subdivided into 25 acre blocks strictly for residential use only; in total it was 400 acres. A Mr Mwai showed him the land. The petitioner was ready to buy land from any member of Kedong Ranch who would give an offer; one month later after the visit, the 1st respondent arrived at the petitioner's work place with an offer to sell his land; Naivasha Maraigushu Block 10/8 (Kedong); the petitioner went for a site visit with the 1st respondent and inspected the beacons in broad day light and the petitioner was satisfied with the suit land which was 2 kilometers from any residential premise and so was appropriate for breeding; consequently he asked for proof of ownership. The 1st respondent responded by stating that he was in the process of obtaining title to the said plot. 5 months later the 1st respondent came back with a title. Later the firm of Odhiambo & Odhiambo Advocates conducted a search at the Lands office and established that the 1st respondent was the owner of the land. consideration of Kshs 13,800,000/= was arrived at between the petitioner and the 1st respondent; a sale agreement was made and executed and the petitioner paid the entire purchase price with the last instalment being paid in 2005. To finance the purchase, the petitioner charged his residence to Barclays Bank and the purchase price was paid to the 1st respondent in instalments first Kshs 3,000,000/= and Kshs 5,200,000/= on October 27, 2004 in the form of bank transfers after which possession of the suit land was given to the petitioner; he then started developing the suit land whilst it was still in the name of the 1st respondent upon his permission. In 2017, the petitioner needed finances for the expansion and approached a financial institution for Kshs 60,000,000/= credit advance on the strength of the suit land as collateral which loan was granted to be repaid in 5 years. The petitioner therefore continued to develop the land. However, in September 2019



the 3rd respondent called the petitioner and claimed that the suit land belonged to the late Angaine's family and the petitioner sought to establish the facts. The petitioner then sought the 1st respondent and they met. Nothing came out of that meeting save the 1st respondent's desire to meet the new persons claiming the ownership of the land. The 3rd respondent then organized a meeting of himself, the petitioner, 1st respondent and the 2nd respondent but some other person claiming to be from the 8th respondent's office attended that meeting where the 1st respondent was asked to explain how he got the land. The 1st respondent alleged he was given the land by the late Jackson Angaine at first but when pressed he alleged that he was given land located in Gilgil but mistakenly registered himself as proprietor of the suit land in Naivasha and offered to refund the consideration paid to him by the petitioner; that the 1st respondent then departed from the meeting and the 2nd respondent demanded either the land be returned or the petitioner pays its market value to her. The 2nd respondent allegedly produced a letter from the late Angaine bequeathing her the suit land; a second meeting was held regarding the suit land. Valuation of the suit land was done by the 4th respondent at the instance of the 2nd and 3rd respondents which ignored the developments on the suit land and which arrived at Kshs 5,000,000/= per acre. The petitioner claimed that he agreed to the valuation simply in order to obtain the identity of the persons he was dealing with and he asked for an offer later which was given to him by the 2nd respondent. Armed with the offer letter, the petitioner thereafter asked his advocates to write a demand letter to the 2nd respondent to stop her interference with the petitioner's peaceful and quiet enjoyment of the property. Soon thereafter the petitioner was summoned to the 8th respondent's Naivasha office. The 8th respondent organized for a meeting with the 1st respondent, 2nd respondent and the 3rd respondent and his officers at which the 1st respondent claimed that some people from Njoro whom he could not remember invited him to be registered as proprietor. At that meeting, the 8th respondent expressed desire that the petitioner should negotiate with the 2nd respondent. The petitioner's fingerprints were taken though no criminal charges had been preferred against him. That other owners of the plots neighbouring the suit land had invited the petitioner to also buy their land; that it is a mystery that it took the 2nd respondent 16 years to notice that the petitioner was in possession of the land while his activities were so public. The petitioner has therefore approached this court seeking the orders set out herein above. The petition is supported by the petitioner's supporting affidavit dated March 25, 2021 largely reiterating the matters contained in the petition.

Responses to the Petition

3. The 2nd and 3rd respondents filed a notice of preliminary objection to the petition which is dated May 21, 2021 and stated therein that the prayers sought against them are unavailable to the petitioner especially prayers Nos (b),(c) (d) and (e) which can be canvassed in an ordinary civil suit; that some of the prayers especially prayer No (b) are sought in futility if the petitioner genuinely believes that he holds genuine title to the suit land and he therefore ought not seek that relief; and finally that the petition does not attain the constitutional threshold as regards the 2nd and 3rd respondents.
4. The 2nd respondent also filed an affidavit which she swore on October 12, 2021. In that replying affidavit she reiterated the claims as to ownership as are given in the replying affidavit of the 8th respondent which will be analyzed later in the present judgment. She also stated that she is one of the administrators of the estate of the late Jackson Harvester Angaine, a former shareholder of Kedong Ranch, from whose estate she derives her ownership of the suit land as a beneficiary. She attached many copies of documents obtained from the 5th respondent as well as an amended certificate of confirmation of grant in support of her claim that she owns the suit land. among her exhibits is an allotment list of members of Kedong Ranch Ltd the 5th respondent indicating Angaine's estate as a member owning plot number 8 measuring 78.98 ha and a sketch that shows the plot No 8 to be 95.32 ha. She exhibited



memos from the late Angaine copied to the 5th respondent indicating that the suit land shall be given to her; she stated that she had done no wrong in following up on her land while liaising with the offices of the 8th and 9th respondents and that she and George Kinoti the former Director of Criminal Investigation Department were not related by blood in any way as had been claimed by the petitioner; that she was simply helping the 8th, 9th and 10th respondents with information that they required in their investigations regarding the suit land. She denied ever threatening or intimidating the petitioner in any manner during the many meetings that she and the petitioner held to resolve the dispute; that the suit land is far from the main road and activities of the petitioner on the land could not have been detected from afar hence the delay in discovering that the petitioner was in occupation thereof; that the petitioner has conceded at paragraph 55 of his affidavit in support of the petition that he was wrongly registered as owner of the suit land; that the petitioner had offered to re-purchase the land, this time from the 2nd respondent, and a valuation was conducted for the purpose but he later reneged on that intended purchase; that the 1st respondent lacked good title to transfer to the petitioner; that the petitioner made payments for the land to a person other than the 1st respondent for removal of caution and later charged the land for a sum of Kshs 60,000,000/=; that the 2nd respondent is in the process of filing a suit, presumably against the petitioner, to claim back the suit land; and that the present petition lacks merit.

5. The 4th respondent filed its replying affidavit sworn by Simon Wanyiri Kanyi, its director, dated January 31, 2022. The deponent stated that he is a director of the 4th respondent; that the petition raises no legal issues against the 4th respondent; that he is a practicing valuer and his firm was asked to value the suit land by the 3rd respondent and his firm's duties and role in the matter ended with the submission of the valuation report to the 3rd respondent and that the 4th respondent lacks any interest in the suit land.
6. The 5th respondent filed grounds of opposition dated May 21, 2021 which state as follows:
 1. That the petition and the application herein do not raise with any degree of clarity, specificity and particularity any constitutional rights infringed and violated by the 5th respondent.
 2. That the petition and application as drawn are premised on allegedly contravention of Articles 2(1), 3(1), 22(1), 23(1) & (3), 27(1) & (2), 31(a), 40(1) (2) & (3), 47(1), 50(1), 60(1) (b), 165(3) (b) & (6) ad 258 of the Constitution of Kenya, 2010. The applicant/petitioner however does not plead with reasonable precision which constitutional provisions, how, who, when and in what manner their constitutional rights were infringed. In the premise, the applicant has no cause of action at all as against the respondents more specifically the 5th respondent.
 3. That there is no privity of contract between the petitioner/applicant and the 5th respondent herein. The petitioner's claim is premised on a sale agreement between the petitioner and the 1st respondent entered into in 2014 for the sale of NAIVASHSA (MARAIGUSHU BLOCK 10/8 (KEDONG)).
 4. That the petitioner has not placed any evidence in support of the various issues raised in both the petition and the notice of motion application. The entire pleading is speculative and full of conjecture.
 5. That further, the averments in the affidavit of one Mr George Abwayo Miheso are based on a misinterpretation of Section 13 of the Environment and Land Act and is intended to misdirect this honourable court.
 6. That the petitioner/applicant seeks outlandish prayers that clearly show he has ulterior motives in instituting the instant petition and the application.



7. That this petition and the notice of motion application are a clear example of abuse of the court process and should be dismissed forthwith.
7. The 6th, 7th, 8th, 9th, 10 and 11th respondents also filed grounds of opposition to the petition dated January 31, 2022 which state as follows:
 1. That the petitioner has not exhausted all the remedies available to them before invoking the jurisdiction of this honourable court.
 2. That the petition falls short of the threshold set out in the case of *Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272* as it does not disclose adequate particulars in support of the alleged violations of the *Constitution* and other quoted laws, to enable the court to grant the relief sought.
 3. That the petition does not establish a prima facie case against the 6th, 7th, 8th, 9th, 10th and 11th respondents.
 4. That the petition is frivolous, lacks merit, premature, grossly exaggerated and is an abuse of court process.
8. In addition to the grounds, the 8th respondent filed his response through the affidavit of Deborah Chepkemoi dated May 10, 2021. In his response the 8th respondent has stated that upon complaint by the 2nd respondent made officially vide OB No 42/23/01/2020 his office investigated the alleged fraudulent transfer of the suit land from the estate of Jackson Harvester Angaine, first to the 1st respondent and then to the petitioner and Inquiry File Number 7/2021 was opened by Deborah Chepkemoi, the Investigating Officer who recorded statements of witnesses; that the Investigating Officer formally sought and obtained copies of green cards and other relevant documents from the Land Registrar Naivasha; that among the documents was the original title deed in the name of the 1st respondent which had been returned and a register of Kedong Ranch members with 30 members listed including the estate of Jackson Angaine which owned plot number 8 which is the suit land; that the 1st respondent does not appear in the list of members of Kedong Ranch but in the parcel file for the late Angaine's land there is a purported list of Kedong Ranch members with the late Angaine's estate's name replaced with that of the 1st respondent; that the green card indeed reflects the transfer between the 1st respondent and the 2nd respondent in the year 2005; that the petitioner was summoned and his statement recorded on February 7, 2020 and he availed his supporting documents to the 8th respondent on two other occasions including copy of title deed in his name and a cash transfer slip of Ksh 8,000,000/= paid to Ruth Wanjiru Muraya on September 12, 2012. Upon request, the Managing Director of Kedong Ranch also supplied the 8th respondent with the copy of the members' register, allotment list and other documents which showed that the 2nd respondent received dividends and which showed that the suit land belongs to the estate of the late Jackson Harvester Angaine while the 1st respondent does not appear anywhere in those records. Finally, the deponent states that the investigations file was forwarded to the office of the Director of Public Prosecutions who recommended that 3 persons i.e. Joseph Mulinge Munguti, the 1st respondent and the petitioner be jointly charged with inter alia conspiracy to defraud contrary to Section 317 of the Penal Code and fraudulently securing the issuance of a title deed contrary to Section 102(1) (c) (i) of the *Land Registration Act* 2012; that the said suspects were arraigned before the Naivasha Law Courts on the May 4, 2021 vide Naivasha Criminal Case No 769 of 2021.



Submissions of the parties

9. The petitioner filed submissions on 28/1/2022. He set out the prayers and the facts in the submissions as per his pleadings and framed the issues for determination as follows: (a) whether the petition meets the competence threshold; (b) whether there was indeed violation of rights and freedoms as enshrined in Articles 2, 3, 10, 19(1), 19(2), 20(1), 20(2), 23, 25(c), 27, 40, 48 and 50 of the Constitution; (c) whether the petitioner was the rightful owner of the parcel of land Naivasha Maraigushu Block 10/8 (Kedong) and (d) whether the petitioner is entitled to the prayers sought.
10. Citing the case of Anarita Karimi Njeru v the Republic 1979 eKLR the petitioner submitted that the Constitution of Kenya has provided for the right to fair trial which can not be limited, the right to equality and freedom from discrimination, the right to fair administrative action and the right to access to justice and the right to fair hearing and then stated that the petition meets the competency threshold.
11. Regarding the second issue, the petitioner stated that holders of public office in Kenya have an obligation to respect, uphold and defend the Constitution as per Article 3 and bound by National Values and Principles of governance under Article 10; that the Bill of Rights is an integral part of the Kenyan democratic state and is the framework for social-economic and cultural policies. According to the petitioner Article 19 (2) provides that recognition and protection of human rights and fundamental freedoms is aimed at preserving the dignity of individuals and communities and promote social justice and realize potential of all human beings. He states that the respondents violated the right to a fair trial under Article 25 (c) and Article 50 (2) in that he faced endless summons since 2019 to the DCIO Naivasha to explain his private property; that the officers of the 9th respondent drawn from the 8th respondent's office scheduled meetings with the 2nd respondent in order to compel the petitioner to enter into an out of court settlement with the 2nd respondent while the 2nd respondent is not the owner of Naivasha Maraigushu Block 10/8 (Kedong); that the endless summons and meetings were without probable or reasonable cause; that the police were working under the instructions of the 2nd and 3rd respondents; that he was summoned in 2019 and a statement taken while the 2nd respondent was 'booked' on January 23, 2020 and no statement was taken from her. He alluded to the presence of a person who introduced himself at the meetings as 'Mr Omar', a representative from the Director of Criminal Investigations which has not been controverted. Consequently, he avers that the right to a fair trial was subverted by the 8th and 9th respondents working in cahoots with the 2nd and 3rd respondents. He states that it is only after his advocate drew a demand letter seeking that the 2nd respondent should cease and desist from inter alia interfering with the land that he was booked in the OB on the January 23, 2020 and investigations commenced by way of writing to the District Land Registrar Naivasha. Thereafter, everything else moved in the lightning speed and he was charged. According to him, the Criminal investigations were mounted in order to intimidate and harass him and he has been occasioned much suffering. He argued that the proceedings and the investigations are an abuse of the due process of the court and that they contravene Articles 2(2), 20(1), 27(1), 40 and 50(1) of the Constitution. He states that as a result of lodging his petition the 10th respondent, the Director of Public Prosecutions preferred Naivasha Chief Magistrates CR Case No E769 of 2021 against him. He maintains that he has been in quiet possession of the suit property up to 2019; that he was given a letter of offer by the 2nd respondent but he instead of accepting it issued a demand letter through his advocate after which he was summoned to record a statement within 2 weeks of that letter; he accuses the 8th respondent for failing to conduct independent investigations without invoking the name of the then Director of Criminal Investigations, Mr George Kinoti and Kinoti's alleged blood relationship with the 2nd respondent and he stated that this is a clear violation of his constitutional rights. He accuses the 8th and 9th respondents of aiding the 2nd respondent in her attempts to acquire the suit property in a



forceful, fraudulent, illegal and unconstitutional manner through the criminal justice system. He avers that, in the light of facts enumerated herein before, it is clear that the dispute is clearly civil in nature and that the criminal proceedings commenced against him are an abuse of court process.

12. He also claims discrimination contrary to Article 27 and violation of the right to property under Article 40. He pleads that he is an innocent purchaser of value of the suit land who followed the legal process and that documents in proof of that have been provided to the Director of Public Prosecutions; however the 8th and 10th respondents hurriedly assembled what the petitioner calls a 'criminal arsenal' immediately after he filed the present petition and charged the petitioner in the Naivasha criminal case; he states that every person has right under Article 40 to acquire and own land of any description and in any part of Kenya and to live, work and own properties anywhere in the country; that it is only this court that can either uphold or cancel the title in question; and the 2nd and 3rd respondents were merely trying to compel him to purchase back his own property from the 2nd respondent who has no proprietary interest therein contrary the principle *nemo dat quod non habet*. He avers that he acquired the suit land lawfully and was registered as a proprietor.
13. The petitioner also alleges violation of Article 47(1) of the Constitution in that the 5th respondent gave a skewed list of owners of properties within the Kedong Ranch which was calculated at disadvantaging the petitioner while the certified true copy of the list of owners in the same Ranch signed by the predecessor chairman now deceased contained the name of the 1st respondent who sold the suit land to the petitioner. He averred that it was administratively unfair to have the petitioner write a statement and have his finger prints taken in 2019 while the 2nd respondent's complaint was registered in the occurrence book in January 2020; he relied on the case of Solai Ruiyobei Farm Limited v Registrar of Companies JR No 14/2018 and the case of Judicial Service Commission v Mbalu Mutava & another [2015] eKLR. He terms the actions of the 6th and 8th respondents and the 2nd respondent as fraudulent, dishonest and aimed at illegally appropriating the suit land.
14. Finally, the petitioner avers that he is the rightful owner of the suit land and that the certificate of title is prima facie evidence that he is the absolute and indefeasible owner thereof and that his title is not subject to challenge. Citing the case of *David Peterson Kiengo & 2 others v Kariuki Thuo Machakos HCCC 180 of 2011*, he urged that the court has upheld the sanctity of title save where the registered owner is proved to have acquired the same fraudulently in which case it would be impeached; he relied on Section 24 (a) of the Land Registration Act which provides that registration confers the proprietor absolute ownership of the land together with all the rights and privileges belonging or appurtenant thereto and Section 26(1) of the Land Registration Act to the effect that the certificate of title shall be taken as prima facie evidence that the person named therein is the proprietor save where he is proved to have been party to fraud or misrepresentation; that a purchaser is only obligated to search the official register and establish the ownership after which the title acquired in good faith thereafter in the basis of entries revealed would be guaranteed by the state. The petitioner claims that he conducted all due diligence before the sale transaction that gave him title to the suit land and found that the 2nd respondent was the proprietor thereto. He claims to have purchased the land at Kshs 13,500,000/= in 2004 and that he has been meeting all the statutory outgoings regarding the suit land as and when they fall due. In 2017 he charged the land for Kshs 60,000,000/= to Co-operative Bank. On the basis of the foregoing, he avers that his title is guaranteed by the state; he avers that no evidence of ownership by the respondents in relation to the suit land has been adduced, and that the estate of the late Angaine does not appear on the green card despite his demise in 1999 and a Succession Cause 379 of 2003 in which the suit property has not been listed in its confirmation of grant as having been gifted to the 2nd respondent. He disputes the validity and the veracity of the purported evidence that the late Angaine owned the land and raises a host of questions regarding the documentation presented by the



respondents regarding that alleged ownership and insists that he was the bona fide purchaser for value. He maintains in his submissions that allegations of fraud must not only be pleaded but must also be proved and there were no improprieties in the entries in the green card to the suit land. He submits that he is entitled to the prayers sought in the petition.

15. The 2nd and 3rd respondents filed their submissions on September 29, 2022. They first recapitulated the contents of the pleadings and the responses and then stated as follows: that the petition does not state whose rights have been violated and in what manner and only lists the provisions of the Constitution and thus has not attained the constitutional threshold; he cited the case of Anarita Karimi Njeru [1979] eKLR and Mumo Matem u v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR; they further submitted that the matter in the petition is an ordinary land dispute which can be addressed by way of an ordinary civil suit and the issues raised do not require any constitutional interpretation at all; that the petitioner is not the rightful owner of the land and has never been a member of the Ranch and he has conceded to having been wrongfully registered as the owner in paragraph 55 of his affidavit; that the petitioner intended to make right his ownership by purchasing it from the 2nd respondent and this occasioned the commissioning of a valuation report, but the petitioner subsequently reneged on his intended purchase upon realizing that the price was high; that the intention of the petitioner and the 1st respondent was to defraud the 2nd defendant; that the 1st respondent could not pass good title to the petitioner and therefore the latter holds nothing; that the petitioner was aware that the 1st respondent did not acquire title lawfully and this explains why he was intent on re-purchasing the land from the 2nd respondent; that under Section 26 of the Land Registration Act a title to land can be challenged where there is fraud, misrepresentation or where the title has been acquired illegally, unprocedurally or through a corrupt scheme, and cancellation of fraudulently obtained titles has been a common practice in our courts, they cite the cases of Mary Ngonyo Kiume v Charles Muisyo David & 3 Others exams housing co-operative society limited (Interested Party) [2022] eKLR and Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR.
16. The 5th respondent filed its submissions on August 29, 2022. In those submissions, it restated the case of the petitioner and its own response and urged as follows: that the 5th respondent is not a necessary party in the petition; it cited the case of Zepbir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matagaro and Ezekiel Misango Mutisya 2015 eKLR; that the amended petition does not meet the threshold of a constitutional petition and it cited the case of Anarita (supra) and Mumo Matem u (supra); that the petitioner is not the rightful owner of the suit property and it cited the decision in Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maim [2019] eKLR; that the nemo dat quod non habet rule does not apply to the petitioner and that the petitioner has not attempted to bring himself within the exceptions in the case of Haul Mart Kenya Ltd V Tata Africa Kenya Ltd 2017 eKLR and Katana Kalume V Municipal Council Of Mombasa [2019] eKLR; that Section 26 of the Land Registration Act provides that a certificate of title may be challenged where it has been acquired illegally unprocedurally or through a corrupt scheme and it cited the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR. The 5th respondent stated that the present petition lacks merit and it ought to be dismissed with costs.

Determination

Issues for determination

17. This court has perused the documents filed by the parties and in its considered opinion the issues arising for determination are as follows:
 - a. Whether the 5th respondent is a proper party to the proceedings;



- b. Whether the constitutional jurisdiction of this court has been properly invoked by way of petition;
- c. Whether the petitioner has demonstrated that any of the petitioner's rights under the Constitution have been violated;
- d. Who ought to meet the costs of the present petition.

The issues arising are addressed as hereunder.

Whether the 5th respondent is a proper party to the proceedings

18. I start by addressing the issue of the joinder of the 5th respondent as in my consideration it is a preliminary issue. The 5th respondent stated that a 'necessary party' to a suit is one whose presence is necessary or relevant for the determination of the dispute and cited the case of Zephir (Supra) where it was stated that:

' A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.'

19. The 5th respondent submitted that no orders have been sought against it and that there is no relief flowing from it to the petitioner and that the ultimate order or decree can be enforced without its presence. For those reasons it states that it is not a relevant party and that it ought to be struck out from the proceedings.
20. In addressing this issue this court has no doubt that the dispute arose in respect of land that had been administered by the 5th respondent before the alleged purchase by the petitioner from the 1st respondent who is now said to be deceased. The 5th respondent keeps all the records of its members. It must be stated that it is from these records that the information as to land ownership that was provided by the 2nd and 8th respondents in their replying affidavits in this petition came from and I have not heard the 5th respondent to deny the veracity of that information. In so far as the claim of the petitioner is that he purchased the suit land from the 1st respondent, that information which the 2nd and 8th respondents provided is crucial in that ultimately, if proved truthful, it will form the basis of a decision in the instant dispute as to whether the 1st respondent has ever been a member of the 5th respondent or not.
21. If the version given by the petitioner is to be believed, the 1st respondent was tipped off by the farm manager of the 5th respondent to the effect that the petitioner was seeking land to buy, and the 1st respondent hence approached the petitioner with an offer to sell the suit land to him. However, it is noteworthy that the petitioner eschews any disclosure as to whether the 5th respondent's farm manager was present when the 1st respondent took him to view the suit land, or whether the 5th respondent knew of or was involved in the making of the sale agreement between the petitioner and the 1st respondent. It is evident that the 5th respondent was not party to the meetings that took place between the petitioner and some of the respondents or to the sale agreement. However, upon perusal of the prayers I find that prayer No (a) (b) and (c) in the petition affect the 5th respondent directly. The petitioner has decided to claim against the respondents as he wishes and the court can not redraw the petition for him. All this court has to do is to await his evidence in proof of his claims against each of the respondents that he



claims from and if no evidence is provided, then he has to be ready to pay the costs for having dragged the respondents to court.

22. In *Jemimah Wambui Ikere v Standard Group Ltd and Anor* Petition No 466 of 2012, the court found that Articles 2 and 20 of the *Constitution* and the definition of the term 'person' under Article 260 envisaged both vertical and horizontal application of the Bill of Rights, that is vertical application between the citizen and the State and horizontal application between one citizen and another citizen.
23. In this court's view, it is unsafe in many an instance to sequester and determine the sole issue as to whether a private entity of body is properly joined to a constitutional petition especially at the inchoate stages of that litigation while amendments may be possible much later to justify the inclusion of the joined parties. It is also unnecessary to determine the same question in the final judgment since the judgment is meant to indicate whether any case has been proved by way of submitted evidence against the parties or bodies joined which determination without more automatically involves the finding as to the culpability or otherwise of every respondent named. The case of *Zephir* (supra) cited by the 5th respondent can be distinguished in that it was a commercial dispute. Nevertheless, the court in that case made an observation that is still relevant to the present petition when it stated as follows:

' A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.'
24. Generally, in view of the possibility of horizontal applicability of the bill of rights, I also find it unsafe for parties to make self-serving and skewed presumptions as to their innocence and fail to file sworn affidavits and restrict themselves to grounds while some facts have been pleaded in a petition against their agents as was done against the 5th respondent's farm manager in the present case. It is an unnecessary risk. I would in this regard draw the 5th respondent's attention to the replying affidavit of the 4th respondent who, while fully believing in the futility of the petitioner's claim against it, nevertheless filed a replying affidavit to the petition outlining the facts as to the limit of their involvement in the dispute.
25. I must conclude by stating that in the light of the mention of the 5th respondent's agent (farm manager) in the petition and in the light of the role played by the 5th respondent in supplying documents in proof of membership within it of the late Angaine's estate and also having considered the inclusion of prayers sought directly against it at the end of the petition which was not subsequently amended to exclude it, the 5th respondent is a necessary party to the present litigation.
 - b. Whether the constitutional jurisdiction of this court has been properly invoked by way of petition;
26. All the respondents who filed responses are of the view that the present petition does not attain the constitutional threshold. They cited the cases of *Anarita Karimi Njeru* [1979] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.
27. Though many parties appear to interchangeably use these questions while making their submissions before court, I would consider the question as to whether a petition has attained a constitutional



threshold to be an entirely different question from whether the constitutional jurisdiction of this court has been properly invoked by way of petition.

28. In this court's view the first question regarding threshold evokes the inquiry as to whether the petitioner has presented his petition in the proper manner outlined by the Court of Appeal in the Anarita Karimi Njeru Case (supra) or not. The dicta of the court in that case went 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.'

29. In the case of *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR* the court observed as follows:

' 11. It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints.'

30. It is therefore clear that the issue of 'threshold' is predicated on the manner of pleading. A properly pleaded petition would therefore show with a reasonable degree of precision that of which is complained of, the provisions said to be infringed, and the manner in which they are alleged to be infringed with respect to a particular petitioner. I must state that it is possible that a person may set forth his petition with that stated precision and fail to persuade the court that his rights have been infringed or are threatened with infringement upon an interpretation of the provisions by the court with respect to the prevailing facts of his case. In the Anarita case (supra) for example, the applicant moved Court for a declaration that during her trial before the Resident Magistrate Meru upon two charges of stealing by a person employed in the public service the provisions of section 77 of the then Constitution of Kenya were contravened. She further asked for orders that her trial be nullified or otherwise disposed of under those provisions. The court sought to be enlightened as to which of the paragraphs of section 77 of the then Constitution were thereby alleged to have been infringed, and a Mr Mwirichia, counsel for the applicant simply referred to his list of authorities which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This is what prompted the court to state that 'this was a rather curious manner of bringing a statutory provision to the notice of a court of law.' and soon thereafter in the said judgment the court made the dicta cited herein before at paragraph 28, which has also been replicated in countless cases and submissions before. The issue as to whether she had any alternative statutory remedies did not feature in the case of Anarita (Supra).

31. On the other hand, the second question as to whether the constitutional jurisdiction of the court has been properly invoked calls for an interpretation as to whether any constitutional question arises in the dispute or not and it should normally be raised when there are other statutory or common law remedies available to the petitioner which he appears not to have explored or exhausted. In the celebrated case of *Speaker of the National Assembly v James Njenga Karume [1992] eKLR*, on April 30, 1992, for example, Karume resigned from his ministerial position and joined the Democratic Party



of which he said he was a founder member. The Speaker, pursuant to the provisions of Section 40 of the Constitution as amended by the Constitution of Kenya (Amendment) (No 2) Act, 1991 (Act No 12 of 1991) and Section 18 of the National Assembly & Presidential Elections Act (Cap 7) (Elections Act) declared the Kiambaa parliamentary seat vacant. Karume filed Miscellaneous Civil Cause No 388 of 1992 under Order 53 Rule 1 of the Civil Procedure Rules, seeking leave to apply for an order of certiorari to remove into the High Court and quash the Speaker's said declaration and a direction that the grant of such leave do operate as a stay of the said declaration. The Honourable Mr Justice Shields made under Order 53 of the Civil Procedure Rules, Cap 21 on May 20, 1992, whereby he granted Honourable James Njenga Karume (the respondent) leave to apply for an order of certiorari to remove into the High Court and quash the declaration dated March 9, 1992, by the Speaker published in the Kenya Gazette Notice No 977 of 1992, declaring the Kiambaa parliamentary seat held by the respondent vacant. In granting leave to apply, the Judge had also made a direction under order 53 Rule 1 (4) that the grant of leave to apply was to operate as a stay of the declaration made by the Speaker. Soon thereafter, an application was filed under rule 5(2)(b) of the Court of Appeal Rules brought by the Speaker of the National Assembly (the Speaker), seeking a stay of the orders. The thrust of submissions made on behalf of the Speaker was that Parliament in its own wisdom having prescribed the procedure to be followed by anyone seeking to challenge a declaration made by the Speaker under Section 18 of the Elections Act, it was not open to the respondent to bypass this procedure by invoking the prerogative orders under Order 53 of the Civil Procedure Rules. When challenged, a Mr Mukuria, counsel for Karume, narrated the special circumstances which made it necessary for an application to be made under Order 53 of the Civil Procedure Rules. These were that it was difficult to constitute an Election Court expeditiously and further, that experience had shown that it took 4 to 5 years before an election petition was heard. He also contended that the provisions of the Elections Act did not exclude the remedy available under Order 53 of the Civil Procedure Rules. The court observed as follows regarding his stated answer:

' Irrespective of the practical difficulties enumerated by Mr Mukuria, these should not in our view be used as a justification for circumventing the statutory procedure.'

32. Soon thereafter in their ruling, the court made the so often cited dicta as follows:

' In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.'

33. In this court's view the two questions should not therefore be used interchangeably. Having attempted to distinguish the two questions by way of examining the backgrounds to the most often quoted passages in respect of those questions, I now turn to the present case in which I think only the question of correct invocation of the court's constitutional jurisdiction arises.

34. The summary of the petitioner's claim is that the petitioner purchased land from the 1st respondent and developed it extensively; later on it turned out that the 2nd respondent claimed to be the owner of the land. The 2nd respondent, in liaison with the 8th and 9th respondents followed up on the issue of the registration of the land in the name of the petitioner and he was made to write a statement with the law enforcement agencies. Before all this, there is alleged to have been an attempt, not entirely clear whether initiated by the petitioner or by the 2nd respondent, to have the petitioner regularize his ownership of the land by re-purchasing it albeit from the 2nd respondent, and a valuation was done. After the valuation was conducted at the behest the 2nd respondent, the petitioner suddenly withdrew from the proposed sale arrangement. Soon thereafter he was charged in a criminal case alongside two



other persons with conspiracy to defraud in Naivasha Criminal Case No 769 Of 2021 and he does not deny the fact. As at the time of conclusion of the submissions of the parties the court was not informed of the progress made in that criminal case.

35. In his petition he laments the fact that he was summoned many times to the Naivasha office of the 8th respondent and that he was made to record a statement in 2019 while the complaint by the 2nd respondent was booked in the Police Occurrence Book on January 23, 2020.
36. This court finds it not possible to conclude that the offices of the 8th 9th and 10th respondents were involved in this dispute before the 2nd respondent's complaint was booked in the occurrence book in 2020 as the petitioner has not persuaded the court that 'Omar' or any other person involved in the meetings held between the petitioner and the 2nd respondent was from the offices of the 8th 9th and 10th respondents. I must presume that the petitioner and the 2nd respondents and their helpers were merely attempting a settlement out of court which could have ended with the 2nd respondent getting value for her land and the petitioner retaining his possession and obtaining a clean title thereof. However, it appears that with the sudden withdrawal of the petitioner and his calling in of his lawyers into the matter, those attempts at a settlement crumbled. Apparently, the petitioner's lawyer having concreted the petitioner's claim to the suit land by way of a very stringent demand letter and the negotiations having been called off, the 2nd respondent appears to have ran out of options but to report to the police which she did on January 23, 2020 after which the petitioner was, upon the recommendation of the Director of Public Prosecutions dated April 19, 2021, arraigned in court on May 20, 2021. There is a notable time lapse of 5 months from the date of the report made by the 2nd respondent to the police and the booking of her report in the Police Occurrence Book (January 23, 2020) and the date of recommendation by the 10th respondent that the petitioner and others be arraigned (April 19, 2021) and also between the date of recommendation and the actual date of arraignment (May 20, 2021). These are facts that have not been disputed by the petitioner who moved this court by way of his petition on April 13, 2021 which is a date between the date of the 2nd respondent's report and the date of the recommendation by the DPP that he ought to be charged. In this court's view, the petitioner had clearly been acutely tracking the actions of the offices of the 8th 9th and 10th respondents and his action of filing a motion contemporaneously with the petition, seeking inter alia conservatory orders barring their investigations into his conduct is prima facie evidence of the fact.
37. Consequently, it is very obvious that the proper chronology of events in this dispute has been deliberately obfuscated by verbal foliage in the petitioner's petition and supporting affidavit as he cries foul against the process of investigation and arraignment in court by the properly mandated offices over suspected offences defined under the law.
38. A decision or a recommendation by the DPP for the arraignment of a person is not to be taken lightly. Article 157(6) of the Constitution provides as follows:
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
- (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).



39. Article 157(10) and (11) provide as follows respectively:
- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
 - (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
40. It is therefore the case that an independent constitutional office has recommended the arraignment of the petitioner in court over suspected illegal acquisition of the suit land in his name. The documentation that has been availed by the respondents in this case points to a simmering ownership dispute over the suit land between the petitioner and the 2nd respondent. Prayer no (b) in the present petition seeks that this court do declare that the petitioner is the rightful and legal owner of the suit land comprised in Naivasha Maraigushu Block 10/8 (Kedong). The petition and the responses render it beyond a shadow of a doubt that the title held by the petitioner is under a very serious challenge by the 2nd respondent and that the report of the 2nd respondent to the 9th respondent prompted police investigations into the manner of acquisition of the title by the petitioner.
41. I must state that in the circumstances of this case, it matters not whether the view of the petitioner is that the actions of the 8th, 9th and 10th respondents were directed towards helping the 2nd respondent in a certain manner as long as a prima facie offence had been demonstrated to have been committed by either the petitioner or by the 1st respondent or by both; consequently, claims of violation of constitutional rights would not stand.
42. It would appear that the 1st respondent has not been a stranger to controversy. In the case *Benson Mbeni Kibetu v Inspector General of Police & 2 others [2017] eKLR* in which Benson Mbeni Kibetu, the 1st respondent herein, sought an order of prohibition barring the respondents from continuing with his prosecution in Kajiado Principal Magistrates Court Criminal Case No 627 of 2016 on the charge of stealing contrary to Section 268 as read with Section 275 of the *Penal Code* and an order of certiorari to remove to court and quash the decision by the 2nd Respondent to charge him. It now emerges that the offence Benson Mbeni Kibetu had allegedly committed to warrant arraignment in Kajiado was not much different from that which he and the petitioner in the present suit are perceived to have committed in the present dispute: one Joshua Parmeres complained that he deposited his title deed for Kajiado/Mailua/3462 with his advocates M/S Sekento & Co Advocates but the title got lost mysteriously and the said advocate swore an affidavit and advertised the loss in the Daily Nation newspaper of July 6, 2015. On March 16, 2016 the said Joshua conducted a search at the Kajiado Lands registry and found out that it had been charged by Kenya Women Finance Bank by Benson Mbeni Kibetu to secure a loan of Kshs 6,300,000 and that the charging of the title was without his consent. Investigations by the police then commenced. The report from the document examiner indicated that the signature of Joshua Parmeres had been forged; that an impostor had been presented to the financial institution to impersonate Joshua, and that Benson Mbeni Kibetu had used a stolen identity card issued to one Caroline Nzangi, purporting her to be the wife to Joshua Parmeres. Benson Mbeni Kibetu, then applicant in the Kajiado Judicial review case cited above, claimed that he had been charged in court for an offence he did not commit and that the 1st and 2nd Respondent therein in preferring the



said charges had fallen short of the standard required of them under the Constitution and the National Prosecution Policy among others. The court in that case observed as follows:

- ' 37. Allegations of violations of constitutional rights are viewed seriously by courts which are enjoined to enforce such rights. Indeed, this Court is enjoined to vigorously enforce the fundamental rights and freedoms of the individual guaranteed by the Constitution which is the voice of the people of Kenya. The Constitution is the supreme law and it binds all persons and all State organs. There is no limitation in the enforcement of fundamental rights and freedoms.
38. In this case, although it was alleged that the criminal investigations were commenced with a view to compel the petitioner to settle his disagreement with one Joshua Parmeres I am not satisfied based on the evidence on record that this is so.
39. I have noted that during his submissions, the petitioner has consistently stated that proper investigations were not conducted before he was charged. I wish to remind the petitioner that it is not his business to claim that proper investigations were not done. If anything, the Petitioner should rejoice that the authorities have allegedly done such a shoddy job and use it to his advantage as this may well be his road to acquittal.
40. The petitioner was summoned to appear for interrogation on 20th April 2016 and recorded his statement on the same day. On May 3, 2016, he was arrested and charged before court. It noteworthy that the Petitioner was accorded the due process upto the point he was presented before court including his right to bond.'
43. Perchance the present petitioner had perused the decision in *Benson Mbeni Kibetu v Inspector General of Police & 2 others* [2017] eKLR, he may not have attempted to bring the present petition at all for obvious reasons, not least among them being that his partner in the sale transaction subject matter of the present suit had a suspect background.
44. In the above described circumstances, where it is not possible to state with certainty that the petitioner owns the suit land or that his acquisition of it was proper and without fraud as alleged by the 2nd respondent, it is also impossible to state that the petitioner can establish that the actions of all the respondents (save the 1st respondent) in their attempts to bring him to justice were unconstitutional. What I am saying is that the present petition is premature in that the petitioner has yet to prove that his title is clean before he can claim that his rights with regard to the suit land were violated. In this court's view, the petition should not have been filed, and the petitioner ought to have lodged a suit against the 2nd respondent so that the claims of illegality of his title or otherwise would be determined.
45. In the case of *Mike Rubia & another v Moses Mwangi & 2 others* [2014] eKLR it was observed as follows by the court:
- ' I maintain that the Constitution is not a substitute for all redress of all injuries especially where the Petitioner has another remedy in law. If that be the case, he must pursue that remedy instead of making constitutional issues of what really is a pure matter of private law and where private law has an adequate remedy.'



46. The age old case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR comes to mind again in aid of the proposition of use of the proper forum, where the Court of Appeal observed as stated herein before that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.
47. The jurisdiction of this court was therefore wrongly invoked and the present petition cannot succeed. This is a dispute in which the matters are not constitutional in nature. It is an ordinary land ownership dispute which the petitioner ought to have filed by way of plaint in the Environment and Land Court for its resolution. Consequent to that finding, there is therefore no need to examine the last question as to whether the petitioner has demonstrated that any of the petitioner's rights under the Constitution have been violated.
48. Before I pen off I must state that this nation is already heaving under the yoke of valid land disputes not involving fraud and that the glacial pace of our criminal justice system in bringing to justice suspected land fraudsters in investment transactions worth hundreds of billions of shillings is squeezing the breath out of the real property investment sector. It is no wonder that, if that was genuinely the case, the 2nd respondent attempted to have the petitioner quietly re-purchase the suit land rather than follow up with the law enforcement authorities as the first recourse. All this speaks of a system crying out for reform to ensure that miscreants face justice swiftly without hiding in certain legal nooks long enough to frustrate the victims into abandonment of either their complaints to the police or the criminal cases preferred after complaints.
49. That said, I must reiterate that the petition herein ought not to have been filed as a petition in the first place but as an ordinary land dispute case in the Environment and Land Court and this court's jurisdiction has been wrongly invoked. I therefore strike out the petition dated March 25, 2021 and I award costs to all the respondents save the 1st respondent.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 17TH DAY OF NOVEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

