



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Bargochut v Birir & 13 others (Petition 07 of 2018)
[2025] KEELC 5316 (KLR) (14 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
PETITION 07 OF 2018
MN KULLOW, J
JULY 14, 2025**

BETWEEN

ESTHER CHESANG BARGOCHUT PETITIONER

AND

KURGAT ARAP BIRIR 1ST RESPONDENT

**PHILIP LANGAT (LEGAL REPRESENTATIVE OF THE ESTATE OF SAMUEL
KOSGEY MWIGEY) 2ND RESPONDENT**

**DANIEL MUTAI (LEGAL REPRESENTATIVE OF THE ESTATE OF KIMITA
CHUMO) 3RD RESPONDENT**

**PHILIP LANGAT (LEGAL REPRESENTATIVE OF THE ESTATE OF SAMUEL
KOSGEY MWIGEY) 4TH RESPONDENT**

JOHN KIPKULEI TURGAT 5TH RESPONDENT

**PHILIP LANGAT (LEGAL REPRESENTATIVE OF THE ESTATE OF CHUMO
CHEPKWONY) 6TH RESPONDENT**

**JULIUS KIRUI (LEGAL REPRESENTATIVE OF THE ESTATE OF FRANCIS
KIPKURUI BUNEI) 7TH RESPONDENT**

THOMAS KIPROTICH NG'ENO 8TH RESPONDENT

**DAVIES MTAI (LEGAL REPRESENTATIVE OF THE ESTATE OF JOHANA
KIMUTAI MABWAI) 9TH RESPONDENT**

TRANSMARA COUNTY COUNCIL 10TH RESPONDENT

**THE SUB-COUNTY DIRECTOR OF LAND ADJUDICATION AND
SETTLEMENT, TRANSMARA 11TH RESPONDENT**

THE LANDS REGISTRAR, TRANSMARA 12TH RESPONDENT



SURVEYS TRANSMARA 13TH RESPONDENT

THE ATTORNEY GENERAL 14TH RESPONDENT

JUDGMENT

1. This petition, filed by Esther Chesang Bargochut on 11th April 2018, seeks to challenge what the Petitioner describes as fraudulent and unconstitutional subdivision, allocation, and registration of land parcels Transmara/Angata-Barigoi/479, 480, 481, and 482, which were hived off from the original parcel Transmara/Angata-Barigoi/442. The Petitioner claims these actions violated her rights to property under Article 40 and to a fair hearing under Article 50(1) of *the Constitution*.
2. The Petitioner contends that she is a lawful beneficiary of the estate of her late father, Kipkemboi Bargetuny, who originally owned the parcel Transmara/Angata-Barigoi/442. She avers that following the death of her father, the parcel was subdivided and registered without her consent and without following due process.
3. The Petitioner alleges that the subdivision was fraudulent and carried out with the collusion of the 10th to 14th Respondents being public officers responsible for land adjudication, registration, and survey and that the resultant titles were issued to the 1st to 9th Respondents, many of whom claim through deceased estates.
4. In support of her claims, the Petitioner annexed to her affidavit copies of the green card showing the original parcel and the resulting subdivisions, a copy of the official search confirming ownership, and maps illustrating the boundaries before and after the alleged subdivisions.
5. The Petitioner further avers that the adjudication section in the area was declared around 1986, and yet there is no evidence that her family was consulted or informed at any stage of the adjudication process. She disputes any assertion that her late father consented to allocation of land for public or urban use and states that there is no documentation or minutes showing such consent. In her view, the Respondents have unlawfully used the adjudication framework to deprive her of her rightful inheritance.
6. The Respondents filed responses denying the allegations. The 1st to 9th Respondents contend that the titles were lawfully acquired through a process that dates back to 1986, when the adjudication section was declared and adjudication carried out in compliance with the *Land Adjudication Act*. They assert that the Petitioner's father consented to the allocation of part of the land for urban development, and that the subdivision and issuance of title were proper and regular.
7. The Petitioner seeks declaratory reliefs, injunctive orders, cancellation of titles, and costs. With leave of court, parties agreed to canvass the petition through written submissions that were filed by 9th of September 2020.

Issues for Determination

The issues calling for my determination are:

- i. Whether the 1st to 9th Respondents acquired titles fraudulently;
- ii. Whether the Petitioner's rights under Articles 40 and 50(1) were violated;
- iii. Whether the Petitioner is entitled to the reliefs sought;



- iv. What orders as to costs should issue.

Analysis and Determination

8. In respect of a claim/defense founded on fraud, the position of the law is now trite, established and hackneyed. Invariably, the decision in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

9. Furthermore, the position as pertains to a claim of fraud as well as the requisite standard of proof attendant thereto, was also adverted to and succinctly illuminated upon in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR, where the Honourable Court expressed itself as follows; -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.

Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...” ...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

10. In light of these binding authorities, I now turn to the facts of the present case. The Petitioner alleges that the land originally owned by her father was fraudulently subdivided and that resultant titles were issued to the 1st to 9th Respondents without her knowledge or consent. She claims she did not participate in the adjudication process and was unaware of the subdivision.
11. However, the Petitioner has failed to present any documentary evidence or witness testimony showing that the 1st to 9th Respondents were involved in or aware of any fraudulent scheme. While she produced a copy of the green card and official searches in respect of parcel No. 442, these documents alone do not establish fraud. No forgery, manipulation of land records, or collusion with the 10th to 14th Respondents has been shown.
12. Additionally, the adjudication process in this matter began in 1986. The Petitioner has not submitted any contemporaneous objections to the adjudication records, nor has she shown that she lodged any complaints with the Land Registrar or pursued remedies under Sections 26 or 29 of the *Land Adjudication Act*. The absence of such action, especially over a prolonged period, undermines the credibility of her allegations.
13. Moreover, it is not in dispute that the Petitioner’s father was the original allottee and that he participated in the adjudication process. The Respondents assert and the Petitioner has not rebutted that he was aware of the hiving off of part of the land for urban development. The titles were issued in 2001, yet the Petitioner raised no objection until over a decade later. She offers no explanation for this delay.



14. Under Sections 24, 25, and 26 of the *Land Registration Act*, a certificate of title is conclusive evidence of proprietorship and may only be challenged on grounds of fraud or misrepresentation to which the holder is proved to have been a party. Section 26(1)(a) is explicit on this point.
15. Applying the law to the facts at hand, the Petitioner has neither pleaded fraud with the required specificity nor proven it to the standard required. No fraudulent acts by the 1st to 9th Respondents have been distinctly alleged or strictly proved, as the law demands. Instead, the claim relies largely on inference and suspicion, which is impermissible in establishing fraud.
16. Turning to the constitutional rights invoked, the Petitioner alleges a violation of her right to property under Article 40 of *the Constitution* of Kenya, 2010. Article 40(1) guarantees every person the right to acquire and own property of any description in any part of Kenya. However, this right is not absolute. Article 40(6) expressly limits this protection by stating that the right does not extend to any property that is found to have been unlawfully acquired. The implication of this provision is that any person claiming protection under Article 40 must first demonstrate that their interest in the subject property is lawful, procedurally obtained, and properly documented in accordance with the law.
17. In the present matter, the Petitioner has not produced any evidence to show that she had a registered, beneficial, or otherwise legally recognized interest in the suit land at the time of or prior to the alleged subdivision. Her claim is based solely on being a daughter of the original allottee and an alleged beneficiary of her deceased father's estate. However, she has not presented any grant of letters of administration intestate, any certificate of confirmation of grant, nor any pleadings or orders from a succession cause showing that she has legal authority to act on behalf of the estate or any confirmed beneficial interest in the subject property.
18. Her assertion that she and her siblings occupied the land after their father's death, while indicative of possession, does not elevate her to the status of a legal owner or recognized beneficiary under *the Constitution* or relevant land laws. Article 40(1) protects rights that are recognized under statute, particularly under the *Land Registration Act*, 2012, which requires that a person claiming interest in land demonstrate registration or otherwise prove their legal claim to the land. In the absence of succession proceedings or any formal legal documentation, the Petitioner's interest remains unperfected, speculative, and not enforceable under Article 40.
19. On the claim that her right to a fair hearing was violated, the Petitioner invokes Article 50(1) of *the Constitution*, which guarantees every person the right to a fair and public hearing before an independent and impartial tribunal. The Petitioner contends that she was not involved in or notified of the adjudication and subdivision process. However, the *Land Adjudication Act* (Cap. 284) provides a well-established participatory framework for land adjudication, including publication of adjudication records, opportunity to file objections (Section 26), and appeals mechanisms up to the Minister (Section 29).
20. The Petitioner has not demonstrated that she filed any formal objection during the adjudication process, or that she sought administrative or judicial redress through the statutory channels provided. Her silence during the entire adjudication and registration process undermines the credibility of her claim that she was excluded from participation. A fair hearing, as contemplated under Article 50(1), includes both the right to be heard and the obligation to exercise that right when provided. Where statutory avenues exist and a party fails to utilize them, they cannot later claim to have been denied a fair hearing.
21. Additionally, the Petitioner's delay of over 15 years since the issuance of the titles in 2001 raises the equitable doctrine of laches. Equity does not assist those who sleep on their rights. The Petitioner has



not provided any reasonable explanation for her inaction over such an extended period. Where no challenge is raised within a reasonable time, and where third parties have since acquired legal titles and interests in the land, the law disfavors reviving stale claims that disrupt settled property rights.

22. It is also important to emphasize that the burden of proof in civil matters including constitutional claims is borne by the party who alleges. Under Section 107 of the *Evidence Act* (Cap. 80), the person who desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In this case, the Petitioner had the burden of proving that the 1st to 9th Respondents acquired their titles fraudulently, and that her own interest in the land is valid and enforceable. She has failed to discharge this burden, and her allegations remain unsubstantiated.
23. While *the Constitution* guarantees broad rights and freedoms, including protection of property and access to justice, these rights must be exercised within the framework of the law. Constitutional protections do not operate in a vacuum, nor do they excuse a party from fulfilling procedural and evidentiary requirements under ordinary civil and land laws. Rights under Articles 40 and 50 must be read together with other constitutional principles, including the rule of law, access to justice, and respect for due process.
24. In sum, the Petitioner's invocation of constitutional rights does not, on its own, establish a cause of action. Her failure to demonstrate a lawful interest in the land, to participate in the adjudication process through the mechanisms available, to provide documentary proof of ownership or succession, and her prolonged delay in asserting her claim, all fatally undermine her petition.

Disposition

- a. The Petition dated 11th April 2018 is hereby dismissed in its entirety;
- b. The prayers for declarations, cancellation of titles, injunctions, and costs are declined;
- c. The Petitioner shall bear the costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THE 14TH DAY OF JULY, 2025.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

..... for the Petitioners

..... for the Respondents

Philomena W. Court Assistant

