



**Thika Bakery Limited v Kinyanjui & 4 others (Environment & Land Petition  
E017 of 2022) [2024] KEELC 594 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 594 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND PETITION E017 OF 2022  
BM EBOSO, J  
FEBRUARY 7, 2024**

**BETWEEN**

**THIKA BAKERY LIMITED ..... PETITIONER**

**AND**

**RUTH MUTHONI KINYANJUI ..... 1<sup>ST</sup> RESPONDENT**

**BLUE NILE ROLLING MILLS ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**MS GO WAYUMBA SURVEYORS ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF SURVEYS ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. M/s Thika Bakery Limited brought a petition dated 20/12/2022 alleging breach of various Articles of the Constitution of Kenya 2010 by the respondents. The petitioner contended that the respondent had violated its rights under Articles 27, 35, 40 and 47 of the Constitution. Further, the petitioner alleged and particularized various aspects of fraud on part of the respondents, involving procurement of Allotment Letter Number 23136/XXVIII/59B dated 21/12/1990; procurement of Deed Plan Number 169091 dated 8/1/1993; and procurement of Grant Number IR 69027 dated 11/4/1996, all relating to a parcel of land located in Thika Municipality.
2. The Petitioner sought the following verbatim reliefs under Rules 3, 4(1), 8 and 10 of the Constitution of Kenya [Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013:
  - a. A declaration that the petitioner is the bona fide owner of un-surveyed industrial Plot No Q under allotment letter No 23136/XXVIII/49 Thika Municipality measuring 1.68 hectares.



- b. A declaration that Title I.R 69027, obtained by the 1st respondent herein is void ab initio, illegal and an order of Certiorari does hereby issue to place before this Honourable Court and quash Deed Plan No 16991 dated 8th January 193 and entries No 3, 4, 5, 6 and 7 made in the said grant.
  - c. An order of mandamus compelling the 6th respondent to resurvey Industrial Plots P and Q Thika Municipality.
  - d. An order of mandamus compelling the 3rd and 4th respondents to issue and facilitate the issuance of a title with respect to the suit property in favour of the petitioner upon compliance with all necessary requirements.
  - e. Declaration to issue that the acts of the respondents were unlawful and resulted in the violation of the petitioner's rights as provided under Articles 27, 35, 40 and 47 of the Constitution.
  - f. The honourable court be pleased to award the petitioner general and exemplary damages against the respondents for breach and violation of the fundamental rights.
  - g. A declaration that the provisional certificate of title with respect to Grant I.R 69027 and the ensuing gazette notice number 5568 dated 21st May 2010 be declared a nullity and void ab initio.
  - h. A mandatory order for eviction of the 2nd respondent from the suit property to be effected under the supervision and protection of the Officer in Charge, Thika Police Station.
  - i. Permanent injunction restraining the respondents from interfering with the quiet possession and/or ownership of the suit land by the petitioner herein.
  - j. A declaration that the respondents herein are liable to compensate the petitioner herein for the market value of the suit property to be assessed by the court.
  - k. An award as to damages for trespass to land.
  - l. An award as to damages of mesne profits for the period the 1st and 2nd respondents have been in illegal occupation of the suit property.
  - m. Costs of this suit.
  - n. Interest on (m) and (n) above at court rates until payment in full [sic].
  - o. Any other relief that the court may deem fit.
3. Together with the petition, the petitioner brought a notice of motion dated 20/12/2022 under Section 3A of the Civil Procedure Act and Order 40 rules 1, 2 and 3 of the Civil Procedure Rules, seeking interlocutory injunctive reliefs. As an alternative interlocutory relief, the petitioner sought a status-quo order relating to the suit land. The said notice of motion dated 20/12/2022 is one of the two applications that fall for determination in this ruling.
  4. The second application falling for determination in this ruling is the 2nd respondent's notice of motion dated 2/3/2023, seeking an order striking out the petition on the ground that it is founded on a claim of alleged fraud, hence it is not a constitutional issue. Given that the application dated 2/3/2023 raises the question of competency of this petition, I will dispose it before disposing the plea for interlocutory injunctive reliefs.



5. The application dated 2/3/2023 was premised on the grounds outlined in the motion and in the supporting affidavit sworn on even date by Botu Rao. It was canvassed through written submissions dated 3/11/2023, filed by M/s Kale Maina & Bundotich Advocates LLP. The petitioner opposed the application through a replying affidavit sworn on 17/7/2023 by Samuel Muturi Gachihi and written submissions dated 13/10/2023, filed by M/s MGA Law Advocates.
6. I have considered the application, the response to the application and the parties' respective submissions on the application. The gist of the application dated 2/3/2023 is that the petitioner has inappropriately invoked the redress forum provided under Articles 22 and 23 of the Constitution to ventilate a pure claim of fraud. It is the position of the applicant that the claim in this petition is a private law claim that should be ventilated as a normal civil claim on the platform of a plaint and disposed through normal civil trial.
7. On its part, the petitioner contends that Article 23(3) of the Constitution empowers this court to grant any appropriate relief, hence the reliefs sought in the petition can properly be granted under the said Article.
8. I have considered the rival arguments. The key issue to be determined in this ruling is whether the dominant issue in the dispute comprised in this petition is one that can be properly ventilated on the platform of a constitutional petition under Articles 22(1) and 23 of the Constitution.
9. The two Articles provide as follow;

“ 22.

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

23.

- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-
  - (a) A declaration of rights;
  - (b) An injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;



- (e) An order for compensation; and
- (f) an order of judicial review.

10. The court has read the petition and the affidavit filed in support of the petition. The gist of the petitioner's case is that the Allotment Letter and the Deed Plan which culminated in Grant Number IR 69027 were fraudulently procured. It is also the petitioner's case that the resultant Grant is a product of fraud; is null and void; and should be cancelled. Indeed, the petitioner outlined lengthy particulars of fraud on part of the respondents. It is therefore clear from the petition that the dominant issue to be determined in this dispute is the question as to whether the impugned allotment letter, deed plan and grant were procured fraudulently.
11. Fraud as a civil claim is a tort that falls within the domain of private law. In Kenya's existing civil legal system, the tort of fraud is ventilated on the platform of a plaint. Trial relating to the tort of fraud is governed by the provisions of the Civil Procedure Act and Rules. Clearly, the choice of the petitioner to ventilate the tort of fraud on the platform of a constitutional petition is misplaced.
12. Not too long ago, the Court of Appeal stated the following in Kennedy Odoyo Okello v District Land Registrar, Migori & 2 others [2015] eKLR on this issue:

“In our view, the petition did not raise any constitutional issues and whatever complaint the appellant had squarely lay in the domain of private law.”
13. On my part, I would state that the dominant issue in this petition is a private law issue that should be ventilated on the platform of a plaint. It is not an issue that can be adjudicated efficaciously under Articles 22 and 23 of the Constitution.
14. Indeed, the notice of motion which the petitioner brought under Section 3A of the Civil Procedure Act and Order 40 rules 1, 2 and 3 of the Civil Procedure Rule alongside the petition does not lie in a constitutional petition. A petition under the Bill of Rights is governed by the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013. A party seeking interlocutory reliefs moves the court under rule 23 which provides for conservatory or interim orders. The interlocutory injunction that the petitioner sought is a private law remedy under the Civil Procedure Rules.
15. That is not all. In the petition before this court, it does emerge from the exhibited title that there subsist five legal charges in favour of three different financial institutions. Those three financial intuitions are not parties to this petition. The petitioner nonetheless wants the title nullified on account of alleged fraud in the absence of the three chargees.
16. For the above reasons, the court finds that the dominant issue in this petition relates to the tort of fraud which is a private law issue that ought be ventilated on the platform of a plaint as a normal civil suit. It is not an issue to be adjudicated under Articles 22 and 23 of the Constitution. The result is that the petition is struck out in terms of prayer 1 of the notice of motion dated 2/3/2023. Subject to the law of limitation, the petitioner will be at liberty to ventilate their claim on the platform of a normal suit.
17. Owing to the circumstances of this dispute, parties will bear their respective costs of the petition.
18. The notice of motion dated 20/12/2022 suffers the same fate as that of the petition. Both the petition and the notice of motion are struck out.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF FEBRUARY 2024**



**B M EBOSO**

**JUDGE**

**In the presence of:**

**Ms Kisoo for the petitioner**

**Ms Obiri for the 2nd Respondent**

**Court Assistant: Hinga**

