



REPUBLIC OF KENYA



Kinama v Sub-County Land Adjudication & Settlement Officer, Kibwezi & 4 others (Environment & Land Petition E007 of 2021) [2024] KEELC 625 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEELC 625 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION E007 OF 2021
TW MURIGI, J
FEBRUARY 7, 2024**

BETWEEN

LYDIA MBULI KINAMA PETITIONER

AND

**THE SUB-COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER,
KIBWEZI 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
PAUL NZIOKA NDUNDA 3RD RESPONDENT
BETH NDUNDA 4TH RESPONDENT
FLORENCE MUTHONI MUHIA 5TH RESPONDENT**

JUDGMENT

1. The Petitioner Lydia Mbuli Kinama filed this Petition dated 3rd December 2021 seeking the following orders against the Respondents:
 - i. A declaration that the Respondents violated the Petitioner's rights to acquire, own, access and use all that parcel of land known as Plot No. 613 at Mbeetwani Settlement Scheme.
 - ii. General damages for violation of the Petitioner's rights.
 - iii. A declaration that the Petitioner is the legal owner of all that parcel of land known as Plot No.613 at Mbeetwani Settlement Scheme.
 - iv. That an order of permanent injunction do issue restraining the Respondents or any other person acting under their authority from denying all the Petitioners, their agents and or any other person claiming under them access to her land and more specifically all that parcel of land known as Plot No. 613 at Mbeetwani Settlement Scheme.



- v. Any further relief or orders that this Honourable Court shall deem fit to grant.
2. The Petition is supported by the affidavit of Lydia Mbuli Kinama sworn on even date.

The Petitioners Case

3. The Petitioner averred that she is the bona fide and legal owner of Plot No. 613 Mbeetwani Settlement Scheme in Mtito-Andei Location (the suit property herein) having purchased the same on 15/08/1992 from the Committee Ilikoni Village. She further averred that she developed the suit property substantially by constructing both permanent and semi-permanent buildings.
4. That shortly thereafter, she fell ill and sought for treatment for a period of six years. She averred that when she returned to the suit property in the year 2015, she found the land and the records held at the Land Adjudication Office were still intact. That upon a second visit on or about 20/09/2019, she found that the 3rd, 4th and 5th Respondents had trespassed on the suit property and had also erected a fence around it thereby denying her access to the suit property.
5. The Petitioner contended that the Respondents demolished her house and structures on the suit property and constructed their own temporary structures. She added that she visited the 1st Respondent's offices and upon conducting due diligence, she discovered that the 1st Respondent had unlawfully transferred the suit property to the 3rd Respondent who subsequently transferred the same to the 4th and 5th Respondents. That the 1st Respondent issued a letter dated 5/2/2020 indicating that the current ownership of the suit property was vested in the 4th and 5th Respondents whilst the 3rd Respondent had been the original owner during the demarcation period yet she had purchased the same on 15th August 1992.
6. The Petitioner averred that after lodging a complaint with the 1st Respondent vide the letter dated 25/9/2019, the 4th and 5th Respondents were summoned by the 1st Respondents but failed to honour several summons issued against them and as a consequence, a ground visit was conducted on 6/3/2021 and a report dated 6/5/2021 was prepared which confirmed that she was the bona fide proprietor of the suit property and the same ought to revert to her.
7. That on the basis of the report dated 6/5/2021, the Sub-County Land Adjudication Officer, Kibwezi cancelled the names of the 3rd, 4th and 5th Respondents and the land reverted back to her name. She further contended that the 1st Respondent had again cancelled her name under unclear circumstances and made alterations which reverted the suit property to the 4th and 5th Respondents. Consequently, the 4th and 5th Respondents commenced usage of the suit property, an action which not only amounts to trespass but also degrades the sustainability of the suit property.
8. The Petitioner contended that the 1st Respondent's actions are unconstitutional as they amount to unlawful eviction without due regard for substantive and procedural laws. She asserted that the actions of the 3rd, 4th and 5th Respondents are unlawful because they have used forceful tactics to deny her the right to acquire, own and access the suit property. The Petitioner contended that unless the orders sought in the Petition are granted, she stands to suffer irreparable loss which cannot be compensated by an award of damages.

The 3rd, 4th and 5th Respondents Case

9. The 3rd, 4th and 5th Respondents opposed the Petition through the replying affidavit sworn on 10/1/2022 by the 4th Respondent on her own behalf and that of the 3rd and 5th Respondents. She averred that for the period before and after demarcation in the year 2001 when the 3rd Respondent was



- using the land, they had been grazing livestock thereon for all that period and there were no structures on the suit property. She averred that the suit property was owned by the 4th and 5th Respondents.
10. The 4th Respondent contended that the 3rd Respondent was the legally registered owner of the suit property having been allocated the same by the 1st Respondent following a land adjudication exercise conducted in the year 2001. That the 3rd Respondent was subsequently issued with ownership documents by the 1st Respondent and eventually sold the suit property to the 4th and 5th Respondents herein after they verified the ownership records at the 1st Respondents offices.
 11. That vide a letter dated 25/9/2019, the 1st Respondent summoned the 3rd Respondent and the deponent herein for a meeting with the Petitioner that took place on 16/10/2019 at the 1st Respondent's offices. The 4th Respondent averred that after checking the ownership records, the 1st Respondent verbally confirmed that the suit property is legally registered in her name and that of the 5th Respondent, having been transferred to them by the 3rd Respondent.
 12. The 4th Respondent contended that despite confirmation of their ownership, the Petitioner trespassed into the suit property on 7/6/2021 and a report thereof was made at Mtito-Andei Police Station vide OB No. 3/07/06/2021. That despite advice from the 1st Respondent, the Petitioner went ahead and constructed a semi-permanent kiosk-like structure on the suit property between 7th and 9th June, 2021. That on 10/6/2021, the kiosk-like structure was demolished by unknown persons and the photos are what the Petitioner annexed to her supporting affidavit as Exhibits 'LMK 4A' and 'LMK 4B'.
 13. The 4th Respondent averred that pursuant to a sale agreement dated 15/5/2018, David Kyalo is the current owner of the suit property and that he has constructed permanent and semi-permanent houses where he was carrying out livestock-keeping and peasant farming. She contended that if the Petition is allowed, the current owner stands to suffer irreparable loss which cannot be compensated by an award in damages.
 14. She further contended that all the transactions by the 3rd, 4th and 5th Respondents were legal since ownership of the suit property was verified by the 1st Respondent. She stated that the demarcation records from the year 2001 are a true reflection of the legal ownership of the suit property. The 4th Respondent contended that the Petition herein is frivolous, an abuse of the court process and that it ought to be dismissed with costs.

The Response

15. In her further affidavit dated 16/2/2022, the Petitioner averred that the 4th Respondent's Exhibit marked 'B.E.N 1' was a piece of paper which did not show the proprietorship of the suit property or specify details of how proprietorship thereof was transferred by the Petitioner to the 3rd Respondent. She contended that the 4th and 5th Respondents do not have a good title to the suit property because it was transferred to them by a person who did not have a title to transfer to them in the first instance.
16. She reiterated that the Respondents have employed unlawful tactics with the sole aim of dispossessing her of the suit property and transferring the same to third parties. She urged the Court to allow the Petition as prayed.
17. The 1st and 2nd Respondents did not file any response to the Petition.
18. The Petition was canvassed by way of written submissions.



The Petitioner's Submissions

19. The Petitioner filed her submissions on 14/09/2023. On her behalf, Counsel reiterated the grounds in support of the Petition. Counsel submitted that the instant Petition is founded on the infringement of the Petitioner's Constitutional right to acquire, own, use and access land as guaranteed under Article 40 of the Constitution. Counsel submitted that the Petitioner's case is grounded on the fact that she acquired absolute and indefeasible ownership of Plot No. 613 Mbeetwani Settlement Scheme under the Land Adjudication Act and that Article 40 of the Constitution protects the said ownership.
20. Counsel added that the 1st Respondent cannot alienate land which is already owned by the Petitioner and that such a determination must follow due process. Counsel contended that based on the evidence on record, the Petitioner is the bona fide owner of the suit property and that the 1st Respondent fraudulently altered her ownership records in favour of the 4th and 5th Respondents.
21. Counsel contended that the Petition herein is merited and that having demonstrated violation of her property rights under the Constitution, the Petitioner is entitled to an award of Kshs. 1,500,000/= in general damages. To buttress this point, Counsel relied on the case of Simeon Nyachae & another v County Government of Mombasa [2020] eKLR.

The 3rd, 4th and 5th Respondents' Submissions

22. The 3rd, 4th and 5th Respondents were filed on 26/09/2023.
On their behalf, Counsel commenced his submissions with a recap of the contents of the 4th Respondent's replying affidavit. Counsel submitted that the only issue for determination is whether Plot No. 613 Mbeetwani Settlement Scheme belongs to the Petitioner.
23. Counsel submitted that the Petitioner did not adduce any evidence to demonstrate her ownership of the suit property. Counsel further argued that the Petitioner did not produce any evidence to show the land transaction of 1992 as alleged and that there are no records of the said transaction in the Lands office.
24. Counsel submitted that the Petitioner has not demonstrated fraud against the Respondents on their title to the suit property. Counsel further submitted that the Petitioner's claim to the suit property is barred by Section 7 of the Limitation of Actions Act having admitted in her claim that she acquired title to the suit property in the year 1992 and that she came back to the suit property after twenty-seven years.
25. Counsel further submitted that the Petitioner has not demonstrated the elements required for the grant of an injunction. Counsel urged the Court to dismiss the Petition with costs to the Respondents. None of the authorities cited by Counsel were availed for the Court's perusal and the same have accordingly been disregarded. Counsel did not annex any authorities but cited the following cases.

Analysis and Determination

26. Having considered the Petition, the respective affidavits and the rival submissions the following issues emerge for determination:-
 1. Whether the Petitioner has exhausted the dispute resolution mechanisms/remedies provided under the Land Adjudication Act.
 2. Whether the Petitioner is entitled to the orders sought.



Whether the petitioner has exhausted the Dispute Resolution Mechanisms/remedies provided under the Land Adjudication Act.

27. The pleadings herein show that the suit property is within an adjudication area. It is common ground that land adjudication Process within Mbeetwani Settlement Scheme was carried out in the year 2001. On the factual background of the Petition, the respective affidavits and the evidence annexed in support of each party's respective case, it is clear that the ownership records of the suit property are in the custody of the Land Adjudication & Settlement Officer, Kibwezi Sub-County who is the custodian of the adjudication register.

28. The Land Adjudication Act Cap 284 Laws of Kenya provides for an elaborate dispute resolution mechanism for claims arising in an adjudication section. The Committee that has been appointed for an adjudication section will hear such disputes under the provisions of Section 21 (3) of the Act with succeeding mandate going to the Arbitration Board under Section 22, the Land Adjudication officer under Section 26 with the final appeal being made to the Minister under Section 29 thereof.

29. In the case at hand, the Petitioner and the 3rd, 4th and 5th Respondents have competing interests in the suit property that is within an Adjudication Section. There is no evidence illustrating that either party invoked the dispute resolution mechanism that is available to them under the Land Adjudication Act. Moreover, no evidence has been presented to confirm that the adjudication register for Mbeetwani Settlement Scheme has been completed under the provisions of Section 25 of the Land Adjudication Act. Section 30 of the Land Adjudication Act bars the Petitioner from court litigation when the adjudication register has not become final or without the express consent of the area Land Adjudication Officer. Section 30 stipulates as follows: -

- i. Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

30. The wording in Section 30(1) of the Act is mandatory. It sets out the conditions under which a party can approach the court before the adjudication process is complete. The requirement for consent to be granted by the Land Adjudication Officer before a suit can be filed is a statutory requirement.

In the matter at hand, there is no evidence that the Petitioner obtained consent from the Land Adjudication Officer before instituting the instant Petition. In as far as the Petitioner is seeking ownership rights over the suit property, that claim is barred by virtue of Section 30 of the Land Adjudication Act.

In the circumstances, this court finds and holds that the Petitioner has not complied with the mandatory provisions of Section 30(1) of the Land Adjudication Act before approaching this court.

The doctrine of exhaustion has been propounded in multiple judicial precedents. .

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by In Speaker of National Assembly v Karume [1992] KLR 21 the Court of Appeal stated as follows:

“Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”



Similarly, in the case of *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.”

From the foregoing, it is the finding of this court that the Petitioner has not exhausted the available remedies under the Land Adjudication Act.

Whether the petitioner has demonstrated merit in the Petition

31. It is trite law that the Petitioner must specifically and precisely demonstrate evidence of the alleged Constitutional violations. In the case of *Anarita Karimi Njeru v Republic* [1979] KLR 154 the court set out the substantive test to be applied when making a finding whether the alleged violation formed the basis of the Petitioner's complaint 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.”

The Supreme Court in *Communications Commission for Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR aptly held as follows: -

“Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

In the instant Petition, the Petitioner has made allegations of fraud in the removal or alteration of the ownership records held by the 1st Respondent.

32. The Petitioner has not substantiated/demonstrated the allegations of fraud against the Respondents. In any event, it is trite law that fraud must be specifically pleaded and proved. A proper cross-examination of witnesses and forensic examination of the documents would commend itself for a fair determination of the dispute herein. A Constitutional Petition is not the best forum for testing such contentious evidence.



In the end, this court finds that the Petitioner has failed to prove any infringement or contravention of her Constitutional rights.

The upshot of the foregoing is that this Petition is devoid of merit and the same is dismissed with no orders as to costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DELIVERED, DATED AND SIGNED VIA MICROSOFT TEAMS THIS 7TH DAY OF FEBRUARY 2024.

In the presence of:-

Court assistant Kwemboi

Ms Makau holding brief for

Mr Munyao for the Petitioner

